IN THE
SUPREME COURT OF MISSOURI

NO. SC87691

DENNIS E. HESS,

Plaintiff/Appellant/Cross-Respondent,

v.

CHASE MANHATTAN BANK USA, N.A.,

Defendant/Respondent/Cross-Appellant.

Appeal from the Circuit Court of Platte County
Hon. Abe Shafer

SUBSTITUTE BRIEF FOR CHASE MANHATTAN BANK USA, N.A. AS RESPONDENT AND AS CROSS-APPELLANT

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JURISDICTIONAL STATEMENT

This lawsuit arises from plaintiff Dennis E. Hess's purchase of real estate in Platte County, Missouri, from Chase Manhattan Bank USA, N.A. ("Chase") in 1999. Plaintiff appeals from the Judgment of Partial Dismissal on the Pleadings entered on October 16, 2003 by the Circuit Court of Platte County, dismissing Count III of his Second Amended Petition, brought pursuant to the Merchandising Practices Act, §407.025, RSMo. (L.F. 64).[1/] A jury trial was held from May 3 to May 14, 2004, and a verdict was returned in favor of plaintiff in the amount of $52,000 on his sole remaining claim of fraudulent nondisclosure (S.L.F. 14). Chase timely filed its Motion for Judgment Notwithstanding the Verdict on June 8, 2004 (L.F. 65). The circuit court entered its Final Judgment on July 9, 2004, rendering the earlier dismissal of Count III final and appealable (L.F. 89).

On July 19, 2004, plaintiff timely filed his notice of appeal of the dismissal of Count III to the Missouri Court of Appeals, Western District, and on August 2, 2004, Chase timely filed notice of its cross-appeal from the entry of judgment on the verdict in favor of plaintiff on his fraud claim (L.F. 90, 149). Following briefing and argument, the

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[1/] The record on appeal in this case is cited as follows: trial transcript ("Tr. [Vol.]:[page]"); legal file ("L.F. __"); supplemental legal file ("S.L.F. __"); supplemental record on appeal ("SR __"); supplemental record on appeal of exhibits admitted at trial ("SR2 ___"); appendix to plaintiff's opening brief ("Plf's Apdx A_"); appendix to this brief ("Apdx A-__").

Western District filed an opinion on March 28, 2006, affirming the judgment in favor of plaintiff on his fraudulent nondisclosure claim, reversing the dismissal of Count III, and ordering a new trial on actual and punitive damages on Count III (Plf's Apdx A1). The court's opinion was authored by Judge Edwin H. Smith, with Judges Victor C. Howard and Thomas H. Newton concurring. Chase filed its Motion for Rehearing, Rehearing En Banc, or Transfer to Missouri Supreme Court on April 11, 2006, and it was denied on May 2, 2006. On May 17, 2006, Chase filed the Application for Transfer in this Court that was sustained on June 30, 2006.

STATEMENT OF FACTS

Response to Plaintiff's Statement of Facts

Plaintiff's opening brief in the Court of Appeals contained a four and one-half page Statement of Facts limited to the allegations in his Second Amended Petition and the case's procedural history, as is appropriate in an appeal from a dismissal on the pleadings. But in a transparent attempt to preempt Chase's recitation of the facts relevant to its cross-appeal, plaintiff's Statement of Facts in his substitute brief in this Court is *sixteen* pages long, and purports to recount trial testimony and other evidence that has nothing to do with the sole issue raised in his appeal — whether the 2000 amendment to the Missouri Merchandising Practices Act, §407.010 R.S.Mo. *et seq.* (the "Act") may be applied retrospectively. Plaintiff's Statement ignores the dictates of Rule 84.04(c), which requires that a statement of facts be "a fair and concise statement of the facts *relevant to the questions presented for determination* without argument" (emphasis added).

Plaintiff's Statement is premised upon the faulty notion that "[t]his appeal must be decided in light of the jury's fraud verdict in Mr. Hess' favor" (Br. 9). But the fraudulent nondisclosure verdict in favor of plaintiff has no bearing whatsoever on the issue raised in his appeal, which involves the pre-trial dismissal of a claim based on pure legal principles. Whether the 2000 amendment to the Act may be applied retrospectively depends not on any facts a jury determined, but on whether that amendment is substantive or procedural.

Even if the evidence at trial had any bearing on plaintiff's appeal, much of the Statement would still be irrelevant. Its extraneous nature is perhaps best exemplified

by his extended discussion of Chase employee Amber Metzler's denials, limited recollection, and supposed claim of "ignorance" during the discovery process as to what she knew regarding the EPA's "involvement" with the property prior to the sale (Br. 13-15). What Ms. Metzler recalled during her depositions in 2002 and 2003 regarding Chase's foreclosure sale and plaintiff's purchase of the property some three to four years previously is, of course, entirely immaterial to whether the 2000 amendment to §407.025 should be applied retrospectively. The discussion, sprinkled with unsupported references to "withheld" documents and "compelled production" (Br. 14), is plainly intended to prop up plaintiff's claim by portraying Ms. Metzler and, by extension, Chase, in a negative light. Because plaintiff's Statement of Facts is largely if not completely irrelevant to the single question of law raised by his pleadings, it should be stricken.

Because plaintiff's Statement ultimately has no bearing on his appeal or on the issue presented by Chase's cross-appeal, we will not endeavor to point out each inaccurate or argumentative assertion by plaintiff, but offer an example to demonstrate that the Court should not accept plaintiff's recitation of "facts" at face value. Throughout the Statement, plaintiff continually refers to the EPA's "involvement" with the property (Br. 9, 12, 13, 14, 17). Plaintiff's studious use of that purposefully vague term is plainly designed to imply that Chase knew that the EPA's interest in and plan for the property extended beyond its request to remove paint cans — an implication wholly at odds with the record evidence that Chase had no such knowledge, and the EPA had no such plan. Plaintiff states, for instance, that "Chase's foreclosure counsel … received notice from representatives of the neighboring property that the USEPA was *involved* with the

property" (Br. 12-13) (emphasis added). A review of the cited transcript pages and exhibit reveals that the "notice" that Chase's foreclosure counsel received was from the lawyer who had foreclosed on the adjoining property, who said that the EPA had called him to say that paint cans had been found on either the property *or* the one he had foreclosed on (Tr.V:824-28, 891-92). This and other deliberately imprecise references to EPA's "involvement with" or contacts "regarding" the property are intended to obscure the fact that Chase knew only that the EPA wanted to access the property to remove paint cans, and to attribute greater knowledge to Chase than the record supports.

Facts Relevant to Chase's Cross-Appeal

Chase brings this cross-appeal from the entry of judgment in the amount of $52,000 on plaintiff's fraudulent nondisclosure claim arising from his April 1999 purchase from Chase of real estate located at 19015 Humphrey Access Road in Platte County, Missouri (the "property"). Plaintiff contended that Chase failed to disclose that the EPA was "involved with environmental issues" concerning the property at the time of the sale (S.L.F. 8). The sole issue raised by Chase's cross-appeal is whether, as a matter of law, Chase can be liable for fraudulent nondisclosure when the parties contractually agreed that Chase, as seller, was making "no representations, guaranties, or warranties, either written or implied, regarding the property," and that "[t]he property is being sold in 'AS-IS' condition with no expressed or implied representations or warranties by the sellers or its agents as to the physical conditions, quality of construction, workmanship or fitness for any particular purposes" (L.F. 20; Apdx A-5).

Background

After its mortgagee, Billy Stevens, defaulted on his home loan, Chase acquired the property in foreclosure on January 22, 1999 (Tr. IV:599, 604-05, 618, 631-32; V:817-19). Chase engaged the Kansas City law firm of Kramer & Frank and its attorney, Juliann Graves, to handle the foreclosure sale (Tr. IV:605-06; V:877-78). An electronic file maintained by Kramer & Frank regarding the Stevens' foreclosure notes that on September 30, 1998, Graves' legal assistant, Diane Slayton, received a telephone call from an attorney who was foreclosing on the adjoining property (Tr. V:815, 817, 822-26). The attorney told Slayton that the EPA had called him "to say that hazardous material had been found (rusted paint cans in barn) on either this property or the one he had just foreclosed on. EPA representative, Mike Gieryic, 551-7822, should be calling for permission to go on the property for clean up" (Tr. V:822-26).

More than three months later, on January 6, 1999, EPA's Gieryic telephoned Graves, advising that he needed to coordinate pick-up of "350+ containers of paint et cetera on the property" (Tr. V:836-38, 902). Gieryic's notes from that conversation indicate that Graves told him that she would "contact someone at Chase that handles contaminated properties" (Tr. V:904-06). At Graves' direction, Slayton called Chase's foreclosure specialist, Joann Flors, and received authorization to permit the EPA access to the property to pick up the paint containers (Tr. V:838-41, 859-60, 907-09). Accordingly, Slayton advised Gieryic that Chase had granted its permission (Tr. V:859). Slayton told a Chase representative in a January 11, 1999 conversation to "call the EPA attorney" (Tr. 874-75).

About a month later, on February 18, 1999, Graves entered a note in the file reflecting a conversation she had had with Chase's Amber Metzler Braun, in which Braun indicated that she "will not [review] the [EPA] issues for a few weeks," and that she "would be dealing directly with [EPA]" (Tr. V:920-21). Graves sent Braun a closing letter dated that same day, which stated in part: "Finally there are the environmental issues and clean up of paint containers. You have the name and number of the attorney from the EPA and will contact him in the next couple of weeks. I will not deal with the EPA issues any further" (Tr. V:922-24, 943-44; Ex. 54, SR2 31). No evidence was offered at trial that anyone from the EPA ever indicated to Chase, Graves, or Slayton that its interest in the property extended beyond removal of the paint containers (Tr. V:869-72, 937-38, 948).

Plaintiff's Purchase of the Property

After the foreclosure was completed, Chase entered into a listing agreement on April 14, 1999, with real estate broker Ken Karns and his company, Americana Real Estate, Inc., to list the property for sale for $54,000 (Tr. IV:703, 704, 708, 725, 742-44; Ex. 32). On April 23, 1999, plaintiff, a former home inspector and real estate agent, made an offer to purchase the property for $52,000, which Chase accepted (Tr. IV:760, 777-78, 780; VII:1163-67, 1172; Ex. 39; L.F. 16-23).

As is its policy when it sells real estate it has acquired through foreclosure, Chase required that any prospective purchaser of the property review and sign an "Addendum to Purchase Contract" ("Addendum") (Tr. VI:1140-42; L.F. 20-21; Ex. 670; Apdx A-5). The Addendum states in large capital letters at the top, "ATTENTION

REALTORS AND POTENTIAL BUYERS!!, and in the paragraph directly below that caption advises, "A signed copy must accompany any offer to purchase" (L.F. 20; Apdx A-5). The Addendum further provides in relevant part:

> "9. The seller is a corporation who acquired the property through foreclosure sale. The seller has never seen nor occupied the property. The seller makes no representations, guaranties, or warranties, either written or implied, regarding the property.
>
> "10. The property is being sold in 'AS-IS' condition with no expressed or implied representations or warranties by the seller or its agents as to the physical conditions, quality of construction, workmanship or fitness for any particular purposes. The seller has no obligation to make any changes, alterations, or repairs to the property" (L.F. 20; Apdx A-5).

In addition to the terms set forth in the Addendum, the Residential Real Estate Sale Contract ("Contract") entered into by the parties sets forth as an "Additional Term[] and Condition[]" that "Buyer agrees to accept 'as is' and has inspected property" (L.F. 19; Apdx A-4). Plaintiff signed the Contract and Addendum on April 23, 1999 (L.F. 19, 21; Apdx A-4). Directly above his signature on the Addendum, it states, "The undersigned hereby acknowledges the foregoing has been read and is understood" (L.F. 21; Apdx A-6).

Pursuant to paragraphs 9 and 10 of the Addendum, Chase did not make any disclosures regarding the property (Tr. IV:781, 783, 785-86). Karns advised plaintiff that the Addendum was "the only disclosure statement that Chase offered," and that there would be no standard seller's disclosure (Tr. IV:781, 783, 785-86). Plaintiff testified at trial that he did not read the Contract or Addendum before signing them, but acknowledged that he should have (Tr. VII:1240-41, 1244). Plaintiff was not told of the contacts between EPA's Gieryic and Kramer & Frank regarding the paint containers, or of the communications between Kramer & Frank and Chase regarding the EPA (Tr. VII:1172-73).

The EPA's "Involvement" with the Property

The transaction between plaintiff and Chase closed soon after the Contract and Addendum were executed, and plaintiff's deed was recorded on April 30, 1999 (Tr. VII:1351; Ex. 200). At the time of his purchase, the property was littered with trash and debris, and there were more than 300 used paint cans of varying sizes stacked around an old barn foundation in the south end of the property (Tr. V:902, 994-95, 999; VI:1008-12, 1021, 1101; VII:1178-79, 1245; IX:1551-52, 1701-02; XI:2107). Plaintiff's contention that "[t]he paint cans … were not easily accessible or visible" (Br. 17) is contrary to his own testimony that before closing on the property he saw "a lot of debris and junk" down near the old barn foundation, and that if he had walked down there, he could have seen that it included paint cans (Tr. VII:1178-79). It is likewise contrary to the testimony of his own witnesses, including two real estate agents and two potential buyers, that they saw the paint cans when they walked the property (Tr. IV:737, 773-75; V:994-95, 998-

99; VI:1008-12, 1021, 1034 (cans were open and obvious)). Sometime after his purchase, plaintiff learned that the paint cans came from Mizzou Paint Co., a Kansas City painting firm that was owned by Stevens, the previous owner of the property (Tr. VII:1267, 1281, 1285).

After closing on his purchase, plaintiff directed Stinnett Construction to pull up two trees and to bury or burn all the trash on the property, including the paint cans (Tr. VII:1182-83, 1185-86, 1256-57). After the police and fire departments paid a visit, plaintiff obtained a permit from Platte City to burn yard waste (Tr. VII:1182-85). At plaintiff's direction, Stinnett dug three large holes on the property and buried the paint cans in one (Tr. VII:1186-88, 1256; VIII:1422-24, 1426-27). There was no evidence that plaintiff contacted Chase regarding the paint cans prior to directing their burial.

Following the burial of the paint cans, representatives of the EPA came to the property and advised Hess that they had received a report that he had disposed of hazardous waste on the property (Tr. VII:1189-90). He later learned that the "hazardous waste" the EPA was referring to was the paint cans he had directed Stinnett to bury on the property (Tr. VII:1190). The EPA ultimately issued a Unilateral Administrative Order, dated January 18, 2000 (the "Order"), which required plaintiff to remove the buried cans within ten days (Tr. VII:1191-92, 1329; Ex. 64, 540). The Order indicated that Hess was liable for the costs of removal because he did the burying (Tr. VII:1267-69, 1272). Three months later, on April 20, 2000, plaintiff filed his original Petition against Chase (L.F. 98).

Plaintiff hired Kingston Environmental Services to perform the clean-up, which was done with oversight from the EPA's contractor, Ecology & Environment (Tr. VII:1272-73; IX:1587-89; Ex. 156). In February 2002, at plaintiff's request, the EPA issued him a "clean bill of health" letter, confirming that he had fully complied with the requirements set forth in its Order (Tr. VII:1289-1292, 1332-33**;** Ex. 542).

In addition to ordering plaintiff to clean up the trench in which the paint cans had been buried, the Order also detailed that in June 1997, former employees of Mizzou Paint Co. had reported to the EPA that Billy Stevens (the previous owner of the property and former owner of Mizzou Paint) had ordered them to dump paint waste and solvents on the property (Tr. VII:1267; Ex. 540). Likewise, in September 2000, plaintiff received a memorandum from the EPA which related in part the "Site History" of the property, including facts regarding a criminal investigation undertaken by the EPA in 1998 with respect to allegations made by former Mizzou Paint employees that they had dumped solvents on the property (Tr. VII:1292-97; Ex. 640). The memorandum stated the EPA's contractor's conclusion, in the wake of plaintiff's cleanup of the paint-can trench, that no known significant conditions existed to warrant further EPA Superfund removal actions, and that it appeared that "'no threat to the surface water, ground water, soil, and air pathways [exists]'" (Tr. VII:1295-96). No one from the EPA ever said anything to plaintiff about the reported solvent dumping, and he was never required to do anything with respect to it (Tr. VII:1193-94, 1260-61, 1267, 1269, 1295-96, 1309-1311).

Two former Mizzou Paint employees – both convicted felons – testified at trial that they had been involved in the pouring of paint waste or used solvents on the

property, and had been in contact with the EPA about their involvement (Tr. II:371, 377-83, III:410-12, 461-65, 467-71, 478, 480, 482). David Arles, who was fired from Mizzou Paint, testified that he had been involved in loading drums of paint waste onto a trailer to be taken to the property for dismissal, although he did not go with the trailer (Tr. II:386-90; III:404, 411). John Mahler, whom Billy Stevens threatened to fire from Mizzou and who was mad when he left the company, testified that he had dumped paint thinners and by-products on the property on two occasions (Tr. III:461-65, 467-73, 487, 494-95).

On September 18, 2003, the EPA sent a letter to Ken Karns' attorney, William Quitmeier, reiterating that the actions required by its Order had been completed, and stating that the EPA "anticipates no need to take additional Superfund enforcement, investigatory, cost recovery, or cleanup action at this site unless new information warranting further Superfund consideration, not previously known, are [sic] discovered" (Tr. VII:1313-15; Ex. 639). On September 29, eleven days after receiving this letter from the EPA indicating the end of its involvement with plaintiff's property and just three weeks before trial was set to begin, plaintiff's attorneys and his expert witness, Robert Morby, met with EPA representatives at the EPA's offices (Tr. VII:1315-16, 1326-28, 1334).[2/] At that meeting, plaintiff's representatives urged the EPA to rescind its September 18th "clean bill of health" letter, to do more work at his property, and to refrain from archiving the site (Tr. VII:1328, 1334-35).

[2/] The trial setting was subsequently changed, and the case was ultimately tried from May 3 to May 14, 2004 (L.F. 145).

Following the meeting with plaintiff's counsel, the EPA sent its contractor, Tetra Tech, to plaintiff's property to test the soil (Tr. VII:1335-37; IX:1634-36). Tetra Tech completed a report, with the input of EPA's attorney and on-scene coordinator, dated April 19, 2004 (Tr. VII:1335; IX:1634; Ex. 796). Tetra Tech concluded that "[t]he concentrations reported in the samples collected do not warrant any further response actions by EPA" (Tr. VII:1339-40; Ex. 796). Specifically, Tetra Tech determined that no reason existed to conduct any further tests on the air, soil, or ground water at the property (Tr. VII:1340; IX:1637-38, 1644-46, 1648, 1657-58; Ex. 796). Although Ray Forrester, an environmental consultant testifying on plaintiff's behalf at trial, opined that ground water monitoring should be conducted on the property, he conceded that based on his own observations and testing, he could not say that any environmental contamination had occurred (Tr. IX:1536, 1707).

Plaintiff conceded that other than the paint can burial that is the subject of the Order, the EPA has never told him there were any other environmental issues relating to the property, nor has the EPA or any other person or entity ever required him to undertake any clean-up activities at the property (Tr. VII:1193-94, 1260-61, 1295-96, 1297-98, 1309-11, 1334). Only his attorneys and John Mahler, the former Mizzou Paint Company employee, have ever told him that any solvents had been poured into the ground at the property, or anything else about ground contamination there (Tr. VII:1295-98, 1311-12).

Proceedings Below

Plaintiff filed his original Petition against Chase on April 20, 2000, and was granted leave to file his First and Second Amended Petitions against Chase, Karns, and Americana Real Estate on October 19, 2000, and August 23, 2002, respectively (L.F. 1, 98-99, 110-11). Plaintiff's Second Amended Petition (the "Petition") — filed six months after the EPA issued him its first "clean bill of health" letter — alleged six causes of action against Chase: breach of contract (Count I); fraud (Count II); violation of §407.020 of the Missouri Merchandising Practices Act (Count III); rescission of the contract (Count IV); negligence (Count V); and negligence per se (Count VI) (L.F. 8, 9, 11, 12, 13).

Count II, the subject of Chase's cross-appeal, alleged that before Chase sold him the property, it knew, *inter alia*, that paint had been dumped on the property, that it was the subject of a criminal investigation by the EPA, and that the EPA considered it contaminated (L.F. 9-10). Count II further alleged that Chase had a duty to disclose these "material facts" to plaintiff but failed to do so, that plaintiff reasonably relied on their "non-existence," and that as a result of the nondisclosure, plaintiff was damaged in that he was "fraudulently induced to enter into the Contract to purchase the property" (L.F. 10-11). Plaintiff sought actual and punitive damages in connection with the alleged fraudulent nondisclosure (L.F. 11).

In Count III, the subject of plaintiff's appeal, he alleged a cause of action against Chase, Karns, and Americana pursuant to §407.025, alleging that they violated §407.020 of the Missouri Merchandising Practices Act (the "Act") by engaging in "acts

of deception, fraud, false pretense, false promise, misrepresentation, unfair practice and concealment, suppression, and omission of material facts in the sale of the property" to him (LF. 11). Plaintiff sought actual and punitive damages as well as costs and attorney's fees in Count III (L.F. 11-12).

On September 23, 2003, Chase moved to dismiss Count III of the Petition (L.F. 44). Chase argued that at the time plaintiff bought the property in 1999, §407.025 of the Act did not apply to residential real estate transactions, and that the amendment of that statutory section in 2000 to cover, for the first time, such transactions could not be applied retrospectively to cover his purchase (L.F. 44-48). Chase's motion was granted on October 16, 2003 (L.F. 64). Plaintiff sought interlocutory review of the dismissal of Count III by filing a Petition for a Writ of Mandamus, but the Petition was denied by the Court of Appeals, Western District, on January 15, 2004 (L.F. 141).

Chase moved for summary judgment on plaintiff's fraudulent nondisclosure claim on the grounds that Chase had no duty to disclose because the parties had contractually agreed, in paragraphs 9 and 10 of the Addendum, that Hess could not construe Chase's silence as an implied representation of any fact (Tr. I:52, 54-58). Although the court deemed Chase's argument "compelling," the motion was denied (Tr. I:129).

The case was tried from May 3 to May 14, 2004, and plaintiff's claim for fraud in Count I of the Petition was the only claim submitted to the jury (L.F. 145).[3/] Chase's motions for a directed verdict made both at the end of plaintiff's case and at the close of all evidence were denied (Tr. XI:1947-56; XII:2151-52, 2155). Although plaintiff sought actual damages in the amount of $408,000 and punitive damages between five and ten million dollars (Tr. XII:2215-16), the jury's verdict, signed by only nine of the twelve jurors, awarded plaintiff only $52,000 on his fraud claim, and found that he was not entitled to punitive damages (S.L.F. 14; Plf's Apdx A44).

After denying the parties' respective post-trial motions, the trial court entered final judgment on the jury's verdict on July 9, 2004 (L.F. 89; Plf's Apdx A45). Plaintiff's notice of appeal was timely filed on July 19, 2004 (L.F. 90), and Chase's notice of cross-appeal was timely filed on August 2, 2004 (L.F. 149).

The Court of Appeals' Opinion

The Court of Appeals heard argument on August 18, 2005, and on March 28, 2006, filed an opinion affirming the judgment in favor of plaintiff on his fraudulent nondisclosure claim, reversing the dismissal of Count III, and ordering a new trial on actual and punitive damages on Count III (Plf's Apdx A1). The court held that although Article 1, §13 of the Missouri Constitution prohibits the enactment of retrospective laws, the 2000 amendment to §407.025, authorizing a "private cause of action" on behalf of

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3/ Plaintiff dismissed his claims against Karns and Americana on January 9, 2004, pursuant to a settlement agreement he reached with them (L.F. 141).

parties to a real estate transaction, could be applied retroactively to subject Chase to liability for new penalties, including punitive damages, for a transaction completed the year prior to the amendment (Plf's Apdx A22). The court analogized the creation of the private right of action under the 2000 amendment to legislation waiving the State's sovereign immunity, which has been held to be procedural or remedial (Plf's Apdx A14, citing *Wilkes v. Missouri Hwy. & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988)).

In addition, although the court acknowledged that "laws providing for penalties and forfeitures are always given only prospective application," and that "[p]unitive damages are penal in nature," it concluded that the 2000 amendment to the Act could be applied retrospectively even though it subjected parties to residential real estate transactions to punitive damages for the first time. The court reasoned that because the Attorney General, at the time of plaintiff's purchase, could pursue civil actions against parties to real estate transactions for violations of the Act and could obtain a "limitless" penalty under §407.140.3, the "punitive damages authorized by the [2000 amendment] was [sic] just another mechanism to punish MPA violators [and as] such, it was remedial in nature and subject to retrospective application, in the absence of any legislative intent to the contrary" (Plf's Apdx A20-21). The court concluded that even though the issue of Chase's liability under the Act was not considered by the jury and the jury had already found that plaintiff was not entitled to punitive damages on his fraud claim, plaintiff was nevertheless entitled to a trial on his claim under the Act "on the issue of damages only, both actual and punitive, and to assess attorney's fees, if any" (Plf's Apdx A36).

With respect to Chase's cross-appeal, the Court of Appeals determined that Chase could be liable for fraudulent nondisclosure even though the parties had contractually agreed that Chase, as seller, was making "no representations, guaranties, or warranties, either written or implied, regarding the property," and that "[t]he property is being sold in 'AS-IS' condition with no expressed or implied representations or warranties by the seller or its agents as to the physical conditions, quality of construction, workmanship or fitness for any particular purposes" (Plf's Apdx A31, 36). The court did not address whether that contractual language negated the elements of the plaintiff's fraudulent nondisclosure claim, as Chase argued in its cross-appeal. Rather, the court determined that Chase had abandoned the point on appeal (Plf's Apdx A34, 36). It reached that conclusion by characterizing Chase's argument as grounded on waiver or release (Plf's Apdx A33, 34). The court so held even though Chase argued not that plaintiff relinquished a known right, but that he had never acquired a right to disclosure or a right to rely, and nothing in the contract or addendum is couched in terms of release of claims or liability. The court then concluded that Chase's failure affirmatively to plead release or waiver constituted abandonment of Chase's point, even though Chase in fact had pleaded waiver, and plaintiff had not argued at trial that Chase's argument was premised on unpleaded affirmative defenses (Plf's Apdx A34-36).

BRIEF AS CROSS-APPELLANT

POINT RELIED ON

THE TRIAL COURT ERRED IN DENYING CHASE'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF DID NOT MAKE A SUBMISSIBLE CASE ON HIS FRAUDULENT NONDISCLOSURE CLAIM IN THAT CHASE HAD NO DUTY TO DISCLOSE AND THIS PLAINTIFF HAD NO RIGHT TO RELY ON ANY PURPORTED NONDISCLOSURE BY CHASE BECAUSE THE PARTIES CONTRACTUALLY AGREED THAT CHASE WAS MAKING NO REPRESENTATIONS, GUARANTIES, OR WARRANTIES, EITHER EXPRESS OR IMPLIED, REGARDING THE PROPERTY.

Ringstreet Northcrest, Inc. v. Bisanz, 890 S.W.2d 713 (Mo. App. 1995);

Constance v. B.B.C. Dev. Co., 25 S.W.3d 571 (Mo. App. 2000);

Bydalek v. Brines, 29 S.W.3d 848 (Mo. App. 2000);

Volker Court, LLC v. Santa Fe Apartments, LLC, 130 S.W.3d 607 (Mo. App. 2004).

ARGUMENT

STANDARD OF REVIEW

"The main question in reviewing a trial court's denial of directed verdict or JNOV is whether . . . the plaintiff made a submissible case." *City of Sullivan v. Truckstop Restaurants, Inc.*, 142 S.W.3d 181, 191 (Mo. App. 2004). To make a submissible case, a plaintiff must present substantial evidence for every fact essential to liability. *Erdman v. Condaire, Inc.*, 97 S.W.3d 85, 88 (Mo. App. 2002). Whether the evidence in a case is substantial is a question of law. *Coggins v. Laclede Gas Co.*, 37 S.W.3d 335, 339 (Mo. App. 2000). Whether a duty to disclose exists is also a question of law. *Ringstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d 713, 724-25 (Mo. App. 1995). Questions of law are reviewed *de novo*. *See, e.g., Williams v. Kimes*, 996 S.W.2d 43, 44-45 (Mo. banc 1999).

I. THE TRIAL COURT ERRED IN DENYING CHASE'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF DID NOT MAKE A SUBMISSIBLE CASE ON HIS FRAUDULENT NONDISCLOSURE CLAIM IN THAT CHASE HAD NO DUTY TO DISCLOSE AND THIS PLAINTIFF HAD NO RIGHT TO RELY ON ANY PURPORTED NONDISCLOSURE BY CHASE BECAUSE THE PARTIES CONTRACTUALLY AGREED THAT CHASE WAS MAKING NO REPRESENTATIONS, GUARANTIES, OR WARRANTIES, EITHER EXPRESS OR IMPLIED, REGARDING THE PROPERTY.

The trial court erred in denying Chase's motions for directed verdict and for JNOV and submitting plaintiff's fraudulent nondisclosure claim to the jury because he could not, as a matter of law, establish the "duty to disclose," "reliance," or "right to rely" elements of that claim. Because Chase very plainly bargained for the right to be silent with respect to the property, plaintiff is contractually foreclosed from arguing that Chase's silence is tantamount to an implied representation that the property was problem-free in any respect.

The parties unequivocally agreed in the Addendum, which is expressly made part of the Contract in paragraph 6 (L.F. 16; Apdx A-1) and was separately executed by Chase and Hess, that Chase was making no representations whatsoever with respect to the property:

> "9. The seller is a corporation who acquired the property through foreclosure sale. The seller has never seen nor occupied the property. The seller makes no representations, guaranties, or warranties, either written or implied, regarding the property.
>
> "10. The property is being sold in 'AS-IS' condition with no expressed or implied representations or warranties by the seller or its agents as to the physical conditions, quality of construction, workmanship or fitness for any particular purposes. The seller has no obligation to make any changes, alterations, or repairs to the property" (L.F. 20; Apdx A-5).

Under paragraph 18 of the Contract, plaintiff was granted the unfettered right to inspect the property:

> "Buyer may, at Buyer's expense, have property inspections which may include, but are not limited to, the: appliances, plumbing (including septic system), electrical, heating system, central air conditioning, fireplace, chimney, foundation, roof, siding, windows or doors, ceilings, floors, insulation, drainage, interior and exterior components, any wall, decks, driveways, patios, sidewalks, fences, slabs, health and/or environmental concerns (including lead-based

> paint) and wood-destroying insect or other pest infestation and/or damage" (L.F. 18; Apdx A-3).

It is undisputed that plaintiff was given unrestricted access to the property to conduct any inspections he desired (Tr. VII:1242-43). Just above plaintiff's signature line, as an "Additional Term[] and Condition[]," the Contract states that he "agrees to accept 'as is' and has inspected property" (L.F. 19; Apdx A-4).

To make a submissible claim of fraudulent nondisclosure under Missouri law, a plaintiff must establish: (1) a duty to disclose on the part of the defendant; (2) the defendant's intent that its nondisclosure be acted upon in the manner reasonably contemplated; (3) the plaintiff's reliance on the nondisclosure; (4) its right to rely on the nondisclosure; and (5) proximate injury. *See Ringstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d at 720; *see also Kesselring v. St. Louis Group, Inc.*, 74 S.W.3d 809, 813-14 (Mo. App. 2002) (citing *Restatement (Second) of Torts*, §551). In *Constance v. B.B.C. Development Co.*, 25 S.W.3d 571, 580 (Mo. App. 2000), the Court of Appeals described the circumstances in which a duty to disclose will be imposed:

> "A duty to disclose arises from a classical fiduciary relationship, from a partial disclosure of information, or from particular circumstances such as where one party to a contract has superior knowledge and is relied upon to disclose this knowledge. A duty exists also where one party expressly or by clear implication places a special confidence in the other." (citation omitted).

Given the terms of the Contract and Addendum, it is clear that none of these situations in which a duty to disclose is imposed exists here. There was no "classical fiduciary relationship" between plaintiff and Chase, nor did Chase make a partial disclosure. Further, paragraphs 9 and 10 of the Addendum demonstrate that plaintiff neither "expressly" nor "by clear implication" placed "a special confidence" in Chase, but in fact explicitly disclaimed any such confidence.

Plaintiff likewise did not establish that Chase had superior knowledge which he relied upon Chase to disclose, which was the basis for the alleged duty to disclose set forth in the verdict director (Plf's Apdx A42-43; S.L.F. 8-9). He presented no evidence at trial that Chase knew that any dumping of paint waste had occurred on the property, or that Chase even knew that such dumping was alleged to have occurred. The evidence showed at best that Chase knew that some 300-plus paint cans sat in an old barn foundation on the south end of the property — information plaintiff could have gleaned for himself had he bothered to make a full visual inspection of the property he was acquiring. Even assuming Chase can be said to have had superior knowledge, plaintiff cannot have actually or reasonably relied on Chase to disclose any information to him when paragraphs 9 and 10 of the Addendum provided that Chase would be making no representations whatsoever.

The Court of Appeals' opinion in *Ringstreet Northcrest, Inc. v. Bisanz* is directly on point and compels the conclusion that Chase had no duty to disclose here. In *Ringstreet*, the purchaser of an apartment complex alleged that the sellers had fraudulently failed to disclose that the water pipes in the complex froze on a regular basis

in cold weather. 890 S.W.2d at 719-20. The Court's affirmance of summary judgment in favor of the sellers turned on the following language from the real estate contract:

> "[Section 6.] Seller has allowed Buyer and its authorized agents access to the Property. . . *for the purpose of inspecting all mechanical and structural components of the Property* . . . . *By execution of this Contract Buyer acknowledges that it has performed all such inspections and that the results thereof are satisfactory to Buyer.*
>
> . . .
>
> "[Section 10.] The parties recognize and agree that Buyer will have ample opportunity to examine all financial and legal documents, records, files and information and all physical items and conditions relating to the Property. *Except as may be specifically set forth herein, Seller makes no warranties, representations or statements about any such matters. . . . By its execution of this Contract, Buyer acknowledges that Seller has made no warranties, representations or statements other than those set forth herein . . . concerning any condition or matter relating to the Property, including such matters as the . . . physical condition of the Property or any improvements thereon. Seller has relied upon this acknowledgement as a material inducement to enter into this*

> *Contract.* Buyer is hereby purchasing the Property 'as is' and 'where is,' *and agrees that it relies upon no warranties, representations or statements by Seller or any other persons for Seller in entering into this Contract . . . .*" *Id.* at 721-22 (italics original; some ellipses original).

The sellers argued that under these terms, the buyer had relinquished its right to obtain any statements from them regarding the property and they were thus relieved from any duty to make any disclosures. *Id.* at 722. Moreover, the sellers maintained that because they had contractually bargained to eliminate any duty to disclose on their part, the buyer thus "had no right to rely on [the sellers'] silence as an implicit representation that no defects existed in the plumbing." *Id.* The buyer's president testified in a deposition that he had asked, during an inspection of the complex, whether there had been any problems with the pipes and was told "'there had been one instance.'" *Id.* at 723.

The Court of Appeals agreed that the sellers had no duty to disclose:

> "The real estate contract clearly states that Ringstreet agrees that 'it relies upon no warranties, representations or statements' by Respondents in purchasing the property. Furthermore, Ringstreet was allowed to conduct a thorough inspection of the Property and examine documents relating to the Property. Given the particular provisions of the real estate contract here, and especially if, as the record indicates,

> Ringstreet was told prior to purchasing the Property that there had been one instance of pipes freezing, Ringstreet should have investigated the potential problem further. Respondents did not have a duty to disclose the problem, and thus Ringstreet's fraud claim must fail as a matter of law." *Id.* at 724-25.

The contractual language set forth in paragraphs 9 and 10 in the Addendum at issue here is substantially similar to the provisions the Court found controlling in *Ringstreet*, and requires the same result. Both contracts, here and in *Ringstreet*, afforded the buyers full access to the properties for inspection, and plainly stated that the sellers were making no warranties or representations. The bargain Chase struck with plaintiff went even further than the contract in *Ringstreet*, as it relieved Chase of the obligation to make *any* representations, guaranties, or warranties – written *or* implied – regarding the property. In effect, Chase contracted for the right to be silent, and plaintiff agreed that he would not take Chase's silence as an implied representation of any fact. But in claiming that Chase fraudulently failed to disclose the EPA's "involvement" with the property, plaintiff is doing exactly what he agreed *not* to do. He is inferring from Chase's contractually-authorized silence a representation of fact – that the property lacked any defect.

Although the Court in *Ringstreet* did not expressly address the issue, the terms of the Addendum preclude additional elements of plaintiff's fraudulent nondisclosure claim. Just as Chase had no duty to disclose under the terms of the

Addendum, plaintiff had no right to rely, and could not have actually or reasonably relied, on Chase's purported nondisclosure. To the contrary, plaintiff contractually agreed that he would not interpret Chase's silence about the property as an implied representation, warranty, or guarantee. Plaintiff cannot be deemed to have had a right to rely on Chase's nondisclosure of EPA's involvement with the property in the face of plain contractual language that Chase was making no representations whatsoever, express or implied. *See, e.g., Volker Court, LLC v. Santa Fe Apartments, LLC*, 130 S.W.3d 607 (Mo. App. 2004) (as a matter of law, would-be purchaser of apartment complex had no right to rely on alleged representations by owner that he would sell complex for $4.6 million in light of owner's written statement that his partner's approval was necessary for any contract). Plaintiff's background and experience as a home inspector and real estate agent should have made him particularly cognizant that the terms of the deal he was agreeing to with Chase precluded him from reliance on Chase's silence and of the need to inspect the property in full.

The appellate courts of this state have advised repeatedly that they are not in the business of rewriting contracts to create an agreement the parties themselves did not make or to relieve one of the parties of the consequences of its own bargain. *See, e.g., Bydalek v. Brines*, 29 S.W.3d 848, 855 (Mo. App. 2000) (court must "read and follow unambiguous contracts as written without regard to their wisdom or folly"); *Simpson v. Maxon Sys., Inc.*, 886 S.W.2d 92, 94 (Mo. App. 1994); *Textor Constr., Inc. v. Forsyth R-III Sch. Dist.*, 60 S.W.3d 692, 697-98 (Mo. App. 2001). The contract unambiguously provided Chase the unfettered right to make no disclosures and to have

no inferences drawn from its silence. The trial court was obligated to give those terms full effect, and it erred in allowing the jury to override those terms. *See, e.g.*, *Bydalek*, 29 S.W.3d at 856 (interpretation of terms of unambiguous contract "'is a matter of law for the trial court to decide, not a factual issue for resolution by the jury'"); *Parker v. Pulitzer Publ'g Co.*, 882 S.W.2d 245, 250 (Mo. App. 1994).

By allowing plaintiff to proceed with his fraudulent nondisclosure claim, the trial court committed reversible error by depriving Chase of the benefit of its bargain, which allocated to plaintiff the risk of any defect that he chose not to inspect for or did not uncover in his inspections. In submitting plaintiff's fraud claim to the jury, the trial court impermissibly shifted that risk and brushed the terms of the Addendum aside. The judgment should be reversed.

BRIEF AS RESPONDENT

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFF'S CLAIM UNDER THE MERCHANDISING PRACTICES ACT, §407.025, RS MO. BECAUSE THE 2000 AMENDMENT TO THAT STATUTE WAS SUBSTANTIVE AND PUNITIVE AND THEREFORE HAD ONLY PROSPECTIVE APPLICATION, IN THAT THE AMENDMENT CREATED A PRIVATE CAUSE OF ACTION WITH RESPECT TO PURCHASES OF REAL ESTATE AND, BY SUBJECTING SELLERS TO LIABILITY TO PURCHASERS FOR ACTUAL DAMAGES, PUNITIVE DAMAGES, AND/OR ATTORNEY'S FEES, THE AMENDMENT CREATED NEW OBLIGATIONS FOR, IMPOSED NEW DUTIES ON, AND/OR ATTACHED NEW DISABILITIES TO THOSE SELLERS, WHO HAD A VESTED RIGHT TO BE FREE FROM SUIT UNDER THE ACT BY INDIVIDUALS, AND APPLYING THE AMENDMENT RETROSPECTIVELY WOULD DENY CHASE DUE PROCESS.

State ex rel. Webster v. Cornelius, 729 S.W.2d 60 (Mo. App. 1987);

Detling v. Edelbrock, 671 S.W.2d 265 (Mo. banc 1984);

Stark v. Missouri State Treasurer, 954 S.W.2d 645 (Mo. App. 1997);

Wellner v. Director of Revenue, 16 S.W.3d 352 (Mo. App. 2000);

Merchandising Practices Act, §407.010 et seq. R.S.Mo.;

Missouri Constitution, Article I, §13.

ARGUMENT

STANDARD OF REVIEW

Plaintiff's Brief correctly sets forth the applicable standard for review of an order granting a motion to dismiss — the sole issue is the adequacy of the petition (Br. 26-27). But as the rest of his brief demonstrates, he pays only lip service to that standard. In addition to his erroneous declaration in his Statement of Facts that "[t]his appeal must be decided in light of the jury's fraud verdict in Mr. Hess' favor," he criticizes Chase for arguing against retroactive application of the 2000 amendment even though the jury found in his favor on his fraud claim, and repeatedly refers to the jury's finding (Br. 28; *see also* Br. 30, 31, 43).

In reviewing the dismissal of plaintiff's claim under the Act, however, the nondisclosure verdict is irrelevant. *See, e.g., Kraus v. Hy-Vee, Inc.*, 147 S.W.3d 907, 914 (Mo. App. 2004) (on review of dismissal of a claim, the appellate court "'may not address the merits of the case or consider evidence outside of the pleadings'") (citations omitted). Whether the 2000 amendment to the Act may be applied retrospectively is, as plaintiff concedes, a question of law reviewed *de novo*, and the answer to that question cannot turn on the circumstances of his specific case — in particular, the outcome of the trial. As plaintiff states, not all of the elements of common law fraud need be met to prove a violation of the Act (Br. 48). If the amendment may be applied retrospectively, it may be applied retrospectively for anyone who can prove a cause of action under the Act, not just those who have had a jury render a fraud verdict in their favor.

I. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFF'S CLAIM UNDER THE MERCHANDISING PRACTICES ACT, §407.025, RS MO. BECAUSE THE 2000 AMENDMENT TO THAT STATUTE WAS SUBSTANTIVE AND PUNITIVE AND THEREFORE HAD ONLY PROSPECTIVE APPLICATION, IN THAT THE AMENDMENT CREATED A PRIVATE CAUSE OF ACTION WITH RESPECT TO PURCHASES OF REAL ESTATE AND, BY SUBJECTING SELLERS TO LIABILITY TO PURCHASERS FOR ACTUAL DAMAGES, PUNITIVE DAMAGES, AND/OR ATTORNEY'S FEES, THE AMENDMENT CREATED NEW OBLIGATIONS FOR, IMPOSED NEW DUTIES ON, AND/OR ATTACHED NEW DISABILITIES TO THOSE SELLERS, WHO HAD A VESTED RIGHT TO BE FREE FROM SUIT UNDER THE ACT BY INDIVIDUALS, AND APPLYING THE AMENDMENT RETROSPECTIVELY WOULD DENY CHASE DUE PROCESS.

Plaintiff asks this Court to subject Chase to liability for actual and punitive damages and attorney's fees under a statutory cause of action that did not exist until a year *after* their real estate transaction took place. Specifically, he contends that the trial court erred in dismissing his claim brought pursuant to §407.025, RSMo. of the Merchandising Practices Act (the "Act") based on its holding that the 2000 amendment to that section was substantive and therefore could not be given retrospective application to

his 1999 real estate transaction.[4/] His contention ignores the dictates of due process, misconstrues the decisions of the appellate courts of this State interpreting Article 1, §13 of the Missouri Constitution, and in particular overlooks the controlling case of *State ex rel. Webster v. Cornelius*, 729 S.W.2d 60 (Mo. App. 1987), which held that an earlier amendment to the Act could be applied prospectively only.

In his attempt to classify the amendment to §407.025 as merely "procedural or remedial," plaintiff both mischaracterizes the nature of the amendment and misstates the applicable standard for determining whether a statutory amendment may be applied retroactively to transactions that occurred before its enactment. The 2000 amendment did not, as plaintiff repeatedly asserts, simply provide a new remedy under the Act – it *created* a cause of action under the Act for certain purchasers of real estate. Likewise, whether a statutory amendment may be applied to a transaction already transpired does not, as plaintiff claims, turn on whether the defendant's conduct was illegal at the time it occurred, nor is the sole consideration whether the amendment impairs a substantive, pre-amendment right of the defendant's. Rather, a statutory amendment that is punitive, or creates a new right or obligation, imposes a new duty, or attaches a new disability is also

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[4/] Plaintiff's appeal assumes that the judgment on his nondisclosure claim will be upheld by this Court. But if this Court rules in favor of` Chase on its cross-appeal and reverses the judgment on plaintiff's nondisclosure claim, it need not address whether the amendment to the Act is retroactive because under those circumstances, plaintiff could not, as a matter of law, establish a violation of the Act. §407.020.

considered substantive in nature, and therefore may not be given retroactive application. Because the 2000 amendment to §407.025 created a cause of action under the Act on behalf of purchasers of real estate, is punitive, and creates a new obligation on the part of vendors, the trial court properly held that it could not be applied retroactively to the 1999 real estate transaction at issue here.

A. The Merchandising Practices Act Provides for Enforcement of its Provisions by the Attorney General and Through a Private Cause of Action, But Before an Amendment in 2000, the Private Cause of Action Excluded Real Estate Transactions Such as the One at Issue Here.

1. The Attorney General's right of enforcement and the private cause of action prior to 2000.

An understanding of the Act's provisions, both before and after the 2000 amendment, is critical to the determination of the retroactivity issue. The Act, §407.010 *et seq.*, declares unlawful certain deceptive or fraudulent practices "in connection with the sale or advertisement of any merchandise." §407.020. The definitional section, §407.010, and the sections governing the Attorney General's right to enforce the Act, §§407.020, 407.100, 407.130, and 407.140, were in effect at the time plaintiff purchased the property, and have not been amended since. "Merchandise" is defined in §407.010(4) as "any objects, wares, goods, commodities, intangibles, real estate or services." Section 407.100 authorizes the Attorney General to pursue various remedies for any conduct declared unlawful in §407.020, including injunctive relief, restitution, and a civil penalty of not more than $1,000 per violation. Pursuant to §407.130, in any action brought under

§407.100, the Attorney General is entitled "to recover as costs, in addition to normal court costs, the cost of the investigation and prosecution of any action to enforce the provisions of this chapter." Section 407.140.2 establishes the "Merchandising Practices Revolving Fund," to finance "the payment of all costs and expenses incurred by the attorney general in the investigation, prosecution, and enforcement of" the Act, as well as consumer education and advocacy programs. Under §407.140.3, when the court awards restitution under §407.100, "there shall be added, … an amount equal to ten percent of the total restitution awarded, or such other amount as may be agreed upon by the parties or awarded by the court," payable to the Fund. The Attorney General did not file any action against Chase in connection with the sale of the property.

In addition to the authority provided to the Attorney General, the Act also established a private right of action. But in contrast to the Attorney General's authority, which extends to transactions involving "any *merchandise*," prior to the 2000 amendment, §407.025 provided a private right of action under the Act only to "[a]ny person who purchases or leases *goods or services* primarily for personal, family or household purposes" and thereby suffered a loss as a result of conduct declared unlawful by §407.020. This pre-amendment version of §407.025 was held not to provide a cause of action to the purchasers or lessees of real estate. *See, e.g.*, *Detling v. Edelbrock*, 671 S.W.2d 265, 272-73 (Mo. banc 1984) ("The legislature specifically excluded real estate transactions from the scope of the private right of action provision"); *Schimmer v. H. W. Freeman Constr. Co.*, 607 S.W.2d 767, 769 (Mo. App. 1980) (real estate is not "goods or services").

2. The 2000 amendment to the Act expanded the private cause of action to include certain real estate transactions for the first time.

In 2000, the year after plaintiff purchased the property, §407.025 was amended to substitute the word, "merchandise," for the phrase, "goods or services." The amendment thus enlarged the class of potential plaintiffs by providing a cause of action to "[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes" and suffers a loss as a result of conduct violative of §407.020. Because "merchandise" is defined in §407.010(4) to include real estate, §407.025 as amended now covers real estate transactions for personal, family or household purposes, and entitles prevailing plaintiffs to recover "actual damages." §407.025.1. In addition, "[t]he court may, in its discretion, award punitive damages and may award to the prevailing party attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper." *Id.*

B. The 2000 Amendment to §407.025 May Be Applied Prospectively Only Because It is Punitive and Creates A New Cause of Action for Certain Purchasers and Lessees of Real Estate and Creates New Obligations for, Imposes New Duties on, and Attaches New Disabilities to Vendors and Lessors, and Retrospective Application Would Violate Due Process.

Article I, §13 of the Missouri Constitution provides in relevant part that "no . . . law . . . retrospective in its operation . . . can be enacted." As the Court of Appeals has explained, this constitutional provision means that no statute "'can be allowed to operate retrospectively so as to affect . . . past transactions to the substantial prejudice to the parties interested. A law must not give to something already done a different effect from that which it had when it transpired.'" *Rice v. Huff*, 22 S.W.3d 774, 782-83 (Mo. App. 2000) (emphasis omitted) (quoting *State ex rel. Clay Equip. Corp. v. Jensen*, 363 S.W.2d 666, 670 (Mo. banc 1963)); *see also Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006) (quoting *Squaw Creek Drainage Dist. No. 1 v. Turney*, 235 Mo. 80, 138 S.W. 12, 16 (1911)).

There is a presumption under Missouri law that a new statute or statutory amendment operates prospectively only, unless it is procedural or remedial in nature. *See, e.g., Wellner v. Director of Revenue*, 16 S.W.3d 352, 354 (Mo. App. 2000); *State ex rel. Webster v. Cornelius*, 729 S.W.2d at 65. A statute is substantive, and thus not subject to retroactive application, when it "take[s] away or impair[s] vested rights acquired under existing laws, or create[s] a new obligation, impose[s] a new duty, or attach[es] a new

disability." *Cornelius*, 729 S.W.2d at 66 (citing *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974)); *see also Phillips*, 194 S.W.3d at 850. In addition, laws that are punitive in nature are applied prospectively only. *See, e.g., Cornelius*, 729 S.W.2d at 66; *Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights*, 791 S.W.2d 382, 387 (Mo. banc 1990) ("'laws providing for penalties and forfeitures are always given only prospective application, and retrospective application would render such a statute unconstitutional'") (quoting *U.S. Life Title Ins. Co. v. Brents*, 676 S.W.2d 839, 842 (Mo. App. 1984)); *State ex rel. Carlund Corp. v. Mauer*, 850 S.W.2d 357, 361 (Mo. App. 1993) (same).

As the Court of Appeals recently explained,

> "Substantive law creates, defines and regulates rights; procedural law prescribes a method of enforcing rights or obtaining redress for their invasion. The distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit." *Cook v. Newman*, 142 S.W.3d 880, 893 (Mo. App. 2004) (en banc) (citation omitted).

1. The 2000 amendment created a private cause of action under the Act for certain purchasers of real estate, and is therefore substantive.

The underlying premise of plaintiff's argument that the 2000 amendment to the Act should be applied retrospectively to his 1999 real estate purchase is that the amendment is simply "remedial or procedural" in nature (Br. 29, 32-33, 39, 40-41). He repeatedly mischaracterizes the amendment as "merely provid[ing him] with a remedy to enforce his pre-existing statutory rights" or "merely modif[ying] remedies available with respect to an existing statutory violation" (Br. 29). Plaintiff's attempt to minimize the amendment's impact is unavailing. The amendment to §407.025 did not "merely" provide plaintiff with remedies or modify existing remedies. Rather, the amended statute expanded the class of individuals with a cause of action under the Act by substituting the word "merchandise" for the phrase, "goods or services," thus including within its ambit, for the first time, parties to certain real estate transactions.

Plaintiff acknowledges as much in his Point Relied On, where he refers to "the private cause of action *created* by a 2000 amendment to the Act" (Br. 25, 26) (emphasis added). It is hard to conceive of a more substantive law than one that created a cause of action where none existed before. *See, e.g., Stark v. Missouri State Treasurer*, 954 S.W.2d 645, 647 (Mo. App. 1997) (amendment to Workers' Compensation Act, providing for action against Second Injury Fund in a "dual employment" situation, was substantive; "amendment did not fine tune an existing right — it created a new cause of action"). None of the cases plaintiff cites for the proposition that the 2000 amendment

should be applied retroactively involved a statutory amendment that created a new cause of action or expanded a cause of action to include a new class of plaintiffs.

Moreover, the cases plaintiff relies on do not talk about laws that provide or modify remedies "for existing statutory violations," as he represents. It is clear from the passage plaintiff quotes from *Files v. Wetterau, Inc.*, 998 S.W.2d 95, 97-98 (Mo. App. 1999) (Br. 33), that the Court classified as "remedial" those statutes that "authorize a remedy for an existing *cause of action.*" There is, of course, a big difference between a statute that prohibits certain conduct, and one that authorizes a private right of action to enforce the general right of the public at large to be free from the conduct prohibited. Only when §407.025 was amended in 2000 was the private right of action expanded to cover the purchase or leasing of real estate for personal or household use. The amendment thus "created and defined" the rights of purchasers and lessees of real estate with respect to violations of the Act, and is therefore substantive. *See, e.g., Cook*, 142 S.W.3d at 893. Plaintiff, like other parties to pre-2000 real estate transactions, had no cause of action under the Act.

Plaintiff argues that because Chase's conduct was allegedly unlawful under §407.020, and subject to an enforcement action by the Attorney General at the time it occurred, the 2000 amendment "did not change Chase's substantive obligation under existing law to refrain from omitting or concealing material facts in the sale of real estate" (Br. 29). But plaintiff cites no case law to support the notion that because vendors and lessors of real estate were subject to liability to and prosecution by the Missouri Attorney General under the Act before 2000, the statutory amendment exposing them to

liability to private parties was therefore merely procedural. The assertion that "Chase Manhattan's nondisclosure was unlawful under the Act … when it occurred," even if it were true, has no bearing on whether the 2000 amendment can be applied retroactively to drastically change the legal effects of a transaction completed a year before the amendment was enacted.[5/]

A case involving an earlier amendment to the Act is directly on point and controlling here. In *Cornelius*, 729 S.W.2d 60, the defendants' actions, which took place prior to February 1985, were held to have violated §407.020 of the Act, and a permanent injunction and order of restitution entered against them were upheld. Despite the fact that their conduct was unlawful at the time it occurred, the Eastern District held that amendments to the Act effective in May 1985 could not be applied retrospectively to require the defendants to pay ten percent interest on the restitution award as well as investigative and prosecutorial costs. The Court held that those amendments, to §407.130 (allowing the attorney general to recover the costs of the investigation and prosecution of enforcement actions) and §407.140.3 (allowing the trial court to add an amount equal to ten percent of the total restitution awarded), "attach[] a new disability to

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[5/] As set forth in Chase's cross-appeal, its "nondisclosure" was not fraudulent and did not violate the Act because the contract signed by the parties expressly stated that the property was being sold "in 'AS-IS' condition" and that Chase as seller "makes no representations, guaranties, or warranties, either written or implied, regarding the property" (L.F. 20).

the [defendants]. [Defendants'] acts at the time of commission were subject to liability only in the amount of normal court costs and restitution for any ascertainable losses." *Id.* at 66.

The Court in *Cornelius* also determined that the amendments at issue there were "clearly punitive in nature," and could be applied only prospectively for that additional reason. *Id.; see also State ex rel. Webster v. Myers*, 779 S.W.2d 286, 289 (Mo. App. 1989) (Attorney General properly acknowledged that an award of a penalty under §407.100 or costs of investigation and prosecution under §407.130 would require retrospective application of those sections, and thus abandoned those claims for "substantive relief")*; State ex rel. Webster v. San Juan Prods., Inc.*, 728 S.W.2d 735, 735 n.1 (Mo. App. 1987) (amendments to §§407.100 and 407.110 "are substantive and relate directly or indirectly to a possible penalty," and were therefore not retroactive). Thus the fact that the defendants' conduct was found to have violated the Act at the time it occurred was immaterial to the determination that the statutory amendments could not be applied retroactively to increase their liability.

The holding in *Cornelius* applies with even greater force here, and dictates that the dismissal of Count III be affirmed. There the amendments to §§407.130 and 407.140 of the Act would have granted the Attorney General additional remedies against the defendants for violations of the Act. Even though the Attorney General already had a cause of action pursuant to §407.100, because those added remedies were punitive and "attached a new disability" by increasing the defendants' exposure, the amendments could not be applied retroactively. Here, the 2000 amendment did not merely add

remedies, but subjected parties to certain real estate transactions to an entirely new private right of action. While the amendments at issue in *Cornelius*, had they been applied retroactively, would have subjected the defendants to an increase of ten percent in the amount of restitution as well as investigative and prosecutorial costs, the increased exposure to Chase from applying the 2000 amendment here would be far greater, including actual damages, punitive damages, and attorney's fees. Under *Cornelius*, this potential liability for punitive damages in and of itself calls for prospective application only, as nothing could be more "clearly punitive in nature" than punitive damages. Allowing plaintiff to pursue a cause of action against Chase under the 2000 amendment to §407.025 would be fundamentally at odds with the holding in *Cornelius* and *San Juan Products*.

Plaintiff's only response to *Cornelius* is to claim that it is "outmoded" because it relies in part on this Court's opinion in *Buder*, 515 S.W.2d 409 (Br. 47-48 & n.7). In *Buder*, this Court held that the statutory elimination of a $50,000 cap on a wrongful death damages award could not be applied retrospectively because the cap had "operated to protect defendants from verdicts in excess of a certain maximum." *Id.* at 411. Plaintiff quotes *dicta* from *Pierce v. State Department of Social Services*, 969 S.W.2d 814, 823 n.2 (Mo. App. 1998), to the effect that *Buder*'s reasoning is not "fully consistent" with subsequent cases holding that amendments to remedial statutes may be applied retroactively. *Buder*, however, remains good law, and continues to be cited with approval. *See, e.g., United Investors Life v. Wilson*, 191 S.W.3d 76 (Mo. App. 2006). In fact, the proposition for which *Cornelius* cites *Buder*—that laws that take away or impair

vested rights, create new obligations, impose new duties, or attach new disabilities cannot be applied retrospectively (729 S.W.2d at 66)—was reaffirmed by this Court in its very recent opinion in *Phillips*, 194 S.W.3d at 850. Indeed, the Court cited its opinion in *Jerry-Russell Bliss, Inc. v. Hazardous Waste Management Commission*, 702 S.W.2d 77, 81 (Mo. banc 1985) — which in turn cites *Buder*. Missouri's Constitution has not changed.

A line of cases holding that a statutory amendment that increases a limitations period cannot be applied retrospectively to resuscitate a cause of action that has already expired further confirm that the alleged unlawfulness of Chase's conduct at the time it took place is irrelevant to the retroactivity analysis. *See, e.g., Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. banc 1993) (when a statute of limitations for a common law or statutory action expires, it creates a vested right on the part of a would-be defendant "to be free from suit, a right that is substantive in nature"); *Beck v. Fleming*, 165 S.W.3d 156, 159-60 (Mo. banc 2005) (former husband "acquired a substantive right to be free from suit" ten years after dissolution decree was entered, and an amended statute that effectively increased the period during which the plaintiff could sue could not be applied retrospectively "to strip away that substantive right"); *State ex rel. Wade v. Frawley*, 966 S.W.2d 405, 407 (Mo. App. 1998) ("change in the statute of limitations will not revive a cause of action which has already expired").

Files v. Wetterau, Inc., 998 S.W.2d 95 (Mo. App. 1999), cited by plaintiffs, is in line with *Doe*, *Beck*, and *Wade*. The Court in *Files* held that §287.430.2, a section of the Worker's Compensation Act allowing a claimant to reactivate his claim after

settlement if he required modification, replacement, or exchange of an existing prosthetic device, could not be applied retrospectively to reactivate the plaintiff's claim, which had settled before §287.430.2 was enacted. The Court determined that "a retroactive application of the statute would impact the substantive rights of the parties" because it "would create a new right for Claimant to receive additional compensation for a claim he knowingly released and impose a new burden on Wetterau." *Id.* at 98. Just as the defendants in *Doe*, *Beck*, and *Wade* acquired a vested right to be free from suit when the statutes of limitations expired, Wetterau acquired a "vested right to rely on the settlement agreement as finally disposing of all matters between the parties." *Id.* at 99.

Doe, *Beck*, and *Wade*, like *Cornelius*, undermine plaintiff's repeated claim that the 2000 amendment may be applied retrospectively to Chase because "its conduct was unlawful *when it occurred*," and subject to an enforcement action by the Attorney General under the Act (Br. 27-28, *see also* 29, 30, 31, 34). If a party obtains a vested right to be free from suit based on a settlement agreement or the serendipitous circumstance that the prospective plaintiff failed to file suit on time, a party that *had no liability at all* to a would-be plaintiff at the time of the transaction at issue necessarily has a vested right to be free from suit as well. In *Doe*, for example, the parties did not contest that the defendant's acts would have violated a number of criminal statutes, 862 S.W.2d at 340, and thus his conduct was unlawful when it occurred, and subjected him to liability at that time. Nonetheless, because the limitations periods for the plaintiffs' causes of action had expired before §537.046 was enacted, that statute could not be applied retrospectively to revive those causes of action. So, too, the amendment to §407.025,

subjecting vendors and lessors of real estate to liability to individuals under the Act *for the first time*, certainly cannot be applied retrospectively either.

Plaintiff argues that he in fact had a cause of action under §407.025 *before* the 2000 amendment. He relies heavily on *Wilkes v. Missouri Highway & Transportation Commission*, 762 S.W.2d 27 (Mo. banc 1988), claiming that it is "indistinguishable," and that it "*mandates* the Court of Appeals' decision" (Br. 34, 45). Plaintiff is wrong on both counts, and overlooks a critical distinction between this case and *Wilkes*. At issue in *Wilkes* was whether §537.600, abrogating sovereign immunity in certain circumstances, could be applied retroactively to allow the plaintiffs to proceed with their personal injury claim against the defendant.

The Supreme Court decided that question as follows:

> "An act abrogating sovereign immunity *does not create a new cause of action but provides a remedy for a cause of action already existing* for which redress could not be had because of the immunity.
>
> "As presently enacted, § 537.600 provides a remedy for a cause of action whose remedy was previously barred so it is procedural or remedial." *Id.* at 28 (citations omitted; emphasis added).

The plain import of *Wilkes* is that if the statute at issue there had created a cause of action, the Court would have applied it prospectively only. Because the

amendment to §407.025 did just that, it cannot be applied retrospectively to create a right of action for plaintiff.

Plaintiff makes a strained attempt to fit the facts of his claim within the holding in *Wilkes* by explaining how he too had a cause of action under the Act even before the 2000 amendment (Br. 35). His claim to an "'existing cause of action'" in 1999 is belied by *Detling*, 671 S.W.2d at 272-73 (in the pre-amendment version of §407.025, "[t]he legislature specifically excluded real estate transactions from the scope of the private right of action provision"), and *Schimmer*, 607 S.W.2d at 769 ("cause of action [in pre-amendment §407.025] does not apply to purchases of real estate").

Even if *Detling* and *Schimmer* did not completely defeat plaintiff's claim, his self-serving definition of "cause of action" ignores the decisions of the appellate courts of this State defining that term. *See, e.g., Dragna v. Auto Owner's Mut. Ins. Co.*, 687 S.W.2d 277, 279 (Mo. App. 1985) ("A cause of action has been defined as 'a subject matter upon which a proceeding may be brought by one party against another to obtain whatever relief the one is legally entitled to receive as against the other under the facts and circumstances upon which he relies'") (quoting *Ford v. American Brake Shoe Co.*, 252 S.W.2d 649, 652 (Mo. App. 1952)); *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315 (Mo. banc 2002) (cause of action is "'a group of operative facts giving rise to one or more bases for suing'") (quoting *Black's Law Dictionary* 214 (7th ed. 1999)). Under either of those definitions, plaintiff had no cause of action under the Act at the time of his 1999 real estate transaction: he could not bring a proceeding for violation of the Act in connection with that purchase, and had no legal entitlement to relief under

its terms, nor did he have a basis for suing under the Act. *See, e.g., Warner v. Warner*, 658 S.W.2d 81, 82 (Mo. App. 1983) ("It is axiomatic that one who seeks relief under the provisions of a statute must plead and prove that he falls within the purview of that statute").

Plaintiff's effort to bring himself within the holding in *Wilkes* also ignores a fundamental difference between the waiver of sovereign immunity at issue there and the 2000 amendment's creation of a private right of action under the Act. In *Wilkes*, the statutory abrogation of sovereign immunity allowed the plaintiffs to proceed with their negligence claim against the Commission. As a common law claim, a negligence cause of action is available to anyone who can establish the required elements: duty, breach of duty, and damages proximately caused by the breach. *See, e.g., Mirth v. Reg'l Bldg. Inspection Co.*, 93 S.W.3d 787, 790 (Mo. App. 2002). The plaintiffs in *Wilkes* thus had a cause of action at the time of their accident in that they could satisfy the elements of a negligence action, but their claim was against a State entity which at that time enjoyed immunity. The subsequent statutory waiver of sovereign immunity, which applied retrospectively, removed the bar to recovery of a remedy. *See Wilkes*, 762 S.W.2d at 28.

In contrast, in creating a private statutory cause of action, the Act *defines* the cause of action: who has standing to sue and under what circumstances. *See, e.g., State ex rel. Slibowski v. Kimberlin*, 504 S.W.2d 237, 239 (Mo. App. 1973) ("There was no right of action for a wrongful death at common law. Thus it is only by virtue of legislative enactment that any claim or cause of action accrues under § 537.080," which "nominates those entitled to sue and the terms on which they can sue"). Like other

parties to real estate transactions that transpired before the Act was amended in 2000, plaintiff was not among those "nominate[d as] entitled to sue," and he therefore *had no cause of action* under the Act. *See, e.g., Wessels v. Gipfel*, 522 S.W.2d 653, 654 (Mo. App. 1975) (unless a party brings himself "'within the statutory requirements necessary to confer the right[,] …his petition states no cause of action . . . . Only such persons can recover … as the letter of the law prescribes. Only such persons may sue as the statute permits, and they alone can sue'") (citation omitted). As the Court stated in *State ex rel. Slibowski*, 504 S.W.2d at 240: "When a statute gives a right of action, provides a remedy, and imposes conditions as to the exercise of the remedy, the conditions thus imposed modify and qualify the right of recovery, and form a part of the right itself, upon which its exercise depends." [6/]

Moreover, that plaintiff did not have "an 'existing cause of action' at the time of the 1999 real estate transaction … whose remedy was previously barred," is confirmed by a number of decisions of this Court that hold that when a statute expressly

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[6/] *Wilkes* and other cases holding that laws waiving sovereign immunity may be applied retrospectively are inapposite for another reason. As this Court has noted, "[b]ecause the retrospective law prohibition was intended to protect citizens and not the state, the legislature may constitutionally pass retrospective laws that waive the rights of the state." *Savannah R-III Sch. Dist. v. Public Sch. Ret. Sys.*, 950 S.W.2d 854, 858 (Mo. banc 1997). In contrast, the 2000 amendment, subjecting sellers of real estate to a new cause of action, certainly was not a voluntary waiver by those sellers.

provides for another means of enforcement — *e.g.*, by a state agency — and does not clearly imply a private right of action, a violation of the statute does not give rise to a private cause of action. *See, e.g., Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 667-68 (Mo. banc 1999) (mandate of statutes regulating Medicare supplement insurance is carried out through "system of regulatory compliance and enforcement, not private lawsuits"); *Johnson v. Kraft Gen. Foods, Inc.*, 885 S.W.2d 334 (Mo. banc 1994) (§454.505.10, prohibiting employment decisions based on a child support withholding order, does not give rise to a private cause of action; legislature manifested its "intent to create a cause of action exclusively in favor of the Director" of state agency); *R.L. Nichols Ins., Inc. v. Home Ins. Co.*, 865 S.W.2d 665, 666-67 (Mo. banc 1993) (legislature vested director of insurance with means of enforcement of §375.035, and its violation did not give rise to private cause of action).

The defendants in those cases had a "duty" not to violate those statutes to the same extent that sellers and lessors of real estate had a duty not to violate the Act in 1999, and the plaintiffs in those cases had a "right" to be free of such violations to the same extent plaintiff and other purchasers of real estate had a right to be free of a violation of the Act. Like Mr. Dierkes, Mr. Johnson, and the Nichols agency, though, plaintiff had no private cause of action under the Act. The holdings in these cases also undermine plaintiff's "private attorney general" argument (Br. 38-40). Purchasers of real estate were not "private attorneys general" under the Act until the 2000 amendment to §407.025 created a private cause of action on their behalf — too late to provide a cause of action for plaintiff.

Plaintiff's reliance on *State Division of Family Services v. Slate*, 959 S.W.2d 944 (Mo. App. 1998), and *Gunter v. Bono*, 914 S.W.2d 437 (Mo. App. 1996), is as misplaced as his reliance on *Wilkes* (Br. 36-38). The statutory amendment at issue in *Slate* did not create an illegitimate child's right to retroactive child support. As the Court noted, that right had been recognized in *McNulty v. Heitman*, 600 S.W.2d 168, 171-72 (Mo. App. 1980). *Slate*, 959 S.W.2d at 944. The statutory amendment simply "prescribe[d] a method of enforcing the right." *Id.*

Gunter involved the amendment of §315.476(2)(5), which removed a temporal limitation on a dissolved corporation's ability to enforce its rights. The Court held that the amended statute was procedural and remedial because it "merely provide[d] a legal channel" through which the plaintiffs could vindicate their "[substantive] right to full payment on the promissory note, a right that has existed since the note was executed." 914 S.W.2d at 441. In contrast, purchasers of real estate did not have any right of action under the Act until the 2000 amendment was enacted.

Plaintiff claims that the 2000 amendment should be applied retroactively because the Act is a remedial statute, and courts have held that amendments to remedial statutes should be applied retroactively (Br. 40, 46, citing *Leutzinger v. Treasurer, Custodian of Second Injury Fund*, 895 S.W.2d 591, 594 (Mo. App. 1995)). But the Act is not strictly remedial — it is penal in several aspects, including the provisions for criminal sanctions, the penalty in §407.100, and punitive damages. *See Myers*, 779 S.W.2d at 289-90 (noting that the Act is both remedial and penal, and thus "should be considered … penal when enforcement of the penalty is sought"); *see also Garrett v. Citizens Sav.*

Ass'n, 636 S.W.2d 104, 111 n.4 (Mo. App. 1982) (amendment to anti-usury statute providing for double penalty was not "'strictly remedial'").

Moreover, Missouri courts have often held that amendments to the Act and remedial statutes such as the Workers' Compensation Act were substantive and therefore could be applied prospectively only. *See, e.g., Patrick v. Clark Oil & Ref. Co.*, 965 S.W.2d 414 (Mo. App. 1998) ("dual employment" provision in Workers' Compensation Act was substantive); *Stark v. Missouri State Treasurer*, 954 S.W.2d at 647 (same); *Stillwell v. Universal Constr. Co.*, 922 S.W.2d 448, 455-56 (Mo. App. 1996) (amendment increasing limit in burial allowance under workers' compensation statute was substantive), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003); *Cornelius*, 729 S.W.2d at 66 (amendments to Act could be applied prospectively only); *San Juan Prods.*, 728 S.W.2d at 735 n.1 (same).

2. Because the 2000 amendment creates a new obligation, imposes a new duty, or attaches a new disability, it may be applied prospectively only.

In addition to Chase's vested right to be free from liability to an individual under the Act, the 2000 amendment is substantive and subject to prospective application only for other reasons. In reciting the standard for determining whether a statute may be given retroactive application, plaintiff studiously ignores well-established case law holding, as set forth above, that a statute is also substantive and may be applied only prospectively when it creates a new obligation, imposes a new duty, or attaches a new disability (Br. 17-18). *See, e.g., Doe v. Phillips*, 194 S.W.3d at 850; *Buder*, 515 S.W.2d

at 410; *Cornelius*, 729 S.W.2d at 66. By subjecting vendors and lessors of real estate to a private right of action under the Act and a potential judgment including actual damages, punitive damages, and attorney's fees, the 2000 amendment did in fact create new obligations, impose new duties, and attach new disabilities.

Other cases have followed *Cornelius* in holding that statutes which increase a litigant's potential liability or provide new remedies to their litigation opponent are substantive because they create a new obligation or impose a new duty. In *Wellner*, 16 S.W.3d at 355, for example, the Court of Appeals held that a statute allowing a driver who successfully appeals the suspension of his driving privileges to collect attorney's fees and costs "created a new obligation or imposed a new duty, and, therefore, is substantive in nature" (citing *Cornelius*, 729 S.W.2d at 66). Awarding fees and costs under the new statute "would constitute a retrospective application of a substantive law since the statute increases the penalty after the conduct to be penalized has already occurred." 16 S.W.3d at 355. Plaintiff feebly attempts to distinguish *Wellner* by pointing out that it involved a waiver of sovereign immunity, a distinction which is of course shared by *Wilkes*, on which plaintiff so heavily relies (Br. 46). But unlike *Wilkes*, the holding in *Wellner* is based not on the waiver of immunity but on the statute's creation of a new obligation or imposition of a new duty. *Id.*

In *Wellner*, the Court discussed in detail its holding in *State Board of Registration for Healing Arts v. Warren*, 820 S.W.2d 564, 565 (Mo. App. 1991), in which a statute providing for attorney fees and costs to be paid to the prevailing party in an

administrative proceeding was determined to be substantive. The Court in *Warren* explained its decision as follows:

> "Before the enactment of § 536.087 there was no requirement that the state pay attorney fees or other expenses. The statute created a previously unrecognized right in certain prevailing litigants and imposed new obligations on the state by eliminating an immunity that it previously enjoyed. These factors define the law as substantive and its retrospective application as violative of vested rights." 820 S.W.2d at 566.

Thus, even if plaintiff were correct in characterizing the 2000 amendment as simply adding new remedies, his contention that the amendment therefore can be applied retroactively is inaccurate. *See*, *e.g.*, *Buder*, 515 S.W.2d at 411 (amended statute removing $50,000 damages cap in wrongful death actions could be applied prospectively only; "previous monetary ceiling . . . . operated to protect defendants from verdicts in excess of a certain maximum"); *Stillwell*, 922 S.W.2d at 455-56 (amendment was substantive because the employer "possessed a vested right under Section 287.240.1 that its liability for burial expenses could not exceed $2,000"); *Garrett*, 636 S.W.2d at 111.

3. The 2000 amendment increased the measure of damages a defendant faces under the Act and is punitive, and must be applied prospectively only.

Plaintiff maintains that "[t]he fact that [he] may be entitled to a different *remedy* post-2000 is irrelevant" because a change in the applicable measure of damages

is procedural, "and must be retroactively applied" (Br. 40-41). He ignores that he had no cause of action, and was thus entitled to no remedy, before the 2000 amendment. As discussed in Point I.B.2, *ante*, the 2000 amendment may not be applied retrospectively in this case because doing so would create a new obligation and impose a new duty on the part of Chase, and would attach a new disability to it. Cases such as *Wellner*, *Warren*, *Buder*, and *Stillwell* conclusively demonstrate that an *increase* in the measure of damages is in fact substantive and cannot be applied retroactively.

Plaintiff claims that a "statutory amendment which increases or decreases a defendant's financial exposure for conduct already declared unlawful … is procedural … and must be retroactively applied," but the cases he cites do not support that proposition (Br. 40-41). *Pierce*, 969 S.W.2d 814, and *Croffoot v. Max German, Inc.*, 857 S.W.2d 435 (Mo. App. 1993), did not involve "unlawful conduct" at all, and in both an amended statute was applied retroactively to *reduce* the plaintiff's recovery. At issue in *Pierce* was an amendment to §208.215, which gave the trial court discretion to reduce the Department of Social Services' recovery of Medicaid payments when the recipient of those payments has also received compensation from a third party. 969 S.W.2d at 819-20. The Court of Appeals held that the amended statute was remedial because it "substituted a new or more appropriate remedy for the enforcement of the Department's existing right in its cause of action to recover public assistance benefits paid." *Id.* at 823.

In *Croffoot*, an amendment to §287.160.3, limiting interest on a worker's compensation award, was applied retroactively. The Court of Appeals stated that the statute "does not define or regulate a claimant's right to compensation for injuries, but

affects only the measure of damages in the enforcement of that right." 857 S.W.2d at 436. The Court made clear that a different result would obtain if the amended statute had increased the defendant's liability. It noted that "[r]etroactive application of the statute does not offend notions of justice and fair play," contrasting the scenario before it with *Buder*, in which the removal of the damages ceiling was not applied retroactively because it was "enacted to protect defendants during its operation." *Id.*

Plaintiff cites no cases to support his theory that because "the scope of Chase's exposure after the 2000 amendment does not *materially differ* from its pre-amendment liability," the amendment may be applied retroactively (Br. 41, emphasis added). In any event, a real estate vendor or lessor's exposure after the 2000 amendment is in fact drastically different than under the previous version of the Act. In being exposed for the first time to lawsuits by private plaintiffs, vendors and lessors now face potential awards of actual damages, punitive damages, and attorney's fees. Plaintiff ignores the potential actual damage awards vendors and lessors now face, apparently assuming that actual damages are the equivalent of the restitution that the Attorney General can recover at the court's discretion. Plaintiff, however, sought actual damages on his fraud claim in the amount of $408,000, which exceeds by a multiple of almost eight the amount he paid for the property.

As for the potential punitive damage and attorney's fee awards, contrary to plaintiff's claim, vendors and lessors had no exposure to either prior to the amendment.[7/] Plaintiff attempts to downplay the significance of the newly-created punitive damages exposure, citing the statement in *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. banc 1986), that "punitive damages are remedial." Plaintiff's discussion of *Vaughan* throughout his brief is misleading at best (Br. 34, 42-43). He cites *Vaughan* for the proposition that "'"[n]o person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights,'" including that person's level of financial exposure under prior law" (Br. 34). But *Vaughan* had nothing to do with whether the defendant had a "vested right" in any particular "level of financial exposure";

[7/] As an initial point, plaintiff's contention that the "retroactivity analysis should be separately applied" to "the attorneys fees and punitive damages remedies" is misguided (Br. 41). In *U.S. Life Title Insurance Co. v. Brents*, 676 S.W.2d 839, 842 (Mo. App. 1984), the Court stated that "[i]f part of the *law* is prospective in operation, it is evidence that the *whole law* is intended to be prospective in operation" (emphasis added). In *State ex rel. Carlund Corp. v. Mauer*, 850 S.W.2d 357, 361 (Mo. App. 1993), the Court cited *Brents* but modified that statement: "Punitive prospective provisions within the subsection are evidence that the legislature intended that the entire subsection have prospective application." *Carlund Corp.*, though, involved the retroactivity *vel non* of a statutory section with five subsections. Here, only §407.025.1 is at issue, so under either *Brents* or *Carlund Corp.*, if any aspect of it is prospective, the entire section is as well.

to the contrary, its focus was on whether the plaintiff had a vested right to the punitive damages available under the version of the Missouri service letter statute, §290.140, in effect when his claim accrued. A subsequent amendment, in effect at the time of his trial, added a *prohibition against* punitive damages. *Id.* at 659. Noting that "[p]unitive damages are never allowable as a matter of right" because they are "'allowed in the interest of society, and not to recompense solely the victim,'" this Court concluded that a plaintiff therefore has no vested right to receive them, and held that the amendment could thus be applied retroactively. *Id.* at 660 (citation omitted).

Section 407.025 provides for an award of punitive damages, and is therefore substantive because it is both penal and imposes a new obligation on and/or attaches a new disability to vendors and lessors of real estate. Plaintiff's reliance on the Court's statement in *Vaughan* that "punitive damages are remedial" is grossly misplaced (Br. 43). Whether a plaintiff has a vested right to be awarded punitive damages, which are intended to punish and deter and not to compensate, is a vastly different question than whether a defendant has a vested right not to be subject to a punitive damage award. The constitutional implications, for example, are poles apart. As this Court noted in *Vaughan*, a plaintiff has no right of constitutional dimension in being awarded any particular remedy. *Id.* at 660. But due process affords a defendant a right to notice of both the conduct that will subject him to punishment and of the severity of the penalty he may face. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)). Under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Missouri

Constitution, subjecting Chase to punitive damages liability that it did not have prior notice of would violate its fundamental right to due process.

Plaintiff claims that even if punitive damages are substantive, vendors and lessors of real estate were already subject to "significant punitive sanctions" even before the 2000 amendment (Br. 43). Even if that were true, it wouldn't matter. Missouri law is clear that "'laws providing for penalties … are *always* given only prospective application.'" *Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights of City of Springfield*, 791 S.W.2d 382, 387 (Mo. banc 1990) (quoting *Brents*, 676 S.W.2d at 842); *see also Cornelius*, 729 S.W.2d at 66; *Brents*, 676 S.W.2d at 842.[8/] Plaintiff cites no cases holding that an exception exists when a previous version of the law provides for a different penalty, and the holding in *Garrett* demonstrates that there is no such exception: although the usury statute already provided for a penalty, interest, and attorney's fees, an amendment providing for a double penalty was held to be prospective only because it

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[8/] Plaintiff's claim that this principle should be limited to "true 'penalties' owing to the State" (Br. 45-46) ignores: (1) §537.675.3, which provides that 50% of a punitive damages award, after attorney's fees and costs, *is* payable to the State; (2) his own statement on the previous page promoting the "analogousness" of criminal penalties and punitive damages (Br. 44); and (3) United States Supreme Court precedent holding that punitive damages are "quasi-criminal," *see, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

"increase[d] the penalty." 636 S.W.2d at 110-11. *See also Campbell*, 538 U.S. at 417 (due process requires notice of the severity of a potential penalty).

In any event, vendors and lessors of real estate were not, as plaintiff claims, subject to "significant punitive sanctions" prior to the 2000 amendment. The civil penalty recoverable by the Attorney General under §407.100.6 was capped at $1,000 per violation. In contrast, as noted above, plaintiff's counsel asked for a punitive damages award between five and ten million dollars (Tr. XII:2216). As for the potential criminal sanction under §407.020.3, that applies only to "willful and knowing" violations of the Act, and the maximum fine in this case would have been only twice the purchase price of the property, or $104,000. Moreover, had the Attorney General pursued a criminal sanction against Chase, Chase would have been entitled to all of the constitutional protections available to criminal defendants, including the higher burden of proof and a unanimous jury.

Picking up on an argument raised by the Court of Appeals *sua sponte*, plaintiff contends for the first time in this case that §407.140.3 provides for an "uncapped" penalty against vendors and lessors (Br. 43). That argument is a gross distortion of that section. Section 407.140.3, the purpose of which is to fund the Merchandising Practices Revolving Fund, certainly cannot be read to authorize a penalty without limit. Read in context, the phrase "or such other amount as may be … awarded by the court" is intended to give the court some flexibility to award an amount that is not strictly ten percent of the restitution award. But to read that phrase as legislative authority to award any amount whatsoever runs afoul of the excessive fines and due

process clauses of both the Missouri and United States Constitutions. *Cf. State v. Polley*, 2 S.W.3d 887, 890, 894-95 (Mo. App. 1999) (action by Attorney General under the Act; penalty that falls within statutorily prescribed range is not excessive fine).

The few cases addressing awards made under §407.140 demonstrate that it does not provide for an "uncapped penalty." *See, e.g., Polley, id.* (referring to $1,554.50 "contribution" to the Fund, which was ten percent of the court's restitution award); *Cornelius*, 729 S.W.2d at 66 (referring to an award under §407.140 as a "fine of ten percent interest"); *State ex rel. Webster v. Ames*, 791 S.W.2d 916, 917 (Mo. App. 1990) (awarding $141.36 to the Fund, ten percent of the restitution award); *State ex rel. Webster v. Eisenbeis*, 775 S.W.2d 276, 281 (Mo. App. 1989) (awarding $30,000, ten percent of the restitution award, to the Fund). Section 407.140.3 simply cannot be equated to a directive to a jury that it may award punitive damages to "punish and deter."

Plaintiff is likewise off the mark in assuming that the "costs of investigation and prosecution" recoverable by the Attorney General under §407.130 include attorney's fees. As this Court has noted, "the term 'costs' as used in a statute does not include attorneys' fees, with certain exceptions." *State ex rel. Cain v. Mitchell*, 543 S.W.2d 785, 786 (Mo. banc 1976); *Wirken v. Miller*, 978 S.W.2d 60, 63 (Mo. App. 1998) (same). If the legislature had intended §407.130 to allow the Attorney General to recover attorney's fees, certainly it would have said so. The Missouri statutes, including §407.025, are replete with references to attorney's fees. *See, e.g., Cook v. Newman*, 142 S.W.3d at 892 ("[w]hen different terms are used in different subsections of a statute, presumably, the legislature intended the terms to have different meaning and effect"). Even if §407.130

could be interpreted to authorize an award of attorney's fees to the Attorney General, a quantum difference exists between the potential attorney's fee exposure a vendor or lessor of real estate would face in an enforcement action brought by the Attorney General compared to a potential fee award in litigation brought by private counsel.

Plaintiff's desire to recover attorney's fees is understandable, given the paltry amount of his recovery compared to the damages he requested and the large sum he no doubt sunk into this case, as evidenced by his two testifying expert witnesses and the 80 or so depositions taken in the case (Tr. XII:2311). But Chase had no exposure to attorney's fees at the time of the 1999 real estate transaction, and certainly no exposure to private attorney's fees. Because the 2000 amendment increases the measure of damages a defendant faces under the Act and is punitive, it cannot be applied retroactively.

C. Even If Plaintiff's Claim Under the Act is Reinstated, The Resolution Plaintiff Proposes — A New Trial on Actual and Punitive Damages Only—Would Be Improper Because (1) Plaintiff Did Not Prove All the Elements of a Claim Under the Act; and (2) Even If He Had Proven the Elements of a Claim Under the Act, the Jury Considered and Rejected His Claim for Punitive Damages.

1. Plaintiff did not prove all the elements of a claim under the Act.

Plaintiff's assertion that "[t]o prove a violation of the Merchandising Practices Act, it is not necessary to prove all the elements of common law fraud" (Br. 48) is correct as far as it goes. But his contention that the nondisclosure verdict in his favor means that he "also necessarily proved Chase's violation of the [Act]" (Br. 48) overlooks that a cause of action under §407.025 is available only to persons who purchase or lease merchandise "primarily for personal, family or household purposes." *See State ex rel. Nixon v. Telco Directory Publ'g*, 863 S.W.2d 596, 599 (Mo. banc 1993) (in contrast to private right of action created by §407.025.1, Attorney General's right to enforce Act under §407.100 is not limited to purchases for personal or household use).

Even if this Court determines that plaintiff's nondisclosure claim was properly submitted to the jury, in returning its verdict the jury did not have to consider the purposes for which plaintiff purchased the property (Plf's Apdx A42-43; S.L.F. 8-9). Because the trial court dismissed plaintiff's claim under the Act, whether plaintiff — a former home inspector and real estate agent — purchased the property for personal, family or household purposes was not at issue, and Chase had no reason or incentive to

present evidence on the issue or to cross-examine plaintiff on the nature of his intentions at the time of his purchase. In the unlikely event that this Court reverses the dismissal of plaintiff's claim under the Act and upholds the judgment in his favor on his fraudulent nondisclosure claim, the case should be remanded to the trial court for a new trial on liability and damages on plaintiff's claim under the Act.

2. Plaintiff is not entitled to a second shot at punitive damages.

In its opinion, the Court of Appeals overlooked the "for personal, family, or household purposes" requirement, and held that plaintiff was entitled to a new trial on actual and punitive damages (Plf's Apdx A36), and plaintiff seeks the same result before this Court. Even if the jury's nondisclosure verdict were dispositive of plaintiff's claim under the Act, the jury denied plaintiff's claim for punitive damages, necessarily finding that Chase's conduct was not outrageous. *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140 (Mo. banc 2005), does not apply because the jury there had already awarded the plaintiff punitive damages on his fraud claim when this Court held that his claim for punitive damages under the Act should have been submitted as well. Plaintiff was allowed to try his case to the jury and to ask for an award of punitive damages based upon all of the facts he could muster to support his claim that Chase's conduct was "outrageous." The jury heard and rejected that argument. It would be patently unfair to expose Chase a second time to potentially unlimited punitive damages when nothing at all has changed about Chase's alleged conduct.

Because the jury here rejected plaintiff's punitive damages claim, Chase cannot be subjected to a new trial on punitive damages by reason of collateral estoppel. *See, e.g.*, *State ex rel Conners v. Miller*, 194 S.W.3d 911, 913 (Mo. App. 2006) (collateral estoppel precludes relitigation of the same issue decided in prior litigation between the same parties in which the party to be estopped had a full and fair opportunity to litigate the issue). Plaintiff wants to parlay his nondisclosure verdict into a victory on his claim under the Act even though no jury has ever considered that claim, but at the same time he asks that a second jury consider anew his entitlement to actual and punitive damages in the hope that a different result would prevail on the same facts. Plaintiffs' attempt at a second bite at the apple should not be countenanced.[9/]

[9/] Nothing in the Attorney General's *amicus* brief bears on the sole issue raised by plaintiff's appeal, whether the 2000 amendment may be applied retroactively. He purports to address the Court of Appeals' discussion of the proper elements of a claim under the Act, but that opinion has been vacated. As explained above, remand on all issues is the only proper outcome if plaintiff's appeal is successful and the nondisclosure verdict stands. In that event, the trial court must in the first instance consider the elements of a claim under the Act; for this Court to do so would be an improper advisory opinion. *See, e.g.*, *State v. Self*, 155 S.W.3d 756, 761 (Mo. banc 2005). Further, the Attorney General's reference to his "numerous enforcement actions against sellers of real estate during the past three decades" (*Amicus* Br. 13) serves only to highlight his apparent lack of interest in taking any such action on plaintiff's behalf.

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Allowing plaintiff to pursue an action under the 2000 amendment, thereby subjecting Chase to liability for actual and punitive damages and attorney's fees that it did not face at the time of the 1999 transaction, would represent a complete sea change in this Court's retroactivity analysis under Article I, §13. It would impermissibly give the parties' 1999 transaction far "different effect[s] from that which it had when it transpired." *See Rice*, 22 S.W.3d at 782-83; *Phillips*, 194 S.W.3d at 850. The after-the-fact exposure to punitive damages, in particular, would be fundamentally inconsistent with principles of due process. Because the amendment to §407.025 creates a new cause of action on the part of certain purchasers and lessees of real estate, takes away the vested right of vendors and lessors to be free from suit under the Act, is punitive, and creates new obligations for, imposes new duties on, and attaches new disabilities to vendors and lessors, it is plainly substantive. This Court should affirm the trial court's dismissal of plaintiff's claim under the Act.

CONCLUSION

For the reasons stated, the dismissal of plaintiff's claim under the Merchandising Practices Act should be affirmed, and the judgment against Chase on plaintiff's fraud claim should be reversed and the case remanded with instructions to enter judgment for defendant.

Respectfully submitted,

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CERTIFICATE REQUIRED BY SUPREME COURT RULE 84.06(c)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Rule 84.06(b)(1). The foregoing brief contains 18,486 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(g) has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Chase Manhattan Bank USA, N.A.'s Substitute Brief as Respondent and as Cross-Appellant, as well as a diskette formatted in Word XP were mailed first class, postage pre-paid, on this 18th day of September, 2006, to:

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INDEX FOR APPENDIX