

IN THE MISSOURI SUPREME COURT

No. SC91369

**ESTATE OF MAX E. OVERBEY, DECEASED, and GLENNA J. OVERBEY,
Appellants/Cross-Respondents,**

v.

**CHAD FRANKLIN,
Respondent/Cross Appellant,**

and

**CHAD FRANKLIN NATIONAL AUTO SALES NORTH, LLC,
Respondent.**

**Appeal from the
Circuit Court of Clay County, Missouri
Division 2
The Honorable Anthony Rex Gabbert, Circuit Judge**

REPLY BRIEF OF CROSS-APPELLANT CHAD FRANKLIN

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ARGUMENT

REGARDING CROSS-APPELLANT CHAD FRANKLIN'S CROSS-APPEAL.

- I. **The trial court erred in denying Franklin's motions for directed verdict and judgment notwithstanding the verdict because the Overbeys failed to adduce sufficient evidence to support a finding that Franklin had violated the Missouri Merchandising Practices Act with regard to the Overbey transaction, in that the Overbeys failed to offer any evidence that Franklin had personally engaged in any conduct that violated the Missouri Merchandising Practices Act as to the Overbeys' transaction and the Overbeys did not seek to impose individual liability upon Franklin through submission of a claim seeking to pierce the corporate veil of Chad Franklin National Auto Sales North, LLC.**

The Overbeys acknowledge in their response brief that they were not seeking to hold Franklin individually liable via piercing the veil of National Auto (despite their closing arguments to the jury that Franklin should be held liable merely because he was "owner" of National Auto). Thus, it stands as undisputed at this point that the Overbeys did not intend to make, nor did they satisfy, the necessary showing needed to pierce the corporate veil of National Auto. Accordingly, veil-piercing cannot constitute an alternative basis for upholding the judgment against Franklin. Rather, the judgment against Franklin depends exclusively upon whether the Overbeys made a submissible

case to hold Franklin directly and individually liable for violating the MMPA. Clearly, the Overbeys failed to meet both their burden of proof and persuasion on this issue.

The Overbeys attempt to rest their claims against Franklin upon three slender reeds: (1) Franklin's status as "owner" of National Auto, (2) Franklin's brief appearance in television advertisements for another dealership, Chad Franklin Suzuki, and (3) a representation made by an employee of National Auto, months after the Overbeys' vehicle purchase, that the employee was speaking on the phone to Franklin.

A. Franklin's mere status as "owner" does not provide a basis for individual liability.

Turning to the first of these grounds, Franklin's status as "owner" of National Auto, this Court should hold that mere ownership of a company cannot, alone, permit extension of individual liability against the owner for the acts of the business entity. To hold otherwise would render meaningless the concept of the corporate veil. Rather, in order to make a submissible case against Franklin, the Overbeys were obligated to demonstrate that Franklin *personally* engaged in conduct that violated the MMPA. Or, as submitted in the Overbeys' verdict director, that "Plaintiffs were damaged by Defendant *Chad Franklin's* use of misrepresentation or [*Franklin's*] omission of any material fact in connection with the sale of the 2007 Suzuki motor vehicle to Plaintiffs." Legal File at LF 206.

The Overbeys argue that there was sufficient evidence to submit their MMPA claim against Franklin, because there was evidence that he had participated, approved, sanctioned, or ratified the conduct of National Auto and its employees. They cite to the case of *Wolfersberger v. Miller*, 39 S.W.2d 758 (Mo. 1931), for the proposition that an officer can be held individually liable when the officer has actual or constructive knowledge of the actual wrong and participation therein. It is important to note, however, that the underlying claims in *Wolfersberger* were for fraud and conspiracy. *See Wolfersberger*, 39 S.W.2d at 764. Conspiracy is a device employed in order to extend joint and several liability to persons who were not directly involved in an underlying tort. *See 8000 Maryland, LLC v. Huntleigh Fin. Svcs.*, 292 S.W.3d 439, 451 (Mo. App. 2009). Here, the Overbeys did not plead any cause of action for conspiracy, and therefore *Wolfersberger* is distinguishable. *See* Legal File at LF 16-46. Moreover, the *Wolfersberger* Court specifically noted that a corporate officer cannot be held liable for conspiracy merely because he or she is an officer of a corporation:

Nor do we think that McCanless personally may be charged with notice of a conspiracy or fraud merely because he was president of the corporation. To hold an officer of a corporation for acts done, it must be shown by evidence of probative force that he had actual or constructive knowledge of the actionable wrong *and participated therein*.

Wolfersberger, 39 S.W.2d at 764 (italics added).

While the Overbeys also cite *Wolfersberger* for the proposition that a company officer can be held liable for the conduct of the company's employees, the cited language of that opinion was in reference to holding the *company* liable for the acts of an employee, not a corporate officer. *See id.* at 764 ("We think that the representations made by Snyder were within the course and scope of his employment, resulting that the McCanless Company, his principal, was responsible therefore.") Thus, the cited section of *Wolfsberger* is merely a summary of the well-settled doctrine of *respondeat superior* liability. While this doctrine forms the basis for holding National Auto responsible for the acts of its employees, the Overbeys misapply that doctrine by suggesting that it permits assertion of individual liability against Franklin, given that National Auto was the employer of the persons with whom the Overbeys transacted business.

In summary, the Overbeys cannot rely merely upon Franklin's status as "owner" of National Auto to hold him individually liable under the MMPA. To do so would simply be another form of veil piercing, a mechanism that the Overbeys expressly concede that they are not seeking to assert in the case at bar.

B. Franklin’s brief appearance in television advertising does not provide a basis for holding individually liable, as there is no evidence that Franklin personally made any statements in those advertisements that violate the MMPA.

The Overbeys next assert that Franklin’s appearance in television advertisements constitutes “direct evidence” of personal involvement in the Overbeys’ transaction. While Franklin appears briefly in certain of the Chad Franklin Suzuki advertisements, there was no evidence that he appeared in *any* advertisements for National Auto, the selling dealer in the Overbey transaction. *See* Exhibit 3. None of this evidence, however, demonstrates that Franklin, individually, made “use of misrepresentation or the omission of any material fact in connection with the sale of the 2007 Suzuki motor vehicle to Plaintiffs,” as set forth in Plaintiff’s verdict director. *See* Legal File at LF 206.

The Overbeys cite to Page 47 of the transcript and Exhibit 3 from the trial proceedings in support of the astonishing (and baseless) assertion that “[i]n one commercial, for the Payment for Life Program, *Franklin explicitly explained that program.*” Overbey Response Brief at 6 (italics added). Neither of the Overbeys’ citations to the record support that assertion, however. Their first citation, to Page 47 of the trial transcript, is a citation to a portion of Plaintiff’s opening statement, which is not evidence. Their citation to Exhibit 3 is to a collection of various television advertisements shown to the jury during trial. Only one of those advertisements was for

National Auto (the remaining advertisements were for another dealership, Chad Franklin Suzuki, who was not a party to this matter). *See* Exhibit 3. Contrary to the Overbeys' assertion in their response brief, **nowhere** in any of the advertisements in Exhibit 3 does Franklin personally explain the program at issue. *See* Exhibit 3. The sections of the advertisements discussing various incentive programs are presented as graphics overlaid with a narrator discussing the program(s). *See id.* There was no evidence offered or admitted at trial that Franklin was the narrator in any of those advertisements. Nor can any such inference be reasonably derived from the evidence adduced. In short, the Overbeys' assertion that Franklin personally explained the program in any of those advertisements is a serious mischaracterization of the evidence presented to the jury and is devoid of evidentiary support.

Franklin's brief appearance in certain advertisements (for another motor vehicle dealership) also does not constitute any evidence that Franklin had any role in granting approval of the overall content of those advertisements or that he had any knowledge of the contents of the advertisements other than the very short segments in which he appeared, let alone the content of any of National Auto's advertisements (none of which Franklin personally appeared in). Rather, the record at trial was void of any evidence that would demonstrate that Franklin was responsible for the advertisements' content or that he ratified the content of those advertisements.

C. The purported conversation between “Ben” and Franklin, months after the Overbey transaction took place, does not demonstrate that Franklin violated the MMPA in connection with the sale of the Overbey vehicle.

Lastly, the Overbeys rely upon evidence of an incident in which “Ben,” a National Auto Sales employee, purportedly spoke to Franklin on the telephone provide as evidence that Franklin personally violated the MMPA. Not only did this conversation take place several months after the Overbey transaction (and therefore could not involve any “use of misrepresentation or the omission of any material fact in connection with the sale of the 2007 Suzuki Motor Vehicle to Plaintiffs,” as submitted in the Overbeys’ verdict director (Legal File at LF 206), that conversation does not even demonstrate that Franklin made any misrepresentation or omitted any material fact.

Michael Overbey testified that this incident occurred, in April of 2008, several months after the purchase of the subject vehicle. *See* Tr. at 98:3-22. Michael Overbey testified that he was not included in that phone call, but testified that he heard Ben speak to “Franklin” regarding whether he had any knowledge of the Overbey transaction or the whereabouts of certain former employees of National Auto:

Q. Were you on the phone when Ben called Mr.
Franklin?

A. No, he was on the phone.

Q. So it was just a conversation --

A. Between Ben and him in front of me.

Q. And you have no personal knowledge what was actually said between the two other than --

A. He asked him about the deal and asked him about where Nick was and basically they had come up that Nick was working now at Van Chevrolet and was no longer in the employment of Chad Franklin and he had absolutely no knowledge about any deal made, and that's what Ben told me.

Tr. at 98:23-99:9. Nothing in that discussion suggests that Franklin had any knowledge of the Overbey transaction, let alone any participation in that transaction or that he had ratified or sanctioned the transaction. Thus, it does not yield evidence that would support submission of the Overbeys' MMPA claim against Franklin.

D. The Overbeys failed to meet their burden to present evidence demonstrating a basis to hold Franklin individually liable.

The Overbeys argue that Franklin “stands on shaky ground” by failing to present evidence at trial, citing *Chesus v. Watts*, 967 S.W.2d 97 (Mo. App. 1998), in support of that argument. However, *Chesus* only stands for the proposition that it is risky for a defending party not to present evidence *after the plaintiff has made a submissible case*.

Chesus, 967 S.W.2d at 112. However, a “defendant, who has the benefit of the burden of proof, is entitled to try the case with no evidence at all and to rely solely upon the jury disbelieving the plaintiff’s evidence.” *Brandt v. Pelican*, 856 S.W.2d 658, 664-65 (Mo. banc 1993).

It was the *Overbeys*’ burden, as the plaintiffs at trial, to present evidence sufficient make a submissible case that Franklin was individually liable for violation of the MMPA. *See generally, Chochorowski v. Home Depot USA, Inc.*, 295 S.W.3d 194, 198 (Mo. App. 2009) (discussing elements of MMPA claim); *Day v. Niebur*, 534 S.W.2d 843, 844 (Mo. App. 1976) (discussing a plaintiff’s burden of proof and risk of non-persuasion). This, they failed to do. Franklin acknowledges that he did not testify at trial.¹ However, had the *Overbeys* desired Franklin’s testimony, they had clear statutory authority to compel that testimony via a trial subpoena. *See* § 491.030, RSMo 2000. However, despite

¹ The *Overbeys*’ response brief incorrectly states that “Franklin did not appear at trial.” Franklin *did* appear at trial through his counsel of record, even though he did not physically attend the trial proceedings. *State ex rel. Anderson v. Nixon*, 158 S.W.3d 306, 309 (Mo. App. 2005) (“Where a party does not personally appear at trial but counsel does appear, the party is deemed to have appeared at trial through counsel.”) Nor does Franklin’s decision not to attend the trial render the case uncontested. “[T]hrough his counsel,” Franklin “opposed, resisted, disputed, called into question, and challenged” the *Overbeys*’ claims. *Id.*

statutory authorization to do so, the Overbeys declined not to subpoena Franklin to testify. Nor did the Overbeys subpoena any employees of National Auto to testify at trial. Put another way, they proceeded to trial with no expectation that they would be able to offer any testimony in their case-in-chief from Franklin or representatives of National Auto.

As a result, no evidence was offered by the Overbeys in the proceedings below that would demonstrate (or allow a reasonable inference) that Franklin, aside from being the titular “owner” of National Auto, was involved in the day-to-day operations of National Auto or that he had any role in reviewing or approving its advertising. Nor was there any evidence that Franklin personally participated in the transaction in which the Overbeys purchased the subject vehicle and upon which their MMPA claims are focused.

Consequently, the Overbeys failed to present evidence that they “were damaged by Defendant Chad Franklin’s use of misrepresentation ... in connection with the sale of the 2007 Suzuki Motor vehicle to Plaintiffs.” Legal File at LF 206. Nor was there any evidentiary basis for a jury to find that Franklin had made any “omission of any material fact in connection with the sale....” *Id.* Having failed to offer sufficient evidence that Franklin personally violated the MMPA with regard to the Overbey transaction, the MMPA claims against Franklin were not properlymissible to the jury. Accordingly, this Court should conclude that the trial court erred in denying Franklin’s motions for directed verdict and motion for judgment notwithstanding the verdict and reverse the

judgment below as to Franklin, remanding with directions to dismiss the claims against Franklin with prejudice.

II. The trial court erred in failing to reduce the punitive damages award against Franklin to a single-digit multiple of the actual damages assessed against Franklin, because the reduced punitive damages award of \$500,000 was still far in excess of the amount permitted under the due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, Section 10, of the Missouri Constitution, in that the evidence adduced at trial does not support an award of punitive damages of an amount over 111 times the amount of actual damages based upon (1) the reprehensibility of Franklin’s conduct, (2) the disparity between the harm actually or potentially suffered by the Overbeys and the punitive damage awarded, and (3) the difference between the punitive damages awarded and comparable civil penalties that could be imposed in similar cases.

As demonstrated in Cross-Appellant Franklin’s prior brief, the evidence adduced at trial does not support a conclusion that the punitive damages awarded against Franklin in this matter (whether the \$1 Million originally awarded by the jury or the reduced amount of \$500,000 within the trial court’s final judgment) is consistent with Franklin’s rights to due process under the constitutional principles set forth in the U.S. Supreme Court’s decisions in *BMW of North America v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). Rather, the evidence in the record amply demonstrates that an award in excess of a single-digit multiplier was required under those cases. However, even one or more of the *State Farm*

guideposts suggested that a higher ratio could be awarded without violating due process, it does not follow that a ratio of 111 to 222 times the award of actual damages was permissible. Rather, even if deviation from a single-digit ratio was permissible, the constitutional due process limits were far surpassed by the resulting award of punitive damages.

A. The reprehensibility guidepost does not support an award of punitive damages of more than either 222 or 111 times the amount of actual damages in this matter.

The Overbeys first argue that the *State Farm* guidepost of “reprehensibility” supports the award of punitive damages exceeding a single-digit ratio of the actual damages awarded as to Respondent/Cross-Appellant Franklin in this matter. They specifically contend that reprehensibility is present, here, because of three circumstances: (1) an assertion that the Overbeys were “financially vulnerable,” (2) repeated conduct, and (3) the harm arose from “intentional malice, trickery, or deceit.” As discussed below, none of these three factors are supported by the evidence adduced with regard to Franklin. Nor do the Overbeys offer any persuasive argument that, even if such factors were present, that they would render an award of punitive damages constitutionally proper in amounts that exceed either 222 times or 111 times the amount of actual damages awarded (corresponding to the original punitive damages award of \$1 Million or the reduced punitive damages of \$500,000).

Turning first to the assertion that the Overbeys were “financially vulnerable,” they cite to immaterial testimony of nonparties Michael and Mashele Overbey that they could not afford a vehicle costing more than \$20,000. Tr. at 51:4-11 (Testimony of Michael Overbey), 109:3-6 (Testimony of Mashele Overbey). *Neither Michael and Mashele were plaintiffs in the underlying action, nor are they parties to the present appeal.* As such, the financial vulnerability (if any) of Michael and Mashele Overbey is irrelevant. Indeed, the jury was **forbidden** to consider their financial vulnerability. Punitive damages cannot be awarded to punish a defendant for harming others. *Philip Morris USA v. Williams*, 549 U.S. 346, 347 (2007); MAI 10.01 (2008 Revision). Thus, the issue was whether *Max and Glenna Overbey*, the plaintiffs in the proceedings below, were financially vulnerable. The Overbeys’ failure to identify any evidence in the record that Max or Glenna were financially vulnerable amply demonstrates that there was no such evidence in the proceedings below. Thus, this reprehensibility factor is not present in the case at bar.

Next, the Overbeys contend that an award of punitive damages in excess of a single-digit multiplier is proper because the conduct at issue was “repeated” conduct and not isolated. In support of this contention, they cite first to trial testimony by a number of other customers of National Auto. Tr. at 198:12 to 217:22. None of this testimony discussed *any* misconduct by Franklin, personally, but rather the conduct of National Auto and its employees. *See id.* The Overbeys also cite to two exhibits (Exhibits 25 and 26) presented as part of the testimony of Shelly Land, a representative of the Missouri

Attorney General's office, regarding consumer complaints made to that office regarding National Auto. *See*, Appendix to Overbeys' Response Brief at A17-18; Tr. at 134:20-135:7. Ms. Land expressly testified that she could not recall if any of those persons made any complaint against Franklin, individually. Tr. at 136:13-137:17. While the evidence cited by the Overbeys might support evidence of repeated conduct by National Auto, there was no evidence adduced below that *Franklin* personally engaged in any repeated misconduct. Thus, this reprehensibility factor also fails to support the punitive damages awarded against Franklin.

Lastly, the Overbeys argue that the amount of punitive damages awarded was proper because the misconduct at issue was purposeful and constituted intentional "malice, trickery, and deceit." Again, as discussed with regard to Franklin's first point on cross-appeal, above, the portions of the record cited by the Overbeys discuss conduct by National Auto, not Franklin personally. They offer no evidence that Franklin was personally aware of the conduct of National Auto's employees in the Overbey transaction, or that he had any personal involvement in the dealership's negotiation or approval of that transaction. It should also be noted that the Overbeys' claims in the proceedings below were not for fraud (i.e. intentional misrepresentation). Rather, their claims were presented as violations of the Missouri Merchandising Practices Act, violations which require no proof of intent or other *mens rea* element, nor any findings as to such issues. Thus, the Overbeys' attempts to now argue on appeal that Franklin had

engaged in “fraud,”² are not a proper characterization of the jury’s findings based upon the claims submitted. In short, the Overbeys’ showing of reprehensibility falls far short with regard to their punitive damages claim against Franklin, individually.

B. The amount of actual damages awarded against Franklin, even if it would allow some deviation from a single-digit multiplier, does not permit the radical departure from such ratios as reached by the jury’s original award or as it was subsequently reduced by the trial court.

The Overbeys offer no meaningful argument that would allow this Court to conclude that an award of punitive damages of either \$1 Million or \$500,000 represents, in any way, a “reasonable and proportionate” amount based upon the actual harm the Overbeys sustained, as reflected by the \$4,500 actual damages awarded by the jury. Franklin acknowledges that both *State Farm* and this Court’s precedent recognizes an exception to the “single-digit multiplier” principal where the amount of actual damages are low, it does not follow that this exception eliminates all restrictions on the ratio of actual to punitive damages.

The comparison between the harm suffered and the amount of punitive damages assessed against Franklin cannot be squared with the jury’s award of actual and punitive

² See, e.g., Overbeys’ Response Brief at 18.

damages awarded against National Auto. The ratio of punitive to actual damages awarded against National Auto was 3.3:1. *See* Legal File at LF 209. In terms of absolute dollars, the punitive damages originally awarded against Franklin were \$750,000 greater than the punitive damages assessed against National Auto. *See id.* That is, the jury awarded *four* times the amount of punitive damages against Franklin as it assessed against National Auto. *See id.* Even after reduction of the punitive damages awarded against Franklin to \$500,000, those damages were still \$250,000 (or two times) more than the punitive damages entered against National Auto. *See* Legal File at LF 303. This disparity is impossible to square with the evidence presented, as the trial record provides *no* reason why Franklin should be subjected to more harsh punishment than National Auto. *Compare, Davis v. Chatter*, 270 S.W.3d 471, 481 (Mo. App. 2008) (discussing how punitive damages awarded against defendants equally deserving of punishment should be generally equivalent).³ The Overbeys make no effort to explain the disparity

³ A reduction of the punitive damages award against Franklin to the amount assessed against National Auto (\$250,000), would still be unconstitutionally excessive, as it would represent a ratio of 55.5 times the amount of actual damages assessed against Franklin. Unlike *Davis*, here there were separate (and different) actual damages awards entered against the defending parties. *Compare, Davis*, 270 S.W.3d at 481; Legal File at LF 302-304. Accordingly, the underlying principle of *Davis* that similarly situated defendants should be treated equivalently with regard to punitive damages awards would be satisfied by applying the 3.3:1 ratio of punitive to actual damages awarded against

between the two awards, or offer any rational explanation of how the jury (or the trial court) could have treated the two defending parties so differently.

Astonishingly, the Overbeys argue that such high ratios are proper because Franklin did not present evidence of his net worth during the punitive damages proceedings.⁴ Such argument clearly disregards the fact that it was the *Overbeys* who

National Auto to the award against Franklin, which would result in a punitive damages award of \$14,850, based upon the jury's actual damages assessment of \$4,500.

⁴ Beyond statements that a defendant's financial status can be considered by the jury in determining the amount of punitive damages, no Missouri authority appears to have directly answered the question as to which party bears the burden to present such evidence. *See, e.g., Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719, 724 (Mo. 1966). However, the manner in which this issue has arisen in reported cases suggests that the burden rests with the party seeking to raise financial status in order to either increase or mitigate the punitive damages to be awarded. *See, e.g., Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996) ("evidence of a defendant's financial status is admissible as an indication of the amount of damages necessary to punish the defendant"); *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 468 (Mo. banc 1995) ("the specific financial condition of the defendant are among factors that may mitigate against assessment of such damages"). Here, as the Overbeys sought to present evidence of financial status in order to seek an elevated punitive damages award, their failure to

elected to present evidence attempting to demonstrate the financial status of National Auto and Franklin in the proceedings below. Tr. at 239:24-240:5, Exhibit 27. They suggest that such an award was appropriate in light of evidence presented that *National Auto* had over \$13 Million in sales over a particular eighteen-month period. However, this argument continues their misguided conflation of Franklin with National Auto. Moreover, despite evidence regarding the amount of *sales*, the Overbeys offered no evidence as to what National Auto accrued as *profit* from those sales, let alone the extent to which that profit flowed to Franklin, personally.

There is no Missouri authority to suggest that the ratio of punitive damages here (which exceeds either 111 or 222 times the amount of the actual damages awarded, with regard to the amended and original awards, respectively) meets constitutional muster under this guidepost. The only circumstances relied upon by the Overbeys are from other jurisdictions and involving very large companies, not individual defendants. Those cases are, therefore, inapposite. In light of the incredibly large ratio of punitive to actual damages, the punitive damages award, here “raises a presumption of unconstitutionality per the holding in [*State Farm v.*] *Campbell.*” *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 851 (Mo. App. 2007).

present any proof of Franklin’s individual financial status undermines their assertion that the punitive damages assessed against Franklin are not excessive.

If anything, this matter seems more closely akin to the case of *Delong v. Hilltop Lincoln-Mercury*, 812 S.W.2d 834 (Mo. App. 1991), in which a motor vehicle dealer was held liable upon a claim that the dealer had engaged in fraudulent conduct by misrepresenting a vehicle as being a “trade in” from another customer rather than obtained via a wholesale transaction with another dealership. *See Delong*, 812 S.W.2d at 837. As in the case at bar, there were allegations of repeated misconduct. *See id.* at 841 (“McGoogan testified that he routinely told customers a car was, to his knowledge, a trade-in, regardless of its true origin”). Like the present matter, the damages at issue were purely economic. *See id.* at 841-42. Ultimately, the jury awarded the plaintiffs actual damages of \$3,000 and punitive damages of \$75,000, a ratio of 25:1. *See id.* at 836. On appeal, the Court of Appeals concluded that the punitive damages were not excessive. *See id.* at 841. While decided prior to *BMW* and *State Farm*, the *Delong* decision is nevertheless instructive as to what might constitute a more appropriate ratio of punitive to actual damages in situations where deviation from a single-digit multiplier is permissible.

C. Comparable civil penalties do not support a conclusion that the punitive damages against Franklin are consistent with Franklin’s rights to due process.

Turning to the issue of comparable civil penalties, the Overbeys first argue that the State’s failure to resolve its pending attorney general action against National Auto is a basis for disregarding this guidepost. They offer no authority in support of that argument,

however. While Franklin acknowledges that while the Attorney General's action is still pending, the mere fact that the action has been filed in the first instance amply demonstrates that the State has not ignored the alleged misconduct at issue in the case at bar. Rather, the filing and prosecution of that action amply demonstrates that the State has elected to exercise its authority under the MMPA.

Instead, the Overbeys are left to argue that this Court should not consider the civil penalties available to State actions under the MMPA in order to assess what punishment is appropriate to assess in a private civil action under the exact same act. The absurdity of this position should be readily apparent. The purpose of the statutory penalties in the MMPA is to punish those who violate the MMPA. The scope of punishment assessed against Franklin for violating the MMPA should not be any greater merely because the action is brought by a private litigant rather than the State. Instead, this Court must follow the guidance of *BMW v. Gore*, and consider the sanctions available in State civil and criminal actions for violations of the MMPA in assessing the propriety of the punitive damages awarded against Franklin in the proceedings below. *See BMW*, 517 U.S. 559, 583-585 (1996).

The Overbeys have failed to offer any authority that would allow this Court to defy binding precedent of the U.S. Supreme Court by refusing to consider comparable civil and criminal penalties as required under this guidepost. Accordingly this Court should conclude that the radical departure of the punitive damages award, here, as

compared to the civil penalties available in State actions under the MMPA, strongly suggests that the punitive damages awarded to the Overbeys in this matter are excessive and must be reduced to an amount consistent with due process.

In summary, the *State Farm* guideposts do not support a finding that the blatantly excessive amount of punitive damages awarded against Franklin is consistent with constitutional due process. The reprehensibility factors the Overbeys seek to rely upon are either unsupported by any evidence as to Franklin (as opposed to National Auto), or are based upon the immaterial circumstances of nonparties Michael and Mashele Overbey that cannot be taken into consideration. Moreover, this is a case in which the underlying damages are purely economic, rather than involving any physical harm or injury (or even any risk thereof). The ratio of punitive to actual damages is clearly excessive under the guidance of *State Farm* and *BMW v. Gore*, which strongly suggests that a single-digit ratio is more appropriate. This is further underscored by comparison to the single-digit ratio of punitive to actual damages assessed against National Auto. Indeed, comparing the two Defendants' awards clearly demonstrates that the award of punitive damages against Franklin was excessive, especially in light of the absence of any evidence suggesting that Franklin had personally engaged in any reprehensible conduct, let alone conduct that could be considered more reprehensible than National Auto's conduct. The comparable civil and criminal penalties also demonstrate that the punitive damages award (even after reduction by the trial court) is excessive and beyond constitutional due process limitations. Accordingly, Cross-Appellant Franklin's Second

Point on Appeal should be granted, with this Court either reversing and remanding for further reduction of the punitive damages award or alternatively this Court entering an amended judgment under Supreme Court Rule 84.14 reducing the punitive damages award.

III. The trial court erred in awarding the Overbeys attorneys fees in the amount of \$72,000, because that award was not supported by competent evidence, in that the Overbeys' counsel presented evidence of incurring attorneys fees of only \$67,000 and there was no evidentiary basis for the trial court's award of an additional \$5,000 in attorneys fees, indicating that the award was arbitrary and lacked careful consideration.

The Overbeys contend that the trial court did not abuse its discretion by awarding them attorneys fees in an amount \$5,000 greater than requested in their post-trial motion seeking attorneys fees. They primarily rely upon their November 2, 2011, filing of a document captioned "Plaintiffs' First Amended Itemization of Attorney's Fees." Supplemental Legal File II at SLFII 1-10.⁵ An application for attorneys fees should be supported by affidavit, in addition to offering records of the work performed, hours billed, billing rates, and expenses. *See, e.g., Klinkerfuss v. Cronin*, 289 S.W.3d 607, 612

⁵ The Overbeys mischaracterize the record by referring to this document as an "amended motion for attorney fees," despite the fact that the document was not captioned or described in its body as an "amended motion" for such fees, but was instead an attempt to supplement the exhibits filed with the original motion. *See* Supplemental Legal File II at SLFII 1.

(Mo. App. 2009).⁶ Here, Plaintiffs' First Amended Itemization was not submitted with any affidavit. Thus, the "amended itemization" could not be properly considered by the Court as evidence of the Overbeys' attorney's fees.

However, even if the "Amended Itemization" could have been considered by the Court, it remains that the Overbeys never amended their underlying motion seeking attorneys, fees. That motion sought only an award of \$67,000. Legal File at 220. As such, the trial court abused its discretion in awarding more in attorneys fees than the amount set forth in the Overbeys' motion. *Compare, Watts v. Lane County*, 922 P.2d 686, 690 (Or.App. 1996).

⁶ Numerous Missouri appellate cases refer to the filing of affidavits in support of attorney fee requests. *See, e.g., Midwest Grain & Barge Co. v. Poeppelmeyer*, 295 S.W.3d 211, 213 (Mo. App. 2009); *Vogt v. Emmons*, 181 S.W.3d 87, 97 (Mo. App. 2005); *In re Alcolac, Inc. Litigation*, 945 S.W.2d 459, 461 (Mo. App. 1997); *Dover Elevator Co. v. Rafael*, 939 S.W.2d 474, 477 (Mo. App. 1996); *State ex rel. Accurate Const. Co. v. Quillen*, 809 S.W.2d 437, 440 (Mo. App. 1991); *American Bank of Princeton v. Stiles*, 731 S.W.2d 332, 339 (Mo. App. 1987); *Heshion Motors, Inc. v. Western Intern. Hotels*, 600 S.W.2d 526, 541 (Mo. App. 1980); *Gabler v. Continental Cas. Co.*, 295 S.W.2d 194, 198 (Mo. App. 1956).

Accordingly, this point on cross-appeal should be granted and the Court should amend the judgment below, pursuant to Supreme Court Rule 84.14, to reflect an attorney's fee award to the Overbeys in the amount of \$67,000.00. *See, e.g., Franklin v. Franklin*, 213 S.W.3d 218, 230 (Mo. App. 2007).

CONCLUSION

This Court must reverse the judgment of the trial court as to Cross-Appellant Franklin, for the reasons discussed above and in Franklin's opening briefing in this appeal. The Overbeys failed to adduce sufficient evidence that Franklin had violated the MMPA. The Overbeys were obligated to satisfy their burden to prove the elements of that claim as set forth in their verdict director (Legal File at LF 306), and failed to do so. Accordingly, the judgment against him, individually, cannot stand.⁷

However, even if the Overbeys made a submissible case against Franklin at trial, the resulting award of punitive damages assessed against Franklin was far in excess (both in ratio and in absolute amount) of what was permissible under the constitutional due process principles articulated in the *BMW v. Gore* and *State Farm v. Campbell* decisions of the U.S. Supreme Court, even after that award was reduced by the trial court. None of the *State Farm* guideposts supports a conclusion that a punitive damages award that is a three-digit multiple of the actual damages awarded is consistent with due process. Thus, even if the underlying liability finding against Franklin is affirmed, the punitive damages

⁷ As discussed in the opening brief filed by Respondent National Auto and Respondent/Cross-Appellant Franklin, the granting of either of Franklin's first two points on Cross-Appeal would moot the constitutional challenge to Section 510.265, RSMo 2005

assessed against him must be reduced to an amount that is in accordance with the binding precedent of the U.S. Supreme Court as articulated in *BMW* and *State Farm*. Thus, this Court should reverse and remand this matter for entry of a new award of punitive damages or this Court should amend the punitive damages award under Supreme Court Rule 84.14.

Lastly, this Court should sustain Franklin's third point on appeal, and reduce the attorneys fees awarded in the Amended Judgment to \$67,000.00, the amount sought by the Overbeys' motion in the proceedings below, rather than the higher amount awarded by the Court, which was based upon an amended exhibit that was unsupported by affidavit and therefore not properly within the trial court's consideration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Respondent/Cross-Appellant Franklin states that this Brief is in compliance with the limitations of Rule 84.06(b), is in Microsoft Word format using Times New Roman 13 point font and contains 6,537 words, exclusive of the cover, Certificate of Compliance, Certificate of Service, signature block, and appendix. CD-ROMs, which have been scanned for viruses and are virus free containing the full text of the Brief in Microsoft Word format have been provided to the Clerk and to counsel for Appellants/Cross-Respondents.

Kevin D. Case

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Supreme Court Rules 84.01, 84.05(a), 84.07, and 84.11 that two copies of Appellant's Brief and a CD-ROM containing same were mailed, via regular U.S. mail, first class, postage prepaid this 23rd day of March, 2011, to:

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