

IN THE MISSOURI SUPREME COURT

No. SC86287

LANCE SCOTT,
Appellant/Cross-Respondent,

v.

BLUE SPRINGS FORD SALES, INC.,
Cross-Appellant/Respondent,

and

ROBERT C. BALDERSTON,
Respondent.

**APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE MARCO A. ROLDAN
DIVISION 16**

**REPLY BRIEF OF CROSS-APPELLANT
AND BRIEF OF RESPONDENT**

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REPLY TO APPELLANT/CROSS-RESPONDENT SCOTT'S

STATEMENT OF FACTS

Introduction

Cross-appellant/respondent Blue Springs Ford Sales, Inc. (“BSF”) submits this reply to appellant/cross-respondent Lance Scott’s (“Scott”) statement of facts to correct, clarify and place in context the disputed, inaccurate and dramatic arguments contained in Scott’s statement of facts. Scott’s Statement of Facts does not comply with Missouri Supreme Court Rule 84.04(c), which requires: “. . . a fair and concise statement of the facts relevant to the questions presented for determination *without argument.*” (Emphasis added).

Scott’s Claims

In his Statement of Facts entitled “Scott’s Claims,” Scott merely rehashes the allegations in his Amended Petition. (Brief of Appellant/Cross-Respondent at 18-20). Such allegations are not facts supported by evidence. Moreover, his recitation of the allegations contained in his Petition is a flamboyant, dramatic, and argumentative statement of his position more suitable for closing argument. Thus, these alleged facts should be disregarded.

Scott's Purchase of the SUV

When Scott purchased the SUV on March 5, 1994, the SUV did not have a salvage title. (Exhibit 12). At the time of the sale, even the Carfax database did not indicate that the SUV had any salvage history. The Carfax representative who testified at trial, George Bounacos, testified that the salvage history information was not added to its database until after Scott's purchase. (SLF, 33-35, Exhibit 6, final page).

BSF's Attempted Registration of the ESP

Scott cites the testimony of Marnett Grace concerning the attempted registration of the extended service plan ("ESP"). (Brief of Appellant/Cross-Respondent at 25-26, 28-29). Scott omits material key evidence. Grace did not remember and lacked personal knowledge of Scott's vehicle and the ESP. She merely testified from the documents and what she remembered to be the "standard practices." Moreover, Grace testified that she had processed thousands of ESPs since 1994, and by the time of trial, Grace had not performed that job for five years. (Tr., 431, 449, 455). Therefore, her memory and testimony lacked clarity.

Grace identified a notation on Exhibit 39 in her handwriting, stating that the ESP could not be entered in the computer registration system. (Tr., 447-448). She concluded that she had no personal knowledge why the ESP could not be entered,

and proffered an assumption why the matter should have been referred to the finance department:

“I would assume that finance should take a look at the contract, maybe there was something written incorrectly, the warranty start date was incorrect, it could have been any number of things.” (Tr., 448).

Grace testified that it would have been her practice if she was unable to register an ESP to give it to her supervisor, the service manager, and let him deal with it. (Tr., 448).

Further, Grace did not know if she ran the second Oasis report on August 12, 1994, because it was standard procedure for the service advisor to run the Oasis report at the time a vehicle is brought in for service. (Tr., 457). Grace never discussed the matter with Mr. Balderston. (Tr., 458).

In sum, the facts, which Scott argumentatively describes as a “cover-up,” are more accurately described as inadvertence by personnel failing to follow BSF’s procedures.

The Grabinski Interrogatories

Scott implies that Balderston and BSF intentionally failed to disclose in interrogatories answered in the *Grabinski* matter that BSF had sold a vehicle to Scott in March 1994 that may have had undisclosed wreck damage. (Brief of

Appellant/Cross-Appellant, p. 27). The interrogatories were answered in April 1994, shortly after Scott purchased the SUV and almost six years prior to Scott's first contact with BSF concerning his claim. The evidence establishes that Balderston, who signed the interrogatories on behalf of BSF, lacked personal knowledge of the Scott SUV until 2000. (Tr., 1430). The information concerning the salvage history was not added to Carfax until some time late in April 1994, after BSF had ran the Carfax showing no salvage history. Moreover, Ms. Grace lacked personal knowledge as to the reason she was unable to register the ESP. (Tr., 448). The above facts demonstrate that Balderston and BSF did not intentionally fail to disclose the Scott SUV, as they were unaware of the problem at the time the interrogatories were answered.

Scott's Discovery of the Prior Damage

Scott alleges that after he discovered the SUV had a salvage history, Scott parked the SUV and did not continue to drive it, allegedly because he thought the SUV was unsafe. (Brief of Appellant/Cross-Respondent at 32). In truth, Scott testified that in October 1999, he parked the SUV because he could not afford it: "I mean, the transmission was going out again. They wanted like \$2,000, I think, to fix it. And I was like well, man, I can't afford another \$2,000 to keep it running. So I was like, maybe I should just get another car." (Tr., 334).

Scott's conflicting testimony demonstrates the pretextual statement about safety. The real reason the SUV was parked was because the transmission was going out, not because the SUV was unsafe. There is no evidence linking the transmission problem to the prior repaired accident damage to the SUV. Scott purchased the SUV with 48,000 miles on it and drove it an additional 186,000. In October 1999, it was nine years old and had 234,000 miles on it. After 234,000 miles, the SUV required maintenance, repair and part replacement. (Tr., 389, Exhibit 21). Moreover, as discussed below, Scott's expert, Diklich, did not discover the alleged corrosion, which was the sole basis for Scott's "safety concerns," in his initial inspection in 1999, but not until 2002 after the car had been parked outside for three years. (Tr., 1190, 1201). Therefore, Scott had no basis to question the SUV's safety until Diklich's second inspection, almost three years after Scott stopped driving the vehicle because it needed transmission repair.

The May 11, 2000 Refund Letter

Scott outrageously asserts that the May 11, 2000 letter offering Scott a complete refund of his purchase price (Exhibit 1) was an improper attempt to influence Scott's testimony in the *Looney* matter. (Brief of Appellant/Cross-Respondent, 34-36). Scott's assertion is ridiculous. The May 11, 2000 letter was a settlement communication provided to Scott's attorney, Bernard Brown. Bernard

Brown was also the plaintiff's attorney in the *Looney* matter. (Tr., 244, Exhibit 1).
BSF's May 11, 2000 refund letter was proper and above board.

Numerous Other Factual Inaccuracies

The Brief of Appellant/Cross-Respondent contains numerous other misstatements of fact designed to mislead this Court. In the interest of brevity, a few of the more material examples are discussed below.

Unrelated Sales of Other Vehicles

Scott inaccurately asserts that Balderston acknowledged that it is possible BSF has dozens or hundreds of files on vehicles with documentation showing those vehicles were rebuilt wrecks sold without disclosure. (Brief of Appellant/Cross-Respondent at 57). Scott's statement is inaccurate.

After Balderston acknowledged that some prior repaired wrecked vehicles had been sold by BSF, Scott asked Balderston if any investigation was taken with regard to all the used cars that were sold to determine if there were any others. Balderston stated that BSF had not searched through 40,000 files. (Tr., 1374, 1440). Scott's counsel then asked Balderston the following question:

“Q. You could have, for all you know, you could have dozens,
hundreds of files with that that show documentation that indicates

that you sold a rebuilt wreck and it wasn't disclosed; is that fair to say?

A. I guess it's possible. I don't know if that's fair to say." (Tr., 1442).

Scott's Witness, Diklich, Testimony as to Value of the Scott Vehicle

Scott falsely alleges that his witness, Diklich, testified that if the Scott SUV were offered for sale in the wholesale dealer market with full disclosure of the actual history and condition, the market prices paid by the buyers would have been based on their expectations that such buyers were not going to disclose such issues upon resale. (Brief of Appellant/Cross-Appellant at 61). Scott's statement is an incorrect description of Diklich's testimony. Diklich actually testified as follows:

"Q. Well, in an alternative market, I suppose one can sell anything to somebody. May be able to sell prohibited contraband to somebody, you'll find a buyer.

A. Well, it doesn't rise to that level to me. There's always a market if it's America. We're awash in a sea of cars and somebody's going to buy it for whatever reason they want to do it. They may buy it and repair it, which means they're not going to get much money. They're going to have to invest money in it to make it

right. That's a very common market. It's not common to everybody, but it's common to me, being in the repair business.

Q. If the vehicle were sold at general wholesale auction and disclosed that it had a previous salvage title and a rebuilt wreck and having defects that affect safety in the way it was repaired in March of 1994, do you have an opinion as to what kind of price would have been a fair market price?

A. Well, with that kind of disclosure at a wholesale dealer only market, I mean, you know, these folks are not looking for reasons to give more money for a car. You are looking, probably, at a – maybe a \$7,000, \$7,500 number at that point in time, depending on the number of people there and whether there are buyers for that car there.

You also have to remember that sometimes dealers will buy things knowing that they're not going to disclose those types of things about it. So they may want to give a little more for it just simply because they know they're not going to disclose those issues.” (Tr., 1143-1144).

Diklich did not state that the market price paid by buyers would have been based on their expectation that they were not going to disclose the issues on resale.

He testified that there are those people out there who would pay more than his estimate of value if such persons were not going to give full disclosure on resale.

This fact is highlighted in his cross-examination where Diklich was impeached with his deposition testimony in which he testified the true value of the SUV at the time of the sale was \$10,500.00. First he stated the figure of \$10,500.00 assumed uncertainty if the SUV had a salvage title. (Tr., 1195). However, he was confronted with the following testimony from his deposition:

“Q. You formed an opinion as to diminution in value in terms of the price of this vehicle at the time it was sold?

A. Yes, assuming the disclosure of the problems the vehicle had and assuming that there was, in fact, was a salvage title on it, although I haven't seen that, I have been told that. My opinion is that the vehicle would have been worth 10,500 at the time it was sold.” (Tr., 1195-1196, quoting from Diklich deposition at 74).

Then, in an effort to rehabilitate himself, Diklich stated the \$10,500.00 figure he testified to in his deposition was based upon a dealer paying that price with plans not to disclose the salvage history to the dealer's customer. (Tr., 1196-1197).

Profit on the Sale of the Explorer

Scott falsely alleges that BSF made a profit of \$12,617.00 (\$11,772.00 plus the full price of the ESP, \$1,475.00)¹ on the sale of the SUV to him. (Brief of Appellant/Cross-Respondent at 62). Scott's recitation of the facts is grossly misleading. Scott cites the testimony of Carl Young, who testified without personal knowledge. Young was handed a file which contained various papers, including Exhibit 31. When Young was asked if the document stated \$11,772.00, he acknowledged he lacked personal knowledge: "Yes. But that doesn't look right to me. I wasn't there when the car deal was done. But that's extremely high." (Tr., 576-578). On cross-examination, Young stated that there should be other information in the file other than Exhibit 31 which would state exactly what the profits were, but it wasn't in the file he was handed on direct examination. He was then provided with defendant's Exhibit 1157A. He stated that by looking at Exhibit 1157A, he could tell that the actual profit on the sale of the SUV was \$1,149.75, plus an additional \$3,272.75 profit on the F&I² products -- ESP contract, creditor's life and disability. (Tr., 713-714).

¹ In addition to the discussion below, this figure is error because it includes the **full sales price** of the ESP contract **plus the profit** on the ESP, adding the profit twice.

² F&I stands for finance and insurance.

Additional factual errors will be discussed where relevant in the argument section.³

³BSF's initial Brief of Cross-Appellant/Respondent contains two statements of fact which are not supported by the record, the last two sentences on page 29. At the time the Brief was repaired, BSF's counsel believed that the excerpts from the Craig deposition cited were read at trial and planned to place such excerpt in the Supplemental Legal File at pages 25 and 26. Counsel for other parties were not available to confirm which pages were read. After the Brief was filed, the Supplemental Legal File was prepared and Scott's counsel informed BSF's counsel that such excerpts were not read. Thus, BSF so informs this Court and requests such facts be disregarded.

ARGUMENT

REPLY TO SCOTT'S RESPONSE TO BSF'S APPEAL

I. THE TRIAL COURT ERRED IN ADMITTING PREJUDICIAL EVIDENCE OF ALLEGED SIMILAR OCCURRENCES OF SALES OF USED VEHICLES WITH UNDISCLOSED REPAIRED COLLISION DAMAGE BY BLUE SPRINGS NISSAN AND BLUE SPRINGS FORD SALES OUTLET, INC., WHICH WERE SEPARATE ENTITIES AND NOT PARTIES TO THIS ACTION.

A. BSF has Properly Preserved this Issue for Appeal, Including the Issue Concerning the Admission of Evidence of the Grabinski Transaction and the Highly Prejudicial Testimony of Vicki Grabinski.

Scott asserts that the objection to the evidence of the Grabinski vehicle was not preserved for appeal because it was not raised in BSF's motion for a new trial. (Brief of Appellant/Cross-Respondent at 69). Scott's argument is inaccurate. Scott objected to such evidence at every stage of the proceeding – pre-trial, during trial, and post-trial. Prior to trial defendants BSF and Balderston filed motions in limine to preclude and limit Scott's use and admission of alleged "other similar act evidence," including the *Grabinski* matter. (SLF, 8-12; LF, 69-106, 109-122).

Throughout trial, both defendants objected to all such similar act evidence. (See, Tr., 147-150, 155-166, 184, 524, 637, 906, 971, 1262).

Following the Court's entry of the amended judgment, defendant BSF filed its motion for a new trial, or in the alternative for remitter with suggestions in support. (LF, 375-400). The motion challenged all similar act evidence alleging specific grounds, including: (1) the other alleged similar acts were not substantially similar to the one at issue; (2) admission of the other similar acts allowed the jury to punish the defendant BSF for the other alleged acts; (3) several of the cases admitted did not involve BSF, but Blue Springs Nissan; (4) plaintiff's counsel violated boundaries established by the Court; and (5) admission of the evidence denied BSF due process under the Fourteen Amendment to the U.S. Constitution. (LF, 375-381). In its motion, BSF renewed its objections to all of the similar act evidence, including the Grabinski evidence. This claim of error encompassed evidence concerning the Grabinski vehicle and the testimony of Vicki Grabinski. (LF, 382-401). Scott's assertion is unfounded.

B. Missouri Case Law Does Not Approve the Use of Evidence of “Other Similar Transactions” of Separate Corporate Entities under Circumstances as Presented in the Present Case.

Scott cites *Blakely v. Bradley*, 281 S.W.2d 835, 839 (Mo. 1955), and *Osterberger v. Hites Construction Company*, 599 S.W.2d 221, 229-30 (Mo. App. 1980), for the proposition that Missouri courts have approved use of evidence of other similar transactions where the conduct involved was by corporate entities “other than (but related to) the defendant.” (Brief of Appellant/Cross-Respondent at 70). An examination of *Blakely* and *Osterberger* demonstrates that such cases do not apply to the present case.

In *Blakely*, the plaintiff Blakely brought an action to rescind her sale of land and to cancel the deed she executed. Blakely alleged her real estate agent, Harold Bradley, and his company, Harold S. Bradley, Inc., was the real purchaser in violation of Missouri law, and that the title was taken in the name of a straw party for the benefit of Bradley. Blakely sued Bradley and his company. Blakely presented evidence of four other similar transactions involving Bradley, his company, and the same straw party. The *Blakely* court allowed the evidence to prove the existence of the straw party for Bradley and his company. The other transactions involved the same parties involved in the Blakely transaction. The case

did not involve a separate, non-party company as in the present case. Moreover, Scott has never alleged a straw party and no similar fraud was at issue.

Osterberger is similarly distinguishable. Plaintiffs, Thomas and Janet Osterberger, sued defendants Hites Construction Company, its president and secretary-treasurer, alleging that defendants fraudulently concealed the existence of an outstanding deed of trust on a house that defendants conveyed to the Osterbergers. Defendant president admitted that Hites Construction Company had transferred other properties to other buyers by warranty deed, which likewise did not indicate outstanding deeds of trust. The *Osterberger* court relied on his admission, stating that fraud can be shown by circumstantial evidence. The evidence involved the same party defendants as that in the Osterbergers' claim, the president and his company, Hites Construction Company. Moreover, Hites did not claim error in the admission of this testimony. The case simply does not apply.

Finally, Scott also relies upon *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 517 (7th Cir. 1997), for the proposition that similar conduct by multiple companies owned by the defendant corporation was held to be highly probative of the defendant's intent. *Jannotta* is radically dissimilar and inapplicable to the present case.

In *Jannotta*, a landlord, Jannotta, sued its tenant, Subway Sandwich Shops, Inc. ("SSS"), its parent corporation, Doctors Associates, Inc. ("DAI"), and DAI's

owners, for fraud involving the lease of a commercial property in Chicago, Illinois. The evidence at trial established that defendants had developed a fraudulent scheme to defraud landlords by getting them to sign leases with various wholly owned “shell” corporations, containing no assets and no employees.

Jannotta specifically demanded the parent company sign the lease so that Jannotta could look to the parent company if the franchisee failed to satisfy its rental or insurance obligations. 125 F.3d at 506. SSS’s representative specifically represented that SSS was the parent company and had assets of approximately \$1 million. Subsequently, Jannotta learned that SSS was not the parent company, but was merely a related leasing company with no employees and virtually no assets, i.e., a “shell” corporation. *Id.*

The evidence established that DAI trained development agents for its franchising operations at its home office. The development agents were told that DAI’s leasing companies had no assets and they were instructed not to mention that fact to potential landlords. The agents were also told that the leasing companies were set up for the protection of DAI because the companies had no assets and it would be very difficult, if not impossible, for landlords to collect judgments from those companies. *Id.*, at 509.

The plaintiffs in *Jannotta* presented testimony from five former Subway landlords to establish that the development agents regularly followed these practices

in negotiating leases. Like Jannotta, these landlords were not told that the leasing company who would execute the lease on behalf of Subway had virtually no assets and would be unable to satisfy its obligations under the lease if the franchisee either failed to pay the rent or vacated the premises. The court stated: “The evidence at trial further demonstrated that DAI routinely used leasing companies like SSS to execute leases with landlords in order to avoid imposing rental obligations on DAI.” *Id.*, at 512. DAI was a defendant in *Jannotta*. The other acts, which were admitted, were the acts of defendant DAI through its “shell” corporations, having no assets and no employees. The present case is clearly distinguishable.

BSF, Blue Springs Nissan, and Blue Springs Ford Sales Outlet, Inc. are all separate corporations, each with its own assets, and each with its own employees. There is no evidence that they are “shell” corporations. There was no scheme engaged in by BSF or Balderston to use “shell” corporations in order to avoid liability. *Jannotta* simply does not apply to the facts stated herein.

Scott attempts to justify the admission of the evidence concerning the transaction of the separate corporate entities of Blue Springs Nissan and Blue Springs Ford Sales Outlet, Inc. by alleging the common ownership interest of defendant Balderston, as well as Balderston’s involvement in all such entities. In other words, Scott asserts the corporation’s separate corporate status should be disregarded, and the separate corporations’ acts should be attributed to Balderston;

i.e., Scott attempts to pierce the corporate veil of Blue Springs Nissan and Blue Springs Ford Sales Outlet, Inc. However, he comes forward with no evidence to justify piercing the corporate veil. The facts that Balderston had an ownership interest in all the corporations and that he was involved in the corporations are not sufficient to pierce the corporate veil and ignore the legal distinction between separate corporate entities. See *K.C. Roofing Center v. On Top Roofing*, 807 S.W.2d 545 (Mo. App. 1991)(the mere fact that one is the sole officer, director or shareholder is not sufficient to pierce the corporate veil; one must also show the separateness is used as a mere subterfuge to commit a wrong).

Scott further justifies the admission of evidence by attempting to demonstrate that Blue Springs Nissan was merely an arm of defendants BSF and Balderston, by citing the testimony of Jerry Dover that when he brought the used car back to Blue Springs Nissan, the Blue Springs Nissan manager told Dover that the manager did not have authority to handle the complaint and that Dover would have to talk to Blue Springs Ford management. (Brief of Appellant/Cross-Respondent at 72). Scott's recitation of the testimony is inaccurate. Dover testified:

“Q. So the person you spoke with at Blue Springs Nissan, do you recall what his position was?”

A. I assumed he was the sales manager at that time period because I immediately asked for a sales manager. Assuming that the same gentleman that I bought it from would be there, but he was not.

Q. The sales manager you said – correct me if I’m wrong – that he indicated that you would have to take this up with Blue Springs Ford?

A. Yes. He indicated that he did not have the authority. First thing he tried to do, he said, well, is there a vehicle we can trade for? I said, no, that’s not the issue at this point. I want to speak with Mr. Balderston. He said he would have to refer me to Blue Springs Ford.”

Dover was not referred to BSF until Dover asked to speak to Balderston. Balderston’s office is at BSF; therefore, referring Dover to Balderston at BSF is perfectly reasonable and logical. (Tr., 1370). Dover ultimately traded the vehicle at BSF for a Ford Explorer because there was no Nissan at Blue Springs Nissan that he wanted to purchase. After the trade, BSF transferred the car back to Blue Springs Nissan for value, because it was Blue Springs Nissan’s original transaction. Transferring the vehicle back to Blue Springs Nissan, for value, further demonstrates that the two corporations were separate entities and operated accordingly.

In sum, the trial court erred in allowing admission of prejudicial evidence of other dissimilar transactions involving a separate entity, which was not a party to the case, Blue Springs Nissan. The admission of such evidence was clearly prejudicial because the jury knew of defendant Balderston's common ownership of Blue Springs Ford and Blue Springs Nissan, as evidenced by the jury's excessive verdicts. In his closing argument, Scott referenced and relied upon these other transactions by a different entity, Blue Springs Nissan,⁴ emphasizing the evidence and adding to the prejudicial effect. (Tr., 1633, 1649).

C. Admission of the Grabinski Evidence was Prejudicial Error.

The facts of the Grabinski transaction are not sufficiently similar and its prejudicial effect outweighs any probative value. First, the *Grabinski* matter was not similar because it involved a retail sale and representations to the consumer by Blue Springs Nissan, not BSF. Second, the bulk of Vicki Grabinski's testimony centered on the coerced use of a "tow-off agreement" or "junk affidavit." This highly volatile and prejudicial fact was not present or similar to any facts in the present matter.

⁴ Further, Scott frequently mentioned the CBS 60 Minutes television story, which involved Blue Springs Nissan at a time **before** Balderston even held an ownership interest in Blue Springs Nissan. (Tr., 773, 1365, 1617, 1653, 1655, 1804, 1815).

Scott relies upon the two federal *Grabinski* opinions: *Grabinski v. Blue Springs Ford Sales, Inc., et al.*, 136 F.3d 565 (8th Cir. 1998) (“*Grabinski I*”), and *Grabinski v. Blue Springs Ford Sales, Inc., et al.*, 203 F.3d 1024 (8th Cir. 2000) (“*Grabinski II*”). In *Grabinski I*, the court set forth the various allegations and representations of the parties. BSF was named as a defendant because it had accepted on trade the Grabinski vehicle, a nine-year-old 1984 GMC. BSF decided to wholesale the GMC and sold it to Blue Springs Ford Sales Outlet, Inc. It was alleged that BSF told Blue Springs Ford Sales Outlet, Inc. that the GMC was “very nice” and that it was “driving fine” and needed only a clean-up and standard servicing. 136 F.3d at 567. In contrast, the salesman at Blue Springs Ford Sales Outlet, Inc. represented to Grabinski that the vehicle was in “A-1” condition, that it **had never been wrecked, only had had one owner**, and ran perfectly. *Id.*

Ms. Grabinski's testimony could only be relevant concerning any acts of BSF; however, she was allowed to testify concerning the representations of Blue Springs Ford Sales Outlet and Blue Springs Ford Sales Outlet's use of the coerced “junk affidavit.” There is no evidence that BSF used a “junk affidavit”; therefore, this act is not similar. Grabinski testified that she signed the “junk affidavit” because she “understood the representations were to say **there was one owner and it had never been wrecked.**” (Tr., 1477). (Emphasis added). Grabinski relied upon the representations of Blue Springs Ford Sales Outlet, not of BSF. This demonstrates

the prior bad act relied upon by Grabinski was not a result of Blue Springs Ford Sales Outlet passing along BSF's representations as BSF made no such representations.

The admission of this prior dissimilar act testimony of a separate non-party was error, and, prejudiced BSF because the jury knew that BSF was indirectly connected to the Grabinski transaction and knew that Balderston had an ownership interest in both BSF and Blue Springs Ford Sales Outlet. Scott injected the Grabinski matter into the present matter with almost every witness and referenced it frequently in his closing argument, emphasizing the prejudicial impact of the evidence. (Tr., 1655, 1721, 1804, 1815).

II. THE TRIAL COURT ERRED IN ADMITTING CRUCIAL, PREJUDICIAL TESTIMONY CONCERNING SAFETY ISSUES OF THE EXPLORER.

Scott now asserts that the fact that his witness, Diklich, was not an engineer and that Diklich failed to perform crash testing is insignificant. (Brief of Appellant/Cross-Respondent at 78). The testimony cited in BSF's initial Brief at page 46 indicates that Diklich himself testified: "You would want to crash test it or roll it or do a roof crush test." (Tr., 1123). Thus, Diklich's own testimony indicates that a crash test, which he did not perform, was necessary. Moreover, his opinion of

safety concerns was not stated with unequivocal language as required by Missouri law: *Shackelford v. West Central Electric Cooperative*, 674 S.W.2d 58, 62 (Mo. App. 1984); *Abbott v. Haga*, 77 S.W.3d 728, 733 (Mo. App. 2002). The trial court's admission of such opinion without proper foundation was erroneous and prejudicial.

Scott appears to assert that allowing his witness' opinion concerning safety without proper qualifications and testing is not error because the sale of a repaired wrecked vehicle "automatically" raises safety issues, citing *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001); *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1027 (8th Cir. 2000); *Chung v. Parker*, 361 F.3d 455, 458 (8th Cir. 2000); *Werremeyer v. K.C. Auto Salvage Co., Inc.*, 203 WL 21487311 (Mo. App. 2003), *aff'd* and *rev'd in part on other grounds*, 134 S.W.2d 633 (Mo. banc 2004). (Brief of Appellant/Cross-Respondent at 81-82).

Although stated in a footnote, Scott alleges that *Werremeyer* held that expert testimony on safety is not required because it is in the realm of juror's common sense that a rebuilt wreck presents safety concerns. Scott portrays *Werremeyer* too broadly. *Werremeyer* presents a unique set of bizarre facts. The vehicle involved in *Werremeyer* was the product of a "full frame off" or "body swing" – i.e., the combination of the chassis from one vehicle (which had been in an accident in Nebraska) and the body from another vehicle (which had been stolen in California). 203 WL 21487311 at *1. The court described the car as follows: "Copart's

misrepresentation led the Werremeyers to purchase a car that had been fabricated, presumably by a ‘chop shop’ out of two different vehicles. Such a car, if only because the fabrication was not regulated, posed a danger to both the Werremeyers and to the public.” *Id.* at *10.

Expert testimony may not be required in an extreme situation like *Werremeyer*, where a car was **fabricated** from two separate cars. Scott’s SUV is not remotely similar to the vehicle in *Werremeyer*. The SUV, which had been “totaled” by the insurance company, was repaired. This fact simply means that the estimated cost of repair exceeded the value. Diklich testified that the SUV was a “light rollover” or a “repairable rollover.” (Tr., 1166). It is possible to safely repair totaled vehicles. Diklich further testified that the repairs to the Scott SUV met minimum standards with the exception of lack of corrosion protection (Tr., 1189, 1191), and that at the time of the sale of the SUV to Scott (1994), the corrosion that he first discovered in 2002 would not have progressed to weaken the vehicle. (Tr., 1190, 1201). Moreover, because he did not discover the corrosion until three years after Scott stopped driving the vehicle and three years after his initial inspection, he could not testify concerning the vehicle’s condition in 1999, when Scott stopped driving the vehicle because the transmission needed repair. (Tr., 1190-91). Thus, the basis for Diklich’s safety concerns did not exist at the time of the sale and may not have existed during Scott’s use of the SUV. This testimony demonstrates that if the

vehicle had been treated for corrosion, it never would have developed safety concerns, contradicting Scott's claims that all previously wrecked vehicles present safety concerns, and further demonstrating that expert testimony, based upon proper foundation, is necessary.

Scott's reliance on the other cited cases is equally flawed. In *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024 (*Grabinski II*), the U.S. Eighth Circuit Court of Appeals concluded that defendant's conduct therein demonstrated a clear and disturbing disregard for Grabinski's safety and her economic interest, but did not discuss the evidence that it relied upon and did not address expert testimony. Grabinski did present expert testimony; the same expert presented here, Richard Diklich. *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d at 568 (*Grabinski I*). However, the court was not presented with the same challenge to Diklich's testimony as presented here. Therefore, *Grabinski* is neither instructive nor persuasive.

Chung v. Parker is similarly not persuasive, it merely cites *Grabinski II* for the proposition that the jury could conclude the defendant's conduct in selling a rebuilt wreck was egregious and that it demonstrated a clear and disturbing disregard for Mr. Chung's safety and economic interest. 361 F.3d at 460. The precise issue presented here was not presented there. There was no discussion of the expert testimony presented in *Chung*.

Parrott is also not persuasive. First, the specific issue, the qualifications of an expert to testify concerning safety, was not presented for the court's decision. Second, the court noted the vehicle in that case, which had prior damage, involved the removal and failure to replace several pieces of emission control equipment, including the air cleaner, an exhaust gas recirculation system, and an air pump. This prevented the vehicle from obtaining a Department of Environmental Quality's certification required in Oregon. Since the court did not discuss the expert testimony concerning safety issues, it is highly possible and probable that there was some testimony concerning safety as it related to this missing emission control equipment. Third, *Parrott* is a decision from the Supreme Court of Oregon, which is not binding.

In sum, plaintiff's assertion that even if his witness was not qualified, that it is common sense that a repaired wrecked vehicle raises safety concerns is not supported by the evidence. Moreover, it is contrary to Diklich's own testimony that a light rollover can be repaired properly.

III. THE COMPENSATORY DAMAGES AWARDED IN THE AMOUNT OF \$27,599.82 ARE GROSSLY EXCESSIVE AND DEMONSTRATES BIAS, PASSION, AND PREJUDICE BY THE JURY, REQUIRING A NEW TRIAL OR, IN THE ALTERNATIVE, A REMITTITUR.

A. Standard of Review.

Scott incorrectly cites *Callahan v. Cardinal Glennon Hosp.*, 836 S.W.2d 852, 871 (Mo. banc 1993), for the proposition that a jury's determination of damages will not be disturbed on appeal unless the amount is so grossly excessive that it "shocks the conscious of the court." (Appellant/Cross-Respondent's Brief at 83). That standard of review is not appropriate in the present case because *Callahan* was a medical malpractice case in which a jury is entitled to consider, among other things, past and future pain and suffering, and affect on lifestyle.

The standard of review stated in *Ince v. Money's Building & Development, Inc.*, 135 S.W.3d 475, 478 (Mo. App. 2004), cited by BSF, is more appropriate in this case. *Ince* requires the jury verdict be supported by the evidence. *Id.* at 478. See also *DeLong v. Hilltop Lincoln-Mercury, Inc.*, 812 S.W.2d 834, 841 (Mo. App. 1991)(a jury's verdict is not erroneous if it is within the range of evidence).

B. BSF's Closing Argument was Taken out of Context.

Scott asserts that BSF argued to the jury that \$25,400.40 award of actual damages was reasonable, falsely implying that BSF invited this error. (Brief of Appellant/Cross-Respondent at 83-84). Scott's quotation of BSF's closing argument is a distortion of the record and taken out of context. Scott's quotation is to that portion of the record **after** the jury had already returned its actual damages award, and the argument occurred in the punitive damages phase in which BSF was arguing for a low punitive damages award. A review of BSF's closing argument in the liability phase demonstrates that BSF challenged the evidence on damages and on difference in value. There was never an admission that \$25,400.00 was the proper measure of actual damages. (Tr., 1663-1666).

C. Scott's Testimony As To Value of the SUV Was Not Competent.

Scott properly cites *DeLong v. Hilltop Lincoln-Mercury, Inc.*, 812 S.W.2d at 841 for the very general proposition that an owner of property may testify as to its value. BSF does not quibble with that legal principle. However, Scott attempts to contradict his own testimony by alleging that the SUV had no value. Scott first testified that the true value of the vehicle at the time of purchase was \$5,000.00 or \$6,000.00, (Tr., 354), but then later testified that he did not know what it was worth because he does not appraise cars. (Tr., 415). (BSF's Brief of Cross-

Appellant/Respondent at 49-50). By Scott's own admission, his testimony as to value is not competent.

The testimony of Scott's expert indicates a difference in value between the value as represented and the actual value as \$8,500.00. (Brief of Cross-Appellant/Respondent at 50).

D. Scott Improperly Recovered Expenses that Would Have Been Incurred, Even if the Vehicle had been as Represented.

In a vehicle fraud case, a buyer is not entitled to recover expenses that would have been incurred even if the vehicle had been as represented, including finance charges and taxes paid to purchase the vehicle. *Bird v. John Chezik Homerun, Inc.*, 152 F.3d 1014, 1017 (8th Cir. 1998). Scott cites *Salmon v. Brookshire*, 301 S.W.2d 48, 54 (Mo. App. 1957), for the proposition that finance charges, credit insurance, taxes and license fees are compensable. (Brief of Appellant/Cross-Respondent at 86). *Salmon* actually supports BSF's position in this matter. *Salmon* states that the proper measure of damages is the difference between the actual value of property at the time purchased, and the value the property would have had had if the representations had been true, where the property is retained by the one defrauded. *Id.* However, where the one defrauded rescinds the contract or receives nothing of

value, he may recover the amount he paid with interest from the date of payment plus incidental losses and expenses suffered as a result. *Id.*

Misunderstanding *Salmon*, Scott asserts he is entitled to both retain the property and obtain the amount he paid plus incidental damages. Scott's interpretation and application of *Salmon* is erroneous. Scott cannot seriously maintain that he received nothing of value as his expert opines that the SUV was worth at least \$7,000.00 to \$7,500.00, and Scott got "good use" out of the SUV driving it 186,000 miles.

Scott also relies upon *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565 (*Grabinski I*), for the proposition that interest charges related to purchase are recoverable. (Brief of Appellant/Cross-Respondent at 86). In *Bird v. John Chezik Homerun, Inc.*, 152 F.3d 1014, the U.S. Eighth Circuit Court of Appeals specifically discussed *Grabinski I*, stating:

"*Grabinski* [136 F.3d 565] allows a plaintiff to recover consequential damages, in addition to benefit of the bargain damages, for expenses that are attributable to the fraud. However, *Grabinski* does not permit recovery of expenses that would have been incurred even if the vehicle had been as represented. . . . *Bird* is not entitled to recover the finance charges and taxes she paid to purchase the car, since she would have

incurred those costs even if the vehicle had been exactly as represented.” 152 F.3d at 1017.

Finally, the only other Missouri case cited by Scott to support his claim for finance charges is *Antle v. Reynolds*, 15 S.W.3d 762, 764, 768 (Mo. App. 2000). The issue of the element of damages was not addressed in *Antle*. Thus, *Antle* does not support Scott’s position as alleged.

Scott is not entitled to recover expenses that would have been incurred even if the vehicle had been as represented, including finance charges. However, even if the Court accepts Scott’s position, the most that Scott would be entitled to recover is finance charges on the difference in value between the actual value of the SUV at the time of purchase and the value it would have had if it had been as represented, or finance charges on the \$8,500.00. In this case, the jury erroneously awarded Scott the full amount of the finance charges on the entire purchase. Such an award would only be appropriate under a claim for rescission, not a claim for damages. *Salmon*, 301 S.W.2d at 54. Scott did not rescind the transaction. Therefore, the award of actual damages is error requiring a remedy from this Court.

E. No Evidence Supports Damages for Inconvenience, Embarrassment and Storage.

Scott also argues that he is entitled to recover damages for inconvenience, embarrassment, and storage. (Brief of Appellant/Cross-Respondent at 88). However, Scott does not cite to any evidence from which the jury could have determined these elements of damage. Scott elected to stop driving the SUV because the transmission was going out, not because he learned that it had been salvaged. Moreover, he presented no evidence of the value of the loss of use. Scott admitted no evidence from which the jury could have determined a value for his alleged inconvenience, such as amount of time he spent, the dates of his time spent, or the rate he should be compensated for such time. As for storage, again there was no evidence admitted as to the cost or value for such storage. Further, there was no reason for Scott to store the SUV. The SUV was not admitted into evidence at trial. Once the SUV was inspected by his expert, Scott could have notified defendants of his intention to dispose of the vehicle. He could have disposed of the SUV at any time so long as he gave defendants an opportunity to inspect the SUV themselves. In sum, Scott presented no evidence from which the jury could have awarded any sum for inconvenience and storage. Scott admitted that he was not entitled to damages for emotional distress, which prevents damages for embarrassment. (Tr., 1562).

As demonstrated in BSF's initial brief, the jury's award of actual damages is clearly in excess of the range of evidence and must be reversed. *Ince*, 135 S.W.3d at 478; *DeLong*, 812 S.W.2d at 841.

IV. THE JUDGMENT ENTERED ON THE JURY VERDICT OF PUNITIVE DAMAGES IN THE AMOUNT OF \$840,000.00 IS GROSSLY EXCESSIVE, DEMONSTRATING THE JURY’S BIAS, PASSION, AND PREJUDICE AND VIOLATES CONSTITUTIONAL PRINCIPLES SET FORTH IN *STATE FARM MUT. INS. CO. v. CAMPBELL*, REQUIRING A NEW TRIAL OR, IN THE ALTERNATIVE, AN ORDER OF REMITTITUR.

A. The Erroneous Admission of “Similar Act Evidence” Prejudiced BSF.

Scott’s analysis demonstrates the prejudicial effect of “similar act” evidence on the jury’s determination of punitive damages. Scott emphasized the other instances even more than facts of the Scott transaction, causing the jury to punish BSF for such prior acts and not just for the Scott transaction in violation of *State Farm Mut. Ins. Co. v. Campbell*, 508 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and the Due Process Clause of the Fourteenth Amendment, which prohibits the imposition of grossly excessive or arbitrary punishment on a tortfeasor. For example, Scott relies heavily on the alleged “similar act” evidence concerning the prior *Grabinski* case. Evidence of the *Grabinski* matter alone was so prejudicial as to require reversal of the punitive damages award. *Grabinski*, as it relates to BSF, is

simply not similar. In *Grabinski*, BSF sold the GMC wholesale to another, separate dealer. The alleged representations made by BSF to the other dealer were that the GMC was “very nice”; that it was “driving fine” and needed only a clean-up and standard servicing. *Grabinski*, 136 F.3d at 567.

In contrast, in the present case, BSF’s sale was a retail sale to a consumer and Scott alleged that BSF was specifically represented to him that the vehicle had never been wrecked. In *Grabinski*, there was no representation by BSF that the car had never been wrecked. It was the separate entity, Blue Springs Ford Sales Outlet, Inc. which misrepresented that the car had never been wrecked, not BSF. Moreover, Blue Springs Ford Sales Outlet, Inc. used another non-similar tactic of requiring *Grabinski* to sign a “tow-off agreement,” also known as a “junk affidavit.” This dissimilar act, which was the emphasis of *Grabinski*’s testimony admitted in the present case, did not constitute similar conduct, was by a non-party separate entity, and was highly prejudicial.

The jury in *Grabinski* found BSF’s conduct less culpable than Blue Springs Ford Sales Outlet, Inc. It awarded actual damages in the amount of \$5,300.00 against Blue Springs Ford Sales Outlet, Inc. and its three employees, while only awarding actual damages in the amount of \$2,535.00 against all of the defendants, including BSF, jointly and severally. Thus, only the \$2,535.00 applied to BSF. Further, while the jury awarded punitive damages of \$100,000.00 against the

retailer, Blue Springs Ford Sales Outlet, and an additional \$60,000.00 in total punitive damages against the three individuals, it awarded punitive damages of only \$50,000.00 against BSF, the wholesaler. This constitutes a ratio of punitive damages to actual damages of 19.7:1 ($\$50,000.00 \div \$2,535.00$). At numerous times in his brief, Scott refers to the punitive damage to actual damages ratio in Grabinski as 99:1. This is obviously incorrect. Although the U.S. Eighth Circuit Court of Appeals used the 99:1 ratio for BSF in *Grabinski II*, the Court apparently divided the \$2,535.00 by the five defendants since liability was joint and several. Using this analysis, the jury only found that BSF was responsible for \$507.00 for Grabinski's actual damages.

Whether the court uses the \$2,535.00 or the \$50,000.00 figure, the exception stated in *Campbell* to the general rule that single-digit multipliers are more likely to comport with due process would apply:

“Ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’” 538 U.S. at 425.

In the present case, the actual damages of \$27,099.82 cannot be deemed a “small amount of economic damages.”

The U.S. Supreme Court stated in *Campbell*:

“In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” *Id.* at 426.

This Court simply cannot find that punitive damages in the amount of \$840,000.00 is either reasonable or proportionate to the amount of harm to Scott. This Court should consider that Scott purchased the vehicle for \$14,999.00, financed the sale, and purchased credit life insurance. There is no allegation that he did not receive the benefit of the credit life insurance. He also purchased an extended service contract (“ESP”) that was never issued; however, he did not experience any harm from that act because the only time he presented the car for service under the warranty, his car was serviced. Scott was never turned down for any service under the ESP. In addition, Scott drove the vehicle for almost six years and an additional 186,000 miles. Scott only stopped driving the vehicle when it had 234,000 miles on it and the transmission was going out. Scott’s expert, Diklich, acknowledged that Scott got good use out of the vehicle. Given the above facts, \$840,000.00 in punitive damages is neither reasonable nor proportionate to the amount of harm to Scott. *Campbell*, 538 U.S. at 426.

Scott’s relies on the other allegedly similar act evidence that actually involved BSF. Balderston acknowledged at trial that BSF had sold previously wrecked and repaired cars. This acknowledgement was after Scott pointed out during

examination of Balderston that previously damaged vehicles were an industry problem due in part to unibody construction and the “sophistication of repairs.” (Tr., 1374; see also Scott’s Brief of Appellant/Cross-Respondent at 37). However, all of the alleged similar act evidence must be placed in context. Throughout a several year period, BSF sold 40,000 used vehicles. Out of these 40,000 vehicles, Scott was able to find a little more than ten vehicles that slipped through BSF’s policies enacted to prevent the sale of such vehicles. In most of these cases, BSF repurchased the car and reimbursed the buyer. Although BSF believes that even one car being sold without proper disclosure is too many, the fact of the matter remains that percentage-wise, the problem was not widespread as Scott would have the Court believe.

B. The Evidence Does Not Support a Finding That the SUV Was Unsafe and Likely to Cause Harm.

BSF relies on *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460, 113 S.Ct. 2711, 125 L.Ed.2d 306 (1993), for the proposition that the Court should consider the potential harm that might have resulted from BSF’s sale of the SUV. (Brief of Appellant/Cross-Respondent at 93). Scott seizes upon his interpretation of *TXO* and declares that the SUV sold to Scott was unsafe, stating “any mile he drove the vehicle could well have resulted in injury or death to him and

to others.” (Brief of Appellant/Cross-Respondent at 94). Scott’s argument is flawed both on the law and on the facts because Scott misinterprets *TXO* and no evidence supports Scott’s claim of “potential harm.”

In *TXO*, the U.S. Supreme Court relied upon its prior decision of *Pacific Mut. Life Ins. Co. v. Haislip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), stating:

“Taking account of potential harm that might result from defendant’s conduct in calculating punitive damages was consistent with the views we expressed in *Haislip*, *supra*. In that case, we endorse the standards that the Alabama Supreme Court had previously announced, one of which was “whether there was a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendants’ conduct as well as harm that actually has occurred.” *Id.* at 21. *TXO*, 509 U.S. at 460 (emphasis the court’s).

Thus, *TXO* adopted a standard of potential harm “likely to result,” not potential harm that “might” occur. It is common sense to require an unequivocal standard such as “harm likely to result” rather than an equivocal, speculative standard of harm that “might” result, which would include harm that might result, but is not likely to result.

The standard for potential harm espoused in *TXO* emphasizes the error in permitting the expert testimony of Diklich. Diklich did not testify giving his opinion

concerning the safety concerns using any unequivocal language such as “likely to result.” As an example, on cross-examination when asked about his concern over windshield retention, Diklich testified:

“Q. In your research in preparation in forming your case opinions, did you learn that Mr. Scott never experienced the windshield actually becoming dislodged?

A. I never assumed that it did. We were just talking about possibilities.” (Tr., 1200). (See also Diklich testimony quoted at pages 40-41 of Brief of Cross-Appellant/Respondent).

A review of his testimony will demonstrate that at no point did he state that it was **likely** that an accident in the SUV would result in harm to Scott or others because it had been previously wrecked and repaired.

Moreover, Diklich testified that the structural methodology of the repair was correct with the exception of lack of corrosion protection and was within the range of industry standards. (Tr., 1189-1191). He also testified that in 1994, at the time of sale, deterioration resulting from a lack of corrosion protection had **not** occurred. (Tr., 1190). Diklich further testified that he could not quantify the progression of the deterioration:

“Q. But you cannot quantify how long after the repairs were made that the corrosion in the roof area would become a safety issue; can you?

A. Oh, not within standards of what I would need to have for this venue to quantify it, no.

Q. And if Mr. Scott stopped driving the vehicle in October of 1999, your inspection of the welds and actually pulling back the headliner did not occur until nearly three years later; is that correct?

A. That’s correct. (Tr., 1190-1191).

The above testimony demonstrates that Diklich failed to give an unequivocal opinion using the appropriate standards. Further, Diklich’s discovery of the alleged corrosion did not even occur until three years after Scott stopped driving the vehicle – three years after it had been parked outside in the elements. Thus, Diklich could not testify to the condition of the SUV and the state of any corrosion **during the period Scott drove the SUV.**

Despite all the alleged similar act evidence admitted, not one of the prior transactions involved a personal injury. There is absolutely no evidence in the record of the sales of repaired vehicles of any injury or damage beyond the economic damages, primarily diminution in value of the vehicle. Therefore, Scott’s

argument should be rejected as prejudicial, unsubstantiated hyperbole. As noted in BSF's initial Brief, Scott emphasized this alleged potential harm/safety issue at trial, which demonstrates the resulting prejudice to BSF. (Brief of Cross-Appellant/Respondent at 43-44).

Scott falsely alleges that BSF makes the conclusion that BSF will be caught rarely, and even then with almost no consequences so that when BSF is caught BSF should be punished severely. (Brief of Appellant/Cross-Respondent at 103). Scott relies upon *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003)(if a tortfeasor is caught only half the time he commits torts, when he is caught he should be punished twice as heavily). This reasoning violates *State Farm v. Campbell*. The Utah Supreme Court sought to justify the huge punitive damages award with the fact that State Farm will only be punished in one out of every 50,000 cases. The U.S. Supreme Court rejected the argument:

“Here the argument that State Farm will be punished in only the rare case, coupled with reference to its assets (which, of course, are what other insureds in Utah and other states must rely for payment of claims), had little to do with the actual harm sustained by the Campbells.” 538 U.S. at 427.

Scott made this same improper, prejudicial argument to the jury during his closing argument in the punitive damages phase of the trial. (Tr., 1800-1801). The

huge, disproportionate punitive damages award is a testament to the prejudicial effect. Because such prejudicial argument violates *Campbell*'s holding that the measure of punishment must be reasonable and proportionate to the harm to the plaintiff, the punitive damages award must be reversed. 538 U.S. at 426.

C. The Cases Relied Upon by Scott Do Not Justify the Unconstitutional Punitive Damages Award.

Scott relies upon the following cases to support his huge multiple punitive damage award: *Mathias; Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001); *Kemp v. American Telephone & Telegraph Co.*, 393 F.3d 1354 (11th Cir. 2004); *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999); *Grabinski*, 203 F.3d 1024; *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3rd Cir. 2005); and *Lincoln v. Case*, 340 F.3d 283, 294 (5th Cir. 2003). (Brief of Appellant/Cross-Respondent at 92, 97-98). With the exception of *Parrott*, each of the cases involved small amounts of actual damages. Therefore, the small damage exception to the single-digit ratio rule stated in *Campbell* applies.⁵ Moreover,

⁵*Campbell* stated that few awards exceeding a single-digit ratio between punitive damages and actual damages will satisfy due process but noted greater ratios may comport with due process in a particularly egregious act has resulted in only a small amount of punitive damages. 538 U.S. at 425.

Parrott and *Johansen* are pre-*Campbell* cases; thus, those courts did not have the benefit of the U.S. Supreme Court's guidance in *Campbell*. Finally, none of the cases relied upon by Scott are binding upon this Court.

In *Mathias*, defendant operated a hotel in downtown Chicago. The plaintiffs were guests at the hotel and were bitten by bedbugs. The plaintiffs sued, alleging defendant was guilty of willful and wanton conduct. The jury agreed and awarded each of the two plaintiffs \$5,000.00 in compensatory damages and \$186,000.00 in punitive damages, a ratio of 37.2:1. Affirming the award, the *Mathias* court noted that the defendant's aggregate net worth was \$1.6 billion and that punitive damages needed to be significant to punish and deter the defendant. (*Id.* at 677).

This case can be distinguished from the present case in two ways. First, because \$5,000.00 is a relatively small amount of damages, the small damage exception to the single-digit ratio rule stated in *Campbell* applies. Moreover, in *Mathias*, the defendant was worth \$1.6 billion. In contrast, BSF's net worth was only \$2.3 million (Tr., 1785), and its net profit/loss through July of 2003, the year of trial, was a negative \$140,000.00 (loss). Because of the *Mathias* defendant's huge net worth, a large punitive damages award was necessary to punish and deter. The total punitive award was \$372,000.00 against a company worth \$1.6 billion, or .02% of net worth. In contrast, the jury in this case awarded \$840,000.00 punitive damages against BSF, with a net worth of \$2.3 million, or 36.52% of net worth.

This huge award violates due process and must be reversed. *Campbell*, 538 U.S. at 425.

Parrott, as mentioned above, is a pre-*Campbell* case. Thus, it is a questionable precedent. Moreover, the decision of the Oregon Supreme Court, is not binding on this court. Nevertheless, it is distinguishable and should not be followed. The plaintiffs purchased a used Suburban SUV from defendant Carr Chevrolet. At the time of the sale, the mileage stated on the Suburban was incorrect; the vehicle had been defaced with missing VIN numbers in violation of Oregon law; the seller did not disclose that the emission control equipment had been completely removed and failed to disclose prior damage. At trial, the plaintiff proved the defendant had known about the condition of the Suburban when the defendant sold it to plaintiff. Because the emission control equipment had been removed, it could not be brought into compliance with the Department of Environmental Quality (“DEQ”) and therefore could not be operated in Portland. At the time of the sale, plaintiff was required to sign two conflicting documents. One was entitled “Special Disclaimers and Conditions,” which stated that the dealership had visually inspected the vehicle and that there were no apparent deficiencies in the installation of the emission control devices. The second one was a buyer’s order that had inconsistent language that the dealership had not inspected the vehicle and had no knowledge of the vehicle’s condition, including the DEQ certification.

The jury awarded plaintiff the sum of \$11,496.00 in compensatory damages and \$1 million in punitive damages. The trial court reduced the punitive damages award to \$50,000.00, but the Oregon Court of Appeals directed the trial court to grant defendant's motion for new trial unless plaintiff filed a remitter of punitive damages in the amount of \$300,000.00.

Subsequently, the Oregon Supreme Court reinstated the \$1 million award for punitive damages. The court noted that as a result of the defendant's material misrepresentations about the Suburban's condition, the plaintiff was unable to obtain comprehensive insurance coverage. When the Suburban's current registration expired, plaintiff would not have been able to drive it within the Portland metropolitan area because it could not have been brought into DEQ compliance. Further, plaintiff established that the defendant's misconduct was part of defendant's day-to-day business dealings and was not limited to the sale of the Suburban.

This Court should not follow *Parrott* for several reasons. First, *Parrott* did not have the benefit of the guidelines in *Campbell*. Second, the case is distinguishable because Parrott was unable to obtain any significant use of the vehicle and was unable to ever obtain proper insurance. In contrast, Scott obtained substantial use of the SUV, driving it almost six years and 186,000 miles. He had no problems with insurance. Additionally, removing pollution control equipment harms all of society. Parrott was able to prove that this incident was, by design, part

of the car dealer's day-to-day operations as demonstrated by the inconsistent forms required to be signed. In this case, BSF's action was not part of BSF's day-to-day operations, but was just one of a few vehicles out of 40,000 that fell through the cracks. Given the above inconsistent facts, *Parrott* is not persuasive in this matter.

In *Kemp v. American Telephone & Telegraph Co.*, 393 F.3d 1354, the jury found that AT&T was guilty of fraudulent billing practices and fraudulent collection of illegal gambling debts in violation of the Federal and Georgia RICO statutes. These gambling debts were incurred after the plaintiff's grandson called a 900 number. AT&T attempted to collect these debts by including the charges in the plaintiff's phone bill as though they were long distance charges. The jury awarded the plaintiff \$115.05 in actual damages, and \$1 million in punitive damages. The trial court denied AT&T's motion for remitter of the punitive damages award. On appeal, the U.S. Court of Appeals for the Seventh Circuit reversed and reduced the punitive damages award to \$250,000.00. The Seventh Circuit noted that as the Supreme Court explained in *Campbell*, a higher ratio than a single-digit ratio might be appropriate where a particularly egregious act has resulted in only a small amount of economic damages. The court noted that approving a punitive damages award in an amount of only nine times actual damages would mean that AT&T would receive a sanction of a little more than \$1,000.00, and stated:

“Such an amount, levied against a company as large as AT&T, would utterly fail to serve the traditional purposes underlying an award of punitive damages, which were to punish and deter.” 393 F.3d at 1364.

The court found that an award of less than \$250,000.00 would not serve a meaningful deterrent to a corporation like AT&T; however, an award greater than that amount would prove an unconstitutional windfall. *Id.* at 1365.

The facts of the present case are clearly distinguishable. Scott was awarded a sizeable actual damage award of \$27,599.82 as compared to the de minimus award of \$115.05 awarded in *Kemp*. Thus, *Kemp* is a clear application of the exception to the single-digit ratio standard espoused in *Campbell*. Second, BSF is not AT&T. BSF’s net worth of \$2.3 million dwarfs AT&T’s multi-billion dollar net worth. The original \$1 million award would have been a tiny fraction of AT&T’s net worth, yet the Seventh Circuit reduced the award to \$250,000.00. In contrast, the \$840,000.00 punitive damages award of this case is 36.52% of BSF’s net worth, constituting a violation of due process because it is not reasonable and proportionate to the harm to Scott and far exceeded any amount necessary to punish and deter. *Campbell*, 538 U.S. at 425.

In *Johansen v. Combustion Engineering, Inc.*, a group of 15 property owners, who owned 16 parcels of land, sued Combustion Engineering, Inc., the owner of a former mining site, alleging that polluted water had escaped from mining waste

containment areas known as impaling ponds, damaging the stream that ran through their property. The jury awarded an aggregate amount of \$47,000.00 in actual damages to the 15 landowners and \$3 million in punitive damages to each landowner for a total of \$45 million in punitive damages. The trial court entered an order granting the defendant's motion for a new trial unless the property owners agreed to remit all punitive damages over \$15 million. Combustion Engineering appealed.

The U.S. Eleventh Circuit Court of Appeals found that the trial court's reduced punitive damages of \$15 million was grossly excessive and remanded the matter back to the district court to reconsider its ruling in light of *BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), which had been decided after the trial court's initial decision. *Johansen* is a pre-*Campbell* case. On remand, the district court reduced the punitive award to \$4.35 million. Combustion Engineering ("CE") again appealed. The Eleventh Circuit Court of Appeals found that the actual damages awarded was relatively small, justifying a higher ratio. It also found that in promoting deterrence, the economic wealth of the tortfeasor might be considered, and stated that a larger award is needed to attract the attention of a large corporation. The Court commented:

“CE is a large and extremely wealthy international corporation. It is unlikely that having to pay \$4.35 million in punitive damages would not make the company newsletter.” *Id.* at 1339.

In *Johansen*, the jury awarded actual damages of \$47,000.00 to 15 plaintiff landowners concerning 16 parcels of land, which resulted in an average of \$3,133.33 per landowner or \$2,937.50 per parcel. Thus, when viewed by the individual plaintiffs and/or parcels, the actual damages verdict was relatively small falling within the small actual damages exception to the single-digit ratio rule stated in *Campbell*. Moreover, the defendant was a large and extremely wealthy international corporation. The facts of the present case are obviously distinguishable. The actual damages award of \$27,599.82 to Scott stemming from the purchase of a \$15,000.00 SUV does not fall within the small actual damages exception to the single-digit ratio rule. BSF is a small Missouri corporation with a net worth of \$2.3 million and not an extremely wealthy international corporation. Finally, *Johansen* is a pre-*Campbell* decision, decided without the additional guidance of the U.S. Supreme Court. Therefore, the multiplier used in *Johansen* is not appropriate for this case.

In *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224, the plaintiff insured brought a bad faith action against its property insurer, Public Service Mutual Insurance Company (“PSM”), stemming from the manner in which the insurer attempted to settle a claim when the plaintiff’s building was damaged by a tornado.

The plaintiff insured had to wait over two years after its building was damaged by a tornado to receive the final payment on its property damage claim. The matter was tried to the district court, which found that the insurer's conduct constituted bad faith due to unreasonable delays in the processing of the insured's claim stating:

“Specifically, unreasonable delays in the processing of the Willow Inn's claims were extraordinarily unwarranted such that there can be no conclusion except that PSM knowingly or recklessly disregarded the absence of a reasonable basis for its conduct.”

Prior to the case being filed, the insurance company finally settled Willow Inn's property loss claim for \$117,000.00, but refused to pay \$2,000.00 for costs associated with preparing the proof of loss as provided in the insurance policy. Thus, the trial court awarded the plaintiff \$2,000.00 in actual damages. However, the trial court did not only consider PSM's failure to pay the \$2,000.00, it considered PSM's entire claims adjustment process. The trial court ultimately applied the factors discussed in *Campbell* and *BMW v. Gore*, and awarded the plaintiff \$150,000.00 in punitive damages. The trial court reasoned that the \$150,000.00 was approximately equal to the value of the Willow Inn claim under the policy, \$117,000.00, plus the \$2,000.00 cost to prepare the proof of loss. The trial court specifically found that Willow Inn was in a financially vulnerable position and that

PSM's conduct was reprehensible because of the unreasonable delay in payment of the claim and was not a "mere accident."

On appeal, the U.S. Third Circuit Court of Appeals found that the \$2,000.00 awarded by the trial court as actual damages was related to only one aspect of PSM's bad faith conduct and was not indicative of PSM's culpability. *Id.*, at 234-35. The court determined that the \$2,000.00 actual damage award would be an improper figure to use in the ratio analysis. *Id.*, at 235. The bad faith claim was based upon a Pennsylvania statute. The Eleventh Circuit relied upon a Pennsylvania case, *Hollock v. Erie Ins. Exch.*, 204 Pa. Super. 13, 842 A.2d 409, 421 (Pa. Super. 2004) (en banc), which found that in a statutory bad faith action, the actual damages for the *Campbell* ratio analysis should include the cost of attorney fees awarded. *Id.*, at 236-237.

Willow Inn is clearly distinguishable. First, the amount of actual damages awarded in *Willow Inn* was small, invoking the small actual damage exception to the single digit ratio rule set forth in *Campbell*. The court only discussed enhancing the actual damages for purposes of the ratio analysis, after reciting the exception to the single-digit multiplier rule. Second, the amount actually at stake in *Willow Inn* related to the bad faith conduct was the amount of the property damage of \$117,000.00 plus the \$2,000.00 cost of preparing the proof of loss. The Third Circuit's conclusion of the statutory attorney fee award for the *Campbell* multiplier

analysis was based upon a Pennsylvania statute and Pennsylvania precedent construing the statute. Thus, that portion of the case is based upon a particular state statute and is not universally applicable. Given the facts, a punitive damage award in the amount of \$150,000.00 was not excessive. Moreover, the punitive award in *Willow Inn* was determined by a judge and not a jury.

Finally, plaintiff relies on *Lincoln v. Case*, which was a racial discrimination case under the Fair Housing Act. The jury awarded the plaintiff only \$500.00 in compensatory damages, and awarded the plaintiff \$100,000.00 in punitive damages. The district court denied the defendant landlord's motion for remitter. On appeal, the U.S. Fifth Circuit Court of Appeals reversed the district court's denial and reduced the punitive damages award to \$55,000.00. Again, the small actual damages exception to the single-digit ratio rule applies in *Lincoln*. The actual damages in the amount of \$500.00 was minimal. A punitive damage award of nine times \$500.00 would result in a punitive damages award of \$4,500.00, which would be insufficient to punish and deter the extremely reprehensible discriminatory conduct. Moreover, in reaching its ultimate decision of \$55,000.00, the court relied upon the civil penalty provision of the Fair Housing Act that allowed for a penalty not to exceed \$55,000.00 for a first time offense.

The facts of the present case are clearly distinguishable. First, Scott did not obtain a small damage award, but a relatively large award of \$27,599.82. Second,

there is no civil penalty in Missouri anywhere near the size of \$55,000.00, as in the Fair Housing Act. Thus, *Lincoln v. Case* provides no guidance for this Court.

In conclusion, the jury's punitive damages award of \$840,000.00 is grossly excessive and presents an unconstitutional windfall to Scott. The grossly excessive punitive damage verdict can be explained by the trial court's erroneous admission of evidence concerning similar conduct by the separate distinct entities Blue Springs Nissan and the dissimilar conduct of BSF and Blue Springs Ford Sales Outlet, Inc. in *Grabinski*. In *Grabinski*, BSF made a wholesale sale to a separate dealer and made no representations concerning prior collision damage, while the real culpable entity, a separate dealer, misrepresented that the GMC had never sustained wreck damage and coerced and "tricked" Grabinski into signing a "tow-off agreement," also known as a "junk affidavit." The introduction of such evidence prejudiced the jury against BSF. The prejudice was magnified by Scott's emphasis in closing arguments. Moreover, limiting punitive damages to more than nine times the amount of actual damages in this case is the constitutional limit under *State Farm v. Campbell* and *BMW v. Gore*.

This Court should also consider BSF's May 11, 2000 offer of a complete refund as well as BSF's subsequent offers of judgment of \$75,000.00 and \$125,000.00, plus reasonable attorney's fees to mitigate punitive damages. See *Maugh v. Chrysler Corporation*, 818 S.W.2d 658, 664 (Mo. App. 1991)(Chrysler's

offer to replace new car which had been sold without disclosure of prior repaired collision damage relevant to mitigate punitive damages.). Therefore, this Court should either remand the case with directions for the district court to enter a remittur, or remand the case for a new trial on all issues.

V. THE TRIAL COURT ERRED IN DENYING BSF'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE MAGNUSON-MOSS WARRANTY ACT CLAIM BECAUSE THE EVIDENCE AT TRIAL FAILED TO ESTABLISH THAT SCOTT SATISFIED THE CONDITION PRECEDENT OF PROVIDING BSF A REASONABLE OPPORTUNITY TO CURE.

Scott makes an irrelevant argument that BSF did not submit a jury instruction concerning a lack of an opportunity to cure. Such argument is irrelevant because BSF argues that it was entitled to a directed verdict, and the claim should not have gone to the jury.

Scott argues that an opportunity to cure is not necessary in this case because a wrecked vehicle which has been repaired cannot be cured as it will always be a previously wrecked vehicle, citing *Maberry v. Said*, 911 F. Supp. 1393 (D. Kan. 1995). *Maberry* involved a vehicle that was fraudulently sold to a consumer with the representation that its actual mileage was 52,000 miles, when in fact the true mileage was 152,000 miles. The plaintiff consumer discovered the mileage discrepancy approximately six months after he bought the car after he had made six payments. The court denied summary judgment to the defendant seller on the basis that the plaintiff consumer did not give the defendant seller an opportunity to cure

because a high mileage vehicle cannot be cured, but cited no authority. There was no evidence that the defendant auto dealer offered to trade the consumer for the value of the car as represented, i.e., with 52,000 miles, or offered the consumer a complete refund.

In the present case, in contrast, after Scott had driven the SUV for almost six years and an additional 186,000 miles, BSF offered to trade the SUV in for the value it would have had if it had never been wrecked. When BSF did not hear from Scott regarding that offer, BSF made an unconditional offer to completely refund all of Scott's money (Exhibit 1), including finance charges, fee for credit life insurance which he received the benefit of, and the cost of the ESP, even if Scott no longer owned the SUV. Scott did not accept. Both offers occurred before Scott filed this lawsuit. Where a defendant is given an opportunity to cure, and the defendant offers a complete refund, a party may not maintain an action under the Magnusson-Moss Warranty Act. *Heller v. Shaw Industries, Inc.*, 1997 WL 535163, 1997 U.S. Dist. LEXUS 12399, CCH Prod. Liab. Rep. ¶15,050 (E.D. Pa. 1997).

Because BSF offered Scott an unconditional, complete refund prior to Scott making a claim in the Magnusson-Moss Warranty Act, BSF's offer of complete cure precludes Scott from maintaining an action under the Magnusson-Moss Warranty Act. *Id.*

Finally, Scott cites *Radford v. Daimler Chrysler Corp.*, 168 F. Supp. 2d 751, 753-754 (N.D. Oh. 2001), and *McFadden v. Dryvit Systems, Inc.*, 2004 WL 2278542 (D. Or. 2004), for the rule that where there is evidence that the seller knew of the defect at the time of the sale, the Magnusson-Moss opportunity to cure does not apply. Scott's argument should be rejected both under the facts and under the law. Factually, there was no evidence that BSF knew that the Explorer had suffered collision damage and been repaired at the time of the sale. The title did not list it as salvage and it was not reported in Carfax. The earliest evidence that BSF knew of the prior damage occurred after the sale. Thus, these cases do not apply. Second, and more importantly, the purpose of giving the seller an opportunity to cure is to put the seller on notice of the claim and give him an opportunity to remedy the breach of warranty without litigation. The theory stated in *Radford* and *McFadden*, that the seller does not need a notice and opportunity to cure if the seller knew of the defect at the time of the sale, applies simply because the seller already had such notice of the defect. These cases do not hold that once a seller has notice of the buyer's claim of breach of warranty and makes an unconditional offer of a complete cure prior to suit being filed, the buyer can reject such cure and pursue a Magnusson-Moss Warranty Act. Such a rule of law would encourage needless litigation and would be nonsensical.

Because BSF offered Scott a complete refund, and, in fact, offered more than Scott was entitled to under his breach of warranty claim under the Magnusson-Moss Warranty Act, the trial court erred in denying BSF's motion for directed verdict and motion for JNOV, because Scott should have been precluded from pursuing his Magnusson-Moss Warranty Act claim.

RESPONSE TO SCOTT'S APPEAL

ARGUMENT

I. RESPONSE TO SCOTT'S FIRST CLAIM OF ERROR: THE TRIAL COURT DID NOT ERR IN REFUSING TO SUBMIT TO THE JURY SCOTT'S CLAIM FOR PUNITIVE DAMAGES UNDER R.S.Mo. § 407.025 BECAUSE THE STATUTE CLEARLY RESERVES THE AWARD OF PUNITIVE DAMAGES TO THE COURT AND NOT THE JURY; AND SUCH STATUTE DOES NOT VIOLATE THE MISSOURI CONSTITUTIONAL RIGHT TO A JURY TRIAL; AND THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES UNDER THE MISSOURI MERCHANDISING PRACTICES ACT UPON SCOTT'S REFUSAL TO MAKE AN ELECTION OF REMEDIES BETWEEN COMMON LAW FRAUD AND AN ACTION UNDER THE MISSOURI MERCHANDISING PRACTICES ACT.

A. Standard of Review.

Scott challenges the constitutionality of R.S.Mo. § 407.025.1. “An act of a legislature approved by the governor carries with it a strong presumption of constitutionality. This Court will resolve doubts in favor of the procedural and

substantive validity of an act of the legislature. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994).” *Hoskins v. Businessmen’s Assurance*, 79 S.W.3d 901, 904 (Mo. 2002). The party challenging the constitutionality of the statute bears of the burden of proving the statute’s unconstitutionality. *Fust v. Fust*, 947 S.W.2d 424, 427 (Mo. 1997), citing *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). This Court is to resolve all doubts in favor of the statute’s validity, and in doing so, this Court is allowed to make every reasonable intendment to sustain the constitutionality of the statute. *Westin Crown Plaza Hotel Co.*, 664 S.W.2d at 5.

B. Section 407.025.1 Reserves the Award of Punitive Damages to the Court and Not the Jury.

Section 407.025.1 provides:

“Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by Section 407.020, may bring a private civil action in either the circuit court of the county in which the seller or lessor resides, or in which the transaction complained of took place, to recover

actual damages. **The court may, in its discretion, award punitive damages and may award to the prevailing party attorney’s fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper.”**

(Emphasis added).

“From the very wording of [§ 407.025.1], it can be observed that the award of punitive damages is reserved to the court and not the jury.” *Dover v. Stanley*, 652 S.W.2d 258, 261 (Mo. App. 1983).

C. Section 407.025.1 Does Not Violate the Right to a Trial by Jury Under Mo. Const., Art. I, § 22(a).

Scott alleges that the trial court’s failure to submit his claim for punitive damages under the Missouri Merchandising Practices Act, and the Act itself, unconstitutionally deprived him of his constitutional guarantee of a right to have the jury determine the punitive damages award under the Missouri Merchandising Practices Act. As will be demonstrated below, Scott’s argument should be rejected and this Court should uphold the constitutionality of the statute, reserving the issue of punitive damages, attorney’s fees and equitable relief to the Court, not the jury.

Art. I, sec. 22(a) of the Missouri Constitution provides: “The right of trial by jury as heretofore enjoyed shall remain inviolate;” Plaintiff relies upon *State ex*

rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. 2003), which interpreted the above Missouri constitutional provision granting the right of a jury trial with regard to Diehl's claims for damages only (as Diehl did not seek any form of injunctive relief) under the Missouri Human Rights Act provision, R.S.Mo. § 213.111. Diehl's claim for damages was based upon the Missouri Human Rights Act provision, R.S.Mo. § 213.055, which provides that it is unlawful for an employer covered by the Act "to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age, or handicap. . . ." Section 213.055.1(1)(a).

The specific statutory provision of the Missouri Human Rights Act at issue was Section 213.111.2 which stated:

"The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award court costs and reasonable attorney's fees to the prevailing party, other than a state agency or commission or a local commission; except that, a prevailing respondent may be awarded court costs and reasonable attorney's fees only upon a showing that the case is without foundation."

As is readily apparent, Section 213.111.2 was much broader than Section 407.025.1 in that it reserved for the court the award of all damages, **including actual damages**.

In *Diehl*, this court determined that pursuant to Article I, Section 22(a) of the Missouri Constitution, the inquiry was whether *Diehl's* civil action for damages was the kind of case that carried a right of trial by jury in 1820 when the first Missouri Constitution was enacted. The court found that the simple analysis is “whether the action is a ‘civil action’ for damages. If so, the jury trial right is to ‘remain inviolate.’” *Diehl*, 95 S.W.3d at 85. The court stated that the exceptions recognized for the right to jury trial are cases under the court’s equitable jurisdiction, and those claims that are adjudicated in administrative proceedings. *Id.* An action that is equitable in nature does not have a constitutional right to a trial by jury. *Id.*, citing *Hammons v. Ehney*, 924 S.W.2d 843, 846 (Mo. App. 1996).

The court noted that Section 213.111.2 authorized equitable relief but stated that fact does not make a civil action for damages an action in equity. *Diehl*, 95 S.W.3d at 88-89. The characterization of an action as one at law or equity depends upon the issues tendered by the pleadings. *Id.*, at 89. “If the pleadings do not contain an equitable claim, the case is not in equity.” *Id.* In ruling that the trial court’s order overruling *Diehl's* request for a jury trial denied her a constitutional right to trial by jury under the Missouri Constitution, this Court was careful to note

that Diehl filed a civil action for damages only, not seeking any equitable relief, and limited the holding in *Diehl* accordingly. *Id.*, at 92.

The present case is clearly distinguishable because Scott did seek equitable relief. Moreover, in *Diehl*, the statute also denied a jury trial on actual damages as well as punitive damages. Here, R.S.Mo. § 407.025.1, which directs the court to determine punitive damages, does not apply to actual damages. *Diehl* did not specifically discuss the issue of a right to trial by jury on punitive damages alone where actual damages are awarded by the jury. Therefore, *Diehl* is not dispositive of this matter.

The real issue in the present case is whether Missouri grants a right to trial by jury on an award of punitive damages authorized by a statute where actual damages awarded under such statutorily created action are submitted to the jury. Missouri courts have not ruled on that issue. However, Missouri has upheld the constitutionality of R.S.Mo. § 537.675, which restricts the recovery of punitive damages to a plaintiff. *Fust v. Fust*, 947 S.W.2d 424 (Mo. 1997); *Hoskins v. Businessmen's Assurance*, 79 S.W.3d 901 (Mo. 2002).

In a very analogous case, the Kansas Supreme Court has held that a statute that required the court and not the jury determine the amount of punitive damages did not violate the Kansas constitutional provision guaranteeing the right of trial by jury. *Smith v. Printoff*, 866 P.2d 985 (Kan. 1993). The Kansas constitutional

provision, Section 5 of the Bill of Rights of the Kansas Constitution, is very similar to the language of the Missouri Constitution, Article I, Section 22(a). Section 5 of the Bill of Rights of the Kansas Constitution provides: “The right of trial by jury shall be inviolate.” *Smith* employed the same analysis as *Diehl* – to determine whether the right to trial by jury for the specific claim existed at common law prior to the enactment of the State Constitution. The plaintiff, Smith, argued that because punitive damages were determined by a jury at common law, the Kansas constitutional provision protected that right. The defendant argued that a plaintiff has no vested right to punitive damages, permitting legislative modification of the procedure by which to determine the amount punitive damages. Therefore, there is no constitutional right to a jury determination of punitive damages.

In its analysis, the *Smith* court first noted that the plaintiff was correct in that punitive damages were available at common law subject to the jury’s determination in a proper case. However, the court noted that punitive damages are not awarded to a plaintiff as a matter of right. 866 P.2d at 992. The court further noted that a claim for punitive damages is not a cause of action triable to a jury as the punitive damage award is incident to and dependent upon the recovery of actual damages. *Id.* The court determined that the issue is whether the fact that juries historically have determined the amount of punitive damages rises to the level of a right that existed

at common law. *Smith* noted there is no question in Kansas that the right to a trial by jury includes the right to have a jury determine actual damages. *Id.* at 993.

The *Smith* court found that, as in Missouri, the availability of damages distinguishes a suit at law from one in equity, and that suits at law were tried to a jury at common law. *Id.* at 993. However, the Kansas Supreme Court noted that punitive damages are different from compensatory damages:

“Although the amount of punitive damages may be regarded as a fact question, punitive damages are different from compensatory damages. . . . Compensatory damages fall into the category of a remedy at common law. As noted above, however, punitive damages were not considered a remedy at common law, but merely incident to those causes of action in tort requesting compensatory damages. We do not regard punitive damages as compensatory in any way, . . . , and there is no right to punitive damages. . . . Punitive damages are not awarded because of any special merit in the plaintiff’s case. . . . The express purpose of punitive damages is and has been to punish the tortfeasor and to deter it and others from committing similar wrongs in the future. . . . No separate right of action existed at common law for punitive damages. . . .” [Citations omitted]. *Id.* at 994.

Smith reasoned that because a plaintiff does not have a right to punitive damages, the legislature could abolish punitive damages without infringing a plaintiff's basic constitutional rights. The court then concluded: "If a legislature may abolish punitive damages, then it also may, without impinging upon the right to trial by jury, accomplish anything short of that, such as requiring the court to determine the amount of punitive damages or capping the amount of punitive damages." *Id.*

In *Fust*, this court conducted a similar analysis. Although the court was not determining the constitutional right to a trial by jury, the court noted that placing reasonable limitations on common law causes of action is within the discretion of the legislature, citing *Simpson v. Kilcher*, 749 S.W.2d 386, 391 (Mo. banc 1988). *Fust*, 947 S.W.2d at 430-431.

This Court stated in *Simpson*:

"[T]he legislature is entitled to provide reasonable restriction or expansion of causes of action which it creates. *Chapman v. State Social Secur. Commission*, 235 Mo. App. 698, 700, 147 S.W.2d 157, 158-159 (1941); *Nistendirk v. McGee*, 225 F. Supp. 881, 882 (W.D. Mo. 1963)(abolishing common law action and replacing it with statutory action under 28 U.S.C. Section 1346, which does not allow for a jury trial). Restrictions on causes of action created by statute in the area of

tort law have been consistently upheld. *See e.g., Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609, 615 (Mo. 1965), *appeal dismissed*, 385 U.S. 5, 17 L.Ed.2d 5, 87 S.Ct. 44 (1966)(upholding the limitation on damages and wrongful death cases, reasoning that the legislature created ‘the right of action where none existed before, and it may condition the right as it sees fit’) . . .” 749 S.W.2d at 391.

Fust then went on to note that because a plaintiff has no vested property interest in any rule of the common law, the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law. 947 S.W.2d at 431. This Court held in *Fust* that because a plaintiff has no vested right to the remedy of punitive damages, the legislature was free to modify the right to punitive damages by granting the State of Missouri 50% of any final judgment awarded in punitive damages. *Id.*

To reach its conclusion that a plaintiff has no vested right of action in the remedy of punitive damages, *Fust* further relied upon *Simpson*. *Simpson* specifically ruled that where the plaintiff’s injury occurred after the enactment of the statute which abolished the cause of action, *Simpson* had no property right in the discarded rule of law. Applying a similar reasoning, *Scott*’s injury occurred after the legislature enacted Section 407.025.1. Therefore, *Scott* can have no vested right of action and no property right in a punitive damages award created by and authorized

by statute, other than that provided in the statute, i.e., to be awarded by the court in its discretion. *Simpson* is in accord with other Missouri cases. See, e.g., *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 159 (prior to entry of judgment no plaintiff has a vested right to punitive damages and a statute precluding an award of punitive damages may constitutionally be applied retroactively; however, once the plaintiff has a judgment awarding him punitive damages, he has a vested right in said punitive damages and cannot be deprived of the punitive damages by retroactive application of a statute precluding an award of punitive damages which was enacted after the entry of judgment); *Crews v. Sikeston Coca-Cola Bottling Co.*, 225 S.W.2d 812, 815 (Mo. App. 1949)(“punitive damages are not a matter of right”).

In Missouri, as in Kansas, punitive damages are not compensatory but are awarded for the purpose of punishing the wrongdoer and deterring the wrongdoer and others. *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. banc 1989); *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 365 (Mo. App. 1993). Another similarity between Kansas and Missouri law is that Missouri law also does not recognize an action for punitive damages. “A punitive damage claim is not a separate cause of action, it must be brought in conjunction with a claim for actual damages.” *Klein v. General Electric Co.*, 728 S.W.2d 670, 671 (Mo. App. 1987). Punitive damages are merely an element of damage to be sought in an appropriate cause of action. Missouri Supreme Court Rule 55.19 makes this clear: “In actions where exemplary or

punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered.”

Given the similarities between Missouri and Kansas law, *Smith v. Printoff* is persuasive and should be followed. As stated by the Kansas Supreme Court in *Smith v. Printoff*, if the legislature has the power to abolish a common law cause of action, then it also may without impinging upon the right to trial by jury accomplish anything short of abolition such as requiring the court to determine punitive damages as opposed to the jury. *Fust* also recognized the legislature’s ability to abrogate the common law.

Because the legislature created and has the authority to abolish plaintiff’s right to obtain punitive damages under the Missouri Merchandising Practices Act, the legislature also may provide such punitive damages shall be determined by the court without violating Article I, Section 22(a) of the Missouri Constitution. Therefore, Section 407.025.1 does not violate the right to a jury trial under the Missouri Constitution.

D. The Trial Court Did Not Err in Denying Scott's Claim for Punitive Damages and Attorney's Fees Under the Missouri Merchandising Practices Act Because Scott Refused to Make an Election of Remedies and Gained an Advantage By Having the Jury Determine Punitive Damages.

After the jury returned its first verdict finding for plaintiff on plaintiff's claims for common law fraud and for violation of the Missouri Merchandising Practices Act, and determining that plaintiff was entitled to punitive damages, BSF moved the Court to require Scott to make an election of remedies before the case was submitted to the jury on the amount of punitive damages under the common law fraud. BSF argued that Scott should be required to make an election if he wanted the jury to determine the punitive damages pursuant to the common law fraud, or if he wanted the Court to determine punitive damages and award attorney fees under the Missouri Merchandising Practices Act. BSF argued that the election must be made before the issue of the amount of punitive damages on the common law fraud is submitted to the jury because it would be unfair to allow Scott to see how much the jury awards in punitive damages, and if he does not like the award, then request the Court to do so. Allowing such a procedure would give plaintiff an unfair advantage. (Tr., 1752-1753).

The trial court deferred ruling on the issue and allowed the issue of punitive damages on the common law fraud claim to go to the jury and stated that the court would rule on the issue before it addressed Scott's claim for punitive damages and attorney fees under the Missouri Merchandising Practices Act at the time of entry of judgment. (Tr., 1756-1757). After the trial, the parties briefed the issue. (LF, 175-178, 200-207).

The Court conducted a post-trial hearing on the matter. BSF argued that Scott was required to make an election of remedy. BSF essentially argued that because Scott was not required to make the election of remedies prior to the jury awarding punitive damages, if the Court assesses punitive damages and attorney's fees, if Scott is allowed to have judgment entered for the punitive damages assessed by the jury on the common law fraud claim, and then, if Scott is allowed to pick and choose elements from the jury's award of punitive damages and the trial court's awards of punitive damages and attorney's fees under the Missouri Merchandising Practices Act, Scott is essentially contravening § 407.025.1 and obtaining a jury award of punitive damages under Missouri Merchandising Practices Act. (Tr., 1880-1883).

Gollwitzer v. Theodora, 675 S.W.2d 109 (Mo. App. 1984), which is directly on point, prohibits the procedure advocated by Scott and requires an election of remedies. In *Gollwitzer*, plaintiff brought an action for fraud and for violation of the Missouri Merchandising Practices Act stemming from the purchase of a boat.

Defendant's salesman represented the boat to be a 1980 model, when in fact it was a 1976 model. At trial, the plaintiff elected to have the jury determine punitive damages on the common law fraud claim. As in the present case, the defendant in *Gollwitzer* objected to the submission of punitive damages to the jury under the Missouri Merchandising Practices Act because Section 407.025 provides that the trial court may award punitive damages. The court agreed and stated:

“Having made that election, however, plaintiff was not entitled to seek attorney's fees under the statute and the court erred in making an award of attorney's fees. *Farley v. Johnny Londoff Chevrolet, Inc.*, 673 S.W.2d 800 (Mo. App. E.D. 1984) . . . The statute [Section 407.025] broadens the scope of conduct which will subject a merchant to liability, but it does not provide for recovery under both theories for the same misconduct. Plaintiff may elect to pursue either his common law or his statutory remedy. Whichever he elects, he is bound by the restrictions placed on that cause of action. By electing common law fraud, plaintiff received the benefit of having the jury rather than the judge to set punitive damages but he lost the right to have the judge award attorney's fees.” 675 S.W.2d at 111.

Scott relies primarily upon *Freeman v. Myers*, 774 S.W.2d 892 (Mo. App. 1989), involving the interaction between a common law fraud claim and a claim for

violation of federal odometer statutes, 15 U.S.C. Section 1988, *et seq.* Plaintiff alleged that it purchased the car based upon a false odometer statement. As quoted by Scott (Brief of Appellant/Cross-Respondent at 114), *Freeman* stated:

“Our case is ruled by this principle as stated in 25 Am.Jur.2d *Election of Remedies*, Section 12 (1966): ‘Where the remedies are not inconsistent, but are alternative and concurrent, there is no bar until satisfaction has been obtained, **unless the plaintiff has gained an advantage or the defendant has suffered a disadvantage.**’” 774 S.W.2d at 895. (Emphasis added).

The above quotation is consistent with *Gollwitzer* and supports BSF’s position. In the present case, Scott gained an advantage by having the jury determine punitive damages instead of the Court. An election should have been required before the amount of punitive damages was submitted to the jury. Because plaintiff refused to make an election of remedies either before or after the verdict, the trial court did not err in denying plaintiff’s claim to have the Court exercise its discretion in determining whether to award punitive damages and attorney’s fees under the Missouri Merchandising Practices Act.

II. RESPONSE TO SCOTT’S SECOND CLAIM OF ERROR: THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING SCOTT’S CLAIM AGAINST BSF FOR EQUITABLE RELIEF UNDER SECTION 407.025.1.

A. Standard of Review.

BSF agrees that Section 407.025.1 specifically provides that the Court may, in its discretion, provide such equitable relief as it deems necessary or proper. Thus, the standard of review is abuse of discretion. This statutory discretion standard is in accord with Missouri common law. See *N.W. Electric Power Cooperative, Inc. v. Dagle*, 277 S.W.2d 883 (Mo. App. 1955)(injunctive relief is not a matter of right, but rests in the sound discretion of the trial court; the action of the trial court may be reviewed on appeal for error in case of a clear abuse of discretion, but not otherwise); *Troske v. Martigney Creek Sewer Co.*, 706 S.W.2d 282 (Mo. App. 1986)(the grant or denial of injunctive relief largely rests within the sound discretion of the trial court).

“Judicial discretion is abused when a trial court’s ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.”

Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813, 819 (Mo. banc 2000), *cert denied*, 532 U.S. 990, 121 S.Ct. 1644, 149 L.Ed.2d 502 (2001).

B. Argument.

R.S.Mo. Section 407.025 provides, in pertinent part:

“The court may, in its discretion, award punitive damages and may award to the prevailing party attorney’s fees, based upon the amount of time reasonably expended, and **may provide such equitable relief as it deems necessary or proper.**”

“Equitable relief is discretionary, extraordinary, and should not be applied when an adequate legal remedy exists.” *Umphres v. J.R. Mayer Enterprises, Inc.*, 889 S.W.2d 86, 90 (Mo. App. 1994). To obtain injunctive relief, a party must prove: (1) the party has no adequate remedy of law; and (2) that irreparable harm will result if the injunction is not granted. *Walker v. Hanke*, 992 S.W.2d 925, 933 (Mo. App. 1999). No “adequate remedy of law” generally means that damages will not adequately compensate the plaintiff for the injury or threatened injury, or that the plaintiff would be faced with a multiplicity of suits at law. *Id.* “Irreparable harm is established if monetary remedies cannot provide adequate compensation for improper conduct.” *Id.*

Scott cites *State ex rel. Nixon v. Beernuts, Ltd.*, 29 S.W.3d 828, 837-38 (Mo. App. 2000), for the proposition that the only prerequisite for issuance of an injunction is a court's finding that the defendant has engaged in, is engaging in, or is about to engage in unlawful practices as defined by the act. The *Beernuts* court was interpreting a different provision under the Missouri Merchandising Practices Act, § 407.100.1, rather than § 407.025.1, at issue herein.

The language of § 407.100.1 is different than § 407.025.1 and provides:

“Whenever it appears to the Attorney General that a person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, the Attorney General may seek and obtain, in an action in a circuit court, an injunction prohibiting such person from continuing such methods, acts, uses, practices, or solicitations, or any combination thereof, or engaging therein, or doing anything in furtherance thereof.”

In contrast, § 407.025.1 provides in pertinent part: “The court . . . may provide such equitable relief as it deems necessary or proper.”

The language in the statute is clearly different and provides specific instances in which the Attorney General may obtain an injunction: “Whenever it appears to the Attorney General that a person has engaged in, is engaging in or is about to engage in” unlawful practices under the act.” In contrast, the legislature did not

provide specific instances or a standard for the court to use in a private cause of action pursuant to § 407.025.1. Because the *Beernuts* court applied the language of § 407.100.1, the court's application provides no guidance for this Court in applying the broad language of § 407.025.1, allowing the trial court to grant equitable relief to a private individual in his private cause of action when the trial court deems such equitable relief is necessary or proper.

In the present case, Scott has not shown that the trial court's denial was an abuse of discretion. Scott brought this action for himself individually. Although Section 407.025.2 authorizes a plaintiff to bring a class action where the unlawful method, act or practice has caused similar injury to other persons, Scott did not bring a class action for the benefit of others. Scott only sued on behalf of himself; therefore, only his interests were before the trial court. The alleged violations against him were complete and not ongoing. Scott had stopped driving the SUV. He was not faced with irreparable harm. Moreover, Scott has an adequate remedy at law. The trial court simply did not find that Scott demonstrated that an injunction was "necessary or proper." Scott has simply shown no abuse of discretion. This point should be denied.

III. RESPONSE TO SCOTT’S THIRD CLAIM OF ERROR: THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO ADMIT EVIDENCE CONCERNING: (A) REPAIRED PREVIOUSLY DAMAGED VEHICLES SOLD BY BSF IN 2000 THROUGH 2002, (B) THE *GRABINSKI* VERDICT/JUDGMENT, AND (C) THE *LOONEY* SETTLEMENT.

Although Scott limits this point on review to the trial of Scott’s claims against Balderston, BSF will respond to this argument because allowing this evidence would have prejudiced BSF.

A. Standard of Review.

BSF agrees with the standard of review stated by Scott – abuse of discretion. However, Scott fails to discuss the standard for obtaining relief. To be a ground for reversal, trial court error in the admission or exclusion of evidence must be prejudicial, materially affecting the merits of the action. *Murray v. Lamont*, 931 S.W.2d 889, 901 (Mo. App. 1996).

“When proffered evidence is denied admission, relevancy and materiality must be shown by specific facts sufficient in detail to establish admissibility of the

offering party to preserve the matter for appeal.” *Anderson v. Wittmeyer*, 895 S.W.2d 595, 601 (Mo. App. 1995).

B. Evidence Concerning Repaired Vehicles Which had Previously Suffered Collision Damage Sold by BSF in 2000 Through 2002.

Trial courts have wide discretion on issues of admission of evidence of similar occurrences. *Pierce v. Platte-Clay Electric Cooperative*, 769 S.W.2d 769, 774 (Mo. banc 1989). This Court’s “review is limited to a finding that the trial court satisfied itself that the evidence was relevant to an issue of the case and that the occurrence bore sufficient resemblance to the injury-causing incident, while weighing the possibility of undue prejudice or confusion of the issues.” *Id.*

First, Scott has failed to discuss the excluded evidence with any detail or specificity, referring only to five rebuilt wrecks that BSF sold between April of 2000 and May of 2002. (Brief of Appellant/Cross-Respondent at 120). Thus, this point should be denied for this failure alone. Nevertheless, BSF will search the record, review the evidence, and demonstrate that the trial court did not abuse its discretion.

BSF and Balderston argued that the evidence of the proffered vehicle transactions, Oliver, Hendrix, Hull, Mehaffe, and Von David were not sufficiently similar primarily because they were not salvaged vehicles, were remote in time to the Scott transaction, and would result in prejudice and confusion having to have

mini-trials within the trial of this matter. As to prejudice, BSF and Balderston specifically argued that allowing such evidence could result in being punished multiple times for the same conduct in violation of *Campbell*. (LF, 69, 79-81, 83, 92-93; Tr., 147-150, 163-165). The trial court properly considered the proffered evidence, along with numerous other transactions, under the *Pierce* standard stated above and issued its ruling allowing evidence of twelve other occurrences, including those challenged in BSF's appeal. (Tr., 175; LF, 107-108). The trial court did not make specific findings or state the specific grounds for its decision in its two-page order. (LF, 107-108). Scott did not request the trial court to make specific findings or to state the specific grounds for its decision; therefore, all fact issues shall be deemed to be found in accordance the trial court's decision. *Walker v. Walker*, 631 S.W. 2d 68, 71 (Mo. App. 1982); *Mayo v. Lasater*, 312 S.W.2d 601, 603 (Mo App. 1958). Therefore, it must be deemed that the court found that excluded "other acts" were not sufficiently similar and that any probative value was outweighed by the potential prejudice to BSF and Balderston.

In the present case, plaintiff gave a lengthy narrative concerning these alleged sales of repaired damaged vehicles. (Tr., 1537-1547). Scott's offer of proof demonstrates that the other acts were not sufficiently similar. In this case, Scott was sold a previously **salvaged** vehicle that was repaired. Scott does not allege in his offer of proof, that the vehicles involved were **salvaged** or "totaled" vehicles, but

just alleges that the vehicle had previously been damaged, repaired and sold without disclosure. The distinction is critical. For example, the sale of a vehicle, which has been in a collision and properly repaired, is not sufficiently similar to the sale of a salvaged vehicle, which has been improperly repaired. The distinction is also critical because CarFax reports salvaged vehicles and may not report collision damage which does not result in the vehicle being totaled or declared salvage. None of the vehicles in Scott's offer of proof was represented as being salvaged or totaled vehicles; therefore, the occurrences were not sufficiently similar.

The Scott sale occurred in 1994. The trial court allowed other alleged "similar act" evidence of BSF occurring as late as 1999, five years after the Scott sale. (The Snell vehicle, Tr., 1243-46). The excluded transactions, occurring in 2000 to 2002, were simply too remote. See *State v. Stegall*, 353 S.W.2d 656, 658 (Mo. 1962)(prior conduct occurring 14 months after the conduct subject of trial was too remote).

Admitting the excluded evidence would require BSF to either allow the evidence be unchallenged and be prejudiced thereby or to present its side of the case on each vehicle. This would result in several mini-trials within this trial resulting in unnecessary complexity and a probability of confusion. Moreover, admitting this evidence as to Balderston, even with a limiting instruction, would have a prejudicial effect on BSF, subjecting BSF to the further danger of being punished multiple times

for the same conduct – once by the jury in this case and again in the underlying matters – in violation of *Campbell*.

Finally, the court allowed a great deal of such alleged “similar act” evidence over defendants’ objections. Therefore, such evidence would have been cumulative in addition to being unduly prejudicial.

For all of the above reasons, Scott has not shown that the trial court’s exclusion of the evidence was proper and was not an abuse of discretion.

C. The *Grabinski* Verdict/Judgment.

As argued in the Brief of Cross-Appellant/Respondent, Issue I, and in the reply portion of this Brief, the issue of the *Grabinski* matter was not sufficiently similar and should not have been admitted. The retail sale to Grabinski was not by BSF but was by Blue Springs Nissan, a separate entity. The sale by BSF to Blue Springs Nissan was a wholesale sale to a dealer, rather than a retail sale to a consumer, and there was no representation that the vehicle had never previously sustained damage. Moreover, Blue Springs Nissan used a “tow-off agreement” or “junk affidavit” contrary to the facts of the present case. Simply put, *Grabinski* was not similar and resulted in prejudice to BSF. The evidence of the facts of *Grabinski* should not have been admitted in any way.

An even stronger argument exists to exclude evidence of the prior jury's verdict and judgment in *Grabinski*. BSF and Balderston objected to the admission of not only the facts of the *Grabinski* matter, but also particularly as to the admission of the prior jury's verdict and the judgment entered in *Grabinski* on the grounds that the prejudicial effect outweighed any probative value in that there was danger that the jury in this case would give the findings of the prior jury too much weight and fail to make its own independent findings. The Court appeared to agree and informed Scott that it would only allow such evidence if Scott could provide Missouri case law authorizing the admission of such evidence. Scott could not. (Tr., 84).

The trial court's judgment is sound. The trial court allowed Scott great latitude in the admission of the facts of *Grabinski*, but simply excluded the actual verdict and judgment. The Court's ruling is in accord with Missouri precedent. *Olsten v. Susman*, 391 S.W.2d 328 (Mo. 1965). Although *Olsten* involved the prior jury verdict and judgment of the plaintiff's wife, stemming from the same accident, the principle should apply here as well because the danger of the jury giving the prior jury's verdict too much weight is the same whether the prior verdict resulted from the same occurrence or simply involves the same defendant. Moreover, the amount of the prior verdict has no relevance to damages sustained by Scott. *Toppins v. Miller*, 891 S.W.2d 473, 475 (Mo. App. 1994). Under Scott's reasoning, a party

alleged to have committed a tort or violation of the Missouri Merchandising Practices Act would be entitled to admit evidence of prior judgments in the parties favor. Such a rule would be ridiculous. The trial court's ruling was a proper exercise of discretion.

Scott has not demonstrated an abuse of discretion. Moreover, Scott has not demonstrated prejudice by the exclusion of such evidence, warranting a new trial against Balderston.

D. The *Looney* Settlement Offers and/or Settlement Amount.

Scott argues that the trial court erred in denying admission of evidence of BSF's settlement offers made in the *Looney* matter and of the actual settlement amount ultimately reached. It should be noted that Scott does not cite to the record where such evidence was proffered to the trial court. Nevertheless, Scott cannot show that the trial court abused its discretion as the trial court allowed Scott great latitude in admitting evidence of the *Looney* underlying facts.

It is well established in Missouri that no evidence of prior settlement offers should be presented to a jury. *See, e.g., Rodgers v. Czamanske*, 862 S.W.2d 453, 460 (Mo. App. 1993). Allowing the admission of settlement offers would frustrate the public policy, which encourages settlement. *Id.* at 460.

Similarly, evidence of settlements involving other parties is generally not admissible. *Toppins*, 891 S.W.2d at 475. Generally, such settlements are not relevant because the fact that a party settled to avoid trial does not make the party's liability in another case more or less probable. Moreover, the amount of a settlement in another case, or even the amount of a jury verdict, would not be relevant to establishing the amount of damages in this case. *Id.*

Scott has shown no abuse of discretion and no prejudice justifying reversal.

IV. RESPONSE TO SCOTT’S FOURTH CLAIM OF ERROR: THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING SCOTT’S CLAIMS FOR ATTORNEY’S FEES AGAINST BSF UNDER THE MISSOURI MERCHANDISING PRACTICES ACT AND THE MAGNUSSON-MOSS WARRANTY ACT.

A. Standard of Review.

Under both the Missouri Merchandising Practices Act and the Magnusson-Moss Warranty Act, the appropriate standard of review of the trial court’s decision on an award of attorney’s fees is abuse of discretion.

R.S.Mo. § 407.025.1, which permits an individual to bring a private civil action to recover damages, authorizes the court in its discretion to award attorney’s fees. The statute specifically states:

“The court may, in its discretion, award punitive damages and **may award to the prevailing party attorney’s fees**, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper.” (Emphasis added).

The statute uses the word “may” rather than “shall” and clearly grants discretion to the trial court as to attorney’s fees.

Similarly, the Magnusson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.* authorizes the court to award a prevailing party attorney's fees. The relevant statutory provision is 15 U.S.C. § 2310(d)(2), which provides:

“If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he **may** be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court **in its discretion** shall determine that such an award of attorneys' fees would be inappropriate.” (Emphasis added).

15 U.S.C. § 2310(d)(2) grants the trial court discretion whether to award or disallow fees. *Hibbs v. Jeep Corp.*, 666 S.W.2d 792, 799 (Mo. App. 1984), *cert. denied*, 469 U.S. 853, 83 L.Ed.2d 111, 105 S.Ct. 177 (1984). An appellate court's standard of review of a trial court's decision denying attorney fees under the statute is abuse of discretion. *Id.* “An abuse of discretion is an erroneous finding and judgment which is clearly contrary to the facts or the logical deductions from the facts and circumstances before the court – a judicial act which is untenable and clearly against

reason and which works an injustice.’’ *Id.*, quoting *State v. Stubenrouch*, 499 S.W.2d 824, 826 (Mo. App. 1973).

B. Additional Facts Relevant to Attorney’s Fees.

At a very early stage of this dispute, BSF attempted to resolve the dispute without the need for litigation. First, immediately upon being notified by Scott that BSF had sold him a vehicle that had previously been wrecked and repaired, BSF offered to trade the vehicle, giving Scott the value of the vehicle as if it had never been wrecked. Subsequently, after Scott did not respond to BSF’s offer, BSF offered to refund Scott all of the money he had paid, including the purchase price, credit insurance, the ESP, and finance charges, \$25,400.40. (Exhibit 1). BSF’s offer was unconditional and it even offered to provide the refund if Scott no longer owned the SUV. This would have provided Scott more than his actual damages because it did not take into consideration Scott’s extensive use of the vehicle, driving it almost six years and 186,000 miles, and offered to reimburse him items which were not legally awardable because they would have been incurred even if the vehicle would have met the representations at the time of sale. *Bird v. John Chezik Homerun, Inc.*, 152 F.3d 1014, 1017 (8th Cir. 1998). Scott did not accept the offer.

Eight months later, on January 2, 2001, Scott filed this action. Shortly thereafter, on March 5, 2001, BSF made a formal offer of judgment in the amount of

\$75,000.00, plus reasonable attorney's fees incurred to date. (LF, 50-51). Plaintiff did not accept defendant's offer of judgment. Subsequently, on February 27, 2003, defendant made a second offer of judgment in the amount of \$125,000.00, reasonable attorney's fees determined by the Court, and any accrued court costs. (LF, 67-68). Again, plaintiff did not accept defendant's generous offer of judgment. Subsequently, an additional offer to resolve the matter was made in the amount of \$200,000.00. (Tr., 1525-1526).⁶

C. Attorney's Fees Under the Missouri Merchandising Practices Act.

This issue is controlled by *Gollwitzer v. Theodora*, which is directly on point. When Scott refused to make an election of remedies between common law fraud and the Missouri Merchandising Practices Act, he obtained the advantage of having the jury award punitive damages and lost the right to have the judge award attorney's fees. The Missouri Court of Appeals stated:

⁶The trial court excluded the offers of judgment and subsequent offer at the jury trial; however, BSF made an offer of proof that the Court was aware of it at the time of the court's decision concerning attorney's fees. However, BSF's pre-filing offer of complete refund (Exhibit 1) was admitted.

“By electing common law fraud, plaintiff received the benefit of having the jury rather than the judge to set punitive damages but he lost the right to have the judge award attorney’s fees.” 675 S.W.2d at 111.

See discussion above at pages 86-89.

Even aside from Scott’s election depriving him of the right to attorney’s fees under the Missouri Merchandising Practices Act, the trial court’s decision denying attorney’s fees was not an abuse of discretion. The trial court had before it several facts with which to consider. First and foremost were the pre-filing offer of a complete refund and the subsequent generous offers of judgment. Second, the jury found in favor of defendant Balderston on all counts. R.S.Mo. § 407.025.1 provides that attorney’s fees may be awarded to the prevailing party. In addition to denying attorney’s fees to Scott, the trial court denied attorney’s fees to defendant Balderston despite the fact that Balderston was a prevailing party. Third, as noted in the Statement of Facts in BSF’s initial Brief, at page 18, Scott increased the cost of this litigation by causing a mistrial of the first trial. This increased all parties’ attorney’s fees in having to prepare and attend the first trial, which was eight months prior to the second trial. Thus, all the preparation work had to be repeated. In addition, the Court noted the generous amounts given for actual and punitive damages and determined that attorney’s fees were not necessary.

Scott relies primarily upon *Grabinski II*, 203 F.3d 1024, to support his argument that an award of attorney’s fees to Scott was mandated despite the plain language of R.S.Mo. § 407.025.1, granting the court discretion. (Brief of Appellant/Cross-Respondent at 123-24). *Grabinski II* relied heavily upon this Court’s decision in *O’Brien v. B.L.C., Ins. Co.*, 768 S.W.2d 64 (Mo. banc 1989), to predict how this Court would construe § 407.025.1, and stated: *O’Brien* “is controlling on the issue of when attorney’s fees should be awarded under *Mo. Ann. Stat. § 407.025.1.*” 203 F.3d at 1027. The U.S. Eighth Circuit Court of Appeals reasoned in *Grabinski II* that because *O’Brien* cited several cases discussing attorney’s fees under 42 U.S.C. § 1988(b), which contains similar language to § 407.025.1, *O’Brien* was controlling. The reasoning of *Grabinski II* is faulty. *O’Brien* reviewed attorney’s fees awarded under R.S.Mo. § 407.545.1, which provides, in pertinent part, “any person who . . . violates any of the provisions of [certain statutes] **shall be liable** . . . for reasonable attorney’s fees.” (Emphasis added). The statute in *O’Brien* used the word “shall” rather than “may.” Thus, the award of attorney’s fees was not discretionary under the statute in *O’Brien*. Further, the issue in *O’Brien* was not whether the court had discretion to award attorney’s fees, but was what the proper amount of attorney’s fees should be. *O’Brien* relied upon federal case law to provide a framework to determine the appropriate amount of fees. 768 S.W.2d at 71. Therefore, *Grabinski II*’s flawed reliance on *O’Brien*

provides questionable guidance in reviewing the trial court's denial of attorney's fees in this case.

As demonstrated above, Scott has not shown that the trial court abused its discretion.

D. Attorney's Fees Under Magnusson-Moss Warranty Act.

First, this issue is moot. As demonstrated in BSF's appeal, the Magnusson-Moss Warranty Act claim should not have been submitted to the jury because after notice of Scott's claim for breach of warranty, BSF made an unconditional offer of a complete refund. Scott's rejection of this offer deprived BSF of the opportunity to cure. (See BSF's Point V on appeal).

If this Court rules that BSF was not entitled to a directed verdict, given the circumstances discussed above, the trial court did not abuse its discretion in denying Scott's request for attorney's fees under the Magnusson-Moss Warranty Act. The offer of refund and offers of judgment are particularly appropriate for consideration under the Magnusson-Moss claim.

The Magnusson-Moss Warranty Act requires a defendant to be given an opportunity to cure before a party may bring a cause of action for violation of the Act. 15 U.S.C. § 2310(e); *Delong v. Hilltop Lincoln-Mercury, Inc.*, 812 S.W.2d 834, 844 (Mo. App. 1991). The purpose of such requirement is to avoid litigation if

the defendant cures the breach. On May 11, 2000, eight months before Scott filed suit, BSF offered Scott a complete refund, a complete cure. In fact, BSF offered Scott more than he was entitled to as noted above. This fact alone is sufficient for the trial court to exercise its discretion and deny attorney's fees under the Magnusson-Moss Warranty Act.

The Magnusson-Moss claim does not authorize punitive damages, but only allows actual damages. Both of Scott's offers of judgment, which included costs and attorney's fees, exceeded the jury's verdict for actual damages by almost three times. Therefore, the trial court's denial of attorney's fees cannot be an abuse of discretion. Missouri Supreme Court Rule 77.04 authorizes an offer of judgment and provides, in pertinent part: "If the adverse party fails to obtain a judgment more favorable than that offered, the parties shall not recover costs in the circuit court from the time of the offer, but shall pay costs from that time." In the present case, plaintiff did not receive a more favorable judgment for actual damages under the Magnusson-Moss Warranty Act. Thus, plaintiff was not entitled to costs, including attorney fees, beyond March 1, 2001.

Given the above, Scott has not established the trial court abused its discretion in denying attorney's fees under the Magnusson-Moss Warranty Act.

CONCLUSION

For all the reasons stated above, Scott's appeal should be denied and BSF's appeal should be granted, entitling BSF to a new trial or, in the alternative, the court should order a remitter as to punitive damages.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03 and complies with the limitations of Rule 84.06(b). Relying upon the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 22,815, excluding the parts of the brief exempted, has been prepared using Microsoft Word 2002 in 14 pt, Times New Roman font, and includes a 3.5" floppy disk, which has been scanned for viruses by the Norton anti-virus program and has been found to be virus free.

David J. Roberts

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2005, two copies of the above Reply Brief of Cross-Appellant/Respondent and Brief of Respondent and a 3.5” disk with this Brief in Microsoft Word format, were served by depositing in the U.S. Mail, first class postage prepaid, addressed to:

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