No. SC87691

IN THE SUPREME COURT OF MISSOURI

DENNIS E. HESS,

Plaintiff-Appellant,

v.

CHASE MANHATTAN BANK USA, N.A.,

Defendant-Respondent.

Appeal from the Circuit Court of Platte County, Missouri
Case No. 00CV82892 – Honorable Abe Shafer, Judge

PLAINTIFF-APPELLANT'S SUBSTITUTE OPENING BRIEF

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JURISDICTIONAL STATEMENT

This lawsuit concerns the April 1999 sale of property in rural Platte County, Missouri by Defendant-Respondent Chase Manhattan Bank USA, N.A. ("Chase") to Plaintiff-Appellant Dennis E. Hess. LF2.[1] Mr. Hess filed suit in April 2000, claiming that Chase had defrauded him by failing to disclose material information in its possession concerning the United States Environmental Protection Agency's investigation of hazardous waste disposed at the property. LF2-9. Before trial, the Circuit Court dismissed Mr. Hess' claim under Missouri's Merchandising Practices Act, § 407.010 RSMo *et seq.* LF64. After a seven-day trial a jury found in Mr. Hess' favor on his common-law fraud claim, and awarded him actual damages of $52,000.00, his initial purchase price for the property. LF145, SLF14.

The Circuit Court entered its final judgment on July 9, 2004. LF89, 149. Mr. Hess timely filed his Notice of Appeal on July 19, 2004. LF90-97. Chase filed its Notice of Cross-Appeal on August 2, 2004. LF149. Because this appeal does not involve any issue within this Court's exclusive appellate jurisdiction, original appellate jurisdiction lay in the Court of Appeals. Missouri Const. Art. V, § 3.

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[1] Mr. Hess cites the Transcript on Appeal as "Tr.," the Legal File as "LF," Chase's Supplemental Legal File as "SLF," the Supplemental Record consisting of deposition excerpts read at trial as "SR," and the Supplemental Record of Exhibits Admitted at Trial as "2SR."

The Court of Appeals, Western District, issued a unanimous 36-page Opinion on March 28, 2006 (Smith, C.J., joined by Howard and Newton, JJ.). (A copy of the Court of Appeals' Opinion ("Op.") is included in the Appendix to this Brief.). The Court affirmed the jury's fraud verdict in Mr. Hess' favor, and reversed the Circuit Court's dismissal of Mr. Hess' Merchandising Practices Act claim. The Court of Appeals held that the jury's fraud verdict established Chase's liability under the Merchandising Practices Act, because the statutory claim required a *lesser* showing than under the common law. The Court remanded the statutory claim solely for assessment of Mr. Hess' actual and punitive damages and attorneys fees under the Act. Op. 22-31.

This Court sustained Chase's Application for Transfer on June 30, 2006.

STATEMENT OF FACTS

This appeal must be decided in light of the jury's fraud verdict in Mr. Hess' favor. In reaching its verdict the jury necessarily found:

- that Chase failed to disclose that the United States Environmental Protection Agency ("USEPA") was involved with environmental issues concerning the property, with the intent of deceiving Mr. Hess;
- that Chase had superior knowledge of USEPA's involvement with the property, information which was not within Mr. Hess' "fair and reasonable reach";
- that Chase's purposeful concealment was material to Mr. Hess' purchase decision;
- that Mr. Hess reasonably relied on Chase's concealment; and

- that Chase's concealment damaged Mr. Hess.

SLF8-9 (verdict directing instruction and converse), 14 (completed verdict form) (included in the Appendix). As shown below, these findings are amply supported by the evidence.

1. The Platte County Property.

The property at issue in this litigation – located at 19015 Humphrey Access Road in Platte County, Missouri – is a four-acre lot in what was at that time a generally rural portion of southwestern Platte County. 2SR2. The property is surrounded by expansive acreage and has a view of an outlying lake. Tr. 1177. In 1999, a three bedroom home was located on the property; but that home was in disrepair, and in need of extensive rehabilitation or demolition. 2SR4.

Chase acquired the property after its mortgagor, Billy Stevens, pled guilty to federal environmental charges for illegally disposing of hazardous wastes, Tr. 309-22, declared bankruptcy and defaulted on his mortgage. Chase began the foreclosure process in April 1998, and obtained relief from the bankruptcy court to proceed with foreclosure in June or July of 1998. Tr. 821, 881. Chase bought the property out of foreclosure on January 22, 1999. Tr. 631.

Chase sold the property to Mr. Hess for $52,000.00 on April 23, 1999. Tr. 1160. Mr. Hess made substantial improvements to the property after purchasing it, including building a new home on the existing foundation and a swimming pool, all financed by a $250,000 mortgage. Tr. 1174-75, 1202. Despite investing more than $300,000, Mr.

Hess' evidence at trial was that the property was valueless and unmarketable due to environmental conditions. Tr. 1224, 1771-75.

2. USEPA's Activities Concerning the Property, and Chase's Knowledge of USEPA's Involvement.

At the time Chase sold the property to Mr. Hess, USEPA was actively investigating paint waste and solvent dumping at the property. A former Assistant United States Attorney testified that USEPA was investigating environmental crimes related to the property in 1998. Tr. 305-06, 321-22, 465-66, 499-500. Former employees of Mizzou Paint, a company owned by Chase's mortgagor Billy Stevens, testified that they met with USEPA regarding disposal at the property of commercial hazardous wastes from painting and sandblasting operations. Tr. 377-82, 465-66, 499-500. One of the employees described two occasions on which he transported truckloads of 55-gallon drums of waste from Mizzou Paint to the property, and dumped the contents onto the ground. Tr. 461-75. These hazardous wastes consisted of "residential paint thinners and anything, byproducts, left over from what the field or the shop was doin'." Tr. 473; *see also* Tr. 494-95 (wastes included paint thinners and waste paints). The materials were illegally dumped at the property to avoid the costs of legal disposal, and due to concerns that the wastes were accumulating at Mizzou Paint's facility, and might be observed by State inspectors. Tr. 463, 467-68.

Mr. Stevens entered a guilty plea to federal environmental criminal charges on December 21, 1998; part of the factual basis for his plea was the unlawful disposal of at least three to four truckloads of 55-gallon drums of hazardous waste from Mizzou Paint

at the property. Tr. 309-10, 320-22. Chase bought the property out of foreclosure a month later. Tr. 631.

Prior to Chase's sale of the property to Mr. Hess, it had knowledge of USEPA's involvement with the property. It is undisputed that Chase did not share that information with Mr. Hess, Tr. 1172-73, 1211; SR34-37, 43-45, or with other potential buyers who testified at trial and had themselves made offers to purchase the property. Tr. 973-74, 997, 1010, 1021, 1040. Both Mr. Hess and the other potential buyers testified that they would not have offered to buy the property if they had known the information which the jury found Chase had intentionally concealed. Tr. 997-98, 1010-11, 1097, 1172-73, 1211.

Chase's information concerning USEPA's activities came from multiple sources. Chase's foreclosure counsel (the Kramer & Frank firm) received at least two phone calls concerning the property from Mike Gieryic, a USEPA attorney. Tr. 836, 888-89, 897-98, 901-902; 2SR24, 30, 32, 36, 40. Kramer & Frank informed Chase employee Joann Flors of these communications, and received Ms. Flors' consent to USEPA's entry on the property to perform a removal action. Tr. 618-21, 838-41, 859-60, 907-09, 933-34; 2SR24, 27-28, 30, 32, 36, 40. Records of that communication were included in Chase's electronic file for the property. *Id.*

The trial testimony also revealed that the listing agent for the adjacent property notified Chase that the USEPA had been contacted regarding the property. Tr. 666-71, 688-91. Chase's foreclosure counsel likewise received notice from representatives of the

neighboring property that the USEPA was involved with the property. Tr. 824-28, 891-93; 2SR24.

Following Chase's purchase of the property at the foreclosure sale, the "whole file" was transferred to Chase's Real Estate Owned ("REO") Department, which handled the property sale to Mr. Hess. Tr. 631-32.

Following foreclosure, Kramer & Frank received another call from representatives of the neighboring property referencing USEPA. Tr. 918; 2SR29. Finally, Julie Graves, a Kramer & Frank attorney, spoke with Chase REO Specialist Amber (Braun) Metzler regarding the USEPA issues. Ms. Graves confirmed this conversation in a February 18, 1999 letter, which stated that Chase had "the name and number of the attorney from the EPA and will contact him in the next couple of weeks," and that Ms. Graves would "not deal with the EPA issues any further," because Ms. Metzler would handle the matter directly. Tr. 920-24; 2SR31.

Chase's REO Specialist, Ms. Metzler, commissioned an appraisal of the property before listing it for sale. Under the heading "Adverse environmental conditions," the appraisal report explicitly noted on page one that "the EPA is scheduled to inspect the site and possible requirement [sic] may be made." 2SR2. Ms. Metzler acknowledged ordering and receiving the appraisal, and using the appraisal to set the property's listing price. SR41-42.

Despite her conversation and correspondence with foreclosure counsel, the electronic records in her file concerning similar earlier conversations, and the explicit statement in the appraisal report she had ordered, Ms. Metzler initially denied that she

was aware of USEPA's involvement with the property prior to the sale to Mr. Hess. Thus, in a February 2002 deposition played to the jury, Ms. Metzler testified that Chase's file contained "***no documentation * * * that anyone had been contacted by EPA*** at all during any of the processes." SR13 (emphasis added). Ms. Metzler was emphatic: she testified that she had gone through "***every document in the file*** whether it was part of the origination site, the foreclosure, preforeclosure, REO, any portion of the file that had any documentation in it, ***there's no reference to EPA***." *Id.* (emphasis added).[2]

Although claiming ignorance, Ms. Metzler acknowledged that, if she *had* known of EPA's involvement, "***It would be illegal not to disclose that***." SR127 (emphasis added).

Chase initially withheld from production the February 1999 letter from foreclosure counsel to Ms. Metzler, which recited the prior contacts with USEPA, and the understanding that Ms. Metzler would take appropriate follow-up actions. On Mr. Hess' Motion, the trial court ordered the letter's production. Ms. Metzler's deposition was reconvened for the third time in November 2003 following Chase's compelled production. At that deposition Ms. Metzler was confronted with the letter, the appraisal referencing a USEPA inspection and "possible requirement[s]," and Chase's electronic

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[2] In February 2000, in response to a call from Mr. Hess, Ms. Metzler made an electronic notation in the file which similarly proclaimed that Chase "had no knowledge, no documentation, no contact from EPA" prior to the property sale. SR48, 50; 2SR45.

records reflecting four phone conversations concerning USEPA issues. SR33-44. Ms. Metzler acknowledged that it was "quite possible" she had seen the letter while working on the account in 1999, and that the letter would have been in her file at the time of Chase's sale of the property to Mr. Hess. SR33, 45, 48-50. While she was "not denying that [the contrary documents] were in the file," Ms. Metzler testified that she "just [did not] recall specifically looking at those documents." SR54.

3. Mr. Hess' Purchase of the Property.

In 1999 Dennis Hess was living and working in the Kansas city area. Tr. 1162. Certain members of Mr. Hess' family were also living in the greater Kansas City area, including several of his grandchildren. Although he wanted to stay in the area for family reasons, Mr. Hess was looking for a property with some acreage away from the city, where he could build a house on a hill with the view and land he had always wanted. As Mr. Hess testified at trial, he "wanted the southern exposure, high on a hill." Tr. 1177.

Mr. Hess testified that he fell in love with the property from the first time he saw it. Tr. 1170-71. He felt that the property was "perfect" for his needs – substantial acreage, relatively close to the city while still being "in the country," and situated so that "you can see for 20 miles." *Id*. Although the structure on the property was dilapidated, that was not a concern – Mr. Hess had planned on building a new home on the property site. Tr. 1174. Mr. Hess testified that the listing price of $54,000 essentially valued the property as if it were unimproved land, subject to the need to either substantially rehabilitate, or remove, the existing structure. *Id.* The house on the property "was just a pile of junk"; "anything in there inside had no value." *Id.*

Mr. Hess planned to rehabilitate the dilapidated house, and build his dream home in its place. Tr. 1174-78. Chase's listing agent knew of his intentions. Tr. 1176-77. Mr. Hess testified that it was obvious that any purchaser would have to make substantial additional investments to make the property habitable. Tr. 1174.

In the three years following his purchase, Mr. Hess salvaged the foundation, plumbing and some additional building materials from the original home, and built his new home on the site. Tr. 1174-75. Mr. Hess also built a pool. Tr. 1182-83. To keep costs down, he did much of the extensive rehabilitation work on his own, including drafting the plans and acting as the general contractor. Tr. 1174. Mr. Hess took out a $250,000 mortgage to pay for the improvements. Tr. 1174-75, 1202. When the extensive rehabilitation project was complete, the home appraised at values ranging from $215,000 to $315,000. Tr. 1201-02.

Due to concerns over environmental contamination discovered by his consultants, however, Mr. Hess was not living at the property at the time of trial. Tr. 1159-60, 1202. Instead, he was living in a rental property he owned in Kansas City, Missouri. Tr. 1159. He nevertheless continued to make monthly mortgage payments of $1873 per month on the property; at the time of trial he still owed approximately $245,000 on the mortgage. Tr. 1202.

Mr. Hess testified that he considers the property to be worthless. Tr. 1224. He presented testimony of an expert appraiser that the property had no market value at the time of Mr. Hess' purchase. Tr. 1775. The appraiser testified that there is no market in Platte County for contaminated residential properties, explaining that "a knowledgeable

buyer will not accept the liability and responsibility of a contaminated property such as this." Tr. 1771.

4. The Materiality of Chase's Non-Disclosure, and Mr. Hess' Reasonable Reliance.

The evidence clearly supported the jury's finding that Mr. Hess' failure to independently investigate, or discover, USEPA's involvement was reasonable. Two different local real estate agents (each with more than 15 years' experience) testified that they had never performed environmental inspections on residential properties, or contacted USEPA as part of a residential real estate transaction. Tr. 1017, 1022, 1057, 1099, 1100.

Chase has argued that Mr. Hess' claims relate solely to the presence of paint cans on the property, and that the presence of those paint cans was easily discoverable. *E.g.*, Application for Transfer at 2-3. Mr. Hess did not see waste paint cans stored on the property when he visited it. Tr. 1180. The paint cans were not easily accessible or visible. The foundation in which the cans were located was from an old barn, about 300 feet southwest of the house, and overgrown with weeds. Tr. 1178. The property is steep, and the view of the foundation was not clear from the house. Tr. 1178. Mr. Hess' contractor testified that he could not see the cans from the house, but that a person had to be "right next to" the barn foundation to see them. Tr. 1425-26. In any event, *even if* Mr. Hess had known of the paint cans, that knowledge would not have indicated *USEPA's involvement*: other potential buyers testified that they *had* seen the paint cans when inspecting the property, but had no idea USEPA was involved. Tr. 995-98, 1008-11.

Mr. Hess reasonably relied on Chase to disclose material adverse information in its possession. Mr. Hess testified that he would have expected disclosures of known adverse conditions affecting the property, even with an "as-is" sale. Tr. 1208-09. Two experienced local real estate agents who had represented other potential buyers similarly testified that seller disclosures would have been expected even in an "as-is" sale. Tr. 977-79, 982-83, 1025-26, 1042-44, 1095-99. As one of the agents testified: "I would have understood that the disclosures would still have been made. 'As-is' doesn't preclude disclosure. It just means that whatever's disclosed is not gonna be fixed." Tr. 1043.

Chase's own employee responsible for the property sale, REO Specialist Amber Metzler, testified that, notwithstanding the "as-is" clause in the purchase contract, "anything factual that we know as a certainty should be disclosed. ***It would be illegal not to disclose that***." SR127 (emphasis added).

Mr. Hess presented evidence at trial that he remained exposed to potential liability for further, substantial environmental remediation costs. One of his experts, Ray Forrester, testified that a more extensive groundwater study was needed for the site. Tr. 1536. Mr. Forrester testified to the high levels of contamination identified during the USEPA criminal investigation, and the failure of any subsequent study to establish the true extent of the contamination. Tr. 1523-33. Mr. Forrester testified that the further testing he recommended would cost approximately $78,000, apart from any cleanup which that testing suggested. Tr. 1570. (Mr. Hess had already paid Mr. Forrester more than $15,000.)

A second expert, Robert Morby, was a former director of USEPA's Region 7 Superfund program. Mr. Morby testified that the chemicals identified at Mr. Hess' property are hazardous substances under the Superfund law, and that their presence on the property made Mr. Hess a liable party under Superfund. Tr. 1814-18. Mr. Morby also testified that the pouring or open dumping of liquid wastes, as referenced in the investigative reports, were a matter of "great concern." Tr. 1837. Mr. Morby agreed that a groundwater study remained necessary, Tr. 1855, 1858-59, and emphasized USEPA's continued ability to demand cleanup or repayment of its costs. Tr. 1871-74.

5. Relevant Proceedings in the Circuit Court.

Mr. Hess filed this suit in April 2000. Mr. Hess' Second Amended Petition alleged claims against Chase for common law fraud (Count II) and violation of Missouri's Merchandising Practices Act, §407.010 RSMo, *et seq*. (Count III). LF9-12.[3]

Mr. Hess' Second Amended Petition alleged that Chase "had been advised and knew about adverse material facts relating to environmental problems and concerns with respect to the property, but failed to disclose any of these adverse material facts to Hess."

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[3] Mr. Hess voluntarily dismissed Counts IV and VI of his Second Amended Petition on December 13, 2002, LF118, and Count I on October 15, 2003. LF136. Mr. Hess did not submit his claim for Negligence (Count V) to the jury.

Pursuant to settlements, Mr. Hess dismissed his claims against the two other defendants, Kenneth B. Karns and Americana Real Estate, Inc., on January 9, 2004. LF141.

LF3 ¶ 9. The Petition detailed the course of USEPA's criminal investigation of the dumping of paint wastes and solvents at the property by Chase' mortgagor, LF3-4 ¶¶ 10-14, Chase's knowledge of USEPA's activities, LF4-5 ¶¶ 15-18, LF9-10 ¶ 49-50, Chase's failure to disclose this material information to Mr. Hess and Mr. Hess' ignorance of that information, LF6 ¶¶ 27-28, LF10 ¶ 51, and alleged that Chase intended to induce Mr. Hess' reliance in concealing the adverse information. LF10 ¶ 54. Based on these allegations, Mr. Hess asserted claims both for common-law fraud, and for breach of the Merchandising Practices Act, and prayed for actual and punitive damages, as well as his attorneys' fees. LF9-12.

On September 23, 2003, Chase moved to dismiss Mr. Hess' Merchandising Practices Act claim, arguing that the Act did not apply to this April 1999 real estate transaction. LF44-49. Although the Merchandising Practices Act afforded a private right of action for fraudulent nondisclosure in consumer real estate transactions at the time of trial, *see* § 407.025 RSMo, and although Chase's conduct had been prohibited by the Act and subject to Attorney General enforcement at the time it occurred, §§ 407.020, 401.100, Chase argued that the 2000 statutory amendment adding a *private* remedy for unfair practices in real estate transactions could not be applied here. LF45.

Mr. Hess opposed Chase's Motion, arguing that the 2000 statutory amendment merely supplemented the remedies that were available in 1999, and emphasizing that Chase's fraudulent nondisclosure had been unlawful under the Act when it occurred. LF50-53; Tr. 14-20.

The Circuit Court granted Chase's Motion to Dismiss the Merchandising Practices Act claim on October 16, 2003. LF64.

On May 3, 2004 Mr. Hess' remaining fraud claim, and Chase Manhattan's counter-claims for breach of contract and negligence, proceeded to jury trial. LF145. After seven days of testimony, the Circuit Court granted Mr. Hess' Motion for Directed Verdict on all of Chase's counter-claims, and submitted Mr. Hess' fraud claim to the jury. *Id.* On May 14, 2004, the jury returned its verdict in favor of Mr. Hess for fraudulent nondisclosure. *Id.*; SLF 14. The jury awarded Mr. Hess actual damages of $52,000.00, the initial purchase price for the property. *Id*.

Although the jury found in Mr. Hess' favor on his fraud claim, the Merchandising Practices Act claim would have entitled Mr. Hess to broader remedies, including attorneys fees. *See* § 407.025, RSMo. Accordingly, on June 9, 2004 Mr. Hess filed an after-trial Motion requesting that the Court reinstate his Merchandising Practices Act claim and allow him to elect his remedy between common law fraud and the Merchandising Practices Act prior to entry of final judgment. LF 75-88. On July 9, 2004, the trial court denied Mr. Hess' Motion, accepted the jury's verdict, and entered its Final Judgment in favor of Mr. Hess on his fraud claim. LF89, 149; Tr. 49-50.

Mr. Hess appealed the dismissal of his Merchandising Practices Act claim, and Chase cross-appealed from the jury verdict on Mr. Hess' common-law fraud claim. LF90-97, 149.

6. The Court of Appeals' Decision.

On March 28, 2006, the Court of Appeals, Western District issued a 36-page, unanimous Opinion reversing the dismissal of Mr. Hess' Merchandising Practices Act claim, and affirming the fraud award.

With respect to the Merchandising Practices Act claim, the Court emphasized that procedural or remedial laws "are presumed to operate retrospectively only, unless the legislature expressly states otherwise." Op. at 11-12 (citing *Wilkes v. Missouri Hwy. & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. 1988)). The Court of Appeals found that the statutory amendment on which Mr. Hess relied was remedial, and therefore applied here. The Court observed that, at the time of the real-estate sale, Mr. Hess "had an existing right, under § 407.020.1, for full disclosure from Chase, the violation of which, in effect, he was prevented from enforcing individually, due to the express terms of § 407.025.1, limiting prosecution of such violations to the Attorney General * * *." Op. 15. Given that Chase's conduct was *already* unlawful prior to the 2000 statutory amendment, the Court of Appeals found this Court's prior decision in *Wilkes* to be controlling:

> *Wilkes* teaches us that a statutory amendment, which does not create a right, but provides for a new and/or additional manner for enforcing an existing right or seeking redress for a violation of that right, is procedural and remedial in nature subject to retrospective application, absent express statutory language to the contrary. *Wilkes* implicitly rejects the proposition, urged by Chase, that the authorization of the prosecution of a cause of action that was previously barred is substantive in nature.

Op. 14.

Thus, Mr. Hess' Merchandising Practices Act claim could proceed, because the 2000 statutory amendment merely authorized a private suit to enforce pre-existing rights and obligations, as a supplement to existing enforcement mechanisms: "[T]here is no question that in extending, by amendment, the application of § 407.025.1 to real estate transactions, so as to allow individual redress, in addition to any action by the Attorney General, the legislature was providing a new and additional remedy for an alleged violation of the right guaranteed by § 407.020.1." Op. 15. The Court noted further that the remedies to which Chase was subject in Mr. Hess' private action were similar to those previously available to the State. Op. 16-21. "[B]ecause the amended version of § 407.025.1, expanding enforcement of the MPA, with respect to real estate transactions, to the filing of private causes of action, did not impose on Chase any new obligations, duties or disabilities, the amendment was procedure or remedial in nature." *Id.* at 22.

The Court of Appeals then addressed the appropriate disposition. After examining in detail the elements Mr. Hess proved on his common-law fraud claim, Op. 22-28, the Court concluded that the jury's fraud verdict necessarily established Chase's liability under the Act:

> In reading Instruction No. 6, instructing the jury on Hess's fraud count, Count II, it is readily apparent that all five proof elements of Hess's MPA count, Count III, were implicitly included in that instruction. Thus, inasmuch as the underlying operative facts were identical, the jury, in finding for Hess on Count II, would have been duty-bound to have found

> for him on Count III, as to liability, had it been submitted. * * * [¶] As such, on remand, the trial court must be instructed to find for Hess on Count III.

Op. 28.

Citing *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140 (Mo. 2005), the Court of Appeals held that Mr. Hess was entitled to a new jury determination of his actual and punitive damages, and to the Circuit Court's determination of his recoverable attorneys fees. Op. 29-31. "Once done, the trial court then must determine whether the awards under Count III [the Merchandising Practices Act claim], if any, merge with those awards made with respect to Count II [common-law fraud]." Op. 31.

In its cross-appeal, Chase argued for reversal of the fraud judgment on the ground that any duty to disclose on its part, or reliance on Mr. Hess' part, had been defeated by the terms of the parties' real-estate contract, which provide that "[t]he seller makes no representations, guaranties, or warranties * * * regarding the property," and that "[t]he property is being sold in 'AS-IS' condition with no expressed or implied representations or warranties." Op. 31. The Court of Appeals rejected these arguments. It held that Chase's arguments did not attack the submissibility of Mr. Hess' trial evidence, that the arguments amounted to an affirmative defense of waiver or release that was irrelevant to a submissibility argument, and that Chase had waived any such affirmative defense by failing to plead it. Op. 31-36.

This Court granted Chase's Application for Transfer on June 30, 2006.

POINT RELIED ON

THE TRIAL COURT ERRED IN DISMISSING MR. HESS' MERCHANDISING PRACTICES ACT CLAIM ON THE PLEADINGS BECAUSE THE PRIVATE CAUSE OF ACTION CREATED BY A 2000 AMENDMENT TO THE ACT IS APPLICABLE TO ALL CASES TRIED AFTER THE AMENDMENT'S EFFECTIVE DATE IN THAT THE AMENDMENT IS REMEDIAL OR PROCEDURAL AND DOES NOT ALTER CHASE'S SUBSTANTIVE RIGHTS OR OBLIGATIONS, CHASE MANHATTAN'S NONDISCLOSURE WAS ILLEGAL UNDER THE ACT AND SUBJECT TO ENFORCEMENT ACTION WHEN IT OCCURRED, AND THE LEGISLATURE DID NOT EXPRESSLY PROHIBIT APPLICATION OF THE 2000 AMENDMENT HERE.

- *Wilkes v. Missouri Hwy. & Transp. Comm'n.*, 762 S.W.2d 27 (Mo. 1988)
- *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656 (Mo. 1986)
- *Files v. Wetterau, Inc.*, 998 S.W.2d 95 (Mo. App. E.D. 1999)
- *Gunter v. Bono*, 914 S.W.2d 437 (Mo. App. E.D. 1996)
- Missouri Constitution Art. I, § 13
- § 407.020, RSMo
- § 407.025, RSMo

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING MR. HESS' MERCHANDISING PRACTICES ACT CLAIM ON THE PLEADINGS BECAUSE THE PRIVATE CAUSE OF ACTION CREATED BY A 2000 AMENDMENT TO THE ACT IS APPLICABLE TO ALL CASES TRIED AFTER THE AMENDMENT'S EFFECTIVE DATE IN THAT THE AMENDMENT IS REMEDIAL OR PROCEDURAL AND DOES NOT ALTER CHASE'S SUBSTANTIVE RIGHTS OR OBLIGATIONS, CHASE MANHATTAN'S NONDISCLOSURE WAS ILLEGAL UNDER THE ACT AND SUBJECT TO ENFORCEMENT ACTION WHEN IT OCCURRED, AND THE LEGISLATURE DID NOT EXPRESSLY PROHIBIT APPLICATION OF THE 2000 AMENDMENT HERE.

I. Under the Applicable Standard of Review, this Court Accepts the Allegations of Mr. Hess's Petition as True, and Reviews the Trial Court's Legal Ruling on the Retroactivity of the 2000 Statutory Amendment *De Novo*.

In reviewing the trial court's dismissal of Mr. Hess' Merchandising Practices Act claim, this Court must accept all of the allegations of Mr. Hess' Petition as true:

> A motion to dismiss for failure to state a cause of action is an assertion that, while taking all factual allegations as true, plaintiff's pleadings are insufficient to establish a cause of action. [¶] [It] is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable

> inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action * * *.

Grewell v. State Farm Mut. Auto. Ins. Co., 102 S.W.3d 33, 35-36 (Mo. 2003) (footnotes and citations omitted); *see also, e.g.*, *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). This Court reviews the trial court's legal rulings *de novo*. *Grewell*, 102 S.W.3d at 36.

II. The Circuit Court Erred in Dismissing Mr. Hess' Claim under the Merchandising Practices Act.

Count III of Mr. Hess' Second Amended Petition, which alleges a Merchandising Practices Act violation based on the same operative facts underlying Mr. Hess' common-law fraud claim, plainly pleads a cause of action under § 407.025, RSMo for Chase's use of unlawful merchandising practices in the sale of the Platte County property. LF11-12. Indeed, as the Court of Appeals recognized, Op. 9-10, Chase's Motion to Dismiss did not rely on any purported deficiency in Mr. Hess' pleading. LF44-48. Instead, Chase's Motion relied solely on its contention that the 2000 amendment to the Merchandising Practices Act, recognizing a private right of action for deceptive practices in the sale of real estate, could not be applied to the April 1999 transaction at issue here. *Id.*

The Court of Appeals properly rejected Chase's non-retroactivity argument. Chase argues that the private cause of action contained in the Merchandising Practices Act cannot be applied to this 1999 real estate transaction, even though:

- Chase's conduct was unlawful *when it occurred*, violating Chase's *then-existing* duty to refrain from "the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise," § 407.020, RSMo.;
- *at the time it occurred*, Chase's conduct subjected it not only to liability for common-law fraud, but to enforcement action by the Missouri Attorney General under the Act, in which the Attorney General could seek injunctive relief, restitution, unlimited civil penalties, and attorneys' fees, as well as potentially subjecting Chase and its employees to criminal felony prosecution; and
- the jury in this case found that Chase's conduct in fact constituted common-law fraud subjecting Chase to potential liability for actual and punitive damages.

Chase's argument focuses myopically on the fact that the 2000 statutory amendment for the first time gave *Mr. Hess* a right to sue for Chase's violation of the Act. But that argument ignores that the 2000 amendment merely added additional *remedies* for an existing statutory violation, remedies similar to the relief to which Chase was *already* subject at the time it cheated Mr. Hess. Applying established Missouri caselaw, the Court of Appeals properly characterized the 2000 amendment as "procedural or remedial," and held that the amendment *had to* be applied in this case. Indeed, because the Court of Appeals applied well-established principles of Missouri law in its thoughtful and detailed analysis of the retroactivity issue, Mr. Hess submits that this case

should be retransferred to the Court of Appeals for reinstatement of its well-reasoned Opinion.

A. The 2000 Amendment of the Merchandising Practices Act Is Remedial or Procedural, and Must Be Applied Here, because it merely Provided Mr. Hess with a Remedy To Enforce his Pre-Existing Statutory Rights.

"A statutory provision that is remedial or procedural [ ] ***must be applied retrospectively*** unless the legislature expressly states otherwise." *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 661 (Mo. 1986) (emphasis added); *accord*, *e.g.*, *Wilkes v. Missouri Hwy. & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. 1988); *American Family Mut. Ins. Co. v. Fehling*, 970 S.W.2d 844, 851 (Mo. App. W.D. 1998). Because the statutory amendment on which Mr. Hess relies clearly was "procedural or remedial" under Missouri law, the Court of Appeals properly held that the amended statute "must be applied" in this case.[4]

1. Chase's Conduct Was *Already* Unlawful under the Act, and Subject to Enforcement Action, when it Occurred.

The 2000 statutory amendment on which Mr. Hess relies is plainly "procedural or remedial," because it merely modifies the remedies available with respect to an existing statutory violation; that 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.

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[4] The statute does not itself preclude retrospective application, as the Court of Appeals recognized. Op. 12.

As it existed at the time of the underlying real estate transaction in April 1999, the Merchandising Practices Act defined "merchandise" as "[a]ny objects, wares, goods, commodities, intangibles, *real estate* or services." §407.010(4) (emphasis added). The Act also – at that time – expressly prohibited exactly the sort of deceptive conduct in which the jury found that Chase had engaged. Pursuant to §407.020, RSMo, *as it existed in April 1999:*

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the *concealment, suppression, or omission of any material fact* in connection with *the sale* or advertisement *of any merchandise* in trade or commerce * * * in or from the State of Missouri, *is declared to be an unlawful practice*.

(Emphasis added). Chase's conduct also violated the Attorney General's implementing regulations, promulgated in 1994. 15 C.S.R. § 60-9.110(3).

At the time of the underlying real estate transaction, the *private* cause of action under the Merchandising Practices Act was limited to transactions involving the sale of "goods and services," which did not include real-estate transactions. *Detling v. Edelbrock*, 671 S.W.2d 265, 272-73 (Mo. 1984). Even in April 1999, however, Chase's deception was subject to enforcement action by the Missouri Attorney General, who was empowered to seek injunctive relief, restitution, unlimited civil penalties, and attorney's fees to respond to Chase's unlawful practices; Chase was also potentially subject to criminal prosecution as a Class D felony. §§407.020, 407.095, 407.100, and 407.130, RSMo. As his *Amicus Curiae* Brief recounts, the Attorney General has exercised this

authority by bringing "numerous enforcement actions against sellers of real estate during the past three decades of enforcing the Merchandising Practices Act." Br. 13.

Thus, *at the time of the April 1999 transaction*, Chase's fraudulent nondisclosure of environmental matters of which it was aware – as alleged by Mr. Hess and as found by the jury – was unlawful, and subjected Chase to civil and criminal enforcement action by the Missouri Attorney General. Moreover, by the time this action was filed, the Merchandising Practices Act ***did*** provide Mr. Hess with a privately enforceable remedy for Chase Manhattan's unlawful conduct. The statute was amended in 2000 to provide a private right of action for consumer transactions involving *all* "merchandise" as defined in the Act, including real estate. H.B. 1509. As amended, §407.025, RSMo provides:

> Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by Section 407.020, may bring a private civil action * * * to recover actual damages. The 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.

2. Missouri Caselaw Establishes that Statutory Amendments which Merely Modify or Supplement the Remedies Available for Existing Statutory Violations Are "Remedial or Procedural," and *Must* Be Applied to Pending Actions.

Article I, § 13, of the Missouri Constitution prohibits enactment of statutes retrospective in their operation. However, "Article I, section 13 of the Missouri Constitution * * * does not apply [ ] to a statute dealing only with procedure or remedies." *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. banc 1986) (citations omitted). On the contrary, statutory amendments that are remedial or procedural "***must*** be applied retrospectively, unless the legislature expressly states otherwise." *Id.* at 661 (emphasis added).

> A statute which affects only procedure or remedy applies to all actions which fall within its terms, whether commenced before or after the enactment, unless the statute has a contrary intention, or retrospective application will impair a substantive right vested by the prior statute.

State ex rel. Research Medical Center v. Peters, 631 S.W.2d 938, 946 (Mo. App. W.D. 1982) (citations omitted).

The 2000 amendment to § 407.025 is clearly procedural, *not* substantive. As this Court recently explained:

> Procedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights. The distinction 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.

State v. Jaco, 156 S.W.3d 775, 781 (Mo. 2005) (citations and quotation marks omitted), quoting *Wilkes v. Missouri Hwy. & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. 1988); *see also Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. 1993).

Applying these principles, Missouri caselaw recognizes that laws which merely modify, supplement, or create a remedy for existing statutory violations are remedial, not substantive.

> Substantive laws fix and declare primary rights and remedies of individuals concerning their person or property, while remedial statutes affect only the remedy provided, including laws that substitute a new or more appropriate remedy for the enforcement of an existing right. Missouri courts have interpreted statutes that affect a measure of damages as remedial.
>
> Similarly, statutes which authorize a remedy for an existing cause of action have been construed as remedial.

Files v. Wetterau, Inc., 998 S.W.2d 95, 97-98 (Mo. App. E.D. 1999) (citations omitted); *see also American Family Mut. Ins. Co. v. Fehling*, 970 S.W.2d 844, 851 (Mo. App. W.D. 1998); *In re Estate of Pierce v. Missouri Dep't of Social Servs.*, 969 S.W.2d 814, 822-23 (Mo. App. W.D. 1998); *Faulkner v. St. Luke's Hosp.*, 903 S.W.2d 588, 592 (Mo. App. W.D. 1995) ("remedial" statutes includes those "enacted to afford a remedy," or which "remove past disabilities in order to effect the true intent of the legislature").

The amendment to § 407.025 is not "substantive" within the meaning of these cases. Despite Chase's contrary claims, the statutory amendment does not alter "the rights and duties giving rise to the cause of action," nor does that amendment alter "the primary rights of individuals concerning their person and property." The "primary rights" and duties "giving rise to the cause of action" are (a) Chase's duty to refrain from unfair merchandising practices, and (b) Mr. Hess' correlative right to be free of such oppressive tactics. *That "primary" right and duty existed at the time of the real-estate sale*, and were not altered in any way by the 2000 amendment of § 407.025.1. Further, the amendment does not "take away or impair vested rights": Chase had no "vested right" to defraud Mr. Hess in April 1999; as to the remedies available for Chase's fraud, "'[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. *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. 1986) (citation omitted; applying statutory change to recoverability of punitive damages retroactively).

3. This Court's Decision in *Wilkes* Establishes that the Court of Appeals Correctly Applied the 2000 Amendment to Mr. Hess' Merchandising Practices Act Claim.

This Court's decision in *Wilkes v. Missouri Highway and Transportation Commission*, 762 S.W.2d 27 (Mo. 1988), establishes the correctness of the Court of Appeals' decision. *Wilkes* is indistinguishable. Like this case, *Wilkes* involved a statutory amendment that permitted a party to sue for a pre-existing violation of the law,

where that party had previously been barred from filing suit. In *Wilkes*, this Court held that a statute abrogating sovereign immunity for claims of negligent road design was "procedural or remedial" because the change merely provided a remedy for an existing cause of action, even though, at the time of the underlying auto accident, the plaintiff was *completely barred* from filing such a suit. According to this Court:

> [the amended section] provides a remedy for a cause of action whose remedy was previously barred so it is procedural or remedial. As such, it does not violate Mo. Const. Art. I, Sec. 13, which forbids the enactment of a retrospective law which impairs a vested right.

Id. at 28.

Wilkes' statement that the plaintiff had an *existing* "cause of action" necessarily uses the term "cause of action" to refer solely to (1) a right or duty, (2) which had been breached or violated, (3) causing injury. In *Wilkes*, that "cause of action" existed because the State's conduct violated existing legal standards (namely, negligence), even though the plaintiff had no right to sue the State for the injury at the time it occurred. The "existing cause of action" in *Wilkes* was merely a legal right to be free of negligent injury, but without any then-existing judicial recourse. Mr. Hess had an "existing cause of action" at the time of the 1999 real estate transaction in the same sense: Chase was under a statutory duty not to defraud Mr. Hess, and it violated that duty, causing Mr. Hess substantial injury. Mr. Hess had "a cause of action whose remedy was previously barred" to exactly the same extent as the plaintiff in *Wilkes*, and the later statute providing him an

individually enforceable judicial remedy for his existing claim must be applied retroactively.[5]

Other cases likewise recognize that a *substantive*, "primary right" exists separate from the judicial *remedy* available to vindicate it. In *State Division of Family Services v. Slate*, 959 S.W.2d 944 (Mo. App. E.D. 1998), for example, the Court held that it could retroactively apply a statutory amendment that gave divorced spouses the right to recover child support "retroactive to the date of the service of the original petition." Quoted at 959 S.W.2d at 944. The Court held that this provision could be applied retroactively, because "this provision does not create a child's right to support but prescribes a method of enforcing the right and its application does not impair a vested right or affect a past transaction to the substantial prejudice of father." *Id.* Similarly, in this case the 2000 amendment to the Merchandising Practices Act "does not create" Mr. Hess' right not to be cheated in a real estate transaction. That right already existed. All the amendment did was "prescribe a method of enforcing the [pre-existing] right."

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[5] *Mispagel v. Missouri Highway & Transportation Commission*, 785 S.W.2d 279 (Mo. 1990) uses a different form of words to explain *Wilkes*' holding: "The legislature may [retroactively] confer authority to sue <u>*on existing claims*</u>." *Id.* at 281 (emphasis added). Mr. Hess clearly had an "existing claim" under the Merchandising Practices Act when he was defrauded in April 1999, even though the Legislature "confer[red] authority to sue" in 2000.

Similarly, in *Gunter v. Bono*, 914 S.W.2d 437 (Mo. App. E.D. 1996), suit was filed to enforce a dissolved corporation's right to payments under a promissory note, 13 years after the corporation's dissolution. At the time the note was issued, the dissolved corporation would not have had the right to sue for enforcement of the note so long after dissolution. A later statutory amendment extended the corporation's authority to sue. The Court of Appeals held that the statutory amendment applied retroactively, because the "primary," "substantive" rights of the dissolved corporation – namely, to payment on the note – had not been altered by the intervening statute.

> Respondents contend that application of § 351.476 to this case would violate this constitutional prohibition because it would confer on appellants a new right; to wit, the right to sue on a debt some 13 years after corporate dissolution. ***But the substantive right undergirding appellants' lawsuit is the right to full payment on the promissory note, a right that has existed since the note was executed*** * * *. Application of § 351.476 [without which plaintiff had <u>no judicial remedy</u>] ***merely provides a legal channel through which this long-standing right may be vindicated***. Put plainly, application of § 351.476(1)(1) * * * provides a new remedy, not a new substantive right, and, therefore, is presumptively applied retroactively.

914 S.W.2d at 441 (emphasis added). Like the Supreme Court in *Wilkes*, *Gunter* recognizes that the "substantive right" at issue is the real-world right to receive a particular benefit. That "substantive right" exists separately from the "procedural or remedial right" to actually proceed in court. Under this analysis, all of the "substantive

rights and obligations" at issue on Mr. Hess' Merchandising Practices Act claim were in place at the time of the 1999 real-estate transaction; the only missing "piece of the puzzle" was the "procedural or remedial" right to sue individually to enforce those pre-existing rights.

The private right of action granted Mr. Hess merely supplements the remedial scheme existing at the time of Chase's fraud. *Private* enforcement of the Merchandising Practices Act in real estate transactions is an adjunct to the Attorney General enforcement mechanism which existed in 1999, and serves the same remedial purpose. Private parties prosecuting statutory rights in these circumstances, like Mr. Hess, are denominated "*private attorneys general*" for a reason: the private enforcement of statutory violations which caused private injury is an important mechanism for vindicating public policies. As this Court recognized with respect to a private cause of action created under the nursing home laws:

> The provision authorizing an action for damages for breach of the rights of nursing home residents to be free from mental or physical abuse is one reasonably directed toward bringing about compliance with the provisions of the Act. The private remedy for violations of the rights of residents * * * looks to private parties for some degree of policing under the Act. It is a key feature of the Act, adopting the "private attorney general" concept, with the inducement of recoverable actual damages, and in some instances, punitive damages and attorney's fees, all to the end of securing maintenance of nursing home standards. The legislature well

> could have included it upon the rationale "that government cannot do everything and that some requirements of the Act can best be enforced by those most directly involved."

Stiffelman v. Abrams, 655 S.W.2d 522, 530 (Mo. 1983) (citations, footnotes omitted); *see also, e.g.*, *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143, 151 (1987) ("Both [RICO and Clayton Act] bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages."); *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) ("a plaintiff who obtains relief in a civil rights lawsuit 'does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest importance'"; citations omitted).

Thus, in deciding the retroactivity question, this Court should not sharply distinguish between the "old" remedy afforded the Attorney General, and the "new" remedy afforded private parties. Rather, those two remedies both further the same important public policy: ridding this State – in real-estate transactions as elsewhere – of unfair and deceptive merchandising practices. Seen in this light, the amendment recognizing a private cause of action on which Mr. Hess relies "merely substitute[d] a new or more appropriate [*supplemental*] remedy for the enforcement of an existing right." *Files v. Wetterau, Inc.*, 998 S.W.2d 95, 97-98 (Mo. App. E.D. 1999); *American Family Mut. Ins. Co. v. Fehling*, 970 S.W.2d 844, 851 (Mo. App. W.D. 1998); *see* Op. 15 (recognizing that, in providing for private enforcement, "the legislature was providing a

new and additional remedy for an alleged violation of the right guaranteed by § 407.020.1"). The amendment is accordingly procedural, and must be applied retroactively.

It must be emphasized that the Merchandising Practices Act is a remedial statute, intended "to supplement common law fraud remedies in consumer transactions 'to preserve fundamental honesty, fair play and right dealings' in such transactions." *Antle v. Reynolds*, 15 S.W.3d 762, 766 (Mo. App. W.D. 2000) (citation omitted). That fact alone justifies retroactivity: "Statutory amendments to remedial statutory provisions, such as the one here, should be applied retroactively to pending cases." *Leutzinger v. Treasurer*, 895 S.W.2d 591, 594 (Mo. App. E.D. 1995) (statute liberalizing standards for worker to recover from Second Injury Fund applied retroactively).

B. Even if it Were Relevant to the Retroactivity Analysis, the Remedies Afforded Mr. Hess under the 2000 Amendment to § 407.025 Do not Materially Differ from the Remedies to which Chase Was Already Subject.

As shown above, the issue is not whether this suit seeks to invoke new *remedies*, but whether it seeks to enforce new "substantive" or "primary" rights or claims. On that latter issue, the answer is plainly "no" – the substantive rights Mr. Hess is seeking to enforce have existed all along.

The fact that Mr. Hess may be entitled to a different *remedy* post-2000 is irrelevant. A statutory amendment which increases or decreases a defendant's financial exposure for conduct already declared unlawful – such as by changing the applicable

measure of damages – is procedural, *not* substantive, and must be retroactively applied. *Estate of Pierce v. State Dep't of Social Servs.*, 969 S.W.2d 814, 823 (Mo. App. W.D. 1998) (amendment reducing Department of Social Services' right to recover Medicaid expenses was merely procedural); *Croffoot v. Max German, Inc.*, 857 S.W.2d 435, 436 (Mo. App. E.D. 1993) (limitation on interest available to worker's compensation claimant operates retroactively; amendment "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"); *see generally*, *Files v. Wetterau, Inc.*, 998 S.W.2d 95, 97-98 (Mo. App. E.D. 1999) ("Missouri courts have interpreted statutes that affect a measure of damages as remedial."; citations omitted).

Even if the nature of the specific remedies to which Chase is now subject were relevant, it would not defeat retroactivity. As shown below, the scope of Chase's exposure after the 2000 amendment does not materially differ from its pre-amendment liability.

In the following discussion, Mr. Hess discusses the attorneys fees and punitive damages remedies separately, since the retroactivity analysis should be separately applied to each. *See, e.g., State ex rel. Carlund Corp. v. Mauer*, 850 S.W.2d 357, 360-61 (Mo. App. W.D. 1993) (applying separate retroactivity analysis to individual features of single statutory provision).

1. Chase Was Already Subject to Liability for Attorneys' Fees.

At the time of the real-estate transaction at issue here, the Merchandising Practices Act specified the following additional remedies available to the Attorney General:

> In any action brought under the provisions of section 407.100, the attorney general is entitled to recover as costs, in addition to normal court costs, the costs of the investigation and prosecution of any action to enforce the provisions of this chapter.

§ 407.130, RSMo. The present language was enacted in 1985, and superseded a prior provision which only allowed the Attorney General "to recover costs for the use of this state." *See* Historical and Statutory Notes to § 407.130, RSMo.

Clearly, by giving the Attorney General the right to recover "the costs of the investigation and prosecution of any action to enforce" the Act, "*in addition to normal court costs*," the General Assembly gave the Attorney General the right to recover attorneys' fees in addition to costs otherwise taxable. *See State v. Polley*, 2 S.W.3d 887, 894-95 (Mo. App. W.D. 1999) (affirming award to State of $15,350 in investigative and prosecution costs). Chase's potential liability for attorneys fees was uncapped even prior to the 2000 Amendment. *See* Op. 21. Thus, permitting Mr. Hess to recover *his* attorneys fees, where he acts as a "private attorney general," does not materially alter the remedies to which Chase was already subject.

2. Chase Was Already Subject to Unlimited Civil Penalties and Criminal Prosecution under the Merchandising Practices Act at the time of the Property Sale, and to Common-Law Fraud Liability for Actual and Punitive Damages.

This Court has held, in the retroactivity context, that "under Missouri law, *punitive damages are remedial* * * *." *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d

656, 660 (Mo. 1986). Nothing in *Vaughan* suggests that punitive damages are "remedial" from a plaintiff's perspective, but "substantive" from the defendant's. Rather, *Vaughan* relied on the general principle that "'[n]o person may claim a vested right in any particular mode of procedure *for the enforcement or defense of his rights*," 708 S.W.2d at 660, clearly showing that the designation of punitive damages as procedural applies in both "directions."

Even if punitive damages were deemed "substantive" (in direct conflict with *Vaughan*), Chase's conduct subjected it to significant punitive sanctions even prior to the 2000 amendment. For example, the Attorney General was *already* entitled to seek civil penalties under § 407.100.6 RSMo. As the Court of Appeals noted (Op. 21), § 407.140.3 also authorized the Court to assess an (uncapped) amount it deemed appropriate against a violator, to be paid into the merchandising practices revolving fund. Further, willful and knowing violation of the Merchandising Practices Act's prohibitions was – and remains – a Class D felony, *see* § 407.020.3 RSMo, which would subject a corporate violator like Chase to a fine of as much as twice the amount of its gain from commission of the offense, § 560.021 RSMo., in addition to the inevitable collateral consequences such a criminal conviction would have for a financial institution. Finally, to the extent Chase's conduct constituted common-law fraud – which the jury here found – the intentionally tortious nature of its actions would also have justified punitive damages, under the law existing in 1999. Thus, the punitive damages to which Mr. Hess is entitled fall within the range of remedies to which Chase was already subject in 1999.

The fact that the legislature has defined knowing and willful violations of the Act as a felony shows that Chase's punitive damages exposure does not materially alter the pre-existing liability scheme. The analogousness – and indeed greater severity – of criminal punishments as compared to punitive damages is borne out by Supreme Court cases citing to criminal penalties in assessing the excessiveness of punitive damage awards. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996).[6]

C. The Court of Appeals' Decision Does not Conflict with Prior Decisions.

Chase's Application for Transfer claimed that the Court of Appeals' ruling was inconsistent with four prior decisions: *Wilkes v. Missouri Hwy. & Transp. Comm'n*, 762 S.W.2d 27 (Mo. banc 1988); *Yellow Freight Systs., Inc. v. Mayor's Comm'n on Human Rights*, 791 S.W.2d 382 (Mo. 1990); *Wellner v. Director of Rev.*, 16 S.W.3d 352 (Mo. App. W.D. 2000); and *State ex rel. Webster v. Cornelius*, 729 S.W.2d 60 (Mo. App. E.D. 1987). None of those cases conflicts with the Court of Appeals' well-reasoned decision.

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[6] Chase was also subject to *actual* damages liability prior to the 2000 amendment: the Act authorized the attorney general to seek "restitution * * * as may be necessary to restore to any person who has suffered ascertainable loss * * *." § 407.100.4. *See State v. Polley*, 2 S.W.3d 887, 891-92 (Mo. App. W.D. 1999) (stressing "the plain and inclusive language of the statute" and affirming award of amounts necessary to remove and repair or re-install defective products).

First, *Wilkes* is not only consistent with the result reached by the Court of Appeals here – *Wilkes* ***mandates*** the Court of Appeals' decision. As noted above, *Wilkes* holds that a statutory amendment which "provides a remedy for a cause of action whose remedy was previously barred" is "procedural or remedial," and therefore ***must*** be applied to all pending actions. 762 S.W.2d at 28. That is exactly the result the Court of Appeals reached in this case.

The other cases Chase cited are no more compelling. While *Yellow Freight* states that "'laws providing for penalties and forfeitures are always given only prospective application,'" 791 S.W.2d at 387, that statement is plainly *dicta*. The case actually involved a retroactivity claim having nothing to do with penalties or forfeitures: that a state statute "adopted in 1986, can be given retroactive effect to validate a[ ] [municipal] ordinance previously adopted and last amended in 1982." *Id.* Moreover, *Yellow Freight* actually addresses the effect of the 1986 statute, concluding that while it gave municipalities the power to establish "advisory commission[s]" to eliminate discrimination, it could not be read to give municipalities "the power * * * to create an agency to determine and enforce a violation of [an anti-discrimination] ordinance." *Id.* Thus, the Court did not rely on any finding of non-retroactivity; the 1986 statute was simply irrelevant to the issue before the Court.

Finally, in referring in *dicta* to laws "providing for penalties and forfeitures," *Yellow Freight* was clearly referring to true "penalties" owing to the State, as reflected in its quotation of *U.S. Life Title Ins. Co. v. Brents*, 676 S.W.2d 839, 842 (Mo. App. W.D. 1984), which involved a statute providing for "criminal penalties," and the punitive

forfeiture of the contractual right to *any* interest on a debt deemed usurious by a new law. *See also*, *e.g.*, *State ex rel. Carlund Corp. v. Mauer*, 850 S.W.2d 357, 361 (Mo. App. W.D. 1993) (citing same principle of non-retroactivity of "penalties and forfeitures" in case involving civil penalty owing to State). *Cornelius* relied on this same principle concerning the non-retroactivity of "penalties and forfeitures" (also citing to the *Brents* decision) in a case in which such "penalties" would be paid to the State. 729 S.W.2d at 66. Such penalties, which are unknown at common law and solely creatures of statute, are not the same as the remedies afforded Mr. Hess under the Act.

Wellner concerned a statute allowing the award of attorneys fees against the State. The Court emphasized that "a statute which provides a procedure for suing a state agency to collect attorney fees and costs constitutes a waiver of sovereign immunity. Statutes waiving sovereign immunity must be strictly construed." *Id.* at 354 (citation omitted); *see also McGhee v. Dixon*, 973 S.W.2d 847, 849 (Mo. 1998) (noting that "statutory authority is essential to the assessment of attorney fees to the sovereign"). That consideration has no application here – no waiver of sovereign immunity is implicated. Contrary to the strict construction of sovereign-immunity waiving laws, the Merchandising Practices Act is a remedial statute entitled to a *broad* reading; in particular, "[s]tatutory amendments to remedial statutory provisions, such as the one here, should be applied retroactively to pending cases." *Leutzinger v. Treasurer*, 895 S.W.2d 591, 594 (Mo. App. E.D. 1995) (statute liberalizing standards for worker to recover from Second Injury Fund applied retroactively).

Wellner and *Cornelius* are distinguishable for an additional reason: both cases ultimately rely on the analysis of *State ex rel. St. Louis-San Fran. Ry. Co. v. Buder*, 515 S.W.2d 409 (Mo. banc 1974), which held that a defendant had a vested right in a cap on its damage liability.[7] But as the Court of Appeals recognized in *Estate of Pierce v. State Department of Social Services*, 969 S.W.2d 814 (Mo. App. W.D. 1998), "[t]he validity of [*Buder*'s] reasoning in reaching this conclusion does not appear to be fully consistent with subsequent Missouri Supreme Court cases which hold that amendments to remedial statutes are to be retroactively applied." 969 S.W.2d at 823 n.2 (citing *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656 (Mo. 1986), and *Wilkes v. Missouri Hwy. & Transp. Comm'n*, 762 S.W.2d 27 (Mo. 1988)). As discussed *supra*, in more recent decisions "Missouri courts have interpreted statutes that affect a measure of damages as remedial." *Files v. Wetterau, Inc.*, 998 S.W.2d 95, (Mo. App. E.D. 1999) (citations omitted); *see, e.g., Estate of Pierce*, 969 S.W.2d at 823 (statute limiting the Department of Social Services' ability to recoup Medicaid funds previously paid); *American Fam. Mut. Ins. Co. v. Fehling*, 970 S.W.2d 844, 851 (Mo. App. W.D. 1998) (same); *Croffoot v. Max German, Inc.*, 857 S.W.2d 435, 436 (Mo. App. E.D. 1993) (statute limiting a plaintiff's

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[7] *Cornelius*' brief discussion of the retroactivity issue explicitly relies on *Buder*. 729 S.W.2d at 65-66. *Wellner* relies on *Buder* indirectly, by following the Court's earlier decision in *State Board of Registration for the Healing Arts v. Warren*, 820 S.W.2d 564 (Mo. App. W.D. 1991), which in turn relies on *Buder* and *Cornelius*. *See* 820 S.W.2d at 565-66.

entitlement to prejudgment interest). Thus, to the extent they rely on *Buder*'s analysis, the *Wellner* and *Cornelius* cases are outmoded, and should not affect the outcome here.

Of course, the cases Chase cited in its transfer application are irrelevant for an additional reason: none of them involve a situation like this one, where Chase was *already* subject to similar remedies in a suit by the Attorney General. That consideration separately establishes that no "substantive" rights were infringed by the 2000 amendment.

D. The Court of Appeals Properly Held that the Jury's Fraud Verdict Established Chase's Liability under the Merchandising Practices Act, and that Mr. Hess Was Entitled to a Jury Determination of Actual and Punitive Damages and Attorneys Fees on Remand.

As the Court of Appeals recognized, by proving common law fraud at trial, Mr. Hess also necessarily proved Chase's violation of the Merchandising Practices Act. Op. 28. A Merchandising Practices Act claim requires a *lesser* showing than common law fraud. To prove a violation of the Merchandising Practices Act, it is not necessary to prove all the elements of common law fraud. *State ex rel. Webster v. Eisenbeis*, 775 S.W.2d 276, 278 (Mo. App. E.D. 1989); *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. App. E.D. 1988). Rather, all that is required is proof that a defendant's conduct constituted unfair practices. *Id.* The Merchandising Practices Act eliminates the need to prove a defendant's intent to defraud, or a plaintiff's reliance on the defendant's unlawful practices. *Id.*; *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 837 (Mo. App. E.D. 2000); 15 C.S.R. 60-9.110(4) (Attorney General's

implementing regulations).[8] As explained more fully in his *Amicus* Brief, under the Attorney General's interpretive regulations, it is also unnecessary to show that the defendant had actual knowledge of the omitted fact, so long as such fact "upon reasonable inquiry would be known to him/her." 15 C.S.R. 60-9.110(3).

The jury's verdict finding Chase Manhattan liable for common law fraud *exceeds* the standard necessary to establish Merchandising Practices Act liability. As framed by the jury instructions, in finding Chase liable for fraud the jury necessarily found:

- Chase failed to disclose to Mr. Hess that the EPA was investigating disposal of hazardous waste on the property, intending that Mr. Hess rely on Chase's silence;
- EPA was in fact involved with environmental issues concerning the property;
- Chase had superior knowledge or information that the EPA was involved with environmental issues concerning the property which knowledge was not within the fair and reasonable reach of Mr. Hess;
- Chase's failure to disclose was material to Mr. Hess' purchase of the property;

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[8] As the Attorney General's *Amicus Curiae* Brief explains, the Merchandising Practices Act explicitly authorizes the Attorney General to promulgate interpretive rules. § 407.145, RSMo.

- Mr. Hess relied on Chase's silence using that degree of care that would have been reasonable in his situation; and
- As a direct result of Chase's silence, Mr. Hess was damaged.

SLF 8-9.

Thus, as the Court of Appeals recognized, all of the necessary elements to establish Chase's liability under the Merchandising Practices Act were subsumed within the verdict-directing instruction on Mr. Hess' common-law fraud claim. Op. 28. The Court of Appeals properly held that Chase's *liability* for violation of the Act was established by the existing jury verdict.[9]

Mr. Hess was entitled, however, to an independent jury determination of his actual and punitive damages, and to the Court's assessment of his recoverable attorneys fees, before entry of final judgment. "A cause of action for damages for common law fraud and a claim under Section 407.025 are alternative causes of action," and if a plaintiff pleads both, he would only be "required to elect one cause *prior to judgment*." *Lauria v. Wright*, 805 S.W.2d 344, 347 (Mo. App. E.D. 1991) (emphasis added).

The jury's refusal to award punitive damages on Mr. Hess' common-law fraud claim should not prevent him from seeking punitive damages under the Act. Chase's

[9] The Attorney General's *Amicus* Brief demonstrates that the Court of Appeals may actually have *overstated* the elements Mr. Hess was required to prove under the Merchandising Practices Act. That consideration only strengthens the conclusion that the existing fraud verdict establishes Chase's liability under the Act.

Application for Transfer argued (at 10) that in resolving Mr. Hess' common-law fraud claim the jury "necessarily found that Chase's conduct was not outrageous," and that this finding would bind Mr. Hess on his Merchandising Practices Act claim. But the jury made no factual finding "that Chase's conduct was not outrageous." To the contrary, the relevant verdict director makes clear that, *even if* the jury found Chase's conduct outrageous, it could still choose, *in its discretion*, not to award punitive damages:

> If you find in favor of plaintiff, and if you believe the conduct of defendant * * * was outrageous * * *, then in addition to any damages to which you find plaintiff entitled under Instruction Number 8, you *may* award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

SLF 12 (emphasis added).

The jury's exercise of its discretion with respect to Mr. Hess' common-law fraud claim cannot bind a jury adjudicating Mr. Hess' Merchandising Practices Act claim. The fact that one particular decisionmaker exercises its discretion in a particular way, in relation to a particular cause of action, does not mean that another reasonable decisionmaker, on the same facts, could not reach a different conclusion when addressing a separate, broader cause of action.

This Court's decision in *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140 (Mo. 2005), separately establishes Mr. Hess' right to an independent jury determination of his actual and punitive damages under the Merchandising Practices Act. *Scott* held

that a trial court improperly refused to submit punitive damages under the Merchandising Practices Act to a jury for determination. Although the Circuit Court submitted a common-law fraud claim, and the jury awarded punitive damages of $840,000 on that claim, this Court held that the plaintiff was entitled to a *separate* jury determination of punitive damages under the Act:

> Although the jury found Scott was entitled to punitive damages as to the common law fraud claim, there has been no jury finding as to punitive damages on the Chapter 407 violations. It would not be proper to assume that the same, or any, amount of punitive damages would be awarded for such violations. Therefore, a new trial must be awarded to determine the amount of punitive damages for the chapter 407 claim.

Id. at 143.

Scott recognizes that a jury's assessment of damages on common-law fraud and Merchandising Practices Act theories are independent – the jury may award more or less in damages on one claim or the other, and a plaintiff is entitled to an independent jury determination of recoverable damages on each theory. The Legislature enacted the MPA to supplement common-law fraud remedies, and significantly relax the plaintiff's burden to obtain relief. *See, e.g., Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 899-900 (Mo. App. E.D. 2003). The jury's determination on a fraud claim does not preclude a different assessment of damages under the broader Merchandising Practices Act remedy. Following the jury's awards, the trial court can insure that Mr. Hess does not receive a double recovery by determining the extent to which the awards merge, and enter final

judgment accordingly. Op. 23, citing *Scott*, 176 S.W.3d at 143; *see also Trimble v. Pracna*, 167 S.W.3d 706, 711 (Mo. 2005).

CONCLUSION

Because the Court of Appeals applied well-established principles of Missouri law in holding that Mr. Hess was entitled to prosecute his Merchandising Practices Act claim, this case should be retransferred to the Court of Appeals for reinstatement of its Opinion.

In the alternative, this Court should reverse the trial court's dismissal of Mr. Hess' Merchandising Practices Act cause of action. The case should be remanded to the trial court for a jury determination of Mr. Hess' recoverable actual and punitive damages, and the court's determination of the attorney's fees to which Mr. Hess is entitled under § 407.025, RSMo. Following that determination, the trial court should be instructed to permit Mr. Hess to elect between the common law and statutory awards prior to the entry of final judgment.

Mr. Hess further requests that he be awarded his costs and attorney's fees in prosecuting this appeal pursuant to §407.025, RSMo.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06 AND CERTIFICATE OF SERVICE

This brief complies with the type-volume limitation of Rule 84.06 because this brief contains 12,688 words, excluding the parts of the brief exempted by Rule 84.06(b).

This brief complies with the typeface requirements of and type style requirements of Rule 84.06(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 13 point Times New Roman.

The diskette filed with the Court has been scanned for viruses and is virus free.

I further certify that on the 8th day of August, 2006, I served two copies of the foregoing Brief and accompanying Appendix by United States Mail, postage prepaid, on the following:

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