SC96276

IN THE
SUPREME COURT OF MISSOURI

CITY OF AURORA, MISSOURI, *et al.*,

Plaintiffs/Respondents/Cross-Appellants,

v.

SPECTRA COMMUNICATIONS GROUP, LLC, D/B/A CENTURYLINK, *et al.*,

Defendants/Appellants/Cross-Respondents.

Appeal from the Twenty-First Judicial Circuit, St. Louis County, Missouri
Honorable Tom W. DePriest, Jr., Div. 8

RESPONDENTS'/CROSS-APPELLANTS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

City Codes and Ordinances

Missouri Constitution

Court Rules

Other

Statutes

JURISDICTIONAL STATEMENT

Defendants, CenturyLink Inc. and its various subsidiaries, (hereinafter, "Defendants" or "CenturyLink") were the first to file a notice of appeal in this case. Legal File ("LF") 10821.[1] Defendants assert this Court has jurisdiction because Defendants challenge the constitutionality of a state statute. LF 10880-81. Specifically, Defendants contend that the City of Cameron improperly charged Defendants a rights-of-way user fee because the statute authorizing such fee, § 67.1846 RSMo., is unconstitutional. LF 10880-82 Defendants' challenge to § 67.1846 is not real or substantial, and the constitutionality of that statute was not specifically reached by the trial court.

Article V, Section 3, of the Missouri Constitution confers exclusive jurisdiction in the Missouri Supreme Court where an appellant challenges the constitutionality of a Missouri statute. However, where an appellant's assertion of unconstitutionality is merely colorable and is not real or substantial, this Court does not entertain the constitutional challenge. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 51 (Mo. banc 1999) ("Even though a jurisdictional allegation may be proper on its face, this Court will not entertain the appeal if the allegation is pretextual."). Additionally, where "it does not affirmatively

[1] Pursuant to Missouri Rule of Civil Procedure 84.04(i), the Respondents/Cross-Appellants, as the Plaintiffs in the court below, are "deemed the appellant" for the purposes of briefing because the parties have not agreed and the court has not ordered otherwise.

appear from the record that the trial court decided or passed on the constitutionality…no constitutional question is preserved for review on appeal….” *Kersting v. City of Ferguson*, 388 S.W.2d 794, 797 (Mo. 1965).

Defendants’ “special law” challenge to § 67.1846 is not real or substantial. Section 67.1846.1 RSMo. allows a “grandfathered political subdivision” to charge “a public utility right-of-way user a fair and reasonable linear foot fee” when certain conditions are met. § 67.1846.1 RSMo. The statute defines a “grandfathered political subdivision” as “any political subdivision which has, prior to May 1, 2001, enacted one or more ordinances reflecting a policy of imposing any linear foot fees on any public utility right-of-way user.” *Id.* It further provides that such an ordinance must either allow a credit for any amounts paid in gross receipts taxes by the user, or provide for no user fee where the right-of-way user pays gross receipts taxes. § 67.1846.1(1)-(2) RSMo. This law is not based on a closed class, because at any time “the status of members of the class could change” if a municipality amends its linear foot user fee ordinance to eliminate the required credit in § 67.1846.1(1) and (2). *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 334 (Mo. banc 2015). Even if it were a special law, however, the law is substantially justified and the rules of severance demand that statutes be invalidated the minimum amount possible. Severance here would only require deletion of the “May 1, 2001” date, and would still leave intact the City of Cameron’s authority to charge the user fee.

The trial court also did not explicitly reach Defendants’ constitutional challenge to § 67.1846 RSMo. Defendants waived their constitutional challenge by failing to raise it at the earliest possible opportunity – in either of Defendants’ two motions to dismiss. *See*

LF 184, 187, 356, 360; *Hollis v. Blevins*, 926 S.W.2d 683, 683 (Mo. banc 1996) ("Constitutional issues are waived unless raised at the earliest possible opportunity consistent with orderly procedure."); *State v. Flynn*, 519 S.W.2d 10, 12 (Mo. 1975) ("The earliest possible moment consistent with good pleading and orderly procedure in which a party may raise a constitutional issue…is in a motion to dismiss.").

Nevertheless, if the Court concludes it has jurisdiction over CenturyLink's appeal, the Court also has jurisdiction over the Plaintiff Cities' (the Cities of Aurora, Cameron, Oak Grove, and Wentzville, Missouri, hereinafter "Cities" or "Plaintiffs") cross-appeal. *See State ex rel. Union Electric Co.* v. *Public Serv. Comm.*, 687 S.W.2d 162, 165 (Mo. banc 1985) ("The historic and sound rule is that the appeal is properly lodged in the court having jurisdiction over all issues in the case.").

INTRODUCTION

Defendants have willfully flouted municipal ordinances and refused to pay gross receipts business license taxes for more than a decade. LF 1716, 9133, 10815. After giving contradictory accounts and explanations of their services and revenue, Defendants were found to be willfully underpaying license taxes and violating city code requirements regulating the public rights-of-way. LF 1703-1704, 1719. The trial court granted partial summary judgment in favor of the Cities, holding Defendants liable to pay the license taxes on all revenue attributable to their business in the Cities, and left the amount of damages to be determined at trial. LF 9133. After the damages trial, however, the court abruptly modified a portion of the summary judgment on liability without any notice and without providing the Cities an opportunity to respond. LF 10815. This reversal was contrary to well-established law and resulted in an erroneous judgment.

Each of the Plaintiff Cities imposes a business license tax on telephone companies. LF 424, 428-29, 439-40, 443-46. Defendants are telephone companies doing business in the Cities and occupying the Cities' rights-of-ways. In 2009, the Cities learned of the apparent telecommunications industry practice of failing to pay license taxes (calculated using a percentage of gross receipts) on true "gross" receipts, excluding many categories of receipts from tax payments, and failing to report excluded categories. LF 1418-19. After an audit, the Cities learned that Defendants engaged in such practices, and that Defendants inconsistently include or exclude revenues in their payments to the Cities. LF 1073-74, 1417-18. The Cities informed Defendants of the issue, and requested that Defendants pay the full amount of the tax due. *Id.* Defendants refused. *Id.* Defendants

also refused to comply with ordinances governing users of the rights-of-way. LF 1718-19.

The Cities therefore filed suit to learn the true amount of Defendants' gross receipts, and to obtain an order requiring Defendants to pay the proper amount of tax and comply with City codes. Defendants filed counterclaims, none of which prevailed. LF 2263, 2256. Two motions for summary judgment were granted in favor of the Cities on their claims for Defendants' liability. LF 1716, 9133. The final motion for summary judgment fully resolved all tax liability and held that Defendants were liable to pay taxes on "all" gross receipts attributable to their business in the Cities. LF 9135.

The Cities' damages hinge on the amount of Defendants' "gross receipts" – information that is only known to Defendants. During the five years this case was pending in the trial court, Defendants employed many tactics to avoid telling the Cities and the court the true amount of their gross receipts, and the Cities had to spend significant time and resources attempting to learn the truth. *See, e.g.*, 1091, 1380, 2608, 2610, 8811, 9147, 9178, 9417, 9178, 9670, 9938. Even after they were ordered to do so by the court, Defendants still resisted, and in some cases, simply refused. *See, e.g.*, LF 2610, 9178, 9760. Ultimately, Defendants disclosed certain amounts of revenue attributable to Defendants' business in the Cities. Trial Exhibits 1-8.

Four days before trial, the court reaffirmed its summary judgment rulings and denied Defendants' motion to set aside the summary judgments. LF 9966. Other than one discrete issue related to one of Defendants' counterclaims, the only task left for trial was

to calculate the amount of the Cities' damages from Defendants' disclosed revenue information.

Despite the concrete ruling on liability in the summary judgment proceedings, at trial, the court allowed the admission of evidence regarding Defendants' liability. LF 9133-36; Transcript, Dec. 5 2016 ("TR")[2] 267-68, 455-56, 459, 475-76. After trial, the court's final judgment modified the summary judgment ruling and held that Defendants are liable to pay tax on "all" revenue *except* two categories – carrier access revenue[3] (in all Cities), and interstate telephone calls (in Wentzville only). LF 10815. The court provided no notice that it was re-visiting the summary judgment ruling, and no opportunity for the Cities to discover evidence or prepare or present their case to meet that sea change in the scope of the issues to be tried. Despite mandatory penalties, the court also refused to impose them. LF 10817.

[2] Unless otherwise indicated, citations to "TR" hereinafter refer to the trial transcript December 5-7, 2016.

[3] Carrier access revenue is revenue received by Defendants when they, as the local telephone companies in the Cities, connect an interexchange telephone company with its customers, using Defendants' facilities, i.e., terminating or originating a telephone call using Defendants' facilities. LF 7034, 7616; TR 402-403. Essentially, it is revenue Defendants receive from other telecommunications companies for those companies' use of Defendants' facilities in the Cities. LF 7616; TR 402-403.

Aside from proclaiming an erroneous statement of the law, the court's abrupt expansion of the scope of trial and decision to re-open and modify the summary judgment ruling, with no notice or opportunity to the Cities, was a prejudicial error that requires reversal. The summary judgment ruling correctly stated the law and should not have been modified. The amount of damages stemming from that ruling was established at trial, and the court erred in not awarding such damages. The court instead relied on an inadmissible and improperly calculated "summary" exhibit to award damages, and in doing so lacked substantial evidence and misapplied the law. Accordingly, the final judgment must be reversed and modified to correctly state that Defendants are required to pay the license tax on all of their gross receipts attributable to their business in the Cities, and that they owe damages and penalties on such amounts as established by the Cities at trial.

STATEMENT OF FACTS

FACTUAL BACKGROUND

I. Defendants' Refusal to Pay License Taxes

a. The Cities' license taxes on telephone companies

The Cities have validly enacted license taxes, which impose a tax on telephone companies doing business in the Cities. LF 424, 428-29, 439-40, 443-46, 1716-19, 9133-37. The amount of the tax each telephone company must pay is calculated using a percentage of Defendants' gross receipts. *Id.*

Aurora's license tax provides: "[e]very person, firm, company or corporation now or hereafter engaged in the business of furnishing exchange telephone service in the City of Aurora, Missouri, shall pay the said City as an annual license tax, six percent (6%) of the gross receipts derived from the furnishing of such service within said City, as hereinafter set forth." LF 424.

Cameron's license tax provides: "[e]very person, firm, company or corporation now or hereafter engaged in the business of furnishing exchange telephone service in the City of Cameron, Missouri, shall pay the said City as an annual license tax, five percent (5%) of the gross receipts derived from the furnishing of such service within said City, as hereafter set forth." LF 428.

Oak Grove's license tax provides: "[e]very person now or hereafter engaged in the business of supplying gas, telephone service or water for compensation for any purpose in the City of Oak Grove and every manufacturing corporation now or hereafter engaged in the manufacture of gas for compensation for any purpose in the City of Oak Grove

shall pay to the City of Oak Grove as a license tax a sum equal to five percent (5%) of the gross receipts from such business." LF 439.

Wentzville's license tax provides: "[e]very person engaged in the business of supplying electricity, telephone service, natural or manufactured gas by and through a central distribution system, or water for compensation in the City shall pay to the City a license tax of five percent (5%) of the gross receipts from such business, except as otherwise provided." LF 443.

The license taxes are self-reporting. LF 424, 428-29, 439-40, 443-46. Pursuant to the Cities' ordinances, Defendants are required to file sworn statements reporting the amount of their gross receipts. *Id*. Defendants, however, refuse to file the required sworn statements swearing to the amount of their gross receipts. LF 7752, 8620-21. Therefore, the true amount of Defendants' gross receipts received from their business in each City is unknown to all but Defendants.

The Cities each have ordinances imposing a penalty on those who refuse to abide by City laws and pay the required license tax. LF 10514-15; Trial Exhibits 10-13. In Aurora, Cameron, and Oak Grove, violators of city ordinances must pay a penalty not exceeding $500 per day. Trial Exhibits 10-12. The penalty ordinance for the City of Wentzville provides that a penalty of the total amount of the tax deficiency, plus five percent, shall be imposed. Trial Exhibit 13; LF 10515-16.

b. Defendants' business as telephone companies in the Cities and underpayment of the license taxes

Defendants, CenturyLink, Inc. and its various subsidiaries, engage in business in the Cities solely of supplying telephone service. LF 11079-11081, 11090-11111, 10327-10331 (CenturyLink, Inc. corporate representative testifying that Defendants are telephone companies and are not engaged in any other business in any of the Cities). Collectively, Defendants directly or indirectly act in concert with each other in the provision of telephone service and payment of the license tax in each of the Cities. LF 11090-11111. Defendants earn revenue because of their business in the Cities, including carrier access revenue. Trial Exhibits 1-8; LF 7616, 1407-11; TR 402-403.

CenturyLink, Inc., the parent company, calculates and pays certain, inadequate amounts of the license taxes on behalf of each Defendant. LF 11111; 11022-24; Trial Exhibit 22. The subsidiary Defendants do not have their own bank accounts, and the accounts are maintained at the parent level. LF 9464 (deposition transcript of CenturyLink corporate designee, p. 54:17-23).

When calculating and paying the percentage of "gross receipts," owed under the license taxes, Defendants exclude certain categories of receipts and do not pay tax on those categories. *See* LF 1411-16, 11024-27, 10815-16. They refuse to include their actual, total "gross" receipts when calculating and paying the license tax. LF 11024-27 (*see, e.g.*, admissions of Defendants that they do not pay the tax on "all revenue received by certain of the Defendants related to the [Plaintiff Cities]," and that "some has been excluded from the calculation of the license taxes paid…."); Trial Exhibit 9, 22.

Defendants readily admit that they do not pay the license tax on all revenue "related to" the Plaintiff Cities. LF 11024-27. Defendants argue that not all of their receipts should be considered "gross receipts" for the purpose of paying the tax. LF 3078-79. For example, they contend that receipts from carrier access should not be included in the "gross receipts" upon which they calculate and pay the license tax. LF 3078.

The Cities informed Defendants of the requirement to pay license taxes, and of Defendants' unlawful conduct in failing to pay the license taxes, but Defendants persisted in underpaying the taxes. LF 1417-18.

c. Defendants' revenue from doing business in the Cities

Defendants disclosed certain amounts of their revenue attributable to their business in each City. Trial Exhibits 1-8. Defendants acknowledged and admitted that "each revenue number is attributed to one of the plaintiff cities." TR 302:20-22. Defendants would not have received any of the revenue they disclosed to the Cities and the Court, including carrier access revenue in each City and interstate telephone calls in Wentzville, but for their business in the Cities. TR 332-333, 402-403. However, they do not pay tax on all of that revenue. Trial Exhibit 22; *See* LF 1411-16, 11024-27, 10815-16.

d. Defendants' tax protest payments

In January 2013, Defendants began making certain tax payments under "protest," attempting to satisfy § 139.031 RSMo. TR 236, 320. Defendants also filed tax protest lawsuits, purportedly pursuant to § 139.031 RSMo. LF 10472-73. The tax protest lawsuits are still pending, and the Cities have moved to dismiss those cases on the grounds that Defendants failed to satisfy § 139.031 RSMo., among other reasons. TR

554-55. While the tax protest lawsuits are pending, the Cities do not have access to the protested funds and "are not able to use" the money. TR 247:8-9, 320:10-13; § 139.031 RSMo. Defendants did not introduce the tax "protest" payments or the statutorily-required accompanying protest letters or protest petitions into evidence. TR iii-v, 555:8-14.

e. Defendants' contradictory statements to the court, the Cities, and Defendants' customers

Defendants claim that the Cities' license taxes do not actually require payment of a percentage of Defendants' "gross" receipts attributable to their business in the Cities, but, instead, only require payment of the tax on certain kinds of receipts. *See, e.g.*, LF 3093. Defendants' claims about the construction of these license tax laws have morphed throughout this litigation. Defendants have claimed, for instance, that they are only required to include in their "gross receipts," receipts from "basic," "purely local," "exchange telephone service," "occur[ing] wholly within" the Cities. LF 3079, 3085, 3093, 3095, 3102 (alleging, for example, that "exchange telephone service" is a "term of art" that means "only purely local telephone service"). Later, they claimed that the taxes were even more limited, and that Defendants are only required to include in their gross receipts, receipts from "local" "exchange telephone service," from "retail" "customers" "wholly within" the Cities, with "service addresses" in the Cities. TR 350, 385, 423, 433, 445, 460-61, 482, 575-76; LF 10469. These limitations do not appear in the Cities taxes. LF 424, 428-29, 439-40, 443-46.

To support their arguments that certain of their receipts are not taxable, Defendants made several claims to the court about the nature of their services and receipts. LF 3078-79, 3093-94. For instance, Defendants argued to the court that some of their services are not "local" and, therefore, are not taxable. LF 3079, 3085, 3093, 3095. Defendants contend that revenue from things like the "universal service funds,"[4] "extended area service,"[5] and carrier access, among others, do not result from "local" exchange telephone service and are not taxable. *See* 3099-3101.

Defendants told their customers, and the Cities, a different story, however. On customer bills and bills to the Cities, Defendants singled out specific services – including the universal service fund and extended area service, for instance – and described them as "local exchange" telephone service. *See* LF 7692, 7729. CenturyLink itself also represented on its website that carrier access results from local telephone service. LF 7616. CenturyLink's website explains that CenturyLink, acting as a local exchange carrier, sells access services to interexchange carriers (ICs), so that those ICs can complete calls within CenturyLink's local exchanges. LF 7616. Elsewhere on its website,

[4] According to Defendants, these are surcharges to recover the cost of contributions to a program providing telecommunications services to people in areas where there is insufficient infrastructure to offer such services. LF 7035.

[5] According to Defendants, this is a service feature in which a user pays a flat rate to obtain wider geographical coverage without paying per-call charges for calls within the wider area. LF 7034.

CenturyLink specifically states that access revenues "are associated with local service." LF 7616. These numerous public representations and admissions contradicting Defendants' statements to the court were part of the record supporting the trial court's determination that Defendants' nonpayment of the taxes was willful. LF 1701-1706.

II. Defendants' Failure to Pay User Fees to the City of Cameron

The City of Cameron has a rights-of-way code ("ROW Code") which contains regulations regarding the City's rights-of-way and entities that are using the rights-of-way. LF 973. Section 10.5-207 of Cameron's ROW Code imposes a monthly linear-foot user fee on rights-of-way users in the amount of "[f]ifteen cents ($0.15) per linear foot up to a maximum monthly charge of four thousand dollars ($4,000.00)." LF 973. Such users are entitled to a credit for gross receipts tax payments made to the City during the same time period. LF 973. Defendant Spectra has over 26,667 linear feet of facilities in the rights-of-way of Cameron, and is therefore subject to the maximum monthly fee of $4000. LF 1425. Spectra, however, has never paid the fee. LF 1425; TR 137-38. Spectra is also subject to a penalty of $500 per day for its persistent failure to comply with the ROW Code. LF 958, 1718; Trial Exhibit 15.

PROCEDURAL BACKGROUND

I. The Cities' Claims

The Cities filed their original petition in this matter on July 27, 2012, and an amended petition on August 23, 2012. LF 40, 102. Defendants moved to dismiss the Cities' first amended petition, but never sought a hearing on their motion. LF 184. On

November 12, 2013, the Cities filed their second amended petition. LF 200.[6] Counts I-V of the second amended petition sought declaratory and injunctive relief for Defendants' failure to pay the Cities' license taxes; Counts VI-X sought an accounting for the full amounts due to the Cities under the license taxes; Counts XI-XV alleged an action for delinquent taxes, interest, and penalties; Counts XVII and XIX sought declaratory and injunctive relief for Defendants' failure to comply with Cameron's and Wentzville's ROW Codes; Count XVIII alleged an action for delinquent rights-of-way user fees, interest, and penalties owed to Cameron; and Counts XX-XXIV sought damages under § 392.350 RSMo. for Defendants' willful violation of the Cities' ordinances. LF 203-46. Defendants filed a motion to dismiss on December 11, 2013. LF 356. They did not seek a hearing on their motion for almost a year and a half, until April 1, 2014. LF 34. After the court denied their motion to dismiss, Defendants requested and were granted until May 12, 2014, to respond to the Cities' second amended petition. LF 1734.

II. The First Summary Judgment Ruling

On December 19, 2013, the Cities filed a motion for partial summary judgment on liability, and certain ascertainable damages, on counts I-V and XVI-XXV of their second amended petition. LF 372, 1040-75. The Cities sought a determination that Defendants' refusal to include at least four specific types of receipts in their calculation and payment

[6] This action originally included five plaintiffs: the Cities of Aurora, Cameron, Harrisonville, Oak Grove, and Wentzville, Missouri. LF 203. Plaintiff Harrisonville is no longer a party to the case. LF 14.

of the license taxes was unlawful. LF 1041. The Cities sought a ruling that Defendants' violations of the Cities' ordinances were "willful," under § 392.350 RSMo., which entitles the Cities to their attorneys' fees for having to file a suit to enforce their ordinances. LF 1066-74. Finally, the Cities also moved for an order that Defendants violated Cameron's and Wentzville's ROW Codes by failing to obtain required permits, enter into required agreements, and pay user fees to Cameron. LF 1062-65.

Defendants opposed the summary judgment, and both sides fully briefed the motion. LF 372-1075, 1186-1671, 1691-99, 1701-1715. In opposing summary judgment, Defendants asserted various affirmative defenses to the Cities' claims. *See, e.g.*, LF 1186-1225. Defendants also produced several deficient affidavits and other exhibits, which alleged legal conclusions regarding the interpretation of the Cities' ordinances and statements that contradicted Defendants' prior admissions. LF 1258-1379. The Cities moved to strike those exhibits. LF 1486-1509. After a hearing on the summary judgment motion, the court requested even more briefing on the issues, including additional briefing on whether Defendants' violations of law were willful. LF 1700-1715.

After significant briefing and oral argument, on April 17, 2014, the court awarded summary judgment to the Cities. LF 1716. The judgment determined, among other things, that the Cities had validly enacted license taxes, and that Defendants failed to pay taxes that were required by law. LF 1717. The judgment also determined that Cameron and Wentzville have valid and enforceable ROW Codes, and that Defendants unlawfully refused to comply with those codes. LF 1718-19. The court entered judgment on certain ascertainable damages due to the Cities for Defendants' unlawful conduct. LF 1717-18.

The court also determined that Defendants' refusal to comply with the Cities' ordinances was "willful," and that the Cities were entitled to their attorneys' fees pursuant to § 392.250 RSMo. and Wentzville code Section 655.070. LF 1719.

Defendants appealed the summary judgment to the Missouri Supreme Court. LF 1720. The Missouri Supreme Court dismissed the appeal on March 16, 2015, determining that the judgment was not appealable. LF 2605-06. The summary judgment was not reversed, modified, or overturned. LF 2605-06.

III. Defendants' Refusal to Disclose Accurate Revenue Information

On or about October 9, 2012, the Cities served Defendants with discovery, which sought, among other things, a statement of, information related to, and all communications regarding Defendants' revenue in the Cities. LF 1091. Defendants objected, but agreed to produce certain documents. LF 1091-93. Despite agreeing to produce, Defendants failed to do so, and the Cities were forced to compel Defendants' answers and production on February 5, 2014. LF 1091-92. After a hearing on the Cities' Motion to Compel, on June 2, 2014, the court overruled Defendants' objections and ordered Defendants to respond to the Cities' discovery requests. LF 2017-19.[7]

[7] This pattern wherein the Cities requested accurate revenue information, Defendants refused to produce the information, the Cities were forced to compel, and the Court ordered Defendants to produce accurate revenue information continued throughout the case. LF 1091, 1380, 2017, 2608, 2610, 3051, 8811, 9147, 9178, 9670, 9755, 9760.

The court's June 2, 2014 Order required, among other things, that Defendants "disclose the amount and source of *all* revenues received by each Defendant from business or operation in each Plaintiff city…for each calendar year commencing on or after January 1, 2007 to present…." LF 2017 (emphasis in original). The court ordered that this revenue disclosure must include "revenues that were generated by, allocated to, collected as a result of, or were otherwise attributable to each Defendant's business in each of the Cities for each calendar year commencing on or after January 1, 2007 to present." LF 2017. The court ordered Defendants to disclose their revenue "in a usable form and in a manner that enables the parties and the Court to understand the bases and components of the Attributable Revenue…" LF 2018. In addition to requiring disclosure of "all" revenue attributable to Defendants' business in the Cities, the court also named twenty-nine categories of specific revenue that Defendants were to disclose, including carrier access and interstate services. LF 2018.

After an extension of time, Defendants produced some, but not all, revenue information. LF 2079; Trial Exhibit 1. The first disclosure of Defendants' revenue information pursuant to the June 2014 Order was made on July 15, 2014. Trial Exhibit 1. It contained certain revenue amounts from January 2007 through June 2014. *Id*. The disclosure was extremely complicated. *Id.* Defendants produced twenty-six (26) documents, some of which had as many as 484,500 rows and 32 columns in a single Excel spreadsheet. *Id.*; TR 51-52. To further complicate it, the data was coded, or "mapped," but Defendants did not disclose what each coded letter meant on the "key" they produced. *Id.*; LF 10505; Trial Exhibit 1, "Key for atty coding." The production

needed to be deciphered, required several conversations between Plaintiffs' counsel and opposing counsel in an attempt to understand what the numbers represented, and was far from being "in a usable form and in a manner" that allowed the Cities and the Court "to understand the bases and components of the Attributable Revenue." LF 10505; Trial Exhibit 1.

Two days later, on July 17, 2014, Defendants disclosed revenue they explained was attributable to "carrier access." Trial Exhibit 2. Carrier access revenue is only one type of revenue Defendants receive, but it makes up a large portion of Defendants' gross receipts. Trial Exhibits 2, 5, 7, 8. Shortly after disclosure, Defendants called the Cities and stated the carrier access revenue they had disclosed was wrong, and that they may disclose different access revenue at a later date. LF 7934-36. Over the next few months, the Cities' counsel continually questioned Defendants' counsel about the allegedly incorrect data, but Defendants provided no explanation of why the data supposedly overstated Defendants' revenue. LF 7935-36. Furthermore, Defendants provided the Cities with no time frame in which they would produce this allegedly-corrected carrier access revenue. LF 7935. As time passed, the Cities continued to prosecute their case relying on Defendants' court-ordered revenue information as an accurate disclosure (and the only disclosure thus far) of Defendants' gross receipts. LF 7936. It wasn't until exactly one year later, after the Cities used those facts from the court-ordered revenue information in support of their second motion for summary judgment, that Defendants finally disclosed their altered carrier access revenue, on July 17, 2015. LF 2737, 10983; Trial Exhibits 5, 5A. This version stated drastically lower carrier access numbers. Trial

Exhibits 2, 5A. Of course, this lower carrier access revenue was beneficial to Defendants, because it would result in a drastically lower tax payment. Defendants gave no reason for their delay other than they were busy with other things. LF 7934-35, 10119-10121 (119:19-121:4).

Defendants' delay in disclosing the remainder of their revenue persisted throughout the case until trial. *See, e.g.*, 1091, 1380, 2608, 2610, 8811, 9147, 9417, 9178, 9670, 9760, 9938. The Cities had to continuously file formal requests for Defendants to supplement or produce their revenue information, and when those requests went ignored, the Cities were forced to again move to compel. *Id.*

It wasn't until March 25, 2016, that Plaintiffs received revenue data for the remainder of 2015, and Defendants delayed until October 17, 2016, to produce any 2016 revenue information. Trial Exhibits 7, 8. Defendants never disclosed revenue information for any time past June 2016. Trial Exhibits 1-8; TR 299:14-17. Furthermore, of the limited revenue information Defendants did produce in this case in response to the court's June 2, 2014 Order, none of the revenue productions complied with the requirement of the June 2014 Order that the revenue information be "in a usable form and in a manner that enables the parties and the court to understand the bases and components" of it. *See* Trial Exhibits 1-8; TR 51-52, 305-306.

After depositions of CenturyLink's corporate representatives in August 2016, the Cities learned for the first time that Defendants had failed to disclose a significant portion of their revenue information from certain CenturyLink entities. LF 9180-81, 9597 (291:1-6), 9647 (115:14-18) (Defendants admitting that they had not disclosed any revenues for

a major subsidiary of CenturyLink doing business in the Cities, Qwest). The Cities moved to compel disclosure of the missing revenue information. LF 9180. On October 24, 2016, the court ordered Defendants to disclose it. LF 9755. Even after being ordered to do so, however, Defendants refused. LF 9760. On November 3, 2016, Defendants filed a memorandum with the court, in which Defendants stated that they would not disclose the missing information. *Id*.

Throughout the case and even during trial, Defendants continued to attempt to walk back the numbers they had disclosed and continuously contradicted their previous disclosures and statements about the revenue information, all in an attempt to reduce the amount of unpaid taxes they would be adjudged to owe. Ultimately, Defendants never produced a complete account of their gross receipts.

IV. The Second Summary Judgment Ruling

In 2015, the Cities filed their second motion for partial summary judgment on counts I, II, IV, V, XI, XII, XIV, and XV of their second amended petition, to fully and finally determine Defendants' liability for failure to pay taxes. LF 2737. The Cities sought a judgment explicitly stating that Defendants are required to pay the license tax on all gross receipts they receive from doing business in each Plaintiff City. LF 2738. As Defendants had admitted and disclosed the amount of their gross receipts, the Cities also moved for summary judgment on damages for Defendants' unpaid license taxes. LF 10983-85, 2738. Defendants opposed the Cities' motion for summary judgment, but did not properly controvert a single fact. LF 11076-11231. Defendants again offered deficient affidavits that alleged legal conclusions and extrinsic evidence regarding the Cities'

ordinances, none of which created a genuine issue of fact, and many of which controverted Defendants' own prior admissions. LF 8798-8804, 11076-11231. The Cities moved to strike those exhibits. LF 8798-8804.

On July 31, 2015, Defendants filed their own motion for partial summary judgment against the Cities on counts XI-XV and XX-XXIV of the Cities' second amended petition. LF 7093-96. In their motion, Defendants sought a determination that a three-year statute of limitations applied to the Cities' claims and that the Cities' ordinances are limited in scope to telephone service occurring "wholly" "within" each City. LF 7094. Additionally, with regard to the Cities' § 392.350 RSMo. claims, Defendants sought a determination that the court lacked jurisdiction, that the Cities were not "persons" or "corporations" authorized to bring suit under § 392.350, and that the Cities had failed to establish a substantive violation of law to support a § 392.350 RSMo. claim. LF 7093-94. The Cities opposed Defendants' motion for partial summary judgment. LF 7251-7598. The parties fully briefed both motions, and the court held a hearing on December 18, 2015. LF 2737-9130; TR Dec. 18, 2015.

Although voluminous briefing had already occurred, and although there had already been an in-depth hearing on the motions, on January 15, 2016, the Defendants requested a *second* hearing. LF 2737-9130, 8813. The Cities opposed Defendants' request to re-argue the already-submitted motions. LF 8874. Nevertheless, the court allowed re-argument. LF 8878.

After two oral arguments and substantial briefing, on April 6, 2016, the court entered an order granting the Cities' motion for summary judgment as to liability, but not

damages. LF 9133-37. The court denied Defendants' motion. *Id.* The court held, among other things, that the terms of the Cities' ordinances are unambiguous, that "Defendants are liable for license taxes to each City for all revenue they receive in that respective City," and that Defendants had failed to pay the required license taxes. LF 9135. Notably, the court rejected Defendants' argument that an analysis of "each receipt" of revenue is required to determine whether the received revenue is taxable, and specifically held that "[t]he license taxes assess a percentage tax on Defendants' gross receipts 'without regard to the makeup of the revenue,'" and "[t]he tax is imposed on 'the whole and entire amount of the receipts without deduction' for the privilege of doing business in the Cities." LF 9136. Furthermore, the court held, "Defendants must pay license taxes in each City on all revenues in such City specified in the Court's Order of June 2, 2014 and all other revenue in such City." LF 9135.

V. Defendants' Counterclaims

On May 12, 2014, nearly two years after the case was filed, Defendants finally filed an Answer to the Cities' Second Amended Petition. LF 1734. Defendants also filed counterclaims at that time. LF 1811-42. The Cities were initially granted judgment on the pleadings on one of Defendants' counterclaims, which asserted a Section 1983 claim for violation of 47 U.S.C. § 253. LF 2255.

Defendants later filed amended counterclaims, in which they asserted the following claims: I) Declaratory Judgment Regarding Wentzville Right-of-Way; II) Declaratory Judgment Violation of 47 USC § 253; III) Declaratory Judgment Regarding Cameron Right-of-Way; IV) Petition for Writ of Mandamus Regarding Cameron Right-

of-Way; V) Mandatory Injunction Regarding Cameron Right-of-Way; VI) Declaratory Judgment Regarding Cameron Pole Attachment; VII) Mandatory Injunction Regarding Cameron Pole Attachment; VIII) Constructive Trust Consisting of Pole Rent Proceeds; IX) Declaratory Judgment Regarding Tax Base; and X) CenturyTel, Spectra, and Embarq's Action for Costs, Including Attorneys' Fees, Against Cities Pursuant to Art. X. § 23 of the Missouri Constitution. LF 2263, 2340-75. On December 22, 2014, the Cities filed their reply. LF 2579.

After both summary judgment rulings, the claims asserted in Defendants' remaining counterclaims had all been implicitly rejected, and the Cities filed a motion for judgment on the pleadings to explicitly dispose of the counterclaims. LF 1716, 9133, 9149-77. The court granted that motion as to all of Defendants' amended counterclaims, with the exception of a portion of counterclaim VII, which sought an order requiring Cameron to vacate any of Defendants' poles in the City. LF 9757-58. That was the single issue relevant to Defendants' counterclaims that was to be determined at the December 5, 2016 trial. *Id.*

Therefore, after granting summary judgment in the Cities' favor on liability, and dismissing nearly all of Defendants' counterclaims, the court set the case for a nonjury trial to begin on December 5, 2016, with only the issues of Defendants' single remaining counterclaim and the Cities' damages for unpaid license taxes and user fees left to be determined. LF 9144-45.

VI. The Trial Court's Refusal to Set Aside the Summary Judgment Rulings

On November 11, 2016, less than a month before trial, Defendants moved to vacate the summary judgment rulings, arguing that an ordinance they had in their possession for years, and that they had even attached to pleadings in this case, was somehow "covered up" and that it affected their tax liability. LF 9764-66. Plaintiffs opposed that motion, explaining that the alleged ordinance was irrelevant, that Defendants had long ago waived any such arguments, and that allowing Defendants to derail the case days before trial was unacceptable. LF 9844-62. The court agreed, found the motion groundless, and refused to set aside the summary judgments. LF 9966-67. Accordingly, as of four days before trial began, the court clearly intended and there was no doubt that the summary judgment rulings applied. LF 9966-67.

VII. The Cities' Motion in Limine

Out of an abundance of caution, prior to trial, the Cities filed a Motion in Limine to ensure that evidence or argument regarding issues of tax liability would be excluded in the upcoming trial on damages. LF 9950-55. Defendants responded to the motion, agreeing that the trial was on damages only, and promised that they would not introduce evidence regarding liability. LF 9974-75. On the morning trial began, the court addressed the Cities' motion and paraphrased Defendants' response to that motion, stating, "basically the response says at the end of paragraph one, '[t]he defendant agrees that the trial of the tax claims is on damages only. Will present damage evidence at trial and will address liability on appeal.'" TR 3. While the court did not rule explicitly on the motion,

the court emphasized that Defendants had agreed not to present evidence of liability and suggested such a ruling was therefore unnecessary. TR 3-4.

VIII. Trial and Final Judgment

At trial, the Cities presented Defendants' itemized revenue information that had been disclosed in response to the court's June 2, 2014 Order. Trial Exhibits 1-8. Those Exhibits were the exact disclosures Defendants made in response to the order requiring Defendants to disclose their "attributable revenue" from doing business "in each City." LF 2017; Trial Exhibits 1-8. Exhibits 1 through 8 were the only exhibits or evidence presented at trial that established the specific amounts of Defendants' revenue "attributable to each Defendant's business in each of the Cities." LF 2017; TR iii-v.[8]

[8] Defendants did present summary charts, Exhibits W1 through W4, that allegedly contained "revenue related to the Aurora exchange," "revenue related to the Cameron exchange," "revenue related to the Oak Grove exchange," and "revenue related to the Wentzville exchange." TR 258-259. Those summary charts were *not* offered as evidence of the revenue from doing business in the Cities, and Defendants never claimed that such evidence was revenue from their business in the Cities. TR 258-259. Defendants claimed that the exhibits were "summaries of data that was provided to the plaintiffs in this case," but Defendants never established which data those exhibits were summaries of, what documents those exhibits summarized, or the competency of any of the unidentified underlying documents. TR 259-260. The Cities objected to the admission of W1-W4. TR 260:4-6.

The Cities presented testimony from an expert witness, Mark Hoffman. TR 42. Mr. Hoffman calculated the Defendants' underpayment of the license taxes for each City, the amount owed to the City of Cameron for unpaid user fees, pre-judgment and post-judgment interest on those amounts, and penalties. TR 42-43, 46-53. The court admitted the Cities' Exhibit 9, which was a comprehensive explanation of and support for Mr. Hoffman's calculations. TR 46, 129, 140. Exhibit 9 contained a detailed description of every calculation made, the result of the calculations, summaries explaining the conclusions, and citations to the underlying support for each result. Trial Exhibit 9; TR 84-86. Exhibit 9 presented several damages calculations based on different factors: (1) whether the court awarded simple interest, compound interest (annual, semi-annual, or monthly), or applied a specific interest ordinance in Wentzville, and (2) whether the court used Defendants' original carrier access revenue to calculate damages, or Defendants' altered and later-produced carrier access revenue to calculate damages. *See* Trial Exhibit 9, "Tab Section 1," pp. 4-41. The amounts the Cities asked the court to award were presented within the first three pages of Exhibit 9, marked "A" and "B." TR 564:7-14.

With regard to the lone issue on Defendants' remaining counterclaim, which sought an order requiring the City of Cameron to vacate all of Defendants' poles in the City, the City offered the testimony of Zach Johnson, Director of Utilities for the City of Cameron. TR 511. Mr. Johnson testified that the City was not occupying any of Defendants' poles in the City. TR 525:22-25, 526:1-5.

Defendants presented testimony from Kiran Seshagiri, Sidney Eppinette, Pamela Hankins, Glenn Brown, and Alaina Brooks. TR 221, 360, 419, 449, 486. The Cities made

a continuing objection, and several additional objections, to the testimony of Defendants' witnesses to the extent they addressed matters that had been determined in summary judgment, including which of Defendants' receipts were taxable. TR 412-15, 422:20-22. Defendants' first witness, Mr. Seshagiri, is the Director of Tax Systems and Tax Billing for CenturyLink. TR 221:23-25. Mr. Seshagiri testified regarding CenturyLink's various billing systems, Defendants' revenue, and Defendants' new-found contention that their revenue information contained amounts attributable to other companies. TR 231-245. Mr. Seshagiri also described to the court how Defendants determine and calculate the amount of license taxes they pay each City. TR 263, 346-47.

Defendants' next witness, Sidney Eppinette, is the Director of Carrier Access Billing for CenturyLink. TR 360:11-12. Mr. Eppinette's testimony focused primarily on Defendants' original production of carrier access revenue in 2014, and Defendants' later, altered production of carrier access revenue in 2015. TR 361: 5-22, 363:11-15, 366:13-20.

Next, Defendants called Pamela Hankins, Director of Financial Analysis and Decision Support for CenturyLink. TR 420:3-6. Ms. Hankins testified about Defendants' carrier access revenue, and briefly described what revenue she believed was encompassed by the various categories of revenue the court set forth in its June 2014 Order. TR 426-27. Ms. Hankins also testified regarding whether she believed certain revenues were derived wholly "within" the Cities, and specifically testified as to her interpretation of the Wentzville license tax ordinance. TR 428-30, 436-38. The Cities objected to Ms.

Hankins' testimony because it focused on Defendants' liability, which had already been determined. TR 412-19.

Defendants' fourth witness, Mr. Glenn Brown, was called to testify as an expert. TR 454:17-23. He testified regarding the various categories of revenue Defendants received, and gave his opinion on whether he thought those categories were taxable or not. TR 458-60. The Cities objected to Mr. Brown's testimony because it also focused on Defendants' liability, which had already been determined. *See, e.g.*, TR 453:20-21, 454:20-21, 458:7-10.

Defendants also presented bare summary charts of the tax they believed was due pursuant to the Cities' ordinances, the license tax payments they had allegedly made, and the amounts they believed were still owed under the court's orders. Trial Exhibits U1, U2. Defendants only presented the summary sheets. TR iii-v, 233. They did not offer any evidence to back up their numbers, such as the actual payments made. TR iii-v, 233. Defendants did not offer any detailed revenue information attributable to their business in the Cities, and the only such evidence was that which the Cities presented. TR iii-v.

The Cities made repeated objections throughout trial in an attempt to keep the trial narrowed to the genuine issue that actually remained – the amount of damages. *See, e.g.*, TR 161:19-25; 269:1-3; 412-14. Nevertheless, the court permitted such testimony, and allowed evidence regarding what specific receipts were taxable under the Cities' ordinances – a question that had already been determined in summary judgment. *See, e.g.*, TR 269:4-5, 414:20-21. The Cities, having been informed that the summary judgment rulings were intact, that the trial would only be on damages, and that

Defendants promised to only present evidence on that issue, did not receive notice that the trial would encompass liability issues and did not have an opportunity to adequately prepare for a trial on such issues. LF 9966, 9974.

Trial concluded on December 7, 2016, and the court entered its Final Order and Judgment on February 23, 2017. TR ii; LF 10815. In the Final Order and Judgment, the court modified its prior summary judgment ruling and held that Defendants owed license taxes on "all" revenue they receive from their business in the Cities, *except* for carrier access (in all Cities) and interstate telephone calls (in Wentzville). LF 10815. The court's judgment held that the Cities were not entitled to damages on carrier access or interstate telephone calls (in Wentzville only), and failed to award damages on such amounts. LF 10815-20. The judgment also held that Defendants were entitled to a credit against their unpaid tax liability for a lump sum amount of taxes Defendants allegedly paid every month under "protest" pursuant to § 139.031 RSMo. *Id.*. The court credited those amounts in calculating damages, and did not award interest on those amounts. *Id.*

Ultimately, the court's final judgment awarded the following damages for unpaid license taxes: $490,528.12 to the City of Aurora; $608,525.30 to the City of Cameron; $259,981.80 to the City of Oak Grove; and $226,457.08 to the City of Wentzville. LF 10815.

Pre-judgment interest on the Cities' damages amounts was calculated at a rate of 9% per annum for the Cities of Aurora, Cameron, and Oak Grove pursuant to § 408.020 RSMo. LF 10817. The City of Wentzville's pre-judgment interest was calculated at a rate of 2% per month, not to exceed 18% per year, pursuant to Wentzville Code §

140.120. *Id*. As a result, pre-judgment interest was awarded in the following amounts: $275,494.67 for the City of Aurora; $328,683.02 for the City of Cameron; $141,770.51 for the City of Oak Grove; and $208,071.00 for the City of Wentzville. *Id*.

The court also held that the Cities are entitled to post-judgment interest, to be calculated at a rate of 9% per annum for the Cities of Aurora, Cameron, and Oak Grove pursuant to § 408.040 RSMo., and at a rate of 2% per month, not to exceed 18% per annum, for the City of Wentzville pursuant to Wentzville Code § 140.120. LF 10817.

After crediting Defendants with having made "protest" payments, the City of Cameron was awarded an $138,914.00 in unpaid user fees and $83,348.00 in pre-judgment interest on that amount. LF 10817. The court failed to award the Cities any penalties. *Id*. The court felt strongly that the Cities were entitled to attorneys' fees in the case, and did award fees. LF 10817-18; TR. Feb. 14, 2017, 6:14-16.

Defendants filed a notice of appeal, on March 3, 2017, eight days after the court entered its Final Order and Judgment. LF 10821. On March 28, 2017, the Cities filed a Motion to Amend Final Order and Judgment, alerting the court to several errors made in the final judgment, including that it was erroneously inconsistent with the court's prior summary judgment rulings. LF 10887-95. The Cities' motion was denied on April 25, 2017, and on May 5, 2017, the Cities timely filed their notice of cross appeal. LF 10945-46.

POINTS RELIED ON

I. The trial court erred in entering final judgment inconsistent with its prior summary judgment because the court failed to follow the required procedures in that the court did not provide adequate notice and an opportunity for the Cities to respond to or prepare to address the newly re-opened issues of liability.

- Mo. Sup. Ct. R. 74.04
- *State ex rel. Schweitzer v. Greene*, 438 S.W.2d 229 (Mo. banc 1969)
- *Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica*, 242 F.3d 418 (1st Cir. 2001)
- *Singh v. George Washington Univ. Sch. of Med. & Health Scis.*, 508 F.3d 1097 (D.C. Cir. 2007)
- *State ex rel. Turner v. Sloan*, 595 S.W.2d 778 (Mo. App. 1980)

II. The trial court erred in admitting evidence of Defendants' liability, because such evidence was irrelevant, beyond the scope of the trial, and was inconsistent with the court's prior summary judgment in that Defendants' liability had already been determined in full.

- Mo. Sup. Ct. R. 74.04
- *Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica*, 242 F.3d 418 (1st Cir. 2001)
- *Singh v. George Washington Univ. Sch. of Med. & Health Scis.*, 508 F.3d

1097 (D.C. Cir. 2007)

- *In Interest of J.P.B.*, 509 S.W.3d 84 (Mo. banc 2017)

III. The trial court erred in holding in the final judgment that carrier access revenue in the Cities and revenue derived from interstate telephone calls in Wentzville is not taxable because such decision erroneously applied the law and was unsupported by the evidence in that Defendants are subject to the Cities' license taxes and admitted that they earned revenue from carrier access and interstate telephone calls that was attributable to their business in the Cities.

- *Ludwigs v. City of Kansas City*, 487 S.W.2d 519 (Mo. 1972)
- *Kansas City v. Graybar Elec. Co.*, 485 S.W.2d 38 (Mo. banc 1972)
- *Laclede Gas Co. v. City of St. Louis*, 253 S.W.2d 832 (Mo. banc 1953)
- *Suzy's Bar & Grill, Inc. v. Kansas City*, 580 S.W.2d 259 (Mo. banc 1979)

IV. The trial court erred in admitting Defendants' Exhibit U2, a summary of other documents, because it was inadmissible hearsay in that Defendants did not establish the competency of the underlying documents and the underlying documents were never made available to the Cities.

- *Healthcare Services of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604 (Mo. banc 2006)
- *Bolling Co. v. Barrington Co.*, 398 S.W.2d 28 (Mo. App. 1965)

V. The trial court erred in awarding a reduced damages amount as set forth in Defendants' Exhibit U2, Scenario 2, because such award erroneously applied the law and was unsupported by substantial evidence in that (a) the court should have assessed damages based on Defendants' disclosed revenue, all of which they admitted to be attributable to the Plaintiff Cities, (b) the court's award did not include damages for Defendants' failure to include carrier access receipts and "interstate" receipts in their "gross receipts" when paying the tax, (c) even if it were proper to exclude carrier access and "interstate" in Wentzville, there was insufficient evidence regarding such exclusions in Exhibit U2, Scenario 2, (d) even if there was an exemption from taxation for receipts from carrier access and "interstate," there was insufficient evidence to establish Defendants' right to such exemption, and (e) by utilizing Exhibit U2, Scenario 2, the court improperly excluded revenue Defendants admitted was attributable to the City of Oak Grove.

- *Ludwigs v. City of Kansas City*, 487 S.W.2d 519 (Mo. 1972)
- *Tracfone Wireless, Inc. v. Director of Revenue*, 514 S.W.3d 18 (Mo. banc 2017)
- *Laclede Gas Co. v. City of St. Louis*, 253 S.W.2d 832 (Mo. banc 1953)
- *Suzy's Bar & Grill, Inc. v. Kansas City*, 580 S.W.2d 259 (Mo. 1979)

VI. The trial court erred in crediting tax payments Defendants allegedly made pursuant to § 139.031 RSMo. under "protest" in the damages award because that decision erroneously applied the law, was unsupported by sufficient evidence, and deprived the Cities of damages to which they were entitled in that the Cities are not entitled to use any protest payments, there was no evidence regarding the specific amounts of or manner in which Defendants protested, and the lack of evidence led to an inaccurate calculation of interest.

- § 139.031 RSMo.
- *Adams v. Friganza*, 344 S.W.3d 240 (Mo. App. 2011)
- *Ford Motor Co. v. City of Hazelwood*, 155 S.W.3d 795 (Mo. App. 2005)

VII. The trial court erred in failing to impose penalties for Defendants' violations of the Cities' license taxes because penalties were mandatory in that Defendants' failure to comply with the Cities' license taxes was declared unlawful and a violation of the Cities' ordinances.

- *Westrope & Associates v. Director or Revenue*, 57 S.W.3d 880 (Mo. App. 2001)
- *Stein v. State Tax Commission*, 379 S.W.2d 495 (Mo. 1964)
- *City of Kansas City, Missouri v. Garnett*, 482 S.W.3d 829 (Mo. App. 2016)

VIII. The trial court erred in failing to impose penalties for Defendants' violations of the City of Cameron's Rights-of-Way Code because penalties were mandatory in that Defendants refused to comply with the City's Rights-of-Way Code, including by paying the required user fee, and those actions were declared unlawful.

- *Westrope & Associates v. Director or Revenue*, 57 S.W.3d 880 (Mo. App. 2001)
- *Stein v. State Tax Commission*, 379 S.W.2d 495 (Mo. 1964)
- *City of Kansas City, Missouri v. Garnett*, 482 S.W.3d 829 (Mo. App. 2016)

ARGUMENT

I. The trial court erred in entering final judgment inconsistent with its prior summary judgment because the court failed to follow the required procedures in that the court did not provide adequate notice and an opportunity for the Cities to respond to or prepare to address the newly re-opened issues of liability.

Standard of Review and Preservation of Error

"The trial court's judgment in a court-tried case may be reversed when it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law." *Craig v. Missouri Dept. of Health*, 80 S.W.3d 457, 461 (Mo. banc 2002). "Legal questions in a court-tried case are subject to *de novo* review." *Holm v. Wells Fargo Home Mortgage, Inc.*, 514 S.W.3d 590, 596 (Mo. banc 2017).

This error was preserved when the City objected to evidence and testimony regarding liability that had already been determined in the summary judgment ruling, filed a motion in limine, and filed a motion to amend the court's final judgment. LF 9950, 10497, 10887-89; TR 4, 160, 161-62, 172, 177, 199, 269, 412-15, 544-45; *see* Rule 78.07(a), (c).

Argument

Parties are entitled to know the issues in their trial. In this case, the trial court improperly entered a final judgment that was contrary to the court's previous summary judgment rulings. The court did so without giving notice to the Cities that it was re-

opening the issue and expanding the scope and purpose of the trial. The court also did so without providing the Cities an opportunity to discover and present evidence on the newly re-opened issues and adjust the presentation of their case. The resulting judgment misapplied and misstated the law. *See* Point III, below. Moreover, summarily re-opening the summary judgment issues and modifying the summary judgment prejudiced the Cities and resulted in an erroneous judgment, which must be reversed and modified, as explained below. *See State ex rel. Schweitzer v. Greene*, 438 S.W.2d 229, 232 (Mo. 1969) (ruling that modification of a court's prior orders in a case "should be taken *only* after proper notice to the parties") (emphasis added); *Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica*, 242 F.3d 418, 422 (1st Cir. 2001) (holding that after entering partial summary judgment, "if the judge subsequently changes the initial ruling and broadens the scope of trial, the judge must inform the parties and give them an opportunity to present evidence relating to the newly revived issue.").

A. The trial court's partial summary judgment rulings fully determined Defendants' liability regarding the scope of receipts they are required to include in their "gross receipts" license tax payments.

Rule 74.04 provides that a partial summary judgment may be entered on "liability alone, although there is a genuine issue as to the amount of damages." Rule 74.04(c)(6). "Rule 74.04 makes a distinction between a full summary adjudication and a partial summary adjudication, and provides for the rendition of both….Paragraphs (c) and (d) [of Rule 74.04] define more particularly that the partial summary adjudication may operate to conclude the liability although the damage remains an issue…." *State ex rel. Turner v.*

Sloan, 595 S.W.2d 778, 782 (Mo. App. 1980). That procedure occurred in this case.

The trial court initially granted partial summary judgment in favor of the Cities in 2014, resolving certain liability issues and certain discrete damages. LF 1716-19. Later, in 2016, the court granted the Cities' second motion for summary judgment resolving, in full, Defendants' liability for license taxes. LF 9133-37. The 2016 summary judgment was not entered lightly. The briefing was voluminous and the opposition was vigorous. LF 2737-9130. A counter motion and several other related motions were filed. *Id.* The Court held *two* oral arguments on the summary judgment motions. TR Dec. 18, 2015; LF 8874; 8878. Finally, the court entered its second summary judgment in favor of the Cities. LF 9133. The court also denied Defendants' motion for summary judgment on the scope of the Cities' ordinances, among other issues. LF 9133-37.

The court ruled in its 2016 summary judgment that "Defendants are liable for license taxes to each City for all revenue they receive in that respective City." LF 9135. The court ordered that Defendants must pay and are liable for unpaid taxes on "all revenues in such City specified in the Court's Order of June 2, 2014 and all other revenue in such City." LF 9135. In short, the court determined as a matter of law that any revenue type mentioned or listed in the June 2, 2014 Order was taxable, in addition to any other revenues earned as a result of Defendants' business in the Cities. However, the court denied the Cities' motion for summary judgment as to damages, and reserved the damages determination for trial. LF 2738 ¶3; 9133-37. The Court set a trial on damages, to begin on December 5, 2016. LF 9144-45.

The court's June 2, 2014 Order had ordered "each Defendant" to disclose the

amount and type of revenue that was "attributable to each Defendant's business in each of the Cities." LF 2017. It required Defendants to specifically disclose the amount earned for a list of certain, named revenue types, including "carrier access" and "interstate services," as well as *all* other revenue Defendants earned as a result of their business in the Cities that might not fall within the specific list. LF 2017-19.

Therefore, after voluminous briefing, argument, and re-argument of the summary judgment motions, pursuant to the second summary judgment all revenue "attributable to each Defendant's business in each of the Cities," including specifically "carrier access" and "interstate services," was held to be taxable. LF 2017-19, 9133-34.

In response to the court's June 2, 2014 Order, Defendants disclosed an amount of revenue Defendants earned as a result of their business in each City for the revenue streams that were specified in the June 2, 2014 Order. Trial Exhibits 1-8. Those disclosures included detailed lists of revenue and a statement identifying which specific Plaintiff City each item of revenue was attributable to. LF 10505. Each revenue amount had a City listed next to it, and there was nothing in the revenue disclosures that indicated that any of the revenue reported was not earned in one of the Cities. TR 53, 57, 60-61, 68-69, 73, 76, 80, 83-84, 300-301, 302; Trial Exhibits 1-8. Accordingly, given that the Court had already ruled that all of the revenue subject to the court's June 2, 2014 Order was taxable as a matter of law, the only issue at trial should have been the calculation of damages to be made using that court-ordered revenue information.

B. The Cities were entitled to rely upon the summary judgment rulings for the remainder of the case, including at trial.

Upon entry of the partial summary judgment in this case, the issues determined in that summary judgment "shall be deemed established, and the trial shall be conducted accordingly." Rule 74.04(d); *Singh v. George Washington Univ. Sch. of Med. & Health Scis.*, 508 F.3d 1097, 1106 (D.C. Cir. 2007) ("Facts found on partial summary judgment are taken as established at trial.") (citation omitted); *Sheehan v. Northwestern Mut. Life Ins. Co.*, 103 S.W.3d 121, 129-30 (Mo. App. 2002) ("Summary judgment permits the 'claimant' to avoid trial…" and to allow re-argument would "undermine the nature and purpose of summary judgment…."). Partial summary judgments are "designed to isolate disputed facts so as to facilitate trial of a case." *M & P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 162 (Mo. banc 1997). Accordingly, where a partial summary judgment is rendered only on liability, as it was here and "as envisioned in Rule 74.04(c)(3), [it] result[s]…in the removal of that theory at trial…." *Moreland v. Farren-Davis*, 995 S.W.2d 512, 516 (Mo. App. 1999); *Brenneke v. Department of Missouri, Veterans of Foreign Wars of U.S. of America*, 984 S.W.2d 134, 146 (Mo. App. 1998) (where a partial summary judgment had been entered in the case, at trial those matters established in the partial summary judgment "should have been, deemed established…").

In this case, the court established in the summary judgment that Defendants must include in their license tax payments "all revenue" from doing business in the Cities, including specifically "carrier access" revenue and "interstate services" revenue. LF 2018, 9135. That issue "should have been, deemed established" and "remov[ed]" from

consideration at trial. *Brenneke*, 984 S.W.2d at 146; *Moreland*, 995 S.W.2d at 516. Going forward in the case following the summary judgment, the Cities were entitled to, and did, rely on that partial summary judgment ruling. "Once a district judge issues a partial summary judgment order removing certain claims from a case, the parties have a right to rely on the ruling by forbearing from introducing any evidence or cross-examining witnesses in regard to those claims." *Alberty-Velez*, 242 F.3d at 424-25; 27A Fed. Proc., L. Ed. § 62:687 (analyzing Fed. R. Civ. Proc. 56, on which Rule 74.04 is based[9]) ("Parties have a right to rely on" and are "entitled to rely on" a partial summary judgment ruling, "by refraining from introducing any evidence or cross-examining witnesses on those claims" at trial); *Rivera v. U.S.*, No. SA-05-CV-0101-WRF, 2007 WL 1113034 at *3 (W.D. Tex. Mar. 7, 2007) ("If a court renders a partial summary judgment, at trial the party is entitled to rely on the partial summary judgment and is not required to introduce additional evidence on those issues."). Therefore, in justified reliance on the matters determined in the summary judgment rulings, the Cities did no further discovery on Defendants' liability and did not prepare or present evidence at trial regarding Defendants' liability, including whether Defendants should include carrier access revenue

[9] *State ex rel. Turner*, 595 S.W.2d at 782 ("Our summary judgment Rule 74.04 derives from Federal Rule 56 and rescripts that text. The federal commentary and judicial precedents on that rule are therefore distinctive aids to explain the purposes of the summary judgment method.").

and interstate services revenue in their "gross receipts" license tax payments.

Not only did the Cities rely on the summary judgment rulings on liability in preparing for the damages trial, the Cities also, out of an abundance of caution, filed a motion in limine before trial to clarify that the liability portion of the case was complete. LF 9950-53. In response to the motion in limine, Defendants confirmed that they "agree[] that the trial of the tax claims is on damages only, will present damages evidence at trial, and will address liability on appeal." LF 9974. In addressing the Cities' motion in limine on the morning trial began, the trial court specifically noted that Defendants agreed to only present evidence of damages, and not liability. TR 3. There was no indication, therefore, that liability would be an issue at trial. Further, although Defendants had filed a motion to set aside the summary judgments on November 11, 2016, the court denied that motion just four days before trial and refused to set aside the summary judgment liability rulings. LF 9966.

Accordingly, given (1) the court's reaffirmed decision (a mere four days before trial) to stand by the summary judgment rulings and refusal to set them aside, (2) the established ruling on Defendants' liability – that Defendants were liable to pay taxes on *all* revenue attributable to their business in the Cities, including carrier access and interstate services – and (3) Defendants' agreement not to present any evidence regarding liability and the court's recognition of that agreement, the Cities did not prepare and did not offer any evidence of liability. LF 1716, 2017, 9133, 9974.

The Cities instead offered evidence regarding the amount of damages Defendants owe based on Defendants' own admissions of revenue that is "attributable to each of

Defendant's business in each of the Cities." TR 42; LF 2017. Defendants, however, reneged on their agreement to present evidence only on damages. Defendants presented testimony regarding liability, and specifically, what types of Defendants' revenue Defendants believe are taxable under the Cities' ordinances, despite the fact that the court had already determined liability as a matter of law. *See, e.g.*, TR 267, 455-56 (CenturyLink witness testifying that he was asked to opine about "which of those revenue categories" would be within the scope of an ordinance), 459 (CenturyLink witness testifying that "long distance services would not be subject to the tax," and the Cities' ordinances "don't tax interstate long distance services"), 475-76 (CenturyLink witness testifying that "services...excluded under the Wentzville ordinance" would be "interstate long distance; interstate SLC; interstate carrier access charges; and Federal USF"). Defendants' counsel admitted to presenting this evidence, even after agreeing not to, arguing that based on the evidence they had presented, there were only "about eight" taxable categories of revenue under the court's orders. TR 573.

This evidence was contrary to the summary judgment and should have been excluded. *See*, Point II, below. The Cities objected to it throughout trial. *See, e.g.*, TR 172, 412-419, 422. Over the Cities' objections, the court permitted the evidence. *See, e.g.*, TR 173, 438. The court at no point stated that it was re-opening the issue of liability, or that it was overturning, modifying, or vacating its summary judgment orders. The court also at no point gave the Cities notice or alerted the Cities that they should present evidence regarding Defendants' liability to pay license taxes on revenue from carrier access or interstate telephone calls. Accordingly, the Cities proceeded with a trial

whose scope was defined by the previous summary judgments, addressing only the amount of damages and CenturyLink's remaining counterclaim unrelated to the taxes.

After trial, however, without giving the Cities an opportunity to collect or present evidence regarding Defendants' liability, the court modified a portion of its summary judgment and held in its final judgment that Defendants were not liable for and not required to pay license taxes on revenue from carrier access (in all plaintiff Cities) and interstate telephone calls (in Wentzville only), and that the Cities were not owed damages on those amounts. LF 10815-16. This is explicitly contrary to the court's prior summary judgment, which held Defendants must pay, and the Cities are owed, license taxes on *all* revenue, including specifically revenue from carrier access and interstate services. LF 9135 (summary judgment holding that Defendants must pay on all revenue "specified in the Court's Order of June 2, 2014…"); 2017-18 (June 2, 2014 Order specifying "Carrier Access," and "Interstate Services").

C. The trial court's abrupt change of the scope of trial and re-opening of summary judgment issues at trial was improper and prejudiced the Cities, resulting in an erroneous judgment.

The trial court's decision to re-open the summary judgment matters and drastically expand the purpose and scope of the trial, ignore its prior decisions in the case, and modify the summary judgment was erroneous and prejudiced the Cities.

The Missouri Supreme Court has held that modification of a court's prior orders in a case "should be taken *only* after proper notice to the parties." *State ex rel. Schweitzer*, 438 S.W.2d at 232 (emphasis added); *Reynolds v. Reynolds*, 109 S.W.3d 258, 270 (Mo.

App. 2003) (trial court's amendment or modification of its orders "[s]hould be taken only after proper notice to the parties.").

Federal courts interpreting the partial summary judgment rule from which Rule 74.04(c) and (d) are derived have repeatedly explained the prohibition against modifying a summary judgment without adequate notice. Where the trial court intends to re-open a partial summary judgment, the court must give the parties "clear notice" of the court's intent to do so, and "an adequate opportunity to adjust the presentation of their case once he decided not to follow the order." *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 386 (2d Cir. 1989); *Alberty-Velez*, 242 F.3d at 422; *Singh*, 508 F.3d at 1106 (D.C. Cir. 2007) (holding the same).

The standard for adequate notice under this rule is extraordinarily high. Where the parties do not learn until after trial is over that the issues determined in the partial summary judgment are live again, that is, of course, inadequate. *Leddy*, 875 F.2d at 386; *State ex rel. Schweitzer*, 438 S.W.2d at 232 ("proper notice" required). Additionally, "passing comment[s]" during trial regarding the propriety of a prior judgment are insufficient notice. *Alberty-Velez*, 242 F.3d at 423 (trial court's comment that, "Well, I decided and I could be wrong," was insufficient notice to party that trial court was reconsidering summary judgment). Even statements showing "explicit reconsideration" are insufficient where they come after the trial has already begun. *Alberty-Velez*, 242 F.3d at 424. A court's statement to a party at trial that it will be given "wide latitude" to present evidence regarding the re-opened issues is insufficient notice where the trial has already begun. *Alberty-Velez*, 242 F.3d at 424. Even *ten days*' notice before trial is

insufficient. *Reyes Canada v. Rey Hernandez*, 221 F.R.D. 294, 295 (D.P.R. 2004) (determining that court could not revisit a partial summary judgment because the bifurcated trial on the remainder of the case was only ten days away, and acknowledging controlling rule that "[i]f a district court…does decide to revisit a newly revived issue, adequate notice and an opportunity to contest the claim must be afforded to the opposing party."). Here, there was not adequate notice of the trial court's re-opening of the summary judgment issues. In fact, there was no notice.

This case is remarkably similar to *Alberty-Velez*, where the First Circuit Court of Appeals held that a trial court erred in entering final judgment inconsistent with its prior summary judgment, reversing course, and expanding the scope of the trial. 242 F.3d at 424-25. In that case, the plaintiff sued under Title VII alleging discrimination after she was terminated. *Id.* at 420. The trial court determined in partial summary judgment that plaintiff was an "employee," rather than an independent contractor, and thus she was entitled to the protections of Title VII. *Id.* at 420. The court set a trial on the remaining issues in the case. *Id.* at 420. Prior to trial, even though the court had entered partial summary judgment, the plaintiff anticipated that the defendant "may seek to introduce evidence at trial" regarding her status as an employee, so she filed a motion in limine to exclude that evidence. *Id.* at 421, n.5. The defendant argued that such evidence would be relevant to the issue of "intent," even if it could not be admitted to prove plaintiff's entitlement to the protections of Title VII. *Id.* at 421, n.5. The court overruled the plaintiff's motion in limine. *Id.* at 421. The court also overruled the plaintiff's objections to the evidence at trial. *Id.* at 421-22. After trial, the court entered a judgment that

plaintiff was *not* an employee and not entitled to the protection of Title VII, in contradiction to its summary judgment. *Id.* at 420.

Although the *Alberty-Velez* trial court made comments stating that the prior summary judgment could have been wrong, that plaintiff could present evidence regarding the summary judgment issues if she desired, and even stated that the court was reconsidering the summary judgment, the First Circuit *still* held that these statements were insufficient notice. *Id.* at 421-426. The First Circuit held that the trial court's "unexpected reversal of this ruling at the end of the trial substantially prejudiced" the plaintiff because "given the summary judgment ruling," plaintiff "had no reason to provide evidence during her case in chief that she was an employee and not an independent contractor." *Id.* at 423. The appellate court explained that the "earlier summary judgment ruling had a significance that the court did not fully appreciate." *Id.* at 422. The issues determined in summary judgment "*shall* be deemed established, and the trial shall be conducted accordingly." *Id.* at 422 (emphasis added). The First Circuit concluded that the prejudice to plaintiff's case "could not be more palpable." *Id.* at 425.

Here, just like *Alberty-Velez*, the Cities relied on the court's summary judgment ruling in their preparation for trial and the presentation of their case at trial. Similar to the plaintiff in *Alberty-Velez*, the Cities anticipated that Defendants might attempt to admit evidence regarding Defendants' liability, so the Cities filed a motion in limine. Defendants, though, explicitly agreed to present only evidence of damages. LF 9974-75. Defendants later reneged on this promise and did offer evidence regarding their liability to pay tax on certain types of revenue. *See, e.g.*, TR 267, 458-59, 455-56. Both the

Defendants in this case and the defendant in *Alberty-Velez* claimed at points to offer such evidence under the guise of "intent," or "good faith," but the trial court apparently and unknowingly considered the evidence for the purpose of modifying the summary judgment anyway. *Alberty-Velez,* 242 F.3d at 421, n.5; TR 283.

Unlike *Alberty-Velez*, however, the trial court here did not make any "explicit" statement of "reconsideration." *Id.* at 424. Rather, the trial court gave *no* indication that the court was actually re-opening the summary judgment. In fact, only *four days* before trial, the court denied Defendants' motion to set aside the prior summary judgments. LF 9966. This confirmed that the Cities could continue to rely on the summary judgments. The Cities were, therefore, blindsided by the re-opening of these issues and the final inconsistent judgment, with no opportunity to adequately discover evidence or prepare or present their case at trial regarding the re-opened issues.

Exacerbating this issue and the prejudice to the Cities, Defendants presented a contradictory and ever-changing story regarding the nature of their revenue information, despite being ordered to specifically disclose the pertinent revenue data in a format that the parties and the court would understand. LF 2017; Trial Exhibits 1-8. Undoubtedly in an effort to minimize the amount of damages stemming from their undisputed violations of law, Defendants offered testimony regarding their revenue numbers that contradicted their prior explanation of and admissions regarding the numbers. For instance, although they were ordered to produce revenue information only for "each Defendant," Defendants testified, for the very first time at trial, that a column in the various spreadsheets, the "company codes" column, indicated that the revenue information included revenue from

"maybe 50 different company numbers," and claimed that was not actually revenue of *Defendants*.[10] LF 2017; TR 228. Of course, at the time the revenue information was disclosed, Defendants made no mention that they were disclosing revenue information from other companies. TR 303-304. Defendants testified that although they knew it was impossible for the Cities to understand the various company codes, Defendants still chose to disclose the revenue information in that manner and failed to explain the meaning of the codes or why they were violating the trial court's June 2, 2014 Order to only produce revenue information from each "Defendant" in an understandable format. TR 305-306; LF 2017.

Additionally, although they had previously testified, and again admitted at trial, that Defendants recognize and "accrue…revenue when its billed," and that "Column T [of Exhibit 1A, "eq data"] is the 2007 billed amount," [TR 212-213; LF 10386-87], Defendants made the new argument that in one case, to determine the amount of revenue, the Cities should have instead used Column V of Exhibit 1A, "eq data." TR 257. Defendants testified - contradicting their own statements - that this one instance of using Column T instead of Column V resulted in falsely inflating their revenue numbers by 1.7 million dollars. TR 256 (Defendants testifying that the Cities "should have looked at Column V" and not used the numbers totaling 1.7 million from Column T); *cf.* TR 345 (Defendants admitting that "the 1.7 million is revenue…"); TR 257:22-23 (Cities'

[10] Defendants did testify that all of the alleged "50 different" companies were CenturyLink subsidiaries. TR 303:5.

objection to such argument on the basis that it was "contrary to the previous statements in the case."). Such contradictory statements and mischaracterizations are not unique to Defendants' behavior at trial. As the Cities established in summary judgment, Defendants had been telling the court an entirely different story regarding their revenue information than they had told their customers for years. *See* Statement of Facts, I.c. Defendants' continued insistence to hide the true nature and amount of their gross receipts is one reason why the trial court held that Defendants' underpayment of taxes was "willful," and such behavior only increased the prejudice to the Cities at trial. LF 1701-1706.

Accordingly, the lack of notice and prejudice here is even more evident than in *Alberty-Velez*. Had the Cities known that the trial court was reconsidering its determination that Defendants were liable to pay taxes on revenue from carrier access and interstate services, the Cities would have sought and presented evidence establishing Defendants' obligation to do so. Instead, the Cities were given no notice that these issues were live again, and they were given no opportunity to prepare their case accordingly. Defendants, meanwhile, presented an ever-changing story regarding their revenue information and were erroneously permitted to present evidence regarding their liability to pay the taxes. All of the above prejudiced the Cities, and the court's judgment is erroneous for that reason.

Singh v. George Washington University School of Medicine and Health Sciences also presents a similar circumstance. In that case, a student sued George Washington University for violating the ADA. 508 F.3d at 1097. The ADA provides that a plaintiff is disabled if (1) he or she suffers from an impairment, (2) the impairment limits a "major

life activity", and (3) the limitation is substantial. *Id.* at 1099. On partial summary judgment, the court determined that the student had established the first prong – that she suffered from an impairment. *Id.* at 1099. The trial court denied summary judgment on the issue of whether the limitation was substantial, and reserved that issue for a bench trial. *Id.* at 1099. At trial, however, the court permitted evidence regarding the issue it had determined in the summary judgment – whether the plaintiff suffered from an impairment. *Id.* After the bench trial, the court contradicted its summary judgment and ruled that the plaintiff had failed to prove she suffered from an impairment and that she was not disabled. *Id.* at 1099. Neither the trial court nor the defendant gave notice to the plaintiff that either "sought to disestablish the prior finding." *Id.* at 1106. On appeal, the court of appeals found this procedure constituted reversible error. *Id.* As explained by the court, "[f]acts found on partial summary judgment are taken as established at trial…A trial court's reopening of such an issue without notice to the parties is error, and reversible error if it causes substantial prejudice." *Id.* Even though there was no mention of the appellant describing precisely how she was substantially prejudiced, or what evidence she would have presented, the court presumed substantial prejudice and held that the trial court's decision was reversible error. *Id.* at 1106, 1108. The court of appeals came to this conclusion *even though* they thought that some of the trial court's ultimate conclusions might have been correct. *Id.* at 1100.

Here, just like in *Singh*, the Cities relied on the summary judgment determination in trying their case. Also like this case, the Defendants here did not "g[i]ve effective notice that it sought to disestablish the prior finding…" *Id.* at 1106. Rather, Defendants

agreed that the trial was only on damages, and promised that they would address liability only on appeal. LF 9974-75. And just as in *Singh*, the trial court here failed to give notice that it was re-opening the summary judgment issues. Accordingly, just as in *Singh*, the trial court committed reversible error in contradicting its summary judgment.

D. The Court should reverse the trial court's final judgment and enter judgment in accordance with the summary judgment.

The trial court's error in modifying the summary judgment necessitates modification and reversal, but not remand. "This Court may enter the judgment as the trial court ought to have entered." *Hunter v. Moore*, 486 S.W.3d 919, 922 (Mo. banc 2016) (Missouri Supreme Court modifying and affirming judgment as modified); Rule 84.14 (in disposing of an appeal, the appellate court may enter "such judgment as the court ought to give"). The summary judgment rulings correctly applied the law and should not have been modified. *See* Point III, below. This Court should reinstate the summary judgment, and enter a judgment setting forth the damages the Cities are entitled to as a result of that judgment.

This Court has explained that "Rule 84.14 authorizes an appellate court to modify the judgment by eliminating the reduction in damages..." *Hayes v. Price*, 313 S.W.3d 645, 656 (Mo. 2010). "The proper *measure* of damages is a question of law…." *66, Inc. v. Crestwood Commons Redev. Corp.*, 130 S.W.3d 573, 584 (Mo. App. 2003) (internal citations omitted) (emphasis in original). "When the evidence is uncontroverted and the real issue concerns its legal effect, this court need not defer to the trial court's judgment," and the court may enter judgment as it should have been entered rather than remanding.

Wadas v. Director of Revenue, 197 S.W.3d 222, 224 (Mo. App. 2006) (reversing, rather than remanding, judgment where the evidence was uncontroverted). Accordingly, where the damages award was erroneously lower than the law required, rather than remanding, this Court has reversed the trial court's judgment and entered judgment itself to reflect the increased damages award. *See Hayes*, 313 S.W.3d at 656 (reversing improper judgment and entering increased damages judgment that should have been entered in the trial court).

Here, the court's properly-decided summary judgment held as a matter of law that Defendants owe tax on all revenue attributable to their business in the Cities, including carrier access and interstate telephone calls. LF 2017, 9135. The evidence necessary to measure the Cities' damages resulting from that summary judgment is uncontroverted. Defendants admitted and disclosed their revenue "attributable to each Defendant's business in each of the Cities," even identifying line-by-line the City to which each revenue item was attributable. LF 2017; Trial Exhibits 1-8. Therefore, there is no dispute regarding the amount of damages that stems from the court's prior summary judgments and the amount that should have been entered. Accordingly, remand is unnecessary. *Hunter*, 486 S.W.3d at 922; *Hayes*, 313 S.W.3d at 656; *Wadas*, 197 S.W.3d at 224.

This Court should reverse the final judgment and reinstate the summary judgment to hold that Defendants must pay license taxes on all gross receipts attributable to their business in the Cities. The Court should also reverse and enter a damages judgment in accordance with that ruling, specifically to include damages on all revenue, including carrier access in the Cities and interstate in Wentzville.

The amount of Defendants' unpaid taxes resulting from the summary judgment, and the proper damages amounts on unpaid taxes for the Cities are as follows:

(1) $1,102,003.00 to Aurora, $1,575,420.00 to Cameron, $972,861.00 to Oak Grove, and $5,373,129.00 to Wentzville for unpaid taxes on all revenue, including carrier access and interstate telephone calls, through November 30, 2016 (the end of the damage period calculated by the Cities' expert witness),

(2) $542,136.00 to Aurora, $704,625.00 to Cameron, $509,949.00 to Oak Grove, $4,731,960.00 to Wentzville for interest on the unpaid taxes from the dates the taxes were due through November 30, 2016, an additional amount of interest from November 30, 2016 to February 23, 2017 (the date of the final judgment), and another additional amount to be determined for interest that continues to accrue since the final judgment, and

(3) $1,689,500.00 to Aurora, $1,591,500.00 to Cameron, $1,705,000.00 to Oak Grove, and $5,641,787.00 to Wentzville for penalties on the unpaid taxes through November 30, 2016, and an amount to be determined for penalties that continue to accrue since that date.

See Trial Exhibit 9, p. 6-10, Schedules 101-2, 102-2, and 103-2.

II. The trial court erred in admitting evidence of Defendants' liability, because such evidence was irrelevant, beyond the scope of the trial, and was inconsistent with the court's prior summary judgment in that Defendants' liability had already been determined in full.

Standard of Review and Preservation of Error

The appellate court will reverse a trial court's admission of evidence where the trial court abused its discretion. *Healthcare Services of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 616 (Mo. banc 2006).

This error was preserved when the City objected to evidence and testimony regarding liability that had already been determined in the summary judgment ruling, filed a motion in limine, and filed a motion to amend the court's final judgment. LF 9950, 10497, 10887-89; TR 4, 160-62, 172, 177, 199, 269, 412-15, 544-45; *see* Rule 78.07(a), (c).

Argument

As explained above in Point I, the trial court impermissibly re-opened issues of liability after they had already been fully determined in summary judgment. The court expanded the scope and purpose of the trial with no notice to the Cities, and allowed Defendants to present evidence regarding their liability and which of their receipts should be considered "gross receipts" for the purpose of paying the Cities' license taxes. That evidence should not have been admitted.

Despite agreeing that the trial was only on damages, Defendants presented testimony regarding liability, and specifically, what types of Defendants' revenue are taxable under the Cities' ordinances. *See, e.g.*, TR 267, 459, 455-56, 459, 475-76, 573. The Cities filed a motion in limine to exclude such evidence, and they objected to the evidence throughout trial. LF 9950, 10497, 10887-89; TR 4, 160-62, 172, 177, 199, 269, 412-15, 544-45. The trial court overruled those objections, however, and permitted the evidence. *See, e.g.*, TR 173, 438. The trial court's admission of such evidence was a prejudicial abuse of discretion.

A. The Cities were entitled to rely on the partial summary judgment, and the matters determined in the summary judgment should have been deemed established for the purposes of trial.

As explained above in Point I, matters determined in partial summary judgment are deemed established at trial, and the parties are entitled to rely on those established rulings. *See* Rule 74.04(d) (issues determined in partial summary judgment "shall be deemed established, and the trial shall be conducted accordingly."); *Alberty-Velez*, 242 F.3d at 424-25 ("Once a district judge issues a partial summary judgment order removing certain claims from a case, *the parties have a right to rely on the ruling* by forbearing from introducing any evidence or cross-examining witnesses in regard to those claims.") (emphasis in original). Where a partial summary judgment is rendered only on liability, as it was here and "as envisioned in Rule 74.04(c)(3), [it] result[s]…in the removal of that theory at trial…." *Moreland*, 995 S.W.2d at 516; *Brenneke*, 984 S.W.2d at 146 (where a partial summary judgment had been entered in the case, at trial those matters

established in the partial summary judgment "should have been, deemed established…"). Here, Defendants' liability to pay the license tax on "all revenue" "attributable" to their business in the Cities had already been determined and was established for the purposes of trial. LF 9133-34.

B. The court should not have admitted evidence on issues that were already determined.

The trial court's admission of evidence that was contrary to the summary judgment, beyond the scope of the trial, and which the Cities had no notice would be at issue in the trial was prejudicial error. "To be admissible, evidence must be…relevant." *Frazier v. City of Kansas*, 467 S.W.3d 327, 338 (Mo. App. 2015). Evidence regarding an issue that "the circuit court had already determined" is "irrelevant." *In Interest of J.P.B.*, 509 S.W.3d 84, 93 (Mo. banc 2017). Defendants' evidence regarding their liability, therefore, was irrelevant to the issues at trial.

Even where the trial court intends to re-open a partial summary judgment and expand the scope of trial, the court must give the parties "clear notice" of the court's intent to do so, and "an adequate opportunity to adjust the presentation of their case once he decided not to follow the order." *Leddy*, 875 F.2d at 386 (error to allow evidence of already-determined issues); *Alberty-Velez*, 242 F.3d at 424-25 (holding that if the trial court "broadens the scope of trial, the judge must inform the parties and give them an opportunity to present evidence relating to the newly revived issue" and holding that it was error to allow evidence of already-determined issues); *Singh*, 508 F.3d at 1106 (error to allow evidence of already-determined issues).

Here, the court admitted evidence that was irrelevant given the prior rulings in the case. The court also gave no notice that the scope of the trial would be broadened. The court should not have admitted evidence on those determined issues. To do so was contrary to the law and prejudiced the Cities, who were unable to adequately discover evidence or prepare or present their case at trial regarding the re-opened issues.

III. The trial court erred in holding in the final judgment that carrier access revenue in the Cities and revenue derived from interstate telephone calls in Wentzville is not taxable, because such decision erroneously applied the law and was unsupported by the evidence in that Defendants are subject to the Cities' license taxes and admitted that they earned revenue from carrier access and interstate telephone calls that was attributable to their business in the Cities.

Standard of Review and Preservation of Error

"The trial court's judgment in a court-tried case may be reversed when it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law." *Craig*, 80 S.W.3d at 461. "Legal questions in a court-tried case are subject to *de novo* review." *Holm*, 514 S.W.3d at 596.

This error was preserved when the Cities moved for summary judgment, [LF 10992-95] and filed a motion to amend the final judgment. LF 10888-89.

Argument

A. The Court's erroneous holding regarding carrier access and interstate telephone call revenue.

In a drastic reversal to its prior ruling, with no explanation of the reasoning behind the decision or the change, the trial court held in the final judgment that Defendants are *not* required to include revenue from carrier access (in all Cities) or interstate telephone calls (in Wentzville) when paying the Cities' *gross* receipts license taxes, and that Defendants do not owe damages on such revenue. LF 10815-16. Aside from resulting

from a prejudicial modification to the summary judgment, as explained above in Point I, this judgment incorrectly states and misapplies the law. The final judgment stated as follows:

> The Court declares that the tax base under the Aurora City Code § 615.010 *et seq.*, Cameron Ordinance 2878, and Oak Grove City Code § 615.010 *et seq.* is all revenue, other than carrier access revenue, received in each respective city. The Court declares that the tax base under the Wentzville City Code §§ 640.010 and 640.020 is all revenue, other than carrier access revenue and revenue derived from interstate telephone calls, received in the city of Wentzville. Defendants shall prospectively pay, without protest, taxes on the foregoing tax bases for all periods from July 1, 2016 forward, to include: a) in Aurora, Cameron, and Oak Grove tax on all revenue, other than carrier access revenue, received in each respective city, and b) in Wentzville all revenue, other than carrier access revenue and revenue derived from interstate telephone calls, received in the of Wentzville [sic].
>
> LF 10816.

The court's judgment erroneously declares the law by holding that "carrier access revenue" and "revenue derived from interstate telephone calls" are not included in the "tax base" and that Defendants are not required to pay tax on such revenue. LF 10816. The court had no legal basis for carving out two revenue sources from Defendants' obligation to pay taxes and their liability for damages, and it was error and contrary to Missouri law to do so. *See, e.g.*, *Suzy's Bar & Grill, Inc. v. Kansas City*, 580 S.W.2d 259,

262 (Mo. banc 1979) (holding that flat percentage license taxes are imposed on companies engaged in business "without regard to the makeup of the revenue and without restrictions to the percentage stated in the taxing ordinance"); *Ludwigs v. City of Kansas City*, 487 S.W.2d 519, 522 (Mo. 1972) (holding that a municipal license tax is calculated using "the whole and entire amount of the receipts without deduction"); *Kansas City v. Graybar Elec. Co., Inc.*, 485 S.W.2d 38, 41 (Mo. banc 1972) (analyzing municipal license taxes, which are "privilege or occupation" taxes, and holding that gross receipts are "merely a means to calculate the…license tax; what is being taxed is the privilege of doing business in [the] City").

B. The Cities' license taxes are presumed valid and their construction is a question of law.

The Cities' license tax ordinances are "presumed to be valid" and are "prima facie reasonable." *Great Rivers Habitat Alliance v. City of St. Peters*, 384 S.W.3d 279, 296 (Mo. App. 2012); *Ross v. City of Kansas City*, 328 S.W.2d 610, 615 (Mo. 1959); *Parking Sys., Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11, 16 (Mo. 1974) (ordinances are "presumed to be valid"). Even where imposition of a license tax results in a significant tax payment, that does not make the tax unlawful. *Thunder Oil Co. v. City of Sunset Hills*, 349 S.W.2d 82, 87 (Mo. banc 1961) (rejecting argument that simply because license tax imposed a high tax burden on a company it was invalid and holding "[t]he power of a city to tax does not necessarily depend upon the precise results of the tax, when levied….When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers.").

"The construction and meaning" of the Cities' ordinances "is a question of law for the court." *Ludwigs*, 487 S.W.2d at 522 (interpreting municipal license tax as a matter of law). The terms of the Cities' ordinances are unambiguous, as the trial court determined in summary judgment. LF 9135. Where ordinance "language is clear, courts must give effect to its plain meaning and refrain from applying rules of construction unless there is some ambiguity. [O]rdinances…should be construed to uphold [their] validity…." *Moynihan v. Gunn*, 204 S.W.3d 230, 234 (Mo. App. 2006) (internal citations and quotations omitted); *Easy Living Mobile Manor, Inc. v. Eureka Fire Protection Dist.*, 513 S.W.2d 736, 739 (Mo. App. 1974) (in considering an ordinance, "it is the court's duty to uphold the legislative action…"). Accordingly, in analyzing the Cities' ordinances, the Court must review only "the plain and ordinary meaning of the ordinance's language absent a definition in the ordinance." *Tupper v. City of St. Louis*, 468 S.W.3d 360, 371 (Mo. banc 2015).

C. The Cities' ordinances unambiguously impose a license tax on Defendants, as telephone companies doing business in the Cities.

Pursuant to statutory authority, each City has lawfully enacted a license tax on telephone companies for the privilege of doing business in the City. LF 424, 428-29, 439-40, 443-46; § 94.110 RSMo. (authorizing cities of the third class to impose a license tax on telephone companies); § 94.270 RSMo. (authorizing cities of the fourth class to impose a license tax on telephone companies). The Cities' ordinances in effect impose a tax on a type of business (here, those "engaged in the business" of supplying "telephone service" or "exchange telephone service") at a certain flat rate (5% or 6%) of the

telephone company's gross receipts from their business in the Cities. LF 424, 428-29, 439-40, 443-46.

Defendants are engaged in the business of furnishing and supplying telephone service and exchange telephone service, and individually or collectively provide telephone service in the Cities. LF 1391-92, 1397-1407, 9175. Defendants admit they are subject to the license taxes. LF 1397-1407. However, they dispute the amount of tax they are required to pay.

The license taxes are self-reporting taxes. LF 424-46. The Cities do not, and cannot know the true amount of Defendants' gross receipts unless Defendants tell them. Defendants are required by ordinance to submit sworn statements of their gross receipts to the Cities, and they admit this requirement exists. LF 424 428-29, 439-40, 443-46, 1393 ("Defendants admit that companies subject to the ordinance are required to report the taxable gross receipts in a sworn statement."). In theory, this requirement provides at least some minimum guarantee of accuracy. Defendants refuse to comply with this requirement, however, and they do not submit the required sworn statements telling the Cities the amount of their gross receipts. LF 7752, 8620-21.

D. The license taxes require payment of a percentage of Defendants' total gross receipts attributable to their business in the Cities.

Defendants fail and refuse to pay the license taxes based on their actual, total gross receipts attributable to their business in the Cities. *See* LF 1411-16, 11024-27, 10815-16. Defendants argue they are permitted to exclude certain receipts from their "gross receipts" base. LF 3078, 3099-3101. The trial court initially rejected this argument

explicitly, holding that "Defendants argue that an analysis of each receipt of revenue is required to determine whether the received revenue is taxable, but this is incorrect." LF 9136. As described above, however, the court later erroneously modified its summary judgment and held that Defendants do not have to include their true *gross* receipts when calculating and paying the tax, and are not required to include receipts from carrier access (in all Cities) and interstate telephone calls (in Wentzville) in their tax payments. LF 10815-16. The trial court's unreasoned conclusion regarding these two specific categories of receipts misapplied the Cities' license taxes and Missouri law.

The license taxes are clear on the amount Defendants must pay – a flat percentage of either five or six percent of Defendants' "*gross* receipts" from doing business in the Cities. LF 424-46 (emphasis added). The Missouri Supreme Court has explained the plain meaning of the term "gross receipts" in municipal license taxes, holding that "'gross receipts' of a business is the whole and entire amount of the receipts without deduction." *Ludwigs*, 487 S.W.2d at 522.

The issue of what should properly be considered a part of a company's "gross receipts" for purposes of a municipality's license tax was first brought before the Missouri Supreme Court in 1953 in *Laclede Gas Co. v. City of St. Louis*, 253 S.W.2d 842 (Mo. banc 1953). In that case, Laclede Gas Company argued that money it had sequestered in a special account for purposes of a possible refund to its customers was not to be considered "gross receipts" for purposes of the St. Louis license tax. The Supreme Court began its analysis by stating: "[i]n its usual and ordinary meaning 'gross receipts' of a business is the whole and entire amount of the receipts without deduction."

Id. at 848. The word "gross," the Court continued, "appearing in the term 'gross receipts,' as used in the ordinance, must have been and was there used as the *direct antithesis* of the word 'net.'" *Id.* (emphasis added).

Several years later, the Missouri Supreme Court reiterated and reaffirmed this definition of "gross receipts" in *Ludwigs*. Citing the broad definition of gross receipts explained in *Laclede Gas*, including "the whole and entire amount of receipts without deduction," this Court held that even money collected to pay the license tax itself should be considered "gross receipts" for the purposes of paying the tax. *Ludwigs*, 487 S.W.2d at 522-23.[11] In *Ludwigs*, Kansas City taxed the amount that the utility company "passed on" to its customers to pay their obligations under Kansas City's license tax. *Id.* The plaintiffs argued that the gross receipts license tax should only apply to the sums collected for the actual sale of services. *Id.* at 521. Citing *Hotel Continental* and *Laclede Gas*, among other authorities, the Supreme Court rejected that argument, stating that the license tax is a tax levied on the *companies*—not the consumers—and "as such it is an item of cost or expense of doing business." *Ludwigs*, 487 S.W.2d at 521-523 (citing *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 82 (Mo. 1960)). The amounts that the utilities collected from their customers to pay the utilities' gross receipts tax due to the city were "properly included as a part of the base for computing…the tax…." *Id.* at 522.

[11] This is commonly referred to as "tax on tax," or "the License Tax Pass Through," and was one of the revenue streams the trial court specifically ruled in the 2014 summary judgment was required to be paid. *See* LF 1050-1054, 1717; TR 323:6-12.

Accordingly, as demonstrated in these cases, the plain meaning of "gross receipts" for the purposes of a municipal business license tax is extremely broad, and it includes *all* receipts received by Defendants from doing business in the Cities.

E. The license taxes are not transaction taxes, and the trial court erred in cherry-picking certain transactions to which the taxes are not applicable.

An analysis of each receipt Defendants receive from their business in the City is not necessary because the license taxes are not transaction taxes. They are not imposed on specific *revenues*, they are imposed on the telephone *company*. "[A] gross-receipts-occupational-license tax starts with the revenue received by the licensee, not the basic charge made to the customer by the merchant, and assesses a tax equal to a percentage of those revenues **without regard to the makeup of the revenue** and without restrictions to the percentage stated in the taxing ordinance." *Suzy's Bar & Grill, Inc.*, 580 S.W.2d at 262 (emphasis added). Missouri courts have consistently held that municipal license taxes are mere operating expenses, and are imposed on *companies* for the privilege of access to customers within the taxing municipalities and "the advantages afforded by the municipal government" of the Cities. *Graybar Elec. Co., Inc.*, 485 S.W.2d at 42; *City of Bridgeton v. Northwest Chrysler-Plymouth, Inc.*, 37 S.W.3d 867, 872 (Mo. App. 2001) (Bridgeton's license tax is a valid "tax for the privilege of doing business in Bridgeton."). The "company must pay the tax, whatever the total amount thereof, and that total is a fixed and unchangeable…operating expense." *State ex rel. Hotel Continental*, 334 S.W.2d at 82.

As the Court explained in *Graybar Elec. Co. Inc.*, a business or occupation tax is imposed "on the privilege or occupation, that is, on the person for the privilege of engaging in the business or occupation designated," not on the specific sale. 485 S.W.2d at 41. In *Graybar Elec. Co. Inc.*, the electric company sought to exclude certain types of receipts from its payment of Kansas City's gross receipts license tax. *Id.* at 40-41. The Missouri Supreme Court held that such exclusions were unlawful. *Id.* at 41. Quoting the definition of "gross receipts" pronounced in *Laclede Gas*, the Court explained that Graybar "was clearly doing business" in the city, and that the trial court was wrong to exclude receipts and "erroneously read language of limitation into the ordinance which was not present." *Id.* at 40 n.4, 41. The receipts at issue were "fairly attributable" to Graybar's business in Kansas City, and thus, should be included in Graybar's "gross receipts" for the purpose of the tax. *Id.* at 41.

The Missouri Court of Appeals has also explained that once it is determined that a company is of the sort to which a municipal license tax applies, "[t]here is thus no necessity to pursue" an analysis of the various streams of revenue the company receives. *Maury E. Bettis, Co. v. Kansas City*, 488 S.W.2d 302, 305 (Mo. App. 1972) ("Clearly the evidence shows that respondent's earnings were allocated and attributable to its Kansas City office, and such had a sufficient 'nexus' with the City as to be a legitimate basis for the license tax. There is thus no necessity to pursue the City's claim that there was no evidence to sustain the court's finding that much of respondent's income arose from transactions beyond this state…") (internal citation omitted).

In *City of Jefferson City, Mo. v. Cingular Wireless, LLC*, a telephone company providing mobile cellular phone service made similar arguments to those that Defendants assert in this case. 531 F.3d 595, 605-606 (8th Cir. 2008). There, Cingular Wireless argued that its mobile cell phone services were not "telephone service" as used in the city's license tax, and therefore they did not owe a business license tax on those receipts. *Id.* The Eighth Circuit Court of Appeals, applying Missouri law, rejected that argument. *Id.* at 606. The court held that although cell phones have more advanced technology and different features than basic "telephones" did when the license taxes were enacted, "nothing about the term 'telephonic' in the tax ordinance is limited to the technology generally used to operate telephones in 1944." *Id.* at 608. While there may "have been many advances in telephone technology over the past sixty years…with each technological advancement we continue to refer to the product and services as telephonic." *Id.* The court explained that the city "is not required to update its Code for the purpose of recognizing the advent of each new form of technology used to provide telephonic services." *Id.* Therefore, the court refused to exclude revenue from cell phone services from the "gross receipts" tax on telephone companies, and held that the ordinance clearly operated to include revenue from cell phone service. *Id.* As the district court in that proceeding had explained, "if the Defendants' approach were adopted, then each time that a new technology [was] incorporated into an existing service or product, the ordinances and charters of each city would have to be changed or no taxes could be collected." *City of Jefferson v. Cingular Wireless, LLC*, 04-4099-CV-C-NKL, 2005 WL 1384062 at *5 (W.D. Mo. June 9, 2005). That result would be impermissible. *City of*

Jefferson City, Mo., 531 F.3d at 608. Nevertheless, that is the essence of Defendants' claims here – that the various services they provide which have evolved over the years are no longer explicitly "basic" local telephone service, and that they are therefore not to be included in gross receipts. Even if it weren't contradicted by Defendants' own admissions about their services, that argument must be rejected here, just as it was in *City of Jefferson City, Mo.*

Telecommunications companies have long sought to evade their liability for municipal license taxes by attempting to misconstrue the taxes as transaction taxes and carve out specific, high-revenue service items from the tax base. Just as the argument was rejected in *City of Jefferson City, Mo.*, those attempts are routinely rejected by courts across the country. For example, in *Sprint Spectrum, L.P. v. City of Eugene*, Sprint argued that certain parts of its revenue were not taxable under a city's gross receipts tax. 35 P.3d 327, 328 (Or. App. 2001). The Court rejected that argument, finding: "The city contends that it does not tax transactions of any sort, much less transactions that occur outside of its territorial boundaries. Instead, it argues, its telecommunications ordinance imposes a business license tax *on entities* that conduct business within its geographic territory. Such taxes, the city argues, are routinely upheld as appropriate exercises of municipal authority. We agree with the city." *Sprint Spectrum, L.P.*, 35 P.3d at 328-29 (emphasis added). "The ordinance does not tax individual transactions. It is based instead on the provider's '*gross revenues derived from its telecommunication activities within the city.*'" *Id.*; *Taylor v. Rosenthal*, 213 S.W.2d 435, 437 (Ky. App. 1948) ("When a tax is levied on 'gross receipts' it applies to **every penny** a person, firm or corporation takes in

regardless of the source from which it comes.") (emphasis added); *Pacific Greyhound Lines v. Johnson*, 129 P.2d 32, 34 (Cal. App. 1942) ("[A]ll receipts not specifically excluded are to be included…"); *Miller v. City of Springfield*, 750 S.W.2d 118, 120 (Mo. App. 1988) ("The license fee starts with and is based upon all of the seller's revenue. The fee is not based upon a percentage of the price of the goods before taxes, but upon total receipts, including taxes.").

Therefore, the application of the Cities' license taxes is simple: when a company engages in the business of providing telephone service in the Cities, the company must pay a license tax of five or six percent of the company's gross receipts attributable to its business in the City, for the privilege of doing business in the City. Defendants are engaged in the business of providing telephone service in the Cities, and they are not engaged in any other business. LF 11079-11082, 11090-11111, 10327-10331 (CenturyLink, Inc. corporate designee testifying that Defendants are telephone companies and are not engaged in any other business in any of the Cities). The trial court's statement, then, that two specific revenue sources – carrier access and interstate telephone calls – are not to be included in the definition of "gross receipts," is erroneous, an improper application of the Cities' license taxes, and a misstatement of the law. There is no justification for analyzing the "makeup of the revenue," and excluding specific categories of receipts from the tax base. *See Suzy's Bar & Grill, Inc.*, 580 S.W.2d at 262.

F. Extrinsic evidence was not required or appropriate to determine the meaning of "gross receipts" attributable to Defendants' telephone business.

Through deficient affidavits and testimony, including many improper legal conclusions regarding the meaning of the Cities' ordinances, Defendants attempted to support their argument that the license taxes are applicable to only certain receipts. *See, e.g.*, LF 3079, 3084-88 (relying on improper affidavits to assert that the license taxes are only applicable to receipts from "local" telephone exchange service occurring "wholly within" the Cities).

The Cities' taxes are unambiguous, and such extrinsic evidence regarding the meaning of the plain terms used in the Cities' ordinances should not have been considered in ruling on Defendants' liability. *See Ludwigs*, 487 S.W.2d at 522 (interpreting municipal license tax as a matter of law and rejecting affidavits asserting legal conclusions about the meaning of the taxes); *State Bd. of Chiropractic Examiners v. Clark*, 713 S.W.2d 621, 628-29 (Mo. App. 1986) (expert testimony was not required to determine a question of law – whether a particular treatment fell within the definition of the "practice of chiropractic" in regards to a licensing scheme); *State ex rel. Laidlaw Waste Systems, Inc. v. City of Kansas City*, 858 S.W.2d 753, 755 (Mo. App. 1993) ("[W]hen a statute is clear and unambiguous, extrinsic aids to statutory construction cannot be used.") (internal citation omitted).

"Telephone" service is an unambiguous term that does not require legislative history, expert testimony, or extrinsic evidence to be considered. *See City of Jefferson*, No. 04-4099-CV-C-NKL, *LLC*, 2005 WL 1384062, at *4-5 (W.D. Mo. June 9, 2005)

(rejecting argument that extrinsic evidence was required to interpret license tax on telephone companies and holding that although telephone technology has progressed, and although "[e]ach of these new technologies could be described in technical terms that may sound quite unlike our current understanding of telephone services…that does not change the fact that these technologies…are created by 'telephone' companies to provide what we all think of as 'telephone services.'"); *Airtouch Communications, Inc.* v. *Dept. of Revenue*, 76 P.3d 342, 349-50 (Wyo. 2003) (the phrase "telephone companies" is unambiguous).

Extrinsic evidence is inappropriate because the "plain language" of the Cities' license taxes "makes it clear that the ordinance was intended to cover all telephonic services, regardless of the type of technology used to provide the services…" *City of Jefferson City, Mo*, 531 F.3d at 606-08. To the extent Defendants offered extrinsic evidence intended to construe the Cities' license taxes, such extrinsic evidence is not to be considered.

G. Defendants' gross receipts attributable to their business in the Cities includes receipts derived from carrier access and interstate telephone calls.

Even if it were proper to consider extrinsic evidence and analyze each separate receipt a telephone company earns as a result of its business in the Cities to determine taxability, and even if the court accepted Defendants' argument that "gross receipts" only includes receipts from "local" exchange telephone service, receipts from carrier access and interstate telephone calls are clearly part of those gross receipts.

Defendants readily admit they earn receipts from carrier access and interstate telephone calls as a result of their business in the Cities. LF 3057; Trial Exhibits 2, 5 (stating Defendants' carrier access revenue and interstate telephone call revenue attributable to each City, disclosed in response to the court's June 2, 2014 Order); TR 55-56 (Defendants' 2014 production "lists the city, and it says how much of that carrier access revenue is for each city."); TR 72.

Defendants receive carrier access revenue when they, as the local telephone company, allow other telephone companies to use the CenturyLink network. TR 422:13-18, 466:22-25. According to Defendants, carrier access revenue results from "charges long distance companies pay to local telephone companies [Defendants] for access to the local companies' networks." LF 8577. For instance, another telephone company might need to use the CenturyLink network to complete a long distance call in the City of Aurora. If the other company uses CenturyLink's network for that call, CenturyLink bills the other company and receives revenue. TR 402-403. There is no doubt that CenturyLink only receives the carrier access revenue because of its presence in each City. TR 424:19-21, 332-333.

In fact, at trial, CenturyLink's Director of Tax Systems and Tax Billing testified that it was correct that revenue CenturyLink receives for a call that utilizes carrier access "couldn't be completed without CenturyLink presence in the city." TR 332-333. Defendants' Director of Carrier Access Billing also explained the manner in which CenturyLink receives carrier access revenue: when someone living in one of the Cities receives a long distance call from a phone in another state, if the call traverses

CenturyLink's network in the City, CenturyLink would bill the long distance telephone company for that call, and receive carrier access revenue. TR 402-403. CenturyLink accordingly only receives that carrier access revenue *because of* its presence in the Cities. *Id.* Therefore, there is no doubt that such revenue is attributable to Defendants' telephone business in the Cities. Defendants' admissions regarding their own revenue are conclusive and binding. *See In re Estate of Lambur*, 397 S.W.3d 54, 66 (Mo. App. 2013) (holding that "unequivocal" testimony regarding a fact "peculiarly within" the witness's knowledge is "conclusive" and binding admission); *Tienter v. Tienter*, 482 S.W.3d 483, 491 (Mo. App. 2016) (holding that a party was bound by his testimony where the party "testifies unequivocally and understandingly to a material fact within his own knowledge"). There was no evidence in this case to support a ruling that carrier access revenue or revenue from interstate telephone calls were not received as a result of Defendants' business in the Cities, and Defendants' multiple admissions bely such a conclusion.

Defendants concede that, at the very least, revenue from "local" "exchange telephone service," is required to be included in gross receipts for the purposes of the Cities' license taxes. LF 3093 (Defendants' statement that the license taxes apply to "Revenues Derived from the Provision of Local Exchange Telephone Service"). Although denying it in statements to the trial court, Defendants have admitted that their services are "local." For example, Defendant Spectra affirmatively stated to the Missouri Secretary of State that Spectra's *sole* purpose in doing business in Missouri was to "purchase local telephone exchange assets….and thereafter to provide local telephone

exchange services…" LF 8774. Two of the services Spectra provides are carrier access and interstate services. Trial Exhibits 1-8. Accordingly, pursuant to Defendants' own admission that the only services Spectra provides are "local telephone exchange services," both carrier access and interstate services fall within that description. LF 8774. Even under Defendants' strained and faulty interpretation of the taxes, Defendants admit that carrier access and interstate telephone call revenues should be included within their "gross receipts" for the purposes of the taxes.

In over a thousand instances on bills to their customers and the Cities, Defendants also described their services as "local exchange service." LF 11229. Defendants have in fact identified *all* of their services as "local" service in statements to their customers. LF 3093, 7781, 11229. Further, CenturyLink itself concedes that each component of its carrier access service is "local." LF 7936, 7941 (stating on the CenturyLink website that access revenues are "revenues that local exchange companies receive from long distance companies help offset some of those costs to keep the cost of local service affordable. ***As the costs are associated with local service***, the FCC determined that it was appropriate to allow local exchange carriers to recover a portion of the lost access revenues from their customers."). (emphasis added). Even the FCC considers carrier access revenues to be revenue derived from providing local telephone service. 7946, 7954 (categorizing "Access" as "Local Service" Revenue), 7958. Therefore, even if an analysis of each separate receipt was required in analyzing the Cities' license taxes, the evidence established that Defendants' revenue, including carrier access revenue and interstate telephone call revenue, was earned as a result of Defendants' business in the Cities.

Defendants admit that they do not pay the license tax on their total gross receipts attributable to their business in the Cities, including carrier access and interstate telephone calls. *See, e.g.*, LF 450 ("Defendant admits that it did not pay License Tax to the City of Aurora, Missouri on every dollar of revenue generated or collected by Defendant within the City during the Relevant Time Frame…"); 472 (admitting the same in Cameron); 516 (admitting the same in Oak Grove); 538 (admitting the same in Wentzville). Defendants' unilateral decision to exclude certain receipts from the definition of "gross receipts" is contrary to Missouri law and the Cities' ordinances, and the trial court's last-minute approval of that behavior was erroneous and unlawful. But for Defendants' ability to do business in the Cities, they would not earn such revenues. TR 332-333 ("carrier access" "couldn't be completed without CenturyLink presence in [the] city."). Therefore, the "whole and entire amount" of Defendants' receipts attributable to their business in the Cities includes revenue from carrier access and interstate services, and the trial court erred in excluding those revenues.

H. As the taxpayer, Defendants failed to satisfy their burden of proving entitlement to any exemption from taxation.

Even if there were an exemption from taxation for carrier access revenue or interstate telephone call revenue in Wentzville, Defendants did not establish an entitlement to any exemption, and therefore it was error to exclude such revenue. Defendants claimed an exemption from taxation pursuant to Wentzville's ordinance language. LF 10457-59. That language provides that "[n]othing in Section 640.020 shall be construed to apply to revenue derived from interstate telephone calls." LF 443.

Although this claimed exemption was raised in the summary judgment proceedings and rejected, the court improperly modified that decision after trial and applied an exemption. TR Dec. 18, 2015, 43; LF 10815-16. Aside from the procedural defects requiring reversal, the application of this exemption to Defendants' gross receipts was erroneous because Defendants failed to prove that any of their receipts "fit the statutory language" of an exemption "exactly." *Bartlett International, Inc. v. Director of Revenue*, 487 S.W.3d 470, 472 (Mo. banc 2016).

"Taxation is the rule and exemption is the exception." *Tri-State Osteopathic Hosp. Ass'n v. Blakeley*, 898 S.W.2d 693, 694 (Mo. App. 1995). "The burden is on the taxpayer to prove it qualifies for an exemption." *Tracfone Wireless, Inc. v. Director of Revenue*, 514 S.W.3d 18, 19 (Mo. banc 2017); *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885, 887 (Mo. banc 1999) ("Exemptions from taxation are to be strictly construed, and, as such, it is the burden of the taxpayer claiming the exemption to show that it fits" an exemption) (internal citation omitted). "Tax exemptions are strictly construed against the taxpayer." *Tracfone Wireless, Inc.*, 514 S.W.3d at 21. (internal citation omitted). "The burden is on the taxpayer to prove an exemption applies by 'clear and unequivocal proof,' and 'all doubts are resolved against the taxpayer.'" *Id.* at 21-22 (internal citation omitted). The taxpayer must establish that the "transaction at issue fits the statutory language exactly." *Bartlett International, Inc.*, 487 S.W.3d at 472.

Here, even if it were applicable, Defendants failed to satisfy their burden to prove an exemption applies to any of their receipts. Defendants failed to identify which receipts specifically were attributable to the *interstate* portion of telephone calls. Defendants *only*

identified receipts which were attributable to the City of Wentzville (and the other Plaintiff Cities). LF 2017; Trial Exhibits 1-8. There was no evidence to establish that any of Defendants' receipts fit any statutory exemption "exactly." *Bartlett International, Inc.*, 487 S.W.3d at 472.

Defendants admitted and identified the portion of their revenue that was attributable to each City. LF 2017; Trial Exhibits 1-8. The makeup of that revenue and the specific sources it derives from is immaterial. All of it should have been considered "gross receipts" from Defendants' business in the Cities. The trial court erred in holding that it was not, and in holding that the Cities were not entitled to damages on those amounts. Therefore, the trial court's decision must be reversed and modified to hold that Defendants must pay the license tax on their total gross receipts attributable to their business in the Cities, including carrier access (in all Cities) and interstate telephone call receipts (in Wentzville).

IV. The trial court erred in admitting Defendants' Exhibit U2, a summary of other documents, because it was inadmissible hearsay in that Defendants did not establish the competency of the underlying documents and the underlying documents were never made available to the Cities.

Standard of Review and Preservation of Error

The appellate court will reverse a trial court's admission of evidence where the trial court abused its discretion. *Healthcare Services of the Ozarks, Inc.*, 198 S.W.3d at 616.

The Cities preserved this error when they objected to the admission of Exhibit U2. TR 233:20-23, 236-237, 245:18-19.

Argument

During trial, Defendants claimed to have paid more taxes for the relevant time period than they actually had paid, but they failed to offer admissible evidence establishing such payments existed. The only evidence Defendants offered on this point, Exhibit U2, was an inadmissible summary chart stating the total tax payments Defendants claimed to have made. Defendants did not produce the underlying documents for the Cities' inspection, and did not establish the competency of such records. The erroneous admission of Exhibit U2, on which the trial court explicitly based the damages award, prejudiced the Cities, who were never given the chance to review and question the underlying documents which were summarized in Exhibit U2.

A. Defendants never produced the underlying documents that were summarized in Exhibit U2.

Two days before trial, Defendants filed their "Exhibit List." LF 9981. The Exhibit List did not identify Exhibit U2. LF 9981-82. While the Exhibit List did state that Defendants anticipated offering into evidence "demonstrative exhibits and summary exhibits," Defendants did not disclose the records upon which such exhibits would be based, and the Cities were not made aware of Exhibit U2 until the day of trial. LF 9981-92.

At trial, Defendants offered Exhibits U1 and U2, which they claimed summarized "different scenarios that we have for damages." TR 231:19-23. The only difference between Exhibits U1 and U2 were the respective time periods, and thus, Defendants' explanations of Exhibit U1 were applicable to Exhibit U2. TR 231:19-23, 245:8-11. Defendants claimed that the exhibits were created by "pulling together all the revenue and tax data for the respective periods…querying the data to only the defendants at question and also applying the order from the April, 2014 period." TR 232:5-10. The "respective period" for Exhibit U2 was 2007 forward. TR 233:7-9. Exhibit U2 identified amounts that Defendants claimed were summaries of "actual payments that CenturyLink has made for Aurora, Cameron, Oak Grove and Wentzville by the year." TR 233:17-19. Exhibit U2 also identified amounts Defendants' claimed as particular parts of their revenue. *See* Trial Exhibit U2.

The Cities objected to the exhibits for two reasons. One, because the revenue numbers stated on the charts were different than what Defendants had disclosed in response to the Court's June 2, 2014 order. TR 236-237, 245:18-19 ("Judge, again, I'm going to object to this because these are different amounts than the amounts they have produced all along. Its different than either version of all the other revenues that they've given us, supposedly to comply with the order to provide us all revenues in the City.") Two, the Cities objected because Defendants had never produced the underlying data to back up what they claimed were their "actual payments." TR 233:20-23, 245: 18-19. The Cities had requested the information in discovery, and it was never produced. *See, e.g.*, LF 1107-1108; 9418-19. In fact, prior to trial, the Cities deposed Mr. Seshagiri, CenturyLink's Director of Tax Systems and Tax Billing. LF 9417-19. One of the topics Mr. Seshagiri was notified he would be asked to testify about was the amount of Defendants' tax payments to the Cities. LF 9418-19. At the deposition, Mr. Seshagiri was unable to do so. LF 9418-19.

The Cities opposed the admission of Exhibit U2, arguing: "Your Honor, I object. CenturyLink has never produced their actual payment data. We've asked for it. They've been compelled to produce it. They've not. And now they're trotting it out here. We've not seen it. I object to any discussion of this." TR 233:20-23. Defendants' counsel falsely claimed, "[w]e've produced the payment information, including the protest payments." TR 234:2-3. The Cities corrected him, and reminded him that Defendants had not produced the documents. TR 234:4. The court questioned Mr. Seshagiri, who claimed he compiled the exhibit, asking "[h]ave you turned that over, the payment information, this

stuff that's summarized here?" TR 234:5-7. Mr. Seshagiri did not know. TR 234:8-9. Mr. Seshagiri later admitted he actually had not even seen all of the documents that were summarized in Exhibit U2. TR 318:16-18 (Q: "Did you actually see the scanned physical documents of the payments? A: "Not every single month but some of them.").

The Cities again urged the court to reject the exhibits, explaining that, in fact, "one of the things that Mr. Seshagiri was supposed to testify about but couldn't was the amount of those payments. And so not only do we not have the documents that underline that, we don't have his testimony. So we've never had this data." TR 234:11-17. The court overruled the Cities' objections, but then quickly added, "[i]f this has been turned over, I'd like to see the documentation tomorrow morning on this, okay…I want to see what's been turned over, not just put numbers on paper, what's been turned over to substantiate the numbers that I have in front of me." TR 234:18-19, 235:6-17. Defendants' counsel agreed to do so. TR 235:18. The Cities suggested that the court wait to admit the exhibits "until we see the evidence in the morning" when Defendants turn over the supposedly already-produced documents. TR 245:23-25. The court declined to do so and received the exhibits, stating, "I presume they're going to get it to me." TR 246:1-3, 9-10. Of course, having never actually "turned over" or produced the underlying documents that were summarized in Exhibit U2, Defendants were unable to get that information to the court, and they never produced what they claimed had been produced to the Cities. Defendants' counsel later admitted to the court, off the record, that their statements to the court had been false. The Cities were correct. Defendants had never produced the underlying documents. Nevertheless, the trial court's final judgment utilized

Exhibit U2 to calculate damages and specifically awarded damages "as set forth in Exhibit U2." LF 10815.

B. The competency of the underlying documents supporting a summary exhibit must be established and the underlying documents must be produced for inspection and cross-examination.

In order to prevent a party from simply making up evidence and passing it off as an admissible summary of other competent evidence as Defendants did here, "[a] number of foundational requirements must be met before a document may be received into evidence, including relevancy, authentication, the best evidence rule, and hearsay." *Healthcare Services of the Ozarks, Inc.*, 198 S.W.3d at 615. "A summary of voluminous records is admissible in evidence provided that [1] the competency of the underlying records is first established and [2] such records are made available to the opposite party for cross-examination purposes" *Id.* at 616. There must be an "indication in the record" that the underlying records were introduced into evidence or made available to the other side. *Id.*; *Bolling Co. v. Barrington Co.*, 398 S.W.2d 28, 32 (Mo. App. 1965) (holding that where a summary of voluminous records is offered, the original underlying documents must be "made available" to the opposing side "for the purpose of cross-examination.").

In *Bolling Co.*, for instance, the court of appeals reversed the admission of a summary of voluminous records where the party offering the summary had "for its own reasons, perhaps of convenience, deliberately chosen not to put them into evidence and seeks to make its case with a type of evidence which plainly is not the best evidence."

398 S.W.2d at 32. Here, despite claiming to have a different record of the payments they made to the Cities than the Cities themselves had, Defendants still chose not to introduce the actual payments themselves, but instead relied on a summary exhibit. The trial court's admission of such exhibit was accordingly in error and an abuse of discretion.

The Cities were prejudiced by the admission of Exhibit U2 because they were unable to ever question Defendants about those specific payments they claimed to make – payments whose amounts and timing differed from the records the Cities had. The Cities were also prejudiced by the admission of Exhibit U2 because the trial court actually relied on the exhibit in determining the amount of the Cities' damages. The trial court reduced the amount of unpaid taxes by the tax payments Defendants claimed to have made in Exhibit U2, but those payment amounts were incorrect, and the Cities were accordingly deprived of damages to which they were entitled.

V. The trial court erred in awarding a reduced damages amount as set forth in Defendants' Exhibit U2, Scenario 2, because such award erroneously applied the law and was unsupported by substantial evidence in that (a) the court should have assessed damages based on Defendants' disclosed revenue, all of which they admitted to be attributable to the Plaintiff Cities, (b) the court's award did not include damages for Defendants' failure to include carrier access receipts and "interstate" receipts in their "gross receipts" when paying the tax, (c) even if it were proper to exclude carrier access and "interstate" in Wentzville, there was insufficient evidence regarding such exclusions in Exhibit U2, Scenario 2, (d) even if there were an exemption from taxation for receipts from carrier access and "interstate," there was insufficient evidence to establish Defendants' right to such exemption, and (e) by utilizing Exhibit U2, Scenario 2, the court improperly excluded revenue Defendants admitted was attributable to the City of Oak Grove.

Standard of Review and Preservation of Error

"The trial court's judgment in a court-tried case may be reversed when it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law." *Craig*, 80 S.W.3d at 461. Although the *weight* of the evidence "is a matter for discretion," "[t]he *sufficiency* of the evidence is a question of law…." *Taylor v. F.W. Woolworth Co.*, 641 S.W.2d 108, 111 (Mo. banc 1982) (emphasis added).

"The proper *measure* of damages is a question of law, which we review *de novo*." *66, Inc.*, 130 S.W.3d at 584 (internal citations omitted) (emphasis in original). Additionally, "[w]hen the evidence is uncontroverted and the real issue concerns its legal effect, this court need not defer to the trial court's judgment." *Wadas*, 197 S.W.3d at 224; *Tolliver v. Director of Revenue*, 117 S.W.3d 191, 196 (Mo. App. 2003) ("[W]e are not required to defer to the trial court's findings when the evidence is uncontroverted and the case is virtually one of admitting the facts or when the evidence is not in conflict.").

This error was preserved when the Cities objected to the introduction of Exhibit U2, when the Cities presented their damages request to the court, and when the Cities explained that Defendants owed damages on all revenue. Trial Exhibit 9; LF 10497-10529; TR 233-34, 236-37, 245:18-19. The Cities raised Defendants' failure to prove an entitlement to any exemption from taxation both in the summary judgment proceedings and at trial. LF 7610-17; TR 552-53. The Cites also raised the issue in their after-trial motion. LF 10889-90.

Argument

A. The trial court's failure to award damages on Defendants' disclosed revenue, all of which they admitted to be attributable to the Plaintiff Cities, was an erroneous application of the law.

The trial court held in its final judgment:

> The Plaintiffs are awarded damages **as set forth in Defendants' trial Exhibit U-2, Scenario 2**, Tax on All Revenue **Except Carrier Access – Enforcing Wentzville's Express Interstate Exclusion**, in the following

amounts:

a. To the City of Aurora, $490,528.12;

b. To the City of Cameron, $608,525.30;

c. To the City of Oak Grove, $259,981.80; and

d. To the City of Wentzville, $226,457.08.

LF 10815 (emphasis added).

This damages award erroneously excluded revenue from the calculation of Defendants' underpayment of taxes that the court had already determined as a matter of law should be included, and relied on an inadmissible exhibit. LF 1716, 2017-18, 9133-35, 10815; *see* Point IV, above. As explained above, the court's abrupt expansion of the scope of trial and modification of the summary judgment without notice to the Cities and without allowing the Cities an opportunity to prepare their case accordingly to address the newly revived issues was erroneous. Even if the prejudicial procedure were not erroneous, the trial court's subsequent modification of the summary judgment to exclude carrier access and interstate telephone calls from the tax base was a misapplication and misstatement of the law, for the reasons explained above in Points I and III. Additionally, the trial courts' resultant failure to award damages on those amounts was also a misapplication of the law.

The evidence in this case established that all of the revenue information Defendants disclosed, and the *only* revenue information presented at trial, was attributable to one of the Plaintiff Cities. Trial Exhibits 1-8. That revenue information was disclosed in response to the court's June 2, 2014 Order, wherein Defendants were

ordered to disclose the amount of revenue Defendants received from their business in the Cities. LF 2017-18. Those disclosures included numerous spreadsheets with hundreds of thousands of lines of data detailing various revenue amounts and revenue types. The disclosures also attributed every revenue item to a specific Plaintiff City. Trial Exhibits 1-8. Per Defendants' admission at trial, there was nothing in the disclosures that indicated any of the revenue disclosed therein was not earned as a result of Defendants' business in the Cities. TR 53, 57, 60-61, 68-69, 73, 76, 80, 83-84, 300-301, 302; Trial Exhibits 1-8.

Defendants' Director of Tax Systems and Tax Billing compiled the revenue information the Cities introduced at trial. LF 10300. When asked whether he accomplished the task of compiling "revenues that were generated by, allocated to, collected as a result of, or were otherwise attributable to each defendant's business in each of the cities," he stated that he had. LF 10301-302. As one CenturyLink representative testified at trial, the revenue information was "for customers inside the city." TR 301. When asked whether "each revenue number is attributed to one of the plaintiff cities," CenturyLink admitted that was correct. TR 302:20-22. This testimony regarding information that is "peculiarly within [CenturyLink's] knowledge" constitutes binding admissions. *Stidham v. Stidham*, 136 S.W.3d 74, 78 (Mo. App. 2004) ("Unequivocal testimony by a party concerning a material fact peculiarly within that party's knowledge and which undermines the party's claim or defense is a judicial admission…."); *Steward v. Baywood Villages Condominium Ass'n*, 134 S.W.3d 679, 683 (Mo. App. 2004) ("A party is bound by his or her own testimony on matters of fact…. This is because a party's testimony 'may be of such a character as to have all the force

and effect of a judicial admission by which he is bound notwithstanding the testimony of other witnesses to the contrary.'") (internal citations omitted).

Accordingly, the evidence established that Defendants, by their own concessions, received the following receipts (including carrier access and interstate receipts) "attributable to their business in the Cities": $22,210,826 gross receipts in Aurora, $36,937,458 gross receipts in Cameron, $23,260,847 gross receipts in Oak Grove, and $143,316,626 gross receipts in Wentzville.[12] LF 10504; TR 53, 57, 60-61, 68-69, 73, 76, 80, 83-84, 300-301, 302; Trial Exhibits 1-9. The court should have used those amounts to calculate the unpaid taxes, interest, and penalties.

Instead of using that admitted evidence to calculate the Cities' damages, however, the court based its damages award on an inadmissible and unsupported Exhibit, U2, Scenario 2. That Exhibit, and the court's damages award by extension, purports to exclude carrier access revenue and "interstate" in Wentzville (although, as explained below, there is insufficient evidence to establish what the Exhibit actually excludes). LF 10815; TR 241:11-14; TR 245:8-11. Nevertheless, it is clear that the court failed to assess damages based on Defendants' actual, admitted *gross* receipts they received attributable to their business in the Cities. It was error for the trial court to do so.

[12] These receipts do not include Defendants' original production of carrier access revenue. LF 10504; Trial Exhibit 9, 101-2. The only carrier access revenue they include is Defendants' later, altered carrier access revenue, which Defendants claimed to be accurate. *Id.*; LF 10475.

B. The trial court purported to exclude carrier access revenue and interstate telephone call revenue from the damages award, but there was no evidence to support the amount of those exclusions.

Even if it were proper for the court to exclude carrier access revenue and interstate telephone call revenue from Defendants' "gross receipts" tax payments, there was no evidence establishing that the numbers contained in Exhibit U2, Scenario 2, and the court's damages award, actually excluded those amounts.

Defendants testified generally that Exhibit U2, Scenario 2 "includes more revenue within the city, more of the intrastate services." TR 240:21-22 (testifying regarding U1, however, the only difference between U1 and U2 is the time frame applied, *see* TR 245:8-11). But Defendants did not say specifically which revenue. *Id.* Defendants also testified that the damages amount listed in Exhibit U2, Scenario 2 "excluded *interstate* in Wentzville," but not specifically what type of *interstate* revenue, or what amounts of revenue. TR 241:11-14.

This failure of evidence is problematic because, for example, the interstate exclusion Defendants claim, and the one that the court apparently applied in ruling on the tax base, was for revenue derived from "interstate *telephone calls*," not simply revenue from unlimited "interstate." LF 10816. Excluding "interstate" is not the same as excluding "interstate telephone calls." Such an exclusion potentially includes much more than what the court intended. It is impossible to know for sure, however, because ultimately there was no evidence regarding what *exact* revenue and categories of revenue were excluded by Defendants in Exhibit U2.

Defendants' expansion in Exhibit U2, Scenario 2, of the purported Wentzville exclusion from "interstate telephone calls," to the much broader "interstate," is only one example of Defendants' repeated efforts throughout this case to impose more and more restrictions on what they argue is taxable revenue. Defendants first claimed that the taxes were applicable to gross receipts from "local exchange telephone service." LF 3093. Then, they claimed the taxes were only applicable to gross receipts from "local exchange telephone service" occurring "wholly within" the Cities. LF 3088. Even further, they claimed that Defendants are only required to include in their gross receipts, receipts from "local" "exchange telephone service," from "retail" "customers" "wholly within" the Cities, with "service addresses" in the Cities. TR 350, 385, 423, 433, 445, 460-61, 482, 575-76; LF 10469. None of these limitations are contained in the Cities' taxes, and none are supported by the law. Because it is impossible to tell what exact revenue is included and excluded in Exhibit U2, Scenario 2 (and the trial court's judgment), Defendants may have applied all of these limitations to their damages scenario. To do so would be a misapplication of the law, and just one more example of Defendants' ever-changing explanation of their revenue and constant back-peddling.

Although Defendants claimed, in post-trial briefing, that they explained the revenue classified as "interstate telephone calls," and what "CenturyLink consider[s] such revenue streams to be," there is no actual evidence or explanation at trial or otherwise regarding the specific revenue items or streams that were in the "excluded interstate" presented in Exhibit U2, Scenario 2. LF 10789. Even if there was testimony regarding what "CenturyLink consider[s]" that language to encompass, there still was not

evidence to establish specifically how that was applied to the exhibit, and what made up the numbers in that exhibit. Therefore, there was insufficient evidence to support such a damages award. *See Bartlett International, Inc.*, 487 S.W.3d at 472 (sufficient evidence to prove a tax exemption requires proof that the funds "fit the statutory language" of an exemption "exactly"); *Healthcare Services of the Ozarks, Inc.*, 198 S.W.3d at 616 (holding that summary exhibits are *only* admissible where "the competency of the underlying records is first established and such records are made available to the opposite party for cross-examination purposes").

By contrast, the Cities' requested damages award was supported by substantial evidence, which was documented in painstaking detail, down to each line of revenue. *See* Trial Exhibit 9. Although the Cities disagreed with the court's decision to exclude certain revenue from Defendants' gross receipts, when asked by the court to state the amount of revenue that might be included in the category of "interstate telephone calls," the Cities made an effort to do so, again with specificity and documented support. LF 10509-10, 10530-10768. They even prepared a new, full calculation based on those numbers. LF 10510 (Defendants' receipts in Wentzville would have totaled $140,900,176.00), 10530-10768 (detailed calculations of damages based on that amount of gross receipts). Defendants did no such thing. They merely wrote some numbers on a piece of paper, and said that those numbers "excluded interstate." TR 241:11-14. Such an unsupported account is not sufficient evidence to support a damages award.

C. There was insufficient evidence to establish that any of Defendants' receipts qualified for an exemption, even if such an exemption existed.

The failure of evidence supporting the damages award, as explained above, is particularly erroneous here, where there was a high burden to prove that any of Defendants' receipts qualified for an exemption from taxation. "Exemptions from taxation are to be strictly construed, and, as such, it is the burden of the taxpayer claiming the exemption to show that it fits" an exemption. *Westwood Country Club*, 6 S.W.3d at 887 (internal citation omitted); *Qwest Corp. v. City of Northglenn*, 351 P.3d 505, 509 (Col. App. 2014) (holding the defendant was liable for taxes and that "[w]e must presume that taxation is the rule and exemption from taxation is the exception.").

Defendants wholly failed to satisfy their burden of establishing that any of their revenue is exempt from taxation. Defendants presented no credible, admissible evidence to satisfy such a burden. In disclosing revenue information pursuant to the court's order, Defendants violated that order and refused to provide information "in a usable form and in a manner that enables the parties and the Court to understand the bases and components of the Attributable Revenue." LF 2018. Their refusal to provide information in a usable and understandable format contributed to their utter failure to establish what revenue, if any, would fall under their claimed exemption. Aside from the insufficient evidence and lack of support for the numbers in Exhibit U2, Scenario 2, the revenue information listed in that chart was also not in a format in which the court or parties could understand precisely which revenue Defendants contend to be subject to exemption. Nor did the chart's alleged composer, Mr. Seshagiri, explain what revenue he exempted.

Defendants presented no evidence and did not explain which lines of revenue were deducted to make up that chart. Defendants also established no evidence regarding which lines of revenue should be deducted to fit the exemption they sought or the legal or factual justification for such an exemption. It was Defendants' burden to do so, and they failed.

D. Exhibit U-2, Scenario 2 improperly excluded revenue Defendants admitted was attributable to the City of Oak Grove.

Finally, the amounts contained in Exhibit U-2, Scenario 2 erroneously excluded revenue that Defendants admitted was attributable to their business in the City of Oak Grove, and that should have been included in the damages award.

At trial, Defendants attempted to raise an issue regarding revenue identified as attributable to Oak Grove. TR 186-87. Defendants claimed that to determine the amount of revenue, the Cities should have taken the numbers from Column V in Defendants' revenue disclosure, labeled "Tax Amount." TR 256-258; see Exhibit 1A, "eq data." Defendants argued that the Cities improperly utilized the numbers found in Column T, labeled "Billed Amount." TR 256-58; Exhibit 1A, "eq data." Defendants claimed that this resulted in a 1.7 million dollar "error" in the amount of revenue Defendants received in Oak Grove. TR 256-258.

However, Defendants had previously admitted, and Defendants also testified at trial, that when determining the amount of revenue attributable to a City, the Cities should look at Column T, the amount billed. TR 212-213 (deposition testimony of CenturyLink corporate designee stating that Defendants recognize and "accrue…revenue

when its billed," and that "Column T is the billed amount,"); LF 10313. The number in Column T was accordingly revenue Defendants conceded that they received as a result of their business in Oak Grove.

Although the trial court held that there was only *one* exclusion from "gross receipts" in the City of Oak Grove – carrier access – Exhibit U2, Scenario 2 also excluded this revenue item that Defendants admitted was attributable to their business in the City of Oak Grove, and was not carrier access. LF 10816; TR 258. It should have been included in the amount of "gross receipts" on which the tax was calculated. The damages award therefore did not even encompass what the trial court had determined should be taxable in Oak Grove – "all revenue, other than carrier access." LF 10816. Such an exclusion erroneously applied the law, failed to even apply the law as the trial court considered it to be, and was unsupported by the evidence.

For all of these reasons, the trial court's damages amount was erroneously insufficient, and requires reversal. The Court should reverse and enter an award of damages for Defendants' unpaid license taxes based on Defendants' admitted revenue from their business in the Cities, including carrier access revenue and interstate telephone call revenue, in the amounts described in the Conclusion below. *See* Trial Exhibit 9, p. 6, Schedule 101-2, p. 8, Schedule 102-2, p. 10, Schedule 103-2.

VI. The trial court erred in crediting payments Defendants allegedly made pursuant to § 139.031 RSMo. under "protest," in the damages award because that decision erroneously applied the law, was unsupported by sufficient evidence, and deprived the Cities of damages to which they were entitled in that the Cities are not entitled to use any protest payments, there was no evidence regarding the specific amounts of or manner in which Defendants protested, and the lack of evidence led to an inaccurate calculation of interest.

Standard of Review and Preservation of Error

"The trial court's judgment in a court-tried case may be reversed when it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law." *Craig*, 80 S.W.3d at 461. "Legal questions in a court-tried case are subject to *de novo* review." *Holm*, 514 S.W.3d at 596.

The Cities preserved this issue throughout trial (TR 17-18, 96, 555-56), and also filed a motion to amend the final judgment alerting the court to this issue. LF 10890-91.

Argument

The trial court improperly credited Defendants with having paid more taxes than Defendants actually have. The court credited payments Defendants claimed they paid under "protest," and deducted those amounts from the unpaid tax liability for each City and the unpaid user fee liability for Cameron. LF 10815. The court also did not award interest on the "protest" amounts. LF 10815. The credit for these "protest" payments was

erroneous, deprived the Cities of unpaid taxes to which they are entitled, and deprived the Cities of interest to which they are entitled.

A. Defendants' "protest" payments.

The Cities established the amount of taxes Defendants have paid. LF 11126-28 (Defendants admitting that the amounts the Cities claimed Defendants have paid were correct); Trial Exhibit 22. Defendants claimed to have paid more, because they alleged that they made "protest" payments pursuant to § 139.031 RSMo., and they argued they should get a credit for the protested payments. Trial Exhibits U1, U2.

In January 2013, Defendants began making certain tax payments under "protest," attempting to satisfy § 139.031 RSMo. TR 236, 320. Section 139.031 RSMo. allows a taxpayer to seek a refund of protested taxes if the taxpayer strictly complies with a specific procedure. The statute requires that in order to properly protest taxes, the taxpayer must (1) "at the time of paying such taxes," (2) "make full payment of the current tax bill," (3) "before the delinquency date," (4) "file with the collector," (5) "a written statement setting forth the grounds on which the protest is based," and (6) that "statement shall include the true value in money claimed by the taxpayer if disputed." § 139.031.1 RSMo. Furthermore, to perfect the protest and gain the protections of § 139.031 RSMo., the taxpayer must (7) file "an action against the collector…for the recovery of the amount protested," (8) "in the circuit court of the county in which the collector maintains his office." § 139.031.2 RSMo.

If even one of these steps is not followed, the protest is null and void and the protections of the statute are not available to the taxpayer. *See* 139.031 RSMo.; *Adams v.*

Friganza, 344 S.W.3d 240, 248 (Mo. App. 2011) (holding that "[a] taxpayer's failure to follow the mandate of Section 139.031" results in a failed protest); *Ford Motor Co. v. City of Hazelwood*, 155 S.W.3d 795, 798-99 (Mo. App. 2005) (holding that taxpayers must "strictly comply" with § 139.031 RSMo.); *Metal Form Corp. v. Leachman*, 599 S.W.2d 922, 924-25 (Mo. banc 1980) (holding that failure to specifically set forth legal bases for protest in accompanying letter renders the protest illegitimate).

Defendants also filed tax protest lawsuits, purportedly pursuant to § 139.031 RSMo. TR 236, 320. The tax protest lawsuits are still pending, and the Cities have moved to dismiss those cases on the grounds that Defendants failed to satisfy § 139.031 RSMo., among other reasons. TR 554-55. While the tax protest lawsuits are pending, the Cities do not have access to those funds and "are not able to use" the protested monies. TR 247:8-9, 320:10-13; § 139.031 RSMo.

Defendants did not introduce evidence of the alleged monthly protest payments. Defendants' only evidence of the amounts of those protest payments was in the form of an inadmissible summary chart. *See* Point IV, above. That chart alleged a total amount of protest payments made in each City during a time frame of a few years. Trial Exhibit U2. The chart did not disclose or explain the amount of each payment, and Defendants never produced the underlying documents that were summarized in Exhibit U2. Defendants also never introduced any evidence establishing that Defendants complied with the requirements of § 139.031 RSMo. when making the payments. The Cities objected to the admission of this summary chart, because it was unsupported and Defendants had not

produced the data to back it up. TR 233:20-25, 234:4, 234:11-17, 236:1-6. However, the court received it.

In the final judgment, after stating the amount of unpaid taxes owed to each City, the trial court explained, "[t]hese amounts include credit for payments…that Defendants made pursuant to RSMo. 139.031 under protest." LF 10816. The court further ordered that after the judgment became final, "Defendants shall release to the appropriate plaintiffs these payments made under protest and shall dismiss with prejudice the protest actions…." LF 10816.

Additionally, in determining the final amount owed to the City of Cameron for unpaid user fees, the court also credited Defendants' "protest" payments, holding that "Plaintiff, the City of Cameron is also entitled to unpaid user fees in the amount of $4,000.00 per month. After crediting Defendants with business license taxes previously paid under protest and without protest in the amount of $168,000 from January 1, 2013 through June 30, 2016, Defendants owe the City of Cameron $138,914 in unpaid user fees and $83,348 in interest through February 28, 2017." LF 10817.

B. The court should not have credited the "protest" payments as taxes paid, because the Cities are unable to use those funds.

Although the court determined that the Cities were entitled to the money Defendants paid under protest, the court refused to include those amounts in the damages award, and refused to award interest on those amounts. LF 10816. The failure to explicitly award damages on these amounts, and the "credit" given to Defendants for these amounts erroneously deprived the Cites of damages to which they are legally

entitled.

The Cities are unable to use any amounts that Defendants paid under protest until the resolution of the separate litigation filed by Defendants regarding the protest payments. *See* § 139.031.2 RSMo. Because the Cities have no access to or ability to use those funds, they are not "payments" that should be credited to Defendants. The Missouri Court of Appeals has in fact recently recognized that taxes paid under "protest" pursuant to § 139.031 RSMo. do not constitute taxes "paid," and that where a taxpayer has made protest payments, the taxpayer did not actually "pay its taxes." *State ex rel. Summit Natural Gas of Missouri, Inc. v. Morgan County Commission*, SD 34558, 2017 WL 2561094 at *5 (Mo. App. June 13, 2017). As the Cities' expert testified at trial, from an accounting perspective, payments made under protest are not income: "[W]hen you get a payment under protest, you don't get any income. Nothing goes on your income statement…you put the money in the bank as an asset but you got to offset that with a liability for contingent liability," there is "no change in the value of the business. So from an accounting perspective, I believe that that should not be deducted for the purpose of calculating damages." TR 190-91.

The order that Defendants must "release" the payments is also ineffective relief for the Cities, again because when taxes are paid "under protest," cities are required by statute to hold those protest payments separately until the resolution of the tax protest litigation. *See* §139.031 RSMo. CenturyLink admitted this fact. TR 247:8-9, 320:10-13. Therefore, even though this court ordered Defendants to release the protests, those protests are still subject to the jurisdiction of the courts in which the protest actions are

pending. In order to make the Cities whole, the court should not have considered any amounts allegedly paid under "protest."

C. There was no evidence regarding the specific amount of protest payments, which resulted in an inaccurate award.

Defendants did not introduce the amount of the monthly protest payments, or any evidence establishing that Defendants complied with the requirements of § 139.031 RSMo. when making the payments. TR iii-v; Trial Exhibits U1, U2; TR 248:20-22. Even the summary chart that Defendants offered was inadmissible. *See* Point IV, above. The composer of Exhibit U2 did not even review every month's protest payment when he made the Exhibit. TR 318:10-24 (testifying that he saw "not every single month but some of them"). The alleged "total" of protested payments is not sufficient evidence to accurately determine the amount of damages and interest owed to the Cities, even if it were proper to credit the protest payments, and even if that exhibit were admissible.

By crediting a lump sum "total" of protest payments, instead of requiring evidence establishing the monthly payments, the court was unable to and failed to calculate interest on the unpaid license taxes with any accuracy. Interest on Defendants' license tax underpayment begins to accrue the day the taxes are delinquent. *State ex rel. Collector of Revenue v. Robertson*, 417 S.W.2d 699, 702 (Mo. App. 1967) (recognizing that municipal taxes are considered delinquent when not paid in full on the day they were due, and "after that date, interest and penalties accrue"). In this case, that delinquency date occurs at varying six month intervals during the year, or once a year depending on the City. LF 424, 428-29, 439-40, 443-46 (license tax in Aurora is due on September 1 and

April 1, in Cameron on March 15, in Oak Grove on February 1 and August 1, and in Wentzville on January 31 and July 31). Because Defendants did not introduce evidence of the monthly, or even semi-annual amounts of their alleged protests, it was impossible for the court to calculate the tax underpayment and accompanying interest by taxing pay period, and therefore determine exactly what the underpayment was on each delinquency date for each City.

The same problem arises for the unpaid user fees owed to the City of Cameron. The user fees are due monthly. Trial Exhibit 16, § 10.5-207. While the user fees can be offset by the amount of license taxes properly paid, here there was no evidence of the amount of monthly license taxes paid under "protest." *Id.* Accordingly, the trial court failed to properly calculate and award interest. This failure to award the interest owed was in error. *See City of Kansas City v. Garnett*, 482 S.W.3d 829, 832-33 (Mo. App. 2016) (reversing trial court's failure to award city interest on delinquent taxes).

D. The court should have awarded interest on Defendants' total underpayment, which included amounts allegedly paid under "protest."

Interest is owed to the Cities on Defendants' total underpayment of taxes. However, because the court erroneously credited amounts paid under "protest," interest was not awarded on the full amount of unpaid taxes.

Defendants argued that the court should not award interest on the protested payment amounts, because § 139.031 RSMo. prevents the imposition of interest, citing *Westglen Village Associates v. Leachman*, 654 S.W.2d 897, 900 (Mo. 1983) and *Boyd-Richardson Co. v. Leachman*, 615 S.W.2d 46 (Mo. 1981). LF 10473. However, *Westglen*

Village Associates and *Boyd-Richardson Company* do not allow the court to refuse to award the Cities interest. Those cases simply hold that interest and penalties may not accrue *in the protest action* when the *protest statute is satisfied*. *Id.* The imposition of interest only stops, therefore, in the protest case, not in any other case, and only when the statute's requirements have been fully met. This case is not a tax protest case.

Moreover, as the trial court saw no evidence that Defendants strictly adhered to the requirements of the statute, it had no grounds to determine whether Defendants have satisfied the protest statute and can claim the benefits of it. *See* 139.031 RSMo.; *Adams*, 344 S.W.3d at 248. Here, despite having no evidence that Defendants complied with § 139.031 RSMo., and despite having no evidence regarding the amount per taxing period of the alleged protest payments, the trial court credited the "total" protest amounts and refused to award interest on them. This was an erroneous application of the law for which there was insufficient evidence, and it must be reversed.

Ultimately, there was insufficient evidence regarding the alleged "protest" payments, the protest payments were matters that should have been dealt with in the tax protest lawsuits, and the court in this case had no evidence or jurisdiction to enter an order regarding the protests. The court should have used the only actual evidence of Defendants' tax payments – that which the Cities established – to calculate the Cities' damages on unpaid license taxes and user fees. Trial Exhibit 22. It failed to do so, which requires reversal and entry of judgment for the amounts actually owed, as described in the Conclusion herein.

VII. The trial court erred in failing to impose penalties for Defendants' violations of the Cities' license taxes because penalties were mandatory in that Defendants' failure to comply with the Cities' license taxes was declared unlawful and a violation of the Cities' ordinances.

Standard of Review and Preservation of Error

"The trial court's judgment in a court-tried case may be reversed when it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law." *Craig*, 80 S.W.3d at 461. "Legal questions in a court-tried case are subject to *de novo* review." *Holm*, 514 S.W.3d at 596.

This error was preserved throughout the case, including when the Cities filed a motion to amend the judgment for failure to award penalties. Trial Exhibit 9; TR 20, 559-60; LF 10893.

Argument

The Cities' ordinances all provide that penalties must be imposed in the event the ordinances are violated. Trial Exhibits 10-13. Defendants were adjudged to have violated the Cities ordinances beginning in 2007. LF 1716-18, 9133-37, 10815, 10817. Despite holding that Defendants violated the Cities' laws and that Defendants' refusal to pay the license taxes was unlawful, the court failed to award penalties for Defendants' violations. LF 1716-18 ("Defendants failed to pay taxes, as required by law…Defendants' conduct violated applicable law set forth in city ordinances…"); 9133-37, 10815, 10817 ("The Court finds Defendants' conduct violated applicable law under the cities' respective ordinances and RSMo. §392.350."), LF 10817 ("The Court finds Plaintiffs are not

entitled to any penalties..."). Penalties are required for these violations dating back to 2007, and should have been imposed.

Aurora Code Section 100.110 requires that whenever "the doing of any act is required or the failure to do any act is declared to be unlawful….the violation of any such provision of this Code or of any other ordinance of the City…**shall** be punished by a fine not exceeding five hundred dollars ($500.00)…." Trial Exhibit 10 (emphasis added).

Cameron Code Section 1-9 requires that violations of Cameron ordinances "**shall** be punished by a fine not exceeding five hundred dollars ($500.00)…." Trial Exhibit 11 (emphasis added).

Oak Grove Code Section 100.220 similarly provides that whenever any City ordinance is violated, "the violator **shall** be punished by a fine not exceeding five hundred dollars ($500.00)…." Trial Exhibit 12 (emphasis added).

These penalty provisions also provide that *each day* of an ordinance violation "**shall** constitute a separate offense." Plaintiffs' Trial Exhibits 10-12.

Pursuant to Wentzville Code Section 140.120, "all unpaid City taxes…. **shall** also be subject to the same fees, penalties, commissions and charges as provided by law of the State of Missouri for delinquent State and County taxes…." Trial Exhibit 13 (emphasis added). Section 144.157 RSMo., provides that companies who have failed to pay State taxes, including those who have willfully failed to pay tax (as Defendants have been adjudged to have done here), are liable "***in addition to other penalties*** provided by law" for a "***penalty equal to the total amount of the tax evaded***." The "other penalties" referred to in § 144.157 RSMo. include a five percent penalty pursuant to § 144.250

RSMo. The required penalty for Defendants' failure to pay Wentzville's license tax, accordingly, is the total amount of the tax evaded in addition to five percent of the tax evaded.

There is no intent requirement in the penalty provisions. If the Cities' ordinances are violated – no matter Defendants' intent – a penalty shall be imposed. Trial Exhibits 10-13.

This Court has held that "the courts have no power to relieve delinquent taxpayers from penalties imposed by statute. The principle is not affected by the fact that the taxpayer will suffer hardship by reason of paying the penalties. Nor is the principle affected by the facts that the taxpayer is contesting in good faith the validity of the tax, and that the penalties have largely accumulated while the litigation is pending respecting the validity of the tax." *Stein v. State Tax Commission*, 379 S.W.2d 495, 499 (Mo. 1964) (reversing decision of trial court failing to impose penalties after defendant failed to pay taxes); s*ee City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 60 (Mo. App. 1999) (affirming imposition of *both* fines *and* penalties on telephone company's failure to pay municipal license tax); *City of Bridgeton*, 37 S.W.3d at 873 (affirming imposition of penalties and interest on company's failure to pay municipal license tax). The "[p]ower to levy and collect taxes…carries with it the implied power to employ the necessary and usual procedure to execute the power and collect the revenue contemplated by the grant of power to make the levy." *Barhorst v. City of St. Louis*, 423 S.W.2d 843, 850 (Mo. banc 1967) (holding that power to levy a tax includes the power to impose a penalty on those who do not pay).

Where a penalty provision states that a penalty "shall" be imposed, imposition of a penalty is mandatory, not discretionary. *Westrope & Associates*, 57 S.W.3d at 883; *City of Kansas City, Missouri*, 482 S.W.3d at 832 (where municipal ordinances state that violator "is liable for" interest or penalties, imposition is required). In this case, where all of the Cities' ordinances provided that a penalty "shall" be imposed, the court was required to impose one. The failure to impose any penalty on Defendants' decade-long unlawful behavior was erroneous.

Defendants owed a penalty of $500 for each day of their violations in Aurora, Cameron, and Oak Grove. Trial Exhibits 10-12. Penalties due to Aurora, Cameron, and Oak Grove amounted at trial to a total of $1,689,500.00 to the City of Aurora, $1,591,500.00 to the City of Cameron, and $1,705,000.00 to the City of Oak Grove. City of Oak Grove Municipal Code §100.220; City of Cameron Municipal Code §1-9; City of Aurora Municipal Code §100.110. Defendants owed penalties of $5,641,787.00 to the City of Wentzville. City of Wentzville Municipal Code §140.120; §144.157 RSMo. The trial court should have awarded such penalties, and the decision should be reversed and modified to award penalties as stated above.

VIII. The trial court erred in failing to impose penalties for Defendants' violations of the City of Cameron's Rights-of-Way Code because penalties were mandatory in that Defendants refused to comply with the City's Rights-of-Way Code, including by paying the required user fee, and those actions were declared unlawful.

Standard of Review and Preservation of Error

"The trial court's judgment in a court-tried case may be reversed when it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law." *Craig*, 80 S.W.3d at 461. "Legal questions in a court-tried case are subject to *de novo* review." *Holm*, 514 S.W.3d at 596.

This error was preserved throughout the case, including when the Cities filed a motion to amend the judgment for failure to award penalties. Trial Exhibit 9 (requesting penalties); TR 20, 560-61; LF 10893.

Argument

Defendants owe penalties for their refusal to abide by the City of Cameron's ROW Code and pay required user fees. Although the Cities informed the court of the required penalty, the court erroneously declined to award penalties for Defendants' rights-of-way violations.

The City of Cameron's ROW Code, found in Article 10 of the City's Code, contains certain requirements for users of the rights-of-way, including payment of a monthly user fee. LF 950; Trial Exhibit 15. In the court's first summary judgment ruling, the court held that Defendant Spectra failed to abide by the requirements in the City's

ROW Code, ruling that Defendant Spectra "is required to enter into a public ways use permit agreement with Cameron as required by Cameron's ROW Code, and has failed to do so…. Spectra is required to pay to Cameron its User Fee, and has failed to do so, and that such failure violates Cameron's ROW Code and is therefore unlawful." LF 1718. In the final judgment, the court again held that "Defendants owe the City of Cameron" for "unpaid user fees." LF 10817.

The code plainly requires that any person who "refus[es] to comply" with the ROW Code, "**shall be fined** five hundred dollars ($500.00) for each offense." Trial Exhibit 15 (§ 10.5-59) (emphasis added). That section goes on to explain that "[a] separate and distinct offense shall be deemed committed each day on which a violation occurs or continues." *Id.* This penalty does not contain an intent requirement. *Id.* Where the ROW Code is violated, a penalty of $500 per day shall be imposed, regardless of Defendants' mindset. *Id.* As Defendants have never paid the required user fees, and as the court determined that Defendants were required to pay such user fees and their refusal to do so was unlawful, the law requires that Defendants be fined "five hundred dollars" for "each day." TR 137-38; Trial Exhibit 15.

This penalty ordinance allows no discretion in the amount of the penalty. It mandates a penalty of $500 per day. Trial Exhibit 15. As a result of Defendants' refusal to comply with the ROW Code, Defendant Spectra owed penalties to the City of Cameron in the amount of $1,765,500.00 and the trial court erred in refusing to award such mandatory penalties. *See Stein*, 379 S.W.2d at 499 (reversing trial court's failure to award penalties and holding that "the courts have no power to relieve delinquent

taxpayers from penalties imposed by statute."); *Westrope & Associates*, 57 S.W.3d at 883 (where penalty provision states that violations "shall be subject to a penalty," imposition of penalty is not discretionary); *City of Kansas City, Missouri*, 482 S.W.3d at 832 (where municipal ordinances state that violator "is liable for" interest or penalties, imposition is required). The trial court's judgment must therefore be reversed and penalties in the amount of $1,765,500.00 should be awarded to the City of Cameron for Defendants' violation of the City's ROW Code.

CONCLUSION

Defendants have been adjudged to have willfully underpaid license taxes and user fees for over a decade – and they worked hard to continue their scheme in this case. Throughout the litigation, Defendants repeatedly mischaracterized their services to the court and the Cities, describing those services in ways that contradict how Defendants have described their services to customers for years. Defendants also engaged a host of tactics to avoid disclosing their true gross receipts from their business in the Cities. Even after being ordered *several* times to tell the Cities the amount of their gross receipts, Defendants *still* refused. After years of arduous litigation and fighting tooth and nail to learn the truth of Defendants' gross receipts, Defendants still claimed at trial that the amount of gross receipts they had previously admitted pursuant to court order was wrong.

Being a scofflaw, like being a criminal, should not pay. Unless Defendants are forced to finally and fully comply with the law, their scheme of misrepresenting their revenue and underpaying taxes will continue undeterred. Moreover, Defendants' tactics

will be a model for other telecommunication companies who want to avoid their lawful share of taxes.

Yet, Defendants are on the verge of evading accountability. The trial court properly held that Defendants' failure to pay the required taxes was unlawful, and that Defendants are required to pay license tax on *all* gross receipts from their business in the Cities. The court's inexplicable, last-minute reversal, without notice, of its decision with respect to carrier access and interstate telephone calls was improper, misapplied the law, and prejudiced the Cities. This Court should reverse that decision, reinstate the summary judgment holding that Defendants are required to pay the license tax on *all* revenue from their business in the Cities, including carrier access and interstate telephone calls, and award damages, interest, and penalties based on the summary judgment, as the trial court should have done.

Based on the evidence established at trial and Defendants' own admissions, the Cities are entitled to unpaid taxes in the amounts of $1,102,003.00 in Aurora, $1,575,420.00 in Cameron, $972,861.00 in Oak Grove, and $5,373,129.00 in Wentzville. *See* Exhibit 9, p. 6, Schedule 101-2.

The Cities are also entitled to interest on the unpaid taxes through November 30, 2016 (the end of the damage period calculated by the Cities' expert witness), in the amounts of $542,136.00 in Aurora, $704,625.00 in Cameron, $509,949.00 in Oak Grove, and $4,731,960.00 in Wentzville, an additional amount of interest from November 30, 2016 to February 23, 2017 (the date of the final judgment), and another additional

amount to be determined for interest that continues to accrue since the final judgment. *Id.* at p. 8, Schedule 102-2.

Finally, pursuant to their ordinances mandating penalties, the Cities are entitled to penalties in the amounts of $1,689,500.00 in Aurora, $1,591,500.00 in Cameron, $1,705,000.00 in Oak Grove, and $5,641,787.00 in Wentzville, through November 30, 2016, and an additional amount to be determined for penalties that continue to accrue since that date. *Id.* at p. 10, Schedule 103-2.

The City of Cameron is also entitled to unpaid user fees for Defendants' refusal to comply with the City's ROW Code and pay the required user fee. The Court should reverse the trial court's judgment and enter the proper amount owed for unpaid user fees, interest, and penalties to the City of Cameron in the amounts of $194,542.00 in unpaid user fees, $90,449.00 in interest, and $1,765,500.00 in penalties.

The final judgment of the trial court must be reversed, the court's summary judgment ruling must be reinstated, and judgment must be entered for the Cities in the amounts established above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 30,850 words, exclusive of sections exempted by Rule 84.06(b), based on the word count function of the Microsoft Word 2016 word-processing software.

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CERTIFICATE OF SERVICE

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