No. SC92871

IN THE SUPREME COURT OF MISSOURI

LILLIAN M. LEWELLEN,
Appellant/Cross-Respondent,

v.

CHAD FRANKLIN
Respondent/Cross-Appellant,

and

CHAD FRANKLIN NATIONAL AUTO SALES NORTH, LLC
Cross-Appellant.

APPEAL FROM THE
CIRCUIT COURT OF CLAY COUNTY, MISSOURI
THE HONORABLE LARRY D. HARMAN
DIVISION 4

APPELLANT'S RESPONSE TO CROSS-APPEAL AND REPLY BRIEF

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RESPONSE TO FRANKLIN AND NATIONAL AUTO SALES' POINT I

The trial court did not error in imposing sanctions and denying the motion for new trial, because Franklin and National Auto Sales were not prejudiced by inadequate notice of the sanctions, in that Franklin and National Auto Sales' participation at trial demonstrated their preparation in accordance with the specific sanctions imposed.

A. Standard of Review[1]

Discovery sanctions are reviewed for an abuse of discretion. *Trotter v. Distler*, 260 S.W.3d 913, 915 (Mo. App. E.D. 2008). The trial court abuses its discretion when the "ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable

[1]There is some discrepancy as to when the original judgment was filed and if Franklin and National Auto Sales' motion for new trial was timely filed. June 12, 2012 is the date the judgment was filed stamped, LF 553; App. II A1, and the date on the court's docket sheet, LF 20; App. II A8. June 13, 2012 is the handwritten date on the judgment next to the trial judge's signature, LF 559; App. II A7, and the date on Casenet, App. II A10. Franklin and National Auto Sales filed their Motion for New Trial on July 13, 2012. LF 624; App. II A11. It appears that the date the trial court judge signed the judgment would be the controlling date. *See Coffer v. Wasson-Hunt*, 281 S.W.3d 308, 310 (Mo. banc 2009).

"App." refers to the appendix filed with Lewellen's initial brief. "App. II" refers to the appendix filed with this brief.

as to shock the sense of justice and indicate a lack of careful consideration." *Id.*

The denial of a motion for new trial is also reviewed for abuse of discretion. *In re H.L.L.*, 179 S.W.3d 894, 897 (Mo. banc 2005)

B. Adequate notice of the specific sanctions was provided by the trial court

The sanctions imposed by the trial court were specific to allow Franklin and National Auto Sales to prepare for trial.

Rule 61.01 allows the trial court to impose sanctions for failing to attend a deposition that are "just" upon a motion and notice. Rule 61.01(f); App. II A17-A19. Broad authority is afforded to the trial court in imposing sanctions. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648 (Mo. banc 1997).

Lewellen followed the procedures under Rule 61.01. Lewellen filed a motion for sanctions on April 12, 2012. LF 404-67; App. II A20-A25. The grounds for sanctions were Franklin failed to appear for depositions on two occasions, despite a court order compelling Franklin to appear.[2] LF 404-05, 413, 428, 444; App. II A20-A21. In additional support, Lewellen noted that Franklin failed to appear for depositions in different cases, and plead the Fifth Amendment when he testified in a previous trial. LF 405-06, 446-52, 454-67; App. II A21-A22. Lewllen asked for sanction to include: an

[2]Franklin's failure to appear for depositions was not the only discovery matter at issue in this case. The record shows where Lewellen had to file motions to enforce discovery, LF 96-98, 201-03, 216-17, 371-74; and the trial court entered orders on discovery matters, LF 279-83, 390-91. A discovery master was also appointed. TR 62.

order refusing Franklin and National Auto Sales from supporting or opposing defenses and introducing those defenses into evidence, striking the pleadings, and pay costs associated with the deposition. LF 407; App. II A23. Franklin and National Auto Sales did not file a written motion concerning the sanctions. LF 12-20.

At the May 9, 2012 hearing, Franklin and National Auto Sales did not object to the sanctions or motion. TR 55-57; App. II A26-A27. Their counsel only stated that the sanctions would be an "extremely harsh hit" and they wanted to reach an agreement with Lewellen about the sanctions. TR 55-57; App. II A26-A27. At that hearing, the trial court set forth a detailed finding that sanctions were proper because Franklin failed to appear at depositions in his individual capacity and as a corporate representative for National Auto Sales. TR 59-63; App. II A27-A28. Thereby Lewellen was prejudiced as Franklin "intentionally violated" court orders to appear for depositions. TR 63; App. II A28. The trial court set forth the following as sanctions:

> The pleading of Defendant, Chad Franklin, and Defendant, Chad Franklin National Auto Sales, are struck. Those two defendants will be precluded from introducing evidence in defense of the claims. Any documents that had been produced as a result of the discovery process by those two defendants, if offered by plaintiff, can be admitted for purposes against Defendant Franklin, the Franklin Defendants only.
>
> …
>
> People, I've done that off the top of my head. This is not a written order yet. It is the order of the court. The court reporter has, hopefully, taken it down exactly as I

said it, and that will be available to counsel when he can get that done.

TR 64-65; App. II A28-A29.

When counsel for Franklin and Nation Auto Sales asked about cross-examination of witnesses, the trial court said he did not know and will "get something to you." TR 65-66; App. II A29. Twelve days later, May 21, 2012, the parties appeared for a pre-trial hearing. TR 87. The trial court elaborated on the sanctions imposed by stating:

> My rulings with respect to Defendants Franklin, or the Dealer Defendants [National Auto Sales], hasn't changed. And it's almost as if they're in default. The pleadings have been struck. I'm allowing participation in the 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, including plaintiffs, of course, and will allow cross-examination only on the issue of damages.

TR 90; App. II A30.

Franklin and National Auto Sales did not raise the issue of sanctions again or seek a formal order. TR 87-90; LF 12-20; App. II A30. The trial court ruled on Franklin and National Auto Sales' motions in limine, including Franklin's criminal history, which did not pertain to damages. TR 90-114. After the pre-trial hearing, Franklin and National Auto Sales did not file anything with the trial court concerning the sanctions imposed. LF 20.

At trial, there was no further record made about the sanctions. TR 184-426. Franklin and National Auto Sales only objected to the sanction when Lewellen rested. TR

369. Counsel stated "your honor, just for purposes of clarification, given the court's prior sanction's order, I'm just clarifying that I'm precluded as a sanction for putting on an affirmative defense." TR 369. The objection was "as a matter of due process." TR 369.

At trial, Franklin and National Auto Sales gave an opening statement, in which objections that the opening statement exceeded the sanctions were overruled. TR 205-214. Counsel's statement that "part of my analysis and my presentation with regard to the amount of damages is that we should not be attributed damages for the conduct of others" and "I was entitled to cross-examine on the issue of damages" showed that he had notice and was prepared to try the case with the given sanction. TR 210-211. Every witness was cross-examined, and the questioning was broad. TR 226-27, 288-303, 313-14, 331, 359-60. Objections to foundation of business records and the content of the interrogations about Franklin's residence were made. TR 216, 219, 332. Franklin and National Auto Sales made a closing argument in both stages. TR 386-92, 414-20. In the punitive damage stage, counsel did not make a record as to the sanctions. TR 401. Franklin and National Auto Sales did not make any other objection to the sanction or make any further record about the sanctions. TR 205-426.

Franklin and National Auto Sales failed to show how they were prejudiced. Nothing in the brief alludes to the exact prejudice that resulted or the inadequate preparation. The record does not show how Franklin and National Auto Sales were inadequately prepared for trial. TR 205-426. There was no record as to what evidence Franklin and National Auto Sales would have introduced or questions they would have

asked. In fact, the record shows that Franklin and National Auto Sales were prepared and did participate in trial. TR 205-426. Having sanctions imposed because Franklin failed to appear for depositions is not prejudice. Franklin and National Auto Sales do not get a do over when they intentionally failed to participate the first time around.

Franklin and National Auto Sales reliance on *Hammons v. Hammons*, 680 S.W.2d 409 (Mo. App. E.D. 1984) and the dissent in *Simpson by Simpson v. Revco Drug Ctrs. of Mo., Inc.*, 702 S.W.2d 482 (Mo. App. W.D. 1985) is misplaced. In *Hammons*, the Eastern District found the trial court's order vague and not in compliance with Rule 61.01. 680 S.W.2d at 411. The order was if the defendant did not appear for deposition then the "defendant's pleadings to be stricken and appropriate orders entered." *Id.* Sanctions were imposed when the *pro se* defendant appeared for a deposition but it did not occur due to a dispute about how the deposition would proceed. *Id.* at 410. In *Simpson*, the majority found defendant's failure to object to the admission of evidence imposed as a sanction did not amount of plain error. 702 S.W.2d at 85-87. The dissenting judge in *Simpson* found the trial court erred in imposing sanctions because no motion was filed and no notice was given, which is required before sanction may be imposed. *Id.* at 489 (Clark, J., dissenting). The dissent explained "both the conduct which is to trigger the sanctions and the sanctions themselves are to be spelled out with specificity in order that the party against whom the order is to be entered will be apprised of the consequences of non-compliance." *Id.* at 489-90 (Clark, J., dissenting).

These two cases should not be followed as they are not authoritative. *Hammons*

and *Simpson* involve the impositions of sanctions that did not comply with Rule 61.01. 680 S.W.2d at 411; 702 S.W.2d at 489. Here the trial court's sanctions were specific. The trial court explained the sanctions on the record on two separate occasions. TR 64-65, 90; App. II A28-A30. Lewellen also complied with Rule 61.01. LF 404-09; App. II A20-A25. The grounds for sanctions and the sanctions imposed were very specific and provided Franklin and National Auto Sales adequate notice to prepare for trial.

C. The trial court's sanctions were not an abuse of discretion

The trial court did not abuse its discretion in imposing sanctions or denying the motion for new trial. The sanctions were specific and provided Franklin and National Auto Sales with adequate notice of the sanctions to prepare for trial. The sanctions imposed were not against the logic of the circumstances, given Franklin's conduct. The sanctions imposed where essentially what Lewellen sought in her written motion. LF 64-65, 90; App. II A28-A30. The trial court explained the sanctions on the record on two occasions and was very specific as to what Franklin and National Auto Sales could do. TR 64-65, 90; App. II A28-A30. The trial court gave a more detailed explanation at the pre-trial hearing. TR 90; App. II A30. No further questions or objections were raised, indicating Franklin and National Auto Sales understood the sanctions. LF 12-20; TR 65-66, 90; App. II A28-A30. At the trial, Franklin and National Auto Sales made several statements concerning their understanding of the sanctions. TR 210-11, 369. Lewellen's objections that Franklin and National Auto Sales exceeded the scope of the sanctions were overruled, allowing Franklin and National Auto Sales wide latitude. TR 205-14.

In their brief, Franklin and National Auto Sales did not say how they were unable to be prepared for trial by lack of sufficient knowledge of the sanctions. There was no record made that they did not understand the sanctions. There was no record as to what evidence they would have offered or questions they would have asked but for the sanctions. It is difficult to say that the trial court abused its discretion in imposing sanctions when Franklin and National Auto Sales failed to show exactly how they were prejudiced.

The trial court did not abuse its discretion. The sanctions were specific and clear. The sanctions were imposed almost three weeks before trial and clarified one week before trial. TR 64-65, 90; App. II A 28-A30. The record shows that throughout the trial Franklin and National Auto Sales understood and complied with the sanctions. The imposition of sanctions and denial of the motion for new trial concerning the sanctions were not an abuse of discretion.

D. Conclusion

The imposition of sanction and the denial of the motion for new trial concerning sanctions were not an abuse of discretion. Franklin and National Auto Sales' Point I should be denied.

RESPONSE TO FRANKLIN AND NATIONAL AUTO SALES' POINT II

The trial court did not error in not reducing the punitive damage awards against Franklin and National Auto Sales, because the punitive damage awards are not excessive by due process standards under Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution, in that Franklin and National Auto Sales' conduct was reprehensible, the small actual damages and egregious conduct supports awards outside of the single-digit ratio, and the punitive damages are appropriate compared to civil penalties.

A. Standard of Review

A punitive damage award is reviewed *de novo*. *Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC*, 361 S.W.3d 364, 372 (Mo. banc 2012) (*cert. denied*, 133 S. Ct. 39, 183 L. Ed. 2d 679 (2012)). Franklin and National Auto Sales bear the burden of proving the punitive damage awards exceed constitutional due process standards. *Id.*

B. Punitive damage awards are not excessive under due process.

The punitive damages awarded, $1,000,000 against Franklin, or the statutory reduced $500,000 against Franklin, and $539,050 against National Auto Sales, are not excessive under due process.

Punitive damages awards are subject to due process under the Federal and State Constitutions. *See* U.S. CONST. amend. XIV, §1; Mo. CONST. art. I, § 10; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001). Due process only

requires that "adequate standards and controls be in place to prevent the arbitrary deprivation of property." *Call v. Heard*, 925 S.W.2d 840, 848 (Mo. banc 1996). Punitive damages are to punish or deter conduct and should be awarded when actual damages do not effectively punish or deter the conduct. *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

The United States Supreme Court has established three guideposts to determine if a punitive damage award violates due process. *State Farm*, 538 U.S. at 418. The three guideposts are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.*

The Due Process Clause does not require a punitive damage award "actually be reasonable." *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 471 (U.S. 1993) (Scalia, J. concurring)). Courts have not imposed definite ratios which solely determine if a punitive damage award is unconstitutional. *State Farm,* 538 U.S. at 424-25. The United States Supreme Court has noted that single-digit ratios are more likely to comply with due process, but greater ratios can be constitutional when a "particular egregious act has resulted in only a small amount of economic damages." *Id.* at 425. This analysis is "not facilitated by any rigid benchmarks or bright line tests, but is instead guided by the peculiar facts and circumstances of the defendant's conduct and the resulting harm to the plaintiff."

Fireworks Restoration Co., LLC v. Hosto 371 S.W.3d 83, 93 (Mo. App. E.D. 2012) (citing *State Farm*, 538 U.S. at 425). Justice Kennedy summarized the most important factor in determining a punitive damage award as "the precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiffs." *State Farm*, 538 U.S. at 425. Chief Justice Teitelman echoed this:

> because each case must be assessed on its own facts, no court has imposed inviolable constitutional limits on the ration between punitive and compensatory. To do so would require the courts to supplant the jury's considered decision in favor of an arbitrary limit that may have no relationship whatsoever to the extent and severity of the defendant's misconduct.

Scott v. Blue Springs Ford Sales, Inc. 176 S.W.3d 140, 144 (Mo. banc 2005) (Teitelman, J., concurring).

Franklin and National Auto Sales appears to shift the burden to Lewellen by making references to her responses in post-trial motions filed with the trial court. *See* Franklin Brief 70, 74, 76. Franklin and National Auto Sales are not responding to Lewellen's responses at the trial court, it is their argument and they carry the burden.

1. Reprehensibility

The "degree of reprehensibility of the defendant's misconduct," is the most important factor to determine punitive damages. *State Farm*, 538 U.S. at 418-19. The following factors are to be considered: (1) "the harm caused was physical as opposed to economic;" (2) "the tortious conduct evinced an indifference to or a reckless disregard of

the health or safety of others;" (3) "the target of the conduct had financial vulnerability;" (4) "the conduct involved repeated actions or was an isolated incident;" and (5) "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm*, 538 U.S. at 419. The factors of financial vulnerability, repeated conduct, and intentional malice, trickery or deceit support punitive damages of $100,000,000 against Franklin and $539,050 against National Auto Sales.

a. Financial Vulnerability

Franklin and National Auto Sales' business practices targeted the financially vulnerable. The advertisements for National Auto Sales, which Franklin approved, advertised vehicle for $49 a month. TR 234-235, 348. Lewellen saw an advertisement and went in specifically for the $49 a month car payment. TR 235. Franklin's employees at National Auto Sales, repeatedly told Lewellen that her payment would be $49 a month and the balance would be paid by Franklin. LF 237-238. However, Franklin only provided enough money to cover eight payments, leaving Lewellen to pay the full monthly payment of $387.45. TR 258-259. Lewellen was unable to pay the full balance as her monthly income was $902 in social security benefits. TR 230, 251, 278. In the end, Lewellen's car was reposed for failing to make payments and she was sued by the collection agency. TR 281.

Franklin and National Auto Sales targeted the financially vulnerable, specifically when they were making one of the biggest and most expensive purchases a consumer will ever make. Franklin and National Auto Sales' advertisement campaign was directed at

consumers with fixed or limited incomes on the promise of a new car with low payments. However, Franklin and National Auto Sales had no intention on following through with the promise. Franklin and National Auto Sales engaged in a business practice which targeted the financially vulnerable and justifies the punitive damages awarded.

b. Repeated Conduct

Franklin and National Auto Sales repeatedly engaged in conduct where they misrepresented facts and made omission concerning the sales of vehicles. Conduct which is recidivistic "can be punished more harshly than an isolated incident." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). The United States Supreme Court has held that "a jury may not punish for the harm caused others," while recognizing "that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few;" which can be taken into account. *Phillip Morris USA v. Williams*, 549 U.S. 346, 356-57 (2007); *see also Gore*, 517 U.S. at 577 ("our holdings that a recidivist may be punished more severely than a first offender recognize[s] that repeated misconduct is more reprehensible than an individual instance of malfeasance"). A large punitive damage award is the "strong medicine [] required to cure the defendant's disrespect of the law" when he "repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful." *Gore*, 517 U.S. 576-77.

The Western District rejected Franklin and National Auto Sales' argument that repeated misconduct that occurred within a certain time frame is less reprehensible than repeated conduct that continued to occur after notice of the wrongdoing. *Heckadon v.*

CFS Enters., 2013 WL 1110690, at *7-8 (Mo. App. W.D. March 19, 2013). The Western District rejected this argument as "not the standard for introducing evidence of repeated conduct for purposes of assessing a punitive damage award." *Heckadon*, 2013 WL 1110690 at *8. Similarly, in *Krysa v. Payne*, the Western District found the repeated conduct factor was established by the pattern of the defendant's standard business practices despite any indication of prior legal action. 176 S.W.3d 150, 159 (Mo. App. W.D. 2005).

Here, Franklin and National Auto Sales' conduct is evidence of repeated misconduct. At trial, the plaintiffs in *Overbey* and *Heckadon* testified about their similar experiences with Franklin and the misrepresentations made. TR 316-30, 353-59. Records showed that seventy-three consumers filed complaints with the Missouri Attorney General and numerous consumers filed complaints with the Kansas Attorney General about Franklin and his business practices. TR 332, 337.

Franklin and National Auto Sales' conduct was repeated. Their argument that it is less repressible because all the misconduct was done around the same time should continue to be rejected. This was not a one-time mistake, but a business strategy to be repeated hundreds of times and affected hundreds of consumers. The repeated conduct Franklin and National Auto Sales engaged in justifies the punitive damages awarded.

c. Trickery, Malice, and Deceit

Franklin and National Auto Sales engaged in trickery, malice and deceit. At trial, Lewellen testified that she became aware of National Auto Sales from television advertisements promoting vehicles for $49 a month. TR 234-35. When she went to

National Auto Sales, Franklin's employee sold Lewellen a car with monthly payments of $49 a month. TR 240-41. Lewelllen was not aware that the total price of the vehicle included over $2,000 in contracts and fees. TR 243-45. Lewellen credit application had her monthly income of $18,880 when it was actually $920. TR 230, 268-69. Franklin's employee repeatedly assured her that she was only responsible for $49 a month, despite the monthly payments being $387.45. TR 240, 245. Lewellen was told that she would receive a check to cover the difference, but the check only covered eight months. TR 258. Franklin and National Auto Sales used trickery, malice, and deceit in selling Lewellen the car.

Franklin and National Auto Sales' use of trickery, malice, and deceit supports the punitive damages awarded.

d. Conclusion

This Court and the Western District have upheld punitive damage awards against Franklin and his businesses for similar conduct. In *Overbey* and *Heckadon*, the Courts found Franklin and his businesses engaged in repeated conduct that involved trickery, malice, and deceit to target the financially vulnerable. *Heckadon*, 2013 WL 1110690 at *7; *Overbey*, 361 S.W.3d at 373-74. In rejecting Franklin's due process argument in *Overbey*, this Court stated:

> Unlike in *State Farm*, Mr. Franklin did not appear or testify at trial or otherwise express remorse, nor did he make his victims whole, but instead he continued to deny his faults through his counsel, who appeared for him at trial. A jury would be

> within its discretion in determining that, in these circumstances, in which "a particularly egregious act has resulted in only a small amount of economic damages," the usual single-digit ratio may not be an appropriate measure of the limits of due process.

Overbey, 361 S.W.3d at 374.

Franklin and National Auto Sales' conduct was reprehensible. Three of the five factors are present. The evidence of reprehensibility supports the punitive damages awarded.

2. Disparity between actual harm and punitive damages

The ratio between actual damages and punitive damages does not make the punitive damages award excessive. Courts have consistently refused to establish a bright line ratio or strict formula to determine if a punitive damage award is unconstitutional. *State Farm*, 538 U.S. at 242-25; *Scott*, 176 S.W.3d at 144 (Teitelman, J., concurring). The United States Supreme Court has emphasized 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*, 538 U.S. at 426.

Chief Justice Teitelman recognized that punitive damages exceeding the single-digit ratio rarely meet the due process standards, but argued that

> However, the Court qualified this dicta by stating that in cases involving egregious conduct but a small amount of compensatory damages, ratios greater than a single digit may comport with due process. The Court's refusal to adopt an arbitrary ratio

> for reviewing punitive damage awards is consistent with the recognition that punitive damages further a State's legitimate interests in punishing wrongful conduct and deterring its repetition.

Scott, 176 S.W.3d at 144 (Teitelman, J., concurring).

The Missouri Supreme Court reemphasized larger ratio are proper when small amount of damages are awarded because "due process does not prevent large ratios if necessary, given particular facts, to impose punishment and deter future misconduct." *Overbey*, 361 S.W.3d at 373.

Missouri courts have upheld at least eight cases with large punitive damages and small actual damages.[3] Franklin has been the defendant in two such cases. S*ee*

[3] *Heckadon*, 2013 WL 1110690 at *2 ($2,144.87 actual damages, $400,000 punitive damages; ratio of 186 to 1); *Fireworks Restoration*, 371 S.W.3d 83 ($1 actual damages, $150,000 punitive damages; ratio of 150,000 to 1); *Overbey* 361 S.W.3d at 369 ($4,500 actual damages, $500,000 punitive damages; ratio of 111 to 1)*; Krysa*, 176 S.W.3d 150 ($18,450 actual damages, $500,000 punitive damages; ratio of 27 to 1); *DeLong v. Hilltop Lincoln-Mercury, Inc.*, 812 S.W.2d 834 (Mo. App. E.D. 1991) ($3,000 actual damages, $75,000 punitive damages; ratio of 25 to 1); *Freeman v. Myers*, 774 S.W.2d 892 (Mo. App. W.D. 1989) ($7,559 actual damages, $100,000 punitive damages; ratio of 13 to 1); *Smith v. New Plaza Pontiac Co.*, 677 S.W.2d 941 (Mo. App. W.D. 1984) ($400 actual damages, $30,000 punitive damages; ratio of 75 to 1 ratio); *Bowers v. S-H-S Motor Sales Corp.*, 481 S.W.2d 584 (Mo. App. W.D. 1972) ($225 actual damages, $10,000 punitive damages; ratio

Heckadon, 2013 WL 1110690 at *2; *Overbey*, 361 S.W.3d at 369. Other federal and state courts have also upheld similar cases.[4]

In *Gore*, the United States Supreme Court offered two possible situations where a low actual damage award may support a higher punitive damage award. 517 U.S at 582.

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of 44 to 1).

[4] *TXO Prod. Corp.*, 509 U.S. 443 ($19,000 actual damages, $10,000,000 punitive damages; ratio of 526 to 1); *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629 (6th Cir. 2005) ($279.05 actual damages, $600,000 punitive damages; ratio of 2,151 to 1); *Kemp v. Am. Telephone & Telegraph Co.*, 393 F.3d. 1354 (11th Cir. 2004) ($115.05 actual damages, $250,000 punitive damages; ratio of 2,172 to 1); *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d. 672 (7th Cir. 2003) ($5,000 actual damages, $186,000 punitive damages; ratio of 37 to 1); *Deters v. Equifax Credit Infor. Servs.*, 202 F.3d 1262 (10th Cir. 2000) ($5,000 actual damages, $295,000 punitive damages; ratio of 59 to 1); *Bishop v. Mid-Am. Auto Auction, Inc.*, 807 F. Supp. 683 (D. Kan. 1992) ($5,000 actual damages, $250,000 punitive damages; ratio of 50 to 1); *State v. Carpenter*, 171 P.3d 41 (Ala. 2007) ($5,042 actual damages, $150,000 punitive damages; ratio of 30 to 1); *Myers* v. *Workmen's Auto Ins. Co.*, 95 P.3d 977 (Idaho 2004) ($735 actual damages, $300,000 punitive damages; ratio of 408 to 1); *Craig* v. *Holsey*, 590 S.E.2d 742 (Ga. Ct. App. 2003) ($8,801 actual damages, $200,000 punitive damages; ratio of 23 to 1); *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001) ($11,496 actual damages, $1,000,000 punitive damages; ratio of 87 to 1).

This is when a particular egregious act had small actual damages or when "the injury is hard to defect or the monetary value of the noneconomic harm might have been difficult to determine." *Id.* The Court continued to emphasize that a mathematical calculation does not exist. *Id.* at 583-84.

Franklin and National Auto Sales' argument that the actual damages are not "small" so the single-digit ratio would apply is misplaced. Actual damages of $25,000 is still "small" for purposes of punitive damages. Even the Missouri Legislature felt actual damages under $100,000 was "small" based on the wording of section 510.265.[5] Actual damages that are less than $100,000 would be considered small damages to trigger the $500,000 maximum. Actual damages of $25,000 were assessed against Franklin, which is small enough, given the particularly egregious conduct that occurred. Additionally, the harm that Lewellen endured was difficult to place a monetary value on.

Franklin had assessed against him $25,000 in actual damages and $1,000,000 in punitive damages, a ratio of 40 to 1, or a 20 to 1 ratio when the punitive damages were reduced by section 510.265 to $500,000. National Auto Sales was assessed $107,810 in actual damages, with attorneys' fees, and $539,050 in punitive damages, a ratio of 5 to 1. The ratios of punitive damages are in line with punitive damages award upheld in Missouri. *See Heckadon*, 2013 WL 1110690 at *2; *Fireworks Restoration*, 371 S.W.3d at 93; *Overbey*, 361 S.W.3d at 374.[6]

[5] All references are to RSMo, Supp. 2010 unless otherwise noted

[6] Additional Missouri cases where the punitive damages exceed the single digit ratio are in

In comparison to *Gore*, the punitive damages against Franklin and National Auto Sales are reasonable. In *Gore*, the actual damages were $4,000 and the punitive damages were $4,000,000 which amount to a 500 to 1 ratio. 517 U.S. at 565, 583. Lewellen's ratio is twelve times less than the ratio in *Gore.* Here there was evidence of repeated conduct which supports a punitive damage award, which did not exist in *Gore.* *See Gore*, 517 U.S. at 579. The large ratios against Franklin and National Auto Sales is reasonable compared to the even larger ratio in *Gore*.

National Auto Sales' argument that attorneys' fees should not be included in punitive damages has been rejected by this Court. In *Hervey v. Mo. Dep't of Corrections*, this Court held that attorney's fees are part of the net judgment in calculating punitive damages based on the plain meaning of section 510.265. 379 S.W.3d 156, 165 (Mo. banc 2012). Franklin and National Auto Sales' reliance on *Campbell v. State Farm Mutual Auto. Ins. Co.*, 98 P.3d 409, 419-20 (Utah 2004), is misplaced as that case does not concern the language in section 510.265.

This Court and the Western District have upheld larger punitive damage awards against Franklin and his businesses for the same conduct. In *Heckadon* the ratio was 186 to 1 ratio, and in *Overbey*, the ratio was 111 to 1 ratio. *See Heckadon*, 2013 WL 1110690 at *2; *Overbey* 361 S.W.3d at 369. In *Overbey*, this Court stated "a jury would be within its discretion in determining that, in these circumstances, in which 'a particularly egregious act has resulted in only a small amount of economic damages,' the usual single-digit ratio

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footnote 3.

may not be an appropriate measure of the limits of due process." *Overbey*, 361 S.W.3d at 374. The Western District echoed this in *Heckadon*. *See* 2013 WL 1110690 at *8-9. The ratios of punitive damages are consistent with punitive damages upheld by Missouri courts. The ratios do not make the punitive damages excessive.

3. Punitive damage and civil penalties

Punitive damages are compared with civil penalties, although often given less weight. *Krysa*, 176 S.W.3d at 163 n.7. Punitive damages should be "accord substantial deference" to civil and criminal penalties. *Gore*, 517 U.S. at 583. Criminal penalties and the effects of the Defendant's business license are also considered in this analysis. *Krysa*, 176 S.W.3d at 163.

There are no civil penalties associated with the common law fraudulent misrepresentative cause of action. The MMPA provides a range of civil penalties, ranging from $1,000.00 per violation when an injunction is entered to $5,000 for violating the injunction. Sections 407.100.6, 407.110. The MMPA also subjects a party to criminal violations, including a class D felony for violating the MMPA, section 407.020, or for violating an order to cease unlawful activity, section 407.095, and a class A misdemeanor for interfering with a civil investigation, section 407.080.

Furthermore, a car dealer is subject to administrative action for using "fraud, deception, or misrepresentation" when selling a vehicle. *Krysa*, 176 S.W.3d at 163, *see also* section 301.562.

Franklin and National Auto Sales were aware that they were subject to both civil

penalties under the MMPA and punitive damages under the MMPA and common law fraudulent misrepresentation. As the Western District concluded in *Heckadon*, Franklin and his business "were apprised that engaging in unlawful merchandising practices could result in legal action for which punitive damages would be available. Thus, we cannot say that the punitive damages awards were unreasonable merely because they exceed the civil penalties available under the MMPA." 2013 WL 1110690 at *10.

In 2008, the State of Missouri by the Attorney General bought an injunction against Franklin and National Auto Sales in August of 2008. *See State of Missouri ex rel v. Chad Franklin*, 08CY-CV08140; App. II A31-A34. In the five years since the injunction was filed, the only resolution has been a partial summary judgment in favor of Franklin. *See id.;* App. II A31. Franklin avoided criminal charges and so far he has avoided a civil penalty under the MMPA. This further supports the punitive damage awards assessed because the Attorney General has failed to see that civil penalties are imposed against Franklin. The punitive damages awarded are appropriate compared to the civil penalties available.

D. Punitive damages are within the guidepost for due process

The punitive damages awarded are not excessive under due process. The punitive damages awarded are within "substantial deference" to the combination of the civil, criminal, and administrative penalties Franklin and National Auto Sales are subject to. Franklin and National Auto Sales' conduct was reprehensible in that they targeted the financially vulnerable, engaged in repeated conduct, and used trickery, malice and deceit.

Franklin and National Auto Sales' conduct was not a one-time incident, but a repeated pattern shown by their history of engaging in fraudulent sales and advertising practices. Furthermore, the potential civil penalties do not make the award excessive.

The ratio of punitive damages is reasonable, especially in consideration of approved ratios in *Overbey* and *Heckadon.* The $1,000,000 punitive damage award against Franklin is a ratio of 40 to 1, whereas the ratio with the statutory reduced amount is 20 to 1. The ratio for National Auto Sales' $539,050 in punitive damages, with attorneys' fee, is 5 to 1. The ratio of the punitive damage awards here are significant less than the ratios upheld in *Heckadon* and *Overbey*. *See Heckadon*, 2013 WL 1110690 at *2; *Overbey* 361 S.W.3d at 369.

Also important to note is Franklin's conduct during trial. Franklin and National Auto Sales failed to comply with discovery on several occasions, resulting in Lewellen filing motions to enforce discovery and sanctions. LF 96-182, 201-03, 216-33, 271-89. Franklin failed to appear for depositions. LF 405, 413, 428. Franklin did not appear at trial and his participation at trial was limited by his pre-trial conduct. TR 64-65, 90, 386. Franklin has never attempted to make his victims whole. Franklin has never express remorse or reject for his conduct and the harm he caused his customers. Franklin has continued to deny his fault and has never accepted responsibility for his conduct, including by seeking to have the amount of punitive damages reduced.

This Court should follow *Overbey* and *Heckadon*, and find the punitive damage awards are not excessive under due process standards.

E. Conclusion

The punitive damage awards are not excessive under due process. Franklin and National Auto Sales' Point II should be denied.

REPLY TO LEWELLEN'S POINT I

The trial court erred in reducing Lewellen's punitive damage award in her common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates Lewellen's right to a **trial by jury as guaranteed by article I, section 22(a) of the Missouri Constitution, in that Lewellen's right to a trial by jury does not remain inviolate when a jury's verdict for punitive damages in a common law fraudulent misrepresentation cause of action is subject to statutory limitations which did not exist in 1820, thereby implicating her right to a trial by jury and making the her final award of punitive damages for common law fraudulent misrepresentation inadequate.**

A. Vested Right

Franklin makes the argument that punitive damages are not a matter of right. However, he does not cite to authority from Missouri or articulate a legal reason as to how this affects Lewellen's right to a trial by jury. Franklin merely poses a question and chooses not to answer that question, especially with authority from Missouri. *See* Franklin Brief, 19

The authority in Missouri as to when a right to punitive damages vests, concerns the retroactive effect of new statutes. *See Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 865-66 (Mo. App. W.D. 1985).

The vesting of punitive damages is not at issue. That is because in 1820, a plaintiff had the right to a jury trial to determine punitive damages and there were no limitations on

the amount of punitive damages. *See Scott*, 176 S.W.3d at 141-42. Lewellen's right to a trial by jury for her common law cause of action is beyond the reach of hostile legislation, which section 510.265 is. *See Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 640 (Mo. banc 2012). Lewellen has a right to punitive damages, and the amount cannot be limited by section 510.265, because in 1820 the right to a trial by jury on the issue of punitive damages in a common law cause of action was allowed and punitive damages were not limited by statute.

B. Due process does not supersede the right to trial by jury

Franklin's argument that their right to due process supersedes Lewellen's right to a trial by jury is grossly misplaced. The right to a trial by jury under the Missouri Constitution is not superseded by the Fourteenth Amendment of the United States Constitution. Lewellen has a right to a trial by jury for her claim of punitive damages in a common law fraudulent misrepresentation cause of action, a right that was existed in 1820. The court has discretion to engage in a due process review only when a punitive damage verdict is returned and then it is based on the facts of the particular case. Lewellen cannot be denied her right to have a trial by jury on the possibility a court finds the punitive damage award is excessive.

Franklin does not discuss how section 510.265 plays into the balancing of the right to trial by jury and due process. Implying that section 510.265 is similar to due process is misplaced. Section 510.265 is a mandatory and arbitrary reduction that does not account for the facts and circumstances of an individual case. The courts have continuously

refused to apply a bight line test to punitive damages, especially when the actual damages are small. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S.1, 18 (1991); *Scott*, 176 S.W.3d at 144 (Teitelman, J., concurring). Furthermore, punitive damages were not subject to statutory limitations at common law. Whereas, a due process review of a punitive damage award is based upon the facts and circumstances of the case.

Furthermore, the legislature does not have unlimited discretion in creating laws concerning punitive damages. The legislature is limited by the Constitution and any law passed must comply with the Missouri Constitution. Section 510.265 is the exact mathematical calculation and bright line test the Courts have refused to impose. The legislature in enacting section 510.265 did not account for the facts and circumstances of a particular case and afforded no discretion to the trial court in conducting a due process review. Chief Justice Teitelman acknowledged "arbitrarily limiting punitive damages without reference to the facts found by the jury or the limits of due process is inconsistent with the intended purpose of punitive damages." *Overbey*, 361 S.W.3d at 382 (Teitelman, J., concurring). The legislature's discretion is limited by the constitutional right to a trial by jury.

C. *Watts*, not *Adams* is controlling

Franklin's arguments that *Watts* is distinguishable are unpersuasive and not logically or legally supported. As discussed in the previous subsection, due process as applied to punitive damage awards does not make *Watts* inapplicable. *Watts* held that statutory limitations on non-economic damages in a common law cause of action violates

the right to trial by jury. *Watts*, 376 S.W.3d at 636. *Watts* applies here in that the statutory limitation on punitive damages in a common law cause of action violates the right to trial by jury. Due process does not impact the right to trial by jury.

The right to a trial by jury in the Missouri Constitution is different than the United States Constitution pertaining to whether punitive damages are "facts." The right to a jury trial in the Missouri Constitution provides "that the right of trial by jury as heretofore enjoyed shall remain inviolate." MO. CONST. art. I, §22(a). The Seventh Amendment of the United States Constitution provides "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact tried by a jury, shall be otherwise reexamined in any court of the United States*, than according to the rules of the common law." U.S. CONST. amend VII (emphasis added).

As this Court has recognized before, the Seventh Amendment does not apply to Missouri. *Overbey*, 361 S.W.3d at 375. The Missouri Constitution does not contain the facts or reexamine clauses, nor has any Missouri Court held that punitive damages are not facts found by the jury. MO. CONST. art. I, §22(a) In *Scott*, this Court found the right to trial by jury "remains inviolate" under the Missouri Constitution includes the jury determining punitive damages. *Scott*, 176 S.W.3d at 141-42. In *Overbey*, this Court reemphasized that punitive damages are to be determined by the jury. *Overbey*, 361 S.W.3d at 375. In *Watts*, this Court did not distinguish punitive damages from actual damages. *Watts*, 376 S.W.3d at 640. Under Missouri authority, the punitive damages are not treated differently in determining whether the right to trial by jury applies.

Adams by and Through Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. banc 1992), is not controlling and should not be followed. Franklin's argument is based on punitive damages being subject to a due process review, not section 510.265. The post-trial due process review of punitive damages does not affect the right to trial by jury. As previously argued, section 510.265 is vastly different from a due process review in that due process is based on the facts of a particular case. For purposes of the right to trial by jury, punitive damages are not differently solely because of the discretionary due process review. *Adams* should no longer be followed.

D. Conclusion

Section 510.265 is unconstitutional as it violates the right to trial by jury as guaranteed by article I, section 22(a) of the Missouri Constitution.

REPLY TO LEWELLEN'S POINT II

The trial court erred in reducing Lewellen's punitive damage award in a common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates the separation of powers prescribed by article II, section 1, of the Missouri Constitution, in that section 510.265 infringes on the judiciary's role and discretion to decide and pronounce judgments, thereby making Lewellen's final punitive damage 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.

A. Point II is preserved

A constitutional issue is preserved for appeal when the issue is raised at the earliest opportunity, the specific section of the Constitution is identified, the motion for new trial preserves the point, and the brief covers the point. *In re H.L.L.*, 179 S.W.3d at 897. The purpose of a motion for new trial is to "avoid lengthy and complex explanations as to their contentions of error." *Lohmann By and Through Lohmann v. Norfolk & Western RR Co.*, 948 S.W.2d 659, 667 (Mo. App. W.D. 1997). Lewellen properly raised the separation of powers argument in her timely filed motion to challenge to the constitutionality of section 510.265. LF 563-564; App. A32-A33. Lewellen's second point is preserved.

B. Section 510.265 infringes on the judiciary's role

Contrary to Franklin'a argument, section 510.265 is not a parameter which limits the scope of the court's discretion. Section 510.265 mandates the trial court reduce

punitive damages that exceed the arbitrary amount. There is no discretion afforded or guidelines provided to the courts. Section 510.265 is not a parameter to provide the courts guidance, but a limitation on the amount of punitive damages that may be awarded.

Franklin's argument that the legislature has authority to determine punitive damages as with civil penalties and criminal punishments is misplaced. Punitive damages are different from civil penalties and criminal punishments because they are fact dependent on the particular case. Punitive damages are awarded upon the jury finding the defendant's conduct was outrageous because of the defendant's "evil motive or reckless indifference to the rights of others" and the amount is to punish the defendant and deter others. *See e.g.* LF 521, 533; App. A23-A24. When the jury is asked to assess punitive damages, they are to focus on the facts of the particular case; thus the legislature cannot determine what a permissible amount of punitive damages is, as the legislature does not know the facts of a particular case.

Punitive damages are possible in a wide variety of cases, and those cases encompass a range of actual damages, harm, and evil motive. As the United States Supreme Court noted in *Exxon Shipping Co. v. Baker*, there is "no 'standard' tort or contract injury, making it difficult to settle upon a particular dollar figure as appropriate across the board." 554 U.S. 471, 506 (2008). Thus it is very difficult to have a one size fits all punitive damage award. This is different from civil penalties and criminal punishments, which are narrowly tailored to a specific harm and the penalty or punishment is directly associated

with the harm.[7] Permitting the legislature to determine the amount of punitive damages will allow a one size fits all punitive damage award, which is not based on the particular facts and circumstances of a case. The legislature cannot have a significant role in determining the amount because the determination of punitive damages is fact specific.

Furthermore, even if "substantial deference" is afforded to the legislature, the legislature must comply with the Missouri Constitution, including the separation of powers provision. Section 510.265 does not comply with the separation of powers doctrine.

C. The legislature cannot restrict common law remedies

Franklin's argument that statutory causes of action would be invalid under the separation of powers argument is misplaced. Statutory created causes of action, such as the MMPA and UCC, were statutes enacted to replace the common law. When the legislature creates a new cause of action, the legislature can restrict damages on claims it creates. *Overbey*, 361 S.W.3d at 376; *Sanders v. Ahmed*, 364 S.W.3d 195, 205 (Mo. banc 2012). Damages in a common law cause of action cannot be restricted by the legislature. The authority Franklin cites concerns replacing common law causes of action with a statutory cause of action or statutes creating barriers to exercising constitutional rights. *See De May v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931) (creating workers' compensation law); *Kilmer v. Mun*, 17 S.W.3d 545, 554 (Mo. banc 2000) (a "statute may

[7] For example, Missouri does not treat all stealing cases the same, depending on the amount of property stolen the punishment can range from a class A misdemeanor to a class A felony. *See* section 570.030.

not erect arbitrary or unreasonable barriers" to a recognizable injury).

Lewellen's common law fraudulent misrepresentation cause of action is different from a MMPA cause of action. The MMPA cause is created by statute and therefore the damages can be limited. *See Overbey*, 361 S.W.3d at 376. The legislature did not create the common law fraudulent misrepresentation cause of action, and therefore cannot restrict the damages. This follows *Overbey*, *3*61 S.W.3d at 376, and *Sanders*, 364 S.W.3d at 205.

D. Conclusion

Section 510.265 is unconstitutional as it violates the separation of powers provision in article II, section 1 of the Missouri Constitution.

REPLY TO LEWELLEN'S POINT III

The trial court erred in reducing Lewellen's punitive damage award in a common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates Lewellen's right to equal protection as guaranteed by article I, § 2 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution, in that the right to a trial by jury for a common law cause of action is a fundamental right and there is not a compelling state interest to restrict the jury's assessment of punitive damages to punish and deter, or in the alternative there is no rational relationship in limiting punitive damages to achieve a legitimate end to have punitive damages punish and deter, thereby making the final punitive damage award for common law fraudulent misrepresentation inadequate.

A. Point III is preserved

A constitutional issue is preserved for appeal when the issue is raised at the earliest opportunity, the specific section of the Constitution is identified, the motion for new trial preserves the point, and the brief covers the point. *In re H.L.L.*, 179 S.W.3d at 897. The purpose of a motion for new trial is to "avoid lengthy and complex explanations as to their contentions of error." *Lohmann*, 948 S.W.2d at 667. Lewellen properly raised the equal protection argument in the timely filed motion to challenge the constitutionality of section 510.265. LF 563-564; App. A32-A33. Lewellen's Point III is preserved.

B. Exceptions to section 510.265

Franklin's argument that the equal protection argument should be rejected for failing to state why the exceptions violate equal protection is misplaced. A law violates equal protection when it treats two similar situated groups of people different. The two groups are those exempt by section 510.265 and those subject to section 510.265. The group that is exempt from section 510.265 maintains its constitutional right to a trial by jury in that the punitive damages are not subject to the limitations imposed by section 510.265. Since the exempt group's right to a trial by jury is not violated, it is only necessary to discuss how the non-exempt group is denied equal protection.

C. Economic interest is not a compelling state interest

Franklin argues that the economic interest is alone enough to uphold section 510.265, is not a compelling state interest. Franklin's argument that restricting punitive damages will "foster a more business-friendly environment" and attract businesses is without merit and against all logic. *See* Franklin Brief, 43.

Punitive damages are awarded when a defendant engaged in outrageous conduct because of his "evil motive or reckless indifference to the rights of others." *See e.g.* LF 521, 533; App. A23-24. Punitive damages are awarded to punish and deter others from engaging in similar conduct. By restricting the amount of punitive damages, this gives businesses an incentive to engage in outrageous conduct based on evil motives and a reckless disregard to others, because they know the extent of their punitive damage liability.

Restricting punitive damages would allow businesses like Franklin's to continue to engage in sophisticated scheme targeting financially vulnerable customers with fraudulent and deceptive business practices. Franklin personally illustrates how ridiculous this is. In 2007, when Lewellen purchased her vehicle from Franklin, Franklin's business had gross sales of $12,000,000 and gross profits of $2,100,000. TR 396-97. If section 510.265 applied, Franklin's punitive damages would be $500,000. So, in 2007 he would still have a gross profit of $1,600,000. That $500,000 punitive damage payment is not a deterrent, but a cost of doing business. A punitive damage award limited by section 510.265 would have no effect on Franklin and his business practices and does not serve its purpose of punishing and deterring.

Missouri should have no tolerance for businesses and their owners who are assessed large punitive damages, as this shows the character and integrity of the business and their business practices. If businesses are fearful of large punitive damages, then they can change their business practices or move to Nebraska where there are no punitive damages. *See* Franklin Brief, 42. Limiting punitive damages will only allow the evil doer to keep the money, and provide finances to continue the same practice. Imposing a punitive damage award that will impact a defendant's finances is the best deterrence and punishment, but that only comes from a punitive damage award based on the facts and circumstances of a case. Furthermore, not having a statutory limit on punitive damages provides an important check on the State's economic interest, as it protects citizens who are the victims of a business's evil practices and ensures the punitive damage award is

sufficient to punish and deter. When businesses know that punitive damages will be based upon the particular facts of a case, and there is the possibility for a larger punitive damage award, then they will engage in ethical and decent business practices. Missouri citizens are then protected because they will not be taken advantage of by individuals like Franklin.

This economic interest is not a compelling state interest to restrict punitive damages.

D. Conclusion

Section 510.265 is unconstitutional as it violates the right to equal protection as guaranteed by the article 1, section 2 of the Missouri and the Fourteenth Amendment to the United States Constitution.

REPLY TO LEWELLEN'S POINT IV

The trial court erred in reducing Lewellen's punitive damage award in common law fraudulent misrepresentation cause of action pursuant to section 510.265, because section 510.265 violates the due process clause of article I, section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution, in that section 510.265 changes the substantive law for common law fraudulent misrepresentation and is a mathematical bright line thereby eliminating a due process review of the jury's punitive damage verdict, making Lewellen's punitive damage award for common law fraudulent misrepresentation inadequate as it was not reviewed for being excessive.

A. Point IV is preserved

A constitutional issue is preserved for appeal when the issue is raised at the earliest opportunity, the specific section of the Constitution is identified, the motion for new trial preserves the point, and the brief covers the point. *In re H.L.L.*, 179 S.W.3d at 897. The purpose of a motion for new trial is to "avoid lengthy and complex explanations as to their contentions of error." *Lohmann*, 948 S.W.2d at 667. Lewellen properly raised the due process argument in the timely filed motion to challenge the constitutionality of section 510.265. LF 563-564; App. A32-A33. Point IV is preserved.

B. Argument

Franklin's first argument is misplaced. Lewellen's argument is that section 510.265 violates the right to due process in a common law cause of action because section

510.265 substantial changes how punitive damages are reviewed. The one line citation to *Sanders* was made to illustrate the difference between the legislature's ability to modify a common law cause of action and a statutory cause of action. *See Sanders*, 364 S.W.3d at 205. Franklin's argument does not concern due process and is irrelevant to the point.

Franklin's second argument about *Exxon Shipping Co., v. Baker*, 554 U.S. 471 (2008), is misplaced. *Exxon Shipping* concerned maritime law, which is not subject to due process. 554 U.S. at 501-02. The facts in *Exxon Shipping* are very different from the facts in in Lewellen's case. In *Exxon Shipping*, there were actual damages of $19.5 million and punitive damages of $2.5 billion, along with fines and restitution of $125 million and a civil settlement of $900 million. *Id.* at 476, 479, 481. In maritime law, the punitive damages of a 1:1 ratio was appropriate. *Id.* at 513. Here, the actual damages were $25,000 and punitive damages were $1,000,000 with no civil penalties, fines, or restitution.[8] It would be inappropriate to apply that ratio in *Exxon Shipping* to Lewellen because of the vast difference in damages.

C. Conclusion

Section 510.265 is unconstitutional as it violates the right to due process as guaranteed by article I, section 10 of the Missouri and Fourteenth Amendment to the United States Constitutions.

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[8] While the State has a civil matter pending since 2009, there has been no action taken since October 2011, and no civil penalties, fines, or restitution has been ordered. *See State of Missouri ex rel v. Chad Franklin et al*, 08CY-CV08140; App. II A31-34.

CONCLUSION

For the reasons set forth herein, Lewellen respectfully asks this Court to deny Franklin and National Auto Sales' claims for a new trial due to the sanctions imposed and reduce the punitive damages under due process standards. Lewellen respectfully submits that this Court declare section 510.265 unconstitutional as it applies to common law fraudulent misrepresentation, reverse the decision of the trial court, which reduced the punitive damage award from $1,000,000 to $500,000 and remand the case to the trial court for reinstatement of the full jury award of $1,000,000 in punitive damages in favor of Lewellen.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief contains the information required by Rule 55.03 and complies with the limitations of Rule 84.06(b). Relying upon the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this Brief is 10,969 and has been prepared using Microsoft Word in 13 pt. Times New Roman font.

/s/ Douglass F. Noland
DOUGLASS F. NOLAND

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2013, I electronically filed the foregoing Appellant's Response to Cross-Appeal and Reply Brief and Appellant's Appendix for Response to Cross-Appeal and Reply with the Clerk of the Supreme Court using the E-Filing system, which sent notification of such filing to the following:

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