IN THE SUPREME COURT OF MISSOURI

CITY OF ST. LOUIS	)	
	)	
Appellants	)	**Supreme Court No. SC88230**
	)	
vs.	)	**Court of Appeals No. ED87702**
	)	**Court of Appeals, Eastern District**
BENJAMIN MOORE & COMPANY,	)	
MILLENNIUM CHEMICALS, INC.,	)	**Circuit Court No. 002-246**
MILLENNIUM HOLDINGS, LLC,	)	**Circuit Court for St. Louis City**
MILLENNIUM INORGANIC	)	
CHEMICALS, INC., NL INDUSTRIES ,	)	
INC., PPG ARCHITECTURAL FINISHES,	)	
INC., SCM CORPORATION, THE	)	
SHERWIN-WILLIAMS COMPANY, AND	)	
XBD, INC.	)	
	)	
Respondents.	)	

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STATEMENT OF FACTS

A. What Exactly is the City's Claim?

This case was filed on January 26, 2000, and over the course of the litigation, the City has abandoned claims for strict liability, negligence, fraud, civil conspiracy, unjust enrichment, and indemnity. (City Br. 12). The City's Fourth Amended Petition contains a single count alleging that the presence of lead paint in St. Louis, no matter its condition, is a public nuisance. (LF 1089-90). The City seeks only monetary relief; there is no claim for an injunction or any other form of equitable relief.

Named as Defendants are a few of the multitude of former manufacturers of either lead pigments or lead containing paints, as well as a single defendant who was solely a distributor of lead containing paints. (LF 1087-88). The City's Petition alleges that Defendants "produced, manufactured, processed, marketed, promoted, supplied, distributed, sold, and/or placed" lead paints into the stream of commerce in the City. (LF 1084-85). The City is not alleging any type of collective action, fraud, conspiracy or concert of action among Defendants. The City has expressly emphasized, and has done so again in its Substitute Brief, that Defendants "acting independently" allegedly created the public nuisance. (City Br. 27).

In prior rulings, the trial court has defined the alleged "public nuisance" as the mere presence of lead paint (in whatever condition or location) in the City. (LF 1984, 1989-90). The trial court has also defined the alleged public nuisance as a temporary nuisance. (LF 1984). In order to reach that ruling, the trial court

expressly found that the alleged nuisance was reasonably and practicably abatable. (LF 1984).

The City seeks to recover only the dollars that it spent allegedly remediating or abating lead paint from specifically identified, *private*, residential dwellings within the City limits. Lead paint in City-owned buildings is not at issue. These claimed costs are reflected in a list of addresses where the City claims that it spent money to remediate lead paint hazards, with specific dollar amounts attributed to each address.[1] Also, due to the trial court's holding that the alleged public nuisance falls into the category of temporary nuisance, the City's damages are limited to amounts spent within ten years of the date the City first filed this lawsuit. (LF 1981). The City has no damage claims beyond these alleged remediation costs. The City has abandoned any claims for damages based on the cost of providing medical treatment, or preventative and educational services. (LF 1975-76).

The City's Fourth Amended Petition defines the product at issue as "lead paint," which includes both lead paints and pigments, and also "comprises a variety of coating materials such as, but not limited to, interior and exterior household paints, varnishes, lacquers, stains, enamels, primers, and similar coatings furnished for use on various household surfaces." (LF 1085 n.1). The Petition does not allege that the Defendants

[1] *See* "The City of St. Louis Lead Paint Costs Report A" (LF 2453); "The City of St. Louis Lead Paint Costs: DOH, 1990-2000" (LF 2461); The City of St. Louis Lead Paint Costs: 1990-2000 Summary by Address (LF 2457).

represent all of, or even a substantial portion of, the market for lead pigments or for lead paints in St. Louis, or Missouri.[2] Nor does the City's Petition allege that "lead paint" manufactured by the Defendants is the only source of lead in St. Louis. In fact, as of 1920, the St. Louis area led the country in the manufacture of paint pigments,[3] meaning that there were many local sources for any lead in paint applied to houses in St. Louis. Beyond paint, drinking water contaminated by old lead pipes or pipes using lead solder, soil contaminated by the residue of leaded gasoline, and lead introduced into homes through occupational exposures are some of the many other lead sources that can also expose children to harmful levels of lead.[4] In addition, according to the Missouri DHSS, Missouri is the country's leading producer of lead ore and lead by-products. Lead-containing waste products end up in yards, play areas, and other areas accessible to children.[5] Historic government contracting practices also left behind potential sources of lead exposure. For many years, the federal government specified the used of lead based paints in nearly every project it undertook, recognizing the benefits of lead based paints for durability, wear and ease of use.[6]

The City admits that it cannot prove that any product made by any Defendant was, or is, present in any property for which the City seeks to recover its costs of lead remediation, nor can it, nor will it, establish that any Defendant's product actually exists

[2] The City has already voluntarily dismissed former defendants ARCO and Dupont, two companies that it originally alleged had sold "lead paint" in St. Louis.
[3] *See* Wendy Shaw, *A Tale of Two Cities: The Best of Times, the Worst of Times. Inequality in St. Louis' Metro-East*, at 2, available at http://www.siue.edu/~wshaw/esl.htm.
[4] Environmental Protection Agency, *Protect Your Child From Lead Poisoning: Where Lead is Found*, available at EPA website at http://www.epa.gov/lead.
[5] Missouri DHSS, *Childhood Lead Poisoning Elimination Plan*, at 2 (Def. App. 295).
[6] Percy H. Walker & Eugene F. Hickson, *Paint Manual: With Reference to Federal Specifications*, U.S. Department of Commerce, Oct. 11. 1945.

now anywhere else in the City. (City Br. 18; LF 2527, 2826).

B. The City's Lead Laws

More than 80% of lead paints remaining in residential housing were applied before 1940.[7] It is undisputed that Defendants relinquished control of their products at the time of sale many decades ago.

In 1978, the federal government banned from interstate commerce lead paint for residential use. Yet, well before that date, the City knew all the facts on which its purported public nuisance claim is based. As early as 1950, the City's Department of Health was warning about childhood lead poisoning. (LF 0794). In the early 1970s, the City began screening children for elevated blood lead levels. (LF 0796).

The City's first ordinance dealing with lead paint was enacted in 1970. (LF 0790). That ordinance and its successors placed on property owners the legal responsibility to maintain their property in a manner that does not allow lead hazards to exist. (LF 0790) The current City ordinance adopts the United States Environmental Protection Agency's definition of lead hazard, ST. LOUIS CITY REV. CODE § 11.22.030 (Def. App. 2), which focuses solely on deteriorated and dust-producing lead paint. *See* 40 C.F.R. § 745.65. Like earlier versions of the ordinances, current City ordinances also place on property owners the responsibility for maintaining their property in a lead safe condition. If owners do not respond to orders to remediate lead hazards, the City can do the work itself and seek reimbursement from the owners for the costs. ST. LOUIS CITY REV. CODE

[7] *See* President's Task Force on Environmental Health Risks and Safety Risks to Children, *Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards*, (February 2000) (Def. App. 84, Table 4).

§ 11.22.120 (Def. App. 6-7).[8] It is not now and has never been the real world policy of the City to require property owners to remove all lead paint wherever it exists and regardless of condition. It is not now, nor has it ever been, the real world policy of the City to undertake to abate intact lead paint itself. Even after this lawsuit was filed, the City continues to require lead safe housing, not lead free housing, and continues to place the responsibility for meeting that standard on property owners.

C. The Percentage of St. Louis Children with Elevated Blood Lead Levels is Below 10% and Declining

The City's Substitute Brief claims that 40% of children in St. Louis have elevated blood lead levels ("EBLs") (City Br. 10).[9] That assertion is contradicted by the City's own statements and publications by those in City government most knowledgeable about the issue. For example, in Annual Reports concerning Childhood Lead Poisoning, the St. Louis Health Department ("Health Department") has documented a steady decline in the percentage of St. Louis children with EBLs. In 1999, just before this lawsuit was filed, the Health Department reported that 21.9% of the City's children (*not* 40%) had EBLs, including those who had previously tested positive. City of St. Louis Department of Health, *Childhood Lead Poisoning Annual Report 1999* at 15 (Def. App. 156). In addition, the Health Department described as "the better measure of risk" the percentage of *new* cases of EBLs among those tested, and that figure was 14.8% in 1999. *Id.*

[8] The abatement of actual lead hazards in Missouri is governed by the Lead Abatement and Prevention of Lead Poisoning Act ("LAPLP"), s*ee* R.S. Mo. § 701.300, *et seq.* (Def. App. 11), and the City's Lead Poisoning Control Law, ST. LOUIS CITY REV. CODE § 11.22.01, *et seq.* (Def. App. 1), neither of which requires the removal of intact lead paint, and which are operated and funded independently of this lawsuit.

[9] The City's record cite for that assertion, LF 2749, is a page in the City's Memorandum in Support of the City's Combined Opposition to Defendants' Motion to Dismiss and Alternative Motion to Require Joinder or Dismiss, filed July 18, 2003. The statement in the Memorandum is itself offered without any citation of authority to substantiate the 40% figure.

With the exception of a brief rise in 2000, the percentage of children testing positive for EBLs has steadily declined since 1999, even when one factors in children who had previously tested positive. As of 2005, less than 10% of the children who were tested showed EBLs. City of St. Louis Department of Health, *Childhood Lead Poisoning in the City of St. Louis Annual Report 2005* (Def. App. 194) (hereinafter the "Department's Annual Report (2005)"). Preliminary reports indicate that the level will be even lower in 2006. *See* Press Release, Office of the Mayor of the City of St. Louis, *City of St. Louis Makes Progress in Fight Against Lead Poisoning of Children* (Oct. 4, 2006) (stating that as of October 2006, 7.7% of tested children showed EBLs). In addition, the City has admitted that its sampling probably overestimates the elevated blood levels of the general population, because traditionally (and properly) in St. Louis, the most at-risk children are the most likely to be tested. *See* the Department's Annual Report (2005) at 21(Def. App. 220).

D. Existing Lead Programs

In 1971, Congress passed the Lead-Based Paint Poisoning Prevention Act ("LPPPA"), codified at 42 U.S.C. § 4821, *et seq.*, which, *inter alia*: (1) prohibited the use of lead paint (defined as 1% or more lead) for federally-assisted housing; and (2) provided funds for lead-related state and municipal programs. In 1972, the United States Food and Drug Administration prohibited the use of paint containing more than 0.5% lead by weight for housing in the United States. 37 Fed. Reg. 4915 (March 7, 1972), 5229 (March 17, 1972), 16872 (August 22, 1972). Since

that time, numerous federal programs have been created both through the Environmental Protection Agency ("EPA") and Department of Housing and Urban Development ("HUD"), which both have extensive regulations and funding directed at the eradication of childhood lead poisoning. *See* 24 C.F.R. 35.80, *et seq*. (HUD regulations); 40 C.F.R. 745.61, *et seq.* (EPA regulations). Since 1993, the State of Missouri has codified the standards for lead abatement and the prevention of lead poisoning. *See* R.S. Mo. § 701.300, *et seq.* (Def. App. 11). These state standards are broad and comprehensive, addressing the study, detection, and abatement of "lead hazards." *See* R.S. Mo. § 701.300 (Def. App. 12). The statutory scheme also establishes a committee on lead poisoning. *See* R.S. Mo. § 701.302 (Def. App. 15-16). The purpose of the committee is to make recommendations concerning the treatment and prevention of lead poisoning and the identification and abatement of lead problems.

To effectuate state law, the Missouri department of health is authorized to promulgate rules governing lead abatement and prevention of lead poisoning. *See* R.S. Mo. § 701.301 (Def. App. 14). The rules proscribed by the department of health must be "at least as protective of human health and the environment as the federal program established by the residential lead-based paint hazard reduction act [42 U.S.C. 4851, *et seq.*]." *Id.* In carrying out this mandate, Missouri's department of health has developed regulations governing, *inter alia*, (1) work

practice standards for conducting lead-bearing substance activities; (2) lead inspection standards; (3) lead paint risk assessment; and (4) lead abatement standards. *See* MO. CODE REGS. ANN TIT. 19, §§ 30-70.600, 610, 620, 630.

The department of health is responsible for conducting inspections. *See* R.S. Mo. § 701.304 (Def. App. 17); *see also* R.S. Mo. § 701.311 (Def. App. 24-25) (authorizing a representative of the department of health to enter public or private buildings to conduct inspections). If the department of health determines that a lead hazard is present, then it must notify the owner and adult occupant of the dwelling. *See* R.S. Mo. § 701.306 (Def. App. 19); *see also* R.S. Mo. § 701.311 (Def. App. 24-25). Upon notification that a lead hazard exists, the burden of abatement shifts to the owner of a dwelling. *See* R.S. Mo. § 701.308 (Def. App. 20-21). If the owner fails to take the required remedial steps to remove the lead hazard, the department of health may relocate occupants and report the violation to the county prosecuting attorney who "shall seek injunctive relief to ensure that the lead hazard is abated or that interim controls are established." *See* R.S. Mo. § 701.308(5) (Def. App. 20); *see also* R.S. Mo. § 701.311(5) (Def. App. 24) ("The attorney general or the prosecuting attorney … shall, at the request of the city, county or department [of health], institute appropriate proceedings for correction."). An owner who persists in violating state law faces either criminal or civil sanction. *See* R.S. Mo. § 701.320 (Def. App. 33) (identifying a violation of

701.308 to 701.11 and 701.16 as a misdemeanor); R.S. Mo. § 701.330 (Def. App. 38) (identifying a violation of 701.318 to 701.330 as an infraction).

According to the Missouri Department of Health and Senior Services ("DHSS"), "[s]ince [1993], the program has made great strides to increase the number of children in Missouri receiving a blood lead test and assuring follow-up services which, in conjunction with legislative changes, have decreased the prevalence rate of lead poisoning."[10] The CDC reports that the percentage of children less than 72 months old in Missouri with blood lead levels greater than 10 µg/dL (10 micrograms per deciliter of blood) has dropped each year since 1997 (12.12%) to 2004 (2.56%), the latest year for which there is reported data.[11]

The risks of childhood lead exposures in Missouri continue to be addressed through the legislative and executive branches of the state and municipal governments. The Missouri DHSS reports: "Missouri has historically, and continues to receive state legislative support for lead poisoning prevention activities."[12] Missouri statutes provide, *inter alia*, for a Lead Advisory Committee on Lead Poisoning, annual testing of children in high risk areas with home lead assessments for children with elevated blood levels, the requirement of lead hazard controls in home with identified lead hazards, training of lead abatement workers and inspection of lead abatement.

On the federal level, in 1997, President Clinton issued an Executive Order creating the Task Force on Environmental Health Risks and Safety Risks to Children (the "Task

[10] Missouri DHSS, *Childhood Lead Poisoning Elimination Plan* at 2 (Def. App. 295).
[11] *See* CDC Surveillance Data, *1997-2005, Tested and Confirmed Elevated Blood Lead Levels by State, Years and Blood Lead Level Group for Children <72 Mos.*, available at http://www.cdc.gov/nceh/lead/surv/stats.htm.
[12] Missouri DHSS, *Childhood Lead Poisoning Elimination Plan*, at 4 (Def. App. 297).

Force"). In 2000, that Task Force issued a Report containing many recommendations for preventing EBLs in children; the first of these recommendations was "Act before children are poisoned." President's Task Force on Environmental Health Risks and Safety Risks to Children, *Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards*, at 1 (2000) (Def. App. 63) (hereinafter the "President's Task Force Report"). The Task Force commented that communities should be fully equipped to begin implementing these recommendations because "[t]he foundation for solving [the childhood lead poisoning problem] has been established over the past decade." *Id.* at 21 (Def. App. 83). The Report also pointed out that by 2000, the federal government's hazard control techniques had been effectively implemented in over 200 cities. *Id.* Because of these significant achievements, the Report stated that childhood lead poisoning could be eliminated in this country by the year 2010. *Id.* at 1 (Def. App. 63).[13]

In 2003, consistent with the Federal Task Force incentives, the City of St. Louis initiated the *Lead Safe St. Louis Program* and announced the City's "Comprehensive

[13] In 2005, the CDC concurred with the Presidential Task Force when it declared that the steep decline in average childhood blood lead levels in the U.S. "was one of the most significant public health successes of the last half of the 20th century." *Centers for Disease Control and Prevention, Preventing Lead Poisoning in Young Children*, at 1 (August, 2005) (Def. App. 319). As the CDC reported, since the mid-1970's, children's average blood lead levels have declined over 80%. *Id*. at 3 (Def. App. 321).

Action Plan for the Eradication of Childhood Lead Poisoning in St. Louis by 2010." *See* Department's Annual Report (2005) at 3 (Def. App. 202). The Mayor of St. Louis acknowledged at that time that for over 15 years the City's practice had been to focus its efforts "on identifying sick children and treating them only after they had become ill." Press Release, Office of the Mayor of the City of St. Louis, *Mayor Slay Unveils Initiative to Eliminate Lead Poisoning Within a Decade* (Nov. 21, 2003) (Def. App. 439). In initiating this Action Plan, the City's Mayor further acknowledged that "other cities across the country have experienced significant reductions in lead poisoning." *Id.* at 2 (Def. App. 440). The Mayor went on to point the finger directly at weak enforcement of the City's lead laws, against landowners and landlords, as the primary reason why St. Louis continued to have higher than average levels of children with EBLs. *Id.*

In other words, St. Louis has admitted that it has woefully under-enforced its lead laws. The Health Department reported that, in 2002, 415 cases relating to lead hazards were on the court's docket. Of those, only 24 defendants were assessed fines, and those fines totaled only $4,600, or an average of less than $200 per defendant. City of St. Louis Department of Health, *Lead Poisoning Surveillance Report 2002,* 11 (2002) (Def. App. 454). Less than 10% of those cases resulted in abatement, with only one abatement occurring on the first sitting before the judge. *Id.*

Since 2003, the City's Lead Safe Program has received significant funds from the Missouri Foundation For Health, HUD and the EPA. *See* Department's Annual Report (2005) at 2 (Def. App. 201). Those funds, numbering in the millions of dollars, were earmarked to (1) increase blood lead testing, and (2) provide additional education to

families on keeping their homes lead-safe. The HUD funds resulted in the remediation of at least 210 homes in 2005 alone. *Id.* at 4 (Def. App. 203).

When the City began to improve enforcement of its lead laws against property owners, it saw a sharp increase in the number of court referrals and within only two years, lead contamination had been removed from almost 1,000 additional homes. Press Release, Office of the Mayor of the City of St. Louis, *City of St. Louis Makes Process in Fight Against Lead Poisoning of Children* (Oct. 4, 2006). Thus, by increasing enforcement of its own lead laws, which have been on the books in the City since the 1970s, the City has made major progress in dramatically reducing the number of children with EBLs. (*Id*.)

E. What is "Lead Poisoned?"

The City's Substitute Brief states as fact that levels of lead in blood less than 10 µg/dL have been proven to be harmful to children. (City Br. 10.) In the real world, the City expressly follows the Centers for Disease Control and Prevention ("CDC") classifications and guidelines for childhood blood lead levels and expressly acknowledges that a blood lead level of 10 or below is an acceptable risk that requires no action. *See* Department's Annual Report (2005) at 4 (Def. App. 203). In fact, both the CDC and the City require no action, such as home inspections, whatsoever until a child's blood lead level is 20 µg/dL or higher.[14] *Id.* And no medical treatment is recommended until blood lead levels reach 45µg/dL. According to the City's own statistics, less than

[14] The CDC did a comprehensive review in 2005 and decided not to lower the blood lead level of concern below 10 µg/dL. Statement by the CDC and Prevention, *Preventing Lead Poisoning in Young Children*, Aug. 2005, at 27-29. (Def. App. 365-67).

one-tenth of one percent (0.1%) of St. Louis children have had blood lead levels that would require medical treatment in 2003, 2004, or 2005. *Id.* at "Statistics At A Glance" (Def. App. 194).

ARGUMENT

I. THE CITY MUST PROVE THAT A DEFENDANT'S PRODUCT IS ACTUALLY PRESENT IN ST. LOUIS IN ORDER TO MEET ITS BURDEN TO PROVE ACTUAL CAUSATION [APPELLANT'S POINT I.A.]

The City claims that the mere "presence" of lead paint is a public nuisance, but admits it cannot prove that any Defendant's product is actually "present" in St. Louis. Faced with long-settled Missouri law and two lower court decisions holding that the City cannot satisfy its burden to prove cause in fact without product identification, the City argues that it is entitled to a more lenient standard of proof because (1) it is a public entity and (2) this is a public nuisance case. The City cites no Missouri precedent to support its position, nor could it. Moreover, the rule the City proposes would necessarily overturn settled law, create standardless legal policy, and ensure that Defendants would be held liable for injuries they did not in fact cause.

A. Standard of Review

This Court's review of the trial court's grant of summary judgment is *de novo,* because the propriety of the trial court's ruling is "purely an issue of law."

ITT v. Commercial Finance v Mid-America Marine, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is a procedural tool that allows early resolution of claims "in order to avoid the expense and delay of meritless claims or defenses and to permit the efficient use of scarce judicial resources." *Id.* The City does not challenge this standard, but rather implies that the grant of summary judgment below amounted to denial of due process, citing *Olson v Auto Owners' Ins. Co*., 700 S.W.2d 882, 885 (Mo. App. 1985). (City Br. 17). To the contrary, in *ITT,* this Court expressly overruled the "slightest doubt" standard that *Olson* applied. 854 S.W.2d at 378. After *ITT*, summary judgment is no longer a disfavored procedural shortcut, but a vital means of assuring the "speedy and inexpensive determination of the action" that Rule 41.03 requires.

B. The City Must Prove An Actual Causal Connection Between A Defendant's Product And The City's Alleged Injury

The requirement to prove causation in fact is a safeguard against imposing liability on a defendant who has no connection to the plaintiff's injury. Under Missouri law, proof of actual cause is the minimum first step in a plaintiff's case.

> "But for" is an absolute minimum for causation because it is merely causation in fact. Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some

> causal relationship between the defendant's conduct and the injury or event for which damages are sought.

Callahan v. Cardinal Glennon Hospital, 863 S.W. 2d 852, 862 (Mo. banc 1993). In other words, the beginning of a plaintiff's case is establishing that a defendant sought to be charged is actually in the chain of causation leading to the claimed injury.

The only exception this Court recognizes to this longstanding rule is the case of two independent torts, either of which is sufficient on its own to cause the plaintiff's injury (the so-called "two fires" case). *Id.* 862-63. The City's public nuisance claim is not a "two fires" case, however, because in such a case the identity of the persons who started the fires is known and all alleged wrongdoers are before the court. Moreover, the City has not alleged the product of any one Defendant could on its own cause of all of the City's alleged harm. *See Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691, 696-97 (Ohio 1987) (rejecting application of "two fires" rule in asbestos case because plaintiff could not prove exposure to any product manufactured by defendants, and not all manufacturers named in the suit). The City's claim here is more akin to a lawsuit in which the plaintiff, not knowing who actually started the fires, sues everyone in the vicinity who owns matches, or even more aptly, sues a few of the many companies that manufactured matches.

The City purports to find in *Callahan*, a "fluid" standard of causation (City Br. 24) that would require something less than proof of actual causation. On the contrary, *Callahan*, stands unequivocally for the requirement to prove cause in fact for every defendant sought to be charged in a multi-defendant case. 863 S.W.2d at 862. The City

also cites *Krause v. U.S. Truck Co., Inc.,* 787 S.W.2d 708 (Mo. banc 1990) as supporting its argument that it need not prove actual causation. (City Br. 28-29). In *Krause,* however, there was no issue of cause in fact. All of the defendants were actually involved in the multi-car accident in which the plaintiff was injured. *Id.* at 709. If the plaintiffs in *Krause* had been unable to identify the other drivers involved in the crash, and had simply sued a few of the many drivers on the road that day, the case would be more analogous to the City's lawsuit against these Defendants.

Contrary to the City's contention, Missouri courts have consistently enforced the requirement of proving actual causation and have rejected alternative causation theories. *See Missouri Farmers Ass'n. v. Kempker,* 726 S.W.2d 723, 726-27 (Mo. banc 1987) (affirming trial court's rejection of farmer's evidence of damages due to loss of milk production and calves where the farmer's expert witness could do no more than speculate as to whether the defective feed was the cause of the farmer's damages); *D.S. Sifers Corp. v. Hallak,* 46 S.W.3d 11, 19 (Mo. App. W.D. 2001) (rejecting alternative liability as substitute for cause in fact proof); *Gray v. Builders Square, Inc.*, 943 S.W.2d 858, 860 (Mo. App. W.D. 1997) ("Proof of a fact, which is essential to submitting an action, may not rest on speculation or conjecture. . ."); *Rockett v. Pepsi Cola Bottling Co.*, 460 S.W.2d 737 (Mo. App. St. L. 1970) (holding that a plaintiff must prove defendant manufactured and sold contaminated can of soda in order to recover alleged damages).

It follows logically from the principles stated in *Callahan* that when a plaintiff claims that it has been injured by a product, it must establish that a

defendant manufacturer actually made the product at issue. That is the holding of *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. Banc 1984). There, the plaintiffs were women who claimed that they were injured by *in utero* exposure to the drug DES. Like the City here, the DES plaintiffs admitted that they could not identify the manufacturer of the drug their mothers took, *id.* at 243, and sought relief on public policy grounds from the burden to prove cause in fact. In *Zafft*, as here, the trial court and the Court of Appeals suggested that the case called for reexamination of existing law. *Id.* at 242.

This Court analyzed several alternative liability theories urged by the *Zafft* plaintiffs (alternative liability, enterprise liability, concert of action, and market share) and ultimately concluded: "There is insufficient justification at this time to support abandonment of so fundamental a concept of tort law as the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury." *Id.* at 247. *Zafft* also noted that the lack of nexus between a defendant's product and the plaintiff's injury and the fact that the plaintiffs had not sued all of the possible manufacturers of DES, "continues the risk that the actual wrongdoer is not among the named defendants, and exposes those joined to liability greater than their responsibility." *Id.* at 246.

Throughout its Brief, the City argues that because its claim is called "Public Nuisance," this long-standing precedent should go out the window. (*See, e.g.*, City

Br. 33 ("This case is not a products liability case; it is a cause of action for public nuisance.").) *Zafft*, however, addressed who should bear the costs of the injury under Missouri tort law generally, rather than discussing specific causes of action under the tort system. 676 S.W.2d 246. In fact, this Court held that: "[T]o recover under strict liability, *as with any other tort theory*, plaintiff must establish some causal relationship between the defendant and the injury-producing agent." *Zafft*, 676 S.W.2d at 244 (emphasis added).

Confirming that principle, courts since *Zafft* have broadly applied its reasoning outside the product liability context. *See, e.g., D.S. Sifers Corp.,* 46 S.W.3d at 19 (applying *Zafft* to plaintiff's "general negligence" claim and affirming summary judgment in favor of the defendants where plaintiff was unable to point to any specific negligent conduct by defendants); *Weaks v. Rupp,* 966 S.W.2d 387, 393 (Mo. App. W.D. 1998) (applying *Zafft* to a negligence claim and holding plaintiff failed to establish requisite casual connection between alleged negligent maintenance of the furnace and the resulting carbon monoxide poisoning); *Paull v. Shop 'N Save Warehouse Foods, Inc.*, 890 S.W.2d 401, 403 (Mo. App. E.D. 1995) (applying *Zafft* to negligence claim and reversing judgment because no evidence to establish that defendant caused the shopping cart to come into contact with plaintiff's automobile causing damage); *Patterson v. Meramec Valley R-III Sch. Dist.*, 864 S.W.2d 14, 16-17 (Mo. App. E.D. 1993) (applying

Zafft to uphold a dismissal of a claim under R.S. Mo. § 537.600.1(2) because the plaintiff failed to sufficiently allege a casual connection between the alleged dangerous condition of broken pieces of asphalt on school property and injuries resulting from a student throwing the asphalt at another child); *Dale v. Edmonds,* 819 S.W.2d 388, 390 (Mo. App. E.D. 1991) (applying *Zafft* to a claim under R.S. Mo. § 537.600 to hold that the plaintiff failed to establish a causal connection between the defendant's conduct and the plaintiff's injury); *Hargan v. Sears, Roebuck and Co.*, 787 S.W.2d 766, 768 (Mo. App. E.D. 1990) (applying *Zafft* to hold that plaintiff failed to introduce evidence to support her negligence claim that the lack of operating footlights near an escalator caused her fall and injuries); *Vann v. Town Topic, Inc.*, 780 S.W.2d 659, 661-62 (Mo. App. W.D. 1989) (applying *Zafft* to hold that a restaurant was not responsible for injuries to a patron who left the restaurant to stop a fight occurring outside the restaurant); *Richardson v. Holland*, 741 S.W.2d 751, 754-57 (Mo. App. S.D. 1987) (applying *Zafft* to hold that the manufacturer of a "Saturday Night Special" gun that was used mainly in criminal activities was not the legal cause of injury).

The City does not offer any support for the proposition that changing the label from product liability to public nuisance entitles the City to a less rigorous standard of proof. Contrary to the City's assertion, Missouri courts have consistently applied the rule requiring proof of cause in fact to public nuisance

cases. For example, in *State ex rel. Weatherby v. Dick & Bros. Quincy Brewing Co.*, 192 S.W. 1022, 1025-26 (Mo. 1917), a public nuisance claim failed when the state was unable to prove that a brewery's beer sales to a dry county caused a public nuisance from drinking because there was no proof that any of the "idle and turbulent" drinkers had actually purchased the defendant's beer. *See also City of St. Louis v. Varahi, Inc.*, 39 S.W.3d 531, 537 (Mo. App. E.D. 2001) ("[E]vidence must show that defendant's acts were 'the proximate and efficient cause of the creation of a public nuisance.'") (internal citation omitted); *State ex rel. Chicago, B. & Q. Ry. Co. v. Woolfolk*, 190 S.W. 877, 879 (Mo. banc 1916) (state failed to prove that railroad's delivery of liquor to dry county created public nuisance of drinking and causing disturbance). In fact, in every reported municipal public nuisance case in Missouri, the plaintiff has been required to prove the exact location of the nuisance, as well as the specific activity or product of the named defendant(s) that allegedly caused the nuisance. (LF 2772).

Indeed, in its November 20, 2002 Order denying the Defendants' motion to dismiss this lawsuit, the trial court followed that established Missouri law in holding that the City was required to establish product identification in order to prove cause in fact in its nuisance claim:

> A party may not be forced to pay for damages that it did not cause. It is fundamental to the law of torts that, **regardless of the theory upon which liability is predicated** in a products

> liability case, (whether negligence, strict liability, breach of warranty, misrepresentation, **nuisance** or other grounds), in order to hold a manufacturer or seller liable for injury caused by a particular product, there must first be proof that the defendant being sued actually produced, manufactured, sold, or was in some way responsible for the product that caused the harm. This "manufacturer identification requirement" is an element of proximate causation, and serves the function of assigning blameworthiness to culpable parties and limiting the scope of potential liability.

(Supp. LF 55) (emphasis added). In 2002, the City escaped dismissal because it represented that it could meet its burden of proving product identification through testing, sampling and review of Defendants' paint formulae. (Supp. LF 62).

Four years later, the Defendants won summary judgment when the Cityfinally acknowledged that it could and would not meet the burden of showing cause in fact through product identification. (LF 2821).

The City admits that it cannot sustain the burden of proof set by cases such as *Callahan, Zafft, and Weatherby*. Under Missouri law and Missouri public policy, summary judgment dismissing the case was proper and should be upheld.

C. Because The City Seeks Only An Award Of Damages, It Must Prove Actual Causation Under The Same Standard That Would Apply To A Private Plaintiff

The City suggests that it is uniquely situated in this public nuisance claim as a governmental plaintiff and thus entitled to a more lenient standard of causation than would apply to a private plaintiff seeking the same relief. The City's position is directly contrary to Missouri law as stated in *State v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99 (Mo. App. W.D. 1984). In that case, the State sought to recover damages against striking public employees on the basis of public nuisance (among other theories). Noting that "public nuisance also becomes a private tort when an individual shows a particular damage of a kind not shared with the rest of the public," *id*. at 114, the court rejected the State's claim for damages on the ground that:

> [t]he suit by the State of Missouri [in the stead of the municipality] is for recompense for the *public injury*, and does not seek to vindicate a damage distinctive in kind from that suffered by the general community, and so does not describe a recovery for a private tort.

Id. at 114-15 (emphasis in original). In other words, it is only as a private plaintiff seeking recovery of its own damages, which are different from damages to the public generally, that the State can pursue a damage claim at all.

Because the City is ***not*** (and could not be under *Kansas City Firefighters*) seeking to recover for "injury to the public," the very basis on which it seeks an alternative

causation standard fails. As the Court of Appeals noted, there is nothing "uniquely public" about the City's claims in this case.

> [The] damage at issue here is *not* the wide-spread threat to public health posed by the presence of lead paint; it is limited to the costs the City allegedly incurred abating and remediating lead paint in certain, albeit numerous, properties. In this way, the City's claims are akin to a private individual's claims of specific and particularized harm from the public nuisance of lead paint, different in kind from the harm to the rest of the community. This cuts against the City's argument that its status as a governmental entity or the public nature of the injury should set this apart from other public nuisance or subject it to lesser causation standards.

City of St. Louis v. Benjamin Moore & Co., No. ED87702, 2006 WL 3780785, *8-9 (Mo. App. E.D. Dec. 26, 2006) (internal citations omitted) (A. 68-69).

The City was allowed to proceed in the trial court on its claim for money damages because it persuaded the trial court that its alleged damages were in fact "special" or different from any harm or damages to the general public. (Supp. LF 84-85). In an action to recover damages for public nuisance, the City is no

differently situated under Missouri law than a private citizen seeking recovery for costs of removing lead paint from his property.[15]

In fact, even stronger reasons of fundamental fairness compel proof of causation in government-initiated public nuisance cases. First, because public nuisance suits are typically quasi-criminal, the government's burden of proof should be strictly observed. *See City of Kansas City v. Mary Don Co.*, 606 S.W.2d 411, 415 (Mo. App. W.D. 1980) (maintenance of a nuisance also constitutes a violation of certain criminal or quasi-criminal statutes or ordinances); Prosser & Keeton, *Torts*, § 86 at 617 (5th ed. 1984) (public nuisance suits historically were criminal in nature). Due process and adherence to law become more important when the government is the plaintiff, in order to prevent abuses of the tremendous power the government can wield. *See* U.S. Constitution, Fifth Amendment, adopted 1791 ("No person … shall be deprived of life, liberty or property without the due process of law."); U.S. Constitution, Fourteenth Amendment, adopted 1868) (states are prohibited from "depriving any person of property without due process of law."); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("the touchstone of due process is protection of the individual against arbitrary action of government.").

[15] In fact, the City conceded before the trial court (LF 2844-45) and in its brief to this Court (City Br. 27) that an individual plaintiff would be required to prove product identification in order to recover against these Defendants for injuries allegedly caused by lead paint on his property.

It would be paradoxical if the City here had a less onerous burden of proof for what it claims, at least, is a massive, citywide public nuisance action involving thousands of properties than would a private citizen in a civil tort action involving only one property. If there were no requirement that a public entity plaintiff specifically identify the actual causal contribution of any defendant in a public nuisance action, public officials could single out certain individuals or companies for political gain, without having to prove that the targeted defendants, in fact, caused the nuisance. Such tort liability, without meaningful boundaries, "creates opportunities for inconsistent and arbitrary treatment at the hands of courts. . . ." Donald G. Gifford, *Public Nuisance As A Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 785 (2003). It is not right to place such an enormously powerful weapon at the disposal of public officials without, at a minimum, establishing that a defendant made the product that has actually caused harm. For this reason, over the centuries the common law has developed a series of limits on the scope of liability for public nuisance. These limits balance the community's interest in protecting public health and welfare against the risk of governmental excess and abuse of power. *See Women's Kansas City St. Andrew Soc. v. Kansas City*, 58 F.2d 593, 599 (8th Cir. 1932) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a short cut rather than the constitutional way of paying for the change.") (citations omitted).

Simply put, the City's claim that this case presents a unique situation that would or should excuse it from meeting the same burden of proof applicable to every private citizen finds no support in the facts of this case or the long-standing law of Missouri. The City spent money at particular private properties. It has the legal right to obtain reimbursement from each property owner. This Court should decline the City's invitation to deviate so substantially from well-established tort law and, by doing so, give the City unbounded power to sue whomever it pleases.

II. THE "SUBSTANTIAL PARTICIPATION" CAUSATION STANDARD THE CITY ADVOCATES WOULD NOT RELIEVE IT OF THE BURDEN TO PROVE CAUSE IN FACT BECAUSE BOTH MISSOURI LAW AND THE RESTATEMENT (SECOND) OF TORTS § 834 REQUIRE PROOF OF CAUSATION IN FACT [APPELLANT'S POINT I. B

Having admitted that it cannot establish product identification and the but-for causation required under Missouri law, the City seeks to side-step this burden by arguing that (1) Missouri should adopt the Restatement (Second) of Torts § 834 (1979);[16] and (2) that Section 834 sets out a more lenient standard of proof in public nuisance cases. The City's argument misinterprets that Restatement section, and in any event, Missouri does not follow it. Other courts, in nearly identical situations and under substantive law

[16] Section 834, titled "Persons Carrying On An Activity," provides as follows: One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on.

similar to Missouri's, have also rejected similar plaintiffs' arguments that a lesser causation standard applies under Section 834 in cases such as this.

A. The Allegations Of The City's Case Do Not Fit The Circumstances To Which Section 834 Was Intended To Apply.

Section 834 was not intended to apply to the circumstances of this case. By its own terms, Section 834 applies when multiple defendants are engaged in a "common enterprise." Section 834, cmt. b (A. 110-11). Here the City does not allege any "common enterprise." To the contrary, the City's Brief states specifically that "the City alleges that several defendants, acting *independently*, each engaged in activities which were sufficient to cause the lead paint public nuisance." (City Br. 23) (emphasis added).

Second, Section 834 is intended to apply in circumstances where defendants are "carrying on" an activity. In *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 137 (Ill. App. Ct. 2005), the Illinois Appellate Court rejected the application of Section 834 to that city's public nuisance claim against former lead pigment manufacturers, aptly finding that:

> [u]nder section 834 of the Restatement, "one is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." Defendants here are not "carrying on" or participating in "carrying on" anything. No defendant has sold the product in question for over 30 years.

(internal citation omitted). Similarly the Defendants here are not "carrying on" any

activity in St. Louis.

Third, Section 834 is intended to apply in cases involving a defendant's use of land. For that reason, the Illinois Supreme Court declined to apply it in a firearms public nuisance case in *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1117-18 (Ill. 2004):

> Plaintiffs' novel application of the cause of action of public nuisance renders authorities such as the Restatement less than helpful in answering this question. Section 834, for example, focuses primarily on private nuisance and its common law basis tied to a defendant's use of land and the resulting invasion [of] a plaintiff's property rights. The "Scope Note" preceding section 834 states that the defendant's activity "may be the direct cause of the invasion or it may create a *physical condition* that ultimately results in the invasion." (Emphasis added.) Restatement (Second) of Torts § 834 (1979). All of the illustrations that follow section 834 involve invasions of property rights caused by the defendant's use of land and are clearly predicated on a view of nuisance as a physical condition brought about by the wrongful use of real property.

Id. at 1118. Here too, there is no allegation that the alleged public nuisance was caused by any Defendant's use of real property.

B. Section 834, Even If Applied, Would Not Abrogate The City's Burden To Prove Actual Cause.

The City first argues, citing Section 834, that it should only have to establish that Defendants were "substantial participants" in furtherance of the purported public nuisance to satisfy its burden of proof on causation, implicitly assuming that a "substantial participation" standard does not require proof of actual causation. The trial court rejected this argument out of hand as contrary to Missouri law:

> Section 834 does not vitiate the requirement for showing cause-in-fact. . . . Restatement Section 834 alone cannot serve to remove the City's burden of proof under existing Missouri law to show some degree of location-specific product identification in order to establish the necessary element of but-for causation . . . the Court believes that when the Missouri Supreme Court's decision in *Callahan v. Cardinal Glennon Hospital*, *supra*, is read carefully, it holds that the 'substantial factor' test and 'but-for' causation are not really inconsistent; but by the same token the former may not be used as a substitute for the latter ---i.e., ***there must always be sufficient proof of but-for causation*** for each separate defendant in a multiple defendant case.

(LF 2849-50) (emphasis added).

In fact, the "substantial participation/factor" language of the Restatement relates to the analysis of legal cause, an element of the proximate cause analysis separate and distinct from but-for causation under Missouri tort law. *Callahan*, 863 S.W.2d at 861 ("[U]nder the Restatement's approach . . . cases, although called substantial factor cases, are required to meet a 'but for' causation test . . . . [W]hen the Restatement (Second) refers to a substantial factor case it is referring to all cases where legal causation is present."). *Callahan* was specifically discussing the substantial factor test for torts in general, found at Restatement (Second) of Torts §§ 430-432 (1965). *Id.* at 861. Section 834, which is the "substantial participation" standard the City urges, also cross references to the Restatement sections dealing with the general tort standards of causation discussed in *Callahan*, § 834, cmt d, (A. 111), leaving no doubt that the Restatement itself contemplates proof of cause in fact in nuisance cases just as in any other tort. The trial court (LF 2849-50) and the Court of Appeals (A. 64-65) correctly rejected the City's argument that Section 834, even if adopted, would set a lower standard of proof in this case. [17]

[17] An overarching concern in adopting the City's view of who is responsible for the alleged public nuisance created by the presence of lead paint in the City is that it excuses the illegal conduct of the landlords and homeowners who have failed to follow the lead laws that have been on the books since the 1970s as well as excuses the City's utter failure to enforce those laws.

The non-Missouri authority on which the City relies to support application of its reading of Section 834 is inapposite. The court in *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888, 892 (Wis. Ct. App. 2004), applied a "substantial factor" test for causation (without citing Section 834) to reverse the trial court's order of summary judgment for former lead pigment manufacturers against Milwaukee's public nuisance claims. That decision must be understood, however, against the general background of Wisconsin law, which has adopted and applied a modified market share theory in DES cases, *Collins v. Eli Lilly & Co.*, 342 N.W.2d 37 (Wis. 1984), and in personal injury cases against former manufacturers of one type of lead pigment. *Thomas, ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005). In other words, Wisconsin, unlike Missouri, has made the policy choice to adopt causation standards virtually ensuring that a party may be found liable for an injury that it did not in fact cause. Most significantly, a "substantial factor" test that includes no requirement to prove actual causation is directly contrary to this Court's holding in *Callahan.* 863 S.W.2d at 861. The trial court correctly held that "*City of Milwaukee* is at odds with Missouri law on the need for proof of product identification." (LF 2853).

Significantly, courts in jurisdictions that, like Missouri, have rejected market share liability have also strictly applied the actual causation proof requirement in cases alleging injury from lead paints or pigments. In *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d at 124-26, the Illinois Appellate Court relied on *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (Ill. 1990), which had rejected the market share theory adopted in *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980), in upholding dismissal of that city's public

nuisance claim against former lead pigment manufacturers. ***"[P]laintiff has not identified any specific manufacturer's product at any specific location. Plaintiff is attempting to do what the Smith decision forbids: making each manufacturer the insurer for all harm attributable to the entire universe of all lead pigments produced over a century by many."*** *Id.* at 136.

Similarly, in *Jackson v. Glidden Co.*, 2007 WL 184662, *2 (Ohio Ct. App. January 25, 2007), the Ohio Appeals Court cited *Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187 (Ohio 1998), which also rejected *Sindell*, to uphold dismissal of personal injury tort claims (including nuisance) against former manufacturers of lead pigment.[18]

[18] A California Court of Appeals allowed abatement claims in public entity nuisance case to survive demurrer without product identification, but upheld dismissal of the plaintiffs' claims for damages on the ground that "liability for damages for product-related injuries should not be extended beyond products liability law to public nuisance law." *County of Santa Clara v. Atlantic Richfield Company,* 137 Cal.App.4th 292, 313 (Cal. App. 6 Dist. 2006). In an unpublished opinion, the New Jersey Appellate Court reversed dismissal of public entity public nuisance claim against former manufacturers and distributors of lead paint and lead pigment, even though the plaintiffs' allegations appeared to fall within the definitions of the state's Product Liability Act, on the ground that the case was in the nature of an "environmental tort action," which is an exception to the statute. *In re: Lead Paint Litigation,* 2005 WL 1994172 at *8 (N.J. Super A.D.).

Finally, the City relies on an unpublished trial court decision in *State ex rel. Lynch v. Lead Indus. Ass'n*, 2005 WL 1331196 (R.I. Super. June 3, 2005), in which a Rhode Island trial court adopted a "substantial factor" test based on Section 834.[19] Even apart from being an unpublished trial court opinion, the rule espoused in the Rhode Island case is contrary to the fundamental principles of causation that Missouri courts have affirmed time and again.[20] The Rhode Island trial court's causation standard so departs from the principle of actual causation applied in Missouri that it does not even require proof that a defendant's lead pigment was manufactured or sold in Rhode Island. *Id*. at *3. In addition, under that standard, the plaintiff can establish causation based on the conduct of a defendant's "agent." *Id*. Here, however, the City has not alleged liability based on any theory of agency, but rather acknowledges that the case is based on the "independent" actions of the individual Defendants. In short, the Rhode Island ruling is inconsistent

[19] The Rhode Island trial court recently reaffirmed that standard in denying post-trial motions for judgment as a matter of law and for new trial. *State of Rhode Island, by and through Patrick Lynch, Attorney, General v. Lead Industries Ass'n, Inc.*, Superior Court, C.A. No. PC 99-5226 (Feb. 26, 2007), www.courts.state.ri.us/superior/pdf/99-5226-2-26-07.pdf

[20] As the City acknowledges, (City Br. 32), the trial court decision in the Rhode Island case is also contrary to established Rhode Island law. *See Clift v. Vose Hardware, Inc.*, 848 A.2d 1130, 1132 (R.I. 2004); *Gorman v. Abbott Labs.*, 599 A.2d 1364 (R.I. 1991).

with the Restatement itself as well as Missouri law and arises from factually different theories of liability. The trial court here correctly refused to follow the rule set out in that unexamined ruling of a non-Missouri trial court and this Court should affirm that decision.[21]

III. INDUSTRY-WIDE LIABILITY BASED ON MARKETING DATA RATHER THAN PROOF OF ACTUAL CAUSATION IS NOT AND SHOULD NOT BE RECOGNIZED IN MISSOURI

After admitting that it cannot prove the presence of any Defendants' product anywhere in St. Louis, the City urges this Court to "modify" *Zafft* in order to allow it to prove "actual causation" through evidence of "community wide marketing and sales" (City Br. at 19), or in other words to use information about marketing to satisfy its burden of proof on actual causation. This Court has rejected such lesser standards of proof and should continue to do so.

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[21] The City also cites *City of Bloomington v. Westinghouse Elec. Co. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (City Br. 28), but product identification, or cause in fact, was not at issue in that case. Defendant Monsanto did not deny that it had manufactured the chemicals (PCBs) whose alleged release by Westinghouse was the basis of Bloomington's public nuisance claim. *See id.* It was only after cause in fact was established (because product identification was not at issue), that the court examined the "substantial contribution" component of causation discussed in Section 834.

A. Theories of Causation Based On Marketing Data Have Been Overwhelmingly Rejected Because They Undermine The Requirement To Prove An Actual Causal Connection Between A Defendant's Product And A Plaintiff's Injury

In *Zafft*, this Court rejected the concept of market share liability, which is one form of such market-based proof, because there is no foundation for "abandonment of so fundamental a concept of tort law" as the requirement of some actual causal nexus between "wrongdoing and injury." 676 S.W.2d at 247. The City's case does not present any reason to second guess that conclusion.

Market share theory was first applied by the California Supreme Court in *Sindell v. Abbott Laboratories*, a case involving an innocent individual plaintiff with no other remedy who was injured by a generic pharmaceutical product – diethylstilbestrol ("DES") – produced by manufacturers using an identical chemical formula. 607 P.2d 924 (Cal. 1980). Outside of California, the market share theory has been adopted in other DES cases in only four jurisdictions: Florida, New York, Washington and Wisconsin.[22] Each state, however, defines the theory in a different way, so there is no single market share theory. The overwhelming majority of courts, however, have rejected market share

[22] *See Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989); *Martin v. Abbott Labs.*, 689 P.2d 368 (Wash. 1984); and Collins, 342 N.W.2d 37; *see also McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265 (D. S.D. 1983); *compare McCormack v. Abbott Labs.*, 617 F. Supp. 1521 (D. Mass. 1985) with *Gurski v. Wyeth-Ayerst Div. of Am. Home Prods. Corp.*, 953 F. Supp. 412 (D. Mass. 1997) and *Mills v. Allegiance Healthcare Corp.*, 178 F. Supp. 2d 1 (D. Mass. 2001). Hawaii has applied the market share theory outside the DES context in a case involving blood products. See Smith v. Cutter Biological, Inc., 823 P.2d 717 (Haw. 1991).

liability theory for a variety of products.[23] In fact, five state supreme courts, including *this Court*, have rejected the theory even in DES cases.[24] Even the drafters of the Third Restatement of Torts recognized the dearth of cases in which market share would or could ever be appropriate. *See* Restatement (Third) of Torts § 28, comment o. ("The vast majority of decisions outside DES reject market share liability, often because of a lack of fungibility, but for a number of other reasons as well.").

[23] *See In Re New York State Silicone Breast Implant Litig.*, 631 N.Y.S.2d 491, 493-94 (N.Y. Sup. Ct. 1995) (refusing to adopt market share liability in breast implant litigation and collecting other cases); *In re Dow Corning Corp.*, 250 B.R. 298, 362-63 (Bankr. E.D. Mich. 2000) (breast implants); *Black v. Abex Corp.*, 603 N.W.2d 182, 189-91 (N.D. 1999) (asbestos); *Santarelli v. BP Am.*, 913 F. Supp. 324, 329 (M.D. Pa. 1996) (farm-raised salmon); *Bly v. Tri-Continental Indus., Inc.*, 663 A.2d 1232, 1241-45 (D.C. 1995) (benzene); *Mellon v. Barre-Nat'l Drug Co.*, 636 A.2d 187, 192 (Pa. Super. Ct. 1993) (ipecac syrup), *appeal denied*, 648 A.2d 789 (Pa. 1994); *McClelland v. Goodyear Tire & Rubber Co.*, 735 F. Supp. 172, 174 (D. Md. 1990) (toxic chemicals), *aff'd*, 929 F.2d 693 (4th Cir. 1991); *Leng v. Celotex Corp.*, 554 N.E.2d 468, 471 (Ill. App. Ct. 1990) (asbestos), *appeal denied*, 555 N.E.2d 377 (Ill. 1990); *Sholtis v. Am. Cyanamid Co.*, 568 A.2d 1196, 1204 (N.J. Super. Ct. App. Div. 1989) (asbestos); *Shackil v. Lederle Labs.*, 561 A.2d 511, 528-29 (N.J. 1989) (DPT vaccine); *Lee v. Baxter Healthcare Corp.*, 721 F. Supp. 89, 93-94 (D. Md. 1989) (breast prosthesis), *aff'd*, 898 F.2d 146 (4th Cir. 1990); *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 70-71 (Tex. 1989) (asbestos); *York v. Lunkes*, 545 N.E.2d 478, 480 (Ill. App. Ct. 1989) (car batteries); *Poole v. Alpha Therapeutic Corp.*, 696 F. Supp. 351, 353-54 (N.D. Ill. 1988) (blood products); *Dawson v. Bristol Labs.*, 658 F. Supp. 1036, 1040-41 (W.D. Ky. 1987) (tetracycline); *Marshall v. Celotex Corp.*, 651 F. Supp. 389, 392-94 (E.D. Mich. 1987) (asbestos); *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987) (asbestos); *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691, 699-702 (Ohio 1987) (asbestos); *Vigiolto v. Johns-Manville Corp.*, 643 F. Supp. 1454, 1463 (W.D. Pa. 1986) (asbestos), *aff'd*, 826 F.2d 1058 (3d Cir. 1987); *Bateman v. Johns-Manville Sales Corp.*, 781 F.2d 1132, 1133-34 (5th Cir. 1986) (asbestos); *Griffin v. Tenneco Resins, Inc.*, 648 F. Supp. 964, 966-67 (W.D.N.C. 1986) (benzidine dye); *In re Asbestos Litig.*, 509 A.2d 1116, 1118 (Del. Super. Ct. 1986) (asbestos), *aff'd Nicolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987); *Tirey v. Firestone Tire & Rubber Co.*, 513 N.E.2d 825, 827 (Ohio Ct. C.P. 1986) (tire rims); *Celotex Corp. v. Copeland*, 471 So. 2d 533, 537-39 (Fla. 1985) (asbestos); *Cummins v. Firestone Tire & Rubber Co.*, 495 A.2d 963, 971-72 (Pa. Super. Ct. 1985) (tire rims); *Mason v. Spiegel, Inc.*, 610 F. Supp. 401, 406 (D. Minn. 1985) (clothing); *Bradley v. Firestone Tire & Rubber Co.*, 590 F. Supp. 1177, 1181 (D.S.D. 1984) (tire rims); *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581, 583 (5th Cir. 1983) (asbestos), *cert. denied*, 465 U.S. 1102 (1984); *Hannon v. Waterman S.S. Corp.*, 567 F. Supp. 90, 92-93 (E.D. La. 1983) (asbestos); *Starling v. Seaboard Coast Line Ry. Co.*, 533 F. Supp. 183, 188-91 (S.D. Ga. 1982) (asbestos); *Prelick v. Johns-Manville Corp.*, 531 F. Supp. 96, 98 (W.D. Pa. 1982) (asbestos); *Pennfield Corp. v. Meadow Valley Elec., Inc.*, 604 A.2d 1082, 1088 (Pa. Super. Ct. 1992) (electrical cable); *University System of New Hampshire v. United States Gypsum Co.*, 756 F. Supp. 640, 655-56 (D.N.H. 1991) (asbestos); *Herlihy v. Ply-Gem Indus., Inc.*, 752 F. Supp. 1282, 1291 (D. Md. 1990) (plywood); *Franklin County School Bd. v. Lake Asbestos of Quebec, Ltd.*, Civ. A. No. 84-AR-5435-NW, 1986 WL 69060, *5 (N.D. Ala. Feb. 13, 1986) (asbestos).

[24] *See Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (Ill. 1990); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986), *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984); *Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187 (Ohio 1988); *Gorman v. Abbott Labs.*, 599 A.2d 1364 (R.I. 1991).

B. Applying "Market Share" Principles Of Liability Is Impossible In This Case

Not only have the "vast majority" of courts followed suit with Missouri and rejected outright market share liability, courts have specifically considered it and rejected it in the lead-paint context, in cases that involved a much narrower scope of defendants; that is, either solely lead pigment manufacturers or lead-based paint manufacturers. *See Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245 (5th Cir. 1997) (rejecting market share under Louisiana law); *Santiago v. Sherwin Williams Co.*, 3 F.3d 546 (1st Cir. 1993) (applying Massachusetts law); *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112 (3d Cir. 1993); *Hurt v. Philadelphia Hous. Auth.*, 806 F. Supp. 515 (E.D. Pa. 1992) (applying Pennsylvania law); *Swartzbauer v. Lead Indus. Ass'n*, 794 F. Supp. 142 (E.D. Pa. 1992)(applying Pennsylvania law); *Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848 (N.Y. App. Div. 1999) (applying New York law); *Skipworth by Williams v. Lead Indus. Ass'n., Inc.*, 690 A.2d 169, 173 (Pa. 1997) (applying Pennsylvania law).

Courts rejecting market share liability in lead paint and pigment cases have recognized its unworkability for extremely practical reasons. The very few Courts that adopted market share theory in DES cases did so based on the underlying facts that showed: (1) an innocent, individual plaintiff who had no other remedy; (2) a single, chemically identical ("fungible") product; (3) a signature disease (a type of adenocarcinoma) caused only by DES exposure; (4) a narrow, clearly delineated time

frame during which the plaintiff's mother used the drug; (5) a lawsuit in which, in most cases, every manufacturer that could have sold the product in the relevant market in the relevant time frame was named; and (6) defendants who, as manufacturers of prescription drugs, had sole control of the risk the drug posed to users. *See, e.g., Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069

(N.Y. 1989); *Martin v. Abbott Labs*, 689 P.2d 368 (Wash. 1984); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984). Here, none of those factors apply.

1. The Plaintiff is a governmental entity that can more than protect itself. The City has contributed to the alleged nuisance and also failed to enforce its own lead laws, through which it can order property owners to correct lead hazards and can also levy civil and criminal sanctions against homeowners and landlords who allow lead paint to deteriorate. The City can also abate the deteriorating lead paint itself, and then seek reimbursement from the offending homeowner through a civil suit, criminal sanctions, or a tax lien.

2. Here, the City has not based its claim of harm on any single – let alone fungible – product. In fact, the City defines the product at issue as both lead pigments and lead paints, as well "as a variety of coating materials such as, but not limited to, interior and exterior household paints, varnishes, lacquers, stains, enamels, primers, and similar coatings furnished for use on various household surfaces." (LF 1089). The City does not allege that all of the various products defined as "lead pigment" or "lead paint" in its

Petition are fungible, nor could it. Lead pigments come in many forms. In *Brenner*, for example, the court noted that "[d]efendants here manufactured white lead carbonate, but there were lead compounds other than white lead carbonate found in the paint in plaintiffs' apartment, including leaded zinc oxide, lead chromate, lead silicate, and lead sulfate." 699 N.Y.S.2d at 852. Lead-based paints are also not fungible products. Depending on when it was made and the intended use, it contained varying amounts of different lead pigments. Some lead-based paints may have contained 10% lead pigment, while other paints contained as much as 50% lead pigment. Not only did the amount of lead pigments vary, but so did the type of lead pigments used. *Id.* at 853.

3. There is no signature disease caused solely by lead, let alone lead paints or pigments. The types of injuries alleged in this case as the basis of its nuisance claim, including reduced IQ levels, reduced attention spans, and behavioral problems in children (s*ee* City Br. 9), also have many other recognized causes, including "hereditary, social and environmental factors." *Santiago v. Sherwin Williams Co.*, 782 F. Supp. 186, 192 (D. Mass. 1992), *aff'd*, 3 F.3d 546 (1st Cir. 1993). *See Brenner,* 699 N.Y.S.2d at 853 (noting lack of signature injury). *See also Starling v. Seaboard Coast*

Line Ry. Co., 533 F. Supp. 183, 191 (S.D. Ga. 1982) (refusing to apply market share because "[t]he injuries caused by asbestos exposure are not restricted to asbestos products – other products, such as cigarettes, may have caused or contributed to the injury").

4. Lead paints are far from the only cause of elevated blood lead levels. Instead, there are many sources of lead in the environment such as lead in the air and soil from decades of industrial emissions and leaded gasoline, lead contaminated drinking water resulting from lead pipes and lead solder, occupational sources of lead, lead in ceramics, lead in cosmetics, and other products, such as children's toys and jewelry, fishing sinkers and ammunition. *See Santiago,* 782 F. Supp. at 193 ("lead is widespread in many different forms").

5. The time frame for this case stretches across more than three-quarters of the 20th Century, as the City alleges that Defendants placed lead paints and pigments in the stream of commerce between 1900 and 1978. Any attempt to apportion liability based on notions of market share over such a long period would be pure speculation. *See Skipworth,* 690 A.2d at 173 ("the difficulty in applying market share liability for such an expansive relevant time period as 100 years is that entities who could not have been the producers of the lead paint which injured [the plaintiff] would almost assuredly be held liable.")

6. Unlike the DES cases, in which the plaintiff generally alleged that she had

named every manufacturer of DES who could have sold the product in the relevant market, the City does not claim here that it has sued every maker of every type of lead pigment or lead paint, nor every manufacturer of ”coating materials such as, but not limited to, interior and exterior household paints, varnishes, lacquers, stains, enamels, primers, and similar coatings furnished for use on various household surfaces,” as alleged in the City’s Petition. *See Brenner*, 699 N.Y.S.2d at 852 (plaintiffs’ inability to define with precision a national “market” for white lead carbonate, let alone a market for white lead carbonate [one type of lead pigment] used in interior residential paint, rendered market share liability inapplicable to cases involving lead-based paint). In fact, the City has already dismissed two of the original Defendants in the case, companies that it claimed were contributors to the nuisance. In *Zafft*, the fact that all not all possible tortfeasors were before the court was one of the factors that lead this Court to reject alternative liability theories, including market share, which would “expose those joined to liability greater than their responsibility.” 676 S.W. 2d at 246.

7. Finally, the Defendants here did not have exclusive control of any risk. To the extent lead-based paints, lead pigments, or any other of the long list of products that the City has put at issue may still exist in private properties in St. Louis, those products have lasted through generations of property owners, painters, City inspectors, and tenants. They remain present and in

> their current condition because of decisions and actions of a host of people over many decades, who have had control over the properties, their maintenance, and the products. That these products would remain in place for many decades or that owners would not maintain their property as required by law are not risks over which the Defendants had any control. *See Santiago,* 782 F. Supp. at 195 (Lead pigment suppliers "could not control all of the risks that their products may have presented to the public.").

Moreover, the notion that defining the nuisance as the presence of lead paint in a large number of private properties lessens the likelihood that a Defendant will be held liable for injury it did not cause is illogical. The underlying factors such as the numbers of products at issue, the vast time frame, and the absence of responsible parties are not different here than in an individual plaintiff case. Thus, the proposed market share, or market data, standard would be nothing more than a vehicle to impose on a small number of defendants liability for an entire industry's products legally manufactured and sold for decades. Rather than reduce the likelihood of disportionate imposition of liability, such a standard would guarantee that these Defendants would be exposed to "liability greater than their

responsibility," which *Zafft* forbids. 676 S.W.2d at 246.[25]

C. The City's Proposed Proof Of Causation Through Advertising and Promotion Poses Even Greater Risks That Defendants Would Be Held Liable For Injuries They Did Not In Fact Cause

A fundamental presumption of market share liability, or any alternative liability theory, is the capacity or competency of courts and juries to determine with a meaningful degree of accuracy the probability that any particular manufacturer's product is the actual cause of the plaintiff's injury. In the few cases that followed *Sindell*, courts have adopted a manufacturer's market share as the best proxy for the relative likelihood that its products actually caused injury. The standard the City proposes lacks even that modicum of proportionality and creates even greater danger of liability out of proportion to any actual connection to the harm.

The City claims that it can prove causation in fact by relying on historical marketing and advertising materials. (City Br. 18-19). But a trier of fact would have to make a series of unsupported assumptions to arrive at a conclusion that ads or marketing proves sales at any point in time, let alone present-day substantial contribution to a nuisance. Advertising does not equate with products sold for the simple reason that people make their decisions to buy a consumer product based on

[25] *See* Section III, *infra*, for a more detailed discussion of the inapplicability of market share principles in cases against former manufacturers of lead paints and lead pigments.

many factors – such as their own experience and unique needs, a product's reputation, recommendations by friends and professionals – not just advertising. *See* W. Wilkie, *Consumer Behavior* 20-21 (3d ed. 1994) (describing wide variety of influences on consumer preferences, including: beliefs, values, gender, culture, family, external conditions, and situational effects); Krugman, *Advertising – It's Role in Modern Markets* 7 (1993) ("In the simplistic view, advertising is thought to affect behavior in a cause-effect relationship. The assumption is, if money is spent on advertising, sales will follow. Research evidence and many campaign failures, however, tell us that the effect of advertising on behavior is usually mediated by factors internal and external to consumers").

What is more, companies that do *not* have a large share of a particular local market have the most incentive to spend more heavily on advertising and marketing campaigns because they need to gain market recognition. An established local company with an excellent reputation or name recognition might need to spend little on advertising. Conversely, imputing a local market share based on national marketing data would leave out entirely any "contribution" from locally-based companies with no national marketing. Thus, advertising and marketing materials could never give a reasonable or fair picture of any company's actual "share" of a local market.

Moreover, even if the City could prove advertisements decades ago, it would not

mean that a specific Defendant's lead paints or pigments are still present today, much less in a deteriorated condition accessible to young children, which is, after all, the basis of the City's public nuisance claim. One would have to assume that the product advertised contained lead in an amount that posed a danger to children, that the ads led to sales, that the paint was used in the residential buildings that are the basis of the City's damage claims, that the paint was put in places accessible to children, that the paint remained present after years of sanding, scraping, repainting, renovations and repairs and that the paint had not been covered by intact paint, paneling, wall paper or the like. There is no way for a fact finder, without speculating, to come to a reasonable and fair conclusion based solely on advertising and marketing as to whether any Defendant's actually caused the City's alleged injury and damages or even whether such products "substantially contributed" to the alleged public nuisance.

Speculation is not a substitute for proof of legal causation. *See* W. Page Keeton, *Prosser and Keeton on the Law of Torts,* 269 (5th ed. 1984) ("A mere possibility of … causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (Footnotes omitted). *Warner v. St. Louis & M.R.R. Co.*, 77 S.W. 67 (Mo. 1903) (holding that "plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result; and if the evidence leaves it to conjecture, the plaintiff must fail in his action."); *Rose v. Thompson*, 141 S.W.2d 824 at 828

(Mo. 1940) (same); *Daniels v. Smith*, 471 S.W.2d 508, 512-13 (Mo. App. Spr. 1971) (holding that it is a well-established rule in Missouri that the plaintiff has the burden of proving that the defendant's negligence was a proximate cause of her injuries). To allow this type of proof would create an arbitrary, irrebuttable presumption of liability in violation of due process.

Adopting a system of causation, such as that proposed by the City, necessarily would require fact finders to engage in speculation and guesswork to decide how much liability to impose upon each Defendant. The possibility of imposing liability on a Defendant who could not be responsible for the harm would be greatly exacerbated. That approach is directly contrary not only to *Zafft* and *Callahan*, but also to Missouri public nuisance law, which has typically found the harm caused by multiple defendants divisible, particularly where the plaintiff seeks monetary damages. *See Somerset Villa, Inc. v. City of Lee's Summit*, 436 S.W.2d 658, 664 (Mo. 1968) ("if damages are occasioned by independent acts, the tort-feasor is only liable for the damages that his act occasions") (quotations omitted); *State ex rel. Fed. Lead Co. v. Dearing*, 148 S.W. 618, 620 (Mo. banc 1912) (when multiple defendants are accused of polluting a stream, and the plaintiff seeks only money damages and not equitable relief, each defendant "is liable in damage only for his own act, and not for that of any others who may contribute to the injury. If others have contributed, … [their] liability [must be] ascertained accordingly"). In

other words, "a person, who contributes to the production of a nuisance may be chargeable therewith . . . only to the extent of the injury done by himself." *Martinowsky v. Hannibal*, 35 Mo. App. 70, 1889 WL 1569, at *4 (Mo. App. St. L. 1889). The Eighth Circuit, applying Missouri nuisance law, has held: "The fact that the damage which [the plaintiff] ultimately suffered may have resulted from the combined effect of the several and distinct injuries inflicted on him by the defendants does not render their acts concurrent . . . ." *Mosby v. Manhattan Oil Co.*, 52 F.2d 364, 366 (8th Cir. 1931); *see* Restatement (Second) of Torts §§ 840E, cmt. b; 433A, cmt. d (divisibility of an alleged nuisance claim implies the need for product identification). Boiled down to its essence, what the City is really asking this Court for is contrary to those fundamental principles --a hypothetical trial, removed from actual facts surrounding any product, property, injured person, landlord, City activity, lack of the City's enforcement of its own lead laws, or other lead sources – all factors that would enter into a case brought by any individual plaintiff. The result would be an unfair, abstract trial devoid of any of the traditional protections afforded defendants in Missouri courts. *See Broussard v. Mieneke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344, 352 (4th Cir. 1998) (allowing plaintiffs to litigate claims based on a "perfect plaintiff" pieced together for litigation and unconnected to the facts and defenses violates fundamental notions of fairness and the "framework of basic principles of law").

D. The Less Rigorous Causation Standard The City Advocates Has No Limits And Could Be Used Against Government Entities And Public Officials

Under the causation standard the City proposes, liability will be imposed on anyone who "probably" or "most likely" did or did not do something at some time that may have contributed to the alleged public nuisance. Such a new legal standard could backfire on the City because it, too, has "contributed" to this alleged public nuisance. For example, if the City, like many government agencies, specified lead paints in government contracts, did it not contribute to the "presence" of lead in St. Louis? If the City is correct and the "mere presence" of lead paints is a public nuisance, then is the City not liable for all of the lead paints in the City's public buildings, schools, and hospitals, on its bridges and water tanks, and in its playgrounds? If "lead paints" as the City defines them are a public nuisance, then under the City's theory, the City itself and numerous government agencies substantially contributed to that public nuisance.

Moreover, if the presence of lead is a public nuisance, then the City, under its own theory of "contribution," is responsible for the nuisance as a result of a myriad of other operations including its landfills, incinerators, emissions from lead industry operations and decades of operating heavy machinery and City vehicles, and of course, the presence of lead in the City's water system from the use of lead pipes. When one considers who or what "substantially contributed" to the alleged public nuisance, and the alleged harm that flows from it, one can easily see that under such an amorphous standard the City itself may face significant liability.

Liability under the City's limitless "substantial contribution" standard would not only negatively affect just the City. If "substantially contributing" to the presence of lead paints is all that is required for liability, then every hardware store, professional painter, architect, home builder, and homeowner has, by definition, contributed to the nuisance by applying the lead paints or failing to maintain or remove the paint. In addition, every other historical manufacturer, distributor or retailer of lead related products could also be sued for public nuisance under the City's vague and lax definition of what is necessary to prove causation-in-fact.

Take for example the case of *Grommet v. St. Louis County*, 680 S.W.2d 246 (Mo. App. E.D. 1984). In *Grommet*, a group of homeowners sued the school district claiming it created a public nuisance when it built a road to access a school parking lot. Despite building the road to the school, the school district escaped liability after the court held it was not the proximate cause of the increased traffic, hazards to children and pedestrians, errantly driven automobiles, salt spills ruining lawns, or the drug and beer parties, which all alleged resulted from use of the new road. *Id.* at 252. Under the City's proposed new test of whether the school district "substantially contributed" to the nuisance, the result could be different.

To open cities and other public entities up to such unlimited and potentially devastating liability is unwise and unnecessary. The City has already established that, when it enforces its lead laws, the number of children with elevated blood lead levels decreases. The City itself has declared that it will have rid itself of the problem of

childhood lead poisoning by the year 2010. The City has means to protect children and to protect its treasury without this lawsuit. There is no reason for this Court to deviate so radically from established tort law, in a way that calls into question fundamental constitutional rights and imposes amorphous standards of liability, when the City already has the means and knows how to solve its remaining lead problem.

E. Adopting Any Theory of Liability Based on Market Data in Place of Proof of Actual Causation Is Contrary to Missouri Public Policy

The City's causation theory is also directly contrary to Missouri public policy, as recently declared by the legislature. *Zafft* specifically recognized that the case presented a "public policy choice." 676 S.W.2d at 247. Missouri courts have historically held that "the legislature is best equipped" to make "a public policy decision." *Powell v. Am. Motors Corp.*, 834 S.W.2d 184, 189 (Mo. banc 1992). *Accord*, *Ritchie v. Goodman*, 161 S.W.3d 851, 855 (Mo. App. S.D. 2005) ("legislature is better equipped to pronounce public policy relating to the consumption of alcoholic beverages by a minor in a social host setting").

Before 2005, R.S. Mo. § 537.067 (2000), imposed joint and several liability on all liable defendants, no matter how trivial their degree of fault. In 2005, in H.B. 393, the legislature repealed that rule for any defendant not 51% or more responsible for the injury. All other defendants are responsible only for their own percentage of fault. R.S. Mo. § 537.067.1 (2005 Supp.).

Thus, the former statute held a relatively innocent deep-pocket defendant liable for the whole judgment. In eliminating joint and several liability for such defendants, the

legislature obviously concluded that the former statute exposed them to liability greater than their true responsibility. That is precisely why *Zafft* rejected market share liability: it "exposes those joined to liability greater than their responsibility." 676 S.W.2d at 246.[26]

H.B. 393 does not apply to cases, like the City's, that were filed before its effective date. But it does reflect the legislature's current judgment that imposing liability on a party greater than its responsibility is unsound public policy. This Court has recognized the legislature's right to make "significant decisions of public policy" about such matters. *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 440 (Mo. banc 2002). In deciding, in 2007, whether to modify or overrule *Zafft*, this Court should defer to the policy choice the legislature made in 2005.

IV. THE TRIAL COURT CORRECTLY RULED THAT THE CITY IS NOT ENTITLED TO FUTURE DAMAGES IN THAT DAMAGES FOR TEMPORARY NUISANCE ARE LIMITED TO THE TEN YEARS PRIOR TO SUIT [APPELLANT'S POINT II].

In an effort to avoid dismissal on statute of limitations grounds, the City amended its Petition in June 2003 to allege specifically that the alleged public nuisance was "temporary" (LF 1090).[27] That characterization was a deliberate, strategic choice to obtain the benefit of the 10-year statute of limitations for temporary nuisances set forth in R.S. Mo. § 516.110, which "runs anew from the accrual of injury from every successive

[26] As previously explained, the trial court's speculation that this concern does not apply to this case (LF 2933) is simply wrong.

[27] The Amendment came in response to Defendants' Motion for Summary Judgment on Statute of Limitations Grounds (LF 0440).

invasion of interest." *Stevinson v. Deffenbaugh Indus., Inc.*, 870 S.W.2d 851, 855 (Mo. App. W.D. 1993). In contrast, the statute of limitations for a claim based on a permanent nuisance is only five-years, R.S. Mo. § 516.120, and begins to run immediately upon the creation of the permanent nuisance. *Rebel v. Big Tarkio Drainage Dist.*, 602 S.W.2d 787, 792 (Mo. App. W.D.1980), *overruled on other grounds by Frank v. Envtl. Mgt.*, 687 S.W.2d 876, 880 n.3 (Mo. banc 1985). In response to Defendants' 2003 motion for summary judgment on statute of limitations grounds, the trial court ruled in the City's favor and held that the nuisance at issue was temporary under Missouri law. The trial court also held that the City could not recover future damages in a temporary nuisance case, but was limited to a claim for damages incurred within ten years of commencing suit. (Mar. 9, 2004 Order, LF 1981, 1990).

In a transparent attempt to recover windfall damages, the City now argues that it can recover as future damages the costs it claims it will incur to "abate" all lead pigment in the City -- even though it has prosecuted this suit as a temporary nuisance case and future damages are only allowed in permanent nuisance cases. The City's argument on damages is diametrically contrary to Missouri law.

A. Future Damages Are Not Recoverable In Temporary Nuisance Cases.

The City asserts that it is entitled to the claimed future cost of abating lead paint, because, "[n]othing in the nuisance doctrine disallows recovery of future costs to remediate an existing public nuisance." (City Br. 36). Notably, the City fails to cite a *single* Missouri case awarding a plaintiff future costs in a temporary nuisance case. It can not, as the City's position is wholly unsupported by long-standing Missouri law.

Missouri courts have long held that future damages are not available in a temporary nuisance case. As stated by the Supreme Court, "[i]t would be reversible error for the trial court to submit to the jury an instruction on permanent damages where the evidence shows the injury to be only temporary, even though plaintiff pleaded and asked for permanent damages." *Shelley v. Ozark Pipe Line Corp.*, 37 S.W.2d 518, 521 (Mo. 1931). "The reason for this rule is as follows: A plaintiff should not be permitted to recover future damages that may never be sustained." *Id.* Applying this rule, the Court of Appeals has held that:

> [t]he recovery [in a temporary nuisance case] is for the damage *actually sustained* to the commencement of suit, but not for prospective injury. The theory is that a temporary nuisance may be abated at any time by a reasonable effort or by an order of the court, but if not, then the injured party can bring a successive action for the continuance of damage.

Stevinson, 870 S.W.2d at 855 (emphasis added) (internal citation omitted).

The City here is picking and choosing discrete elements from divergent theories to try to evade the statute of limitations. The City says the nuisance is temporary to avoid the statute of limitations; however, to avoid the rule against future damages, the City now argues that the abatement costs it supposedly will incur in the future are not really future damages. Responding to the same argument, the trial court summed up the logical inconsistency in the City's position:

> While the Court appreciates the fact that the City's dilemma on this aspect of the case presents something of a legal Hobson's choice – (i.e., if the nuisance is "permanent" then a damages claim is completely barred by the statute of limitations, while if it is "temporary" then the City is barred from recovering any damages which accrue after the commencement of suit) – nevertheless, . . . that is the law in Missouri.

(LF 1989).

The supposedly contrary cases the City cites are unpersuasive. First, to support its claim for future damages, the City relies on Missouri cases holding that a plaintiff may, under certain circumstances, be entitled to *injunctive* relief. (*See* City Br. 43-44 (citing *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 74 S.W. 474 (Mo. App. St. L. 1903); *City of Kansas City v. Mary Don Co.*, 606 S.W.2d 411 (Mo. App. W.D. 1980)). The City, however, "*has not brought* a claim for *injunctive* relief against Defendants, but rather has only asserted a claim for *damages* resulting from the alleged public nuisance." (Mar. 9, 2004 Order n. 3, LF 1979). Moreover, as the trial court explained, it is unlikely the City could ever obtain injunctive relief against Defendants because they do "not have the power to abate the described nuisance because [they are] not in control of the private dwellings containing the painted surfaces." *Id.*

If anything, the injunctive relief cases the City cites demonstrate why the City's request for future damages is inappropriate. True injunctive relief is subject to well-

established and rigorous standards. *See, e.g., St. Louis Safe Deposit & Sav. Bank*, 74 S.W. at 482 (injunctive relief appropriate only where "the loss to the [defendant property owner] by granting the injunctive relief will not be out of proportion to the advantage to the plaintiff, and it must further appear that the mischief cannot be remedied by more conservative action"). But, the City seeks to evade those standards by avoiding a request for injunctive relief and seeking permanent monetary damages instead.

Next, the City relies on *City of Harrisonville, Mo. v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334 (1933), and *Mel Foster Co. Props., Inc. v. Am. Oil Co.*, 427 N.W.2d 171, (Iowa 1988), neither of which supports its argument. In *Harrisonville*, a nuisance case based on the operation of a sewer disposal plant, the Court acknowledged that it was not applying Missouri law, but looked instead to New York cases for the rule applied. *Harrisonville*, 289 U.S. at 340, n.4.[28]

The decision in *Mel Foster* was based entirely on interpretation of Iowa law, 427 N.W.2d at 175-76, and is also distinguishable on the facts. That case involved a so-called "hybrid" nuisance—a temporary nuisance that results in a permanent, technically non-abatable injury, in that case, contamination of land by gasoline leaking from underground storage tanks. *Id.* at 175. The Iowa court held that, in light of the unique and hybrid nature of the particular nuisance at issue, permanent damages measured by the diminution in the value of the real estate could be awarded in the temporary nuisance action. *Id.* The City makes no claim here that the presence of lead paint is a temporary

[28] In fact, the *Harrisonville* decision acknowledges that under Missouri law the sewage plant would be considered a permanent nuisance, and the claim would be time-barred. *Harrisonville*, 289 U.S.at 341, n.6. *Lewis v. City of Potosi*, 317 S.W.2d 623, 628 (Mo. App. St. L. 1958) (effluent from sewage treatment plant a permanent nuisance subject to five-year statute of limitations), confirms that conclusion.

nuisance that has caused a permanent, non-abatable injury. Nor has the City sought damages measured by the loss of property value. Moreover, under Missouri law, a leaking underground storage tank is treated as a temporary nuisance with damages limited to those incurred within ten years before suit is filed. *Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 108 (Mo. App. E.D. 2005).

B. The City Is Not Entitled To Future Damages Based On Policy And Administrative Reasons.

Having no Missouri authority on which to rest its argument, the City calls for a radical change in Missouri law based on the grounds that the policy concerns underlying nuisance damages are not implicated here and Missouri's traditional rules are too burdensome. (City Br. 40-42). Neither of these assertions is correct.

Future damages and costs are not awarded in temporary nuisance cases precisely because such damages are speculative and "may never be sustained." *Shelley*, 37 S.W.2d at 521. A temporary nuisance, by definition, is abatable and thus may not exist in the future. *See id.* Here, because neither the City nor Defendants control the alleged nuisance, there is *no* guarantee that the alleged nuisance will continue into the future and no possible way to know the amount of damages the City might actually incur from property to property. Missouri law and City ordinances require property owners to maintain their property to prevent any hazardous condition from deteriorating lead paint.[29] Lawbreaking on the part of property owners should not be presumed. Moreover,

[29] Removal of intact lead paint may increase lead dust in the home and create a risk that did not exist. Both EPA and HUD recognize that removal of intact lead paint can create a health hazard that did not exist when the paint was

older homes containing lead paint may be abandoned or demolished; or property owners may choose to leave intact lead paint alone, thus avoiding the possibility of creating a hazard by disturbing intact lead paint.

In addition, the City is required to exhaust its administrative remedies for dealing with problem properties before seeking other remedies. *City of Kansas City v. New York-Kansas Bldg. Assoc., L.P.*, 96 S.W.3d 846, 855-57 (Mo. App. W.D. 2002). Under its own ordinances, the City has the authority to order property owners to abate lead paint hazards. If owners fail to do so, the City may remediate the lead hazard and seek recovery against the property owner for the costs. *See* St. Louis City Ordinance 64690; ST. LOUIS CITY REV. CODE CH. 11.22.120 (Def. App. 6). Thus, any "abatement" costs that the City may incur in the future would arise only if: (i) property owners fail to maintain their property as required by law, (ii) the same property owners also fail to abide by orders to bring their property into compliance with the ordinances, (iii) the City remediates the lead hazards, and (iv) the City fails to obtain reimbursement from property owners. It would be complete speculation to attempt to determine now whether, or to what extent, the events in this chain would ever occur or the amount of un-reimbursed costs, if any, the City would incur.

The City's argument that "the remedy of successive actions" is "overly burdensome," similarly misses the mark. At the outset, requiring the City to pursue successive actions will not, as the City asserts without support, interfere with State or City public health policies. In fact, requiring the City to pursue successive actions

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left intact. *See generally* 66 Fed. Reg. 1206-01 (Jan. 5, 2001) (explaining why the EPA and HUD do not require abatement of all lead paint); *see also* 40 C.F.R. § 745.65 (codifying same).

against property owners is the established public health policy under City ordinances and State statutes. The abatement of actual lead hazards in Missouri is governed by the Lead Abatement and Prevention of Lead Poisoning Act ("LAPLP"), s*ee* R.S. Mo. § 701.300 *et seq.* (Def. App. 11) and the City's Lead Poisoning Control Law, ST. LOUIS CITY REV. CODE § 11.22.01 *et seq.*(Def. App. 1), neither of which requires the removal of intact lead paint, and which are operated and funded independently of this lawsuit. As a result, the only arguable "damage" from requiring the City to pursue successive suits is that the City will not receive at this time the money it asserts *may be* necessary sometime in the future to compensate for un-reimbursed costs of remediating lead hazards or the costs of removing *non-hazardous*, intact lead paint, which neither the legislature nor the Board of Alderman view as a health concern.

Even if the damages sought were necessary for the City's actual abatement program, which they are not, requiring the filing of successive suits would not impede that program. If anything, requiring the City to file successive suits after it has actually spent money on abatement would promote the completion of its abatement program. Successive suits allow the Court to ensure that the damage award is actually being spent, or has been spent, on lead abatement, rather than some other legislative policy once the money becomes part of the City's general fund.

In all events, the City's argument ignores the fact that the "burden" of successive suits in temporary nuisance cases is a direct consequence of the "benefit" of the more generous statute of limitations that applies in such cases. The assumption underlying the longer limitations period in temporary nuisance cases is that the nuisance may constitute

"successive invasions" of the plaintiff's interest over time. The direct consequence of this assumption is that the total measure of damages in a temporary nuisance case cannot be accurately calculated in a single suit, and that damages may never occur or can disappear in the future. *See Shelley*, 37 S.W.2d at 520-21.

Finally, altering the law to allow the City to recover future damages is not, as the City suggests (City Br. 42-45) necessary to deal with the problem of childhood lead poisoning in St. Louis. There is no need for a drastic solution because federal and state and City programs are working. The CDC has declared that the steep decline in average childhood blood lead levels "was one of the most significant public health successes of the last half of the 20th century." U.S. Department of Health and Human Services, *Preventing Lead Poisoning in Young Children A Statement by the Centers for Disease Control and Prevention*, at 1 (August, 2005) (Def. App. 319). Since the mid-1970's, children's average blood lead levels have declined over 80%. *Id.* at 3 (Def. App. 321). Because of these significant achievements, the federal government's Presidential Task Force On Environmental Health Risks to Children believes that childhood lead poisoning can be eliminated in this country by the year 2010. *See* Presidential Task Force Report (Def. App. 65). Consistent with these federal proclamations, in the last five years, elevated blood lead levels in the City have steadily dropped, and the City has declared that it will rid itself of the problem of childhood lead poisoning by 2010.

Moreover, the costs of solving the lead paint issue do not necessarily have to fall on the City and its taxpayers as the City alleges. (City's Br. 38.) Instead, the City can enforce its long-standing lead laws and (1) abate the properties and collect from the landlords and homeowners through a tax lien; or (2) sanction civilly (through monetary sanctions) or criminally violators who continue to allow deteriorated lead paint to exist in their housing units. The City could also choose to target those few individuals who are allowing children to be exposed to deteriorated lead paint and are responsible for the remaining problem. This would be consistent with the legal principle that the party who controls the alleged nuisance is in the best position to prevent or remedy it. *See, e.g., City of Webster Groves v. Erickson*, 763 S.W.2d 278, 280 (Mo. App. E.D. 1988); *Bellflower v. Pennise*, 548 F.2d 776, 778 (8th Cir. 1977).

To abolish the successive suit doctrine, as the City suggests (City Br. 40-45), however, would make the temporary nuisance doctrine theoretically inconsistent: the nuisance would be repeating and renewing (and capable of cessation) for statute of limitations purposes, but permanent – unchanging and unchangeable – for damage purposes; the damages speculative and continuing into the future for limitations purposes, but concrete and already-incurred for damage award purposes. No Missouri court has ever entertained such an incoherent view of nuisance law, and this Court should decline the City's invitation to do so.

V. THIS COURT CAN AFFIRM THE LOWER COURT'S JUDGMENT ON ALTERNATIVE GROUNDS.

This Court should affirm the summary judgment in Defendants' favor on the ground that the City cannot meet its burden to prove cause in fact by proving product identification. This Court may also affirm the lower court's decision on alternative grounds. *See Turner Eng'g., Inc. v. 149/155 Weldon Parkway, L.L.C.*, 40 S.W.3d 406, 409 (Mo. App. E.D. 2001) ("We will affirm the order of dismissal if any ground supports the motion, regardless of whether the trial court relied on that ground."); *Deeken v. City of St. Louis*, 27 S.W.3d 868, 870 (Mo. App. E.D. 2000) (same). Specifically, the entry of judgment in Defendants' favor should also be affirmed (i) because the City's claims are not properly a public nuisance under Missouri law; (ii) the City's claims violate the separation of powers doctrine; and (iii) because the claims as presented in the City's brief to this Court are time-barred.

A. The City Cannot Turn A Products Liability Claim Into A Public Nuisance Claim.

1. The City's public nuisance claim does not rest on an interference with a public right.

Under Missouri law, a public nuisance is defined as unreasonable interference with a right common to the public such as the public health, safety, peace, morals, or convenience. *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 792 (Mo. banc 1980) (quoting Restatement (Second) of Torts § 821B(1) (1977)); *New York-Kansas*

Bldg. Assoc., 96 S.W.3d at 857. Thus, the analysis has two steps: (1) does the condition complained of interfere with a public right; and (2) is that interference unreasonable?

The essence of public nuisance is the interference with a public right:

> . . . consideration should be given to places where the public have the legal right to go or congregate, or where they are likely to come within the sphere of its influence. A nuisance is not public though it may injure a great many persons, the injury being to the individual property of each. A nuisance is public when it affects the rights enjoyed by citizens as part of the public, as the right of navigating a river, or traveling a public highway; rights to which every citizen is entitled.

Varahi, 39 S.W.3d at 535 (quotations omitted). Unlike "the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured," a public right is "collective in nature" and is "common to all members of the general public," like the common right to clean water or a public right of way. Restatement (Second) of Torts, § 821B, cmt. g.

The City's public nuisance claim does not rest on allegations that constitute an interference with a *public* right. The alleged public nuisance exists in the "presence" of lead-containing paint in individual, private, residential properties.

> The concept of public right as that term has been understood in the law of public nuisance does not appear to be broad enough to encompass the right of a child who is lead-poisoned as a result of exposure to deteriorated lead-based paint in private residences or child-care facilities operated by private owners. Despite the tragic nature of the child's illness, the exposure to lead-based paint usually occurs within the most private and intimate of surroundings, his or her own home. Injuries occurring in this context do not resemble the rights traditionally understood as public rights for public nuisance purposes -- obstruction of highways and waterways, or pollution of air or navigable streams.

D. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L.Rev. 741, 818 (2003).

But whatever the type of paint in an individual dwelling and whatever the condition of that paint, the public has no right to enter those premises. Failing such a right, the condition of the property cannot constitute a public nuisance. *See New York-Kansas Bldg. Assoc.*, 96 S.W.3d at 859-60. Conditions that would not constitute a public nuisance in one private property do not become a public nuisance simply because the number of properties increases. *Varahi*, 39 S.W.3d at 535.

Nor is there a collective public right to lead-free housing. Certainly under City ordinances property owners have a legal obligation to maintain property in a condition of

repair that conforms to the ordinances, including maintaining property in a lead-safe condition. There is, however, no generalized, enforceable public right to safe or sanitary housing. *See Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Hurt v. Philadelphia Hous. Auth.*, 806 F. Supp. 515, 529 (E.D. Pa. 1992); *Diversified Realty Group, Inc. v. Davis*, 628 N.E.2d 1081, 1086 (Ill. App. Ct. 1993) (Rakowski, J. dissenting on other grounds). The Court should also affirm the trial court's judgment against the City because the City's alleged public nuisance does not constitute interference with a public right under Missouri law.

2. Missouri public nuisance doctrine does not apply to the manufacture and sale of products.

Historically, Missouri public nuisance law applies in two circumstances. First, public nuisance liability may attach where an owner uses property in a way that interferes with a public right. *See 44 Plaza, Inc. v. Gray-Pac Land Co.*, 845 S.W.2d 576, 580 (Mo. App. E.D. 1992) (public nuisance claim arose where landowner posted signs and planted trees on property in manner that created a traffic hazard); *City of Lee's Summit v. Browning*, 722 S.W.2d 114-116 (Mo. App. W.D. 1986) (public nuisance arose where defendant's salvage yard interfered with traffic and created a safety hazard). Second, older cases also found public nuisance liability based on *unlawful* activities not involving the use of property that interfered with public health or safety. *See State ex rel. Collet v. Errington*, 317 S.W.2d 326, 331 (Mo. 1958) (continuous and habitual violation of medical practice act constituted a public nuisance); *State ex rel. Allai v. Thatch*, 234 S.W.2d 1, 6 (Mo. banc 1950) (striking union workers' blockage of a public road

constituted public nuisance); *State ex rel. Igoe v. Joynt*, 110 S.W.2d 737, 741 (Mo. banc 1937) (ownership and operation of illegal gambling devices constituted public nuisance).

Here, it is undisputed that none of the Defendants owns or controls any of the private residential property where the public nuisance is alleged to exist. Nor does the City allege that any Defendant committed an unlawful act in manufacturing and selling lead pigment or lead-containing paint many decades ago. Thus the circumstances that Missouri law recognizes as the basis of public nuisance liability do not exist here.

Instead, the City advances the novel theory that a public nuisance claim can be based on the manufacture and sale of products. Currently, a well-developed body of law governs liability of product manufacturers. The City seeks to rewrite that law so as to eliminate fundamental elements of product identification, defect and legal causation. This approach would eliminate the restraints on absolute or excessive liability that currently exist. If every activity threatening "health or welfare" were potentially a "public nuisance," plaintiffs would be able to "convert almost every products liability action into a nuisance claim." *See Johnson County, Tenn. v. U.S. Gypsum Co.,* 580 F. Supp. 284, 294 (E.D. Tenn. 1984), decision set aside in part as to lower court's decision on breach of warranty claim only, 664 F. Supp. 1127 (E.D. Tenn. 1985). If lead paint is a public nuisance, why not pharmaceutical drugs that injure people who ingest them, or tires that explode, or a host of other products that have, from time to time, caused injury? Even more relevant, if intact lead paint is a public nuisance, then is not every product that has

the "potential" to cause harm to the health and welfare also a public nuisance? For example, what about brakes on cars that will inevitably fail? What about furnaces that, while functioning now, will inevitably deteriorate and, without proper maintenance, become extremely dangerous? Would not all of those products, the minute they are put on the market, constitute public nuisances under the City's theory of liability? Every product has some foreseeable risk of harm, especially in hindsight. Procedures such as recalls and class actions already provide remedies for defective, unreasonably dangerous products.

All Defendants in this action ceased making lead paints or pigments for residential use by 1978 (at the latest), when lead paints for that use were banned from interstate commerce. Defendants did not have fair warning that they could be held liable in public nuisance to the City for homeowners' failure to maintain or remove deteriorated paint in their private homes (regardless who manufactured that paint); the City began its suit almost three decades after they last sold their products.

As this Court and others have repeatedly said, product manufacturers are not the insurers of all possible subsequent uses and misuses of their products. *See Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343, 346-47 (Mo. 1964) (the manufacturer of a product "is not liable as an insurer, and he is under no obligation to make the product accident proof or foolproof"); *see also Boyer v. Bandag, Inc.*,

943 S.W.2d 760, 764 (Mo. App. E.D. 1997) (court knew of "no authority which premises products liability upon such an absence to police"); *City of Bloomington v. Westinghouse Elect. Corp.*, 891 F.2d 611, 613-14 (7th Cir. 1989) (PCB manufacturers not liable for creation of public nuisance based on improper disposal of PCBs by a third party, after defendant lost right to control the PCBs at the point of their sale); *Mitchell v. Ford Motor Co.*, 533 F.2d 19, 21 (1st Cir. 1976) ("a manufacturer does not have to anticipate that maintenance will be neglected").

Under the City's theory, product manufacturers would be forced to assume the role of insurers of their products and "be forced to police their consumers to ensure that products would not be used in ways that could create a public nuisance." Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L. J. 541, 580 (2006). Tort law has developed numerous common-sense limitations on liability, balanced to protect consumers' safety and to protect product manufacturers from unreasonable and infinite liability – all of which is in jeopardy by the City's new theory of liability.

The City is essentially asking the Missouri courts to invent a new cause of action that would allow plaintiffs allegedly injured by a product to avoid the legal standards and proof requirements of traditional tort theories such as negligence or strict liability. Missouri courts have historically refused to invent new causes of action, because doing so

is a legislative responsibility. *See Powell v. Am. Motors Corp.*, 834 S.W.2d 184, 188-190 (Mo. banc 1992); *Klein v. Abramson*, 513 S.W.2d 714, 718 (Mo. App. K.C. 1974). There is no reason to depart from that settled rule in this case, and every reason not to. The City's new cause of action, as presented in its argument to this Court, would not only expand nuisance liability to encompass what is essentially a product liability or negligence claim, but would require the Court to abrogate established causation principles, *see* Section I, *supra*, turn settled law concerning damages available in temporary nuisance actions inside out, *see* Section II, *supra*, and, moreover, allow a remedy that is contrary to State and City laws governing lead paint hazards. *See* Section IV B, *infra*.

B. The City's Claims Violate The Separation Of Powers Doctrine.

1. The City's suit infringes on the legislative power.

The Court can also affirm the judgment against the City on the ground that the City's claims violate the separation of powers doctrine under Missouri law. Under the Missouri Constitution, the functions and powers of each branch of government are strictly separated:

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others,

> except in the instances in this constitution expressly directed or permitted.

Mo. Const. art. II, § 1. The Constitution vests the legislative power, moreover, in the State General Assembly, *see id.* at art. III, § 1 (legislative vesting clause), or in some instances local governments, *see id.* at art. VI, §§ 18(c), 19(a) (home rule provisions). It further designates funding determinations as exercises of legislative power. *See, e.g., id.* at art. III, § 36.

Recognizing that "[t]he doctrine of separation of powers, as set forth … in Missouri's constitution, is vital to our form of government because it prevents the abuses that can flow from centralization of power," Missouri courts have repeatedly held that "each branch of government ought to be kept as separate from and independent from each other as the nature of free government will admit" and that only the Legislative Branch of government can exercise legislative power. *Weinstock v. Holden*, 995 S.W.2d 408, 410-11 (Mo. banc 1999); *see also State Auditor v. Joint Comm. on Legis. Research*, 956 S.W.2d 228, 234 (Mo. banc 1997). Thus, the courts have recognized that the power to direct fiscal policy can be exercised only by the Legislative Branch. *See State ex inf. Danforth v. Merrell*, 530 S.W.2d 209, 213 (Mo. banc 1975); *State ex rel. Cason v. Bond*, 495 S.W.2d 385, 392 (Mo. banc 1973); *Brown v. City of Craig*, 168 S.W.2d 1080, 1083 (Mo. 1943). As discussed above, Missouri courts have repeatedly refused to invent new causes of action, because the creation of such actions are a legislative function. *See Powell*, 834 S.W.2d at 190; *Klein*, 513 S.W.2d at 718.

The City's suit and its requested judicial relief violate these basic separation of powers principles both by seeking to supplant and undercut legislative enactments and policy relating to lead paint, and by advancing a new cause of action that usurps legislative funding decisions. In 1993, Missouri enacted the LAPLP, a comprehensive legislative scheme for lead paint abatement and the prevention of lead poisoning. *See* R.S. Mo. § 701.300 *et seq.* (Def. App. 11) Unlike the relief requested here, the LAPLP does not prohibit the *presence* of lead paint in dwellings within the State. Rather, it defines a lead hazard as "any condition that causes exposure to lead that would result in adverse human health effects from deteriorated lead-bearing substances or lead-bearing substances present in 'accessible surfaces,' 'friction surfaces' or 'impact surfaces' as such terms are defined in 15 U.S.C. § 2681." R.S. Mo. § 701.300(19) (Def. App. 12). In addition, the LAPLP makes property owners responsible for the prevention and abatement of lead hazards. R.S. Mo. § 701.308(1), (5)(2), (6)(2) (Def. app. 20-21) ("the *owner* shall comply with the requirement for abating or establishing interim controls for the lead hazard," the *owner* may be ordered to "cease and abate" a violation of the Act, and the *owner* may be subject to "injunctive relief to ensure that the lead hazard is abated or that interim controls are established.") An owner who persists in violating state law faces either criminal or civil sanction under the Act. *See* R.S. Mo. §§ 701.320, 701.330 (Def. app. 33, 38). City ordinances similarly place the responsibility for preventing and removing lead hazards on property owners, ST. LOUIS CITY REV. CODE § 11.22.130 (Def. App. 7).

In direct contravention of the comprehensive legislative scheme concerning lead paint implemented by the Missouri Legislature and the Board of Alderman of the City of Saint Louis, the City – in particular the City's Executive Branch – seeks through this public nuisance action to abate the presence of *all* lead paint, not just lead hazards, and attempts to force former lead pigment and paint manufacturers, distributors, or their affiliates – as opposed to property owners – to pay for this abatement. As demonstrated above, the Missouri Legislature and the City's own Board of Aldermen have extensively considered the health hazards posed by lead paint and enacted laws that (i) permit the presence of intact lead paint, (ii) require only targeted abatement in the interest of public health, and (iii) make property owners responsible for abatement costs. Putting the financial and practical responsibility on property owners to prevent or abate lead paint hazards is a sound public health policy, since they are in the best position today to prevent those hazards and protect children living on their properties. This policy fits with property owners' traditional duties to maintain their properties to comply with housing codes and to provide safe, habitable premises. In light of these legislative enactments and the exercise of legislative power they represent, the City cannot use executive and judicial powers to contradict the Legislature's and Board of Aldermen's policies concerning lead paint abatement.[30]

[30] No Missouri court has held that conduct expressly permitted or regulated under a legislative scheme—here, allowing intact lead paint to remain unabated—can constitute a nuisance where the scheme is designed to alleviate the alleged nuisance. For good

Established law in Missouri and elsewhere provides that where, as here, a plaintiff targets an activity or condition on which a legislative body has actively initiated comprehensive standards, and where adjudication could hamper those standards, the judicial branch should decline to interfere with the legislative program. *See generally New York-Kansas Bldg. Assoc.*, 96 S.W.3d at 856-57 (holding that court could not grant injunctive relief in nuisance action in light of comprehensive administrative scheme governing abatement of alleged nuisance); s*ee also City of Chicago v. Gen. Motors Corp.*, 332 F. Supp. 285, 291 (N.D. Ill. 1971) (declining to interfere with "comprehensive [state and federal] programs designed to solve a complex social, economic and technological problem"), *aff'd*, 467 F.2d 1262 (7th Cir. 1972); *State ex rel. Norvell v. Arizona Pub. Serv. Co.*, 510 P.2d 98, 106 (N.M. 1973) (declining to exercise jurisdiction in light of state legislation and regulations creating comprehensive water quality program). And, it is well established that where "there has been established a comprehensive set of legislative acts . . . governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations." Restatement (Second) Torts § 821B, cmt. f.

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reason: doing so would raise serious constitutional questions, such as whether the application of the common law public nuisance doctrine is unconstitutionally vague or violates due process. *See, e.g., Grove Press Inc. v. City of Philadelphia*, 418 F.2d 83, 88 (3d Cir. 1969); *City of Osceola v. Blair*, 2 N.W.2d 83, 84 (Iowa 1942).

The City's action also violates the separation of powers doctrine by re-configuring a legislative fiscal policy decision without legislative authorization. The City seeks to recover from Defendants the "costs for assessing, abating, and remediating" all lead paint. (LF 1090). Legal responsibility for those costs, however, have been legislatively assigned to property owners under State and City's lead laws. To the extent property owners do not fulfill their legal responsibilities and the City undertakes lead remediation directly, such services are traditional government services that the government has elected to provide its citizens. Accordingly, the Court may not allow the City to recover abatement damages absent express statutory authorization. *See U. S. v. Standard Oil Co.*, 332 U.S. 301, 314-16 (1947); *City of Flagstaff v. Atchinson, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323-24 (9th Cir. 1983).

2. Allowing recovery on the City's public nuisance claim would violate the separation of powers doctrine.

Although the trial court correctly recognized that Defendants' separation of powers argument "is a serious and substantial argument, and one that cannot simply be dismissed out of hand," (Mar. 9, 2004 Order at 20, LF 2012) the court nonetheless concluded that no violation of the separation of powers doctrine had occurred. The trial court reasoned that the City's action did not undermine the legislative prerogative, because LAPLP does not define an exclusive remedy (*id.* 23-24, LF 2015-16); the City has general authority to litigate nuisance actions (*id.* 24-28, LF 2016-2020); and nothing in Missouri case law supports Defendants' argument (*id.* 28-29, LF 2020-2021).

At the outset, the LAPLP, specifically R.S. Mo. § 701.324, does not authorize the City's suit. Section 701.324 provides that:

> Nothing in sections 701.300 to 701.324 shall be interpreted or applied in any manner to defeat or impair the right of any person, entity, municipality or other political subdivision to maintain an action or suit for damages sustained or for equitable relief, or for violation of an ordinance ***by reason of or in connection with any violation of sections 701.300 to 701.330***.

R.S. Mo. § 701.324 (emphasis added) (Def. App. 35). The trial court read this provision as a "savings clause" expressly providing that LAPLP is not an exclusive remedy. On the contrary, § 701.324 authorizes *only* those actions that are commenced "by reason of or in connection with any violation of sections 701.300 to 701.330"—provisions that deal only with actions against property owners for the abatement of lead hazards. Thus, § 701.324 *confirms*, rather than disproves, that LAPLP was intended to define an exclusive approach to lead paint abatement.

Similarly, ST. LOUIS REV. CODE § 11.58.010, et seq., which authorizes the City to define and abate a nuisance does not negate the separation of powers violation the City's here represents. The Code authorizes recovery of abatement costs as part of a specific administrative scheme that is not at issue here: after the health commissioner "give[s] notice *to the property owner* or his agent and hold[s] a hearing prior to declaring such condition to be a nuisance and ordering its abatement." ST. LOUIS REV. CODE

§ 11.58.090. And, nothing in the Code purports to authorize the City to recover nuisance abatement costs in a manner that contradicts more specific state and local legislation.

Finally, the Court of Appeals decision in *New York-Kansas Bldg. Assoc.*, 96 S.W.3d 846, establishes that the rule that should apply here. In that case, the court held that the City of Kansas City could not obtain injunctive relief against a nuisance where a complex administrative scheme addressed the same nuisance. The court reasoned that the City could not, in light of the administrative scheme, demonstrate an inadequate remedy at law and also that the City needed independent statutory authority to obtain relief. *Id.* at 856-57. The trial court here declined to apply *New York-Kansas Bldg. Assoc.* on the ground that the decision addresses only injunctive relief. (Mar. 9, 2004 Order at 27, LF 2019) But there is no logical reason to conclude that a complex administrative scheme precludes injunctive relief, but allows claims for damages that are equally inconsistent with the regulatory approach.[31]

In sum, the City's Executive Branch has decided that it does not like the State Legislature's or the City's Board of Alderman's approach to lead paint hazards and seeks to impose an abatement policy and fund that policy in a way that contradicts and undercuts the legislative solution. Executive and Judicial Branch second-guessing of legislative policy and fiscal policy, however, is precisely what the separation of powers doctrine prohibits.

[31] Because the trial court also ruled in 2004 that the City could not recover future damages for temporary nuisance, it did not consider that the City seeks far more than past damages. As its Brief to this Court makes clear (City Br. 35-42), the City seeks to "abate" the alleged public nuisance altogether, by forcing Defendants to pay to remove all lead paint regardless of condition or location, which is contrary to the legislative scheme. In addition, the abatement sought is not pursuant to LAPLP, and thus lacks the requisite independent statutory authority. *See New York-Kansas Bldg. Assoc.*, 96 S.W.3d at 857.

C. The City's Claims As Pled And Argued To This Court Are Barred By The Five-Year Statute of Limitations For Permanent Nuisance.

Judgment for Defendants is also proper because the City's claims, as described in its Brief to this Court, are time-barred. A claim arising out of a permanent nuisance is subject to the five-year statute of limitations provided in R.S. Mo. § 516.120, which "runs immediately upon the creation of [the] permanent nuisance and bars all claims of damage, present and future, after the lapse of the statutory period." *Rebel*, 602 S.W.2d at 792. In contrast, a temporary nuisance is subject to a ten-year limitations period, *see* R.S. Mo. § 516.110, that "runs anew from the accrual of injury from every successive invasion of interest." *Stevinson*, 870 S.W.2d at 855. There is no dispute that the City's suit is time-barred if it is based on a claim of permanent nuisance.

A permanent nuisance is a condition "created by the inherent character of a structure or business," *Shelley*, 37 S.W.2d at 519; where the source of the plaintiff's alleged injury is "injurious as installed, such that the inherent character of the structure will cause injury even in its usual and lawful operation. . . ." *DeSoto Fuels*, 169 S.W.3d at 106; or where the source of the nuisance is intended to be "durable, lasting, unalterable, and thus permanent." *Shade v. Missouri Highway & Transp. Commn*, 69 S.W.3d 503, 513 (Mo. App. W.D. 2001). When a nuisance is permanent, "the act or nuisance at once caused all the possible damage," *Spain v. City of Cape Girardeau*, 484 S.W.2d 408, 505 (Mo. App. St. L. 1972); the damage "'is immediately estimable,'" *Hayes v. St. Louis & S.F.R. Co.*, 162 S.W. 266, 269 (Mo. App. Spr. 1914) (internal citation omitted). Finally, abatability is a factor in determining whether a nuisance is

temporary or permanent. If "abatement [is] reasonably practicable and economically feasible," *Hanes v. Cont'l Grain Co.*, 58 S.W.3d 1, 4 (Mo. App. E.D. 2001), the nuisance falls in the temporary category. "Reasonably and practically" abatable means by "reasonable effort or by an order of the court." *Vermillion v. Pioneer Gun Club*, 918 S.W.2d 827, 831 (Mo. App. W.D. 1996). The "mere technological feasibility" of abatement, however, is insufficient to demonstrate a temporary nuisance, because "'abatable' means that the nuisance can be remedied at a ***reasonable cost by reasonable means***." *Mangini v. Aerojet-General Corp.*, 12 Cal. 4th 1087, 1099 (Cal. 1996) (emphasis added); *see also Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 625 (Ky. Ct. App. 2003) (defining permanent nuisance as a private nuisance "that cannot be corrected or abated at *reasonable expense* to the owner and is relatively enduring and not likely to be abated voluntarily or by court order") (emphasis added).

The public nuisance claim the City describes in its Petition and its Brief to this Court fits the definition of permanent nuisance. *First*, the City's claim is based on the mere "presence" of lead paint, although its Brief acknowledges that deteriorated paint is the real source of any hazard.[32] In other words, the City claims that lead-containing paint is a nuisance *as installed* and due to its *inherent character*, which are criteria for permanent nuisance. (City Br. 11, 37). Moreover, it is undisputed that the lead paint at

[32] In the trial court, the City consistently argued that "[t]he presence of lead paint within housing built before 1978 in the City creates a dangerous condition. Lead paint, *whether deteriorated or maintained*, presents a continuing threat of injury to those who come in contact with it. The dangers of lead paint will always be present until the lead paint is abated." (City's Memo. in Opp'n to Defs' Mot. for S.J. Based on Limitations 2, LF 0955). No doubt because of statute of limitations implications, the City now tries to tread a fine line between a claim that the "presence" of lead paint alone constitutes a public nuisance and a claim that deteriorated paint is the problem. (City Br. 11).

issue here has been "present" in the City for decades, indeed in some older buildings for nearly a century, and is thus "durable" and "lasting" in nature.

Second, the City essentially claims that all of its alleged damages were incurred when the paint was applied and could be estimated immediately in terms of the claimed cost to remove the paint. (City Br. 38-40).

Third, the City appears to claim that "abatement" in the context of its public nuisance claim means to remove all lead paint from private residences in St. Louis, regardless of where it is located or the condition of the paint. (City Br. 35). The Court need look no further than Missouri law and City ordinances to see that such abatement is neither reasonable or practicable. It has already been legislatively determined that the reasonable and practicable approach to lead paint hazards is to require remediation only where lead-containing paint is in a deteriorated condition or is on friction surfaces, and to place that responsibility on property owners. In addition, federal regulations establish that an "abatement" program that disturbs intact lead paint will create hazards where none existed before. *See generally*, 66 Fed. Reg. 1206-01 (Jan. 5, 2001) (explaining why the EPA and HUD do not require abatement of all lead paint); *see* 40 C.F.R. § 745.65 (2002) (codifying same).

In addition, there are no "reasonable means" of abating lead paint wherever it exists throughout the City. The City has not asked for an injunction or any other form of equitable relief, implicitly acknowledging that the alleged public nuisance is not abatable by court order. In addition, no "reasonable effort" by the City's Executive Branch or the Defendants will abate the nuisance, since neither controls the properties that allegedly

contain lead paint. (Mar. 9, 2004 Order 6 n.3, LF 1980). And there is no legal authority for the City or the Defendants to enter private property for the purposes of "abatement." That it may be technologically possible to remove lead paint from all pre-1978 residences in the City[33] does not establish that it is reasonable or practical to do so. Abatement by the City's definition is the equivalent of blowing up a dam or tearing up highway – physically possible, but certainly not a reasonable or practical approach.

This Court should take the City at its word when it describes the elements of its public nuisance claim. The City says that the alleged public nuisance consists of the presence of lead paint, which indisputably has existed for more than 25 years. It says that its alleged damages were incurred and could be estimated from the time the paint was applied. And the abatement that it claims is necessary to remove the alleged nuisance – citywide removal of lead paint regardless of location or condition – is neither reasonable nor practical.

Given the City's own description of its claim, holding that it is barred by the statute of limitations for permanent nuisance would not be unjust. The City has known about the potential hazards of lead paint for over 50 years and has been actively legislating for over 30 years to address the problem. If abatement was so reasonable and practical, it would have taken place 30 to 50 years ago given the City's long knowledge of the alleged risk. If the City's claim is really one for permanent nuisance, as demonstrated by its argument to this Court, then its far-belated attempt to seek damages

[33] The City's record below does not support even this assertion. There is no evidence suggesting, for example, that there are enough licensed inspectors or lead abatement contractors in Missouri, let alone St. Louis, to accomplish what the City defines as abatement.

decades after it knew of its alleged injuries should not be allowed under Missouri's nuisance law.

CONCLUSION

The City admits that it cannot prove that any Defendant's product is actually present in St. Louis, in other words, that it is unable to prove that any Defendant's product is *a cause*, let alone a substantial cause, of the City's claimed damages. The City now asks this Court to upend long-settled Missouri law requiring plaintiffs to prove cause in fact and to create a special a standard of proof for public entities in public nuisances cases – one that abandons the fundamental principle that a plaintiff must prove a nexus between wrongdoing and injury. Jettisoning the requirement to prove cause in fact would make this small group of Defendants the insurers for all former manufacturers of lead paints and lead pigments and for products manufactured and sold by others over the entire course of the 20th Century. Such a broad expansion of liability unconnected to any actual responsibility is contrary to the public policy of Missouri as expressed by the Legislature and by the decisions of this Court.

The City also asks this Court to contort Missouri nuisance law to give it the benefit of the longer statute of limitations for temporary nuisance while still allowing it to recover future damages available only in a permanent nuisance case. If the Court reaches this issue, it should also affirm the trial court's decision precluding recovery of future damages in a temporary nuisance case, which follows Missouri black letter law.

Finally, the Court may also affirm the trial court's summary judgment dismissing the City's case because (i) the City's case is not properly brought as a public nuisance

claim under Missouri law; (ii) the City's claims violate the separation of powers doctrine; and (iii) the claims as presented in the City's brief to this Court are time-barred by the statute of limitations for permanent nuisance.

For these reasons, Defendants respectfully submit that the Court should affirm the judgment of the trial court.

Respectfully submitted,

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The undersigned certifies that this brief complies with the requirements of Mo. R. Civ. P. 55.03 and Mo. R. Civ. P. 84.06, it is proportionately spaced, using Times New Roman, 13 point type, and contains 25,120 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), signature block, and appendix.

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