**IN THE SUPREME COURT OF MISSOURI**

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| **CITY OF HARRISONVILLE,** | ) | |
| | ) | |
| **Appellant/Respondent** | ) | |
| | ) | |
| **vs.** | ) | **SC94115** |
| | ) | |
| **MISSOURI PETROLEUM STORAGE TANK INSURANCE FUND, *et al.*,** | ) | |
| | ) | |
| **Respondent/Appellant.** | ) | |

# SUBSTITUTE BRIEF OF APPELLANT/RESPONDENT CITY OF HARRISONVILLE

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## JURISDICTIONAL STATEMENT

The Court has jurisdiction pursuant to its acceptance of the Application for Transfer timely filed by Appellant/Respondent City of Harrisonville, Missouri pursuant to Mo. R. Civ. P. 83.04.

## STATEMENT OF FACTS

In 2003, Appellant/Respondent City of Harrisonville, Missouri (the "City") discovered extensive gasoline contamination in its sewer easement during construction to replace an existing sewer line. The source of the contamination was a 1997 leak from a gasoline station then owned by Respondent McCall Service Stations d/b/a Big Tank Oil ("McCall") and subsequently purchased by Respondent Fleming Petroleum ("Fleming"). McCall and Fleming were insured by Respondent Missouri Petroleum Storage Tank Insurance Fund ("PSTIF"). The City notified PSTIF of the gasoline contamination. To significantly reduce its costs, PSTIF promised to reimburse all costs related to the contamination if the City would allow Midwest Remediation ("Midwest") to perform the work in accordance with a plan proposed by PSTIF. The City agreed, saving PSTIF over $300,000.00. However, after the work was complete, PSTIF refused to reimburse the funds expended by the City.

It is undisputed that McCall caused the contamination and that PSTIF insured McCall. This case was prompted by PSTIF's repeated refusal, over a period of seven years, to reimburse the City. PSTIF engaged in an ongoing pattern of misconduct including: rigging the bid for remediation work to ensure Midwest was selected, promising to pay all contamination costs despite knowing it was untrue, repeatedly

requesting "information" only to reject the City's claim, fabricating an "alternative" source for the contamination, and finally admitting it owes money to the City based on a calculation made six years too late but still not paying the City.

After hearing a mountain of evidence at trial, the jury determined not only that PSTIF was obligated to pay $172,100.98, but also PSTIF should be punished for its lies and dilatory conduct. The jury's determination is well supported and should not be disturbed.

### A. The Petroleum Contamination

Defendant McCall was the owner of a gas station near the intersection of Joy Street and South Commercial within the City. (Tr. 177:23 to 178:8). Defendant Fleming purchased the gas station from McCall in 2000. (Tr. 182:3-5). Defendant PSTIF provided liability insurance for petroleum fuel leaking from the underground storage tanks. (Tr. 508:17 to 509:3). In September 1997, McCall discovered its underground tanks were leaking gasoline. (Tr. 244:7-12; 508:17-23; Trial Ex. 4). McCall immediately notified PSTIF. (Tr. 204:2-4; 509:4-10; Trial Ex. 4). After an investigation, it was determined that a significant amount of gasoline had escaped into the ground. (Tr. 509:4-21). PSTIF engaged Bob Fine with FINEnvironmental ("Fine") to investigate the extent of the contamination. (Tr. 59:14-24).

On October 24, 1997, Fine informed the Missouri Department of Natural Resources ("DNR") the leaking tanks had caused petroleum contamination to migrate off site in a northwesterly direction toward Commercial Street and a nearby creek. (Tr. 244:17-21; 368:25 to 369:11; Trial Ex. 55). In subsequent reports, Fine disclosed that

contamination from McCall's leak had migrated north of the nearby creek. (Tr. 254:3-10; 373:20 to 374:11; Trial Ex. 64). McCall took no steps to notify the City of the dangerous contamination, despite knowing the contamination had migrated beyond the boundaries of McCall's property. (Tr. 173:15-25; 222:18-20; 372:18-16). After McCall sold the store to Fleming, neither Fleming nor PSTIF took steps to notify the City of the contamination. (Tr. 52:14-20; 173:13-14; 230:22-23; 535:13 to 536:2).

### B. The City Encounters Gasoline Contamination during Construction

In the late 1990s, the City began having problems with its sewer system. (Tr. 44:24 to 46:14). The citizens of Harrisonville approved bond debt for a multi-million dollar project to replace ageing sewer lines and accommodate a growing population. (Tr. 44:24 to 46:14; 47:10 to 48:6). After obtaining the necessary funding, the City engaged the engineering firm of George Butler & Associates ("GBA") to design the project. (Tr. 47:10-25). After the project was designed, the City solicited bids for the construction. (Tr. 48:7-20; 329:3-9).

By 2003, the City engaged a construction company, Rose-Lan, to replace its south sewer interceptor near Joy Street and South Commercial. (Tr. 47:10 to 48:6; 52:2-3; 333:24-25). This line serves approximately half of the City. Shortly after excavation began, Rose-Lan discovered petroleum contaminated soil and was forced to discontinue work at that location. (Tr. 52:4-7; 287:11 to 288:2). To that point, the City received no notification of possible contamination on the City's easement, and it was not until Rose-Lan excavated the south interceptor that the City became aware of the contamination. (Tr. 53:24 to 54:7; 335:10-14).

The City notified the DNR and found that PSTIF had employed Fine to monitor the contamination since 1997. After the City's discovery, Fine was engaged by PSTIF to confirm the gasoline contamination in the sewer easement. (Tr. 58:24 to 59:24; Trial Ex. 36). His report identified the source of the contamination as the McCall site. (Tr. 61:18-22). Further testing of the surrounding area was conducted and found no contamination further north along the creek or toward an upstream convenience store known as Everyday. (Tr. 61:3 to 62:23; Trial Ex. 36). As the City moved forward with replacement of the south interceptor directly adjacent to Everyday, no gasoline contamination was encountered. (Tr. 62:15-23). Thus, the contamination was confined to the area extending north and west from McCall to the sewer line along Commercial Street and to the north side of the creek. *Id.* Fine's testing was paid for by PSTIF pursuant to its coverage of McCall. (Tr. 65:12-17; 386:10-25).

### C. PSTIF Promises to Reimburse All Costs for Remediation

Once the gasoline contamination was discovered, Rose-Lan was no longer authorized to perform the work under OSHA regulations unless the contaminated soil was completely removed and replaced. (Tr. 70:12-24; 292:3-10). The cost to completely remove and replace the contaminated soil was $500,000.00. (Tr. 342:20 to 343:3; 453:24 to 454:11). Rather than removing the contaminated soil, Fine and PSTIF submitted a plan to leave the contaminated soil in place but still replace the City's sewer line. (Tr. 66:15 to 67:1; 342:2-7; Trial Ex. 7). This proposal involved using specially designed pipe that would withstand the gasoline contamination and thus save the cost of full remediation. (Tr. 342:2-7). Fine estimated the cost of his remediation at $190,226.38,

with the City to pay approximately 10% of that amount. (Tr. 382:19 to 383:2; Trial Ex. 7). The City's portion represented costs it would have incurred to replace that portion of the sewer absent the contamination. (Tr. 382:19 to 383:2; Trial Ex. 7). The remaining $171,165.07 was the costs necessitated by the contamination. *Id.*

Fine's proposal was reviewed by Patrick Vuchetich with Williams & Company, which serves as a third-party administrator for PSTIF. (Tr. 221:11-222:3; 489:24 to 490:4). Initially, Vuchetich questioned how the contamination crossed under the creek into the City's easement. (Tr. 89:3-9). In response, Ken Kolthoff with the City's engineering firm, GBA, sent an e-mail to Vuchetich explaining how the contamination migrated beneath the creek. (Tr. 90:13 to 91:15; 394:11-24; Trial Ex. 93). Vuchetich accepted Kolthoff's explanation, but felt Fine's budget for the project was too high. (Tr. 222:22 to 223:2; 395:21 to 396:18; 463:23 to 464:1).

Without telling the City, Vuchetich contacted Shaun Thomas with Midwest. (Tr. 73:21-23; 463:3-15). Vuchetich provided Midwest with Fine's proposal and assisted Thomas with preparation of a bid to undercut Fine's proposal. (Tr. 76:25 to 77:7; 217:8-22; 490:9-491:11; Trial Ex. 15). Vuchetich felt it "would be a sure bet then to push the City to hire Midwest for the job." (Tr. 218:17-19; Trial Ex. 16). Midwest's final bid to perform the PSTIF project was $154,632.00. (Tr. 218:21-22; Trial Ex. 17).

On April 13, 2004, Vuchetich forwarded the bid prepared by Midwest to Carol Eighmey, Executive Director of PSTIF. (219:9-12; Trial Ex. 17). Vuchetich informed Eighmey that PSTIF's exposure was $135,571.00 after subtracting the estimated $19,061.31 in original construction costs to be borne by the City. (Tr. 492:7-9; Trial Ex.

17). Vuchetich also explained that he would meet with the City and tell the City that Midwest's proposed costs were reasonable. (Tr. 219:9-15; Trial Ex. 17).

On April 15, 2004, the City hosted a meeting to discuss the contamination. (Tr. 73:9-10). Attendees included Vuchetich, Thomas, Kolthoff, William Rexroat with Rose-Lan, City Engineer Ted Martin and City Administrator Dianna Wright. (Tr. 288:3-12). During the meeting, Vuchetich presented the Midwest proposal and informed the City the bid was reasonable. (Tr. 82:1-6). Vuchetich assured the City if Midwest was hired to do the work proposed by Fine, PSTIF would reimburse the City for all contamination costs. (Tr. 84:25 to 85:3; 290:21 to 291:6; 348:24 to 350:4).

Vuchetich raised a concern at the meeting that the $19,061.31 of original construction costs seemed to be low. (Tr. 82:7-17). Rose-Lan revised the estimate up to $25,138.41, and Vuchetich expressed no further concerns. (Tr. 82:18 to 83:6). At no time during the meeting did Vuchetich state that the City should bear any of the costs beyond the $25,138.41. (Tr. 84:1-5). Vuchetich spent a considerable amount of time discussing details of the contamination remediation and that PSTIF was agreeing to pay. (Tr. 84:6-24). Despite this representation, Eighmey admitted that, even prior to the April 15, 2004 meeting, PSTIF never had any intention of paying the remediation costs. (Tr. 209:11-14). Eighmey also testified she never informed the City PSTIF did not intend to pay as promised by Vuchetich. (Tr. 209:15-25).

Wright, Martin and Rexroat all testified they left the meeting with the clear understanding that:

- Midwest would be hired to perform the work proposed by PSTIF and Fine. (Tr. 85:11-20; 290:21 to 291:6; 349:7-10); and
- PSTIF would pay the bill. (Tr. 84:25 to 85:3; 87:3-7; 290:21 to 291:6; 348:24 to 350:4).

Later that day, Vuchetich sent an email to Thomas confirming that Midwest would be Rose-Lan's subcontractor on the remediation project. (Tr. 86:12 to 87:2; Trial Ex. 21). On April 22, 2004, Vuchetich confirmed with Wright that Midwest would perform the work. (Tr. 473:5-8; Trial Ex. 153a).

After pricing of the pipe was obtained, Midwest revised its bid upward to $175,161.44 to account for the increased cost. (Tr. 118:24 to 119:2; Trial Ex. 98). In addition, the City incurred testing costs of $4,660.00 and engineering costs of $12,183.00. (Tr. 99:16-24; Trial Ex. 111). The City submitted those costs to PSTIF. On January 20, 2005, PSTIF informed McCall that a claim of approximately $160,000.00 associated with the contamination of the City's sewer easement would be applied to McCall's statutory coverage limits. (Tr. 174:13-19). The number is consistent with PSTIF's representation to the City that it would pay all costs associated with remediation of the contaminated site, less $25,138.41 the City would have paid for the sewer line replacement absent the contamination.

Upon completion of the project, the City owed $180,396.39 for costs associated with replacement of the sewer line within the contaminated area. (Tr. 163:9-15; 291:7-20; Trial Ex. 103). After subtracting $25,138.41 the City would have paid Rose-Lan to install the pipe in uncontaminated soil, the cost due to soil contamination was

$155,257.98. *Id.* When added to the testing and engineering costs, the City's evidence established that the total amount PSTIF was to reimburse the City was $172,100.98. (Tr. 98:1-6; 99:16-24; Trial Ex. 111). The City paid its bill to Rose-Lan and sought reimbursement from PSTIF. (Tr. 103:17-23; Trial Ex. 110).

**D. PSTIF's Refusal to Pay the City's Claim**

The City's acceptance of the PSTIF remedial plan saved PSTIF over $300,000.00. (Tr. 342:20 to 343:3; 453:24 to 454:11). Despite this savings, PSTIF still refused to pay the City's claim. Instead, PSTIF fabricated excuse after excuse to avoid its promise. Each time the City refuted an excuse, PSTIF moved on to a new one:

- PSTIF questioned how gasoline contamination migrated into the City's sewer easement north of the creek. (Tr. 109:9-11; Trial Ex. 110). GBA provided an analysis how the contamination crossed beneath the creek. (Tr. 109:12-16; 394:11-24; Trial Ex. 93; Trial Ex. 110).
- PSTIF claimed GBA bore some responsibility for the remediation costs, but PSTIF never explained what costs should be attributed to GBA, nor did PSTIF suggest the City should pay any of those costs. (Tr. 83:13 to 84:5; 497:13 to 498:7).[1]

[1] Despite PSTIF's allegation that GBA should have discovered the contamination and was responsible for some remediation costs, PSTIF never took action to collect from GBA, name GBA as a party or argue at trial that GBA was in any way responsible.

- PSTIF claimed the cost was too high but dropped this position when the City reminded PSTIF the costs were fully discussed and agreed at the April 15, 2004 meeting. (Tr. 109:24 to 110:11; Trial Ex. 110).
- In February 2005, Eighmey, on behalf of PSTIF, requested additional paperwork from the City, suggesting that, upon receipt, the claim would be paid. (Tr. 105:25 to 106:6; 110:12 to 111:5; Trial Ex. 110). The City provided the requested paperwork but PSTIF still refused to pay. *Id.*
- In May 2005, the City requested the opportunity to appeal to the PSTIF Board, but PSTIF denied the request. (Tr. 105:12-19; Trial Ex. 121).

Frustrated with PSTIF's continued refusals, the City filed suit. (Tr. 104:19 to 105:1). Still, PSTIF continued fabricating excuses.

- On December 27, 2005 PSTIF informed the City that required paperwork had not been submitted properly. (Tr. 112:3-13; Trial Ex. 110). The City provided additional documentation, yet PSTIF still denied payment. *Id.*
- In December 2008, PSTIF alleged the contamination was not related to the McCall site, but in fact came from the Everyday store north of the contamination site. (Tr. 112:14-25). This claim, on the eve of trial, was the first mention of an alternate source for the contamination. (Tr. 375:19-25; 394:11-24; Trial Ex. 93). Fine subsequently testified that there was no evidence of petroleum contamination emanating from the Everyday property north of the creek. (Trial Ex. 110).

- In February 2010, PSTIF stated it would not pay the $172,100.98 claimed by the City because the actual costs related to the contamination were only $72,009.98. (Tr. 440:3-12; 444:23 to 445:8; 457:18-25; 458:9-13). Despite the new admission, PSTIF never paid the $72,009.98 to the City.

The City also presented evidence that PSTIF has a common practice of refusing to pay claims and delaying payment once work is completed. Laura Luther, Remediation Unit Chief for the Tank Section of DNR, testified PSTIF repeatedly refuses to pay for remediation efforts requested and approved by DNR. (Tr. 241:11 to 424:1). Devin Pollock, a former inspector for Environmental Advisors and Engineers ("EAE"), currently with the EPA, testified he worked closely with PSTIF as part of his role at EAE. (Tr. 190:7-9). Pollock testified PSTIF had a pattern where it would agree to pay claims only to sit on invoices once submitted and delay payment. (Tr. 192:3-13). In September 2004, Pollock was an inspector on the site until he was removed by PSTIF from the McCall project. (Tr. 197:5-9). He wishes he would have told the City then that it was being duped by PSTIF. (Tr. 201:6-8).

The pattern of PSTIF's misconduct was further demonstrated in that PSTIF took no action to remedy any of the issues related to the City's third-party claim and PSTIF's refusal to pay. Despite Eighmey's admission that Vuchetich acted inappropriately, Vuchetich was never counseled about his role in rigging the bid for Midwest nor was he ever disciplined for his misrepresentations to the City. (Tr. 208:3-8; 533:9-16). Both Eighmey and Vuchetich held the same position in 2011 when they testified at trial as they did in 2004. (Tr. 459:18 to 460:7; 506:23 to 507:3).

**E. Procedural History**

On November 27, 2007, the City filed its First Amended Petition stating claims of fraudulent misrepresentation and negligent misrepresentation against PSTIF. The City sought punitive damages against McCall, Fleming and PSTIF. (L.F. 45-60). In their answers, the defendants restated some affirmative defenses but did not include any constitutional defenses. (L.F. 42-43, ¶¶ 51-54; L.F. 969, ¶ 108). The stated affirmative defenses, as well as defendants' unpleaded defense of comparative fault were struck by the trial court for incomplete pleading. (L.F. 161-162). Defendants did not seek to reassert any affirmative defenses, including any state or federal constitutional due process defenses related to punitive damages.

The case was tried to a jury beginning May 16, 2011. The City presented 13 witnesses as follows:

1. Dianna Wright (Tr. 41-166) – Wright, the City Administrator from 1998 to 2008, explained the replacement of its south interceptor sewer line, the discovery of petroleum contaminants, the decision to allow Midwest to remediate the contamination based upon PSTIF's plan and promise to pay the City's costs, and PSTIF's refusal to reimburse the City. (Tr. 44:24 to 115:21).

2. Patrick Vuchetich (Tr. 215-231; 459-500) – Vuchetich is a Senior Project Manager for Williams & Company, which handles PSTIF affairs as a third party administrator. (Tr. 215:17 to 216:11). Vuchetich testified regarding his handling of the McCall gasoline contamination and the City's claim. (Tr. 216:13 to 231:3). Vuchetich

admitted he manipulated the bid for Midwest and then informed PSTIF, Rose-Lan and the City that Midwest's bid was reasonable. (Tr. 217:8 to 219:12).

3. Carol Eighmey (Tr. 202-214; 506-542) – Eighmey, the Executive Director of PSTIF, testified PSTIF would never pay the City's claim regardless of any promises by Vuchetich. (Tr. 202:14-20; 290:11-18).

4. William Rexroat (Tr. 276-318) – Rexroat was a professional estimator for Rose-Lan. (Tr. 282:23 to 283:7). He explained the costs associated with the project and the additional costs incurred as a result of the contamination. (Tr. 283:15 to 287:6; 291:7 to 295:7). Rexroat testified $25,138.41 was the costs the City would have paid to replace the sewer absent contamination. *Id.*

5. Ted Martin (Tr. 321-365) – Martin has been the City Engineer for the City of Harrisonville since 2002. (Tr. 325:15-21). Martin discussed the April 2004 meeting and PSTIF's promise to pay all costs. (Tr. 348:8 to 349:10).

6. Laura Luther (Tr. 232-276) –Luther is the Remediation Unit Chief for the Tank Section of the Missouri Department of Natural Resources ("DNR"). (Tr. 232:5-6; 233:7-20). She works closely with PSTIF and testified about PSTIF's repeated refusal to pay remediation efforts required by DNR. (Tr. 238:21 to 242:20).

7. Devin Pollock (Tr. 188-201) – Pollock worked with EAE and PSTIF on the City's sewer easement contamination project until September 2004. (Tr. 188:17 to 190:9). Pollock testified it was standard practice for PSTIF to approve expenditures related to petroleum contamination only to hold invoices and refuse payment after services were provided. (Tr. 192:3-15). Pollock also testified PSTIF was directing the

remediation effort and that he wishes he would have told the City in 2004 about PSTIF's unsavory practices. (Tr. 192:25 to 193:9; 201:6-8).

8. Samuel Styron (Tr. 319-321) – Styron, a civil engineer, testified regarding PSTIF's insistence that Midwest perform the remediation work. (Tr. 320:19 to 321:3).

9. Kenneth Kolthoff (Tr. 391-397) – Kolthoff, an environmental analyst for GBA, testified how the gasoline contamination migrated into the City's sewer easement. (Tr. 394:11 to 395:20).

10. Mary Christine Cochran McGrew (Tr. 171-180) – McGrew admitted for McCall, that McCall contaminated the City's sewer easement and that McCall never told the City about it. (Tr. 172:14-21; 177:9-11; 173:13-14).

11. Edward J. Roitz (Tr. 181-187) – Roitz, President of Fleming, testified he was aware of the contamination when he purchased the site but never told the City. *Id.*

12. Robert Fine (Tr. 367-391) – Fine testified regarding his investigation and monitoring of the McCall gasoline leak on behalf of PSTIF beginning in 1997 and the plan he prepared for PSTIF to remediate the City's contaminated sewer easement. (Tr. 368:5 to 391:1).

13. Mike Tholen (Tr. 399-411) – Tholen, Assistant City Administrator, identified the costs associated with the remediation, and discussed PSTIF's refusal to reimburse the City's costs. (Tr. 399:13 to 411:19).

In sharp contrast, the entirety of the testimony presented on behalf of defendants McCall, Fleming and PSTIF was three witnesses:

1. Shaun Thomas (Tr. 427-458) – Thomas was responsible for estimation and project management for Midwest in 2004. He testified about Midwest's initial bid, the work performed by Midwest and the specific items PSTIF alleged were related to removal of the contaminated soil. (Tr. 428:8 to 458:23).

2. Pat Vuchetich – See, *supra*.

3. Carol Eighmey – See, *supra*.

During trial, the court heard several motions and:

- granted the City's directed verdict against McCall and Fleming as to liability for nuisance and trespass. *Id.*
- denied Defendants' motion for directed verdict on the claim for punitive damages and fraud and misrepresentation claims against PSTIF. (Tr. 417-427).
- denied Defendants' motion for directed verdict as to the City's claims against PSTIF. (Tr. 556-562).
- denied Defendants' motion for directed verdict against themselves and for the City in the amount of $72,009.98 on the claims of nuisance and trespass. (L.F. 446-447; Tr. 576:3-20).

On May 20, 2011, the jury returned a verdict for the City and against PSTIF on all claims. (L.F. 451-459). The jury awarded actual damages of $172,100.98 against all Defendants, punitive damages of $100.00 each against McCall and Fleming and $8,000,000.00 against PSTIF. (L.F. 451-459). The trial court entered its judgment on June 20, 2011. (L.F. 488-490).

Defendants filed post-trial motions for judgment notwithstanding the verdict or, in the alternative, for remittitur and/or a new trial. (L.F. 462-487). PSTIF argued the jury's award of actual damages was not permitted under the statute governing PSTIF coverage, and the award of punitive damages against PSTIF violated the Missouri statutory cap on punitive damages. *Id.* On September 14, 2011, the trial court entered remittitur of the punitive damages award against PSTIF from $8,000,000.00 to $2,500,000.00 on the basis it violated constitutional due process. (L.F. 553-557). The trial court denied the remaining motions. *Id.* On February 25, 2014, the Missouri Court of Appeals determined the statutory cap on punitive damages did apply and reduced the punitive damage award to $860,504.90.

## POINTS RELIED ON

**I. THE TRIAL COURT DID NOT ERR IN REFUSING TO APPLY THE LEGISLATIVELY ENACTED CAP ON PUNITIVE DAMAGES BECAUSE THE STATUTORY CAP ON PUNITIVE DAMAGES VIOLATES THE STATE CONSTITUTIONAL RIGHT TO TRIAL BY JURY AND CANNOT BE RETROACTIVELY APPLIED.**

*Lewellen v. Chad Franklin and Chad Franklin National Auto Sales North, LLC,* Case No. SC92871, 2014 WL 4425202, (Mo. Banc Sept. 9. 2014)

*Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. Banc 2012)

**II. THE TRIAL COURT ERRED IN GRANTING REMITTITUR IN THE AMOUNT OF $2,500,000.00 IN PUNITIVE DAMAGES AGAINST PSTIF BECAUSE PSTIF FAILED TO ASSERT ANY VIOLATION OF DUE PROCESS AS A DEFENSE AT ANY TIME PRIOR TO ENTRY OF JUDGMENT AND THUS WAIVED ANY ARGUMENT THAT THE AWARD WAS VIOLATIVE OF DUE PROCESS.**

*Hollis v. Blevins*, 926 S.W.2d 683 (Mo. Banc 1996)

*Bezayiff v. City of St. Louis*, 963 S.W.2d 225 (Mo. App. 1997)

*Perez v. Webb*, 533 S.W.2d 650 (Mo. App. 1976)

**III. THE TRIAL COURT ERRED IN GRANTING REMITTITUR IN THE AMOUNT OF $2,500,000.00 IN PUNITIVE DAMAGES AGAINST PSTIF IN THAT THE JURY'S AWARD OF $8,000,000.00 IN PUNITIVE DAMAGES DID NOT VIOLATE PSTIF'S CONSTITUTIONAL DUE PROCESS GUARANTEES BECAUSE PSTIF'S CONDUCT WAS PARTICULARLY EGREGIOUS.**

*State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408 (2003)

*Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024 (8th Cir. 2000)

*Lynn v. TNT Logistics North America Inc.*, 275 S.W.3d 304 (Mo. Ct. App. 2008)

*McGathey v. Davis*, 281 S.W.3d 312 (Mo. App. W.D. 2009)

## BRIEF OF APPELLANT

## I. THE TRIAL COURT DID NOT ERR IN REFUSING TO APPLY THE LEGISLATIVELY ENACTED CAP ON PUNITIVE DAMAGES BECAUSE THE STATUTORY CAP ON PUNITIVE DAMAGES VIOLATES THE STATE CONSTITUTIONAL RIGHT TO TRIAL BY JURY AND CANNOT BE RETROACTIVELY APPLIED.

PSTIF successfully argued to the Missouri Court of Appeals that the trial court erred in refusing to remit the punitive damage award pursuant to the cap set forth in § 510.265, RSMo. Although the City contended that the statutory punitive damage cap was unconstitutional, the Missouri Court of Appeals nonetheless reversed the decision of the trial court and applied the statutory cap on punitive damages, reducing the punitive damage award to $860,504.90. *See* Appendix, p. A22. This Court should vacate the decision of the Court of Appeals on this point based on the recently decided case of *Lewellen v. Chad Franklin and Chad Franklin Nat'l Auto Sales North, LLC*, Case No. SC92871, 2014 WL 4425202 (Mo. Banc Sept. 9, 2014).

### A. The Cap on Punitive Damages Violates the Right to Trial by Jury.

Article I, section 22(a) of the Missouri Constitution sets forth a fundamental guarantee in our system of jurisprudence – "That the right of trial by jury as heretofore enjoyed shall remain inviolate . . . ." A determination of whether the statutory cap on punitive damages violates this fundamental right to trial by jury involves a two-prong analysis: (1) whether an award of punitive damages is a "right of trial by jury as heretofore enjoyed;" and (2) whether that right remains inviolate if punitive damages are

subject to a statutory cap. *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 637 (Mo. Banc 2012) (finding the Missouri statutory cap on non-economic damages set forth in § 538.210, RSMo. violates the Missouri Constitution).

This Court has determined the phrase "heretofore enjoyed" means Missouri citizens "are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted in 1820." *Id.* at 638 (quoting *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. Banc 2003)); *see also Lewellen*, 2014 WL 4425202 at *4. Accordingly, if Missouri common law entitled a plaintiff to a jury award of punitive or exemplary damages in 1820, when the Missouri Constitution was adopted, then contemporary plaintiffs have a state constitutional right to a jury determination of punitive damages. *Id.* In other words, "any change in the right to a jury determination of damages as it existed in 1820 is unconstitutional." *Id.* at * 4.

In *Lewellen*, this Court found that in 1820, the determination of the amount of punitive damages was a function of the jury. *Id.* "Under the common law as it existed at the time the Missouri Constitution was adopted, imposing punitive damages was a peculiar function of the jury." *Id.* Accordingly, "the punitive damages cap imposed by section 510.265 'necessarily changes and impairs the right of a trial by jury as heretofore enjoyed'" and is unconstitutional. *Lewellen*, 2014 WL 4425202 at *5 (*citing Watts*, 376 S.W.3d at 640).

The precedent announced in the *Lewellen* case just weeks ago provides direct, on-point authority for this case. The statutory cap on punitive damages as applied to the

City's common law fraud claim is unconstitutional. The decision of the Missouri Court of Appeals on this issue should be vacated. *See* Appendix, p. A21.

### B. The City Preserved Its Constitutional Challenge and (even if it did not), An Unconstitutional Statute Is Void

PSTIF argued and the Missouri Court of Appeals found that the City had not properly preserved its constitutional challenge to the punitive damage cap. The Court of Appeals noted that constitutional challenges must be raised at the earliest opportunity and that the City had not raised before the trial court its claim that the damage cap is unconstitutional.

Such an argument was unnecessary because the City successfully argued to the trial court that the statutory damage cap did not apply because it could not be applied retroactively. (L.F. 555). Thus, the statutory cap was never applied by the trial court. Before the Court of Appeals, PSTIF continued to argue the statutory cap should apply and the City set forth a number of legal theories why it did not. One of the City's arguments was that the statutory cap violates the right to a trial by jury guaranteed in the Missouri Constitution. There is no authority to suggest the City is now limited to only those legal theories and arguments it expressed in response to PSTIF's post-trial motion. To the contrary, because the City prevailed on this issue before the trial court, the decision not to apply the Statute can be affirmed for any reason. *Gaydos v. Imhoff*, 245 S.W. 3d 303, 306 (Mo. App. W.D. 2008).

Furthermore, the Missouri constitution requires the right to trial by jury, unlike other rights afforded under the constitution, remain inviolate. Mo. Const., Art. I, § 22(a).

While a party may waive its right to a jury trial in civil cases, it may do so only through certain specific acts or omissions. *Meadowbrook Country Club v. Davis*, 421 S.W.2d 769, 773 (Mo. Banc 1967). The City did nothing to waive its right to trial by jury. Indeed, the jury returned a verdict awarding $8,000,000.00 in punitive damages against PSTIF and in favor of the City. It cannot be said the City somehow waived its right to have the jury determine the measure of damages merely by not tendering the argument in opposition to PSTIF's post-trial motion for judgment notwithstanding the verdict.

Even assuming, *arguendo*, the City was obligated to raise the issue at the first opportunity, the primary legal authority in support of the City's argument was decided after final judgment was entered in this case. Judgment on all post-trial issues in this case, including remittitur, was entered by the trial court on September 14, 2011. On July 31, 2012, this Court held the Missouri statutory cap on non-economic damages set forth in § 538.210, RSMo. violates the right to trial by jury guaranteed under the Missouri constitution. *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. Banc 2012). Thus, the first opportunity the City had to raise this argument to incorporate the analysis in *Watts*, was in its briefing on appeal.

Moreover, this Court has declared that the statutory punitive damage cap is unconstitutional as applied to common law causes of action. *See Lewellen*, 2014 WL 4425202 at *5. An unconstitutional statute "is no law and confers no rights. . . from the date of its enactment, and not merely from the date of the decision branding it unconstitutional. . . ." *Nike IHM, Inc. v. Zimmerman*, 122 S.W.3d 615, 621 (Mo. App. E.D. 2003). In fact, *Lewellen* teaches that the right to determination by the jury of the

amount of punitive damages is "inviolate" pursuant to Article I, section 22(a) of the Missouri Constitution. *Lewellen*, 2014 WL 4425202 at *5.

In a long-standing case that is still good law, *Lieber v. Heil*, 32 S.W.2d 792 (Mo. Ct. App. 1930), the Court of Appeals was faced with an almost identical situation. An appellant allegedly failed to preserve the issue of the constitutionality of an inheritance statue for review. *Id.* While the matter was still on appeal, the Missouri Supreme Court issued a decision finding that the statute in question was unconstitutional. *Id.* The Court of Appeals was obligated to follow the ruling of the Supreme Court and likewise found the statute at issue to be unconstitutional. *Id.* at 793. "[T]he statute is now to be regarded as void ab initio, and as though it had never been in existence; and it is our constitutional duty, following the ruling of the Supreme Court, so to treat it in all matters affecting its constitutionality." *Id. See also, State v. Hudson*, 386 S.W.3d 177, 179 (Mo. App. E.D. 2012) (finding that even where a defendant did not challenge the constitutionality of a statue in the trial court, where the law changes after the trial court renders judgment but before the appellate court renders its decision, "the law must be obeyed, or its obligation denied.").

The same result should follow here. Based on this Court's pronouncement in *Lewellen*, the unconstitutional cap on punitive damages cannot be applied to the City's claim. The Court of Appeal's application of the statute should be reversed and the original punitive damage amount awarded by the jury, $8 million dollars, should be reinstated.

### C. Missouri's Prohibition against Retrospective Laws Precludes Application of the Statutory Punitive Damages Cap in this Case.

Based on this Court's authority in the *Lewellen* case, the Court need not reach this issue. Nonetheless, if the Court determines *Lewellen* is not controlling, application of the statutory punitive damage cap is still improper because it violates Missouri's prohibition against retrospective laws.

Section 510.265, RSMo., was enacted as part of House Bill 393, which legislated tort reform measures. House Bill 393 not only capped punitive damages awards, but limited compensatory damages for some plaintiffs at $350,000.00. *See* §§ 510.265 and 538.210, RSMo.; Mo. H.B. No. 393, ¶¶ 11 and 14. The Bill's changes were to apply to "all causes of action filed after August 28, 2005." § 538.305, RSMo. However, this Court limited its application to claims accruing after that date. *See Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 760 (Mo. 2010) (Article I, Section 13 of the Missouri Constitution prohibits retroactive application of a cap on damages to causes of action that accrued prior to August 28, 2005, even if the actual lawsuit was filed after that date).

Here, as in *Klotz*, the City's cause of action arose well before the legislature enacted House Bill 393, which established the cap on punitive damages under § 510.265, RSMo.:

- PSTIF made the false representation on April 15, 2004 (Tr. 84:25 to 85:3; 290:21 to 291:6; 348:24 to 350:4); and
- In 2004 PSTIF refused to reimburse the City as promised. (Tr. 109:24 to 110:11; Trial Ex. 110).

The City's considerable effort to convince PSTIF to live up to its promises over the ensuing months, before finally resorting to this lawsuit, does not change the fact that the City's cause of action accrued in 2004. In *Klotz*, this Court dealt with the same House Bill, identical legal issues, and a remarkably similar fact pattern. Accordingly, the statutory cap on punitive damages contained in § 510.265, RSMo, does not apply in this case under the analysis set forth in *Klotz*. 311 S.W.3d at 760.

In an effort to overcome this clear mandate in *Klotz*, PSTIF and the appellate court relied upon a line of decades old cases involving a statutorily created course of action and an attempt to limit windfall punitive damages awards under the Missouri Service Letter Statute. *See Vaughan v. Taft Broadcasting Co*., 708 S.W.2d 656 (Mo. 1986). Reliance on *Vaughan* is misplaced because when determining whether a statute may be applied retroactively, "[m]erely to label certain consequences as substantive and others as procedural does not give sufficient consideration" to the issue. *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. 1974). Rather, the court must examine all facts to determine whether retroactivity is constitutional and appropriate. *Id.*

In Vaughan, this Court was faced with a jury award of $1.00 in actual damages and $173,670.83 in punitive damages in an action brought under the Missouri Service Letter Statute, even though the statute made no mention of punitive damages. The availability of punitive damages under the Service Letter Statute was entirely a matter of statutory interpretation. *See Vaughan*, 708 S.W.2d at 659 (citing *Cheek v. Prudential Insurance Co.*, 192 S.W. 387 (Mo. 1917); *State ex rel. St. Joseph Belt Railway Co. v. Shain*, 108 S.W.2d 351, 356 (Mo. 1937)). To reign in windfall judgments to plaintiffs

who sustained no actual damages, the legislature amended the statute in 1982 to "clarify" its intent that punitive damages were only available if an employer failed to issue a service letter. § 290.140.2, RSMo. The *Vaughan* court was confronted with whether to apply this statutory clarification retroactively.

The cases cited in *Vaughan* also involved the Missouri Service Letter Statute, albeit in a slightly different context. *See Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 159 (Mo. App. 1983). In *Arie*, the Court did not find as a matter of law that punitive damages were not a vested right until judgment was entered. *Id.* at 159. The only other significant authority relied on by *Vaughan* is an Illinois case that addresses not whether a statutory cap on punitive damages can be applied retroactively, but whether the legislature could limit the availability of punitive damages at all. 708 S.W.2d at 660 (quoting *Smith v. Hill*, 147 N.E.2d 321, 327 (Ill. 1958). Retroactive application was not even an issue in *Smith*.

*Vaughan* addressed a singular statute and attempted to remedy a specific punitive damages award that was clearly disproportionate. *Klotz* addresses the issue of damages caps on a more global scale. The enactment of Missouri House Bill 393 in 2005 affected not only the terminated employee who requested a service letter from the prior employer, but every plaintiff who files a tort action in the state of Missouri. The holding in *Klotz* is in line with the contemporary weight of authority against the retroactive application of damage caps. *See Prince George's County v. Longtin,* 19 A.3d 859, 881 (Md. Ct. App. 2011) (refusing to apply statutory cap on damages to cause of action accrued prior to enactment); *Estate of Bell v. Shelby County Health Care Corp.*, 318 S.W.3d 823, 833

(Tn. 2010) (any legislative alteration of the amount of damages recoverable cannot be applied retroactively); *Blair v. McDonagh*, 894 N.E.2d 377, 391 (Oh. 2008) (refusing to apply punitive damages cap retroactively where it was enacted after cause of action arose but before lawsuit was filed); *Martin by Scoptur v. Richards*, 531 N.W.2d 70, 89-92 (Wis. 1995) (finding plaintiffs had a substantive right to unlimited damages at the time of their injury, and therefore cap on damages could not be applied retroactively); *Socorro v. New Orleans*, 579 So.2d 931, 944 (La. 1991) (refusing to apply cap on damages retroactively because it had the effect of altering the amount of damages recoverable)).

In Missouri, courts must apply a case by case analysis in order to determine if legislation should be applied retroactively. *Buder*, 515 S.W.2d at 411. In *Vaughan*, this Court held that the punitive damages limitation contained in the Missouri Service Letter Statute should be applied retroactively to clarify the law regarding if punitive damages are recoverable at all. In *Klotz*, 25 years later, this Court held that the damages caps imposed by sweeping Missouri tort reform in 2005 cannot be applied retroactively to limit the amount of tort damages plaintiffs are entitled to recover. *Id.* at 760 (citing *Buder*, 515 S.W.2d at 411). Similarly, the cap on punitive damages imposed by § 510.265, RSMo., cannot be applied retroactively to the City's cause of action, which accrued prior to its enactment.[2]

[2] Even assuming, *arguendo*, the punitive damages cap could be applied retroactively, the statutory cap is still inapplicable because the statute makes an exception if the State of Missouri is the plaintiff. *See* § 510.265, RSMo. Here, the plaintiff is the

**II. THE TRIAL COURT ERRED IN GRANTING REMITTITUR IN THE AMOUNT OF $2,500,000.00 IN PUNITIVE DAMAGES AGAINST PSTIF BECAUSE PSTIF FAILED TO ASSERT ANY VIOLATION OF DUE PROCESS AS A DEFENSE AT ANY TIME PRIOR TO ENTRY OF JUDGMENT AND THUS WAIVED ANY ARGUMENT THAT THE AWARD WAS VIOLATIVE OF DUE PROCESS.**

At the conclusion of trial, the jury returned a verdict awarding the City $172,100.98 in actual damages and $8,000,000.00 in punitive damages against PSTIF. (L.F. 451-459). PSTIF sought remittitur based on the statutory cap in § 510.265, RSMo. (L.F. 462-487). As set forth above, the trial court properly found the statutory cap is inapplicable to this case. (L.F. 553-557). However, the trial court *sua sponte* determined the amount of punitive damages violated due process and erroneously entered remittitur of the punitive damages award from $8,000,000.00 to $2,500,000. *Id.* In making this determination, the trial court improperly relied on the statutory punitive damages cap, stating the public policy exemplified therein is "instructive." (L.F. 555). The Court of

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City of Harrisonville – a political subdivision of the State of Missouri. *See* § 70.120(3), RSMo. As a political subdivision, the City is entitled to all statutory protections afforded to the State. *Id.* Accordingly, the City is expressly exempted from the punitive damages cap imposed by § 510.265, RSMo.

Appeals did not reach this issue because it improperly found the statutory cap on punitive damages did apply.

To analyze this issue, the Court should start with the fact that PSTIF did not raise any constitutional defenses at any time before the verdict. This Court has already established that when punitive damages are pled in the petition, the appropriate time for a defendant to raise a constitutional issue is in its Answer. *Hollis v. Blevins*, 926 S.W.2d 683, 683-84 (Mo. Banc 1996) (rejecting an argument that constitutional claim challenging statutory prejudgment interest only arose after judgment was entered and finding claim waived when not raised in answer to petition). PSTIF did not raise any constitutional defenses in its Answer, as an affirmative defense, or during trial. PSTIF also failed to set forth any argument on the issue in its post-trial briefing. This argument has been waived. *State v. Wickizer*, 563 S.W.2d 109, 110 (Mo. App. 1978) (constitutional question first raised in motion for new trial was not raised soon enough and therefore waived); *State v. Arnett*, 370 S.W.2d 169, 172 (Mo. Ct. App. 1963) (refusing to consider constitutional question first raised in motion for new trial).

Following the failure of PSTIF to present the issue, the trial court raised *sua sponte* due process concerns articulated in *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408, 419-20 (2003) during a hearing on post-trial motions on August 31, 2011 (8/31/11 Tr. 19:2-24). In its judgment granting remittitur on due process grounds, the trial court incorrectly reasoned that the law required the trial court to raise the issue *sua sponte*. (L.R. 000555). *Bezayiff v. City of St. Louis*, 963 S.W.2d 225, 231 (Mo. App. 1997) (trial court improperly raised due process issue *sua sponte* where defendant failed

to raise issue at earliest opportunity). The finding by the trial court completely disregards clearly established law that a party must raise constitutional issues or they are deemed waived. *Hollis*, 926 S.W.2d at 683; *see also Perez v. Webb*, 533 S.W.2d 650, 655 (Mo. App. 1976) (a trial court is not permitted to search, sua sponte, for constitutional infirmities not raised by the parties). The trial court's remittitur on due process grounds must be reversed.

**III. THE TRIAL COURT ERRED IN GRANTING REMITTITUR IN THE AMOUNT OF $2,500,000.00 IN PUNITIVE DAMAGES AGAINST PSTIF IN THAT THE JURY'S AWARD OF $8,000,000.00 IN PUNITIVE DAMAGES DID NOT VIOLATE PSTIF'S CONSTITUTIONAL DUE PROCESS GUARANTEES BECAUSE PSTIF'S CONDUCT WAS PARTICULARLY EGREGIOUS.**

Assessment of damages is first and foremost a function for the jury. *Knifong v. Caterpillar, Inc.*, 199 S.W.3d 922, 927 (Mo. App. W.D. 2006). In fact, the Missouri Constitution guarantees the right to trial by jury, which extends to the determination of punitive damages in this case. *Lewellen*, 2014 WL 4425202 at *5. A trial court may enter a remittitur only if the jury's verdict is excessive. § 537.068, RSMo. "In reviewing whether a verdict is excessive, [the court is] limited to a consideration of the evidence which supports the verdict excluding that which disaffirms it." *McGathey v. Davis*, 281 S.W.3d 312, 320 (Mo. App. W.D. 2009) (quoting *Graham v. County Med. Equip. Co.*, 24 S.W.3d 145, 148 (Mo. App. E.D. 2000)).

The U.S. Supreme Court in *State Farm* articulated a three-prong analysis when reviewing punitive damages awards:

(1) the degree of reprehensibility of the defendant's conduct;

(2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and

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

538 U.S. at 418. While the U.S. Supreme Court observed that "in practice, few awards exceeding a single-digit" ratio between punitive and compensatory damages will satisfy due process, the Court certainly did not preclude such awards. *Id.* at 425. Indeed, the Court went on to say that "there are no rigid benchmarks" and "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of damages.'" *Id.* (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)). Application of all three guideposts to the facts here reveals the jury's punitive damage award comports with due process requirements and should be upheld.

### A. PSTIF's Conduct Was Reprehensible

The reprehensibility guidepost considers if "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Werremeyer v. K.C. Auto Salvage Co., Inc.*, 134 S.W.3d 633, 635 (Mo. Banc 2004). Where, as here, the conduct is intentional fraud, mitigating factors will not reduce the award of punitive damages. *Id.* Of the three guideposts, the degree of reprehensibility is given the greatest import. *State Farm Mutual*, 538 U.S. at 418.

The evidence at trial established that PSTIF engaged in systematic and intentional conduct to defraud the City including:

- PSTIF knew toxins had migrated from McCall to neighboring property but never told the City (Tr. 53:24 to 54:7; 204:2-4; 509:4-10; 335:10-14; Trial Ex. 4);
- The City was entitled to have all contaminated soil removed at a cost of $500,000.00, yet agreed to PSTIF's proposal for a lower cost alternative based on assurances it would be reimbursed by PSTIF (Tr. 72:4-14; 84:25 to 85:3; 290:21 to 291:6; 342:20 to 343:3; 348:24 to 350:4; 453:24 to 454:11);
- PSTIF tampered with the bid process to ensure its preferred contractor would be awarded the bid to perform the remediation work necessitated by the leaking fuel tanks (Tr. 76:25 to 77:7; 217:8-22; Trial Ex. 15 and 16);
- PSTIF knew Pat Vuchetich had tampered with the bid process, but took no action and did not inform the City (Tr. 208:3-8; 533:9-16);
- PSTIF's own witnesses testified the fund never intended to pay the amount promised to the City (Tr. 209:11-14);
- PSTIF told its insured, McCall, in January 2005 that approximately $160,000.00 for remediation of the City's sewer easement contamination would be assessed against its statutory coverage limits (Tr. 174:17-19);
- Contrary to PSTIF's claim that the amount of compensation was still in dispute, Pat Vuchetich took charge of the project, put the chain of events in

motion, made sure his preferred contractor got the job, and ensured the work was completed despite knowing PSTIF never intended to reimburse the City (Tr. 192:25 to 193:9; 201:6-8);

- Witnesses from DNR and EAE testified PSTIF's conduct was consistent with its standard operation of refusing to pay for remediation plans and promising to reimburse claimants for expenses incurred in remediation efforts and then refusing to pay (Tr. 192:3-15; 238:21 to 242:20); and
- PSTIF refused and failed to reimburse the City as promised year after year, instead propounding excuse after excuse.

Despite the systematic and intentional conduct outlined above, which was PSTIF's standard mode of operation, neither Pat Vuchetich nor Carol Eighmey had been disciplined or terminated as a result of their conduct. (Tr. 208:3-8; 533:9-16; 459:18 to 460:7; 506:23 to 507:3) The first guidepost of reprehensible conduct, the most important of the three criteria, clearly weighs in favor of the jury's punitive damages award.

**B. The Ratio of Punitive Damages to Actual Damages is Not Improper**

The U.S. Supreme Court did not establish a bright line regarding the appropriate ratio of punitive damages to actual damages. *State Farm Mutual*, 538 U.S. at 425. Rather, that Court noted that when there is a relatively low award for economic damages, a larger ratio of punitive damages could be justified. *Id.* In this case, the jury awarded actual damages in the amount of $172,100.98 against all three defendants jointly and severally. Punitive damages were awarded against McCall and Fleming in the amount of

$100.00 each, and PSTIF in the amount of $8,000,000.00. Thus the ratios are as follows: McCall - .0006 to 1; Fleming - .0006 to 1; and PSTIF – 46 to 1.

The evidence presented at trial established that the full remediation would have cost over $500,000.00. This expense would have been borne by PSTIF had the City not fallen victim to PSTIF's fraud. Based on assurances by PSTIF that it would fully pay all remediation costs if the City agreed to forego complete remediation in favor of a less expensive approach, PSTIF saved over $300,000.00. Then, rather than follow through on its promise to pay for the City's costs, PSTIF stuck the City with the bill. It was only after several years, protracted litigation and hundreds of thousands of dollars in legal fees, that the City was able to obtain a judgment for the money it was promised by PSTIF. Accordingly, the magnitude of the fraud perpetrated by PSTIF is not amply illustrated in the award of actual damages alone. When the money saved by PSTIF by way of its fraud is added to the City's legal fees and other expenses, the cost of PSTIF's intentional fraudulent conduct is over $1,000,000.00. Using this total cost, the ratio of punitive damages to actual damages is less than 8 to 1.

Moreover, the jury's decision to appropriate all of the punitive damages to PSTIF was the result of a strategic decision by PSTIF. Specifically, Defendants McCall and Fleming, who were also represented by the same counsel chosen by PSTIF, presented evidence of financial hardship to the jury. PSTIF opted to remain mute regarding its financial condition and ability to pay. Rather, it stipulated to having over 78 million dollars "in the bank." (Tr. 649:22 to 650:9; Ex. 117, Ex. 127). Therefore, the jury assigned virtually all punitive damages to PSTIF. Had the punitive damages been

apportioned equally, the ratio of punitive damages to actual damages would have been 15 to 1 for all three defendants. PSTIF cannot strategically manipulate the jury to apportion all punitive damages to it and then complain the award is disproportionate.

Finally, in remitting the punitive damage award from $8,000,000 to $2,500,000, the trial court improperly relied upon the statutory punitive damage cap, even though she did not apply it directly. The trial court found "instructive" the public policy exemplified in the statute and remitted the punitive damage award to a 5 to 1 ratio when considering the full $500,000 PSTIF would have been required to pay had its fraud not been successful. (L.F. 555). As set forth above, the statutory cap on punitive damages is unconstitutional and wholly inapplicable to this case. The trial court's reliance upon it even as an instructive tool was improper. There was no justifiable basis for the remittitur ordered by the trial court. The ratio of punitive damages to actual damages is not improper, given the evidence adduced at trial and the Defendant's strategic efforts to apportion the entire punitive damage award to PSTIF. The jury's award of punitive damages should be reinstated.

### C. Similar Awards Have Been Upheld in Comparable Cases

Other Missouri cases applying the State Farm Mutual guideposts show other the ratios well in excess of a single-digit multiplier are appropriate:

- In *Grabinski v. Blue Springs Ford Sales, Inc.*, the Eighth Circuit affirmed a far greater punitive damages award against defendants in a suit under the Missouri Merchandising Practices Act. 203 F.3d 1024, 1027 (8th Cir. 2000) (applying Missouri law to a review of punitive damages). There, the

ratio of punitive damages to actual damages as affirmed by the Eighth Circuit was 99 to 1 for the wholesaler and 55 to 1 for the retailer. *Id.*

- In *Lynn v. TNT Logistics North America Inc.*, a plaintiff sued her employer for sexual harassment. 275 S.W.3d 304, 309 (Mo. Ct. App. 2008). After finding the employer was aware of the conduct and did nothing to correct it, the Missouri Court of Appeals ordered judgment for plaintiff of $3.75 million in punitive damages, a ratio of 75 to 1.
- In *Lewellen*, this Court upheld punitive damages in a ratio of 40 to 1 (and 20 to 1) against an auto dealership and its owner for violations of the Merchandising Practices Act. *Lewellen*, 2014 WL 4425202 at * 8. The defendants engaged in repeated bait-and-switch tactics and showed no remorse or effort to rectify the consequences of their unlawful practices. *Id.*
- In *Kerr v. Vatterott Educational Centers, Inc.*, Case No. WD 76903, 2014 WL 76903, (Mo. App. W.D. Aug. 26, 2014), the Court of Appeals upheld a punitive damage ratio in excess of 75 to 1 against a college for its misrepresentations to a student regarding the degree program offered. *Id.* at *9-10.

All of these ratios are comparable to and far greater than the 46 to 1 ratio in this case. In addition, the facts in *Lynn* and *Lewellen* are analogous in that PSTIF did nothing to correct its bad acts even after it was made aware that Vuchetich had rigged the bid process and misrepresented PSTIF's willingness to pay.

Where, as here, the award of actual damages is relatively low but the degree of reprehensibility of the defendants' conduct is egregious, an award of punitive damages in the amount rendered here is justifiable and not violative of PSTIF's due process rights. The jury's punitive damages award of $8,000,000.00 should not be remitted.

## CONCLUSION

WHEREFORE, for the reasons set forth herein, Appellant/Respondent City of Harrisonville respectfully requests this Court: (i) reverse the Court of Appeals' application of the statutory cap on punitive damages; and (ii) reinstate the award of punitive damages against PSTIF in the amount of $8,000,000.00 as determined by the jury.

Respectfully submitted,
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## CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 84.06 of the Missouri Rules of Civil Procedure, this Brief complies with the limitations given in Rule 84.06(b), contains 9,775 words, and is filed electronically under Supreme Court Rule 103 and Court Operating Rule 27.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via e-mail and U.S. First Class Mail, postage prepaid this 20th day of October, 2014, to:

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