

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

CITY OF HARRISONVILLE,

Appellant-Respondent,

v.

**McCALL SERVICE STATIONS d/b/a BIG TANK OIL, et al;
THE MISSOURI PETROLEUM STORAGE TANK INSURANCE FUND,**

Respondent-Appellant.

DOCKET NUMBER WD74429 Consolidated with WD74436 and WD74950

Date: February 25, 2014

Appeal from:
Cass County Circuit Court
The Honorable Jacqueline A. Cook, Judge

Appellate Judges:
Before Division Two: Alok Ahuja, P.J., Mark D. Pfeiffer and Anthony Rex Gabbert, JJ.

Attorneys:
Steven E. Mauer, Kansas City, MO, for appellant.
Glenn E. Bradford, Robert G. Groves and Nancy L. Skinner, Kansas City, MO; Donald A. Willough, Jr., Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

CITY OF HARRISONVILLE

Appellant-Respondent,

v.

**McCALL SERVICE STATIONS d/b/a BIG TANK OIL, et al;
THE MISSOURI PETROLEUM STORAGE TANK INSURANCE FUND,
Respondent-Appellant.**

WD74429 Consolidated with WD74436 and WD74950

Cass County

McCall Service Stations owned a gas station in Harrisonville. In September 1997 McCall discovered that its underground gasoline storage tanks were leaking. It notified the Missouri Petroleum Storage Tank Insurance Fund, which hired an environmental engineer to determine the extent of the contamination which had migrated from the tanks, and to prepare a plan to contain and monitor the leak. The engineer installed several monitoring wells on the streets that were contiguous to the service station. In 2000, McCall sold the service station to Fleming Petroleum.

In 2003, the City of Harrisonville decided to construct an upgrade of its sanitary sewer system. The City's contractor discovered petroleum contamination near the service station while constructing the sewer upgrade, and informed the City that it could not perform the sewer work in contaminated soils. The City notified the Department of Natural Resources of the contamination, and was informed that the Fund was responsible for monitoring the contamination in the area.

The City began discussions with the Fund on the best way to address the contaminated soil, and complete construction of its sewer upgrade project. On April 15, 2004, the City's representatives met with representatives of the Fund. At that meeting, the Fund's representative told the City that the Fund would pay the entire cost of hiring a specialized contractor, Midwest Remediation, to perform the sewer upgrade work in the contaminated soils, less the costs the City would avoid because its original contractor would not be required to perform that portion of the construction work. Constructing the sewer upgrade in the contaminated soils, but otherwise leaving the contaminated soils in place, was approximately one-third as expensive as the alternative of completely excavating the contaminated soils.

Despite its representative's assurances at the April 2004 meeting, however, the Fund did not reimburse the City for the expenses associated with Midwest Remediation's work. The City filed suit against the Fund for fraudulent and negligent misrepresentation, alleging that the City

had hired Midwest Remediation in reliance on the Fund's promise to pay Midwest Remediation's costs. The City also asserted claims for nuisance and trespass against McCall and Fleming, based on the migration of petroleum contamination from the underground petroleum tanks on the service station property. The City sought compensatory and punitive damages from each defendant.

A jury trial was conducted. The jury returned a verdict for the City on all claims. The jury awarded compensatory damages of \$172,100.98 against McCall, Fleming and the Fund. The jury awarded punitive damages of \$100 each against McCall and Fleming, and punitive damages of \$8,000,000 against the Fund. In response to post-judgment motions, the circuit court remitted the punitive damages award against the Fund on due process grounds, reducing it from \$8,000,000 to \$2,500,000.

McCall, Fleming and the Fund appeal. The City cross-appeals the trial court's remittitur of the punitive damages award.

AFFIRMED AS MODIFIED TO REDUCE THE PUNITIVE DAMAGES AWARDED AGAINST THE FUND PURSUANT TO § 510.265.1, RSMo.

Division Two holds:

The service station owners first argue that the trial court's jury instructions erroneously informed the jury that it could award the City "consequential damages" on its trespass claims. We disagree. Missouri law holds that a trespasser is liable for damages for all of the natural, necessary, direct, and proximate consequences of his wrongful act. The trial court's damages instruction did not mislead the jury. Moreover, the damages the City recovered represented those increased costs of constructing the sewer upgrade project which were proximately caused by the discovery of petroleum contamination in its sewer easement; the City did not recover improper "benefit of the bargain" damages.

The service station owners next argue that they were entitled to judgment notwithstanding the verdict (JNOV), or a remittitur, reducing the City's compensatory damages to \$72,009.98, based on the testimony of a former Midwest Remediation employee, that the lesser amount represented the portion of Midwest Remediation's costs which were directly related to the contamination. We disagree. To the extent the Midwest Remediation employee's testimony was inconsistent with the City's damages evidence, that was an issue for the jury to resolve. Moreover, the Midwest Remediation employee testified that he performed his cost analysis in only a brief period of time, from memory, without supporting documentation, years after the work had been performed. He also acknowledged that other costs Midwest Remediation incurred were higher due to the presence of contamination. The station owners did not establish as a matter of law that the City's damages could not exceed \$72,009.98.

The Fund argues that it was entitled to JNOV because the evidence indicated that, after the April 2004 meeting, the Fund made settlement offers to the City of less than the total of Midwest Remediation's net costs; these offers were made before the City hired Midwest Remediation. According to the Fund, this post-meeting correspondence defeats the City's contention that it actually, or justifiably, relied on the representation at the April 2004 meeting

that the Fund would reimburse the entirety of Midwest Remediation's expenses. Although this argument was raised in the Fund's post-judgment motion for JNOV, it was not raised in the Fund's directed verdict motions during trial; the argument is therefore not preserved, and is rejected.

The Fund next argues that it is entitled to JNOV because the evidence does not establish that the City was damaged by its reliance on the Fund's alleged misrepresentations. On the contrary, however, the City presented substantial evidence that the City relied on the Fund's representations when it decided: to hire Midwest Remediation at all; to hire them without a competitive bidding process; and to accept the less costly alternative of leaving much of the contaminated soil in place, and constructing the sewer upgrade in contaminated soils, rather than demanding that the Fund excavate all of it.

The Fund argues that the City's damages, including punitive damages, were unrecoverable because § 319.131.5 limits the damages recoverable against the Fund. We disagree. Section 319.131.5 defines the scope of the Fund's indemnity obligations for property damage or bodily injury caused by leaking petroleum storage tanks which are insured by the Fund. Nothing in § 319.131.5 suggests that it is intended to address the scope of the Fund's liability for its own tortious actions.

The Fund next argues that the statements allegedly made by its representative at the April 15, 2004 meeting were too vague and indefinite to support the City's fraud and negligent misrepresentation claims. To the contrary, multiple witnesses for the City testified that they interpreted the statements to mean that the Fund would pay for all costs incurred by the City, above what its original contractor would have charged, if it hired Midwest Remediation to construct the sewer upgrade in the contaminated area. The alleged misrepresentations were sufficiently specific to support the City's claims.

The Fund argues that the trial court erroneously excluded documentary evidence of the settlement negotiations which occurred subsequent to the April 2004 meeting. The Fund contends this evidence would have been relevant to mitigate its exposure to punitive damages. Although the documents themselves were excluded, however, evidence concerning the substance of the settlement offers was admitted into evidence through witness testimony. Even assuming the trial court's exclusion of the documentary exhibits was erroneous, that evidence would have been cumulative, and the Fund has failed to show that it was prejudiced by the exclusion.

The Fund next argues that there was insufficient evidence that its actions were sufficiently outrageous as to warrant the imposition of punitive damages. The City's evidence showed, however, that subsequent to its agreement to reimburse all of the City's net contamination-related costs, the Fund raised a series of spurious objections to reimbursement. Moreover, the City presented evidence that the Fund's behavior towards the City was part of a larger pattern in which the Fund would object to the scope of cleanups approved by the Department of Natural Resources, and delay paying cleanup contractors. There was sufficient evidence to justify a punitive damage award.

The trial court refused to apply § 510.265.1, which limits punitive damages to the greater of five times the net amount of the damages awarded or \$500,000, on the ground that the statute

was enacted after the City's cause of action accrued. This was error. The statute itself says that it applies to all causes of action filed after its effective date. And the Missouri Constitution's ban on retrospective laws, Art. I, § 13, does not prevent the application of a statute limiting punitive damages to pending suits, because the Missouri Supreme Court has held that a plaintiff has no vested right to an award of punitive damages, and that such awards are remedial or procedural. The City's argument that the punitive damages cap is unconstitutional, as an infringement of its right to jury trial, was not preserved because it was not raised in the trial court, but only on appeal. Applying the statute, we modify the judgment to reduce the punitive damages awarded against the Fund to five times the compensatory damages award of \$172,100.98, or \$ 860,504.90.

Before: Division Two: Alok Ahuja, P.J., and Mark D. Pfeiffer and Anthony Rex Gabbert, JJ.

Opinion by: Alok Ahuja, Judge

February 25, 2014

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.