

IN THE SUPREME COURT OF MISSOURI

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

SUBSTITUTE BRIEF OF APPELLANTS

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ATTORNEYS FOR CITY OF ST. LOUIS

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JURISDICTIONAL STATEMENT

The Plaintiff is the City of St. Louis ("the City"), a constitutional charter city, recognized as both a city and county with the power to sue. MO. CONST. art. VI, § 31. The City sued Defendants who manufactured, marketed, and/or produced lead paint and lead pigment in the City for use in the City's residences. The trial court granted summary judgment in favor of the Defendants on January 18, 2006 on one issue: whether Defendants were entitled to summary judgment on the basis that the City cannot and will not offer site-specific product identification evidence at trial. The City filed a timely notice of appeal of (1) the January 18, 2006 order granting summary judgment LF 2870-2874 and (2) the trial court's March 9, 2004 order limiting recovery of the City's future damages. LF 1974-1991; *see* MO. REV. STAT. §§ 512.010, 512.020 (2005). The appeal was argued November 14th, 2006 in the Missouri Court of Appeals, Eastern District. On December 26, 2006, the Eastern District Court of Appeals issued an opinion upholding the January 18, 2006 summary judgment order and transferred this case to the Supreme Court of Missouri pursuant to MO. R. CIV. P. 83.02. The Appellant seeks Supreme Court review of all issues that were the subject of its appeal.

INTRODUCTION

This is a public nuisance case brought by the City. LF 2745. The defendants in this case manufactured, marketed and/or produced lead paint and lead pigment in the City for use in the City's residences. LF 2745. The actions of these defendants created a public nuisance—deteriorating lead paint—in housing within the City. LF 2745. The City seeks compensation for past costs incurred to address the public nuisance through

lead paint abatement and lead poisoning prevention efforts. LF 2745. The City also seeks actual damages for its future expenses to abate the existing, current public nuisance. LF 2745.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

Lead paint is highly toxic and lead poisoning poses a serious threat to the public, particularly for small children and pregnant women. LF 841. The health problems associated with exposure to lead paint dust can be severe. LF 841. Lead poisoning affects virtually every system in the body, and often occurs with no distinctive symptoms. LF 895. In young children and fetuses, exposure can cause permanent mental problems, such as reduced IQ levels, reduced attention spans, behavioral problems and other problems. LF 840. In older children and adults, it can cause illness, coma, convulsions and, in extreme circumstances, even death. AP 840. Lead is a severe threat to the health of the City's occupants; this threat is particularly severe for its children. LF 2745.

An article in the New England Journal of Medicine describes the situation: "Exposure to lead from deteriorating lead paint in older homes continues; of U.S. homes where children under the age of six years live, 25 percent contain hazardous lead paint. The CDC has estimated that in 2000, there were still 454,000 children in the United States with blood lead concentrations greater than 10 micrograms per deciliter." LF 2745.

See Walter J. Rogan and James H. Ware, *Exposure to Lead in Children - How Low is Low Enough?*, 348(16) N.ENG. J. MED. 1515-16 (April 17, 2003). LF 0907-0910.

Other findings show that even relatively low levels of lead in blood, (less than 10 micrograms per deciliter), can cause significant intelligence impairment in children. Richard L. Canfield, *et al.*, *Intellectual Impairment in Children with Blood Lead Concentrations Below 10 Micrograms per Deciliter*, 348(16) N. ENG. J. MED. 1517-26 (April 17, 2003). LF 0897-0906. These articles confirm what Defendants have known for decades: "Lead is neurotoxic and young children are at particular risk for exposure." *Id.* at 1518. LF 2746.

Because the City of St. Louis is an older, urban area, over 90% of the housing in the City was constructed prior to 1978 when the Federal government banned lead paint. LF 2746. Before the ban, lead paint was used as a wall covering and on metal surfaces (inside and outside), such as windows, doors, ceilings and walls. LF 841. Much of the lead paint applied before the federal ban is still present in housing units in and around the City. LF 840. Many common activities create lead dust or lead paint chips, including remodeling, abrasion, and friction between surfaces painted with lead. LF 841. The lead paint in the City's pre-1978 housing stock is the primary source of the lead paint problem in the City. LF 841. About 40% of the children in the City of St. Louis are lead poisoned. AP 2749. Compared to other large cities, this is an extremely high percentage of lead-poisoned children, LF 2745, and in gross numbers St. Louis, despite its relatively small population, is in the top ten U.S. cities for the number of children with elevated blood levels. LF 2745.

The presence of lead paint poses a continuing danger to the public because it deteriorates over time and releases lead through a variety of mechanisms. LF 841. Those circumstances include:

- Gradual deterioration of the lead-containing paint film through friction, weathering, building vibrations and building settlement;
- System failures such as ruptured pipes, roof leaks, and/or flooding resulting in water damage to painted surfaces;
- Routine maintenance or upgrade activities, including remodeling, painting, and work on electrical and plumbing systems;
- Other construction and demolition activities;
- Friction between lead painted surfaces and other surfaces, such as window frames and sills; and
- Abrasion through human contact or childhood chewing actions. LF 841.

The release of lead does not happen all at once, but continues for as long as the paint is present. Each new release of lead particles creates a new hazard. LF 841.

Lead paint abatement is designed to eliminate or greatly reduce the likelihood of human exposure to various forms of lead, such as lead dust, lead paint chips, or lead particles. LF 842. The abatement process can be initiated at anytime, should be done by trained professionals, and is readily available and economically feasible. LF 842

The City's experience mirrors the conclusions of these two articles: lead poisoning remains a serious health threat to the children of St. Louis. LF 2746. The City's response

to remediate and abate this public nuisance is a proper exercise of the City's governmental function. LF 2746.

II. PROCEDURAL HISTORY

The City filed its original action on January 27, 2000, LF 0457-0484, with claims for public nuisance, and other theories of recovery. The Defendants removed the case to federal court on March 14, 2000. LF 0001-0002. After approximately one year, the case was remanded back to the Circuit Court, LF 0004, and at about the same time, Plaintiff filed its Second Amended Petition containing the same or similar claims to the Original Petition. LF 0017-0042. A series of procedural actions by the Defendants in this case, seeking to end this case before trial, were denied. (*See* Defendants' Motion to Dismiss Plaintiff's Second Amended Petition, LF 0043-0048, denied November 2002, LF 1736-1823; Defendants' Motion for Summary Judgment on Statute of Limitations Grounds, LF 0440-0780).

Soon after Defendants filed their Second Motion for Summary Judgment LF 0440-0780, the City filed its Fourth Amended Petition containing a sole count of public nuisance. LF 1081-1095. Defendants filed a Motion to Dismiss Plaintiff's Fourth Amended Petition for Failure to State a Claim, or In The Alternative, to Require Joinder of Necessary Parties or Dismiss the Fourth Amended Petition for Failure to Join Indispensable Parties, LF 1096-1105, and a Motion for Summary Judgment on Statute of Limitations Grounds LF 1190-1195. On March 9, 2004, the trial court denied both of the Defendants' Motions. *See* Order, LF 1974-1991 (denying Defendants' Motion for Summary Judgment on Limitations Grounds) and Order LF 1992-2032 (denying

Defendants' Motion to Dismiss Plaintiff's Fourth Amended Petition for Failure to State a Claim, or In The Alternative, to Require Joinder of Necessary Parties or Dismiss the Fourth Amended Petition for Failure to Join Indispensable Parties).

Defendants filed their third Motion for Summary Judgment in this case on March 3, 2005, LF 2195-2199, which was granted on January 18, 2006. LF 2821-2862. The City appealed the order of January 18, 2006 granting summary judgment and dismissing all of the City's claims, LF 2821-2862, and the trial court's March 9, 2004 order limiting its damages to past costs accrued within the ten year limitations period prior to the commencement date of the case. LF 1974-1991. The appeal was heard on November 14, 2006 and the Court of Appeals, Eastern District issued its opinion on December 26, 2006 upholding the granting of the summary judgment. Because the Court of Appeals, Eastern District said "the case law affecting this case should be reexamined" and the issues raised were important questions of general public interest, it transferred the case to the Missouri Supreme Court under Rule 83.02.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS BECAUSE THE COURT MISAPPLIED THE LAW OF PROXIMATE CAUSATION BY REQUIRING SITE-SPECIFIC PRODUCT IDENTIFICATION WHEN EVIDENCE THAT A DEFENDANT SUBSTANTIALLY CONTRIBUTED TO THE THREAT TO PUBLIC HEALTH AND SAFETY IS SUFFICIENT FOR A NUISANCE CLAIM.

CASES RELIED ON:

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993)

City of Milwaukee v. NL Ind., 691 N.W.2d 888 (Wis. App. 2004), *review dismissed*, 703 N.W.2d 380 (Wis. 2005).

Krause v. U.S. Truck Co., 787 S.W.2d 708 (Mo. banc 1990)

St. Louis v. Varahi, 39 S.W.3d 531 (Mo. Ct. App. 2001)

OTHER AUTHORITY:

MO. R. CIV. P. 74.04(c)

MO. REV. STAT. § 71.780 (2005)

ST. LOUIS, MISSOURI REVISED CHARTER art. 1 § 25 *Nuisances* (1914)

ST. LOUIS, MISSOURI REVISED CHARTER art. 1 § 33 *General Welfare* (1914)

RESTATEMENT (SECOND) OF TORTS § 821B (1979)

RESTATEMENT (SECOND) OF TORTS, § 834 (1979)

58 AM JUR. 2D *Nuisances* § 32 (2002)

II. THE TRIAL COURT ERRED IN DENYING THE CITY'S CLAIM TO RECOVER IN THIS ACTION THE MONEY IT MUST SPEND IN THE FUTURE TO REMEDY THE PUBLIC NUISANCE CREATED BY THE DEFENDANTS BECAUSE DENYING FUTURE DAMAGES UNDERMINES THE CORE POLICY OF PUBLIC NUISANCE LAW WHICH IS TO PROTECT THE PUBLIC HEALTH AND SAFETY.

CASES RELIED ON:

Kansas City v. Mary Don Co., 606 S.W.2d 411 (Mo. Ct. App. 1980)

Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 53 S. Ct. 602, 77 L. Ed. 1208 (1933)

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St. Louis Safe Deposit & Sav. Bank v. Kennett, 74 S.W. 474 (Mo. Ct. App. 1903)

OTHER AUTHORITY:

58 AM JUR 2d *Nuisances* § 1 (2002)

WILLIAM PROSSER, LAW OF TORTS § 86 (4th ed. 1971)

Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. Envtl. Aff. L. Rev. 89 (1998)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS BECAUSE THE COURT MISAPPLIED THE LAW OF PROXIMATE CAUSATION BY REQUIRING SITE-SPECIFIC PRODUCT IDENTIFICATION WHEN EVIDENCE THAT A DEFENDANT SUBSTANTIALLY CONTRIBUTED TO THE THREAT TO PUBLIC HEALTH AND SAFETY IS SUFFICIENT FOR A NUISANCE CLAIM.

The trial court granted summary judgment for the Defendants on January 18, 2006. LF 2893-2934. The sole issue of law presented to the Court by the Defendants' Motion for Summary Judgment was whether the Defendants were entitled to summary judgment as a matter of law on the basis that the City cannot and will not offer site-specific product identification evidence at trial. LF 2898. The Circuit Court and the Court of Appeals held that the City was required to offer proof of site-specific product identification as a necessary element of its claim and rendered summary judgment for the Defendants. LF 2933-2934.

Standard of Review - Summary Judgment

Summary judgment is determined as a "pure issue of law." *ITT Commercial Fin. Corp. et al. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). In the two issues before this court, there are no disputed material facts, and review by this Court is *de novo*. *Id.* *De novo* review for a summary judgment is appropriate, because this Court considers the same criteria as the trial court:

"The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially....As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment (cites omitted)."

ITT, id. at 376.

Summary judgment is proper only if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. MO. R. CIV. P. 74.04(c). This Court must view the facts presented in the light most favorable to the party against whom summary judgment was entered. *ITT Commercial Fin. Corp., id.* at 376. If the record submitted to this Court does not entitle the moving party to judgment as a matter of law then the judgment must be reversed. *Id.* at 376, 380. It is particularly important that the summary judgment movant successfully meet its burden because "[s]ummary judgment is an extreme and drastic remedy [bordering] on denial of due process in that it denies the opposing party his day in court. Therefore, great caution must be exercised in its use." *Olson v. Auto Owners Ins. Co.*, 700 S.W.2d 882, 885 (Mo. Ct. App. 1985)(citing *Kroger Co. v. Roy Crosby Co.*, 393 S.W.2d 843, 844 (Mo. Ct. App. 1965)(trial courts must use the summary judgment processes cautiously).

A. Upon the undisputed facts of this case, Defendants were not entitled to summary judgment as a matter of law because the City should not be

required to offer site-specific product identification evidence in order to prove causation on its nuisance claim.

Public nuisance is a unique breed of claim and involves a more general type of injury than strict liability or negligence actions designed to address specific injuries to specific individuals. Therefore, the standard of proof for causation must be different. The trial court erred because it held that the City cannot meet its burden of proof in a nuisance case unless it can identify the specific lead paint in each location that contributes to the City's damages. LF 2205-2206. The City freely acknowledges that it cannot and will not identify the manufacturer or brand name of lead paint or lead pigment present in each St. Louis residence. The City will, however, produce ample evidence¹ to demonstrate that each Defendant's product substantially contributed to creating or

¹ The trial court noted the lack of evidence in the summary judgment record. LF 2928 n. 24. Defendants' Third Motion for Summary Judgment was limited to the trial court's consideration of the single issue of law on the city's burden of proximate cause. LF 2201 n. 2. Therefore, little summary judgment evidence other than portions of the legal record was offered by either side in their pleadings, or as part of the oral argument. The trial court did point out since the Defendants framed their entire summary judgment motion around the claim that any other sort of causation evidence regardless of the type or how much was offered would be legally insufficient without site-specific product identification, they could not now be heard to complain that the City did not put evidence into the record. LF 2928 n. 24

maintaining the public health hazard caused by lead paint, This evidence meets, or should meet, the proper standard of proof for proximate cause for a public nuisance claim. The City's evidence will include, but is not limited to, evidence of community wide marketing and sales of lead paint by the Defendants in the City of St. Louis. *See City of Milwaukee v. NL Ind.*, 691 N.W.2d 888, 893-894 (Wis. App. 2004), *review dismissed*, 703 N.W.2d 380 (Wis. 2005)(This type of evidence was sufficient to create a genuine issue of material fact on the question of whether defendants created and/or participated in the creation of a public nuisance of childhood lead poisoning in the City of Milwaukee).

The Defendants argue that in order to prove causation, the City must establish product identification as required by *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. banc 1984) (hereinafter "*Zafft*") and its progeny. LF 2208-2211. The City agrees that it must establish causation. The City's position, however, is that actual causation can be proved in other ways than the single one urged by the Defendants. LF 2530-2534 .

There are no cases under Missouri law where proof of proximate cause in a public nuisance case requires product identification. Although the cases make clear that Missouri requires evidence of actual causation in a public nuisance case, none requires location specific product identification. In a public nuisance case, causation does not necessarily equal product identification as it would in a products liability case.

There is more than one way to prove proximate cause. Public nuisance cases brought by a city to eliminate significant threats to public health implicate different interests than private actions. The harm is not to an individual but to the community as a whole. The remedy is not recovery of damages for an individual but the costs of

remediating the threat to public health. Proof of a hazard at a specific location and the identity of the defendant who created that hazard would not prove that a threat exists to the community at large. That must be proven by examining the hazard in the community at large and then identifying the defendant by proving that the defendant created the larger hazard. The exact type of evidence required to satisfy that burden of proof depends on the facts of the specific case and is not subject to a strict litmus test. Where a city alleges that a defendant's actions contributed to widespread poisoning of its citizens, evidence of actual causation should focus on the effects of those actions on the community at large. *City of Milwaukee, id.*

The trial court recognized that where a lawsuit by a public entity focuses on the societal costs of cleaning up toxic substances a different standard of proof of causation might be necessary. Although the trial court granted summary judgment below, in its Order it questioned the Defendants' absolute reliance on *Zafft's* requirements for product identification in this public nuisance case.

"[T]his court believes it is not entirely clear or certain that the Missouri Supreme Court would today, if faced with an appropriate case that presented an opportunity to revisit and reexamine this area of the law, necessarily hold that Zafft's rigid rejection of any form of market-share liability applied to the same extent in the context of this sort of "mass exposure" toxic tort case, brought by a governmental plaintiff under the public nuisance theory of liability. The court believes this is so for at least two reasons:

First, at the time of Zafft more than twenty years ago, the Zafft court placed heavy emphasis on the fact that **no other court** had (at that time) followed the lead of the California Supreme Court in adopting market-share liability. Zafft, 676 S.W.2d at 246. Since then, however, the law has developed further and it now appears that a considerable number of both state and federal courts have adopted some form or variant of market-share liability. (Footnote omitted).

Second, because Zafft and Hagen were **private** suits by **individual** plaintiffs the court in those cases was concerned that market share liability would involve "the risk that the actual wrongdoer is not among the named defendants, and exposes those joined to liability greater than their responsibility" Zafft, 676 S.W.2d at 246. Very similar concerns were expressed in several **individual** lead-poisoning cases brought in other jurisdictions, wherein the plaintiffs sought to establish some form of market-share liability. See, e.g. Skipworth v. Lead Indus. Assn., 690 A.2d 169, 172-73 (Pa. 1996) (holding that application of market-share liability in such cases would lead to "a distortion of liability" which would make determinations of culpability arbitrary and unfair.") But see Thomas v. Mallett, 701 N.W.2d 523 (Wis. 2005) (allowing market share liability proof to be offered in an individual lead poisoning case).

In contrast, the focus of **public entity** lawsuits brought against manufacturers of highly toxic and dangerous products, such as lead paint, is

not on an injured individual, but rather on the societal and governmental costs of the allegedly harmful products. Because of this very considerable difference in focus, a number of commentators have suggested that there might be stronger grounds in such suits for a more relaxed standard of causation under theories such as market-share liability. See Thomas C. Galligan, Jr., *The Risks and Reactions to Underdeterrence in Torts*, 70 Mo. L. Rev. 691, 714-715 (2005); see also Amber E. Dean, *Lead Paint Public Entity Lawsuits*, 28 Pepperdine L. Rev. 915, 931 (2001). Thus, where private plaintiffs are not permitted to introduce statistical evidence on causative probability, governmental entities bringing a public nuisance claim might well be allowed to do so, since, in contrast to the probability that a particular manufacturer made paint that was sold and used in a particular house, thereby injuring a particular individual, there is in fact a much greater statistical probability that lead paint manufacturers contributed to such governmental costs and in relative proportion to their market share. Dean, 28 Pepp. L. Rev. at 931....This argument can only be properly addressed to the Missouri Supreme Court." (Emphasis in original).

(LF 2930, 2931, 2932, 2933).

The trial court assumed, without deciding, that the current "toxic lead paint hazard" in St. Louis constitutes a public nuisance. LF 1984 and LF 2836. The nuisance at issue is a public nuisance as opposed to a private nuisance. LF 1984. "A public

nuisance is any unreasonable interference with common community rights such as the public health, safety, peace, morals, or convenience." *See Lee's Summit v. Browning*, 722 S.W.2d 114, 115 (Mo. Ct. App. 1986); *St. Louis v. Varahi, Inc.*, 39 S.W.3d 531, 536 (Mo. Ct. App. 2001)("A public nuisance is an unreasonable interference with a right common to the general public" adopting the definition of public nuisance from RESTATEMENT (SECOND) OF TORTS § 821B(1) at 87 (1977)). Public nuisance extends to unreasonable, unwarranted, or unlawful conduct. *Jackson v. City of Blue Springs*, 904 S.W.2d 322, 328 (Mo. Ct. App. 1995)(failing to maintain foliage on a public right of way is a public nuisance); *State ex rel. Igoe v. Joynt*, 110 S.W.2d 737, 740 (Mo. banc 1937) (acts that violate the law and result in injury to the public constitute a public nuisance). Generally, "a nuisance is public because of the danger to the public; it is private only because an individual (as distinguished from the public) has been, or may be injured." 58 AM. JUR. 2D Nuisances § 32 (2002).

The nature of a public nuisance claim is pivotal in determining the appropriate standard of proof for causation. As described above, public nuisance is different from strict liability or negligence due to the public nature of the injury asserted. The behavior condemned as public nuisance injures the health or safety of the "general community." *State ex rel. Dresser Industries, Inc. v. Ruddy*, 592 S.W.2d 789, 792 (Mo. banc 1980)("Keeping waterways of the state safe from harmful contaminants is an objective common to the public at large and has long been [recognized as a public nuisance]. Conduct causing the same is essentially the nuisance."). In a public nuisance claim, the essence of the injury is not injury to a specific individual but to the general public. *See*,

e.g., *Varahi*, 39 S.W.3d at 536. In this nuisance case, there is no individual injury asserted but rather an injury to the public interest--an injury or threat to the health and safety of the people of St. Louis, which are "common community rights." *State ex rel. Dresser Industries, supra* at 792; *see also Lee's Summit*, 722 S.W.2d at 115; *Varahi*, 39 S.W.3d at 536 (quoting RESTATEMENT (SECOND) OF TORTS § 821B(1), acknowledging five categories of public rights: public health, public safety, public peace, public comfort and public convenience). The damage caused here is uniquely public — the monumental task of cleaning up Defendants' toxic products falls upon the City and its taxpayers.

The City agrees with the trial court. There are public policy issues that should be considered in determining this issue. The City urges that under existing Missouri case law the City is not limited to proving causation through evidence of location specific product identification. If, however, *Zafft* is a roadblock to this approach, justice requires that the holding in *Zafft* be modified to allow proof of causation more appropriate to the situation before the Court.

B. The causation requirement in a public nuisance case is satisfied by evidence that the defendant substantially contributed to causing or maintaining the threat to the public health and safety.

The proper standard of nuisance proof is articulated, among other places, in the RESTATEMENT (SECOND) OF TORTS:

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.*

RESTATEMENT (SECOND) OF TORTS § 834 (1979)(emphasis added).

This rule applies to liability for both private nuisances and public nuisances (as defined in the RESTATEMENT, § 821B). RESTATEMENT (SECOND) OF TORTS § 834 cmt. a. Although the City did not locate any reported cases in which Missouri courts adopted or rejected RESTATEMENT (SECOND) OF TORTS § 834 as the applicable standard of proof for causation, Missouri courts have adopted other sections of the Restatement that define the nature of nuisance claims. *See*, RESTATEMENT (SECOND) OF TORTS § 821B (1979), *adopted in St. Louis v. Varahi*, 39 S.W.3d 531 (Mo. Ct. App. 2001); *see also* LF 1783. In fact, the trial court correctly noted that Missouri courts have adopted RESTATEMENT (SECOND) OF TORTS § 821B as the definition of nuisance law, LF 1770, AP1782, and that the definition emphasizes the importance of protecting public health. *Id.* It is therefore logical to use the tools provided in RESTATEMENT § 834 to analyze Defendants' conduct and determine whether that conduct was the proximate cause of the lead paint public nuisance in St. Louis. Adoption of this standard promotes the policy of public protection that underlies the definition of a public nuisance under RESTATEMENT (SECOND) OF TORTS § 821B and Missouri law.

It is illogical to equate the burden of proof in this case with a garden-variety product liability claim involving a specific product tied to a specific injury. The depth and scope of the health hazard at issue here makes this case very different. *See* LF 2885 (describing the widespread presence of toxic lead paint in City housing). The City's nuisance claim is based on its legal duty to mitigate and eliminate the significant harms and injury caused to the public by the widespread presence of defendants' toxic lead paint

in the St. Louis city housing stock, a duty clearly delineated in the St. Louis City Charter and by Missouri law. *See* ST. LOUIS, MISSOURI REVISED CHARTER art. 1 § 25 *Nuisances* (1914) ("[The City may] define and prohibit, abate, suppress and prevent or license and regulate all acts, practices conduct...and all other things whatsoever detrimental or liable to be detrimental to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the city and all nuisances and causes thereof."); ST. LOUIS, MISSOURI REVISED CHARTER art. 1 § 33 *General welfare* (1914)("[The City may] do all things whatsoever expedient for promoting or maintaining the comfort, education, morals, peace, government, health, welfare...of the [city's] inhabitants."); *see also*, MO. REV. STAT. § 71.780 (2005)("[C]ities...shall have...the power to suppress all nuisances which are, or may be injurious to the health and welfare of the inhabitants of said cities...."); *Kansas City v. Mary Don*, 606 S.W.2d 411, 415 (Mo. Ct. App. 1980)("It cannot be questioned that the city may suppress and abate nuisances which are a menace to public health."); *Lee's Summit*, 722 S.W.2d at 116; LF 2004.

These same concerns are addressed in the Restatement:

When a person is only one of several persons participating in carrying on an activity, his participation must be substantial before he can be held liable for the harm resulting from it. This is true because to be a legal cause of harm a person's conduct must be a substantial factor in bringing it about.

RESTATEMENT (SECOND) OF TORTS, § 834 cmt. d.

Further, the Restatement suggests that as long as the activities create a condition that continues after the activity itself ceases, each defendant remains liable when "[h]is

active conduct has been a substantial factor in creating the harmful condition and so long as this condition continues the harm is traceable to him." RESTATEMENT (SECOND) OF TORTS, § 834 cmt. e.

The City alleges that several defendants, acting independently, each engaged in activities which were sufficient to cause the lead paint public nuisance. It is neither necessary nor proper to demonstrate which defendant caused each separate application of lead paint that exists in the City's housing, but only to demonstrate that each defendant contributed to causing or maintaining the threat to the public health and safety. If an individual building owner sued a lead paint manufacturer for contaminating his building, it would be necessary for the building owner to identify the specific manufacturer who caused the harm. But establishing a public nuisance case requires that the plaintiff prove the defendant caused an injury to the public interest and, if there is more than one defendant, that each defendant was the cause of the injury to the public interest. *See, Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 865 (Mo. banc 1993). Location-specific product identification is not required.

The standard contained in RESTATEMENT § 834 is consistent with principles established by the Missouri Supreme Court modifying the standard of proof for cases involving two independent torts, either of which is sufficient in and of itself to cause the injury. *Callahan, supra*, establishes that the burden of proof changes in cases involving two independent torts either of which is sufficient in and of itself to cause the injury. *Callahan*, 863 S.W.2d at 862-863.

It is of course unnecessary that the party charged should have anticipated the very injury complained of or anticipated that it would have happened in the exact manner that it did. All that is necessary is that he knew or ought to have known that there was an appreciable chance some injury would result.

Callahan, 863 S.W.2d at 865.

While *Callahan* does not address a nuisance claim, it demonstrates that the burden of proof for causation is fluid and is governed by the nature of the claim. *Id.* at 862-863; *see also, City of Bloomington, supra*, 891 F.2d 611 (7th Cir. 1977).²

The Restatement's standard is also consistent with widely recognized criteria for establishing proximate cause. The practical test of proximate cause involves a determination of whether the injury was the natural and probable consequence of the act

² Although the city's claims for public and private nuisance were denied in *City of Bloomington*, the trial court commented that if the evidence showed the defendant had actively participated in the continuance of the PCB nuisance at issue ("intentionally marketed the product to customers when it knew or should have known that those customers would dispose of the product in a manner harmful to the environment, or when it had not taken steps to alert customers to the risks of the product"), "such activity would suggest a degree of culpable participation 'within the meaning of [the] phrase ['to a substantial extent'] in the RESTATEMENT § 834." LF 1778.

of the defendant. *Krause v. U.S. Truck Co.*, 787 S.W.2d 708, 710 (Mo. banc 1990). *Krause* reversed summary judgment for defendants in a wrongful death action stemming from the death of an ambulance attendant killed while responding to a multiple-vehicle accident on Interstate 70. The trial court granted summary judgment for all defendants except the driver of the vehicle that struck and killed the ambulance attendant based on the rationale that plaintiff could not meet its proximate cause burden against the other driver-defendants involved in the wreck. *Id.* at 710. The Missouri Supreme Court reversed the summary judgment, stating:

Foreseeability...plays a prominent role in determining proximate cause, [but] the cases discussing proximate cause contain the exasperating caveat that in deciding [the question] each case must be decided on its own facts, and it is seldom that one decision controls another; [identifying] those within the range of foreseeability...is somewhat an exercise in subjectivity.

Id. at 710.

This is a unique case where the issue of proximate cause must be decided on its own facts. *Krause*, 787 S.W.2d at 710. The trier of fact normally decides causation, especially where reasonable minds could differ as to causation on the facts of the case. *Williams v. Missouri Highway & Transp. Comm'n*, 16 S.W.3d 605, 611 (Mo. Ct. App. 2000). As the trial court noted, "reasonable minds could differ as to whether Defendants' actions are the proximate cause of the City's injuries---i.e., whether the injuries alleged are the natural and probable consequence of Defendants' actions...." LF 0222. For that

reason, the proximate cause determination is usually a question for a jury. *Simonian v. Gevers Heating & Air Conditioning*, 957 S.W.2d 472, 475 (Mo. Ct. App. 1997).

Although Missouri courts have not decided this precise issue, a Wisconsin appellate court and a Rhode Island trial court each adopted the "substantial cause" standard advocated here by the City and rejected by the trial court. Conversely, an Illinois appeals court affirmed the dismissal of a lead paint public nuisance action brought by the City of Chicago because the City admitted it was unable to establish the identification of a specific manufacturer at any specific home. *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 1st Dist. 2005).

The Wisconsin court reversed and remanded a summary judgment in favor of defendants on the same issue raised in this appeal. *City of Milwaukee v. NL Industries*, 691 N.W.2d at 897. The Wisconsin court explained that because "public nuisance is focused primarily on harm to the community or the general public, as opposed to individuals who may have suffered specific personal injury or specific property damage," it is not necessary for the City of Milwaukee to provide product identification on a house-by-house basis. *Id.* at 893. Rather, the standard of proof required for the nuisance claim is:

[T]o establish a claim of creating a public nuisance, a plaintiff must prove that the defendants conduct was a substantial cause of the existence of a public nuisance and that the nuisance was a substantial factor in causing injury to the public, which injury is the subject of the action.

Id. at 892.

Although the *City of Milwaukee* decision does not refer to Restatement (Second) Torts § 834, the standard the court employed is virtually identical to the Restatement's language. RESTATEMENT (SECOND) OF TORTS, § 834 (*see also*, cmts. d and e). Wisconsin, like Missouri, adopted RESTATEMENT (SECOND) OF TORTS, § 821B.

Although Wisconsin allows so-called "market share" liability in products liability cases, *City of Milwaukee* makes no mention whatsoever of "market share liability" or product liability claims. In fact, *City of Milwaukee* finds product liability cases are inapposite because the court expressly recognizes that public nuisance claims are materially different from individual injury claims:

Here, the allegation at its essence is that defendants sold and promoted a dangerous product to a community and that product caused a serious public health problem in that community. The City, rather than only the sick children, has suffered and sustained an injury. This injury, unlike injury suffered by individuals, is community-wide and affects even those whose health is not compromised by lead-paint poisoning. The City is also the entity most reasonably able to remedy this community-wide injury to public health.

City of Milwaukee, 691 N.W.2d at 893.

The *City of Milwaukee* court also observed that class action suits provide the vehicle for individuals to pursue remedies for similar harms to large numbers of identifiable individuals. *Id.* at 892. If each individual claim must also be proved in actions to recover for community-wide public nuisances, the public nuisance concept

would "have no distinction from the theories underlying class action litigation, which serves to promote individual remedies . . ." *Id.*³

The trial court in Providence, Rhode Island reached a similar conclusion. *State v. Lead Indus. Assn*, 2005 R.I. Super. LEXIS 95 (2005). The state of Rhode Island sued a group of lead paint/lead pigment manufacturers, suppliers and distributors seeking costs related to abating the public nuisance caused by lead paint in Rhode Island housing stock. Defendants filed a motion for summary judgment asking the court to deny Rhode Island the ability to proceed on a collective liability theory. As they did in *City of Milwaukee* and here, Defendants argued that Rhode Island must identify site-specific product identification to meet their burden of proof on proximate cause. The trial court rejected that argument, holding that property-specific information is not relevant to the issue of whether a public nuisance exists in Rhode Island and that the State was not required to identify a particular paint containing lead pigment manufactured by any particular defendant at any particular location. *State v. Lead Indus. Assn*, at 3. The court rejected defendants' notion that this type proof was required to establish liability, despite a previous Rhode Island Supreme Court case refusing to adopt market share liability doctrine in product liability cases. *Gorman v. Abbott Labs.*, 599 A.2d 1364 (R.I. 1991).

³The lower court commented that the *City of Milwaukee* case is "more precedential on this matter than the *City of Chicago* [case] since [the *City of Milwaukee* court] unequivocally [held] that the lower's court's grant of summary judgment to Defendants [on the product identification issue] was error." LF 2922 n. 21.

The Court recognized the distinction established in *City of Milwaukee* and urged here — that product liability and public nuisance are significantly different types of claims with different burdens of proof. *State v. Lead Indus. Assn.*, at 3-4.

This case is not a products liability case; it is a cause of action for public nuisance. LF 1085. The City can meet its burden on causation, by proving: (1) each defendant's conduct was a substantial cause of the public nuisance, (2) the public nuisance was a substantial factor in causing injury to the public, and (3) that injury is the subject of the action. See RESTATEMENT (SECOND) OF TORTS, §§ 821B, 834; *City of Milwaukee v. NL Industries, Inc.* 691 N.W.2d at 892. This is very different from a requirement of location specific identification of the manufacturer or seller of each the paint in each contaminated location, and it is a burden the City can meet. To the extent *Zafft* requires location specific product identification it should be modified, and the trial court's judgment to the contrary should be reversed.

II. THE TRIAL COURT ERRED IN DENYING THE CITY'S CLAIM TO RECOVER IN THIS ACTION THE MONEY IT MUST SPEND IN THE FUTURE TO REMEDY THE PUBLIC NUISANCE CREATED BY THE DEFENDANTS BECAUSE DENYING FUTURE DAMAGES UNDERMINES THE CORE POLICY OF PUBLIC NUISANCE LAW WHICH IS TO PROTECT THE PUBLIC HEALTH AND SAFETY.

In his March 9, 2004 order, LF 1974-1991, the Honorable Michael P. David denied a different summary judgment motion filed by defendants and found that the City's public nuisance claim was not time-barred. LF 1990. In the same order, Judge

David discussed the distinctions between a permanent and a temporary nuisance at length, correctly concluding that the existing public nuisance caused by lead paint in the City is a temporary nuisance. However, Judge David took his analysis a step further; he also found that, because the claim is for temporary nuisance, the City is entitled to recover only its past lead remediation costs and damages and not its future damages. LF 1977-1984. The order indicated that the City must file successive suits to recover future damages. LF 1984.

The court erred when it blocked the City's effort to recover the money needed to remedy the current public nuisance caused by the Defendants' toxic paint since the result is that the City is effectively denied adequate damages compensation and successive actions would be an overly burdensome remedy. This point was appealed to the Court of appeals which did not write on this issued, but affirmed the January 18, 2006 summary judgment dismissing the case. As part of the transferred case, this point is properly before this Court. Appellants ask this Court to reverse the trial court's order limiting the City's damages to past damages.

Standard of Review – Summary Judgment

Summary judgment is determined as a "pure issue of law" and review by this Court is *de novo*. *ITT Commercial Fin. Corp. et al. v. Mid-America Marine Supply Corp.*, 854 S.W.2d at 376.

A. The trial court's adherence to a narrow view of temporary nuisance damages is error because nuisance law standards are historically interpreted broadly.

As noted above, the trial court determined that the nuisance caused by lead paint located in the City of St. Louis is a temporary nuisance:

Applying [nuisance] principles to the case at hand, the Court finds that the alleged public nuisance here—the widespread presence of toxic lead paint in City housing—is a temporary rather than permanent nuisance. The condition which constitutes the nuisance, and which is the 'source of injury' is the actual presence of lead-based paint in many residential dwellings in the City of St. Louis. Even though such abatement is sometimes expensive, there is no doubt that lead paint in housing can be reasonably and practically abated; and the record here does not support a contrary conclusion.... LF 1984.

Although the trial court's order accurately describes the general standard for temporary nuisance damages, its application of the general rule to these facts is error because that application ignores the flexible nature of the nuisance doctrine which responds to each public injury being threatened based on the facts. Nuisance is a term "incapable of an exact and exhaustive definition which will fit all cases, because the controlling facts are seldom alike, and because of the wide range of subject matter embraced under the term." 58 AM JUR 2d *Nuisances* § 1 (2002). Nuisance law has also been called a versatile, changing, legal concept that is complex and confusing. "There is

perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. WILLIAM PROSSER, LAW OF TORTS § 86 at 571 (4th ed. 1971). One author noted "a large part of the difficulty courts and commentators have with nuisance springs from its resistance to a single definition." Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. Env'tl. Aff. L. Rev. 89, 96 (1998).

The narrow interpretation adopted by the trial court limits the City's damages and effectively stifles the City's ability to abate the existing nuisance even if the City succeeds at trial. It allows the creators of the nuisance to be insulated from significantly contributing to the nuisance abatement effort solely because the costs of abating the nuisance they created is so high the City's budget cannot immediately accommodate it. Nothing in the nuisance doctrine disallows recovery of future costs to remediate an existing public nuisance and it is counterintuitive to deny such a remedy for an extant nuisance. This Court should overrule the trial court's decision in favor of a broader application of the doctrine so that the City might receive "complete monetary redress." See *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 339, 53 S. Ct. 602, 77 L. Ed. 1208 (1933)(the court allowed recovery of all damages arising from a temporary nuisance in one action so that the plaintiff might receive "complete monetary redress" in this Missouri nuisance case).

B. The trial court incorrectly applied the temporary nuisance damages standard.

The trial court erred in limiting the City's damages to those incurred prior to the date this case was filed because it incorrectly applied the temporary nuisance damages

standard. The general policy behind awarding only past damages in a temporary nuisance case is that the plaintiff "should not be permitted to recover future damages that may never be sustained, and a defendant should not be required to pay for a permanent injury on the theory that he will continue illegally to inflict injury upon plaintiff." *Spain v. Cape Girardeau*, 484 S.W.2d 498, 505 (Mo. Ct. App. 1972)(quoting *Shelley v. Ozark Pipe Line Corp.*, 37 S.W.2d 518, 521, (Mo. banc 1931). Those policy concerns do not exist here. The City's damages are not future; they exist now. The City's "future damages" are future only in the sense that the check has not yet been written to address them. The harm to St. Louis' citizens is occurring now, continues daily and will continue until the public nuisance is eliminated. There are no acts the defendants can take to stop illegally inflicting injury upon the citizens of St. Louis except to help pay for the City's costs of abating the lead paint in the City's residences. The daily occurring harm from lead paint has not ceased because the City filed this suit, it will not cease if the City wins its past costs, and it will continue harming St. Louis' citizens on a daily, recurring basis unless action is taken.

After the trial court's March 9, 2004 order, the City produced information related to its past costs by producing lists of "Properties at Issue". These "Properties at Issue" are residences located throughout the City where the City inspected, abated or otherwise addressed a portion of the existing lead paint public nuisance. LF 2262. Examples of the lists provided are at LF 2453-2464. Although there are hundreds of locations on the lists, they are an incomplete list of all the residences (estimated at 90% of the City's housing stock LF 0841) located in the City which:

- Were built prior to 1978;
- Contain lead paint;
- Need inspection and/or various types of abatement activities to identify and contain deteriorated lead paint/lead paint dust;
- Contribute to the existing public nuisance of toxic lead paint. LF 1782; LF 1984; LF 2908 n. 11.

The trial court's proposed measure of damages merely reimburses the City for its past lead paint remediation expenses; it does not in any way reimburse the City for costs related to those homes that remain polluted and dangerous. The damages that the City may recover for past costs are not sufficient to provide the City with a means to end the current, existing public nuisance. Under the trial court's assessment of damages, the City would win an empty victory, leaving its citizens still in harm's way.

Even if the measure of damages set out by the trial court is appropriate, however, the trial court's limitations on the City's damages is still error, because the trial court incorrectly applied the temporary damages standard to these facts.

Courts in other jurisdictions treat the matter of damages for temporary, abatable nuisances differently. They recognize that, in some instances, when a temporary, abatable nuisance creates more than temporary damages, justice requires a permanent damage award. In those cases, the permanent/temporary nuisance distinction does not uniformly mandate specific types of damage awards:

The terms 'permanent' and 'temporary' are somewhat nebulous in that they have practical meaning only in relation to particular fact situations and can

change in characterization from one set of facts to another. It is said that there is no direct relation between the classification of the nuisance and the classification of the injury.... It is possible for a temporary nuisance to result in permanent or temporary damages or both.

Mel Foster Co. Properties, Inc. v. American Oil Co. (AMOCO), 427 N.W.2d 171, 175-76 (Iowa 1988).

This philosophy was expressed in *Harrisonville v. W. S. Dickey Clay Mfg.*, 289 U.S. 334, 53 S. Ct. 602, 77 L. Ed. 1208 (1933). In that case, the plaintiff-Company filed a nuisance claim against Harrisonville, Missouri for polluting the Company's pasture. At trial, the Company was awarded permanent and temporary damages, as well as injunctive relief, but the appellate court vacated the portion of the trial court's judgment allowing permanent damages. The United States Supreme Court reversed the appellate court and found that, by making the injunction against Harrisonville contingent upon payment of permanent damages to the Company, the Company would receive "complete monetary redress." *Id.* at 339. The Court found that awarding the Company permanent damages was an appropriate remedy; further, the Court said that an award of permanent damages did not change the character of the temporary nuisance:

We require this payment not on the ground that the nuisance is to be deemed a permanent one as contended.... This nuisance has at all times been removable by the device of secondary treatment of the sewage. It may be hereafter abated at anytime by the State health authorities requiring such treatment. The City may itself conclude that this should be done in the

public interest, financial or otherwise. Being so terminable, pollution of the creek cannot be deemed to be a permanent nuisance....

Id. at 341. *See also, Mel Foster Co. Properties*, 427 N.W.2d 175-76 (allowing permanent damages for a temporary nuisance resulting from gasoline leaking from an underground storage tank and pipeline).

Although the current lead paint public nuisance is abatable, LF 1984, the City must be able to recover its future costs of abating the lead paint. This is the only way to terminate the public nuisance and end the continuing harm inflicted on each new generation of the City's youngest citizens. By contrast, a damage award under the trial court's approach allows the public nuisance to continue indefinitely as the City's woefully inadequate budget addresses this nuisance in a piecemeal fashion.

C. The trial court's order requiring successive actions for the City's future damages is an overly burdensome, inappropriate remedy in this case.

Although the City disagrees with the trial court's characterization of the City's damages as "past" and "future," there is an additional reason why the City should be allowed to seek its damages in one action: the remedy of successive actions is overly burdensome.

The trial court disallowed any future damages award in this case, instead pointing to successive actions as the City's vehicle for future damages recovery:

Where the nuisance is of a continuing (abatable) nature, each continuance gives rise to a new cause of action, and successive actions may be maintained for the damages accruing from time to time **** although in

such case the recovery is limited to damages for the statutory period preceding the commencement of the action. LF 1982

If there is a non-abatable nuisance, "there will be one cause of action, where all damages resulting from the nuisance—past, present and future must be sought in that single action." *Shade v. Missouri Highway & Transp. Comm'n*, 69 S.W.3d 503, 513 (Mo. Ct. App. 2001); *Shelley v. Ozark Pipe Line Corp.*, 37 S.W.2d at 521. In contrast, for an "abatable nuisance" an injured party can bring subsequent successive actions for injuries sustained by the continuation of the temporary nuisance." *Id.* The reasoning behind the rule is that a defendant will take action to abate the nuisance, and if he does not, then a successive action should be filed.

The right to a successive action for the continuance of a nuisance rests on the principle that the tortfeasor is under a legal obligation to remove, change, or repair the structure or thing complained of, and thereby terminate the injury to his neighbor; and, failing so to do, each day's continuance of the nuisance is a repetition of the original wrong and a new action will lie therefore. The law assumes that a temporary nuisance will abate—if not by voluntary act of the tortfeasor, then by judicial agency—and so confines recovery to injury already accrued.

Schwartz v. Mills, 685 S.W. 2d 956, 960 (Mo. Ct. App. 1985).

Applying this general rule to these particular circumstances is error. The policy underlying this general rule is to create incentives to the wrongdoer to abate the nuisance as quickly and efficiently as possible. *Id.* at 960. But here, except for paying money, the

Defendants can do nothing to terminate the injury to the City or its citizens. Said another way, unlike other temporary nuisance cases where defendants can be ordered to stop the activities creating the nuisance, Defendants' actions here are complete—the abatable harm exists and continues on a daily basis. The only way to abate the nuisance quickly and efficiently is by way of one recovery of all costs, past and future.

Unfortunately, the promise of "successive actions" offers absolutely no incentive for any defendant to act to end the public nuisance now. The successive action remedy posed by the Court will not end the extant public nuisance in any reasonable time frame because the City cannot spend enough out of its tight budget to solve the problem in the near future. The parties who created the public nuisance will effectively be insulated from significant responsibility by reason of the plaintiff's relative poverty. Successive actions mean additional delay; delay will increase the harm from the public nuisance; and delay will allow the existing public nuisance to continue to injure future generations of the most vulnerable citizens of St. Louis.

Many courts have recognized the problems inherent with successive actions. In *Harrisonville supra*, 289 U.S. at 340, the U.S. Supreme Court awarded permanent damages stemming from a temporary, abatable nuisance. As part of its reasoning, the Court noted that permanent damages, not successive actions, were necessary to allow the plaintiff in the case adequate relief: "to oblige the [Plaintiff] to bring, from time to time, actions at law for its (continuing damage) would be so onerous as to deny it adequate relief." *Id.* at 340. Other courts have reached the same conclusion. See *Mel Foster Co. Properties, Inc., supra*, 427 N.W.2d at 175 ("Successive actions to recover temporary

damages stemming from one incident...are contrary to the goal of efficient legal remedies").

Although the City did not locate any Missouri cases dealing specifically with this issue in the context of a temporary nuisance damage award, an analysis of successive lawsuits in a nuisance action has surfaced in the context of granting or seeking injunctions to abate a nuisance. In *St. Louis Safe Deposit & Sav. Bank v. Kennett*, 74 S.W. 474 (Mo. Ct. App. 1903), the parties contracted for an easement in the alley between their buildings. When construction activities interfered with the plaintiff's use of its building (violating the easement), the plaintiff sought an injunction. The trial court enjoined the defendants and ordered them to remove part of the building. The appellate court found that while the removal of a large part of a valuable building was an extraordinary remedy, it was preferable to successive actions for damages:

It is ancient law that a person must use his possessions so as not to injure his neighbor and that a use which results in a permanent nuisance to his neighbor will be restrained by a court of equity. (citations omitted)...No remedy for such wrongs is adequate except one which puts an end to them. Successive actions for damages may be nearly or quite as much annoyance to the person who prosecutes them as the thing to be abated.

Id. at 482.

In an analogous context, Missouri courts have allowed injunctive relief to avoid the filing of successive suits to abate a public nuisance. In *Kansas City v. Mary Don Co.*, *supra*, the City of Kansas City sought injunctive relief ordering the defendant to abate

various nuisances existing at its numerous residential rental properties. Although cited many times in administrative and legal proceedings, the defendant failed to take any action to abate the nuisances. The defendants obtained dismissal orders from the trial court by asserting, among other defenses, that Kansas City possessed adequate remedies at law which precluded injunctive relief. *Kansas City*, 606 S.W.2 at 413. The appellate court reversed, noting:

[T]he overriding and primary purpose of the relief sought by the City was protection of the health, safety and welfare of the public....The City alleged that notwithstanding pursuit of its administrative and legal remedies against (defendant), the latter [refused] to abate the rampant conditions existing on the various properties which it owns....Saying that [the City has] an adequate remedy has a hollow ring when weighed with the public interest....Equity looks to substance rather than form and where, as here, it is pleaded that efforts of the City through administrative and legal channels to eradicate conditions menacing public health, safety and welfare are effectively thwarted, the principal purpose of the City's petition would be broadly viewed as seeking abatement of a public nuisance....As disclosed by the City's petition, numerous prosecutions and the levying of repeated penalties are highly problematical as effective deterrents to Mary Don's continuing, broad scale, illegal conduct. So long as Mary Don's conduct persists, and the complained of conditions stand unabated, the public, for all practical purposes, remains helplessly victimized.

Id. at 415-416.

In the present case, successive actions filed by the City against these Defendants would do nothing to end the existing public nuisance in any timely fashion. Like Kansas City's citizens in *Mary Don*, the citizens of St. Louis "remain helplessly victimized" by the existing public nuisance, with no process in sight to end it. If successive actions are required, the City and its citizens face the prospect of dealing with the public nuisance for a long, long time. In that case, successive actions for damages are more than a mere annoyance to the City and its citizens — it is a continuance of the hazard suffered by the City on a daily basis. Repeating the litigation process to obtain the City's costs in successive actions will result in a piecemeal, sporadic attempt to abate the existing public nuisance. At that rate, the harm suffered by St. Louis' citizens could conceivably continue for 50-75 more years. During that time, the City will be forced to use its limited funds to abate the public nuisance and then engage in inefficient litigation to recover those funds to apply to the next round of abatement.

CONCLUSION

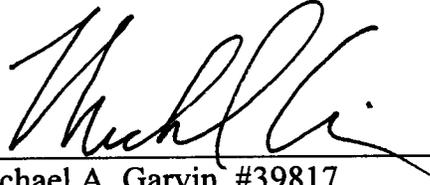
Where the actions of multiple wrongdoers collectively create a threat to the safety and health of the public, the standard of proof for proximate cause should be to bring forward evidence that the actions of each of the defendants, substantially contributed to causing or maintaining the public nuisance of lead paint. Requiring the City to present evidence of the identity of the manufacturer or seller of the paint in each contaminated location in the City is inappropriate in a public nuisance case because it ignores the public nature of the harm and the remedy.

Furthermore, restricting the City's recovery to the amount of money it spent responding to the nuisance prior to filing the action would frustrate the public policy underlying public nuisance law by making it impossible for the City to implement an effective remedy for the nuisance and oblige the parties and the courts to waste resources in a series of successive lawsuits.

For these reasons this Court should reverse the December 26, 2006 decision and order of the Court of Appeals, Eastern District which affirmed the January 18, 2006 summary judgment dismissing this action, reverse the portion of the Circuit Court's order of March 9, 2004 limiting the City's damages to past costs incurred within the ten year limitations period prior to the commencement date of this case, and remand this case to the Circuit Court for other proceedings consistent with this Court's ruling and for trial on the merits.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Kenneth J. Mallin", written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

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 9,680 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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