IN THE MISSOURI SUPREME COURT

No. SC92871

LILLIAN LEWELLEN,
Appellant/Cross-Respondent,

v.

CHAD FRANKLIN NATIONAL AUTO SALES NORTH, LLC,
and CHAD FRANKLIN,
Respondents/Cross-Appellants.

Appeal from the
Circuit Court of Clay, Missouri
Division 4

The Honorable Larry D. Harman, Circuit Judge

BRIEF OF RESPONDENTS/CROSS-APPELLANTS CHAD FRANKLIN NATIONAL AUTO SALES NORTH, LLC, AND CHAD FRANKLIN

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JURISDICTIONAL STATEMENT

Respondents/Cross-Appellants concur with Appellant/Cross-Respondent's jurisdictional statement with regard to Appellant/Cross-Respondent's appeal.

With regard to Respondents/Cross-Appellants' Appeal, that appeal was originally filed in the Missouri Court of Appeals, Western District, as Clay County is within the geographic boundaries assigned to that appellate court. That appeal does not involve any issues reserved for the exclusive jurisdiction of the Missouri Supreme Court under Article V, Section 3 of the Missouri Constitution, in that none of the issues in this matter concerns the validity of a treaty or statute of the United States, the validity of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office, or a criminal conviction where the punishment imposed is death. However, this Court has properly exercised its jurisdiction over this matter by ordering transfer of Respondents/Cross-Appellants' appeal from the Missouri Court of Appeals, Western District, pursuant to Supreme Court Rule 83.01 and Article V, Section 11 of the Missouri Constitution, so that the appeals could be consolidated.

STATEMENT OF FACTS

On or about December 15, 2007, Appellant/Cross-Respondent Lillian Lewellen ("Lewellen") purchased a motor vehicle from Respondent/Cross-Appellant Chad Franklin National Auto Sales North, LLC ("National"). Tr. at 248:24-249:4. At the time of that transaction, National operated a motor vehicle dealership in North Kansas City, Missouri. Legal File at LF 284-85, LF 306. Respondent/Cross-Appellant Chad Franklin ("Franklin") was the owner of National. Tr. at 214:24-215:10.

A. Lewellen's Purchase Of The Vehicle.

Lewellen testified that she saw a series of television advertisements in 2007 which discussed programs in which a customer could purchase a vehicle with only a $49, $69, or $80 per month payment obligation. Tr. at 233:23-234:24. Based on those advertisements, she went to National's place of business and spoke with an employee about that program. Tr. at 235:20-236:14. Lewellen testified that the saleperson stated that the program was for five years, and the dealership would provide her a check for the difference between the monthly payment on the vehicle and her $49 per month payment obligation. Tr. at 237:10-18. At the conclusion of a year, she would be able to return the vehicle, trade it in, and obtain a replacement vehicle under the program under the same payment terms. Tr. at 238:4-24.

She subsequently purchased a vehicle and entered into a retail installment contract which provided for payments of $387.45 per month. Tr. at 248:24-249:4, 258:16-19;

Plaintiff's Exhibit 2. Lewellen received a check from National which provided her funds to pay the difference between the $387.45 and the $49 that she was contributing toward each payment. Tr. at 257:12-258:2. However, she testified that the funds from National were only sufficient to cover somewhere between eight to ten of those payments. Tr. at 258:8-15, 295:2-5.

After the funds from National were exhausted, Lewellen contacted the lender holding the loan, Harris Bank, to advise that she would not be able to make the full payment on the vehicle. Tr. at 277:19-287:12. However she continued to make payments of $49 per month for a number of months before surrendering the vehicle to the lender. Tr. at 280:21-281:2. The lender subsequently brought action against Lewellen for the balance due on the loan. Tr. at 281:19-282:2.

B. Pretrial Proceedings.

Lewellen brought suit against National, Franklin, and Harris Bank, on October 1, 2010. Legal File at LF 1. She subsequently amended her pleadings, and in her final amended petition, she brought claims against National and Franklin under three theories: (1) fraudulent misrepresentation; (2) violation of the Missouri Merchandising Practices Act ("MPAA"), Section 407.010 *et seq.*, RSMo 2000, and (3) negligent misrepresentation. Legal File at LF 291-299.

Prior to trial, Lewellen moved for entry of sanctions against National and Franklin, due to Franklin's failure to appear for deposition (either individually or as the corporate representative of National). Legal File LF 404-472. The trial court conducted a hearing on her motion for sanctions on May 9, 2012. Tr. at 44:20-66:5. At that hearing, counsel for Franklin and National acknowledged that Franklin had failed to appear for deposition. Tr. at 55:23-24. The reason for that failure, however, was not known, as counsel had been unable to locate him despite multiple attempts and trying to notify him of those depositions through every feasible means. Tr. at 55:24-56:15. As trial counsel stated, it was unknown whether his absence was involuntary (due to being placed in a rehab program, psychiatric ward, or incarceration) or due to Franklin's own choice. Tr. at 56:8-15. As such, counsel for National and Franklin argued that entry of sanctions was not warranted because there had been no showing that Franklin's conduct was willful. Tr. at 55:23-56:21.

While finding that Franklin's failure to appear at deposition was not due to any lack of diligence by trial counsel, the trial court nevertheless found that there was sufficient grounds to sanction Franklin and National for Franklin's failure to appear for deposition. Tr. at 64:2-11. Therefore, at the conclusion of the May 9, 2012, hearing, the trial court granted Lewellen's motion for sanctions against both the National and Franklin, stating that it was striking both defendants' pleadings. Tr. at 64:2-11.

When asked to clarify what limitations it was imposing on counsel for Franklin and National with regard to their participation in the approaching trial, however, the trial court stated that it did not yet know how it intended to limit those defendants' participation at trial. Tr. at 65:5-14. Instead, the trial court advised that it would provide that guidance via a subsequent order. Tr. at 65:16-66:3. However, despite the trial court's representation that it would be providing additional guidance in a few days, no order was ultimately issued discussing the sanctions that the trial court was imposing. *See* Legal File at LF 16-20.

Subsequently, on May 21, 2012, the parties appeared for a pretrial conference. Tr. at 87:1-7. Near the beginning of those proceedings, the trial court returned to the subject of its prior entry of sanctions, providing some additional explanation with regard to how Franklin and National would be limited in their presentation of evidence at trial. Tr. at 90:2-12. The Court stated that it considered National and Franklin to be in default and that counsel for those defendants would be permitted limited participation in voir dire "to the extent that an appropriate voir dire question has not been asked by any of the remaining non-sanctioned and not in default parties." *Id.* The Court also indicated that it would permit "cross examination only on the issue of damages." *Id.* The Court did not provide any further explanation regarding the extent to which Franklin or National would be permitted to participate in trial.

C. Trial.

A jury trial commenced on May 29, 2012, with regard to Lewellen's claims against Franklin and National, and continued for four days. *See* Tr at i-v. National and Franklin did not personally appear at trial, but appeared through their counsel. Tr. at 183:1-12; 184:1-12. Lewellen ultimately submitted the case to the jury on two alternative theories, fraudulent misrepresentation and violation of the MMPA. Legal File at LF 541-544, LF 734-737. The jury rendered verdicts in favor of Lewellen against both National and Franklin upon both theories submitted, awarding her $25,000 in actual damages in its verdicts, and finding National and Franklin liable for punitive damages. *Id.* The trial then proceeded to its second phase, where the jury assessed punitive damages of $1 Million against National and Franklin. Legal File at LF 738-739.

D. Post-Trial Proceedings.

Each of the parties timely filed post-trial motions. Legal File at LF 560-656. National and Franklin sought a new trial on the basis that the trial court's sanctions order unfairly prejudiced them on the basis that the court failed to adequately specify what evidence or argument that they would be permitted to present at trial Legal File at LF 625, LF 631-634. Alternatively, they requested that the judgment be amended to reflect merger of the damages awards and application of the punitive damages caps under § 510.265, RSMo 2009, and on constitutional due process grounds under *State Farm v.Campbell*. Legal File at LF 626-627, LF 625-655. Lewellen moved to amend the judgment as well, seeking an award of attorney's fees. Legal File at LF 560-623.

The trial court subsequently entered its First Amended Judgment on September 18, 2012. LF 734-745. That amended judgment granted Lewellen actual damages in the amount of $25,000, for which National and Franklin were to be jointly and severally liable.[1] Legal File at LF 742. With regard to the alternative theories of fraudulent misrepresentation and violation of the Missouri Merchandising Practices Act that were presented to the jury at trial, the trial court concluded that those claims merged, such that Lewellen was required to elect between those theories as to each defendant. Legal File at LF 740-742. Lewellen elected to take her judgment against Franklin under her fraudulent misrepresentation theory, while her judgment against National was taken under the MMPA. Legal File at LF 587.

The trial court's First Amended Judgment granted Lewellen's motion for attorneys fees in part, awarding Lewellen attorneys fees in the amount of $82,810.00, but solely upon her MMPA claim against National. Legal File at LF 742. However, the trial court denied Lewellen's motion seeking to hold Section 510.265, RSMo 2005, unconstitutional, and applied the statute to reduce the punitive damages assessed against Franklin and National. Legal File at LF 742-743. The punitive damages against Franklin

[1] The trial court subsequently found that the actual damages assessed against Franklin and National merged, on the basis that the damages were one and the same. Legal File at LF 742.

were reduced to $500,000 pursuant to the statute. Legal File at LF 743. As to National, the punitive damages were reduced to $539,050, five times the total of the actual damages ($25,000) and the award of attorneys fees ($82,810). *Id.* The trial court denied the all other relief sought by National and Franklin in their post-trial motion. Legal File at LF 740.

National and Franklin timely filed their Notice of Appeal on September 28, 2012, appealing the First Amended Judgment to the Missouri Court of Appeals, Western District. *Id.* at LF 757. That appeal was subsequently transferred before being transferred to this Court by this Court's Order of January 7, 2013.

RESPONSE TO APPELLANTS/CROSS-RESPONDENTS' POINTS ON APPEAL

I. THE TRIAL COURT DID NOT ERR BY REDUCING THE PUNITIVE DAMAGES AWARDED TO LEWELLEN ON HER FRAUDULENT MISREPRESENTATION CLAIM PURSUANT TO SECTION 510.265, RSMO 2005, BECAUSE THAT STATUTE DOES NOT VIOLATE LEWELLEN'S RIGHT TO JURY TRIAL, GIVEN THAT THIS RIGHT MUST YIELD TO A DEFENDANT'S CONSTITUTIONAL DUE PROCESS RIGHTS UNDER THE U.S. CONSTITUTION WHICH BAR IMPOSITION OF EXCESSIVE PUNITIVE DAMAGES AWARDS AND GIVEN THAT THE STATUTORY LIMITS ON PUNITIVE DAMAGES DO NOT IMPEDE THE FUNCTION OF THE JURY AS FACTFINDER, AS (1) THE STATUTE DOES NOT APPLY UNTIL AFTER THE JURY HAS COMPLETED ITS CONSTITUTIONAL TASK, (2) THE STATUTE DOES NOT IMPACT THE PROCESS OF HOW THE JURY IS TO DETERMINE THE AMOUNT OF ITS PUNITIVE DAMAGES VERDICT.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519, 155 L. Ed. 2d 585 (2003)

Cooper Industries, Inc., v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 (2001)

II. THE TRIAL COURT DID NOT ERR IN REDUCING THE PUNITIVE DAMAGES AWARDED TO LEWELLEN UPON HER FRAUDULENT MISREPRESENTATION CLAIM IN ACCORDANCE WITH SECTION 510.265, RSMO 2005, AS THIS STATUTE DOES NOT VIOLATE THE SEPARATION OF POWERS BETWEEN THE LEGISLATURE AND THE JUDICIARY UNDER ARTICLE II, SECTION 1, OF THE MISSOURI CONSTITUTION, IN THAT THIS STATUTE IS AN APPROPRIATE EXERCISE OF THE LEGISLATURE'S AUTHORITY TO MODIFY OR LIMIT CAUSES OF ACTION AND TO ESTABLISH CIVIL PENALTIES FOR WRONGFUL CONDUCT AND SUCH EXERCISE DOES NOT IMPROPERLY INVADE THE JUDICIAL FUNCTION.

Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 833 (Mo. banc 1991)

Fust v. Attorney Gen. for the State of Mo., 947 S.W.2d 424 (Mo. banc 1997)

Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000)

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Evans ex rel. Kutch v. State, 56 P.3d 1046, 1053 (Alaska 2002)

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IV. THE TRIAL COURT DID NOT ERR IN REDUCING THE PUNITIVE DAMAGES AWARDED TO LEWELLEN UPON HER FRAUDULENT MISREPRESENTATION CLAIM UNDER SECTION 510.265, RSMO 2005, BECAUSE THAT STATUTE DOES NOT VIOLATE LEWELLEN'S RIGHT TO DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, IN THAT THE LEGISLATURE HAS THE AUTHORITY TO MODIFY COMMON LAW CAUSES OF ACTION AND REMEDIES AND IS AUTHORIZED TO SET LIMITS UPON THE AMOUNT OF PUNITIVE DAMAGES THAT ARE PERMISSIBLE IN MISSOURI.

Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008)

Sanders v. Ahmed, 364 S.W.3d 195 (Mo. banc 2012)

RESPONDENTS/CROSS-APPELLANTS' POINTS ON APPEAL

I. THE TRIAL COURT ERRED IN ITS ORDER GRANTING LEWELLEN'S MOTION FOR SANCTIONS AGAINST FRANKLIN AND NATIONAL BY FAILING TO CLEARLY SPECIFY THE DISCOVERY SANCTIONS THAT THE COURT WAS IMPOSING ON RESPONDENTS/CROSS-APPELLANTS WITH REGARD TO PRESENTATION OF EVIDENCE AND ARGUMENT AT TRIAL AND BY DENYING RESPONDENTS/CROSS-APPELLANTS' SUBSEQUENT MOTION SEEKING A NEW TRIAL ON THAT BASIS, BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO PROVIDE ADEQUATE NOTICE OF THOSE DISCOVERY SANCTIONS RESULTING IN PREJUDICE TO RESPONDENTS/CROSS-APPELLANTS, IN THAT THE AMBIGUITY OF THE SANCTIONS ORDER WITH REGARD TO THE RESTRICTIONS ON RESPONDENTS/CROSS-APPELLANTS' ABILITY TO PRESENT EVIDENCE, OBJECTIONS, AND ARGUMENT AT TRIAL, MADE IT IMPOSSIBLE FOR THEIR COUNSEL TO ADEQUATELY PREPARE FOR TRIAL

Simpson by Simpson v. Revco Drug Centers of Missouri, Inc., 702 S.W.2d 482 (Mo. App. 1985)

Hammons v. Hammons, 680 S.W.2d 409 (Mo. App. 1984)

II. THE TRIAL COURT ERRED BY DENYING RESPONDENTS/CROSS-APPELLANTS' MOTION TO AMEND THE JUDGMENT TO REDUCE THE PUNITIVE DAMAGES AWARDED AGAINST THEM PURSUANT TO THE DOCTRINE OF *STATE FARM V. CAMPBELL*, BECAUSE THE PUNITIVE DAMAGES ASSESSED AGAINST THEM VIOLATED RESPONDENTS/CROSS-APPELLANTS' RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10, OF THE MISSOURI CONSTITUTION, IN THAT THE EVIDENCE ADDUCED AT TRIAL DID NOT SUPPORT AWARDS OF PUNITIVE DAMAGES IN EXCESS OF A SINGLE-DIGIT RATIO OF THE ACTUAL DAMAGES FOUND BY THE JURY PURSUANT TO THE *STATE FARM* DOCTRINE, THEREBY RENDERING THE AWARDS OF PUNITIVE DAMAGES EXCESSIVE AS A MATTER OF LAW.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)

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

Bennett v. Reynolds, 315 S.W.3d 867, 879 (Tex. 2010)

ARGUMENT IN RESPONSE TO APPELLANT'S/CROSS-RESPONDENT LEWELLEN'S ISSUES ON APPEAL

I. THE TRIAL COURT DID NOT ERR BY REDUCING THE PUNITIVE DAMAGES AWARDED TO LEWELLEN ON HER FRAUDULENT MISREPRESENTATION CLAIM PURSUANT TO SECTION 510.265, RSMO 2005, BECAUSE THAT STATUTE DOES NOT VIOLATE LEWELLEN'S RIGHT TO JURY TRIAL, GIVEN THAT THIS RIGHT MUST YIELD TO A DEFENDANT'S CONSTITUTIONAL DUE PROCESS RIGHTS UNDER THE U.S. CONSTITUTION WHICH BAR IMPOSITION OF EXCESSIVE PUNITIVE DAMAGES AWARDS AND GIVEN THAT THE STATUTORY LIMITS ON PUNITIVE DAMAGES DO NOT IMPEDE THE FUNCTION OF THE JURY AS FACTFINDER, AS (1) THE STATUTE DOES NOT APPLY UNTIL AFTER THE JURY HAS COMPLETED ITS CONSTITUTIONAL TASK, (2) THE STATUTE DOES NOT IMPACT THE PROCESS OF HOW THE JURY IS TO DETERMINE THE AMOUNT OF ITS PUNITIVE DAMAGES VERDICT.

A. Standard of Review.

Respondents concur that this Court engages in *de novo* review of a lower court's determinations with regard to the constitutionality of a statute, provided that the

constitutional issue was not waived by failing to raise that issue at the first opportunity before the trial court. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008). It is well-settled, however, that this Court "will avoid the decision of a constitutional question if the case can be fully determined without reaching it." *State ex rel. Union Elec. Co. v. Public Service Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985). This approach is based upon the fundamental principal that "[a] statute is to be construed so as to render it constitutional, if this is possible." *Id.* (citing *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984); *State Tax Com'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 73 (Mo. banc 1982)). Statutes are presumed to be constitutional. *Ehlmann v. Nixon*, 323 S.W.3d 787 (Mo. banc Oct. 10, 2010) (citing *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002)). As such, the challenged statute "will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368-69 (Mo. banc 2001) (internal citations omitted).

B. Discussion.

While the punitive damages assessed against both Franklin and National were reduced by the trial court pursuant to Section 510.265, RSMo 2005, Lewellen only appeals the statutory reduction of the punitive damages assessed against Franklin. The judgments against Franklin and National were taken under different theories of recovery. *See* Legal File at LF 740-742. Lewellen was required to elect between alternative

theories of recovery as to each defendant, and Lewellen opted to take her judgment against Franklin under her fraudulent misrepresentation theory, while taking her judgment against National under the MMPA. *See id.* In the present appeal, Lewellen only challenges the statutory reduction with regard to the punitive damages assessed under her fraudulent misrepresentation claim (the claim against Franklin). Appellant's Brief at 13-16. In short, she only challenges the constitutionality of Section 510.265 as applied to common-law claims. She does not assert any challenge the reduction of the punitive damages awarded to her in her MMPA claim against National. *See id.*[2]

As a preliminary matter, this Court need not ultimately reach Lewellen's arguments regarding the constitutionality of Section 510.265, RSMo 2005. If this Court

[2] This Court has already passed upon the question of whether the punitive damages cap imposed by Section 510.265, RSMo 2005, is constitutional in the context of statutory claims under the Missouri Merchandising Practices Act. *See generally*, *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 369 (Mo. banc 2012) *cert. denied*, 133 S. Ct. 39, 183 L. Ed. 2d 679 (U.S. 2012). In *Overbey*, this Court concluded that the cap is constitutional in the context of punitive damages awarded pursuant to statutory claims, as those claims are created by the legislature. *See id.* at 374-381. As Lewellen does not raise any challenge to the reduction of the punitive damages award against National, there is no procedural basis for this Court to revisit that prior decision.

determines that this matter must be reversed for a new trial on the grounds set forth in the first point in Franklin and National's cross-appeal, that reversal would moot Lewellen's arguments. Alternatively, if this Court determines that further reduction of the punitive damage award against Franklin was necessary under the *State Farm v. Campbell* doctrine, as argued in the second point in the cross-appeal, this would also render it unnecessary to address the merits of Lewellen's constitutional arguments.

Even if this Court concludes that a further reduction of the punitive damages award was not required by *State Farm*, this Court must nevertheless consider whether the trial court's reduction of the punitive damage awards was necessary under the *State Farm* analysis. If so, then an alternative basis would exist for upholding the reduced punitive damages award that Lewellen challenges in the present appeal, and this Court would not need to reach her constitutional challenge to Section 510.265, RSMo 2005.

1. The Unique Nature Of Punitive Damage Awards.

Punitive "damages" are radically different from other types of damages awarded by a judge or jury. In nearly every other context, the damages awarded by a jury to a prevailing plaintiff are compensatory in nature. For example, a person who sustains a bodily injury may recover actual damages to compensate them for those injuries, which might include costs of past and future medical treatment, lost income or earning capacity, as well as pain and suffering. *See generally*, *Messina v. Prather*, 42 S.W.3d 753, 761 (Mo. App. 2001) (discussing factors that can contribute to a damages award). A person

who falls victim to fraud can recover damages for the economic harm they sustained as a natural and probable consequence of the fraud, which is generally the difference between the value of the property as represented and its actual value. *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. banc 1988).

In contrast, punitive "damages" are not compensatory in nature, but instead serve a different purpose. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519, 155 L. Ed. 2d 585 (2003) (hereafter, "*State Farm*"). Specifically, the purpose of punitive damages is to punish and deter similar conduct by the defendant and others. *See id.* A punitive damages award is a windfall to the prevailing plaintiff, by providing them additional moneys beyond what the factfinder concluded was necessary to make that plaintiff whole. *See Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 329, 294 N.W.2d 437, 471 (1980). Due to the unique nature of punitive damages, courts in other jurisdictions have concluded that a plaintiff has no vested right to an award of punitive damages. *See Smith v. Printup*, 254 Kan. 315, 322, 866 P.2d 985, 992 (1993) ("Punitive damages are not awarded to a plaintiff as a matter of right"). If a plaintiff does not have a vested right to seek an award of punitive damages, it raises a distinct question as to whether a limitation on the ability to seek punitive damages could constitute a violation of the right to jury trial. However, there are additional reasons why Section 510.265, RSMo 2005, does not infringe upon a plaintiff's right to jury trial.

2. Lewellen's State Constitutional Right To Jury Trial Is Limited By A Defendant's Right To Due Process Under The U.S. Constitution Pursuant To The *State Farm v. Campbell* Doctrine.

Even if there was a common law right to jury determination of the amount of punitive damages in 1820, this does not mean that that right is unlimited. The right in question is a right guaranteed by the Missouri Constitution, and to the extent that this right is in conflict with a right guaranteed under the U.S. Constitution, it must yield. Section 510.265, RSMo 2005

The U.S. Supreme Court has recognized that states have considerable discretion with regard to the imposition of punitive damages, but that discretion is bounded by both procedural and substantive limitations under the U.S. Constitution. *State Farm*, 538 U.S. at 416. *See also Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), *BMW of North America v. Gore*, 517 U.S. 559 (1996), *Cooper Industries Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001), *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

In *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633 (Mo. banc 2012), this Court held unconstitutional Section 538.210, RSMo 2000, the statutory cap on noneconomic damages in medical malpractice cases. *See* 376 S.W.3d at 635. In reaching that conclusion, *Watts* overruled this Court's prior decision in *Adams by and through Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992). In *Adams*, This

Court had previously concluded that noneconomic damages caps did not infringe upon a plaintiff's right to jury trial because those caps were "not applied until after the jury has completed its constitutional task," and as a result the cap "does not infringe upon the right to a jury trial." *Id*. at 907. In *Watts*, however, this Court rejected this analysis, reasoning that it rendered lip service to the procedures of a jury trial but deprived it of its function by nullifying (in part) the jury's compensatory damages award. *Watts*, 376 S.W.3d at 542.

Lewellen argues that this Court should extend the reasoning of *Watts* to this matter and conclude that the punitive damages caps also violate a plaintiff's right to a jury trial. *Watts* is distinguishable on two grounds, however. First, the issue before the *Watts* court did not involve an award of damages that is subject to limits imposed by the U.S. Constitution. Because punitive damages are subject to due process limitations, as a matter of law, there remains a role for application of legal limits to an award of punitive damages, and those legal limits can be properly supplied by the legislature. Second, unlike the award of compensatory damages at issue in *Watts*, courts have concluded that the determination of the amount of punitive damages is not a "fact" found by the jury and therefore the amount of punitive damages can be limited by law without invading the function of the jury.

Under *State Farm*, punitive damages awards are subject to limitations arising from the defendant's due process rights under the U.S. Constitution. *See State Farm*, 538 U.S.

416-417. As such, if a jury's punitive damages award exceeds those limits, then that award must be reduced as a matter of law. *Ross v. Kansas City Power & Light*, 293 F.3d 1041, 1050 (8th Cir. 2002) (citing *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331 (11th Cir.1999)). As such, the Eighth Circuit has held that a reduction of a punitive damages award to comply with the constitutional due process limitations does not implicate the right to jury trial under the Seventh Amendment of the U.S. Constitution. *See id.* at 1049-50.[3] Further, such reductions do not implicate the right jury trial because they are not "a substitution of the court's judgment for that of the jury" but instead "a determination that the law does not permit the award." *Johansen*, 170 F.3d at 1330-31.

Under the reasoning of *Watts*, the punitive damages reduction under Section 510.265, RSMo 2005, might appear to violate a prevailing plaintiff's right to jury trial by nullifying a portion of the jury's punitive damages award. However, because the due process protections of the U.S. Constitution supersede the right to jury trial under the Missouri Constitution under the Supremacy Clause,[4] that state constitutional right must yield to the federal right to due process. Therefore, in the context of assessing the

[3] "While 'provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions,' analysis of a section of the federal constitution is 'strongly persuasive in construing the like section of our state constitution.'" *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. banc 2006).

[4] U.S. CONST. art. VI, cl. 2.

constitutionality of a cap on punitive damages, one must recognize that the state constitutional right to jury trial is not absolute, but instead is constrained by the due process protections outlined in *State Farm*.

Because of this, the reasoning of *Adams* remains persuasive and controlling in this context. Whereas *Watts* concerned an issue where the jury was constrained only by the evidence adduced in determining the amount of noneconomic damages to award, the case at bar concerns an issue where the jury's role is limited by due process. As discussed above, the due process protections under the U.S. Constitution impose substantive legal limits upon the amount of punitive damages that can be awarded by a jury. Courts have concluded that these due process limits do not infringe on the right to jury trial. *See Johansen*, 170 F.3d at 1330-31. This echoes the *Adams* analysis, signaling that legal limits on punitive damages do not violate a plaintiff's right to trial by jury.

This leads to the question of whether the Missouri legislature has a role with regard to implementing those constitutional due process limits via state law. The U.S. Supreme Court appears to view state legislatures as having a crucial function in defining such limits. In *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008), the U.S. Supreme Court focused upon a survey of state legislative limits on punitive damage awards in setting the permissible ratio for punitive damage awards for civil claims seeking damages for oil spills under maritime law. 554 U.S. at 510. This is consistent with the Supreme Court's general view that court should "'accord

"substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583, 116 S. Ct. 1589, 1603, 134 L. Ed. 2d 809 (1996) (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)).

Franklin and National submit that, by enacting Section 510.265, RSMo 2005, the Missouri legislature has sought to put in place limits on punitive damages that are consistent with the guidance provided by *State Farm*. While the statute does not attempt to fully implement the complex "guidepost" analysis discussed within *State Farm*, the statutory caps show clear signs that those limits were guided by the U.S. Supreme Court's guidance. Under the statute, punitive damages assessments must bear a reasonable relationship to the actual damages awarded, by providing that punitive damages generally cannot exceed five times the net amount of the judgment.[5] § 510.265, RSMo 2005. This is generally consistent with the U.S. Supreme Court's reasoning that punitive damages awards that exceed a single-digit multiplier likely violate due process. *State Farm*, 538 U.S. at 425. *State Farm* also reasoned that a ratio of four-to-one might also be the limit of constitutional propriety. *See id.* The general statutory limit of a five-to-one ratio,

[5] This has been interpreted to include both actual damages as well as any attorneys fee that may be included in the judgment. *Hervey v. Missouri Dept. of Corr.*, 379 S.W.3d 156, 165 (Mo. banc 2012).

therefore, bears close resemblance to the parameters suggested within *State Farm.* The *State Farm* decision does recognize that cases in which the economic damages are small could justify a larger ratio of punitive damages. *Id.* Section 510.265 also conforms to this analysis, by providing that, where the net amount of the judgment is $100,000 or less, a plaintiff can receive an award of punitive damages of up to $500,000. *See* § 510.265, RSMo 2005. Thus, the punitive damages caps adopted by the legislature are a close analogue to those contemplated by the U.S. Supreme Court in *State Farm.*

There are also grounds to distinguish *Watts* on the basis that the jury does not engage in the same fact-finding function in assessing punitive damages as it does in determining the amount of actual damages. Indeed, the U.S. Supreme Court has reasoned that punitive damages awards do not constitute "facts" found by a jury. *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001) (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)). Arguably, the fact-finding role of a jury under Missouri law is attenuated with regard to determining the amount of punitive damages.[6] If, as suggested by the U.S.

[6] The jury's task in assessing punitive damages is markedly different than its function in determining the amount of actual damages. A party's evidence bearing on the issue of actual damages enables the amount of those damages to be reasonably ascertainable by a jury. For example, in an injury case, the plaintiff will present evidence as to the cost of their medical treatment, their lost wages, and any other evidence of

Supreme Court, a jury's determination of punitive damages is not a fact found by the jury, it follows that legal limits on punitive damages do not infringe upon the jury's function or violate a litigant's right to jury trial.

In summary, then, this Court's determination of whether Section 510.265, RSMo 2000, violates Lewellen's right to jury trial should be governed by the reasoning of *Adams* rather than the more recent *Watts* decision. Punitive damages are subject to due process limitations pursuant to the U.S. Constitution that do not apply to compensatory damage awards. Thus, a jury's punitive damages award is subject to post-verdict reduction as a matter of law if it exceeds those limits, and that reduction does not impinge on the right to jury trial. By enacting Section 510.265, RSMo 2005, the legislature has further defined that legal limit on punitive damages awards and has done so in a manner

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economic loss. While the jury instructions do not provide any formula for determining certain components of an actual damage awards (such as for pain and suffering), the economic damage components of an actual damage award provide guidance as to what they should assess for non-economic compensatory damages component of that award. In contrast, Missouri juries are provided scarce guidance as to what they need to find in rendering their verdict awarding an amount of punitive damages. Juries are not provided any guidance based on *State Farm*, but are instead merely instructed to "award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and others from like conduct." M.A.I. 10.01 (2008 Revision).

consistent with the U.S. Supreme Court's guidance in *State Farm*. Accordingly, this Court should follow *Adams* and conclude that Section 510.265 does not impermissibly infringe upon Lewellen's state right to jury trial, but instead implements the due process limitations upon punitive damages under the U.S. Constitution.

The Eighth Circuit has held that a reduction of punitive damages to comply with the constitutional due process limitations under *State Farm v. Campbell* and *BWV v. Gore* does not implicate the right to jury trial under the Seventh Amendment of the U.S. Constitution. *See Ross v. Kansas City Power & Light*, 293 F.3d 1041, 1049-50 (8th Cir. 2002).[7] The *Ross* Court reasoned that the reduction was required because "the court must decide this issue as a matter of law." *Id.* at 1050 (citing *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331 (11th Cir.1999)). Such reductions do not implicate the right jury trial because they are not "a substitution of the court's judgment for that of the jury" but instead "a determination that the law does not permit the award." *Johansen*, 170 F.3d at 1330-31. In *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001) , as discussed above, the U.S. Supreme Court opined that the amount of punitive damages assessed by a jury is not a "fact" tried by the jury. *Id.* at 437 (quoting

[7] "While 'provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions,' analysis of a section of the federal constitution is 'strongly persuasive in construing the like section of our state constitution.'" *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. banc 2006).

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)). Based upon that premise, the Supreme Court held that court review of punitive damages awards did not implicate constitutional concerns under the Seventh Amendment. *See id.*

Similarly, the majority view among the federal circuits is that the legislature's authority to create, alter, or abolish law encompasses the power to alter or limit the kinds and amount of damages available to a prevailing party, without violating the federal constitutional right to jury trial. *See Davis v. Omitowoju*, 883 F.2d 1155, 1159-1165 (3rd Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989). A number of state courts have reached similar conclusions under the corresponding provisions of their state constitutions. *See, e.g., Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 449 (Ohio 2007);

The above authority stands solidly for the proposition that the legislature has broad authority to limit (or abolish altogether) the availability of punitive damages for either particular causes of action. This authority clearly extends to the ability to place caps on the amount of punitive damages that can be recovered in a civil action. As these limitations due not intrude upon the judicial fact-finding process, they do not violate constitutional equal protection principles. Accordingly, for the reasons discussed above, the Overbeys' second point on appeal should be denied.

II. THE TRIAL COURT DID NOT ERR IN REDUCING THE PUNITIVE DAMAGES AWARDED TO LEWELLEN UPON HER FRAUDULENT MISREPRESENTATION CLAIM IN ACCORDANCE WITH SECTION 510.265, RSMO 2005, AS THIS STATUTE DOES NOT VIOLATE THE SEPARATION OF POWERS BETWEEN THE LEGISLATURE AND THE JUDICIARY UNDER ARTICLE II, SECTION 1, OF THE MISSOURI CONSTITUTION, IN THAT THIS STATUTE IS AN APPROPRIATE EXERCISE OF THE LEGISLATURE'S AUTHORITY TO MODIFY OR LIMIT CAUSES OF ACTION AND TO ESTABLISH CIVIL PENALTIES FOR WRONGFUL CONDUCT AND SUCH EXERCISE DOES NOT IMPROPERLY INVADE THE JUDICIAL FUNCTION.

A. Standard Of Review.

National and Franklin concur in Lewellen's statement of the standard of review applicable to this point of her appeal.

B. Discussion.

Lewellen next argues that section 510.265, RSMo 2005, violates the doctrine of separation of powers between the legislature and the courts. This argument is premised upon two grounds. First, Lewellen argues that the statute interferes with the function of the judiciary by depriving judges of their discretion to reduce punitive damages awards in accordance with "procedural safeguards" (presumably referring to the *State Farm*

analysis). Appellant's Brief at 31, 36. Second, she contends that the statute violates separation of powers because it impermissibly prescribes (or modifies) the remedy for a common law cause of action. Lewellen's arguments need not be taken up by this Court as they are not properly preserved for appeal, but if addressed, they must be rejected by this Court as lacking merit.

1. Lewellen's Point On Appeal Does Not Encompass The Arguments She Seeks To Raise.

As a threshold matter, this Court should consider whether Lewellen's arguments are encompassed within her stated point on appeal. Under Missouri Supreme Court Rule 84.04(d), a point on appeal must identify the trial court ruling or action that the appellant challenges, concisely state the legal reason for the claim of error, and provide a summary explanation of why the legal reason supports the claim of reversible error. Mo. Sup. Ct. R. 84.04(d)(1). The subsequent argument must be limited to the specific errors raised in the point on appeal. Mo. Sup. Ct. Rule 84.04(e). It is a violation of the Rule to expand the argument into an area not covered by the point on appeal. *Perkel v. Stringfellow*, 19 S.W.3d 141, 149 (Mo. App. 2000).

In her second point on appeal, Lewellen identifies the trial court's reduction of the punitive damages award as the challenged ruling, and that the legal reason is due to the separation of powers doctrine. However, in regard to the third requirement of the Rule (subsection (d)(1)(c)), she states "that Section 510.265 infringes on the judiciary's role

and discretion to decide and pronounce judgments, thereby making Lewellen's final punitive damages award for common law fraudulent misrepresentation inadequate as the award is mandated by section 510.265, and not on the evidence in the particular case."

Thus, her summary in her point on appeal as to the legal basis for reversal is different than the two arguments she raises in her argument. Her argument, as summarized above, concerns not the "judiciary's role and discretion to decide and pronounce judgments" discussed in her Point on Appeal but instead concerns whether Section 510.265 infringes on judicial discretion to reduce judgments and whether the legislature has the authority to modify common law remedies. Thus, as her argument addresses different issues than her point on appeal, she has failed to comply with Rule 84.04, and her arguments should be disregarded. *See Perkel*, 19 S.W.3d at 149.

2. Section 510.265 Does Not Interfere With The Judicial Function Of Remittitur.

Turning to her first argument, she contends that Section 510.265 deprives judges of the discretion to reduce punitive damages awards, but instead mandates a ceiling on the amount of permissible punitive damages. Obviously, nothing within the statutory language bars a trial court from applying the *State Farm* analysis or from concluding that a punitive damages award should be reduced to an amount less than the Section 510.265 limits. Therefore, the core of Lewellen's argument appears to be that the statute prevents judges from reducing a punitive damages award to an amount between the jury's original award and the statutory caps.

Lewellen essentially argues that *any* legislative interference in a trial judge's discretion in evaluating whether a punitive damages award should (or should not) be reduced is an improper invasion of the judicial function. However, the authority she cites states that the legislature "cannot *entirely* exclude the exercise of the discretion of the court." *Kyger v. Koerper*, 355 Mo. 772, 777, 207 S.W.2d 46, 49 (1946) (italics added). Thus, this authority would support a conclusion that provides the legislature the ability to set parameters upon the exercise of judicial discretion in this area and that such parameters would not violate the separation of powers, even if they limited the scope of a court's discretion with regard to a punitive damages award.

Indeed, the unique nature of punitive damages supports the legislature having a significant role in determining the amount of permissible punitive damages. Punitive damages, as discussed above, are not compensatory damages, but are properly comparable to civil penalties. *See State Farm*, 538 U.S. at 428. Punitive damages have also been described as "quasi-criminal." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S. Ct. 1032, 1044, 113 L. Ed. 2d 1 (1991). Civil penalties, of course, are creations of statute. *See, e.g., State ex rel. Nixon v. Telco Directory Pub.*, 863 S.W.2d 596, 598 (Mo. banc 1993) (civil penalties under the MMPA). Similarly, criminal sentencing is principally driven by statutory provisions. *See, e.g.*, § 558.011, RSMo 2003. Simply put, the legislature has the predominant role in setting both criminal and civil penalties. Therefore, it would be strange to bar the legislature from setting standards with regard to

the imposition of punitive damages, which serve essentially the same functions as those civil and criminal penalties. Instead, the more logical conclusion would be that the legislature is vested with the authority to set state policy for how wrongdoers in civil litigation should be punished, provided that the legislature does not completely eliminate the discretion of the trial court in reviewing punitive damage awards.

Further, as discussed above in regard to Lewellen's first point on appeal, the U.S. Supreme Court has opined that "substantial deference" must be paid to "legislative judgments" regarding the proper sanctions for wrongful conduct. *BMW*, 517 U.S. at 583. In accordance with that approach, the Supreme Court looked principally to state statutes limiting punitive damages, rather than court holdings, in setting a bright-line limit on punitive damages for certain maritime cases. *See Exxon Shipping*, 554 U.S. at 510. As such, at least from a federal constitutional prospective, the Court appears to consider state legislatures as having the more significant role in setting limits on punitive damages. This is unsurprising, given that it is the role of the legislature, rather than rather than the courts, to make policy judgments. *See Watts*, 376 S.W.3d at 648 (Russell, dissenting). As such, the legislature's implementation of a cap on punitive damages is a proper exercise of its authority to make a policy determination as to the extent to which a civil litigant should be punished for wrongful conduct. It does not constitute an impermissible invasion of the judicial function.

3. The Legislature Has The Power To Modify Common Law Causes Of Action And Remedies.

Plaintiff's second argument with regard to the separation of powers concerns whether the legislature has the authority to modify common law remedies. While Lewellen challenged the constitutionality of Section 510.265 on separation of powers grounds in the proceedings below, she did not raise any argument below that the legislature lacked authority to modify common law remedies under the separation of powers doctrine.[8] Constitutional arguments must be raised at the earliest opportunity to do so. *Young v. Pitts*, 335 S.W.3d 47, 54 (Mo. App. 2011). Here, because Lewellen failed to raise this argument before the trial court, this Court should disregard that argument on appeal. *See id.*

However, if this Court determines that this argument was properly preserved for appeal, the argument should be nevertheless rejected on its merits. Indeed, taken to its conclusion, her argument would imply that statutory schemes ranging from the Uniform Commercial Code and the Workers Compensation Law would be constitutionally infirm.

[8] In the trial proceedings, she argued that the statute violated separation of powers because (1) it infringed on the judicial ability to remit punitive damage awards; (2) it infringed on the jury's function to assess damages; and (3) allowed the executive to determine if an exception to the statute would be applicable. Legal File at LF 13, 19-20.

Lewellen, citing to *Overbey* and *Sanders*, argues that the legislature is forbidden under the separation of powers from altering any common law rights or remedies that existed prior to 1820. Appellant's Brief at 34-35. The *Overbey* decision very deliberately states that the Court was not taking up the question of Section 510.265's enforceability in the context of common law claims. Instead, the *Overbey* decision held that Section 510.265 did not violate the separation of powers because the punitive damages award was assessed upon a statutory cause of action. *Overbey*, 361 S.W.3d at 377-78. Because the legislature had created that statutory cause of action, this Court reasoned that the punitive damages cap was a permissible exercise of the legislature's ability to define the remedies available under that statutory cause of action. *Id*. That decision expressly reserved the question of whether Section 510.265 violated the separation of powers in the context of common law claims to another day. *See id.* at 382 n.6.

This Court has long recognized that the legislature has the power to modify common law causes of action and their remedies. *See Kilmer v. Mun*, 17 S.W.3d 545, 550 (Mo. banc 2000) ("A statute, as noted, may *modify* or abolish a cause of action that had been recognized by common law or by statute."). *See also, De May v. Liberty Foundry Co.*, 327 Mo. 495, 513, 37 S.W.2d 640, 646-647 (1931) (discussing the power of the legislature to change or abolish existing common law or statutory remedies). In *Fust v. Attorney Gen. for the State of Mo.*, 947 S.W.2d 424 (Mo. banc 1997), this Court held that "[p]lacing reasonable limitations on common law causes of action is within the discretion of the legislative branch and does not invade the judicial function. 947 S.W.3d

at 430-31. Indeed, "our legislature has frequently enacted statutes granting immunity or otherwise limiting the rights of action that the common law recognized." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 833 (Mo. banc 1991). This authority even extends to "changes in the common law by eliminating a cause of action that has previously existed at common law…." *Id.* Thus, Lewellen's argument flies against this Court's prior holdings which reflect a recognition that the legislature has the power to modify or abrogate common law causes of action, rights, and remedies.

Indeed, many statutes enacted by the legislature modify pre-existing common law causes of action. Perhaps the broadest case of such modification is the legislature's adoption of the Uniform Commercial Code, which displaces, supplants, or modifies numerous aspects of the common law. *See generally, Chouteau Auto Mart, Inc. v. First Bank of Missouri*, 148 S.W.3d 17, 24 (Mo. App. 2004) (discussing modification of a common law claim by a UCC provision); *Cub Cadet Corp. v. Mopec, Inc.*, 78 S.W.3d 205, 209 (Mo. App. 2002) (discussing how UCC provisions can displace common law theories). Similarly, the adoption of the Workers Compensation Law abrogated whole swaths of common law tort claims, substituting an administrative process and fixed remedy for the claims and defenses of tort litigation between employees and their employers. *See generally, De May v. Liberty Foundry Co.*, 327 Mo. 495, 513, 37 S.W.2d 640, 649 (1931). Under Lewellen's reasoning, however, the legislature would be forbidden from modifying common law claims and remedies, which would lead to the

absurd conclusion that the UCC violates the separation of powers and that it must be held unconstitutional.

Given that Lewellen has not preserved her argument on appeal regarding the scope of the legislature's power to modify common law remedies, this Court should decline Lewellen's invitation to invalidate any statutory provision that modified common law claims or remedies that existed in 1820. As discussed above, her argument flies in the face of decades of this Court's precedents which have recognized the legislature's authority to modify or abrogate entirely common law claims and remedies via legislative enactment. Accepting her arguments would lead Missouri into a realm where the foundations of numerous statutory enactments, including the UCC and the Workers Compensation Law would be undermined and subject to challenge. Therefore, this Court should deny Lewellen's second point on appeal and reject her challenge to Section 510.265, RSMo 2005.

III. THE TRIAL COURT DID NOT ERR IN REDUCING THE PUNITIVE DAMAGES AWARDED TO LEWELLEN UPON HER FRAUDULENT MISREPRESENTATION CLAIM UNDER SECTION 510.265, RSMO 2005, BECAUSE THAT STATUTE DOES NOT VIOLATE THE RIGHT TO EQUAL PROTECTION WITHIN ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, IN THAT THE STATUTE MEETS THE REQUIREMENTS OF DUE PROCESS UNDER EITHER A STRICT SCRUTINY OR RATIONAL BASIS REVIEW STANDARD, MOREOVER, LEWELLEN HAS FAILED TO PRESERVE THIS ARGUMENT FOR APPEAL BY RAISING DIFFERENT ARGUMENTS ON APPEAL THAN IN THE TRIAL COURT.

A. Standard of Review.

Franklin and National agree generally with Lewellen's statement of the general *de novo* standard of review with regard to constitutional challenges to state statutes. However, in her Standard of Review section on this point, she proffers no discussion as to whether she contends strict scrutiny or rational basis standard of review is to be applied to her equal protection arguments. As this Court recognized in *Overbey*, "the state may treat individuals and groups differently as long as the disparate treatment is adequately justified." *Overbey*, 361 S.W.3d at 378 (citing *Doe v. Phillips*, 194 S.W.3d

833, 845 (Mo. banc 2006)). The level of justification required depends on whether or not a fundamental right is at issue. *See id.*

Whether strict scrutiny or rational basis review applies depends on the nature of the distinction drawn by the statute.

> What constitutes adequate justification for treating groups differently depends on the nature of the distinction made. If the law "disadvantages a suspect class" or affects a "fundamental right," a court must apply strict scrutiny to determine "whether the statute is necessary to accomplish a compelling state interest," and whether the chosen method is narrowly tailored to accomplish that purpose.

Doe v. Phillips, 194 S.W.3d 833, 845 (Mo. 2006) (internal citations omitted). In contrast, in applying "rational basis" as the standard for reviewing whether a statute violates equal protection, the reviewing court need only determine that the statute "will be upheld 'so long as it bears a rational relation to some legitimate end.'" *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)).

B. Discussion.

1. Lewellen Raises A Different Equal Protection Argument On Appeal Than She Asserted In The Trial Court, And Has Not Preserved Her Argument On Appeal.

In her third point on appeal, Lewellen contends that Section 510.265, RSMo 2005, violates equal protection on the grounds that the statute impermissibly creates two groups of litigants (those to whom the caps apply and those to whom it does not) and treats them differently. She contends that the statute deprives one of those groups of a fundamental right (the right to jury trial) in support of her argument that the statute must be examined under strict scrutiny. To this extent, her arguments mirror those raised in the trial court below. However, her arguments as to what should be considered under a strict scrutiny analysis differ completely from what she argued in the proceedings below.

In her briefing before the trial court, Lewellen argued that Section 510.265 failed strict scrutiny because there was no compelling state interest to exclude certain categories of claims from the punitive damages caps. *See* Legal File at LF 717. In contrast, on appeal, she abandons that argument and instead advances a completely different argument. On appeal , she argues that the statute fails strict scrutiny because there is no compelling state interest in limiting punitive damages awards. *See* Appellant's Brief at 44-47. As she did not present this argument to the trial court, it is not preserved for appeal. *See Kleim v. Sansone*, 248 S.W.3d 599, 603 (Mo. banc 2008). Therefore, this

Court should deny her third point on appeal because she has not preserved them for appellate review.

2. Lewellen Has Failed To Offer Any Argument As To How The Exceptions To Section 510.265, RSMo 2005, Violate Equal Protection.

While Lewellen suggests that the statute creates a division between two groups (those persons whose claims are subject to the caps and those who are not), it is important to note that the statute excepts three categories of claims from the caps' application (claims brought by the state, claims where the defendant has been found guilty of a felony, and certain claims of housing discrimination). *See* § 520.265, RSMo 2005. Lewellen's equal protection arguments must be rejected because she fails to offer any analysis as to any of those three categories of claims excluded from the punitive damages caps or (more importantly) whether the legislature's decision to exclude any of those types of claims from the punitive damages caps violates equal protection (regardless of whether strict scrutiny or rational basis review applies).

3. Section 510.265, RSMo 2005 Survives Strict Scrutiny Analysis.

Lewellen offers no argument on appeal as to whether or not a compelling state interest exists for treating the claims of those subject to the statute differently than those who have claims under the three categories exempted from the statutory punitive damages cap. Rather, Lewellen instead explores the state's interests in assessing punitive damages, including: punishing wrongdoers, providing access to the Courts, and providing

funding for the Tort Victims' Compensation Fund. Appellant's Brief at 44-47. She follows her discussion with a conclusory statement that there is no compelling interest in limiting punitive damages awards, because limiting punitive damages impairs those state interests. *See id.* In essence, her argument appears to be that, because punitive damages caps detract from the goals that punitive damages are intended to serve, such caps cannot be based upon a compelling state interest.

Lewellen's conclusory argument fails to take into consideration, however, that Missouri has a compelling economic interest in regulating punitive damages awards. While punitive damages awards serve important and significant functions for punishment and deterrence of wrongdoing, a state has an economic interest in setting boundaries for such awards. *Compare Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1053 (Alaska 2002) (discussing economic considerations regarding similar statutory damages caps). Missouri competes both regionally and nationally to attract businesses to relocate to Missouri and to retain businesses that might consider moving to other states. Sophisticated businesses undoubtedly take into consideration the costs of potential litigation in weighing the advantages and risks of potentially relocating to a particular state. Missouri is disadvantaged in that regard, as at least one nearby state, Nebraska, does not allow punitive damages to be awarded upon on state law claims. *See State ex rel. Cherry v. Burns*, 258 Neb. 216, 226, 602 N.W.2d 477, 484 (1999).

In order to create a more level field by fostering a more business-friendly environment, organizations such as the Missouri Chamber of Commerce lobbied for adoption of the 2005 tort reform legislation that included Section 510.265. *See* Missouri Chamber of Commerce, "About Us - History" (available at http://www.mochamber.com/mx/hm.asp?id=History, last accessed April 9, 2013). Thus, far from having "no compelling interest" in limiting the range of punitive damages awards, the state of Missouri has a direct economic interest in moderating and providing greater predictability to such awards.

Missouri courts have not provided such predictability. There are staggeringly few reported cases in Missouri which have concluded that a punitive damages award was excessive under the *State Farm* analysis. Indeed, Missouri appellate courts have routinely affirmed punitive damages awards well in excess of single-digit multipliers. *See, e.g., Heckadon v. CFS Enterprises, Inc.*, WD74288, 2013 WL 1110690 (Mo. App. Mar. 19, 2013) (47:1 and 187:1 ratios); *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 369 (Mo. banc 2012) *cert. denied,* 133 S. Ct. 39, 183 L. Ed. 2d 679 (U.S. 2012) (111:1 ratio); *Lynn v. TNT Logistics N. Am. Inc.*, 275 S.W.3d 304, 312 (Mo. App. 2008) (75:1 ratio); *Miller v. Levering Reg'l Health Care Ctr., LLC*, 202 S.W.3d 614, 617, 619 (Mo. Ct. App. 2006) (24:1 ratio); *Krysa v. Payne*, 176 S.W.3d 150, 160 (Mo. Ct. App. 2005) (27:1 ratio); *Environmental Energy Partners v. Siemens Bldg. Technologies, Inc.*, 178 S.W.3d 691, 708 (Mo. Ct. App. 2005) (19:1 ratio); *Werremeyer v. K.C. Auto Salvage, Co., Inc.*, WD 61179, 2003 WL 21487311 (Mo. Ct.

App. June 30, 2003). While these opinions discuss the principles of *State Farm*, the typical approach of Missouri courts has been to to find the circumstances of each case to be so exceptional as merit a deviation from the single-digit ratio urged by *State Farm*. The almost complete absence of any reported cases[9] in Missouri in which a punitive damages award was reversed under *State Farm* strongly suggests that the exceptions have all but consumed the rule in this instance.

4. If Rational Basis Review Applies, This Court Should Follow Its Prior Decision In *Overbey* And Uphold Section 510.265, RSMo 2005.

[9] Indeed, in the roughly ten years since *State Farm* was decided, it appears that only one reported Missouri appellate decision, *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841 (Mo. Ct. App. 2007)), has reduced a punitive damages award under the *State Farm* doctrine. In *Kelly*, the jury held the defendant liable for actual damages of $4,300, and assessed punitive damages of $2.8 Million. See 245 S.W.3d at 842. On appeal, the Missouri Court of Appeals concluded that the punitive damages, which were 651 times the actual damages assessed, were excessive and disproportionate, and remanded the case for reconsideration of the punitive damages award. *See id.* at 851. On remand, the trial court reduced the punitive damages award to $650,000 (81 times the amount of actual damages), and the reduced punitive damages award was subsequently upheld on appeal. *See Kelly v. Bass Pro Outdoor World, L.L.C.*, ED96999, 2012 WL 1033597 at *1 (Mo. App. Mar. 27, 2012).

If this Court concludes that a fundamental right is not at issue with regard to Lewellen's equal protection challenge to Section 510.265, then this Court's prior decision in *Overbey* provides the framework for resolving Lewellen's arguments on this point. In *Overbey*, this Court took up each of the three categories of claims that are excluded from the punitive damages caps, concluding that each of those three categories is supported by a rational basis. *See Overbey*, 361 S.W.3d at 379-80. As Lewellen provides no grounds upon which this Court should revisit those conclusions, this Court should follow *Overbey* and find that Section 510.265 does not violate equal protection.

IV. THE TRIAL COURT DID NOT ERR IN REDUCING THE PUNITIVE DAMAGES AWARDED TO LEWELLEN UPON HER FRAUDULENT MISREPRESENTATION CLAIM UNDER SECTION 510.265, RSMO 2005, BECAUSE THAT STATUTE DOES NOT VIOLATE LEWELLEN'S RIGHT TO DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, IN THAT THE LEGISLATURE HAS THE AUTHORITY TO MODIFY COMMON LAW CAUSES OF ACTION AND REMEDIES AND IS AUTHORIZED TO SET LIMITS UPON THE AMOUNT OF PUNITIVE DAMAGES THAT ARE PERMISSIBLE IN MISSOURI.

A. Standard of Review.

Franklin and National concur in Lewellen's statement of the applicable standard of review as to this point on appeal.

B. Discussion.

Turning to Lewellen's final point on appeal, she contends that Section 510.265, RSMo 2005, violates her constitutional right to due process under both the Missouri and U.S. Constitutions on two grounds. First, she argues that the statute violates due process because it is a "substantive change to common law fraudulent misrepresentation cause of action." Second, she suggests that the statute violates due process by imposing "bright line" limits on punitive damages that have been resisted by the U.S. Supreme Court. This

Court should deny this point on appeal either on the basis that Lewellen offers different due process arguments on appeal than she raised in the trial court Neither of these arguments were presented below, or because those arguments lack merit.

Lewellen's first contention under her fourth point on appeal asserts that "[t]he legislature cannot change the remedies in a common law cause of action that existed prior to 1820." Appellant's Brief at 52. This argument was not raised in her due process arguments before the trial court. *See* Legal File at LF 722-730. Because it was not raised below, it is not preserved and should not be considered by this Court. *Kleim*, 248 S.W.3d at 603.

Her first due process argument is also flawed on its merits and should be rejected by this Court. Lewellen cites to *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012), support of her contention that the legislature cannot modify common law or remedies that existed as of 1820, but she relies upon an erroneous interpretation of dicta from that decision in reaching that conclusion. In *Sanders*, the Court's opinion states, in part that "[t]he General Assembly may negate causes of action or their remedies that did not exist prior to 1820." *Sanders v. Ahmed*, 364 S.W.3d 195, 205 (Mo. banc 2012). Lewellen reasons from that statement that the Court was suggesting that the legislature could *not* negate (or modify) a cause of action or a remedy that existed prior to 1820.

A fairer and more logical reading of *Sanders*, however, is that the opinion was distinguishing the remedies available upon a wrongful death cause of action (a theory of recovery created by statute after 1820) with the right to jury trial which the Missouri Constitution requires to be preserved to the extent it existed in 1820. *See id.*[10] Moreover, the *Sanders* decision expressly states that it was not addressing the question of whether the legislature had power to abrogate or modify common law claims (let alone those that existed prior to 1820). *See id.* at 203. Thus, Lewellen's attempt to imply that *Sanders* stands for the proposition that the legislature cannot modify common law claims that existed prior to 1820 is refuted by the expressly narrow scope of the *Sanders* Court's holding.

As discussed in regard to Lewellen's second point on appeal, above, there are numerous laws in which the legislature has modified (or abrogated entirely) entire swaths of the common law, by adopting the UCC and the Workers Compensation Law. In

[10] While the plaintiff in *Sanders* asked this Court to reconsider what it had previously held in *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. banc 1992), with regard to the legislature's power to abolish or modify common law causes of action, this Court expressly declined to do so. *Id.* at 203. Because the wrongful death claims in Sanders were the creation of statute, this Court followed *Overbey* in concluding that "the legislature has the power to define the remedy available if it creates the cause of action." *Id.*

addition to these examples, there are undoubtedly many other statutory provisions which seek to modify common law claims and remedies. Under Lewellen's reasoning, however, because the Workers Compensation Law modifies the remedies available to an injured worker from those that existed in 1820 and deprives them of the right to trial by jury on those claims, the Workers Compensation Law would be unconstitutional, and the entire workers compensation system would have to be dismantled. As such, the absurdity of Lewellen's argument and misreading of *Sanders* should be readily apparent.

The more rational approach would be to hold that the legislature has the ability and prerogative to modify the common law (and remedies available upon common law claims), with those statutory modifications operating prospectively upon claims that accrue after the statute becomes effective. *Compare, State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974) (concluding that statutory amendment that removed damage caps in wrongful death cases was prospective in effect only). Here, there is no argument that Lewellen's claims accrued prior to the effective date of Section 510.265, RSMo 2005. Accordingly, given that her claims in this matter arose after the statutory caps went into effect, the application of such caps to her claims does not infringe upon her right to due process.

Turning to Lewellen's second due process argument, she contends that Section 510.265 violates due process because it implements "bright line" limits on punitive damages that she contends that are impermissible because the U.S. Supreme Court has

resisted drawing such a line. This argument also appears to be raised for the first time on appeal and should be disregarded by this Court. *See Kleim*, 248 S.W.3d at 603.

As to the merits of this second argument, her argument attempts to transform the Supreme Court's reluctance to draw a "bright line" limit on punitive damages into a conclusion that the drawing of such a line is impermissible. This argument, however, is without legal basis in precedent and otherwise lacks merit. National and Franklin acknowledge that the U.S. Supreme Court's punitive damages jurisprudence has historically abstained from drawing a "bright line" rule with regard to the maximum ratio of punitive to actual damages. The Court initially based that reluctance on the grounds that "[w]e need not, and indeed cannot, draw a mathematical bright line between the constitutionally acceptable and constitutionally acceptable that would fit every case." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458, 113 S. Ct. 2711, 2720, 125 L. Ed. 2d 366 (1993). Despite that initial reticence, the Supreme Court has moved increasingly closer to declaring such a line. In *State Farm*, the Court stated that "[o]ur jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524, 155 L. Ed. 2d 585 (2003). That opinion further stresses that ratios of 4:1 may be near the limit of constitutional propriety in most instances. *Id.* at 425 (discussing *Haslip*).

More recently, the U.S. Supreme Court has finally adopted a bright-line limit on punitive damages with regard to one substantial category of cases. In *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008), the Court concluded that punitive damages cannot exceed a 1:1 ratio in civil cases under maritime law seeking to recover damages from oil spills. 554 U.S. at 513. The *Exxon Shipping* Court concluded that such ratios were proper, "given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution…." *Id.* Thus, *Exxon Shipping* recognizes that absolute "bright line" limits can be imposed on punitive damages awards.

The *Exxon Shipping* case is also instructive in that the Supreme Court looked for guidance to state statutory limitations on punitive damages in considering what line would be appropriate to draw as the limit of punitive damages for this category of maritime cases. *See id.* at 510. Section 510.265, RSMo 2005, is expressly included in the Court's analysis, and the Court compares the Missouri statute with similar statutes adopted by other states. *See id.* Indeed, the Court almost seems to single out the Missouri statutory cap for particular mention, noting that the Missouri statute adopts a higher permissible ratio than any of the other state statutes discussed. *See id.*

In summary, the *Exxon Shipping* decision clearly implies that state legislatures have an important and appropriate function in setting state policy with regard to how

wrongdoers are to be punished in the civil context. In addition to setting civil penalties by statute, they can properly set state policy with regard to the maximum punishment that can be imposed on a civil litigant via punitive damages. As discussed above, the legislature also has the power to modify (or abrogate altogether) causes of action, rights and remedies that existed at common law. According, should this Court take up Lewellen's unpreserved due process arguments in the instant appeal, it should conclude that Section 510.265 does not violate Lewellen's rights to due process and, by rejecting her arguments on appeal, deny her fourth point on appeal.

ARGUMENT REGARDING RESPONDENTS/CROSS-APPELLANTS' ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN ITS ORDER GRANTING LEWELLEN'S MOTION FOR SANCTIONS AGAINST FRANKLIN AND NATIONAL BY FAILING TO CLEARLY SPECIFY THE DISCOVERY SANCTIONS THAT THE COURT WAS IMPOSING ON RESPONDENTS/CROSS-APPELLANTS WITH REGARD TO PRESENTATION OF EVIDENCE AND ARGUMENT AT TRIAL AND BY DENYING RESPONDENTS/CROSS-APPELLANTS' SUBSEQUENT MOTION SEEKING A NEW TRIAL ON THAT BASIS, BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO PROVIDE ADEQUATE NOTICE OF THOSE DISCOVERY SANCTIONS RESULTING IN PREJUDICE TO RESPONDENTS/CROSS-APPELLANTS, IN THAT THE AMBIGUITY OF THE SANCTIONS ORDER WITH REGARD TO THE RESTRICTIONS ON RESPONDENTS/CROSS-APPELLANTS' ABILITY TO PRESENT EVIDENCE, OBJECTIONS, AND ARGUMENT AT TRIAL, MADE IT IMPOSSIBLE FOR THEIR COUNSEL TO ADEQUATELY PREPARE FOR TRIAL

A. Standard of Review.

Trial courts are vested with broad discretion in controlling discovery. *Giddens v. Kansas City S. Ry. Co.*, 29 S.W.3d 813, 819 (Mo. banc 2000). This discretion extends to the imposition of discovery sanctions. *See id.* Generally, a discovery sanction will not be reversed on appeal unless the trial court has abused its discretion. *See id.* If the reviewing court concludes that the trial court's imposition of sanctions "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration," then that court must conclude that the trial judge has abused his discretion. *See id.*

B. Discussion.

Prior to trial, Lewellen moved for sanctions against both the Dealership and Franklin due to Franklin's failure to appear for deposition. Legal File at LF 404-472. In that motion, she sought various sanctions under Missouri Supreme Court Rule 61.01(d)(1)-(4). *See id.* at LF 407-408. The trial court conducted a hearing on her motion for sanctions on May 9, 2012. Tr. at 44:20-66:5. At that hearing, counsel for Franklin and the Dealership argued that there had not been any showing with regard to the reason why Franklin to appear for deposition and that, therefore, there was insufficient basis for the Court to conclude that Franklin's failure to appear was willful. Tr. at 55:23-56:21.

At the conclusion of the May 9, 2012, hearing, the trial court granted Lewellen's motion for sanctions against both the National and Franklin, stating that it was striking both defendants' pleadings. Tr. at 64:2-11. When asked to clarify what limitations it was imposing on counsel for Franklin and National with regard to their participation in the approaching trial, the trial court stated that it did not yet know how it intended to limit those defendants' participation at trial. Tr. at 65:5-14. Instead, the trial court advised that it would provide that guidance via a subsequent order. Tr. at 65:16-66:3. However, despite the trial court's representation that it would be providing additional guidance in a few days, no subsequent order was issued. *See* Legal File at LF 16-20.

Subsequently, on May 21, 2012, the parties appeared for the pretrial conference. Tr. at 87:1-7. Near the beginning of those proceedings, the trial court returned to the subject of its sanctions order, and providing some additional discussion of how Franklin and National would be limited in their presentation of evidence at trial. Tr. at 90:2-12. The trial court stated that it considered National and Franklin to be in default and that counsel for those defendants would be permitted limited participation in voir dire "to the extent that an appropriate voir dire question has not been asked by any of the remaining non-sanctioned and not in default parties." *Id.* The trial court also indicated that it would permit "cross examination only on the issue of damages." *Id.* The trial court did not provide any further explanation regarding the extent to which Franklin or National would be permitted to participate in trial. *See id.* Thus, it was unclear the extent to which, if any, that those defendants would be able to offer objections to evidence, or to present

arguments to the jury regarding the issues raised by Lewellen during the trial. Nor did any order issue after the May 21, 2012, hearing to provide further clarity on those issues.

While a trial court has broad discretion in controlling discovery and assessing sanctions under Missouri Supreme Court Rule 61.01, "the sanctions themselves are to be spelled out with specificity…." *Simpson by Simpson v. Revco Drug Centers of Missouri, Inc.*, 702 S.W.2d 482, 489 (Mo. App. 1985) (citing *Hammons v. Hammons*, 680 S.W.2d 409, 411 (Mo. App. 1984)). Here, the trial court advised that it would provide the parties with an order setting forth and clarifying the precise sanctions it was imposing upon Franklin and National due to Franklin's failure to appear for deposition. However, that order was never provided. While the trial court attempted to clarify its prior oral ruling at the subsequent pretrial conference, the fact remains that the trial court never entered an order setting forth in full the discovery sanctions that it was imposing on Franklin and National. The failure to clearly specify the sanctions imposed for a discovery violation constitutes reversible error. *See, e.g., Hammons v. Hammons*, 680 S.W.2d 409, 411-12 (Mo. App. 1984) (judgment refusing to set aside default imposed as discovery sanction reversed because sanctions order was "so vague as to be meaningless").

The absence of an order spelling out the precise sanctions the trial court was imposing upon Franklin and National resulted in irreparable prejudice to those defendants. Because there was not a clear understanding of what those sanctions were, Franklin and National were deprived of the opportunity to adequately prepare for trial

with the understanding of what evidence they would be able to present and what evidence they would be precluded from presenting under the court's sanctions order, and to fully understand how the trial court's sanctions order would otherwise impact or limit Defendants' presentation to the jury at trial. Indeed, it was unclear to counsel for Franklin and National until trial, whether they would be permitted to offer objections to Lewellen's evidence. Assuming, without conceding, that the entry of sanctions was appropriate in the first instance, Franklin and National respectfully submit that the trial court's failure to make those sanctions clear prior to trial was an abuse of the trial court's discretion. A defendant, even having been sanctioned, should be afforded the opportunity to prepare for trial with a clear understanding of both the scope and the particulars of the sanctions imposed. Because the trial court did not provide clear notice to Franklin and National with regard to the discovery sanctions being entered, reversible error has resulted that necessitates reversal of the judgment below and a new trial to Franklin and National on all issues. Accordingly, Franklin and National respectfully request that their first point on appeal be granted, and that the matter be reversed and remanded for retrial.

II. THE TRIAL COURT ERRED BY DENYING RESPONDENTS/CROSS-APPELLANTS' MOTION TO AMEND THE JUDGMENT TO REDUCE THE PUNITIVE DAMAGES AWARDED AGAINST THEM PURSUANT TO THE DOCTRINE OF *STATE FARM V. CAMPBELL*, BECAUSE THE PUNITIVE DAMAGES ASSESSED AGAINST THEM VIOLATED RESPONDENTS/CROSS-APPELLANTS' RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10, OF THE MISSOURI CONSTITUTION, IN THAT THE EVIDENCE ADDUCED AT TRIAL DID NOT SUPPORT AWARDS OF PUNITIVE DAMAGES IN EXCESS OF A SINGLE-DIGIT RATIO OF THE ACTUAL DAMAGES FOUND BY THE JURY PURSUANT TO THE *STATE FARM* DOCTRINE, THEREBY RENDERING THE AWARDS OF PUNITIVE DAMAGES EXCESSIVE AS A MATTER OF LAW. .

A. Standard of Review.

The U.S. Supreme Court has held that the assessment of punitive damages by the jury serves a different function than their role as finder of fact in assessing actual, compensatory damages. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434 (2001). In *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, the U.S. Supreme Court analogized the review of punitive damages awards for excessiveness to

the review of punishments for criminal offenses and civil fines and similar penalties. *Id.* at 434-35. While *Cooper* recognized that this Court must accept any factual findings made by the trial court unless they are clearly erroneous, "the question [of] whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *Id.* at 435.

B. Discussion.

1. Constitutional Due Process Limits The Amount Of Punitive Damages That Can Be Awarded By A Jury.

"[I]t is well established that there are procedural and substantive limitations [on punitive damages awards] … The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibits the imposition of grossly excessive or arbitrary punishments upon a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). The Missouri Constitution also provides similar due process protections within Article I, Section 10. As punitive damages "serve the same purposes as criminal penalties," and because parties defending against such damages "have not been accorded the protections applicable in a criminal proceeding," they "pose an acute danger of arbitrary deprivation of property." *State Farm v. Campbell*, 538 U.S. at 416. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that

a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America v. Gore*, 517 U.S. 559, 576 (1996).

In order to provide that notice, and to reduce the arbitrariness of punitive damages awards, the U.S Supreme Court has set forth three primary principals that must be considered in assessing punitive damages awards for excessiveness. Specifically, in *BMW v. Gore*, the U.S. Supreme Court announced three principal guideposts for assessing such awards: (1) the reprehensibility of the defendant's conduct, (2) the disparity between the harm actually or potentially suffered by the plaintiff and the punitive damage award, and (3) the difference between the punitive damages awarded and comparable civil penalties that could be imposed in similar cases. *Id.* at 575. These factors do not support an award of punitive damages of $500,000. Rather, the evidence presented at trial demonstrates that such an award is still grossly excessive and violates Franklin's constitutional due process rights as set forth in the *BMW* and *State Farm v. Campbell* decisions.

In 2005, the Missouri General Assembly enacted Section 510.265, RSMo 2005, which places statutory limitations upon punitive damages awards. Specifically, that statute limits punitive damages awards to the greater of two amounts: (1) five times the amount of actual damages awarded by the jury or (2) $500,000. *See* § 510.265, RSMo 2005. While not expressly adopted to codify the principles of *State Farm v. Campbell* or *BMW v. Gore*, the limits it imposes bear remarkable resemblance to the guidance

supplied in those U.S. Supreme Court decisions, in that it generally limits punitive damages, generally, to a single-digit multiplier.[11] It also allows for a larger ratio of punitive damages in situations where compensatory damages are small, as contemplated by *State Farm v. Campbell*. *See State Farm v. Campbell*, 538 U.S. at 425.

Here, the circuit court reduced the jury's punitive damages awards as to both Franklin and National Auto under Section 510.265, RSMo 2005. The punitive damages award on the fraud claim against Franklin was reduced to $500,000, twenty times the amount of compensatory damages. The punitive damages assessed against National Auto were reduced to $539,050, five times the total of the $25,000 compensatory damages award and the $82,810,00 attorney's fee awarded upon her MMPA claim. As discussed below, however, these reductions were not sufficient to bring the punitive damages awards within the limits imposed by constitutional due process (especially with regard to Franklin). Rather than rely solely upon a statutory cap, the circumstances of the particular case must be considered to determine if the award remains excessive under the U.S. Supreme Court's due process jurisprudence. These decisions make it clear that deviations from a single-digit ratio between compensatory and punitive damages must be reserved for *truly exceptional* cases, rather recognized as the norm. *See State Farm v.*

[11] This statutory limit is also higher than the four-times multiplier the U.S. Supreme Court has suggested is the typical maximum that would comply with due process. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at 425.

Campbell, 528 U.S. at 425 ("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages … will satisfy due process"). The case at bar is does not represent such a truly exceptional case. Accordingly the trial court erred in refusing to reduce the punitive damages assessed against Franklin and National to a single-digit ratio of the actual damages awarded.

As discussed below, the evidence adduced at trial, viewed in the light most favorable to the judgment below, cannot support the grossly excessive punitive damages awards entered, here.

2. There Was Insufficient Evidence To Support A Conclusion That The Conduct Of Franklin And National Was So Reprehensible As To Necessitate An Award Of Punitive Damages In Excess Of A Single Digit Ratio.

Under the first guidepost of the *BMW v. Gore* analysis, a court must consider the reprehensibility of the defendant's individual conduct in assessing whether the punitive damages award was excessive. For that reason, it has been common for Missouri appellate courts to look principally to the reprehensibility guidepost in evaluating punitive damages awards that exceeded a single-digit ratio. *See, e.g., Krysa v. Payne*, 176 S.W.3d 150, 157 (Mo. App. 2005) (27:1 ratio). As discussed below with regard to the

ratio guidepost, however, unless the reprehensibility demonstrated is "particularly egregious," beyond that needed to justify an award of punitive damages in the first instance, there is a significant risk that the ratio guidepost would become meaningless. *C.f. Bennett*, 315 S.W.3d at 879. Put another way, unless the evidence adduced at trial permits a conclusion that Franklin and National's conduct was so egregious that to call for sanctions in excess of a single-digit multiple of the actual damages found by the jury, then this Court should conclude that the punitive damages assessed violate due process and must be reduced under *State Farm*.

The U.S Supreme Court has set forth a number of factors[12] that this Court must consider in evaluating reprehensibility for the purpose of determining the propriety of a punitive damages award:

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[12] In addition to the reprehensibility factors discussed in the *State Farm* decision, Missouri appellate courts have also considered a number of other factors in determining whether a punitive damages award is excessive:

> (1) aggravating and mitigating circumstances surrounding the defendant's conduct; (2) the degree of malice or outrageousness of the defendant's conduct; (3) the defendant's character, financial worth, and affluence; (4) the age, health and character of the injured party; (5) the nature of

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm v. Campbell, at 419 (citations omitted). In the following sections, Franklin and National will demonstrate that none of these factors support a conclusion that a punitive damages award greater than a single-digit multiplier would be appropriate under the evidence adduced.

> the injury; (6) awards given and approved in comparable cases; and (7) the superior opportunity for the jury and trial court to appraise the plaintiff's injuries and other damages.

Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 177-78 (Mo. App. 1997). Lewellen did not raise any argument in the proceedings below that any of these factors were pertinent to determining whether the punitive damages award, here, was excessive.

Turning first to the nature of the underlying injury, it is beyond dispute that the injury to Lewellen was purely economic. She sustained no bodily injury as the result of the alleged conduct of Franklin and National, nor was there any physical assault upon her. Nor was there even any risk of such injury demonstrated at trial. This weighs heavily in favor of a smaller ratio of punitive damages to actual damages. In comparison, courts applying the *State Farm v. Campbell* and *BMW V. Gore* analysis routinely reduce punitive damages to single-digit ratios, even in cases where bodily injury is at issue. *See, e.g., Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (reducing punitive damages in wrongful death action from 4:1 ratio to 1:1 ratio); *Stogsdill v. Healthmark Partners, LLC*, 377 F.3d 827, 830-31, 834 (8th Cir. 2004) (reducing punitive damages ratio from 10:1 to 4:1 despite showing that health care provider was grossly negligent in failing to diagnose constipation that ultimately resulted in bowel perforation and fatal septic shock). *Compare, Morse v. Southern Union Co.*, 174 F.3d 917, 925-26 (8th Cir.1999) (affirming trial court's reduction of punitive damages from 13.8:1 ratio to 6:1 ratio in age-discrimination employment action). The simple fact that punitive damages in injury cases are regularly reduced to single-digit ratios weighs heavily in favor of a similar, if not more significant reduction in the punitive damages ratio, here.

Second, with regard to the question of whether there was indifference or reckless disregard for the safety of others, here, there is no issue with regard to safety. There was

no evidence offered at trial that would admit any conclusion that Defendant Franklin's conduct created any physical danger to Lewellen or otherwise exhibited any such indifference or reckless disregard for her safety. For example, there was no evidence from which the factfinder could conclude that the condition of the vehicle at the time it was sold to the Lewellen presented any health or safety concerns. Again, there is no claim that Lewellen sustained any bodily injury. Simply put, this factor is utterly absent in this matter, and does not support a conclusion that this the conduct of Franklin and National is so reprehensible that it would merit an award of punitive damages that deviates beyond a single-digit multiplier.

As to the third factor, there was evidence that from which a jury could conclude that Lewellen was financially vulnerable. Lewellen testified that she was eighty-two years of age and that her source of income consisted of Social Security payments of $1,136 per month. Tr. at 229:8-230:2. She also testified that she was unable to make the full monthly payment on the loan for her vehicle. Tr. at259:16-19. Thus, this factor would weigh in favor of a finding greater degree of reprehensibility. *See Krysa v. Payne*, 176 S.W.3d 150, 159 (Mo. App. 2005).

The fourth consideration under *State Farm v. Campbell* concerns the question of repeated conduct, sometimes referred to as "recidivism." *State Farm*, citing to *Gore v. BMW*, draws attention to the importance of the *chronology* of the repeated conduct, reasoning that to trigger this prong of the reprehensibility analysis, the wrongdoer must

engage in conduct that is substantially similar to *prior* transgressions.[13] *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423, 123 S. Ct. 1513, 1523, 155 L. Ed. 2d 585 (2003). This focus on chronology is crucial to the analysis of this factor, as it requires distinguishing between two types of repeated misconduct: (1) misconduct that is repeated and which persists after the person is apprised of its wrongful nature (true "recidivism") and (2) misconduct that was merely repeated within a certain span of time. The discussion of repeated conduct within *State Farm* clearly indicates that the former type of repeated misconduct (recidivism) is at issue with regard to this prong of the reprehensibility analysis.

Here, while there was evidence from which a jury could find that Defendants had engaged in similar conduct in other motor vehicle transactions, this case does not present a true case of *recidivism*. Lewellen offered testimony of two other individuals, Glenna Ovebey and David Heckadon, who stated that they had purchased vehicles under similar programs as Lewellen.[14] Overbey testified that her transaction occurred in 2007, the

[13] This chronological distinction discussed in the cases is well-justified, because there are clear reasons to punish a wrongdoer more harshly on a second (or subsequent) offense, if the punishment for the original offense was insufficient to deter the wrongdoer from relapsing into further misconduct.

[14] Lewellen also sought to offer evidence of other complaints via an investigator employed by the Missouri Attorney General. Tr. at 220:7-221:7. That investigator,

same general span of time as the Lewellen transaction. Tr. at 317:4-9. Heckadon did not testify as to the specific timeframe of his transaction. *See generally*, Tr. at 353:8-362:5. As such, the evidence adduced, while perhaps supporting a conclusion that Franklin and National had engaged in "repeated" conduct, fails to demonstrate that the conduct in Lewellen's transaction constituted repeating similar *prior* conduct as contemplated under *State Farm*. *See State Farm*, 538 U.S. at 423. As such, this facto would weigh against finding that Franklin and National had engaged in conduct of sufficient reprehensibility to justify departing from a single-digit ratio of punitive damages.

The last of the reprehensibility factors is whether the harm resulted from "intentional malice, trickery, or deceit, or mere accident." *State Farm v. Campbell*, 538 U.S. at 419. In light of the jury's finding that Franklin had engaged in intentional misrepresentation, this factor would support a finding of increased reprehensibility. However, taking all of the factors into consideration, the overall balance of those factors yields a conclusion that the conduct at issue, here, was not so "particularly egregious" as to justify departing from a single-digit multiplier.

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however, acknowledged that he had no knowledge of the nature of those complaints or whether they were lodged against Franklin, National, or another dealership located in Kansas. Tr. at 222:12-22; 226:16-227-7.

3. The Ratio Of Punitive To Actual Damages Is Impermissibly High.

Turning next to the second of the three *BMW v. Gore* factors, requires a comparison between the harm sustained by Lewellen and the amount of the punitive damages awarded. "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003). While there is no "bright-line ratio" above which a punitive damages award automatically violates due process, as a practical matter "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. Indeed, punitive damages in excess of "four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.*[15] The Missouri Court of Appeals, Eastern District has opined that an award involving a triple-digit ratio of actual to punitive damages "raises a presumption of unconstitutionality per the holding in *Campbell*." *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 851 (Mo. App. 2007).

[15] The Court's reasoning in setting a 4:1 boundary with regard to the permissible ratio of punitive to actual damages is based, in significant part, upon the long history of statutory penalties allowing awards of double, triple, or quadruple damages. *See BMW v. Gore*, 517 U.S. at 580-81.

Here, the jury assessed actual damages in the amount of $25,000 against Franklin and National. Legal File at LF 541-544, LF 734-737. With regard to Lewellen's fraud claim against Franklin, the final award of punitive damages was set at $500,000, representing a 20:1 ratio to the actual damages assessed. *See id.* at LF 743. Turning to National, the punitive damages award of $539,050 represents a 21.6:1, ratio to the amount of actual damages assessed (or a 5:1 ratio to the "net amount of the judgment" under Section 510.265, RSMo 2005). *See id.*

Lewellen argued in the proceedings below that a higher than single-digit ratio of punitive to actual damages was appropriate because this case falls into a recognized exception for situations where a "small" award of actual damages is rendered by the jury. This exception applies when "a particularly egregious act has resulted in only a small amount of economic damages." *BMW*, 517 U.S. at 582; *State Farm*, 538 U.S. at 425. Thus, this exception can only apply if two conditions are met. First, the defendant's conduct must be "particularly egregious." *Id.* Second, the economic damages caused by the defendant's conduct must be "small." *Id.* As discussed in the following subsections, Lewellen's arguments that this exception applies fail on both grounds.

a. The Punitive Damages Should Be Limited To A Single-Digit Ratio Because Defendants' Conduct Did Not Qualify As "Particularly Egregious."

The U.S. Supreme Court has made it clear that a deviation from a single-digit multiplier in cases where actual damages are small in amount may be appropriate only in circumstances where the defendant's conduct is *particularly egregious*. *BMW*, 517 U.S. at 582; *State Farm*, 538 U.S. at 425. While this Court has relied upon this exception in prior cases (such as in the *Overbey v. Chad Franklin* matter), those prior decisions fail to provide any meaningful guidance as to what constitutes "particularly egregious" conduct under Missouri law. This case provides an opportunity to provide such guidance on that issue.

In requiring a defendant's conduct to be "particularly egregious" to qualify for this exception, the U.S. Supreme Court obviously intended to set higher benchmark than the threshold amount of reprehensibility needed to qualify for punitive damages in the first instance. To hold otherwise, would render this language meaningless surplusage. As the Texas Supreme Court recently observed:

> If courts fail to diligently police the 'particularly egregious' exception, they insulate from due-process review precisely those cases where judicial review matters most: those involving unsympathetic defendants where juries are most likely to grant arbitrary and excessive awards. Allowing a freewheeling reprehensibility exception would subvert the constraining power of the ratio guidepost.

Bennett v. Reynolds, 315 S.W.3d 867, 879 (Tex. 2010). In *Bennett*, the Texas Supreme Court reversed a punitive damages award of $55,000, as excessive, based upon a 4.33:1 ratio with the actual damages awarded. *See id.* at 879. The reprehensibility showing entailed to trigger this prong of the exception must be significantly greater than that required to merely support an award of punitive damages in the first instance, otherwise this exception would engulf the rule altogether, rendering the rule meaningless.

To determine whether a defendant's conduct was "particularly egregious," it would stand to reason that the Court should apply the same analytical framework in evaluating reprehensibility. Thus, this would entail determining whether, under the reprehensibility factors, the defendant had engaged in misconduct that was well beyond the degree of reprehensibility that would permit an award of punitive damages. Other considerations the Court might consider in determining whether conduct rose to the level of being "particularly egregious" might include community standards, criminality of the conduct, other social/moral standards, etc. *See BMW*, 517 U.S. at 596 (Breyer, concurring).

Looking back to the discussion of reprehensibility, however, the balance of factors weighs against a finding that the conduct of National and Franklin rose to the level of being "particularly egregious," as compared to other cases which would merit an award of punitive damages. As discussed above, this is supported by the factor that the claims

at bar involve no injury to Lewellen, but instead only economic damages. The factor that there was no risk to her health or safety also weighs against a finding that the conduct at issue qualifies as "particularly egregious." While other factors weigh in favor of an increased degree of reprehensibility (repeated conduct, financial vulnerability, and intentional misrepresentation), the overall balance of factors would arguably weigh against a conclusion that the conduct at issue was so beyond the level of reprehensibility required for an award of punitive damage to be "particularly egregious." In turn, the *State Farm* exception to the single-digit ratios for cases in which there is a small damage award would not apply.

The danger of holding that the conduct, here, crosses into the range of "particularly egregious" conduct, is that it "leaves no room for greater punishment in cases involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of the public." *Bennett*, 315 S.W.3d at 878 (citing *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006)). Put another way, unless the "particularly egregious" standard is differentiated from conduct that merely qualifies for the sanction of an assessment of punitive damages, there is a clear risk that any distinction in punishment between "garden variety" misconduct and truly egregious and harmful misconduct will be lost altogether in "small damage" cases.

b. Deviation From A Single-Digit Ratio Is Improper, Given That The Compensatory Damages Awarded To Lewellen Were Substantial.

The second flaw in Lewellen's argument that the "small damages" exception permits a greater-than-single-digit ratio, here, is that this matter does not involve a "small" award of damages. The actual damages award was, instead substantial, as the damages awarded against National and Franklin were in the amount of $25,000. Legal File at LF 743. Moreover, Lewellen was also awarded over eighty thousand dollars in attorney's fees in her MMPA claim against National. *See id.* at LF 744. As the case at bar does not satisfy both prongs of this exception to the general rule that punitive damages should not exceed a single-digit multiplier, the trial court erred in failing to reduce the punitive damages to an amount consistent with constitutional due process limits.

The award of actual damages, here, was over five times greater than the $4,500 award of actual damages that were awarded in *Overbey*. *See Overbey*, 361 S.W.3d at 369. In contrast with the modest *Overbey* award, the actual damages award of $25,000, here, can hardly be considered "small."[16] Moreover, that award of actual damages should

[16] Looking to other jurisdictions, departures from the single-digit ratio guidepost typically do not occur unless the compensatory damages are less than $12,000. *See* Lauren R. Goldman & Nickolai G. Levin, *Practitioner Note: State Farm at Three: Lower*

flow solely to Plaintiff, given that the Court also entered an $82,810 award of attorney's fees in her favor upon her MMPA claim against National. While Plaintiff did not receive a similar attorney's fee award as to Franklin, this was due to Plaintiff's own choice in electing to take her judgment against Franklin upon her fraud claim, rather than under the Missouri Merchandising Practices Act.

In the proceedings below, Lewellen also relied upon two cases, *Kemp v. AT&T*, 393 F.3d 1354 (11th Cir. 2004), and *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003) to argue that a departure from a single-digit ratio was proper in this case. *See* Legal File at LF 727-728. In *Kemp*, the departure from single-digit ratios was largely premised upon AT&T's status as a multibillion dollar corporation, requiring a higher punitive damages amount to yield sufficient deterrence. 393 F.3d at 1364 (discussing deterrence of "a company as large as AT&T"). *See also generally* AT&T Annual Report 2005, at 18 (reflecting net revenues ranging from $4.7 Billion to $8.5 Billion from 2001 through 2005) (available at http://www.att.com/Investor/ATT_Annual/2005/pdf/ 05ATTar_Complete.pdf). Similarly, in *Mathias*, the defendant was a company with a net worth of **$1.6 Billion**. *See Mathias*, 347 F.3d at 677. Moreover, the reprehensibility in *Mathias* was elevated because of the health and safety issues presented by the bedbug infestation at issue in that

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Courts' Application of the Ratio Guidepost, 2 N.Y.U. J.L. & Bus. 509, 515 (2006). The actual damages awarded, here, are over twice that threshold.

matter, in contrast to the absence of any health or safety issue in the case at bar. *See id.* at 678. Here, there was no evidence either Franklin or National had anything approaching such an extensive net worth. There is no argument, here that an increased punitive damages ratio is needed to provide sufficient deterrent to an individual defendant (Franklin) or an individual motor vehicle dealership (National), in contrast to the large and extremely well-funded corporations at issue in *Kemp* and *Mathias*.

c. There Are No Other Grounds That Would Allow Deviation From A Single-Digit Ratio.

Lewellen also relied in the trial court upon two cases in which misrepresentations were made by motor vehicle dealerships with regard to the sale of rebuilt or previously-wrecked vehicles. In *Parrott v. Carr Chevrolet*, 17 P.3d 473 (S.Ct. Ore. 2001), the court found that a 87:1 ratio of punitive to actual damages was appropriate in light of the fact that the vehicle presented significant safety issues. *See id.* at 488, 489. Similarly, in *Krysa v. Payne*, 176 S.W.2d 150 (Mo. App. 2005), the Missouri Court of Appeals upheld a punitive damages award with a ratio of approximately 27:1 with regard to a claim that a motor vehicle dealership had failed to disclose that a used vehicle had sustained prior collision damage. The high multiplier in *Krysa* (which is nearly 1/10th the multiplier at issue in the case at bar) was justified, in large part, due to the fact that the undisclosed damage presented "significant safety risks to occupants of the vehicle." *See id.* at 158. Again, here, there is no contention that Franklin was involved in conduct that caused bodily injury or even gave rise to a risk of serious injury. Rather, the damages at issue in

this matter are purely economic. Thus, neither *Parrott* nor *Krysa* provide a basis to support the punitive damages ratio, here. Given the significantly more reprehensible nature of the misconduct in *Parrott* and *Krysa*, which led to an award of significantly lower ratios of punitive to actual damages than were awarded in the case at bar, those cases amply demonstrate that the ratio of punitive to actual damages in the present matter are clearly excessive.

In summary, the absence of any physical harm or injury to Lewellen, or even any risk of such harm, clearly weighs against exceeding a single-digit ratio of punitive to actual damages, in conformance with the due process considerations set forth in *BMV v. Gore*. Accordingly, this Court should conclude that the trial court erred in failing to reduce the punitive damages assessed against Franklin to a single-digit ratio of the actual damages assessed against him.

d. An Award Of Attorneys Fees Should Not Be Included In Calculating The Ratio Of Punitive To Actual Damages For Purposes Of Due Process Analysis.

One important distinction between *State Farm* and its progeny and the Missouri punitive damages cap statute concerns what portions of a judgment are included in calculating the permissible ratio of punitive damages. This Court held in *Hervey v. Missouri Dept. of Corr.*, 379 S.W.3d 156, 165 (Mo. banc 2012), that the language of Section 510.265, RSMo 2005, required a court to include all amounts awarded in the

judgment (excluding the punitive damages award itself) in calculating the cap amount. *See* 379 S.W.3d at 165. Thus, any attorneys fee award permitted by law would be included in determining the base amount of the judgment that would be used in calculating the permissible amount of punitive damages. *See id.* The trial court followed this guidance in applying the statutory punitive damages caps, here, as it reduced the punitive damages awarded against National Auto to $539,050, which is equal to five times $107,810, the total of the $25,000 actual damage award and the court's $82,810 attorneys fee award. Legal File at LF 743.

In contrast, there is substantial, persuasive authority standing for the proposition that an award of attorneys fees is not considered in determining the ratio between punitive and compensatory damages for purposes of the *State Farm* due process analysis. As stated in *BMW*, the ratio concerns the ratio between the punitive damages and amount of "actual harm as determined by the jury." *BMW*, 517 U.S. at 582. The Utah Supreme Court also faced this precise issue when it took up the remand of *State Farm* by the U.S. Supreme Court. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004). The plaintiff argued on remand that attorney's fees should be included in the denominator for purposes of evaluating the ratio of actual to punitive damages. *See id.* However, the Utah Supreme Court disagreed, concluding that "the considerable attention given by the Supreme Court to the issue of compensatory damages and the methodology for arriving at a constitutionally permissible ratio of compensatory to punitive damages convinces us that we would not be at liberty to consider a substitute denominator." *Id.*

That court was also concerned that including "attorney fees and expenses in awarding punitive damages also invites unnecessary conceptual and practical complications to an already complex enterprise." *Id.* at 420. In the Utah court's view, bringing attorneys fees and expenses into the punitive damages ratio analysis would impact the trial process by "sidetracking" the focus of trial from the claims of the parties onto those fees and expenses. *Id.*

4. Comparable Civil Penalties Do Not Lend Support To The Punitive Damages Award.

The third *BMW v. Gore* factor consists of a comparison between the punitive damages award and comparable civil penalties. The significance of this factor is to assess whether "a lesser deterrent would have adequately protected the interests of [Missouri] consumers." *BMW of N. America v. Gore*, 517 U.S. at 584. Where there is "an absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance." *Id.* at 585. Here, civil penalties are available under the Missouri Merchandising Practices Act through suits brought by the Missouri Attorney General. *See* § 407.100.5, RSMo 2000. This penalty cannot exceed $1,000.00 per violation. *See id.* The range of other remedies available in an Attorney General action is roughly equivalent to those brought by a private litigant under the MMPA (such as restitution and injunctive relief). *See* §§ 407.100.2, 407.100.4, RSMo 2000. Thus, this

guidepost would appear to lend solid support to a conclusion that the punitive damages assessed against Franklin and National, here, are excessive, and should be reduced to a single digit ratio.

4. The Awards Of Punitive Damages Should Each Be Reduced To No More Than Four To Five Times The Actual Damages Assessed.

For the reasons discussed above, the assessments of punitive damages against Franklin and National exceed the amount permissible under the due process provisions of the U.S. and Missouri Constitutions, even after the trial court's reduction of the original punitive damages awards under Section 510.265. Pursuant to the holdings of *State Farm v. Campbell* and *BMW v. Gore*, that award must be reduced to a single digit multiple of the actual damages assessed against Franklin and National. The question, then, is what single-digit ratio is the most appropriate under the circumstances. A reduction to the highest single-digit ratio (9:1) would result in a punitive damages award of $225,000. However, there are a number of reasons why a lower ratio would be more appropriate, here.

For example, Section 510.265, RSMo 2005, suggests that a five-to-one multiplier should represent the ceiling on a typical punitive damages award, yielding punitive damages of no more than $125,000 in the case at bar. However, reducing the award to a 4:1 ratio (yielding punitive damages of $100,000) would be more appropriate under the

express reasoning of the *BMW* decision, which suggested that a ratio of 4:1 represented the typical limit of punitive damages under due process considerations. *See BMW v. Gore*, 517 U.S. at 581.

For the reasons discussed above, Defendants' second point of their cross-appeal should be granted. The First Amended Judgment should be reversed, with directions to amend the punitive damages assessed against each Defendant to a single-digit multiple of the actual damages awarded against them. Alternatively, this Court may also amend the judgment under Missouri Supreme Court Rule 84.14, in order to reduce the punitive damages award to amounts reflecting such ratios in compliance with constitutional due process in accordance with the *State Farm v. Campbell* and *BMW v. Gore.*

CONCLUSION

For the reasons discussed above, Lewellen's constitutional challenge to Section 510.265, RSMo 2005, if reached by this Court, should be rejected. Many of her constitutional arguments are not preserved for appeal, and the remaining arguments lack merit. This Court should conclude that Section 510.265 does not infringe upon the right to jury trial, but is instead a proper exercise of the legislature's authority to modify common law remedies, especially given that punitive damages are subject to the limits of due process under the U.S. Constitution. Similarly, this Court should conclude that the statute does not violate equal protection, the separation of powers, or Lewellen's right to due process.

However, the Court should reverse and remand this matter for new trial on the basis that the trial court abused its discretion with regard to its order sanctioning National and Franklin due to Franklin's failure to appear for deposition. Even though Franklin's failure to cooperate with discovery was sanctionable, Franklin and National were nevertheless entitled to a clear articulation as to the specific sanctions being imposed. As the trial court failed to provide sufficient guidance as to the specific sanctions it was imposing on Franklin and National with regard to what their counsel could do and could not do at trial, it made it essentially impossible for their counsel to adequately prepare for trial.

If this Court concludes that the trial court did not commit reversible error with regard to its sanctions order against Franklin and National, this Court should nevertheless reverse the awards of punitive damages against these defendants and remand for reduction of those punitive awards pursuant to *State Farm* (or, alternatively, reduce the punitive damages awards under Rule 84.14). The compensatory awards to Lewellen were substantial and do not qualify for the exception provided for cases involving a small award of actual damages. Moreover, the factors of the reprehensibility analysis do not support a conclusion that these defendants' conduct was so egregious as to justify a deviation from a single-digit multiple of the actual damages awarded. This is also demonstrated by the clear disparity between the punitive damages awarded and the comparable civil penalties applicable to similar misconduct.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Respondent 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 20,704 words, exclusive of the cover, Certificate of Compliance, Certificate of Service, signature block, and appendix. The electronic copy of this document electronically filed with the Court has been scanned for viruses using Symantec Endpoint Protection, which reported that said electronic copy is virus free.

/s/ Patric S. Linden
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2013, I electronically filed the foregoing Brief with the Clerk of the Supreme Court using the E-Filing system, which sent notification of such filing via electronic mail to the following counsel of record:

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