IN THE SUPREME COURT OF MISSOURI

ROBERT KAPLAN, et al.,	)	
	)	
Plaintiffs/Respondents,	)	
	)	
vs.	)	Appeal No. SC87390
	)	
U.S. BANK, N.A.,	)	
	)	
Defendant/Appellant.	)	

RESPONDENTS' SUBSTITUTE BRIEF

STONE, LEYTON & GERSHMAN,
A PROFESSIONAL COPRORATION
Thomas P. Rosenfeld #35305
Paul J. Puricelli #32801
7733 Forsyth Blvd., Suite 500
St. Louis, Missouri 63105
Telephone: 314-721-7011
Fax: 314-721-8660

CURL & HARK, L.L.C.
Jeffrey R. Curl #40233
999 Broadway, P. O. Box 1013
Hannibal, MO 63401-1013
Telephone: 573-221-7333
Fax: 573-221-8824

LAW OFFICES OF MICHAEL A. GROSS
Michael A. Gross #23600
34 N. Brentwood Blvd., Suite 207
St. Louis, Missouri 63105
Telephone: 314-727-4910
Fax: 314-727-4378

TABLE OF CONTENTS

TABLE OF AUTHORITIES 7

JURISDICTIONAL STATEMENT 15

STATEMENT OF FACTS 16

I. THE PARTIES 16

II. FACTUAL BACKGROUND 16

A. PCB Contamination At The Lackland Property 16

B. Mercantile And Gusdorf 18

C. The Work Plan 20

D. Mercantile's Evaluation Of Disposal Costs 23

E. AMI's Warnings Of Cross-Contamination 23

F. Mercantile's Decision To Haul The 0-10 PPM Concrete Off-Site 24

G. Mercantile's Disposal Options 26

H. AMI's June 28th Report 34

I. The Dumping Of The Concrete In Plaintiffs' Creek 36

J. Plaintiffs' Discovery Of The Waste And Mercantile's Refusal To Test 37

K. Mercantile's June 25, 1997 Meeting With Kaplan 40

L. Mercantile Ascertains The Cost Of Cleaning The Creek 42

M. Mercantile Hires Litigation Counsel 42

N. Plaintiffs' Notice Of Intent To Sue And Mercantile's Refusal To Clean Up The Creek 43

O. Notice Of Clean Water Law Violations 45

P. Mercantile's Representations To The MDNR, To The Court, And To Plaintiffs Regarding The Construction Contract And Mercantile's Role In The Lackland Clean-Up 46

Q. Plaintiffs' Lease To Lowe's 51

R. The EOI Proposal 52

S. Plaintiffs' Remediation Of The Site 55

III. PROCEDURAL HISTORY 58

POINTS RELIED ON 61

ARGUMENT 66

I. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTIONS 2 AND 7 BECAUSE: (A) MERCANTILE ABANDONED ANY CHALLENGE TO THE FIRST JURY'S DETERMINATION OF LIABILITY BY FAILING TO APPEAL; AND (B) IN *KAPLAN I*, THE COURT OF APPEALS APPROPRIATELY REMANDED FOR A RE-TRIAL ON THE AMOUNT OF PUNITIVE DAMAGES ONLY 66

A, C. Mercantile Abandoned Any Challenge To The Jury's Determination Of Liability For Punitive Damages 66

B. Instructions 2 And 7 Appropriately Instructed The Jury In Light Of *Kaplan I*'s Remand For A Determination Of The Amount Of Punitive Damages 74

D. Mercantile's Allegation Of Error That Instructions 2 And 7 "Skewed The Jury's Determination Of Punitive Damages" Is A Conclusion That Preserves Nothing For Review Under Rule 84.04(d). Further, The Trial Court's Evidentiary Rulings Were Proper And, In Any Event, Did Not Cause Mercantile Prejudice 78

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO REMIT THE PUNITIVE DAMAGES AWARD BECAUSE THE AWARD WAS NOT EXCESSIVE 80

A. Standard of Review 80

B. *Werremeyer* Factors 82

1. Mercantile did not make an isolated mistake but engaged in a pattern of malicious and outrageous conduct 82

2. Plaintiffs' injuries resulted from Mercantile's conduct 91

3. Mercantile disregarded regulatory and contractual standards designed to prevent Plaintiffs' injury 92

C. Non-*Werremeyer* Factors 93

1. Nature of injury 93

2. Mercantile's financial condition 94

3. The character of the parties 94

III. THE TRIAL COURT PROPERLY DENIED MERCANTILE'S MOTION FOR REMITTITUR BASED ON: (A) THE EVIDENCE OF MERCANTILE'S REPREHENSIBILITY; (B) THE RATIO BETWEEN THE PUNITIVE DAMAGE AWARD AND PLAINTIFFS' POTENTIAL HARM; AND (C) THE RELATIONSHIP BETWEEN THE PUNITIVE DAMAGE AWARD AND THE CIVIL PENALTIES SET FORTH IN §644.076.1 RSMO. 96

A. Mercantile's Conduct Was Reprehensible 97

1. "Economic" versus "physical" harm 98

2. Mercantile's indifference to and reckless disregard for the safety and health of others 102

3. Financial vulnerability 105

4,5. Mercantile's repeated misconduct, deliberate false statements, and attempted concealment of evidence 109

B. The Ratio Between The Punitive Damage Award And Plaintiffs' Potential Harm Does Not Offend Due Process 111

1. The proper standard: punitive damages to *potential* harm 111

2. The ratio of punitive damages to Plaintiffs' actual harm is not unconstitutional 116

3. Post-*Campbell* decisions support the jury's award 117

C. The Penalties Available For Mercantile's Misconduct Exceed The Punitive Damage Award..... 118

D. The Trial Court Properly Admitted Evidence Of Mercantile's Trickery And Deceit 120

1. Gusdorf 120

2. Steve Sweet 121

IV. THE TRIAL COURT CORRECTLY AWARDED PREJUDGMENT INTEREST BECAUSE PLAINTIFFS MET THE REQUIREMENTS OF §408.040.2 RSMo. 122

A. Plaintiffs' Certified 60-Day Demand For Corrective Action Satisfies The Requirements Of §408.040.2 124

1. Plaintiffs' Notice Of Intent To Sue constituted a demand 124

2. Plaintiffs' demand was capable of ascertainment 127

B. Plaintiffs' Motion For Prejudgment Interest Was Timely 132

V. THE TRIAL COURT CORRECTLY AWARDED PREJUDGMENT INTEREST AND DID NOT RETROACTIVELY APPLY SECTION 408.040.2 135

A. There Is No Retroactive Application Of Law In *Werremeyer* Or In This Case 135

B. Application of §408.040.2 Does Not Violate Mercantile's Right To Fair Notice 136

CONCLUSION 137

CERTIFICATE OF COMPLIANCE 139

CERTIFICATE OF SERVICE 140

TABLE OF AUTHORITIES

Cases:

Alcorn v. Union Pac. R.R. Co.,

50 S.W.3d 226 (Mo. banc 2001) 80, 81, 88, 89

Am. Family Mut. Ins. v. Hart,

41 S.W.3d 504 (Mo.App. 2005)..... 132

Arnett v. Johnson,

689 S.W.2d 836 (Mo.App. 1985)..... 116

Asa-Brandt, Inc. v. ADM Investor Services, Inc.,

344 F.3d 738 (8th Cir. 2003) 114, 117

BMW of N. Am. v. Gore,

517 U.S. 559 (1996) 96, 97, 98, 99, 101, 105, 106

..... 108, 109, 111, 113, 114, 115, 118

Boerner v. Brown & Williamson,

394 F.3d 594 (8th Cir. 2004) 105

Boggs v. Lay,

164 S.W.3d 4 (Mo.App. 2005)..... 123

Boyer v. Grandview Manor Care Center,

793 S.W.2d 346 (Mo. banc 1990) 66

Brown v. Donham,

900 S.W. 2d 630 (Mo. banc 1995) 123, 127

Burnett v. Griffith,

769 S.W.2d 780, 786 (Mo. banc 1989) 69

Call v. Heard,

925 S.W.2d 840 (Mo. banc 1996) 80, 82, 93, 94, 122, 133, 135, 136

Campbell v. State Farm Mut. Auto. Ins. Co.,

98 P.3d 409 (Utah 2004) 118

Capra v. Phillips Inv. Co.,

302 S.W.2d 924 (Mo. 1957) 71

Chappell v. City of Springfield,

423 S.W.2d 810 (Mo. 1968) 89

Charles F. Curry & Co. v. Hedrick,

378 S.W.2d 522 (Mo. 1964)..... 91

City of Kansas ex rel. Jennings v. Integon Indem. Corp.,

857 S.W.2d 233 (Mo.App. 1993) 132

Continental Trend Resources, Inc., et al. v. OXY USA Inc.,

101 F.3d 634 (10th Cir. 1996)..... 106, 116, 121

Czapla v. Czapla,

94 S.W.3d 426 (Mo.App. 2003) 67

Denofio v. Soto,

2003 U.S.Dist. LEXIS 12225 (D. Pa. 2003) 99, 105, 107

Denton Constr. Co. v. Missouri State Highway Comm'n,

454 S.W.2d 44 (Mo. 1970) 127

Eden Elec., Ltd. v. Amana Co.,

370 F.3d 824 (8th Cir. 2004) 102, 117

Eden Elec., Ltd. v. Amana Co.,

258 F. Supp. 2d 958, 975 (D. Iowa 2003) 94, 105

Friends of the Earth, Inc., v. Laidlaw Envtl. Serv., Inc.,

528 U.S. 167 (2000) 126

Fust v. Francois,

913 S.W.2d 38 (Mo.App. 1996) 81, 88

Goede v. Aerojet General Corp.,

143 S.W.3d 14 (Mo.App. 2004) 70

Grabinski v. Blue Springs Ford Sales, Inc.,

203 F.3d 1024 (8th Cir. 2000) 116

Green Acres Enterp., Inc. v Freeman,

876 S.W.2d 636 (Mo.App. 1994) 117, 124

Griffith v. Sam Ogle Chrysler-Plymouth, Inc.,

769 S.W.2d 796 (Mo. banc 1989) 69

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,

484 U.S. 49 (1997) 126, 129

Hallstrom v. Tillamook County,

493 U.S. 20 (1989) 126

Hatch v. V.P. Fair Foundation, Inc.,

990 S.W.2d 126 (Mo.App. 1999) 70

Haynam v. Laclede Elec. Coop.,

889 S.W.2d 148 (Mo.App. 1994) 89

Hyatt v. Trans World Airlines, Inc.,

943 S.W.2d 292 (Mo.App. 1997) 129, 132

Indep. Flying Serv., Inc. v. Ailshire,

409 S.W.2d 628 (Mo. 1966) 108

Indus. Bank & Trust Co., Inc. v. Hesselberg,

195 S.W.2d 470 (Mo. 1946) 108

Joel Bianco Kawasaki Plus v. Meramec Valley Bank,

81 S.W.3d 528 (Mo. banc 2003) 72, 73

Johansen v. Combustion Engineering, Inc.,

170 F.3d 1320 (11th Cir. 1999) 81, 92, 93, 94, 97, 98, 99

Kansas City Power & Light Co. v. Bibb & Assoc., Inc.,

2006 Mo.App. LEXIS 618 (Mo.App. 2006) 70

Kaplan, et al. v. U. S. Bank, N.A., et al.,

166 S.W.3d 60 (Mo.App. 2003) 15, 22, 31, 58, 59, 65, 68, 69, 72

..... 74, 75, 76, 77, 82, 86, 91, 92, 110, 121

Kaplan et al. v. U.S. Bank, N.A., et al.,

2005 Mo. App. LEXIS 1688 (Mo. App. 2005) 60, 131

King v. Unidynamics Corp.,

943 S.W.2d 262 (Mo.App. 1997) 74

Lester v. Sayles,

850 S.W.2d 858 (Mo. banc 1993) 130

Library of Congress v. Shaw,

478 U.S. 310 (1986) 117

Lopez v. Three Rivers Electric Corp.,

26 S.W.3d 151 (Mo. banc 2000) 88, 89, 92

Lopiccolo v. Semar,

890 S.W.2d 754 (Mo.App. 1995) 80

Lucent Tech., Inc v. Mid-West Elec., Inc.,

49 S.W.3d 236 (Mo.App. 2001) 127

Mathias v. Accor Econ. Lodging,

347 F.3d 672 (7th Cir. 2003) 121

McCormack v. Capital Electric Construction Co., Inc.,

159 S.W.3d 387 (Mo.App. 2004) 124, 130, 133, 134, 136

McMullin v. Borgers,

806 S.W.2d 724 (Mo.App. 1991) 78, 79

Mirth v. Regional Bldg. Insp. Co.,

93 S.W.3d 787 (Mo.App. 2002) 73

Moore v. Missouri-Nebraska Express, Inc.,

892 S.W.2d 696 (Mo.App. 1994) 82, 93

Morrissey v. Welsh Co.,

821 F.2d 1294 (8th Cir. 1987) 74, 75, 88, 82, 88

Myers v. Workmen's Auto Ins. Co.,

95 P.3d 977 (Idaho 2004) 94, 101, 118

Nangle v. Brockman,

972 S.W.2d 545 (Mo.App. 1998) 127

Pacific Life Ins. Co. v. Haslip,

499 U.S. 1 (1991) 111, 112, 113

Palko v. Connecticut,

302 U.S. 319 (1937) 122

Phelps v. Louisville Water Co.,

103 S.W.3d 46 (Ky. 2003) 118

Quinn v. St Louis Public Service Co.,

318 S.W.2d 316, 320 (Mo. 1958) 68

Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.,

345 F.3d 1366 (Fed. Cir. 2003) 102, 105

R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.,

2005 U.S. Dist. LEXIS 3069 (N.D. Ill. 2005) 117, 124

Robbins v. Robbins,

328 S.W.2d 552 (Mo. 1959) 68

Rochin v. California,

342 U.S. 165 (1952) 122

Sanderson v. Ohio Edison Co.,

1996 Ohio App. LEXIS 4777 (Ohio Ct. App.1996) 127, 134

State v. Whitlock,

598 S.W.2d 521 (Mo.App. 1980) 78

State Farm Mut. Auto Ins. Co. v. Campbell,

538 U.S. 408 (2003) 95, 97, 101, 106, 108, 114

Stogsdill v. Healthmark Partners, LLC,

377 F.3d 827 (8th Cir. 2004) 94, 105

Sullivan v. Holbrook,

109 S.W.668 (Mo. 1908) 73

Thummel v. King,

570 S.W.2d 679 (Mo. 1978) 67

Trout v. Garnett,

780 F.Supp. 1396 (D.D.C. 1991) 67, 72

TXO Prod. Corp. v. Alliance Res. Corp.,

509 U.S. 443 (1993) 97, 101, 107, 108, 109, 110, 111, 112, 113, 121

Union Pacific Railroad Co. v. Barber,

149 S.W.3d 325 (Ark. 2004) 120

Unlimited Equip., Inc. v. The Graphic Arts Centre, Inc.,

889 S.W.2d 926 (Mo.App. 1994) 127

Walker Mobile Home Sales, Inc. v. Walker,

965 S.W.2d 271 (Mo.App. 1998) 127, 129, 132

Watson v. Johnson Mobile Homes,

284 F.3d 568 (5th Cir. 2002) 115

Werremeyer v. K.C. Auto Salvage Co.,

134 S.W.3d 633 (Mo. banc 2004) 81, 93, 108, 119, 124, 126, 136, 137

Werremeyer v. K.C. Auto Salvage Co.,

2003 Mo.App. LEXIS 1074 (Mo.App. 2003)..... 115, 116, 117, 118

Whalen, Murphy, et al v. Estate of Roberts,

711 S.W.2d 587 (Mo.App. 1986) 127

Statutes and Rules:

Section 408.040.2, RSMo 15, 122, 123, 124, 129, 132, 133, 136

Section 510.263.3, RSMo 78

Section 644.051, RSMo 41

Section 644.076.1, RSMo 45, 48, 96, 100, 116, 118, 119, 120

Rule 83.04 15

Rule 84.04 (d) 63, 64, 78

Rule 84.13 (a,c) 58, 59, 67

FWPPCA, 33 U.S.C. §1365(b)(1)(A)(iii) 108

CERCLA, 42 U.S.C. §9659(d)(1)(C) 108

Other Authorities:

MAI 10.02 77

AMERICAN HERITAGE DICTIONARY 919 (3rd ed. 1996) 103

JURISDICTIONAL STATEMENT

Plaintiffs/Respondents filed this case in 1998 against Appellant U.S. Bank, N.A. (formerly known as Mercantile Bank, N.A.) ("Mercantile") for negligence and trespass arising out of the unauthorized dumping of 5900 tons of PCB-contaminated concrete in Plaintiffs' creek.[1] *See Kaplan v. U.S. Bank*, 166 S.W.3d 60 (Mo.App. 2003) ("*Kaplan I*").

At trial in August 2001, Plaintiffs submitted claims against Mercantile for actual and punitive damages under negligence and trespass theories. The jury returned a verdict for Plaintiffs and against Mercantile in the amount of $650,000 in compensatory damages and $7,000,000 in punitive damages.

Mercantile appealed the trespass and negligence claims, and the submissibility and amount of the punitive damage award. The Court of Appeals reversed the trespass claim against Mercantile. *Id.* at 69. The court upheld the submissibility of punitive damages for negligence, finding Mercantile's conduct "so egregious that it is the equivalent of intentional wrongdoing." *Id.* at 75. The court "remand[ed] for a new trial as to the amount of those [punitive] damages" *Id.* at 75.

On remand, a second jury returned a verdict for $5,000,000. The trial court awarded prejudgment interest pursuant to §408.040.2 R.S.Mo.

Mercantile appealed. The Court of Appeals reversed and remanded, and this Court granted Plaintiffs/Respondents' application for transfer pursuant to Rule 83.04.

[1] There were other claims and other parties not relevant to this appeal.

STATEMENT OF FACTS

I. THE PARTIES

Plaintiffs/Respondents are Robert Kaplan, Trustee of the Robert Kaplan Trust, and Doris O'Brien, Personal Representative of the Estate of Leonard O'Brien.

Defendant/Appellant U.S. Bank, N.A., f/k/a Mercantile Bank, N.A. ("Mercantile"), is a national banking association.

II. FACTUAL BACKGROUND

A. PCB Contamination At The Lackland Property

In the 1960s, Cooper Industries ("Cooper") used polychlorinated biphenyls ("PCBs") to manufacture electrical transformers at 11440 Lackland Road in St. Louis County, Missouri ("Lackland")(Sweet 4/142;[2] Exs. 73, 78). Through the early 1970s, PCBs were used in the manufacture of heat-generating electrical equipment because of their heat resistant characteristics (Vajda 3/126).

Mercantile states that "concrete containing PCBs in concentrations of less than 10 parts per million is nonhazardous." (App.Br. at 17). According to the MDNR, that is only true if there is no risk of ground water contamination (Madras 8/46-47, 57-58; Ex. 249 at 1-3). Because PCBs do not break down, they pose an environmental and health hazard, particularly once they leach into groundwater:

[2] Citations to the trial transcript include the name of the witness, the volume and the page. For example, "Sweet 4/142" refers to the testimony of Steve Sweet found at Volume 4, page 142 of the transcript.

> Q: Why are you concerned about leaching?
>
> A: PCBs are known toxins, very toxic chemical. If anything is leaching in the creek, it is going to have a toxic effect on any of the fish or biota in the creek.

(Kasper 8/104; *see also,* Madras 8/47-50).

John Madras, Planning Chief of the MDNR's Water Pollution Control Program ("WPCP") explained that, even in small concentrations, PCBs accumulate and become toxic as they move up the food chain:

> Generally they are stored and they are soluble, not so much in water as in fat tissues, so they tend to accumulate in the fatty parts, and as one organism is eaten by another, they tend to accumulate as they get higher in the food chain. So something that is kind of the top predator or top carnivore would have a much higher concentration than the food that it eats.

(Madras 8/49; *Accord* Vajda 3/126)

In the summer of 1996, Southern Contractors dumped over 5,900 tons of PCB-contaminated concrete, including slabs "bigger than cars" with protruding rebar, into a creek on Plaintiffs' property, filling the creekbed over 300 feet long, 25-30 feet wide and 25 feet deep (the "Creek") (Exs. 5, 6, 180, 181; Werre 7/171-172). The Creek feeds directly into Cole Creek which feeds into the Mississippi River (Madras 8/54).

According to MDNR, the presence of PCBs on the concrete, and the volume of concrete and rebar dumped into the creek, constituted multiple violations of Missouri's Clean Water Act (Madras 8/52-55, 57-58, 76; Ex. 259).

> [F]rom a water pollution perspective this appears to be a clear case of a water contaminant being in a location where it is reasonably certain to cause pollution. …. The presence of easily detectable PCBs on the concrete is a clear indication that this material is readily available for uptake by biological organisms in the food chain.

(Ex. 249 at 3; Madras 8/46, 54).

B. Mercantile And Gusdorf

From 1976 to 1993, Gusdorf Corporation operated a furniture manufacturing plant at Lackland (Ex. 78). In mid-1992, Gusdorf defaulted on a loan from Mercantile, which was secured by the Lackland property (Myers 6/22). In March 1993, Gusdorf went out of business and shut down Lackland (Myers 6/25). Mercantile placed Karen Myers, Vice President and Group Manager of Mercantile's Special Assets Division, in charge of the remediation and foreclosure of Lackland (Myers 6/10-11, 17). Myers reported to John Arnold, Mercantile's Vice-Chairman and CFO, who had ultimate authority regarding the project (Myers 6/11-12, 17-18; Arnold 7/121-122).

Mercantile understood that any PCB contamination remaining at Lackland would stigmatize and "severely handicap the marketing of the [Lackland] property and greatly diminish its value" (Ex. 19 at 2).

> Q: The strategy was to catch as much value as you could and minimize the exposure and minimize the expense?
>
> A: Yes.
>
> * * *
>
> Q: You wanted what the bank wanted was a clean piece of real estate, right?
>
> A: Well, we wanted a saleable piece of property, and we came to the conclusion that it needed to be clean in order for it to be saleable.
>
> Q: Clean would mean cleanse the PCBs, right?
>
> A: **At a minimum it had to be contamination free.** I think we later decided that, in addition, its value would be increased if it had no debris on it.

(Arnold 7/120-121; emphasis added).

Mercantile also understood that PCBs leach into soil and water and that Mercantile's environmental liability would "significantly increase" if Mercantile immediately foreclosed and took title to Lackland (Ex. 19 at 4; Hutkin 3/52; Myers 7/13).

Mercantile, therefore, decided to maintain Gusdorf as a shell without any independent management while Mercantile cleaned up Lackland (Myers 6/26, 28, 160, 189; 7/13). According to Myers, Mercantile "had the final say in all matters of importance" (Myers 6/189).

Mercantile paid Gusdorf's former CFO, Mark Wall, $1,000 per month to act as Gusdorf's "last standing officer" (Wall 3/20-22). Other than signing documents presented to him by Mercantile, Wall had no involvement in the environmental clean-up of Lackland (Wall 3/25-30). Mercantile also hired Gusdorf's former controller, Don Duncan, to pay bills and keep the books relating to Mercantile's liquidation of Gusdorf's assets (Duncan 5/53-55). Duncan was a cost accountant who had no experience in environmental, demolition or waste disposal matters (Duncan 5/50-52). Duncan reported directly to Myers (Duncan 5/56). Mercantile created a "zero-balance account" in Gusdorf's name (Duncan 5/54-55). Myers would review bills and fund the account, and Duncan would pay the bills using Gusdorf checks (Duncan 5/56-57).

C. The Work Plan

In late 1993, Mercantile assembled a team to evaluate its options for the remediation and re-marketing of Lackland (Ex. 14; Hutkin 3/42-44, 62). The team included real estate consultants from Hutkin Development, an environmental consultant, Steve Sweet of Abatement Management, Inc. ("AMI"), and a demolition consultant, Gerald Winter of Southern Contractors (Exs. 14, 18; Hutkin 3/44; Sweet 4/131; Myers 6/69).

In March 1994, AMI conducted preliminary tests and reported widespread contamination in all areas tested (Exs. 32, 34, 50; Myers 6/41, 42). By letter dated April 6, 1994 to Myers and Mercantile's counsel, Winter confirmed the team's conclusion that:

> All materials being removed from site shall be assumed to contain some levels of PCB contamination. Testing will establish levels to determine which site is used for disposal, but all within the same disposal company waste stream.

(Ex. 41; *see also* Myers 6/52, 54).

In May 1994, AMI conducted additional tests and reported contamination in each area tested (Ex. 48; Myers 6/62; Sweet 4/139). According to Myers, PCBs were "everywhere" (Myers 6/55, 56).

By December 1994, Mercantile understood that it had a "huge problem at Lackland" (Myers 6/42). Mercantile sought to pass on the cost of the remediation to Cooper and to complete the remediation as quickly as possible: "Time means money to the Bank" (Myers 6/44-45; Exs. 33, 34).

On November 1, 1994, Mercantile and Cooper executed a Release and Settlement Agreement (the "Release")(Ex. 69; Myers 6/77, 79-80). The Release contemplated that: (i) Cooper would pay to remove and dispose of all material having PCB contamination levels over 10 ppm; and (ii) Cooper and Mercantile would pay 75% and 25% to demolish the buildings and other structures (Ex. 69 at 1, 4; Myers 6/77, 79-

80). Mercantile would be solely responsible for disposal of all materials containing PCB levels of 10 ppm or less ("0-10 ppm")(Myers 6/80, 82-83).

Cooper hired Gary Vajda of Dames & Moore to prepare a work plan for the remediation (the "Work Plan")(Ex. 78; Vadja 3/100-101). The purpose of the Work Plan was to protect against inappropriate handling and disposal of waste materials:

> Waste segregation and handling procedures will be enforced to preclude mixing or misdirection of materials that could result in illegal or inappropriate disposal of wastes or on-site/off-site use of materials.

(Ex. 78 at 44).

The Work Plan required that Cooper dispose of materials having PCB levels greater than 10 ppm at a permitted landfill (Ex. 78 at 13-14; Vadja 3/104-106, 109). Any materials having PCB levels less than 10 ppm were required to be either: (i) used on site at Lackland; or (ii) disposed of as special waste at a permitted landfill (Ex. 78 at 14, 33, 37; Vadja 3/108-109, 112; Myers 6/81-82). Mercantile retained sole authority to decide the destination of the 0-10 ppm waste (Vadja 3/107-108; Myers 6/80-82).

The Work Plan made clear, however, "that the Bank had a duty to prevent contaminated concrete from being disposed of anywhere other than at a landfill or on the site." *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d at 71 (Mo.App. 2003)(*see also,* Ex. 78 at 14, 33, 37; Vadja 3/108, 109, 112; Myers 6/81-82). For Mercantile, this boiled down to a

cost-benefit analysis of “the reward of getting additional contaminated material removed versus the cost of remov[al]" (Myers 6/87).

D. Mercantile’s Evaluation Of Disposal Costs

In February 1995, before the cleanup began, Mercantile hired Soil Consultants, Inc. ("SCI") to evaluate disposal options for the 0-10 ppm material (Exs. 89, 98; Myers 6/87-88, 90-93). In April 1995, SCI reported that Mercantile could avoid increased regulatory compliance and risk of liability by removing and landfilling all 0-10 ppm material (Ex. 98 at 2; Myers 6/90-92).

SCI advised Mercantile that the cost to remove and landfill the 0-10 ppm material was $13.89 per ton, or $26.25 per cubic yard (Ex. 98 at 5; Myers 6/91-92; Duncan 5/93).

E. AMI’s Warnings Of Cross-Contamination

The clean-up of Lackland began in April 1995 (Ex. 96). Mercantile hired AMI to monitor the daily remediation activities (Exs. 81 at 2; Sweet 4/142-144, 147; Myers 6/96). From the outset, AMI reported numerous instances of cross-contamination at the site including:

- failure to adequately segregate and mark "hot" zones,
- failure to use a truck wash to clean trucks carrying PCB-contaminated material,
- failure to use a boot wash to prevent tracking of PCB-contaminated mud and soil into clean areas,

- inadequate lighting, inadequate wetting during demolition, and stockpiling of high level PCB-contaminated wood flooring with and against concrete and walls.

(Exs. 2, 3, 96 at 1-7; Sweet 4/148-160; Myers 6/96-99).

AMI provided Mercantile with numerous photographs of the cross-contamination (Exs. 2, 3; Sweet 4/148-155; Myers 6/96-99). Hutkin and Winter also warned Mercantile of cross-contamination, examples of which Myers personally observed (Myers 6/151-152). As a result, Mercantile understood that areas previously thought of as "clean" were now contaminated (Myers 6/95-99).

In the summer of 1995, Steve Sweet, President of AMI, toured the Property with Myers and Mercantile's counsel, pointing out the cross-contamination and numerous violations of the Work Plan (Sweet 4/162; Myers 6/99). In response to Sweet's warnings, Mercantile's counsel told Sweet to "shut up" (Sweet 4/162-163). When AMI's warnings persisted, Mercantile eliminated AMI's role as its environmental monitor (Ex. 113; Sweet 4/160-163).

By late 1995, Cooper had removed all material containing PCBs in excess of 10 ppm, disposing of all of it in licensed landfills (Ex 115; Myers 6/103-104). The 0-10 ppm material remained stockpiled on site awaiting Mercantile's instructions (Myers 6/130-132).

F. Mercantile's Decision To Haul The 0-10 PPM Concrete Off-Site

In early 1996, Mercantile brought AMI back to spot sample at Lackland (Ex. 129, 132, 134 at 1-4; Myers 6/120, 122-124; Sweet 4/168, 174-176). AMI reported

that Southern was breaking up contaminated concrete slabs and adding them to the stockpiles earmarked for removal (Ex. 143 at 16; Sweet 4/177-178; Myers 6/129). Mercantile asked AMI to test the ground where the slabs had been, but not the stockpiles themselves (Ex. 143 at 5; Sweet 4/177, 179; Myers 7/81-82).

Mercantile had concluded that Lackland's marketability depended upon an unrestricted designation from the EPA (Myers 6/112; Hutkin 3/41). Mercantile decided to remove all material from Lackland having any detectable levels of PCBs[3]:

> Q: And the reason you decided to take it off is because you thought it would reduce exposure, reduce liability and increase the marketability of the property?
>
> A: Yes.
>
> Q: I mean, this stuff wasn't cheeseburger wrappers, this under 10, this wasn't milk cartons, you wanted this stuff off of your property, didn't you?
>
> A: Right.

(Myers 6/82-83).

[3] Mercantile also wanted to remove all concrete over 8" in diameter and all concrete containing rebar "because it was dangerous" (Myers 6/95).

However, in February 1996, nearly a year after the remediation began, Mercantile still had not given the go ahead to remove the 0-10 ppm material (Myers 6/130). Mercantile was over budget and had missed several deadlines (Myers 6/107-108; Duncan 5/73, 98). Months earlier, in October 1995, Mercantile had exceeded its $750,000 Credit Line on the clean-up by more than $240,000, requiring Myers to "go crawling back" to John Arnold for additional funds (Myers 6/108).

On February 15, 1996, Winter commented in a Site Status report:

> Building debris from demolition. Demo permit requires disposal of material. Karen has refused to address this problem.
>
> * * *
>
> Bank is unwilling to commit any additional funds at this point.

(Ex. 144 at 2; *see also* Myers 6/130-132).

G. Mercantile's Disposal Options

On May 24, 1996, Winter faxed Myers five options for disposal of clean concrete:

1. Break to loadable or disposable size. Waste Management wants 1' x 1'. **Dispose in Landfill.**
2. Break to compactible fill size and haul to alternate bank owned site in need of fill (Terry

Fischer or Hollister). **Additional testing would be required.**

3. Break to compactible fill size and haul to third party site for fill. **Additional testing would be required.**

4. Deed to Southern Contractors the small parcel by railroad tie in at Page, approximately 1.2 acres for installation of fill. Fair market value will be deducted from cost of concrete disposal and Southern Contractors could sign hold harmless from any future liability.

5. Break up material to crusher size. **Crush rock and install on site or stockpile for further use**.

(Ex. 159; emphasis added).

Under Winter's proposal, if Mercantile decided not to landfill (option 1) or leave the waste on site (options 4 and 5), "additional testing would be required" prior to disposal at other sites (options 2 and 3):

Q: You understood from this letter that if it went off-site anywhere other than a landfill, it had to be tested, right?

A: That's what Mr. Winter is referencing, yes.

(Myers 6/140; *see also* Arnold 7/133).

Mercantile chose not to landfill the waste (Option 1):

> Q: You could have told him to take it to a landfill, correct?
>
> A: Could of.
>
> Q: You could have told him to leave it on-site?
>
> A: Yes.
>
> Q: You had the power and the right to tell him exactly what to do with that material, correct?
>
> A: Yes.
>
> * * *
>
> Q: Just to be clear, you did not choose this option of disposing in the landfill, correct?
>
> A: Right.

(Myers 6/133-134, 137).

Mercantile rejected landfilling the waste because of cost (Duncan 5/74-75; Myers 6/135-137, 140, 160-162). Since April 1995, Mercantile had known that the cost to haul and landfill the 0-10 ppm material was $13.89 per ton, or $26.25 per cubic yard (Ex. 98 at 5; Myers 6/91-92).[4] Mercantile had been waiting to determine the amount of

[4] In January 1996, Waste Management also provided a bid to landfill the waste, again at $13.89 per ton (Ex. 135).

0-10 ppm waste in order to determine the cost to landfill it (Myers 6/131-132, 160-162). In June 1996, Duncan provided Myers with an estimate of 30,000 tons, or 15,000 cubic yards (Ex. 173; Myers 6/161). As a result, Mercantile knew that it would cost approximately $400,000 to landfill the stockpiled material (Exs. 98, 173; Duncan 5/93-96; Myers 6/160-163).

Mercantile did not want to leave the concrete at Lackland or take it to any other Mercantile-owned property (Options 2, 4 and 5) (Myers 6/137-38).

> Q: You did not want this material taken over to the Terry Fisher or Hollister or any other bank owned site; is that correct?
>
> A: No, you are correct.

(Myers 6/137-38).

That left only option 3 -- hauling to third party sites -- which required crushing and removal of rebar and, most important, confirmation testing:

> Q: Okay. Option three. Break down to compactible fill size and haul to third party site for fill. Additional testing would be required. Additional testing would be required because we know that all of those mounds have been potentially cross-contaminated, correct?
>
> A: I presume so, yes.

(Myers 6/138).

Mercantile, however, chose not to test the stockpiles:

Q: After this date, after he is telling you it has got to be tested before it leaves, was there any testing of the stockpiles to confirm that they were clean?

A: No, not after that date.

(Myers 6/150; *see also* Sweet 4/183; Duncan 5/78; Myers 6/149-152).

As a result, according to AMI, there was no way to differentiate between clean and contaminated stockpiles:

Q: In the spring of ’96, or at any time after your role was changed in August of ’95, were you ever asked to do confirmation sampling on any of those stockpiles that were just on the screen?

A: No.

Q: Did you, in the spring of ’96, did you ever see any paint markings on those stockpiles?

A: No.

Q: Did you ever see anybody marking any stockpiles and it’s clean?

A: No.

Q: … Was there any – could you tell when you were out there, assuming clean to be clean, no

parts per million, or no detectable PCBs, could you tell in this area of the east parking lot what was clean, what was two parts per million or three parts per million?

A: I can't, no.

Q: Could you at the time?

A: No.

(Sweet 4/183-184).[5]

Without further testing, Myers told Winter to "Just take it off":

Q: **Just take it off?**

A: **Right. I said, we just want all of the stockpiles removed**. **We're not going to take them to our site.** He and I spoke about Fisher. I told him that I wasn't interested in deeding the property to Southern because of the railroad issue. I didn't want to give up any ground there. And he and I talked. And we said, we're

[5] Mercantile tried to prevent Sweet from testifying in the first trial by telling him that Plaintiffs' subpoena was invalid and that, therefore, he did not have to show up. In fact, Sweet had been properly subpoenaed. *Kaplan v. U.S. Bank, N.A.,* 166 S.W.3d 60 at 75, N. 4 (Mo.App. 2003).

> not going to use it on the site for stockpiling. I think he probably told me there was an issue with St. Louis County and the demo permit which he was anxious to close out. **And we talked, and I just said, well, let--you know, we're just going to remove everything from the site.**

(Myers 6/141-142, emphasis added; *see also*, Duncan 5/96; Myers 6/125-126, 141-143).

Mercantile had previously prepared a "Construction Contract" relating to Winter's completion of "miscellaneous items" such as removing fencing, signage and other general site reclamation work (Exs. 112, 136, 137; Myers 6/102-103, 126-127). The Construction Contract did not address the disposition of the 0-10 ppm stockpiled concrete (Ex. 137 at Appendix B). That decision remained with Mercantile (Myers 6/130-131).

In June 1996, Duncan forwarded to Myers a proposed change order to the Construction Contract with the notation: "Karen, does this meet your requirements? Don." (Ex. 169; Myers 6/12-13). Although Mercantile had not confirmed whether any of the concrete was clean, the Change Order proposed different disposal methods for "contaminated" and "clean" concrete, as follows:

> 2. Dispose of contaminated material at following sites:
>
> * * *

b. PCBs at Waste Management (Milam) or St. Louis Auto Shredding (National City, Illinois)

* * *

4. Clean material not used for backfill to be removed from premises.

(Ex. 169; Myers 6/153-154).

On June 14, 1996, Myers faxed her changes to the proposed Change Order to Duncan stating that, with respect to clean material referenced in paragraph 4, "want to know where it is going…documentation for files" (Ex. 170; Myers 6/13-14, 154-156, 158). As revised per Myers' instructions, the Change Order executed by Southern provided:

4. Clean material not used for backfill to be removed from premises. Gusdorf Corporation to be notified in advance of shipment all locations this material shipped to and estimated quantities.

(Ex. 171).

Duncan testified that everyone understood that, under the Change Order, the stockpiled concrete was not going to a landfill:

Q: And again, if anybody thought this stockpiled concrete was going to a landfill, really would be no reason for paragraph four, would there?

A: True.

(Duncan 5/88).

Mercantile never raised any concern over sending the cross-contaminated concrete to unlicensed third party properties:

Q: Paragraph four, a separate paragraph entirely. Clean material not used for backfill to be removed from the premises, do you see that?

A: Yes.

* * *

Q: When you saw this, did you say hey, hey, Don, whoa, time out. It is all going to a landfill. Did you say that to him?

A: No, I don't think I did.

(Myers 6/154).

H. AMI's June 28th Report

In June 1996, prior to disposing of the stockpiled concrete, Myers toured the stockpiles (Myers 6/54-55).

On Friday, June 28, 1996, AMI submitted its final report, which Mercantile forwarded to the EPA as a supplement to Cooper's January 1996 Closure Report (Exs.

126, 177; Sweet 4/186-191; Myers 6/110-112, 7/78-86). The report repeatedly noted that AMI was not on-site for Mercantile's additional remedial activities and that Don Duncan, Mercantile's bookkeeper for the project, was directing the remediation of any "areas of concern" (Ex. 177 at 3-4, 7-9, 11; Sweet 4/191-192; Myers 7/78-83).

> Q: So again, Southern, you have got Southern acting at the direction of your bookkeeper on the site; is that right?
>
> A: Yes.

(Myers 7/82-83). The June 28 report repeated AMI's warnings about the cross-contaminated stockpiles and indicated that "[t]he disposal procedures for these materials have not been decided upon" (Ex. 177 at 11). The report made no reference to landfilling the concrete:

> Q: There is nothing in there about we are going to take that Milam. There is nothing in there in that sentence, we are going to take that stuff to a landfill, is it? You said you thought it was going to landfill, is there anything about the disposal procedure that said this material is going to a landfill?
>
> A: Not in this particular, no.

(Myers, 7/84-85).

I. The Dumping Of The Concrete In Plaintiffs' Creek

Beginning three days later, on Monday, July 1, and continuing through August 2, 1996, Southern hauled 295 trailer loads (5900 tons) of the stockpiled concrete to a creek located on the northern boundary of Plaintiffs' mobile home park and behind the residences at Nos. 7-9 Faye Avenue (Exs. 180, 181; Duncan 5/99-100; Myers 6/157-158). As Southern disposed of the stockpiled concrete, Winter completed shipping tickets which were kept by Duncan at Lackland and available for inspection by Myers (Exs. 178, 181; Duncan 5/103). When he finished, Winter completed a ledger detailing the destination of each truck load of concrete (Ex. 181; Duncan 5/99, 103). Duncan also prepared a computer log for Myers showing the destination and tonnage of each shipment of stockpiled material (Ex. 180; Duncan 5/103-105). The computer log, ship tickets, and ledger all went to Myers (Duncan 5/105).

Q: Did you provide these load tickets to Miss Myers and the bank?

A: Yes, I would have.

* * *

Q: Did you send this computer log to Ms. Myers?

A: Yes, I would have.

* * *

Q: Okay. So the computer log, the ship tickets, your computer log, the ship tickets, Mr. Winter's handwritten ledger, the ledger was

written by someone in Mr. Winter's office, right?

A: I believe so, I don't know that.

Q: They all went to Miss Myers?

A: Yes.

(Duncan 5/104-106).

Mercantile paid Winter $200,900 to dispose of the stockpiled concrete, approximately one-half of Mercantile's estimated cost to landfill the material (Exs. 98, 135; Myers 6/161-163; Duncan 5/94-96):

On September 20, 1996, Mercantile foreclosed on Lackland (Ex. 189; Milster 4/7-8, 11).

J. Plaintiffs' Discovery Of The Waste And Mercantile's Refusal To Test

Plaintiffs discovered the dumping in December 1996, when water and snow runoff backed up in the culvert, blew off a drainage grate and flooded the rear of Plaintiffs' property (Ex. 192; Kaplan 9/17-18). On January 7, 1997, Bruce Sokolik of Kaplan Real Estate contacted both Harry Mueller and Myers at Mercantile to schedule a meeting at the Creek the following afternoon (Ex. 194; Myers 6/165; Kaplan 9/25-28). According to Sokolik's notes of the phone conversation, Myers told him that, "**Gerry hauled low level contamination only**" and that Myers "has dump manifest for all trucks leaving site" (Ex. 194; Kaplan 9/28-29).

Neither Myers nor any other Mercantile representative attended the meeting (Myers 6/165).

At the meeting, Kaplan expressed his concern to Winter that the material in the Creek might be contaminated and told Winter that he wanted it tested by an environmental firm, ATC (Kaplan 9/33). On January 14, 1997, Winter sent a letter to ATC with copies to Myers and Kaplan (Exs. 200 and 201; Myers 6/167-168). The letter represented that the concrete was clean:

> Structural concrete came from three buildings, the original manufacturing area, a finishing building and rear warehouse, both of which were built in the 1980's and **tested with no contamination**.

(Ex. 200, ¶3; emphasis added). Contrary to the letter, Mercantile's environmental consultant, AMI, previously had reported to Mercantile that both the finishing building and rear warehouse had tested positive for PCBs (Ex. 73 at 18, 20; Myers 6/168-169).

The letter also represented that confirmation testing had been performed on the concrete:

> All of the concrete generated by Southern Contractors was segregated into piles and identified on a map**.** Confirmation testing was performed on concrete by both AMI and Earth Services.

(Exs. 200 and 201, ¶ 4). Mercantile knew that no confirmation testing had been performed on the concrete (Myers 6/170).

Although Myers received and read Winter's letter, Mercantile did not contact ATC or Kaplan to correct the letter's statements (Myers 6/170-171).

On February 6, 1997, Sokolik wrote to Southern and Mercantile to demand corrective action, including: (1) testing and abatement of environmental hazards; and (2) proper removal and disposal of abated and non-hazardous debris (Ex. 207; Kaplan 9/39-40). On February 10, 1997, Winter responded that he did not want "to sign the ATC proposal and later try to collect from Mercantile" (Ex. 208; Kaplan 9/41). On February 12, 1997, Winter wrote to Sokolik, with a copy to Myers, stating, “I have had numerous conversations with Karen Myers, of Mercantile Bank, concerning the problem” (Ex. 209; Kaplan 9/42).

Kaplan, who had been a customer of Mercantile for over 20 years, called Harry Mueller again, who told Kaplan that he had to deal with Myers (Kaplan 9/26-27, 43).

On February 25, 1997, Winter wrote to Myers requesting that Mercantile send a representative to a meeting with Kaplan (Ex. 214; Kaplan 9/44-45). Mercantile did not send anyone to the meeting (Myers 6/171-172; Kaplan 9/45).

The following month, on March 12, 1997, Winter, "as agent for and on behalf of" Mercantile, wrote to ATC and agreed to ATC’s testing proposal (Ex. 216; Milster 4/24-25). That day, Winter's attorney wrote to Mercantile, stating, "We assume from your lack of active participation in this matter that you have authorized Southern Contractors to proceed in your behalf with the execution of a contract with ATC for this testing" (Ex. 217). On March 14, Mercantile responded that Mercantile would not participate in the testing of the concrete:

> Mercantile shall have no obligation on any contract entered into by your firm [ATC] and Southern Contractors.

(Ex. 218; Milster 4/25-27; Kaplan 9/45-46). Alan Milster of Mercantile's Special Asset Division conceded that Mercantile refused to participate in or pay for any testing (Milster 4/26-27, 55-56). Myers testified that Mercantile would not spend "a penny" to test Plaintiffs' property (Myers 6/119, 173).

In April 1997, ATC reported that the waste in Plaintiffs' creek tested positive for PCBs (Ex. 227; Kaplan 9/48-49). On May 15, 1997, ATC recommended removal and disposal of the concrete in a licensed landfill (Ex. 227 at 7, 8; Kaplan 9/48-49).

That same day, Mercantile sold Lackland for $7.4 million (Ex. 228; Arnold 7/149). Prior to the clean-up, in April 1995, Mercantile valued Lackland at $1.4 million (Arnold 7/116-117, 129-130, 149-150; Exs. 92, 107).

K. Mercantile's June 25, 1997 Meeting With Kaplan

In June 1997, after receiving the ATC test results, Kaplan again asked for a meeting with Mercantile, this time writing directly to Mercantile's CFO, John Arnold (Ex. 234; Kaplan 9/49-52). Arnold would not meet with Plaintiffs or return their calls (Ex. 235; Arnold 7/139-140; Kaplan 9/53-54). Instead, Arnold sent Alan Milster and Mercantile's attorney to "hear what Mr. Kaplan had to say and report back" (Milster 4/37-40; Arnold 7/142).

Milster testified that, at the meeting, Kaplan was respectful and that his requests were reasonable (Milster 4/44-46). Kaplan asked that Mercantile: (i) properly remove and dispose of the concrete; (ii) indemnify the property owners against future claims that might arise due to the presence of PCBs on the property; and (iii) reimburse Plaintiffs for their out-of-pocket costs (Ex. 236; Milster 4/44; Kaplan 9/54-59). Plaintiffs did not ask Mercantile to compensate Plaintiffs "one dime" for any damages to their property (Milster 4/43-44; Kaplan 9/55-56).

Milster's notes of the meeting summarize Plaintiffs' demands: "Get Kaplan insulated from a problem they had no hand in creating" (Ex. 236 at 2; Milster 4/44).

Nevertheless, Mercantile would not remove the concrete (Milster 4/45-47; Arnold 7/145-146). Mercantile also would not indemnify Plaintiffs because that created "uncertain liability" for Mercantile. *Id.* According to Milster, Mercantile would only commit to try to get Southern Contractors to "get it out" (Ex. 236 at 3; Milster 4/45, 52-53).

Q: And that's all the bank would do?

A: That's what we told Mr. Kaplan that we were prepared to do.

Q: And the bank never changed its mind on that?

A: No.

Q: Is that fair to say?

A: Yes.

(Milster 4/52-53).

L. Mercantile Ascertains The Cost Of Cleaning The Creek

Following the June 1997 meeting, Mercantile determined that it would cost approximately $107,000 to clean out the creek and landfill the waste (Milster 4/49).

> Q: Weren't you informed or told it would be around $13 dollars a ton?
>
> A: I think I was told it would be about $107,000 to get everything out and do what needed to be done.

(Milster 4/49).

According to Milster, however, Mercantile was only willing to contribute $30,000 to $40,000 toward the cleanup (Milster 4/59). Neither Winter nor Mercantile communicated these discussions to Plaintiffs (Milster 4/59).

M. Mercantile Hires Litigation Counsel

Following the meeting with Kaplan, Mercantile dismissed its environmental attorney and turned the matter over to litigation counsel from another law firm (Ex. 246; Milster 4/112-113). Arnold, Mercantile's Vice-Chairman, removed himself from any further involvement in the matter (Arnold 7/112, 144-147):

> Q: So in June of '97, Milster comes back from the meeting on June 25th, reports to you. At that point you are out of it, fair enough?
>
> A: That's a fair enough statement.
>
> * * *

Q: Who was in charge of the bank's position in terms of this matter?

A: June of '97, that's a very good question; I don't have a definitive answer for you. I don't know who was actually working on this credit at the time of this letter.

(Arnold 7/147; Arnold 9/4-5).

N. Plaintiffs' Notice Of Intent To Sue And Mercantile's Refusal To Clean Up The Creek

Less than two months later, on August 22, 1997, Plaintiffs mailed their Notice Of Intent To File Citizen Suit to Mercantile (the "Notice"). The Notice warned that Plaintiffs would file suit if Defendants did not take corrective action to remediate Plaintiffs' property:

> Kaplan will file the aforementioned lawsuit for the purpose of obtaining a court order requiring Defendants to take corrective action to remove hazardous and solid wastes from a creek located on property owned by Kaplan in St. Charles County, Missouri.

(LF 1175-1179).

Mercantile responded that it would not clean up the Creek because: (1) the neighbors did not want the material removed and the creek bed exposed; and (2)

Plaintiffs had not obtained approval from the Corps of Engineers (Kaplan 9/60-66). In fact, the neighbors told Mercantile that they did want the concrete removed (Werre 7/185). Furthermore, Plaintiffs sought and obtained the City's agreement that, if the waste was removed, the City would extend the culvert the length of the Creek and then grade over it to fill in the exposed creekbed (Kaplan 9/63-64). In September 1997, Plaintiffs obtained the Corps' approval of this plan (Ex. 6; Kaplan 9/64-66).

Mercantile still refused to remove the concrete from the Creek (Kaplan 9/66).

From the time Myers received the first phone call from Sokolik in January 1997 through October 1997, Mercantile never sent a representative to the Creek (Myers 6/166-167).

In October 1997, fourteen months after the dumping, Mercantile's attorney met with the three homeowners whose yards backed up to the Creek (Werre 7/179-187). Mercantile's attorney advised the homeowners that the concrete in the Creek was "clean and safe" (Werre 7/183-184). The homeowners told Mercantile's attorney that they wanted the concrete removed (Werre 7/184-185). Mercantile's counsel told the homeowners that Mercantile was considering removal of the concrete from Plaintiffs' side of the property line, but that Mercantile would not remove concrete on the homeowners' side because there was no issue of contamination (Werre 7/184).

Myers testified that she knew of no offer by Mercantile to Plaintiffs to remove the waste (Myers 6/73).

In November 1997, eleven months after learning of the dumping, Plaintiffs filed suit in federal court (LF 943). By stipulation, the parties dismissed all claims and cross claims in the federal case (SLF 1-4). On October 15, 1998, Plaintiffs filed this action (LF 2).

O. Notice Of Clean Water Law Violations

On August 31, 1998, MDNR sent a letter to Winter and the homeowners notifying them that the contaminated concrete violated Missouri's Clean Water Law and demanding removal and disposal of the concrete at a permitted landfill:

> [T]he placement of the contaminated material in the creek constitutes a violation of the Missouri Clean Water Law under Section 644.051.1(1) and (2) and 644.076.1… The presence of detectable concentrations of PCBs on the concrete is a clear indication water contaminants have been placed in the creek, and is readily available for uptake by biological organisms in the food chain.

(Ex. 251 at 5; Kasper 8/80-81). On November 23, 1998, MDNR sent out a second letter, with a Notice of Violation (Ex. 253 at 3; Kasper 8/81). On February 3, 1999, MDNR sent out a third letter and referred the matter to the Enforcement Section of the Water Pollution Control Program ("WPCP")(Ex. 259; Kasper 8/81-83). Mercantile received copies of all three letters (Exs. 251, 253, 259; Kasper 8/83-84).

P. Mercantile's Representations To The MDNR, To The Court, And To Plaintiffs Regarding The Construction Contract And Mercantile's Role In The Lackland Clean-Up

On May 4, 1999, Mercantile responded to Edwin Knight, Director of MDNR's Water Pollution Control Program, stating that it was Gusdorf, not Mercantile, that was responsible for the contaminated waste in Plaintiffs' creek:

- "We understand your concern about the material in this ditch, however, Mercantile Bank had no involvement in the placement of the materials…."
- "Gusdorf contracted with Southern to remove the rubble, which was deemed clean, from the cleanup site and to haul it to an appropriate but unspecified location."
- "In 1995 and 1996, Gusdorf and Cooper Industries (the successor to the prior owner of the property) undertook an environmental cleanup of the site…."
- "Gusdorf contracted with Southern Contractors to remove that clean concrete rubble from the demolition site…."
- "Mercantile did not contract with Southern Contractors to dispose of the rubble in any fashion."

(Ex. 263 at 1, 2; Kasper 8/86-88).

For four and one-half years, from 1997 until Mercantile's opening statement at trial in August 2001, Mercantile took this same position in its testimony, pleadings, and communications with Missouri regulatory authorities (Myers 6/175-190). Mercantile's Answer to Plaintiffs' Petition denied that Gusdorf had ceased operations prior to 1994, and denied that Mercantile had hired AMI (Ex. 371 at para. 23; Myers 6/179-180; Kaplan 9/66-67). In February 1999, Myers testified in her deposition that it was Gusdorf, not Mercantile, that had "independently engaged Southern Contractors" (Myers 6/181). In 1999, Mercantile filed a motion for summary judgment, representing to the court that "Southern was hired by Gusdorf," and that "[t]here is no factual or legal basis for treating Mercantile and Gusdorf as one in the same" (Myers 6/182-183).

In November 2000, Myers filed an Affidavit in the Missouri Attorney General's statutory enforcement action against Mercantile for violation of the Clean

Water Act,[6] in which she represented that the concrete had been tested and that Gusdorf was responsible for its disposal:

- "After a great deal of negotiations, Gusdorf and Cooper entered into a Release and Settlement Agreement, which named the Bank as a third party beneficiary to the Settlement Agreement."
- "Gusdorf, with financial assistance from the Bank, assumed responsibility for remediation of any PCB materials under 10 ppm, and any other contamination."
- "At the end of the cleanup process, Gusdorf engaged Southern Contractors, under a written Construction Contract and a Change Order, to haul

[6] In 2000, the Missouri Attorney General filed an action against Mercantile under §644.076.1 R.S.Mo., which authorizes penalties of up to $10,000 per day for violations of Missouri's Clean Water Law (Def. Ex. M622). After initially filing a motion *in limine*, seeking to preclude evidence of the Attorney General's suit and the statutory penalties (SLF 119-123), Mercantile withdrew its motion before the 2004 trial (Merc. Stipulation 1/36). Mercantile then told the jury about the Attorney General's suit in Opening Statement, during examination of witnesses, and in Closing Argument (Merc. Open. Stmt. 2/104; Madras 8/74; Merc. Clos. Arg. 10/35).

> off and dispose of some remaining concrete rubble that was considered "clean" because it tested at less than 1 ppm PCBs."

(Ex. 335 at 2-3; Myers 6/185-188).

In its opening statement at trial in 2001, Mercantile changed its position:

> There is not a doubt in the world from the evidence that Gusdorf was in fact a shell, that Mercantile was paying the bills and that Mercantile or Karen Myers was -- had the final say on all matters of importance. There is no doubt about that. I'm not going to try to tell you anything different than that. It had no independent management of its own.
>
> * * *
>
> [T]hat's the contract that was signed. Here is Southern over here and here is Don Duncan signing for Gusdorf. Okay. Again, I'm not going to kid you about Gusdorf. Karen Myers made the final decision on this contract. You've already seen that she suggested changes in the language, and the bank was going to fund it. There is no doubt about it. Okay.

(Myers 6/189-190, reading from 2001 Merc. Open. Stmt.). At the 2004 trial, Myers conceded that, from 1997 to August 2001, Mercantile had refused to accept responsibility for the waste in Plaintiffs' creek:

> Q: And that's the first time, in August of 2001, the first time that the bank ever admitted that it was the bank, not Gusdorf, they didn't admit it, isn't that true?
>
> A: (No response)
>
> Q: Do you recall the bank ever taking that position prior to that moment?
>
> A: Not that I recall.

(Myers 6/190). Myers could not explain her Affidavit to the jury:

> Q: It was the bank who made the decisions regarding remediation of under 10 parts per million under the work plan filed with the Environmental Protection Agency; isn't that true. It was the bank?
>
> A: Yeah, the bank made the decision, yes.
>
> Q: It was the bank's choice, it wasn't Gusdorf's choice, right?
>
> A: Yes.

* * *

Q: In this sworn affidavit filed in this court and the suit brought by the chief law enforcement officer of our state, did you tell him anywhere, tell the court anything about it being the bank who was responsible for the remediation of 10 parts per million or less on the site?

A: Uh, not in this document.

(Myers 6/187-188).

Q. Plaintiffs' Lease To Lowe's

In June 1999, Plaintiffs entered into a Lease of Plaintiffs' Property with Lowe's Home Centers, Inc. (Ex. 269; Kaplan 9/79-81). The Lease granted Lowe's the option to purchase Plaintiffs' Property for $6.7 million (Ex. 269 at 33; Kaplan 9/86). The Lease required that Plaintiffs:

1. completely remediate the creek of all concrete and PCBs pursuant to a Remediation Work Plan approved by Lowe's and MDNR (Ex. 310 at 1, 5; Kaplan 9/81-85); and
2. indemnify Lowe's from and against any future claims or liabilities arising from, connected with or related to the concrete waste (Ex. 310 at 6-7; Kaplan 9/81-85).

To fulfill its obligations under the Lease, in June 1999, Plaintiffs contacted an environmental consulting and engineering firm, Geotechnology, Inc., regarding remediation of the creek (Kaplan 9/86; Brenneke 8/114-116).

R. The EOI Proposal

Plaintiffs advised Mercantile that they were moving forward with remediation plans (Kaplan 9/88). Shortly thereafter, on August 5, 1999, three years after the dumping, Mercantile's counsel delivered a proposal for removal of the concrete (the "EOI Proposal")(Ex. 286; Milster 4/58; Kaplan 9/88). Mercantile set up the proposal as an agreement between an environmental firm, EOI, and homeowners Leonard and Karla Werre (Milster 4/65).

Plaintiffs engaged an independent environmental firm, Geotechnology, to review the proposal (Exs. 287, 289, 290; Brenneke 8/125; Kaplan 9/88-89). Geotechnology reported numerous deficiencies, including:

- EOI did not consult with MDNR before submitting the proposal and the proposal did not provide for any regulatory approval or oversight by MDNR;
- the proposal contained no Work Plan or Sampling Plan;[7]
- the proposal did *not* provide for the removal of impacted sediment and, in fact, allowed residual PCBs to remain in the creek;
- the proposal assumed removal of only 3,575 tons of concrete -- roughly half the amount of waste that Mercantile's records showed having been dumped in the Creek;[8]

[7] The Proposal's author, Tim Hippensteel, testified that this was because Mercantile did not pay EOI to prepare either a Work Plan or Sampling Plan (Hippensteel 5/147).

- the proposal established a $250,000 cap on the project;
- the proposal did not provide for any independent oversight of the remediation and precluded Kaplan from independently overseeing the clean-up to ensure that the work was properly performed;
- the proposal provided EOI with a bonus for coming in under budget, thereby incentivizing EOI to "take shortcuts";
- the proposal failed to identify how and where the waste was to be disposed of; and
- the proposal failed to identify the waste "generator".

(Hippensteel 5/129-131, 135; Brenneke 8/124, 127-131; Ex. 286).

In a September 2, 1999 letter, Plaintiffs conveyed their concerns to Mercantile (Ex. 298; Milster 4/69-70; Brenneke 8/129-131). Mercantile did not show Plaintiffs' letter to EOI or discuss any of Plaintiffs' comments with EOI (Hippensteel 5/135-136). Seven weeks later, on October 20, 1999, Mercantile responded, stating:

---

[8] Hippensteel testified that Mercantile had directed him to reduce the estimated volume from 6,000 tons down to 3,500 tons, even though Mercantile knew that at least 5,900 tons of concrete had been dumped in the creek (Hippensteel 5/126, 128, 129; *See* Ex. 180). Hippensteel testified that, had Mercantile provided him with the correct tonnage amount, he would have never sent out the proposal (Hippensteel 5/129). The proposal also made no provision in the event that the tonnage exceeded 3,500 tons (Kaplan 9/95).

- "It is unnecessary and irrelevant that the EOI proposal does not identify a specific disposal site."
- "testing of the kind you propose is not applicable."
- "Indemnification is…irrelevant."
- "such a sampling plan is not applicable."
- "Whether EOI's proposal underestimates or overestimates the volume of waste is irrelevant."
- "oversight is unnecessary."

(Ex. 311 at 2-3; Hippensteel 5/137; Kaplan 9/92-97).

At trial, Hippensteel agreed that Plaintiffs' concerns were reasonable:

Q: And it is reasonable that Mr. O'Brien and Mr. Kaplan would have wanted to see how you were going to sample before, during and after the cleanup, that's a reasonable request, isn't it?

A: That's reasonable.

* * *

Q: It would be reasonable that they would want you or the bank or whoever is doing this cleanup, to be in communication with the Missouri DNR about this cleanup?

A: Typically, yes.

* * *

Q: Would it be reasonable for Mr. Kaplan and Mr. O'Brien to want the creek completely cleaned out and not let low level contamination to remain in the sediment if it wasn't there, or PCBs weren't put there?

A: It would be reasonable, but it could be based on a prior arranged cleanup level with the DNR.

Q: Would it be reasonable for them to want to know where you are taking this stuff?

A: Yes.

(Hippensteel 5/131-132)

S. Plaintiffs' Remediation Of The Site

In October-December 1999, Plaintiffs remediated the creek (Brenneke 8/132-133). Plaintiffs removed 9,734.91 tons of PCB-impacted sediment, concrete and rubble from the creek at a cost of $636,781.66 (Exs. 327; Brenneke 8/153). The additional tonnage resulted from sediment mixing with the contaminated concrete and from PCBs leaching downstream during the intervening three years (Brenneke 8/142, 144; Ex. 327 at Table 1, Samples GB-3, GB-5, GB-8, GB-9, GB-10).

Daily sampling of the concrete in Plaintiffs' Creek showed PCB concentrations 300 to 700 times greater than found to exist in any of the five neighboring

sample areas tested by Hippensteel in the month prior to trial (Ex. 327 at Table 1, Samples GB-24, GB-25, GB-29, GB-33, GB-37, GB-41, GB-48; Hippensteel 8/148-156).

Plaintiffs landfilled the waste at Milam landfill pursuant to waste manifests that identified Plaintiffs as the "Generator" (Ex. 333A; Brenneke 8/150-151; Kaplan 9/97). As a result, Plaintiffs face exposure to claims in the event a problem arises with the landfill (Kaplan 9/98).

On July 25, 2000, MDNR issued a letter to Plaintiffs stating that no additional investigation or remedial action was required, but cautioned that Plaintiffs remained liable in the event of future environmental problems related to the PCB contamination:

> In the event a further PCB-related environmental problem arises in the vicinity of this property, the department reserves the right to require responsible parties to conduct additional investigation or remedial action.

(Ex. 334; Kasper 8/108-109).

Mercantile's expert testified to the significance of MDNR's reservation of rights against Plaintiffs:

> Q: They are not closing the book totally, are they?
>
> A: Never, no, they don't.
>
> Q: It is still open, right?
>
> A: Yes.

Q: And the books have Bob Kaplan and Leonard O'Brien's name on it, doesn't it?

A: Yes.

(Hippensteel 5/160).

III. PROCEDURAL HISTORY

Plaintiffs filed this case against Mercantile for negligence and trespass.[9] *See Kaplan v. U.S. Bank,* 166 S.W.3d 60 (Mo.App. 2003)("*Kaplan I"*).

In the first trial in August 2001, Plaintiffs submitted claims against Mercantile for actual and punitive damages under negligence and trespass theories. The verdict form permitted the jury to return a general verdict for punitive damages (178-180). Mercantile did not object to the verdict form either at the instruction conference or prior to the trial court's acceptance of the jury's verdict (SLF 6-13). The jury awarded Plaintiffs $650,000 in compensatory damages and $7,000,000 in punitive damages against Mercantile.

In its post-trial motions, Mercantile argued that Plaintiffs failed to make a submissible case for punitive damages (SLF 15-17). Mercantile also challenged its liability for punitive damages as against the weight of the evidence (SLF 20). Mercantile also argued that, in the event that the trial court reversed either the trespass or negligence claim, Mercantile was entitled to a new trial as to punitive damages because the verdict form was submitted in the disjunctive (SLF 20).

The trial court denied Mercantile's post-trial motions (LF 274).

On appeal, Mercantile elected to challenge only the submissibility and amount of the punitive damage award (SLF 81, 82). Mercantile did not assert any error under 84.13(a) relating to the verdict form or its liability for punitive damages (SLF 81-

[9] There were other claims and other parties not relevant to this appeal.

82). The Court was not asked to and did not conduct any plain error review under 84.13(c). *See Kaplan I*, 166 S.W.3d *at* 74-75.

In *Kaplan I*, the Court of Appeals stated that "[a] jury found [Mercantile] and Southern Contractors liable for actual and punitive damages on the plaintiffs' trespass and negligence claims." *Id.* at 64. The court reversed the trespass claim against Mercantile. *Id.* at 69. The court upheld the submissibility of punitive damages for negligence, finding Mercantile's conduct "so egregious that it is the equivalent of intentional wrongdoing." *Id.* at 75. The court "remand[ed] for a new trial as to the amount of those [punitive] damages" *Id.* at 75.

On remand, the trial court instructed the second jury "to decide the amount, if any of punitive damages that should be awarded against [Mercantile]." In May 2004, a jury returned a verdict for $5,000,000. The trial court awarded prejudgment interest pursuant to §408.040.2.

Mercantile appealed, arguing that *Kaplan I* required a re-trial of liability for punitive damages. Mercantile claimed that, in *Kaplan I*: (i) "Mercantile challenged both its underlying liability and its liability for punitive damages" (Orig.App.Br. 28); and (ii) in *Kaplan I*, the Court of Appeals based its decision on Mercantile's challenge to the verdict form (Orig.App.Rep Br. 16). In fact, Mercantile had not raised either point of error in *Kaplan I* (SLF 81-82), as conceded by counsel at oral argument in this appeal:

> Q: (By Baker, P.J.) Did the bank challenge the liability for punitive damages on appeal is one of the points that was brought up?

A: (By Mr. Dellinger) The bank did not challenge, did not raise a separate challenge as it had done post-trial about whether the liability finding was against the weight of the evidence and we do not raise it here….

On November 15,2005, the Court of Appeals reversed and remanded, holding that "the mandate of *Kaplan I* clearly required a new trial on the 'issue of punitive damages,' including a finding of liability for punitive damages and an amount, if any." *Kaplan v. U.S. Bank, N.A., 2005 Mo. App. LEXIS 1688I* at 7 (Mo.App. 2005)("Kaplan II"). The court dealt with Mercantile's waivers as follows: "[T]he issue of 'liability' did not arise until after the court's decision to reverse the punitive damages award in Kaplan I . . . and we cannot penalize the Bank for failing to raise a claim that was not at issue prior to Kaplan I." *Kaplan II* at n. 5.

The Court of Appeals also reversed the prejudgment interest award, ruling the Notice failed to satisfy §408.040.2 because: (1) the Notice "did not specify a dollar amount demanded" and, therefore, was not "readily ascertainable"; (2) the demand did not expressly state that compliance would settle all claims; and (3) Plaintiffs rejected a subsequent proposal made by Mercantile.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTIONS 2 AND 7 BECAUSE: (A) MERCANTILE ABANDONED ANY CHALLENGE TO THE FIRST JURY'S DETERMINATION OF LIABILITY BY FAILING TO APPEAL; AND (B) IN *KAPLAN I*, THE COURT OF APPEALS APPROPRIATELY REMANDED FOR A RE-TRIAL ON THE AMOUNT OF PUNITIVE DAMAGES ONLY.

A, C. Mercantile Abandoned Any Challenge To The Jury's Determination Of Liability For Punitive Damages

Kaplan, et al. v. U. S. Bank, N.A., et al., 166 S.W.3d 60 (Mo.App. 2003)

Quinn v. St Louis Public Service Co.,318 S.W.2d 316, 320 (Mo. 1958)

Rule 84.13 (a, c)

B. Instructions 2 And 7 Appropriately Instructed The Jury In Light Of *Kaplan I*'s Remand For A Determination Of The Amount Of Punitive Damages.

Mirth v. Regional Bldg. Insp. Co., 93 S.W.3d 787 (Mo.App. 2002)

D. Mercantile's Allegation Of Error That Instructions 2 And 7 "Skewed The Jury's Determination Of Punitive Damages" Is A Conclusion That Preserves Nothing For Review Under Rule 84.04(d). Further, The Trial Court's Evidentiary Rulings Were Proper And, In Any Event, Did Not Cause Mercantile Prejudice.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO REMIT THE PUNITIVE DAMAGES AWARD BECAUSE THE AWARD WAS NOT EXCESSIVE.

A. Standard of Review

Johansen v. Combustion Engineering, Inc., 170 F.3d 1320 (11th Cir. 1999)

B. *Werremeyer* Factors

Charles F. Curry & Co. v. Hedrick, 378 S.W.2d 522 (Mo. 1964)

Werremeyer v. K.C. Auto Salvage Co., 134 S.W.3d 633 (Mo. banc 2004)

C. Non-*Werremeyer* Factors

Eden Elec., Ltd. v. Amana Co., 258 F. Supp. 2d 958, 975 (D. Iowa 2003)

III. THE TRIAL COURT PROPERLY DENIED MERCANTILE'S MOTION FOR REMITTITUR BASED ON: (A) THE EVIDENCE OF MERCANTILE'S REPREHENSIBILITY; (B) THE RATIO BETWEEN THE PUNITIVE DAMAGE AWARD AND PLAINTIFFS' POTENTIAL HARM; AND (C) THE RELATIONSHIP BETWEEN THE PUNITIVE DAMAGE AWARD AND THE CIVIL PENALTIES SET FORTH IN §644.076.1 RSMO.

A. Mercantile's Conduct Was Reprehensible

BMW of N. Am. v. Gore, 517 U.S. 559 (1996)

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

B. The Ratio Between The Punitive Damage Award And Plaintiffs' Potential Harm Does Not Offend Due Process

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993)

C. The Penalties Available For Mercantile's Misconduct Exceed The Punitive Damage Award

Section 644.076.1 RSMo.

D. The Trial Court Properly Admitted Evidence Of Mercantile's Trickery And Deceit

IV. THE TRIAL COURT CORRECTLY AWARDED PREJUDGMENT INTEREST BECAUSE PLAINTIFFS MET THE REQUIREMENTS OF §408.040.2 RSMo.

A. Plaintiffs' Certified 60-Day Demand For Corrective Action Satisfies The Requirements Of §408.040.2

Brown v. Donham, 900 S.W. 2d 630 (Mo. banc 1995)

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1997)

Section 408.040.2 RSMo.

McCormack v. Capital Electric Construction Co., Inc., 159 S.W.3d 387 (Mo.App. 2004)

B. Plaintiffs' Motion For Prejudgment Interest Was Timely

V. THE TRIAL COURT CORRECTLY AWARDED PREJUDGMENT INTEREST AND DID NOT RETROACTIVELY APPLY SECTION 408.040.2

Call v. Heard, 925 S.W.2d 840 (Mo. banc 1996)

Werremeyer v. K.C. Auto Salvage Co., 134 S.W.3d 633 (Mo. banc 2004)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTIONS 2 AND 7 BECAUSE: (A) MERCANTILE ABANDONED ANY CHALLENGE TO THE FIRST JURY'S DETERMINATION OF LIABILITY BY FAILING TO APPEAL; AND (B) IN *KAPLAN I*, THE COURT OF APPEALS APPROPRIATELY REMANDED FOR A RE-TRIAL ON THE AMOUNT OF PUNITIVE DAMAGES ONLY

A, C. Mercantile Abandoned Any Challenge To The Jury's Determination Of Liability For Punitive Damages

This Court must determine the scope of *Kaplan I's* remand as to the "amount" and "issue" of punitive damages. *Kaplan I*, 166 S.W.3d at 75, 77. The question is not one of intent, either Mercantile's or the appellate court's. Rather, the question is one of authority, legal and procedural. The answer depends upon a critical analysis of Mercantile's pleadings leading up to *Kaplan I* because Mercantile, as appellant, necessarily framed the issues on appeal.

"It is, of course, axiomatic that issues not presented in the points to be argued in an appellate brief are abandoned and will not be considered by a reviewing court." *Boyer v. Grandview Manor Care Center*, 793 S.W.2d 346, 347 (Mo. banc 1990).

> [P]ursuant to the doctrine of the 'law of the case,' a former adjudication is conclusive not only as to all questions raised directly and passed upon, but also as

> to matters which arose prior to the first appeal and which might have been raised thereon but were not.

Czapla v. Czapla, 94 S.W.3d 426, 428-29 (Mo.App. 2003). *See also Trout v. Garnett*, 780 F. Supp. 1396, 1495 n.71 (D.D.C. 1991)("Departure from this doctrine would lead to the absurd result, as Judge Friendly said, 'that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than the one who argued and lost'").

Rule 84.13(a) states that "allegations of error not briefed or not properly briefed shall not be considered in any civil appeal and allegations of error not presented to or expressly decided by the trial court shall not be considered in any civil appeal from a jury tried case." The only exception relevant here is the appellate court's discretion under Rule 84.13(c) to conduct plain error review "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom."

As this Court has observed, the Court of Appeals sits as a court of review:

> Ordinarily, an appellate court sits as a court of review…. It is not the function of the appellate court to serve as advocate for any party to an appeal. That is the function of counsel. It would be unfair to the parties if it were otherwise.

Thummel v. King, 570 S.W.2d 679, 686 (Mo. 1978).

In the first trial in August 2001, Mercantile did not object to the disjunctive verdict form either at the instruction conference or prior to the trial court's acceptance of the jury's verdict (SLF 6-13).[10] After the jury's award of actual and punitive damages, however, Mercantile argued in its motion for new trial that the verdict form required a new trial if the trial court reversed either the trespass or negligence claims -- the very objection Mercantile failed to make in its two opportunities at trial (SLF 20). Mercantile also challenged submissibility, the amount of the punitive award, and that its liability for punitive damages was against the weight of the evidence (SLF 20).[11] The trial court denied Mercantile's motions (LF 274).

On appeal, Mercantile abandoned any claim of error with respect to the verdict form or its liability for punitive damages, making the tactical decision to challenge only the submissibility and amount of the punitive damage award (SLF 81-82).

[10] This waived any objection to the verdict form. *See, e.g., Quinn v. St. Louis Public Service Co.*, 318 S.W.2d 316, 320 (Mo. 1958).

[11] Mercantile's challenge to the weight of the evidence "in itself implies that there is some evidence to support the verdict." *Robbins v. Robbins*, 328 S.W.2d 552, 556 (Mo. 1959).

The Court of Appeals was not asked to and did not conduct any plain error review under 84.13(c).[12] *See Kaplan I*, 166 S.W.3d at 74-75.

This is not a case where, as Mercantile argues, Mercantile "*never* received a determination -- by *any* finder of fact -- that its negligence justified punitive damages" (App.Br. 30; original emphasis). First, to the extent that Mercantile's complaint derives from any criticism of the general verdict form, Mercantile missed every opportunity to make the argument by failing to object to the disjunctive submission at the instruction conference or immediately after the jury returned its verdict (SLF 6-13):

> Yet, Rockwell failed to object to the general verdict form either before it was submitted to the jury or after it was returned by the jury. "An objection to a verdict form must be raised either at the instruction conference or when the verdict is returned by the jury before it is accepted by the court." Rockwell neither objected to the general verdict form nor did it offer its own form to allow application of its affirmative defense. Furthermore, it did not request clarification of the

[12] Even under those rare circumstances where plain error is available in a civil case, this Court has warned that "plain error is not a doctrine available to revive issues already abandoned by selection of trial strategy or by oversight." *Burnett v. Griffith,* 769 S.W.2d 780, 785 (Mo. banc 1989).

> verdict for purposes of applying its affirmative defense before the trial court received the verdict and the jury was discharged. Rockwell's failure to take any action to determine the basis of its liability under the general verdict resulted in abandonment of its affirmative defense.

Kansas City Power & Light Co. v. Bibb & Assoc., Inc. 2006 Mo.App. LEXIS 618 at *28 (Mo.App. 2006)(citations omitted). *See also, Goede v. Aerojet General Corp.,* 143 S.W.3d 14, 28 (Mo.App. 2004)("[C]ounsel is required to make specific objections to the instruction at trial"); *Hatch v. V.P. Fair Foundation, Inc.,* 990 S.W.2d 126, 140 (Mo.App. 1999)("Where an alleged error relating to an instruction differs from the objections made to the trial court, the error may not be reviewed on appeal").[13]

More important, after Mercantile argued its case to the jury and lost, Mercantile raised its liability for punitive damages in its motion for new trial and lost again (LF 274, SLF 20). The trial court's denial of Mercantile's motion for new trial all but sealed the issue of punitive damage liability:

> It is well settled that for the purposes of appellate review a plaintiff's verdict (defendant's motion for new

[13] The reason for the stringent requirement of a specific objection is illustrated by this case. Had Mercantile timely raised the issue, the trial court could have revised the instruction before submitting the case to the jury.

> trial standing overruled) is final on the fact issues if supported by substantial evidence…. In the circumstances presented we do not weigh conflicting probative evidence.

Capra v. Phillips Inv. Co., 302 S.W.2d 924, 929 (Mo. 1957). This Court will not overturn the jury's verdict "unless there is a complete absence of probative facts to support it." *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 537 (Mo. banc 2003).

Mercantile chose the issues that it would appeal in *Kaplan I*. Mercantile could have taken the position that there was no probative evidence to support its liability for punitive damages, but chose not to do so (SLF 81-82).

Nevertheless, Mercantile begins its argument with the assertion that it did just that: "In *Kaplan I*, the Bank challenged both its underlying tort liability and its liability for punitive damages" (App.Br. 31). In a subsequent footnote, Mercantile describes its procedural posture just slightly differently: "By challenging submissibility, the Bank obviously *contested* its liability for punitive damages" (App.Br. 36 n.4; emphasis added). By the end of its argument, Mercantile concedes that "the Bank did not challenge the verdict on the *separate* basis as being against the weight of the evidence" (App.Br. 40). This was a classic and conscious waiver of the issue on appeal, as conceded by counsel at oral argument in this second appeal:

Q: (By Baker, P.J.) Did the bank challenge the liability for punitive damages on appeal is one of the points that was brought up?

A: (By Mr. Dellinger) The bank did not challenge, did not raise a separate challenge as it had done post-trial about whether the liability finding was against the weight of the evidence and we do not raise it here….

As a result of Mercantile's appellate strategy in *Kaplan I*, once the Court of Appeals ruled against Mercantile on submissibility, Mercantile's liability for punitive damages was fixed, leaving only Mercantile's challenges to the amount of those damages.

Mercantile nevertheless argues that the Court of Appeals' reversal of the trespass claim in *Kaplan I* somehow revived the issue of Mercantile's liability for punitive damages, making it unnecessary for Mercantile to preserve the issue (App.Br. 39-40). Mercantile's argument that it should get a third shot at liability "would lead to the absurd result" of putting Mercantile in a better position having waived its objections to the verdict form and liability than having raised them. *See, Trout v. Garnett*, 780 F. Supp. 1396, 1495 n.71 (D.D.C. 1991).

Had Mercantile elected to challenge punitive damage liability on appeal, reversal of the trespass claim would not have prevented the Court of Appeals from deciding whether there was *any* probative evidence to support a verdict for negligence-

based punitive damages. *See, Joel Bianco Kawasaki Plus,* 81 S.W.3d 528, 537 (Mo. banc 2003)**.** If the Court of Appeals had found *no* probative evidence to support a verdict, Mercantile would have prevailed and ended this litigation. However, if the Court of Appeals found *any* probative evidence to support liability, as it obviously did ("[Mercantile's] conduct was so egregious that it is the equivalent of intentional wrongdoing," *Kaplan I* at 75), then the appellate court would have faced the same question that it faced in *Kaplan I* -- how *much* of the punitive damage award related to Mercantile's negligence? ("This point is moot in light of our decision to remand for a new trial as to the *amount* of those damages." *Kaplan I* at 75).

Under Rule 84.14, the Court of Appeals could have awarded a partial new trial on the amount of punitive damages, but could not revive an issue long abandoned by Mercantile.

> A just rule, fairly interpreted and enforced, wrongs no man. Ostensibly enforced, but not, it necessarily wrongs some men viz., those who labor to obey it--the very ones it should not injure.

Sullivan v. Holbrook, 109 S.W. 668, 670 (Mo. 1908)

Most of Mercantile's arguments completely beg the question by assuming that the Court of Appeals in *Kaplan I* could and did remand "for a new trial on punitive damages considering only the Bank's negligence" (App.Br. 40). The Court of Appeals had no authority to "revive issues already abandoned by selection of trial strategy or oversight" even under review for plain error. *Mirth v. Regional Bldg. Insp. Co.,* 93

S.W.3d 787, 790 (Mo.App. 2002); *King v. Unidynamics Corp.*, 943 S.W.2d 262, 266 (Mo.App. 1997). This conclusion is not, as Mercantile suggests, an "attack" on *Kaplan I* (App.Br. 39), rather the logical result of Mercantile's litigation strategy.

The resulting re-trial allowed Mercantile an opportunity to convince a second jury that its liability for punitive damages was less than $7,000,000, or even zero. Ultimately, the new trial produced a $5,000,000 verdict consistent with the Court of Appeals's notion that the original $7,000,000 verdict could have included some amount "based on the Bank's vicarious liability for trespass." *Kaplan I*, at 77. Mercantile has not preserved any legal challenge to this outcome.

B. Instructions 2 And 7 Appropriately Instructed The Jury In Light Of *Kaplan I's* Remand For A Determination Of The Amount Of Punitive Damages

Although it created the record that resulted in a limited remand, Mercantile is remarkably strident in its criticism of the trial court, stating that Mercantile "*never* received a determination - by *any* finder of fact – that its negligence justified punitive damages." (App.Br. 30). Plaintiffs believe the first jury's verdict reflected a determination that Mercantile was liable for punitive damages under either theory.[14] But,

[14]The language of *Kaplan I* supports this view:

> The Bank knew or should have known that by sending it off site for disposal at an unknown location without further testing created a high degree of probability of

if it can be said that it did not, that was Mercantile's fault. Mercantile *never* objected to the general verdict form and deliberately abandoned the issue of punitive damage "liability" on appeal in *Kaplan I* (SLF 81-82). Guided by the issues preserved by Mercantile, the Court of Appeals in *Kaplan I* found that Plaintiffs satisfied submissibility for punitive damages and "remand[ed] for a new trial as to the amount of those damages". *Kaplan I*, at 75.[15]

Based on the procedural history dictated by Mercantile, Instructions 2 and 7 properly instructed the jury as to its role in the second trial. Instruction No. 2 provided the jury with a concise, non-argumentative history of the litigation:

> 1. 5900 Tons of concrete containing a chemical injury—namely, harm to the value of the property on which the contaminated material was disposed. In doing so, the Bank showed complete indifference to and conscious disregard for others' rights. This conduct was so egregious that is the equivalent of intentional wrongdoing.

Kaplan I at 75.

[15] Mercantile argues that "[b]y challenging submissibility, the Bank obviously contested its liability for punitive damages." (App.Br. 36). Ultimately, however, Mercantile concedes that "the Bank did not challenge the verdict on the *separate* basis as being against the weight of the evidence" (App.Br. 40).

compound known as polychlorinated biphenyls, or PCBs, were deposited into a creek owned by the Plaintiffs.

The Court made this uncontroverted finding in *Kaplan I,* at *64*.

2. Defendant U.S. Bank violated an environmental Work Plan and was therefore negligent by failing to properly dispose of the concrete.

This is from *Kaplan I,* at 66, 67.

3. Southern Contractors, who deposited the concrete in the Plaintiffs' creek was also negligent.

This statement accurately informs the jury that Southern Contractors was the party that actually deposited the concrete in the creek.

4. U.S. Bank was 80% at fault and Southern Contractors was 20% at fault on the negligence claims.

The Court specifically stated that "[t]he allocation of fault, based entirely on the direct negligence of each defendant and not challenged on appeal, is also fixed on remand at 80% to the Bank and 20% to Southern." *Kaplan I,* at 68.

5. Southern Contractors was not the agent of the Bank and the Bank was not liable for the conduct of Southern Contractors.

This statement adheres to the Court's admonition that "the Bank cannot be held vicariously liable for Southern's conduct." *Kaplan I*, at 66.

> 6. Plaintiffs were awarded their clean up costs, $650,000, as their actual or compensatory damages.

This is undisputed.

> 7. Defendant U.S. Bank's conduct was the equivalent of intentional wrongdoing and showed complete indifference to and conscious disregard for Plaintiffs' rights.

This statement is straight out of *Kaplan I*, at 75.

> 8. Under Missouri law, plaintiffs have established all of the preconditions to an award of punitive damages. Your duty is to decide the amount, if any, of punitive damages that should be awarded against Defendant U.S. Bank.

As discussed above, this statement accurately describes the function of the second jury. Moreover, the phrase "if any" gave the jury the option to award zero dollars as punitive damages if they had so decided.

Instruction No. 7 tracked exactly MAI 10.02's language governing the amount of (as opposed to liability for) punitive damages. Both the verdict form and Instruction No. 7 allowed for a zero verdict.

If Mercantile had wanted to challenge its liability for punitive damages, it could have done so in its first appeal. Mercantile knew how to do it, having raised the issue in its motion for new trial (SLF 20). Mercantile, however, decided to leave liability alone (SLF 81-82). That decision left the Court of Appeals, and ultimately the trial court, with the task of directing a new jury on what was essentially the second phase of a bifurcated trial on the amount of punitive damages. *See* §510.263.3 RSMo. Both courts properly and fairly exercised their discretion, giving due deference to all of the litigants' rights.

D. Mercantile's Allegation Of Error That Instructions 2 And 7 "Skewed The Jury's Determination Of Punitive Damages" Is A Conclusion That Preserves Nothing For Review Under Rule 84.04(d). Further, The Trial Court's Evidentiary Rulings Were Proper And, In Any Event, Did Not Cause Mercantile Prejudice.

Rule 84.04(d) requires that points relied on identify the challenged ruling, state concisely the legal reasons for the claim of error and explain in summary fashion why the ruling constituted error. "The requirements of Rule 84.04 are mandatory and essential for the effective functioning of appellate courts." *McMullin v. Borgers,* 806 S.W.2d 724, 730 (Mo.App. 1991). Mercantile's assertion in its Point Relied On that Instructions 2 and 7 "skewed the jury's determination of punitive damages" fails to include any of Rule 84.04's required elements. It "is a bold conclusion and fails to comply with Rule 84.04 (d) by stating wherein and why the challenged ruling [was] erroneous. It has preserved nothing for review." *State v. Whitlock,* 598 S.W.2d 521, 522

(Mo.App. 1980).

> None of these points states with any specificity what evidence plaintiff finds objectionable. Point VIII does not identify a trial court ruling. We are not told why any of these matters are collateral or what effect they had on the outcome.

McMullin, 806 S.W.2d at 730.

The argument on the point is found in subpart I.D. and it, too, fails to give any clear indication of the claimed error. Mercantile objects to Plaintiffs' reference to Instruction 2 during trial (App.Br. 41-42), which is a rehash of its complaint that the trial court gave Instruction 2 at all. Mercantile also makes a generic complaint that it should have been allowed to introduce evidence on the issue of mitigation, but does not identify the evidence or refer to the record, making it impossible to respond. (App.Br. 42).

When Mercantile does reference the record, it fails to mention that, in most cases, the excluded evidence was admitted in the very excerpt cited by Mercantile or other places in the record. For example, Mercantile complains that the Court sustained Plaintiffs' objection to Werre's testimony that he and Winter agreed to put the concrete in Plaintiffs' creek (App.Br. 43). However, the transcript reveals that Plaintiffs' objection came after Werre gave the objectionable testimony and no remedial instruction was requested or given (Werre 8/11). Mercantile complains that Myers was not allowed to testify that she believed that Southern would remove the concrete (App.Br. 43). However, Myers testified to that twice (Myers 7/61, 62). Mercantile complains that the

trial court excluded "evidence of [Mercantile's] lack of knowledge that the concrete was placed on Plaintiff's property" (App.Br. 43). Myers had already testified that she "figured that everything had gone where it needed to go" (Myers 7/54; *see also* 7/59, 60).

The only exception is testimony sought from Gary Vadja regarding Southern's responsibilities under the Work Plan, offered to show that "when [Winter] approached the bank he had no basis to tell the bank what he was doing was improper or illegal" (Counsel's argument at 3/125). Winter's state of mind has nothing to do with whether Mercantile acted reprehensibly or not, or how Vajda could have testified to Winter's state of mind. Mercantile was free to call Winter to testify about what he did or did not tell Mercantile, but elected not to do so. The evidence was properly excluded.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO REMIT THE PUNITIVE DAMAGES AWARD BECAUSE THE AWARD WAS NOT EXCESSIVE.

A. Standard of Review

A trial court's refusal to remit an award of punitive damages is ordinarily reviewed for abuse of discretion. *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. 1996). When the issue raised in a point of error was not presented to the trial court, review is for plain error. *Lopiccolo v. Semar*, 890 S.W.2d 754, 759 (Mo.App. 1995).

Punitive damages may be awarded in a negligence case where the defendant knew or should have known that its conduct created a high degree of probability of injury and the defendant thereby showed complete indifference to or conscious disregard of the rights of others. *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d

226, 247 (Mo. banc 2001). When a tortfeasor's conduct harms or threatens to harm the environment, the state's "strong" interest in deterring pollution justifies a sizeable award of punitive damages, even if the actual damages suffered are comparatively small. *Johansen v. Combustion Engineering, Inc*., 170 F.3d 1320, 1338 (11th Cir. 1999) (upholding a $4.35 million punitive award based on $43,500 in actual damages). The decision to award punitive damages is peculiarly committed to the jury and the trial court's discretion. *Fust v. Francois*, 913 S.W.2d 38, 50 (Mo.App. 1996). Only in extreme cases will an appellate court interfere with an award of punitive damages. *Id*.

Mercantile argues that three factors identified in *Werremeyer v. K.C. Auto Salvage Co*., 134 S.W.3d 633, 636 (Mo. banc 2004), require remittitur of the punitive damage award in this case. These factors are: (1) whether the conduct was an isolated occurrence; (2) the injury likely occurs only with another's negligence; and (3) the defendant did not knowingly violate a rule designed to prevent injury. *Id*.[16]

In addition to the *Werremeyer* factors, several other factors not mentioned by Mercantile are pertinent to the trial court's consideration of remittitur, including: (1) the nature of the injury suffered; (2) the defendant's financial status; (3) the character of

[16] In its post-trial motions, Mercantile never asked the trial court to remit the award based on *Werremeyer*, or these three factors. Although *Werremeyer* was decided before Mercantile filed its Motion for Remittitur -- and four months before Mercantile's Renewed Motion, Appellant's Renewed Motion only cited *Werremeyer* with respect to the Court's award of prejudgment interest (LF 1341-1342).

the defendant; and (4) the character of the injured party. *Call*, 925 S.W.2d at 849-50; *Moore v. Missouri-Nebraska Express, Inc.*, 892 S.W.2d 696, 714 (Mo.App. 1994).

None of the factors supports reversal of the trial court.

B. *Werremeyer* Factors

1. Mercantile did not make an isolated mistake but engaged in a pattern of malicious and outrageous conduct

Mercantile argues that it simply "made a mistake" (App.Br. 46), despite the fact that two juries punished the same conduct with successive awards of $7,000,000 and $5,000,000, and the Court of Appeals characterized the conduct as "so egregious that it is the equivalent of intentional wrongdoing." *Kaplan I* at 75. Mercantile offers no explanation for how two juries and the Court of Appeals could have so grossly misread Mercantile's intentions.

Mercantile says that Southern had a contractual obligation to properly dispose of the concrete and that Mercantile therefore "assumed" that Southern would landfill the waste (App.Br. 46). There are three very fundamental problems with Mercantile's position. First, Mercantile, not Southern, retained the authority to decide where the material should go:

> Q: You could have told him to take it to a landfill, correct?
>
> A: Could of.
>
> Q: You could have told him to leave it on-site?
>
> A: Yes.

Q: You had the power and the right to tell him exactly what to do with that material, correct?

A: Yes.

(Myers 6/133-134)

Second, Mercantile explicitly rejected Winter's proposal to landfill the waste:

Q: Just to be clear, you did not choose this option of disposing in the landfill, correct?

A: Right.

(Myers 137).

Third, after spending over 18 months reviewing the cost of landfilling, Mercantile paid Winter only $200,000 -- approximately one-half of the estimated landfill cost -- to haul the concrete off-site (Duncan 5/74-75; Myers 6/135-137, 140, 160-162).

In truth, Mercantile could never have assumed that Southern would take the concrete to a landfill because Mercantile was too busy perpetuating the fiction that some or all of the concrete was "clean" and, therefore, did not require landfilling. When it came time to remove the concrete, Mercantile negotiated a change order to the Construction Contract that called for disposal of "clean" concrete at third party sites (Ex. 171; Duncan 5/88), with Myers explicitly noting "want to know where it is going" (Ex. 170). Yet, Mercantile knew it had <u>never</u> tested the stockpiles and it is abundantly clear from the record that Mercantile had no reason to believe that <u>any</u> of the concrete was clean.

In 1994, Mercantile was warned that that "all materials being removed from the site shall be assumed to contain some levels of PCB contamination" (Ex. 41; Myers 6/52-54). In 1995, after submitting the Work Plan to EPA, Mercantile ignored AMI's repeated warnings -- complete with photographs -- of rampant cross-contamination (Exs. 2, 3, 96; Sweet 4/148-160; Myers 6/96-99, 151). In early 1996, after Mercantile silenced AMI and terminated its oversight functions, AMI again warned Mercantile that Southern was adding contaminated concrete slabs to the stockpiles. Mercantile's response took conscious disregard to new levels -- insisting that AMI test only the ground underneath the slabs -- Mercantile's property -- without testing the stockpiles bound for third party sites (Sweet 4/177, 179; Myers 7/81-82; Ex. 143 at 16; Sweet 4/177-179; Myers 7/81-82; Ex. 177 at 8).

On June 28, 1996, three days before Southern began hauling the concrete, AMI again reported to Mercantile that the stockpiles were contaminated:

> The concrete walls parking areas, and loading dock slabs exhibiting PCB concentrations to 10 ppm were removed and stockpiled on the east parking lot by Southern. **The disposal procedures for these materials have not been decided upon.**

(Ex. 177 at 11, emphasis added; Myers 7/84-85).

Nevertheless, Mercantile rejected landfilling or testing the concrete and told Southern to "just take it off" (Myers 6/ 141-142):

> Q: After this date, after he is telling you it has got to be tested before it leaves, was there any testing of the stockpiles to confirm that they were clean?
>
> A: No, not after that date.

(Myers 6/150).

Mercantile did not make a "mistake" about the character or destination of the concrete. The failure to landfill the waste was the natural result of a course of conduct motivated by the one thing that Mercantile did care about: Money. Mercantile wanted to re-sell Lackland and believed that any detectable PCBs would lower Lackland's value and subject Mercantile to increased regulatory compliance and greater risk of environmental liability (Ex. 98 at 2; Myers 6/82-83, 90- 92). Disposal costs also reduced Mercantile's bottom line and, accordingly, Mercantile used the cheapest means possible to clean the cross-contaminated waste off of Lackland:

> When it came time, the Bank chose the least expensive option for disposing of these stockpiles of concrete and the one that required no further testing: it told Southern to just take it off site. . . . In doing so, the Bank showed complete indifference to and conscious disregard for others' rights. This conduct was so egregious that it is the equivalent of intentional

> wrongdoing, of which plaintiffs' harm was the natural and probable consequences.

Kaplan I, at 75.

On Monday, July 1, 1996, Southern began hauling the concrete out to Plaintiffs' creek (Exs. 180, 181; Duncan 5/99-100). Mercantile received shipping tickets, a ledger, and a computer log showing the destination of each load (Duncan 5/99, 103-105; Exs. 178, 180, 181).[17]

Plaintiffs' discovery of the concrete in their creek in January 1997 only fueled Mercantile's contempt for the regulatory process. In 1997, Mercantile lied to the homeowners that the concrete was "clean" and refused to contribute "a penny" to test the material (Werre 7/183-184; Myers 6/119, 173). Mercantile rejected Plaintiffs' request to remove and dispose of the concrete, or to indemnify the owners against future claims (Ex. 236; Milster 4/44-45, 53).

For the next four years, Mercantile misrepresented to Missouri's regulators and the Court that it was Gusdorf, not Mercantile, who "had assumed responsibility for remediation of any materials under 10 ppm, and any other contamination" (Ex. 335), including:

- representing to MDNR that "[Mercantile] had no involvement in the placement of the materials" and that it "did not contract with Southern

[17] Mercantile did not offer any landfill waste manifests to support its contention that it believed the stockpiled concrete had been taken to a landfill.

Contractors to dispose of the rubble in any fashion." (Ex. 263 at 1, 2; Kasper 8/86-88);

- testifying on deposition that Gusdorf, not Mercantile, "independently engaged Southern Contractors." (Myers 6/181);
- in an affidavit in the Missouri Attorney General's statutory enforcement action, representing that "Gusdorf, with financial assistance from Mercantile, assumed responsibility for remediation of any PCB materials under 10 ppm, and any other contamination." (Ex. 335 at 2-3; Myers 6/185-188);
- asserting in motions filed before the trial court that "Southern was hired by Gusdorf" and that "there is no factual or legal basis for treating Mercantile and Gusdorf as one in the same" (Myers 6/182-183);

Mercantile knew this story would not sell to a jury and, in its Opening Statement in the first trial, attempted to recant its story:

> Nobody was under any misapprehension that Gusdorf had an independent management or anything like that. **There is not a doubt in the world from the evidence that Gusdorf was in fact a shell, ...** There is no doubt about that. **I'm not going to try to tell you anything different than that. It had no independent management of its own. ... Again, I'm not going to**

kid you about Gusdorf. Karen Myers made the final decision on this contract.

(Myers 6/189-190 quoting Mercantile's 2001 Opening Statement; emphasis added).

A challenge to a punitive damages award is assessed on its own merits, without regard to specific awards in other cases. *Fust*, 913 S.W.2d at 51. Mercantile's citations do not support its argument that the jury's award is excessive.

Mercantile states that *Morrissey v. Welsh Co*., 821 F.2d 1294, 1296 (8th Cir. 1987), found a "$750,000 award was excessive" (App.Br. 47). In fact, the Eighth Circuit made no such finding. In *Morrissey*, two plaintiffs suffered relatively minor injuries due to the collapse of a wall and were awarded $15,000 and $3,000, respectively, as actual damages, and $750,000 each in punitive damages. *Id*. The court *rejected* defendant's request for remittitur, noting that remittitur is "generally granted when a verdict is plainly excessive." *Id*. at 1299 n.3. Instead, the court ordered a new trial for "a different reason", citing "the vast difference between the fifty to one and two-hundred-fifty to one ratios." *Id*. at 1298-99. According to the court, "the disparities in the awards reveal that the jury did not fashion the punitive damage awards to bear a relation to the injuries inflicted." *Id*. No such disparity exists in this case.

Mercantile also cites *Alcorn* and *Lopez* as cases involving "negligence resulting in serious personal injury or death – much more serious than the economic injury in this case" (App.Br. 47). *Alcorn* and *Lopez*, however, are *submissibility* cases in which the Court concluded that, despite the severity of the injuries, the plaintiffs had not established submissible claims for punitive damages because defendants' honest

compliance with regulatory or industry standards negated conscious disregard, even in the presence of one or more factors that otherwise might support a punitive damage award. *Alcorn*, 50 S.W.3d at 249; *Lopez*, 26 S.W.3d at 160.[18] While the Court was reluctant to punish defendants for their observation of industry and statutory standards, the Court warned that "if there was evidence that the railroad failed to cooperate or comply with the regulatory process, punitive damages might appropriately have been brought." *Alcorn*, at 249.

Unlike the defendants in *Alcorn* and *Lopez*, Mercantile disregarded its regulatory responsibilities under both the Work Plan and Missouri environmental regulations. This is not a case where regulations were followed in good faith.

---

[18] Punitive damages are awarded to punish defendant's bad conduct, not to compensate the plaintiff:

> To rule as *Laclede* invites us to rule, namely, that the submissibility of a punitive damages claim is dependent on the harm that actually occurs rather than the defendant's mental state, would blur--perhaps eradicate--the clear demarcation between the functions of punitive and compensatory damages.

Haynam v. Laclede Elec. Coop., 889 S.W.2d 148, 154 (Mo.App. 1994) *citing Chappell v. City of Springfield*, 423 S.W.2d 810, 812 (Mo. 1968).

Mercantile's disregard of the requirements of the Work Plan and the repeated warnings of its consultants was a conscious undertaking (Myers 6/137, 141).[19]

Before the cleanup began, Mercantile valued the Lackland property at $1.4 million (Ex. 107; Arnold 7/116-130). After the cleanup, Mercantile sold Lackland for $7.4 million, a $6 million increase in value (Ex. 228; Arnold 7/149).

Based on the evidence at trial, the jury and the trial court reasonably concluded that Mercantile's conduct amounted to more than an isolated "mistake".[20]

---

[19] Mercantile knew that the jury might wonder why it had not tested the stockpiles in light of the cross-contamination and, therefore, unsuccessfully moved *in limine* to exclude any evidence of cross-contamination (LF 820). While the jury did not hear about the motion, it did hear about Mercantile's subsequent attempt to keep AMI's Steve Sweet from testifying at trial (Sweet 5/46-47).

[20] Mercantile claims that its post-dumping conduct should not be considered, citing no authority for its position (App.Br. 47-48). Mercantile had a duty to properly dispose of the waste from Lackland. That duty did not end simply by dumping the waste in Plaintiffs' creek and leaving it there. As a result of Mercantile's continued refusal to remove and properly dispose of the waste, the waste leached, as Mercantile knew it would. In 1999, Plaintiffs were required to remove 9,734 tons of PCB-impacted waste -- 3,834 tons more than originally dumped in the creek -- at a cost of $636,781.66 (Exs. 180, 327). Two years earlier, in 1997, removal of the concrete would have cost Mercantile only $107,000 (Milster 4/49, 59). Mercantile's post-dumping conduct and its

2. Plaintiffs' injuries resulted from Mercantile's conduct.

Mercantile argues that the award should be remitted because the Plaintiffs' injury would not have occurred absent the negligence of other parties. This argument is premised on Mercantile's remarkable statement that "[t]he Bank was found liable only for negligence in monitoring Southern's disposal of waste concrete." (App.Br. 45). In *Kaplan I*, the Court of Appeals found otherwise:

> **[T]he Bank had a duty to prevent contaminated concrete from being disposed of anywhere other than at a landfill or on the site.** This duty included the duty to prevent against disposal on property without the owner's permission. ... [Mercantile's] conduct was so egregious that it is the equivalent of intentional wrongdoing, **of which the plaintiffs' harm was the natural and probable consequence.**

Kaplan I, at 71, 75 (emphasis added).

Mercantile's failure to discharge its duties caused Plaintiffs' injuries. In violation of the Work Plan, Mercantile ordered the materials off its property knowing that a third party would suffer the very injury Mercantile was seeking to avoid -- increased environmental liability, increased regulatory compliance, potential physical injury, and

---

resulting aggravation of the Plaintiffs' harm was properly admitted. *See Charles F. Curry & Co. v. Hedrick*, 378 S.W.2d 522, 536 (Mo. 1964).

decreased market value. Mercantile presented no evidence that had Mercantile instructed Winter to haul the waste to a landfill, he would not have done so.

3. Mercantile disregarded regulatory and contractual standards designed to prevent Plaintiffs' injury.

Mercantile claims that it did not knowingly violate a standard designed to prevent Plaintiffs' injury. The Work Plan, however, established clear rules and standards to avoid "illegal and inappropriate disposal of wastes" and the resulting "harm to the value of the property on which the contaminated material was disposed." *Kaplan I*, at 71, 75. In its prior appeal, Mercantile conceded that "[s]uch work plans are common in remediation cases because they describe a method for completing the cleanup and obtaining regulatory approval." (SLF 70).

The record is replete with evidence that Mercantile knowingly violated the Work Plan in its disposal of the contaminated concrete and that, as a result, Plaintiffs suffered precisely the injuries that the Work Plan was designed to prevent. *Kaplan I*, at 75. *See Lopez*, 26 S.W.3d at 160.

Mercantile also claims that "no [Clean Water Law] notices were directed to the Bank" (App.Br. 49). Mercantile fails to mention that the Attorney General is prosecuting Mercantile for violations of the Clean Water Law in this matter. Mercantile repeatedly told the jury about that prosecution, apparently to show that Mercantile already faces punishment outside of this case:

> [T]he Missouri Attorney General has sued my client, Mercantile Bank, and claimed we violated the Clean

> Water Act. . . . if, in fact we are found liable in that case, we will have to pay a substantial fine to the State of Missouri, not Mr. Kaplan. That is where the money will go.

(Merc. Opening Statement 2/104).

C. Non-*Werremeyer* Factors

None of the *Werremeyer* factors warrant remitting the award. Furthermore, other factors omitted by Mercantile support the trial court's decision to deny remittitur.

1. Nature of injury

Mercantile's negligence created an environmental hazard that affected not only Plaintiffs and nearby landowners but also the general public. The trial court was entitled to consider this aggravating factor in denying Mercantile's motion for remittitur. *Moore*, 892 S.W.2d at 714.

In *Johansen v. Combustion Engineering, Inc.*, several property owners brought a nuisance and trespass action against the defendant alleging that acidic water had escaped from the defendant's site and damaged streams running through their properties. 170 F.3d at 1326. The Eleventh Circuit affirmed an award of $4.35 million in punitive damages – 100 times the $43,500 compensatory damage award. *Id*. at 1327, 1339. The court concluded that, although "[t]he actual damages awarded were relatively small", the state's interest in deterring environmental pollution is "strong" and warranted the 100:1 ratio of punitive to compensatory damages. *Id*. at 1338-39. According to the

court, deterring large organizations from adopting "pollute and pay" environmental policies justified "ratios higher than might otherwise be accepted." *Id*.

2. Mercantile's financial condition

Mercantile's financial condition is another factor supporting an award of punitive damages. *Call*, 925 S.W.2d at 849. As of the date of the initial trial, Mercantile had a net worth of $19 billion (Stipulation 2/13). Based on Mercantile's outrageous conduct, the jury could have reasonably concluded that an award of $5 million was necessary to punish Mercantile and to deter Mercantile from engaging in similar conduct in the future. Even so, the award constitutes less than 0.03% of Mercantile's net worth—a fraction of what other courts have considered a constitutional proportion of punitive damages to net worth. *See, e.g. Eden Elec., Ltd. v. Amana Co.*, 258 F. Supp. 2d 958, 975 (D. Iowa 2003)(concluding that due process permits a $10,000,000 punitive award, representing 3% of the defendant's net worth); *Myers v. Workmen's Auto Ins. Co.*, 95 P.3d 977, 992 (Idaho 2004)(affirming punitive award that "represents 1% of the total net worth of [defendant]. . . . [a] significantly smaller amount would likely be ineffective in deterring future wrongful conduct"); *cf. Stogsdill v. Healthmark Partners, LLC*, 377 F.3d 827, 833 (8th Cir. 2004)(finding constitutionally excessive a punitive award "more than eight times [defendant's] net worth").

3. The character of the parties

In deciding whether to remit the award, the trial court may also consider the character of the parties. *Call*, 925 S.W.2d at 849. Mercantile's efforts to conceal the contamination, its irresponsible decision to order the concrete hauled off-site without

testing, and its subsequent attempt to mislead Plaintiffs, the MDNR, and the trial court are relevant to this factor.

Other actions taken by Mercantile reflect poorly on its character and support the trial court's decision to deny remittitur, including:

- refusing to meet with Plaintiffs for over six months.
- refusing to contribute to test the waste in Plaintiffs' creek .
- refusing to send a representative to inspect the creek for ten months.
- refusing to remove the concrete, indemnify the property owners, or reimburse Plaintiffs for their costs, despite the testimony of Mercantile's official who met with Kaplan that these requests were reasonable.
- falsely representing to the homeowners that the concrete was clean and safe.
- filing a false affidavit regarding its role and responsibility in the Lackland cleanup.
- attempting to prevent its former consultant from testifying at trial.

The evidence pertaining to these factors provide ample support for the trial court's denial of remittitur in this case. The judgment should be affirmed.

III. THE TRIAL COURT PROPERLY DENIED MERCANTILE'S MOTION FOR REMITTITUR BASED ON: (A) THE EVIDENCE OF MERCANTILE'S REPREHENSIBILITY; (B) THE RATIO BETWEEN THE PUNITIVE DAMAGE AWARD AND PLAINTIFFS' POTENTIAL HARM; AND (C) THE RELATIONSHIP BETWEEN THE PUNITIVE DAMAGE AWARD AND THE CIVIL PENALTIES SET FORTH IN §644.076.1 RSMO.

Mercantile argues that the trial court's refusal to remit the punitive damage award violates its right to due process, citing *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *Gore* and *Campbell* identify three "guideposts" for courts reviewing punitive damage awards:

1. the degree of reprehensibility of the defendant's misconduct;

2. the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award;[21] and

3. the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Gore, 517 U.S. at 575; *Campbell*, 538 U.S. at 418. Application of these factors support the trial court's decision not to remit in this case.

A. Mercantile's Conduct Was Reprehensible.

The most important criteria in assessing the reasonableness of the punitive damage award is the reprehensibility of the defendant's conduct. *Campbell*, 538 U.S. at 419.

In *Gore*, the Supreme Court identified several factors to be considered in assessing the reprehensibility of a tort defendant's conduct: (a) whether "the harm

[21] Mercantile significantly misstates the Supreme Court's ratio analysis in *Campbell* as comparing "the punitive damages to plaintiff's actual harm." (App.Br. 50). In the cited passage in *Campbell*, however, the Supreme Court followed its prior holdings in *Gore* and *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) in considering "the disparity between the actual **or potential harm** suffered by the plaintiff and the punitive damages award." *Campbell*, 535 U.S. at 418 (emphasis added). Nowhere in Mercantile's 80-page brief is there any reference to "potential harm."

caused was physical as opposed to economic," (b) whether the defendant's conduct "evinced an indifference to or a reckless disregard of the health or safety of others," (c) whether the plaintiff "had financial vulnerability," (d) whether the conduct was "an isolated incident" as opposed to part of a series of actions, and (e) whether the defendant engaged in "intentional malice, trickery, or deceit" or merely had an accident. *Id.* at 576-77.

1. "Economic" versus "physical" harm.

Mercantile argues that the harm it caused was "purely economic in nature" because the jury awarded Plaintiffs their clean-up costs (App.Br. 49). That argument focuses only on Plaintiffs' *remedy* and completely ignores the nature of the *harm* caused by the dumping of 5,900 tons of PCB-contaminated concrete slabs with protruding rebar into a residential creekbed. The *harm* that Mercantile inflicted was *environmental,* and threatened not only Plaintiffs' property, but the safety of Plaintiffs' neighbors and their children, and Missouri's food chain.

The State's interest alone in policing this physical intrusion justifies the punitive damage award. In *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1338-1339 (11th Cir. 1999), property owners sued the owner of a mining site that polluted the owners' streams. The property involved was rarely used or visited by the owners and the owners did not claim any risk to human health or damage to crops or animals. *Id.* at 1327. The jury awarded combined actual damages of $43,500 for trespass and nuisance and punitive damages of $15,000,000. *Id.* Following the Supreme Court's

opinion in *Gore*, the trial court reduced the punitive damage award to $4,350,000 – 100 times the actual damage verdict. *Id*.

Applying *Gore,* the Eleventh Circuit upheld the $4,350,000 award: "[T]he state's interest in deterring the conduct – environmental pollution – is strong. In order to achieve this goal, ratios higher than might otherwise be acceptable are justified". *Id.* at 1338. The Eleventh Circuit explained that:

> A bigger award is needed to "attract the ... attention" of a large corporation. …. It is not unlikely that having to pay $4.35 million in punitive damages would not make the company newsletter. It should, however, attract the attention of whomever is in charge of the corporation's daily decisions regarding environmental protection, and would, no doubt, bear heavily upon regional or local managers where failures to regard consequences would be expected to subject their employers to loss.

Id. at 1338-39.

Here, Mercantile acknowledged that the exposed concrete and rebar was "dangerous" (Myers 6/95). *See Denofio v. Soto*, 2003 U.S.Dist. LEXIS 12225, at *2 (D. Pa. 2003)("[P]hysical harm could certainly have occurred had the plaintiffs not taken steps to remedy the dangerous condition in which their property was left."). There is

likewise no dispute that the PCB contamination threatened the environment and violated Missouri's Clean Water Law (Ex. 249 at 3, Ex. 259):

> Q: What is it – what was in that creek is the contaminant that you are speaking of?
>
> A: (John Madras, MDNR) Well, there are several different contaminants there. The one we are focusing on is the PCBs and the aspects related to that. The concrete and rebar itself were also water contaminants, and their presence in the creek is a violation as well.
>
> * * *
>
> Q: Now, the fact that there were PCBs in the concrete to you, did that make this more serious?
>
> A: Yes, it did.
>
> * * *
>
> Q: Is it also significant that this tributary goes to Cole Creek and Cole Creek goes to the Mississippi?
>
> A: Yes, it does.

(Madras 8/53, 54). MDNR's Martin Kaspar explained that: "PCBs are known toxins, very toxic chemicals. If anything is leaching in the creek, it is going to have a toxic

effect on any of the fish or biota in the creek." (Kaspar 8/104). By the time Plaintiffs began their cleanup of the creek in 1999, PCB contamination had, in fact, leached to Cole Creek (Brenneke 8/142; Ex. 327 at Table 1, Samples GB 3, 5, 8, 9, 10).

Moreover, nothing in *Gore* or *Campbell* precludes the award of punitive damages in a case of purely economic harm. *Gore* explicitly states, "[t]o be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, ... , can warrant a substantial penalty". *Gore*, 517 U.S at 576. The Court singled out its prior opinion in *TXO Prod. Corp. v. Alliance Res. Corp.,* 509 U.S. 443 (1993), in which it upheld a $10,000,000 punitive damage award supported by only $19,000 in economic damages. *Gore*, 517 U.S. at 582.

The federal circuits routinely uphold substantial punitive awards where, unlike here, the harm is *exclusively* economic. In *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp*., 345 F.3d 1366 (Fed. Cir. 2003), the Federal Circuit Court of Appeals upheld a $50,000,000 punitive damage award for fraudulent inducement, indicating that *Campbell* primarily sought to limit the states' ability to punish extraterritorial conduct:

> In addition, the central holding of State Farm has no bearing on this case. In State Farm, the Supreme Court reversed the Utah Supreme Court's decision upholding an award of punitive damages that was punishing out-of-state conduct, holding that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." Thus, the Supreme

> Court focused on where the conduct being punished occurred, not the conduct itself. In contrast, the conduct itself is the issue in this case, and there is no claim that the punitive damage award in this case punished out-of-state conduct.

DeKalb, 345 F.3d at 1370 (citations omitted). *See also Eden Elec., Ltd. v. Amana Company*, 370 F.3d 824, 828 (8th Cir. 2004)(upholding $10,000,000 punitive damage award for fraud in distributorship agreement).

2. Mercantile's indifference to and reckless disregard for the safety and health of others.

Mercantile contends that its "conduct did not present a risk to health or safety" referring, as it often does, to the fact that the 0-10 ppm material is classified as non-hazardous (App.Br. 50). However, that technical classification is just the beginning -- not the end -- of the analysis. Mercantile understood that PCBs leach into soil and water and, for that reason, MDNR considered the PCBs a threat to the environment (Hutkin 3/52; Ex. 19; Madras 8/49). In addition, Mercantile correctly considered the concrete slabs and rebar dangerous (Myers 6/82-83, 91, 95). These were all valid concerns when the concrete was on *Mercantile's* property:

> Q: And the reason you decided to take it off is because you thought it would reduce exposure,

reduce liability and increase the marketability of the property?

A: Yes.

Q: I mean, this stuff wasn't cheeseburger wrappers, this under 10, this wasn't milk cartons, you wanted this stuff off of your property, didn't you?

A: Right.

(Myers 6/82-83; emphasis added).

Mercantile's attitude toward the cross-contaminated concrete changed dramatically once the waste was removed from its property. Indifference refers to "[h]aving no particular interest in or concern for" a matter, not caring "one way or the other." AMERICAN HERITAGE DICTIONARY 919 (3rd ed. 1996). That would be a generous description of the attitude that Mercantile displayed toward Plaintiffs, the neighboring homeowners, Missouri's regulators, and the environment, after the waste was discovered on *Plaintiffs'* property.

After Plaintiffs discovered the waste, Mercantile refused to test or remove the waste, or provide Plaintiffs with an indemnity against potential claims relating to material that Mercantile now says was no safety risk (Milster 4/26-27, 45-47, 55-56; Arnold 7/145-146). Mercantile even told Plaintiffs and neighboring homeowners that the material was "clean" and could stay in the creek (Ex. 201; Werre 7/183-184). When MDNR demanded a clean-up, Mercantile elected to duck responsibility, directing MDNR

to Gusdorf -- an unusual reaction in light of Mercantile's current position that the PCB-infected concrete was of no moment (Exs. 263, 335; Kaspar 8/86-88).

In 1999, Plaintiffs removed 9,734 tons of PCB-impacted rubble, including soil and sediment downstream where the PCBs had leached during the preceding three years (Brenneke 8/142, 144; Ex. 327 at Table 1, Samples GB 3, 5, 8-10).[22] Plaintiffs' remediation took two months and required 24-hour security to prevent injuries to persons from falling in the excavated ditch, or climbing on the concrete (Brenneke 8/141-142). That no one was injured does not absolve Mercantile of its utter indifference to that possibility:

> In the instant case, although the harm was economic, **physical harm could certainly have occurred had the plaintiffs not taken steps to remedy the dangerous condition in which their property was left**. The water-filled pit existed on plaintiffs' property from December 1999 onwards. DeNofio's repeated attempts to contact Soto to remedy the condition were

[22] Mercantile carefully states that there was "no evidence that PCBs had leached "into the *water*." (App.Br. 53; emphasis added). There was, however, ample evidence that PCBs leached into the *sediment* downstream and that MDNR was concerned about potential water contamination (Ex. 327 at Table 1, Samples GB 3, 5, 8-10; Kaspar 8/103-104).

to no avail. **Soto's conduct demonstrated complete indifference to the safety of others in the vicinity.**

DeNofio v. Soto, 2003 U.S. Dist LEXIS 12225, at *2 (D. Pa. 2003).

The cases cited by Mercantile do not undermine the constitutionality of the jury's award in this case. In *Stogsdill*, 377 F.3d at 832, 833, the Eighth Circuit reduced a punitive award only after finding that: (1) the $5,000,000 punitive damage verdict was "more than eight times [defendant's] net worth"; (2) there was no evidence of "malice, trickery or deceit, [rather than] mere accident"; and (3) the trial court's admission of substantial "extraneous evidence may well have caused the jury to base its punitive damages award on evidence unrelated to the treatment Stogsdill received in April 1999." Furthermore, in *Boerner v. Brown & Williamson*, the Court's remittitur of the punitive award to $5,000,000 had nothing to do with the defendant's reprehensibility, but the enormous size of the actual damage award (over $4,000,000). 394 F.3d 594, 602-603 (8th Cir. 2004).

3. Financial vulnerability.

In *Gore*, the Court did not say that the Constitution prohibits plaintiffs of means from recovering punitive damages, regardless of the cost and risk imposed upon the plaintiff by the defendant. *See, e.g., Rhone-Poulenc Agro*, 345 F.3d at 1366 (Fed. Cir. 2003)(upholding $50,000,000 punitive award with no finding of financial vulnerability); *Eden Elec*., 258 F. Supp. 2d at 970 (D. Iowa 2003)($10,000,000 in punitive damages awarded to a plaintiff that "was, and is, a large, successful enterprise").

In arguing that Plaintiffs have "been made whole by substantial compensatory damages" (App.Br. 54), Mercantile completely ignores Plaintiffs' uncompensated ongoing liability, threatened harm and enormous litigation costs[23] resulting from Mercantile's conduct, including:

[23] *See, e.g., Continental Trend Resources, Inc. v. OXY USA, Inc*., 101 F.3d 634, 640, 642 (10th Cir. 1996), in which the 10th Circuit applied *Gore* in upholding a $6,000,000 punitive damage award based $269,000 in compensatory damages and the larger *potential* loss to plaintiff. The Court also considered plaintiffs' reasonable legal fees, stating: "On any reasonable hourly fee basis plaintiffs' legal costs no doubt exceed their compensatory damages award. Nothing in BMW would appear to prohibit consideration of the cost of those legal proceedings in determining the constitutionally permissible limits on the punitive damages award". *Id*. at 642

1. potential claims for personal injury and environmental contamination from neighboring property owners, against which Mercantile refused to indemnify Plaintiffs;[24]
2. the potential loss of millions of dollars in the value of their property, which Plaintiffs had owned since 1981 (Kaplan 9/82);
3. providing a perpetual indemnity to the purchasers of their property (Ex. 310; Kaplan 9/82);
4. incurring Waste Generator liability, in the event of a claim involving the Milam landfill (Ex. 333A; Kaplan 9/97); and
5. incurring seven years of litigation costs, including two multi-week trials and Mercantile's two appeals from jury verdicts.

In addition to Plaintiffs, there were other financially vulnerable targets[25] of Mercantile's conduct that Mercantile does not mention. The adjoining homeowners (two

[24] Although Milster's meeting notes indicate, "get Kaplan insulated from a problem they had no hand in creating", Arnold, Mercantile's Vice Chairman, decided otherwise: "it is an uncertain liability and it would be something that the bank obviously would rather not do" (Ex. 236 at 2; Milster 4/44; Arnold 7/146). *See DeNofio*, 2003 U.S. Dist. LEXIS 12225 at *2 ("[P]laintiffs were left financially vulnerable by defendant's actions [because they] would have been liable for injury caused to others by the condition on their property").

retirees and a delivery man) asked Mercantile to remove the concrete (Werre 7/158, 182, 184-185). Mercantile's counsel told the homeowners that the concrete was "clean and safe,"[26] and left them to fend for themselves (Werre 7/183-184).

> Q: Mr. Werre, what effect do you believe that the PCBs and the concrete that was in the creek behind your home had on your property while it was there?
>
> A: I don't believe I could have sold my house to anyone. I don't know if I would have had any value at that point in time.
>
> **Q: Do you think your home had any worth at that point in time?**
>
> **A: No**.

(Werre 8/5-6)(emphasis added).

---

[25] *Gore* and *Campbell* discuss the financial vulnerability of the "target", not the "plaintiff". *Gore*, 517 U.S. at 576; *Campbell*, 538 U.S. at 419. Mercantile references only the "plaintiff" and never mentions the word "target".

[26] Mercantile thus lied both *to* the homeowners (telling them the concrete was "clean and safe"), and *about* the homeowners (telling Plaintiffs that the homeowners did not want the concrete removed)(Kaplan 9/62).

4, 5. Mercantile's repeated misconduct, deliberate false statements, and attempted concealment of evidence.

In *Gore* and *TXO*, the Supreme Court recognized that "deliberate false statements, acts of affirmative misconduct, or concealment of evidence" would justify a substantial punitive award, and that a "pattern" of such conduct would lend further support to the constitutionality of such an award. *Gore*, 517 U.S. at 576-577, 579; *TXO*, 509 U.S. at 462.

In *TXO*, TXO filed a frivolous suit to quiet title to oil and gas development rights, the real intent of which was to reduce the royalty payments that TXO had agreed to pay its grantor, Alliance. 509 U.S. at 451. To support its position, TXO attempted to convince another party in the chain of title to execute a false affidavit concerning a prior transfer. *Id.* at 449-50. Alliance counterclaimed for slander of title. *Id*. at 447. The jury awarded Alliance $19,000 in actual damages (its cost in defending the suit), and $10,000,000 in punitive damages (526 times the actuals). *Id*. at 447. The Supreme Court upheld the award, concluding that the punitive award was supported by TXO's reprehensible conduct, the potential loss to Alliance ($1 million), and the net worth of TXO ($2.2-2.5 billion). *Id*. at 462. The Supreme Court was most distressed that TXO's pattern of misconduct, culminating in its "knowingly and intentionally [bringing] a frivolous declaratory judgment action":

> What could be more egregious than the Vice President of a company saying, well, testifying and saying that

> he knew all along that this property belonged to [Alliance]?

Id. at 451.

Mercantile claims that the "Bank's errors were sins of omission rather than commission." (App.Br. 55). In *Kaplan I*, however, the Court of Appeals ruled that Mercantile's conduct "was so egregious that it is the equivalent of intentional wrongdoing, of which the plaintiffs' harm is the natural and probable result." *Kaplan I*, at 68. Mercantile also claims that the "Bank's misconduct is based on a single event – the deposit of concrete on Plaintiffs' property by mistake" (App.Br. 54). This statement ignores the lion's share of the evidence at retrial. Mercantile continues to disregard its extensive history of misconduct and deceit, running full circle from its conscious disregard of AMI's warnings in April-August 1995, through its failed attempt to keep AMI's President, Steve Sweet, from testifying at trial six years later.

This is not a case where consultants' warnings did not make their way to Mercantile. Two years before the dumping, Mercantile knew that contamination was "everywhere" at Lackland (Myers 6/55-56) and completely disregarded its responsibility to get the contaminated material to a landfill. When caught by Plaintiffs, MDNR, and the homeowners, Mercantile refused to test or remove the concrete, engaged in chronic misrepresentations, litigated issues it knew to be false and, four years later, tried to convince its own consultant not to show up at trial.

For three years, while Mercantile was stonewalling and attempting to deceive Plaintiffs, regulatory authorities, the Attorney General, and the trial court, the

PCBs leached into the creek, as it knew they would (Ex. 19). Because of Mercantile's egregious conduct, Plaintiffs incurred extensive cleanup costs and ongoing exposure to additional liability, and the environment suffered an inexcusable insult.

B. The Ratio Between The Punitive Damage Award And Plaintiffs' Potential Harm Does Not Offend Due Process.

Mercantile claims that "[t]he 11-to-1 ratio of punitive to actual damages renders the punitive damages award unconstitutional." (App.Br. 55). To reach this conclusion, Mercantile misstates both the legal standard announced by the Supreme Court and the proper measure of the ratio.

1. The proper standard: punitive damages to *potential* harm.

Mercantile's comparison of the punitive award to the *actual* damages only applies the wrong standard (App.Br. 55). The Supreme Court has repeatedly ruled that the proper ratio is that of punitive to actual *and potential* damages: "the proper inquiry is whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct, as well as the harm that actually has occurred." *Gore*, 517 U.S. at 581, *quoting TXO*, 509 U.S. at 460 (emphasis in original);

In both *Gore* (1996) and *TXO* (1993), the Supreme Court traced its focus on "potential harm" back to its opinion in *Pacific Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In *Haslip*, a defendant insurance agent's misappropriation of premiums caused the plaintiffs' health insurance to lapse, resulting in hundreds of thousands of dollars in actual damages. *Haslip*, 499 U.S. at 6-7. In reviewing the constitutionality of the punitive award, the Court looked beyond the plaintiffs' actual injury to consider "whether

there is a reasonable relationship between the punitive damages award *and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred*." *Haslip*, 499 U.S. at 21 (italics added).

In *TXO*, the Court upheld a $10,000,000 punitive award that was 526 times the actual damages ($19,000), but only 10 times the *potential* lost royalty payments to Alliance:

> **Taking account of the potential harm that might result from the defendant's conduct in calculating punitive damages was consistent with the views we expressed in *Haslip, supra*.** In that case, we endorsed the standards that the Alabama Supreme Court had previously announced, one of which was "whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred." **Thus, both State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages.**

TXO, at 460; italics in original, emphasis added.

The Court found that this 10:1 ratio did not "jar one's constitutional sensibilities":

> While petitioner stresses the shocking disparity between the punitive award and the compensatory award, **that shock dissipates when one considers the potential loss to respondents**, in terms of royalty payments, had petitioner succeeded in its illicit scheme.

TXO, 509 U.S. at 462 (emphasis added).

In *Gore*, the Court again confirmed "that the proper inquiry is 'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'" *Gore*, 517 U.S. at 581, quoting *TXO*, 509 U. S. at 460 (italics in original), quoting *Haslip*, 499 U.S. at 21. In *Gore*, the Court found the *absence* of potential harm critical to its decision to remit a $2,000,000 punitive award based on $4,000 of minor, cosmetic defects to the plaintiff's car:

> The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury. **Moreover, there is no suggestion that Dr. Gore or any other BMW purchaser was threatened by any additional potential harm by BMW's nondisclosure policy.** The disparity in this case is thus dramatically greater than those considered in *Haslip* and *TXO*.

Gore at 582 (emphasis added).

In *Campbell*, the Court repeated that the proper ratio compares the *potential harm* and the punitive damage award. 538 U.S. at 418, 424, 425. The Court suggested that "in practice, few [punitive damage] awards exceeding a single-digit ratio between punitive damages and compensatory damages, to a significant degree, will satisfy due process." *Id*. at 425. The Court expressly refused, however, to establish any constitutional "maximum" on punitive damages: "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* at 425. *See also Asa-Brandt, Inc. v. ADM Investor Services, Inc*., 344 F.3d 738, 747 (8th Cir. 2003)(upholding an infinite ratio of $1.25 million in punitive to nominal damages for breach of fiduciary duty, and finding, "it is proper to consider not only the harm that actually resulted, but also the harm that might have resulted").

Mercantile never mentions "potential harm" in discussing the Supreme Court's ratio analysis (App.Br. 55-58). That is because here, Plaintiffs faced millions of dollars in potential harm as a result of the Mercantile's conduct, including:

1. the inability to sell Plaintiffs' property -- absent remediation and a perpetual indemnity -- representing a potential loss to Plaintiffs of $6,700,000 (Ex 310; Kaplan 9/82, 85-86);[27]
2. potential liability under the indemnity granted to the purchaser of the property (Ex. 310; Kaplan 9/82);
3. potential third-party claims for personal injury and environmental contamination;[28]
4. potential Waste Generator liability in the event of a claim involving the Milam landfill (Ex. 333A; Kaplan 9/97); and

[27] Plaintiffs' potential loss due to the contamination, thus, mirrors the $6,000,000 gain achieved by Mercantile – from $1.4 million to $7.4 million – by removing the contamination from Lackland (Exs. 107, 228; Arnold 7/116-117, 129-130, 149-150). A neighboring homeowner, Leonard Werre, also testified that the contamination left his neighboring property valueless (Werre 8/5-6). *See Watson v. Johnson Mobile Homes*, 284 F.3d 568, 573 (5th Cir. 2002)("*BMW* suggests that a court should aggregate the actual and threatened harm suffered not only by the plaintiff but also by individuals similarly situated").

[28] Mercantile considered the waste "dangerous", and viewed an indemnity against this liability "something that the bank obviously would rather not do" (Myers 6/95; Arnold 7/146).

5. seven years of litigation costs, including two multi-week trials and Mercantile's two appeals from jury verdicts.[29]

The potential harm resulting from Mercantile's conduct likely *exceeded* the punitive damage award. The ratio of the jury's $5,000,000 punitive award to Plaintiffs' "potential harm" is reasonable and appropriate under any constitutional analysis.

2. The ratio of punitive damages to Plaintiffs' actual harm is not unconstitutional.

Setting aside Plaintiffs' potential harm, Mercantile still miscalculates the ratio. The ratio of punitive to actual damages alone is less than 7.8:1 – well short of "double digits". To inflate the ratio, therefore, Mercantile first disregards Missouri law that a joint and several tortfeasor "is individually liable for the entire judgment", *Werremeyer*, 134 S.W.3d at 636 (Mo. banc 2004), and reduces the actual damage award to 80% (App.Br. 56).[30] Mercantile then, without any authority, *adds the prejudgment*

---

[29] *See Continental Trend*, 101 F.3d at 642 ("We have held that the costs of litigation to vindicate rights is an appropriate element to consider in justifying a punitive damages award"). The Court may determine the reasonable amount of fees without the aid of evidence. *Arnett v. Johnson*, 689 S.W.2d 836, 838 (Mo.App. 1985).

[30] The case which Mercantile cites for this proposition, *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000), upheld ratios of 99:1, 55:1, 16:1, 11:1 and 5:1, having an aggregate ratio of 27:1.

interest award to the punitive damage award (App.Br. 56).[31] Prejudgment interest, however, is *compensatory*, not punitive:

> Pre-judgment interest is awarded on the theory that it is necessary to give full compensation for the loss sustained.

Green Acres Enter., Inc. v Freeman, 876 S.W.2d 636, 641 (Mo.App. 1994). *See also Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, 2005 U.S. Dist. LEXIS 3069 (N.D. Ill. 2005)("A properly calculated award of prejudgment interest, no matter how large it is, cannot be punitive"). Thus, if interest is to be added anywhere, it should be added to the actual damage side of the equation.

3. Post-*Campbell* decisions support the jury's award.

Finally, Mercantile states that "recent Eighth Circuit decisions confirm that a 1-to-1 ratio is the maximum permissible in this case." (App.Br. 57). This statement ignores *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 828 (8th Cir. 2004), a case cited by Mercantile in its original Brief, which upheld a $10,000,000 punitive damage award based on $2,000,000 in economic damages. It also ignores *Asa-Brandt*, 344 F.3d at 744 (8th Cir. 2003), upholding a $1.25 million punitive award on a breach of fiduciary duty claim supported by *nominal* damages -- an infinite ratio. *See also*, *Werremeyer v. K.C. Auto Salvage Co.*, 2003 Mo.App. LEXIS 1074, at *8 (Mo.App. 2003)(in which the Western

[31] Mercantile's case, *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986), has nothing to do with punitive damages and merely distinguishes prejudgment interest from costs.

District upheld a 13.9 to 1 punitive damage ratio) *affirmed Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633 (Mo. banc 2004).

These holdings are consistent with decisions from other states and federal circuits, **including the remand of *Campbell* itself, which resulted in a $9 million punitive award and a 9:1 ratio to actual damages.** *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004), *cert denied*, 160 L.Ed. 2d 123 (2004). *See also Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003)(upholding $2 million punitive award on $176,361 in actual damages, an 11:1 ratio); *Myers v. Workmen's Auto Ins. Co.*, 95 P.3d 977, 992 (Idaho 2004)(affirming award of $735 in compensatory damages and $300,000 in punitive damages – a ratio of 408:1 – because the punitive award "represents 1% of the total net worth of [defendant]. . . . [a] significantly smaller amount would likely be ineffective in deterring future wrongful conduct").

The ratio of the jury's punitive damage award to Plaintiffs' potential harm is consonant with *Gore* and *Campbell*, and with traditional notions of due process.

C. The Penalties Available For Mercantile's Misconduct Exceed The Punitive Damage Award.

The third guidepost identified in *Gore* is the "civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583.

Missouri's Clean Water Law provides "for the assessment of a penalty **not to exceed ten thousand dollars per day** for each day, or part thereof, the violation occurred and continues to occur … as the Court deems proper." §644.076.1 RSMo (1994)(emphasis added).

In a footnote, Mercantile states that the "[p]enalties for violation of Missouri's Clean Water Law are not analogous because the Bank . . . could not be found liable for violating that law." (App.Br. 58). The Missouri Attorney General apparently believes otherwise and has sued Mercantile for Clean Water Law violations.

In its Opening Statement, Mercantile advised the jury regarding its potential liability in the Attorney General's suit and argued that Mercantile's exposure to substantial fines under the Clean Water Act warranted a lighter punitive verdict in this case, based on Mercantile's assumption that the jury would prefer that the money go to the State of Missouri rather than to Plaintiffs:

> And, in fact, the Missouri Attorney General has sued my client, Mercantile Bank, and claimed that we violated the Clean Water Act. We are contesting that because the Act says we actually have to be the one who did it or permitted it to be done, but if, in fact, we are found liable in that case, **we will have to pay a substantial fine to the State of Missouri, not to Mr. Kaplan. That is where the money will go.**

(Merc. Open. Stmt. 2/103; emphasis added; *see also* Myers 7/64).

During Closing Statement, Mercantile repeated this theme:

> Clean Water Act. You have heard my client has been charged with violating the Clean Water Act. Separate lawsuit filed by the Attorney General. If we

are found liable, we have to pay fines, we have to

pay penalties, nothing to do with this case.

(Merc. Closing Stmt. 10/35).

Mercantile now argues that it "cannot be found liable for violating that law". (App.Br. at 58). Mercantile's position on whether it is potentially subject to civil penalties under the Clean Water Act apparently depends on whether the audience is a jury or a Court on review.

In this case, the contaminated waste remained on Plaintiffs' property from July 1, 1996 to December 23, 1999, a period of over 1,200 days (Exs. 180, 181; Ex. 327, Table 1). Mercantile thus was on notice that, under the Clean Water Law, it was susceptible to fines totaling in excess of $12 million, over twice the punitive damage award in this case. *See, e.g., Union Pacific Railroad Co. v. Barber*, 149 S.W.3d 325, 349 (Ark. 2004), *cert. denied,* 125 S. Ct. 320 (2004)(upholding $25,000,000 punitive damage award where defendant had notice of potential statutory penalty of $22,000 per day for 450 days, totaling $9.9 million).

This factor supports the ruling of the trial court.

D. The Trial Court Properly Admitted Evidence Of Mercantile's Trickery And Deceit.

This Court's evidentiary rulings before and during the trial were correct.

1. Gusdorf

Mercantile complains that the Court admitted evidence of its "litigation behavior" and "aggressive defense" (App.Br. 59-60). Mercantile, however, did not have

the right to argue legal and factual positions that Mercantile knew to be false.

> What could be more egregious than the Vice-President of a company saying, well, testifying and saying that he knew all along that this property belonged to [Alliance]?

TXO, 509 U.S. at 451. *See also Mathias v. Accord Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003); *Continental Trend*, 101 F.3d at 642.

For five years from August 1996 to August 2001, Mercantile engaged in a scheme to deceive Plaintiffs, homeowners, regulators, and the trial court regarding the waste in Plaintiffs' creek and Mercantile's role in the Lackland clean-up. This scheme involved misstatements in letters, false deposition testimony and a false affidavit.

Mercantile's use of Gusdorf is relevant for the very reason that Mercantile set up the artifice: it demonstrates that Mercantile was aware of the liability associated with PCB-contaminated materials and the risks associated with environmental remediation. Mercantile's subsequent lies to MDNR and the court evidences Mercantile's continuing desire to avoid its obligation under the Work Plan to properly dispose of the concrete in a landfill. This conduct allowed the PCBs to remain in Plaintiffs' creek, leach downstream, and aggravate Plaintiffs' damages.

2. Steve Sweet

In *Kaplan I*, the Court of Appeals specifically referenced Mercantile's attempt to prevent Steve Sweet from testifying during the first trial. *Kaplan I*, at 75 n.4. This was, in fact, the second time that Mercantile tried to silence Sweet, the first being

Mercantile's counsel's instruction to Sweet to "shut up" when Sweet reported cross-contamination at the site (Sweet 4/162-163). When he persisted, Mercantile eliminated his oversight function at the site (Sweet 4/160-163; Ex. 113).

In sum, Mercantile's contention that the punitive damage award violates its right to substantive due process is untenable. Substantive due process protects individuals from government action that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). With due regard for the Court's recognition in *Gore* that a grossly excessive award of punitive damages can operate to deprive an individual of substantive due process, in this case it is Mercantile's conduct rather than the jury's punitive damage award that sends the conscience reeling.

The federal constitution does not require remittitur of the jury's award in this case.

IV. THE TRIAL COURT CORRECTLY AWARDED PREJUDGMENT INTEREST BECAUSE PLAINTIFFS MET THE REQUIREMENTS OF §408.040.2 RSMo.

Section 408.040.2 obligates the trial court to award prejudgment interest where the amount of the judgment exceeds either "a demand for payment of a claim or an offer of settlement of a claim", as follows:

> In tort actions, if a claimant has made **a demand for payment of a claim or an offer of settlement of a claim,** to the party, parties or their representatives **and**

> **the amount of the judgment or order exceeds the demand for payment** or offer of settlement, **prejudgment interest,** . . .. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier.

§408.040.2 RSMo. (1987)(emphasis added).[32]

The "judgment" referred to in §408.040.2 includes both actual and punitive damages. *Call v. Heard*, 925 S.W.2d 840, 853-854 (Mo. banc 1996). Thus, where the combined verdict exceeds the pre-filing demand, plaintiffs are entitled to prejudgment interest on the combined award. *Id.*

The statute requires only that the demand be sent by certified mail and left open for sixty days. With that exception, the statute does not specify any form of demand or require any particular language. As this Court has made clear, "the demand need not always be expressed in dollars and cents" and need only be "capable of ascertainment in a certain dollars and cents amount." *Brown v. Donham*, 900 S.W.2d 630, 633 (Mo. banc 1995). A claimant may join multiple parties and multiple claims in a single, unapportioned demand. *Boggs v. Lay*, 164 S.W.3d 4, at 24; *Call*, 925 S.W.2d at 854 (Mo. banc 1996).

[32] Mercantile cites the 2000 version of the statute, which contains the identical pertinent language as the 1987 statute.

Once the statutory prerequisites have been met, the Court must make an award of 9% simple interest beginning sixty days after the demand. Large awards are not uncommon or improper. *See, e.g., McCormack v. Capital Electric Construction Co., Inc.*, 159 S.W.3d 387, 401-403 (Mo.App. 2004)($3,789,665 award). That is because the purpose of §408.040.2 is to "compensate claimants for the true cost of money damages they incurred due to the delay of litigation" and "promote settlement and deter unfair benefits from the delay of litigation." *Werremeyer,* 134 S.W.2d at 636, 637, *quoting Brown,* 900 S.W.2d at 633. Prejudgment interest is compensatory, not punitive:

> Pre-judgment interest is awarded on the theory that it is necessary to give full compensation for the loss sustained.

Green Acres, 876 S.W.2d at 641. *See also, R.J. Reynolds Tobacco Co.*, 2005 U.S. Dist. LEXIS 3069 (N.D. Ill. 2005)("A properly calculated award of prejudgment interest, no matter how large it is, cannot be punitive").

A. Plaintiffs' Certified 60-Day Demand For Corrective Action Satisfies The Requirements Of §408.040.2

1. Plaintiffs' Notice Of Intent To Sue constituted a demand

In this case, after Plaintiffs discovered the waste in their creek in January 1997, Plaintiffs spent eight months attempting to get Mercantile to test and remove the waste (Exs. 194, 207, 211, 234, 236, 242). Mercantile repeatedly refused (Milster 4/52-53; Myers 6/73, 6/ 73, 119, 173).

On August 22, 1997, Plaintiffs sent Mercantile a Notice Of Intent To File

Citizen Suit (the "Notice")(LF 1175-1179). The Notice warned that Plaintiffs would file suit if Defendants did not remove the infected concrete from Plaintiffs' creek:

> Kaplan will file the aforementioned lawsuit **for the purpose of obtaining a court order requiring Defendants to take corrective action to remove hazardous and solid wastes from a creek located on property owned by Kaplan in St. Charles County, Missouri.**

(LF 1178; emphasis added). Under federal law, the Notice constitutes a demand that the violator take corrective action to avoid litigation:

> Any other conclusion would render incomprehensible §505's notice provision, which requires citizens to give 60 days' notice of their intent to sue the alleged violator as well as to the Administrator and the State.… **It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into compliance with the Act and thus likewise render unnecessary a citizen suit.… Indeed, respondents, in propounding their interpretation of the Act, can think of no reason for Congress to require such notice other than that "it seemed right" to inform an alleged violator that it**

was about to be sued.

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1997)(emphasis added). Like §408.040.2, the purpose of the Notice is to promote resolution of claims "and, thus ... render unnecessary a citizen suit." *Friends of the Earth, Inc., v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 175 (2000). *See also, Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989).

Mercantile understood the Notice not as a "*fait d'accompli*" (App.Br. at 64) but for what it was -- a demand. Mercantile, in fact, responded that it would not clean up the creek because: (1) the neighbors did not want the material removed;[33] and (2) Plaintiffs had not obtained approval from the Corps of Engineers (Kaplan 9/60-66). Plaintiffs eliminated both excuses, but Mercantile still refused to take corrective action (Kaplan 9/60-66).

Mercantile knew it had sixty days in which to act to avoid a lawsuit. Mercantile understood the cost of compliance but chose to do nothing (*see* Section IV A. 2, *infra*). The Notice complied with both the statutory requirements and the purpose of the prejudgment interest statute to "promote settlement and deter unfair benefits from the delay of litigation." *Werremeyer*, 134 S.W.3d at 636, 637 (Mo. banc 2004).

[33] This was false; the neighbors wanted the contaminated material removed and so stated to Mercantile (Werre 7/185-186).

2. Plaintiffs' demand was capable of ascertainment.

In *Brown v. Donham*, 900 S.W.2d 630, 633 (Mo. banc 1995), this Court ruled that a "demand need not always be expressed in dollars and cents" and need only be "capable of ascertainment in a certain dollars and cents amount."

The Missouri courts have followed *Brown* and upheld prejudgment interest demands for unliquidated claims that were quantifiable using commercially reasonable standards. *See, e.g., Lucent Tech., Inc v. Mid-West Elec., Inc*., 49 S.W.3d 236, 247 (Mo.App. 2001)(claim for *quantum meruit* ascertainable as the "price usually and customarily paid for such services or like services at the time and in the locality where the services were rendered"); *Nangle v. Brockman*, 972 S.W.2d 545 (Mo.App. 1998)(contingent fee award based on the disputed fair market value of the property recovered held "readily ascertainable" because the value could be established by appraisal); *Unlimited Equip., Inc. v. The Graphic Arts Centre, Inc.*, 889 S.W.2d 926, 942 (Mo.App. 1994)(claim for diminution of value in equipment held readily ascertainable where the market and liquidation values could be established by appraisal); *Denton Constr. Co. v. Missouri State Highway Comm'n*, 454 S.W.2d 44 (Mo. 1970)(unliquidated claim for reasonable value of construction work readily ascertainable even though the plaintiff offered two different methods for calculating its damages); *Whalen, Murphy, et al v. Estate of Roberts*, 711 S.W.2d 587, 590 (Mo.App. 1986)(reasonable value of law firm's services held "readily ascertainable" by a client even where the value was far less than the amount actually billed).

Thus, if the wrongdoer can "liquidate" the demand by commercially reasonable appraisals or bids, the demand is "capable of ascertainment" within the meaning of the statute. This common sense approach promotes settlement and eliminates the ability of a recalcitrant defendant to hide behind a manufactured ignorance of ordinary commercial practice.

Here, at the time of Plaintiffs' Notice, Mercantile had three years of experience in pricing the removal and disposal of this same material from its own property and had in fact, already determined that it would cost $107,000 to clean up the creek:

> Q: You have been involved and seen the numbers put together by Mr. Winter on that issue, right?
>
> A: Um, we had a meeting subsequent to the one at Mr. Kaplan's office where we talked to Jerry Winter about how much it was going to cost to deal with this situation.
>
> Q: Weren't you informed or told it would be around $13 a ton?
>
> A: I think I was told it would be about $107,000 to get everything out and do what needed to be done.

(Milster 4/49)(emphasis added).

Mercantile argues, however, that the demand was insufficient because Plaintiffs "never suggested that the amount of the bid would resolve their claims against the Bank." (App.Br. 67). This statement obliterates the distinction between a "demand for payment" and an "offer of settlement", either of which satisfy §408.040.2. In the former case, there is no statutory requirement that the demand expressly indicate that satisfaction of the demand will settle the plaintiff's claims. Where, for example, a party makes demand under a promissory note, satisfaction of the claim must be implied from the circumstances of the demand — i.e. payment eliminates the claim.

This case is no different. Clean up of the creek would have "render[ed] unnecessary a citizen suit," *Gwaltney, supra*, 484 U.S. at 60, and eliminated Plaintiffs' claims for actual and punitive damages. *See Hyatt v. Trans World Airlines, Inc*., 943 S.W. 2d 292, 296 (Mo.App. 1997); *Walker Mobile Home Sales, Inc. v. Walker*, 965 S.W. 2d 271, 277 (Mo.App. 1998).

Mercantile also argues that Plaintiffs' demand was not ascertainable because earlier requests from Plaintiffs had "sought testing of the concrete and surrounding areas for PCBs, indemnification for all liability, costs and attorneys' fees." (App.Br. 68).[34] Plaintiffs' earlier terms for settlement, however, are not referenced in or part of the Notice and have no bearing on the sufficiency of the Notice's demand to clean

[34] The two exhibits cited by Mercantile, Exs. 236 and 242, refer to negotiations occurring, respectively, on June 25 and July 3, 1997, preceding the Notice by two months.

out the creek. The Notice demanded only that Mercantile clean up the Creek, which is all Mercantile had to do to avoid this litigation.

Mercantile speculates that removal of the concrete would not have "satisfied" Plaintiffs, relying on Plaintiffs' response to a proposal made by Mercantile **two years** after the Notice (App.Br. at 68). Under the statute, however, the issue is not whether Plaintiffs would have been "satisfied", but whether the Notice afforded Mercantile an opportunity to avoid Plaintiffs' claim for clean up costs that formed the basis for Plaintiffs' ultimate recovery.

Moreover, this Court has ruled that it will not assess a prejudgment interest demand based upon events occurring after the demand. *See, e.g., Lester v. Sayles*, 850 S.W. 2d 858, 874 (Mo. banc 1993) ("Under the statute, it is immaterial whether plaintiff made any subsequent offers of settlement"). The Western District has interpreted *Lester* to stand for the proposition that "the statue does not refer to or give any weight to intervening events between the demand and the final judgment." *McCormack v. Capital Electric Construction Co., Inc.*, 159 S.W. 3d 387, 402 (Mo.App. 2004). To allow otherwise would encourage defendants to make spurious proposals in order to raise the issue of whether the plaintiff was serious about settlement in the first place.

That is exactly what happened here. Mercantile sent its proposal in 1999, two years after the demand and after Plaintiffs had begun plans to remediate the creek (Ex. 286). The proposal (i) provided for removal of only a portion of the 5,900 tons of waste in the creek, (ii) provided no Work Plan or Sampling Plan as required by MDNR, (iii) failed to identify disposal sites, and (iv) did not provide for removal of residual PCBs

(Hippensteel 5/129-32, 147; Brenneke 8/128, 130; Kaspar 8/90, 97-98). Contrary to *Kaplan II*, Mercantile never contacted MDNR for review and coordination (Hippensteel 5/131). Even the proposal's author agreed that Plaintiffs should reasonably expect a Work Plan, Sampling Plan, MDNR oversight, and that Plaintiffs ought to know where the waste was going prior to agreeing to the proposal (Hippensteel 5/130-132).Mercantile complains that the cost of cleanup was a "roving number" that increased over time (App.Br. 70). There is no question that, during the three years that Mercantile allowed the contaminated waste to remain in the creek, PCBs leached into the surrounding soils and sediment, ultimately requiring Plaintiffs to remove and dispose of over 9,000 tons of contaminated material at increased cost (Brenneke 8/142, 144, 153; Ex. 327). This could not have surprised Mercantile, which had been warned by its consultants back in 1993 that the PCBs would leach from the concrete into surrounding soils and sediment (Myers 6/39-40). The fact that Mercantile's continued refusal to clean the waste ultimately resulted in higher cleanup costs to Plaintiffs does not alter the fact that at the time of the Notice, Mercantile had ascertained the cleanup cost at $107,000.

Finally, Mercantile argues that the Notice is defective because, the respect to punitive damages, Plaintiffs "did not demand a specific dollar amount" (App.Br. 70). The Notice demanded that Mercantile take corrective action or face litigation of Plaintiffs' federal and state claims. Had Mercantile complied and cleaned up the creek, there could have been no subsequent claim by Plaintiffs for clean-up costs on which both the actual and punitive damage awards were based. *See Hyatt v. Trans World Airlines, Inc*., 943 S.W.2d 292, 296 (Mo.App. 1997)("A punitive damage claim is not a separate

action; but rather it must be brought in conjunction with a claim for actual damages."); *Walker Mobile Home Sales, Inc. v. Walker*, 965 S.W.2d 271, 277 (Mo.App. 1998)("As damages are an element of a cause of action for negligence, nominal damages cannot be awarded on such a claim").

Whether intending to comply with the federal environmental statutes, or with §408.040.2, Plaintiffs' Notice satisfied both the purpose and procedural requirements of §408.040.2.

B. Plaintiffs' Motion For Prejudgment Interest Was Timely

Mercantile argues that "Plaintiffs were required to seek and obtain prejudgment interest within thirty days of the entry of judgment in the first trial." (App.Br. 70). Neither the statute nor the case cited by Mercantile states any such rule. In *Am. Family Mut. Ins. v. Hart*, 41 S.W.3d 504, 513 (Mo.App. 2005), the Western District simply confirmed that a motion for prejudgment interest is **not** one of the six authorized post-trial motions that extends the trial court's jurisdiction for 90 days. *Id.* at 511-512.[35]

Section 408.040.2 awards prejudgment interest where "the amount of the judgment or order exceeds the demand for payment…." The statute does not refer to the

[35] Mercantile also cites *City of Kansas ex rel. Jennings v. Integon Indem. Corp*., 857 S.W.2d 233, 238 (Mo.App. 1993) -- a case that has nothing whatsoever to do with prejudgment interest -- as supporting its argument that Plaintiffs' waived their right to prejudgment interest (App.Br. 70). *Jennings* addresses a litigant's failure to preserve a point for appeal in a motion for new trial. *Id.*

first, second or tenth judgment. There is nothing in the statute that conditions an award based on whether the plaintiff elected to pursue interest on earlier judgments or suggests that some judgments are more deserving than others.

In *McCormack v. Capital Electric Construction Co., Inc.*, 159 S.W.3d 387, 401 (Mo.App. 2004), the jury in the first personal injury trial returned a verdict less that the §408.040.2 demand. The trial court granted a new trial, which was unsuccessfully appealed, and the second jury returned a verdict well in excess of the demand. *Id.* at 403. The plaintiff moved for prejudgment interest. *Id.* at 401. The trial court denied the motion. *Id.* at 401, 402. The Western District reversed and awarded prejudgment interest in the amount of $3,789,665. *Id.* at 403, 404.

On appeal, the defendant argued that the demand only applied to the first verdict and that the plaintiff should have made a second demand for purposes of the second trial. *Id.* at 403. The Court determined that the defendant's position made little sense as a matter of procedure or statutory construction:

> The case reverted to its pretrial status and, just as the parties were not required to submit new pleadings, the McCormacks were not required to submit a new demand letter. Despite successive trials, the December 1997 settlement offer remained valid for purposes of determining prejudgment interest.

Id. at 403. The court indicated that there was nothing in the language or purpose of the statute to support the notion that §408.040.2 demands become stale:

> The plain language of Section 408.040.2 does not allow the trial court discretion to deny prejudgment interest once the statutory conditions are met. The fairness of the award is not a relevant consideration. Nor does the statute suggest that the defendant is entitled to notice of the likely amount of a jury's verdict. The defendant is only entitled to written, certified mail notice of the settlement demand or offer. **... The statute does not refer to or give any weight to intervening events between the demand and the final judgment. ... Likewise, the statute gives no indication that a voided jury verdict affects the validity of the original settlement demand for purposes of seeking prejudgment interest.**

Id. at 402 (emphasis added); *accord Sanderson v. Ohio Edison Co.*, 1996 Ohio App. LEXIS 4777 (motion for prejudgment interest filed 9 years after trial court's judgment, at conclusion of appeals, not untimely).

The same logic applies here. The Court's remand to determine the amount of punitive damages nullified the $7,000,000 punitive damage award. Prior to the second trial, Plaintiffs' actual damage award of $650,000 represented the cost to remediate the creek, as demanded in the Notice. On May 28, 2004, the jury awarded Plaintiffs punitive damages in the amount of $5,000,000, bringing the combined judgment to $5,650,000.

The trial court's award of prejudgment interest on the combined award should be affirmed.

V. THE TRIAL COURT CORRECTLY AWARDED PREJUDGMENT INTEREST AND DID NOT RETROACTIVELY APPLY SECTION 408.040.2

A. There Is No Retroactive Application Of Law In *Werremeyer* Or In This Case.

Mercantile argues that the trial court retroactively applied §408.040.2 in violation of both the United States and Missouri Constitutions. Section 408.040.2, however, was enacted in its present form in 1987, nine years before Mercantile's waste was dumped in Plaintiffs' creek, ten years before Plaintiffs sent out the Notice, and seventeen years before the 2004 punitive damage award.

In June 1996, a year before Plaintiffs sent out their Notice and filed suit against Mercantile, the Missouri Supreme Court ruled that §408.040.2 authorized prejudgment interest on punitive damages. *Call v. Heard*, 925 S.W.2d 840, 854 (Mo. banc 1996). In its 2004 decision in *Werremeyer*, the Missouri Supreme Court applied *Call* in assessing prejudgment interest on punitive damages:

> In *Call v. Heard*, the plaintiffs demanded $10 million, in accordance with section 408.040. The compensatory award was only $9.5 million, but the punitive award pushed the total well over $10 million. *Call*, 925 S.W.2d at 853**. This Court upheld**

prejudgment interest on both the compensatory and punitive damages.

Werremeyer, 134 S.W.3d at 637. (emphasis added).[36]

The Court's decision in *Call* preceded the dumping on Plaintiffs' property (July-August 1996), the Notice and lawsuit (1997), and the juries' respective verdicts for actual and punitive damages (2001, 2004). Application of §408.040.2, therefore, is not "retroactive." *Werremeyer* did not announce a new principle of law.

B. Application of §408.040.2 Does Not Violate Mercantile's Right To Fair Notice.

In *Werremeyer,* the Court re-affirmed its 1996 ruling in *Call*. 134 S.W.3d at 633. By either benchmark -- the enactment of §408.040.2 in 1987, or the Court's 1996 opinion in *Call* -- Mercantile had fair notice.

Finally, Mercantile argues that application of §408.040 imposes a hardship on it and that the "almost $3 million in prejudgment interest is more that [sic] *half* the total award of both compensatory and punitive damages" (App.Br. 75). However, as already indicated, "the fairness of the award is not a relevant consideration." *McCormack*, 159 S.W.3d at 402.

The purpose of the prejudgment interest statute is to "promote[] settlement

[36] Although Mercantile cites *Call* four times in its Brief (App.Br. 27, 45, 46, 65), Mercantile fails to point out that *Call* allowed prejudgment interest on punitive damages pursuant to §408.040.2.

and deter[] unfair benefit from the delay of litigation." *Werremeyer*, 134 S.W.3d 636, 637 (Mo. banc 2004). While Mercantile claims "hardship", it was Mercantile that chose to save hundreds of thousands of dollars by dumping their waste on "third party sites" rather than properly disposing of it in a landfill. It was Mercantile that chose to allow its own contaminated waste to remain in Plaintiffs' creek for over three years, leaching into the sediment, exposing Plaintiffs to future liability and devaluing Plaintiffs' and the surrounding properties. Finally, it was Mercantile that dragged Plaintiffs, Missouri's environmental regulators, and the courts, on an eight year odyssey of deception, rather than cleanse Plaintiffs' property of Mercantile's waste.

Because the combined award in this case exceeds the reasonably ascertainable cost of the clean-up demanded in the Notice, Plaintiffs are entitled to recover prejudgment interest on the combined award, calculated at 9% per annum, commencing October 21, 1997.

CONCLUSION

The judgment of the trial court should be affirmed.

STONE, LEYTON & GERSHMAN,
A PROFESSIONAL ORPORATION

By: _____
Thomas P. Rosenfeld #35305
Paul Puricelli #32801
7733 Forsyth Blvd., Suite 500
St. Louis, Missouri 63105
(314) 721-7011 (telephone)
(314) 721-8660 (facsimile)

CURL & HARK, L.L.C.
Jeffrey R. Curl #40233
999 Broadway
P.O. Box 1013
Hannibal, MO 63401-1013
(573) 221-7333 (telephone)
(573) 221-8824 (facsimile)

LAW OFFICES OF MICHAEL A. GROSS
Michael A. Gross #23600
34 N. Brentwood Blvd., Suite 207
St. Louis, Missouri 63105
(314) 727-4910 (telephone)
(314) 727-4378 (facsimile)

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Mo. S. Ct. Rule 84.06(c), this brief (1) contains the information required by Mo. S. Ct. Rule 55.03; (2) complies with the limitations in Mo. S. Ct. rule 84.06(b); and (3) contains 27,130 words, determined using the word count program in Microsoft Word. The undersigned counsel further certifies that the accompanying disk has been scanned and was found to be free of viruses.

_____

Thomas P. Rosenfeld

CERTIFICATE OF SERVICE

I certify that two hard copies of this brief and one copy on disk, as required by Mo. S. Ct. Rules 84.05(a) and 84.06(g), were served on each of the counsel identified below by the means identified below, on this 7th day of June, 2006.

Via Hand Delivery
Gerald Ortbals, Esq.
John W. Moticka, Esq.
Gretchen Garrison, Esq.
Stinson, Morrison Hecker LLP
100 South Fourth Street, Suite 700
St. Louis, MO 63102

Via U.S. Mail, Postage Paid
Walter Dellinger, Esq.
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006

Attorneys for Defendant/Appellant

_____
Thomas P. Rosenfeld