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Timing Is Not on Your Side: Missouri Retroactively Limits Punitive Damages

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City of Harrisonville v. McCall Serv. Stations[1]

Kayla Meine

I. INTRODUCTION

Limitations on punitive damages have led to many constitutional challenges. While statutory restrictions on punitive damages are generally upheld as constitutional, there is limited case law regarding the application of a retroactively enacted punitive damages cap. However, the Missouri Western District Court of Appeals recently applied a punitive damages cap retroactively to a cause of action filed after the limitation was in effect, but accrued before the enactment. The court reasoned that limiting punitive damages is a procedural, rather than substantive statute; thus, the Missouri Constitutional provision prohibiting retroactivity of laws did not apply.

Timing was not on the side of the plaintiff. In fact, the plaintiff might have had better luck in one of the other states that has implemented a punitive damages cap and held that such limitations are substantive. A closer examination of the history of Missouri law suggests the distinction between substantive and procedural is not as simple as the Western District Court of Appeals made it appear. Part II of this note summarizes the facts, procedural posture, and holding of the instant case, *City of Harrisonville v. McCall Serv. Stations*. Part III explores the legal background of retroactively applying statutes, including those pertaining to punitive damages. Next, Part IV describes the majority opinion in *McCall* and examines the Western District Court of Appeal's rationale. Finally, Part V examines the modern trend among states that have implemented similar statutes limiting punitive damages and analyzes how the Western District Court of Appeal's decision differs from this trend.

[1] 2014 Mo. App. LEXIS 192 (Mo. App. W.D. Feb. 25, 2014).

II. FACTS AND HOLDING

During construction of a sewer upgrade project in the City of Harrisonville ("the City"), a contractor for the City discovered that a service station's underground storage tank system had been leaking petroleum products, contaminating the soil. [2] McCall Service Stations ("McCall") owned this underground storage tank system until 2000, when it sold the service station to Fleming Petroleum ("Fleming"). [3] The plaintiff, City of Harrisonville, brought claims for nuisance and trespass against McCall and Fleming. [4] Additionally, the City brought claims for fraudulent and negligent misrepresentation against the Missouri Petroleum Storage Tank Insurance Fund ("the Fund").[5]

The Fund, created in 1989 by the Missouri Legislature, provides insurance to service station owners for the cleanup costs associated with spills and leaks from underground petroleum storage tanks.[6] In September 1997, McCall discovered its underground gasoline storage tank system was leaking and contacted the Fund.[7] The Fund and McCall had an environmental engineer investigate the leak, and the engineer determined that the leak contaminated the soil surrounding McCall's tank system with petroleum, and that the contamination had migrated toward a nearby creek on the north side of the service station.[8] The environmental engineer notified the Department of Natural Resources and was hired by the Fund to monitor the leak.[9] Following these events, McCall sold the service station to Fleming in 2000.[10]

In 2003, the City began constructing a sewer upgrade project.[11] As part of the project, the City planned to install new sewer piping under the

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[2] City of Harrisonville v. McCall Serv. Stations, No. WD 74429, 2014 Mo. App. LEXIS 192, at *1 (Mo. App. W.D. Feb. 25, 2014).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* at *2-3.
[7] *Id*. at *2.
[8] Bob Fine was hired by the Fund to investigate and monitor the leak. *Id.* at *3.
[9] *Id.*
[10] *Id.*
[11] *Id.* at *3.

street adjacent to Fleming's service station. [12] Additionally, it planned to install a portion of piping adjacent to a nearby creek.[13] The original bid for the sewer upgrade project was with Rose-Lan Construction ("Rose-Lan") for $19,061.31.[14] During construction, Rose-Lan encountered soil that was contaminated by petroleum products.[15] The City contacted the Department of Natural Resources, which informed the City about the Fund hiring an environmental engineer to monitor the contamination in 1997.[16] Per the City's request, the Fund hired the same environmental engineer who determined that the gasoline from the service station was responsible for the soil contamination in the City's sewer easement.[17]

The City and the Fund began discussions about the best way to complete construction of the sewer upgrade project and to address the contaminated soil.[18] The City's engineer estimated a cost of more than $500,000 for the removal and replacement of contaminated soil.[19] The Fund suggested leaving the contaminated soil in place and substituting petroleum-resistant pipes as a more cost-effective approach.[20] The Fund, through Pat Vuchetich, an employee of the Fund's third-party administrator, encouraged the City to hire Midwest Remediation to install the petroleum-resistant pipe.[21] The bid was for $175,161.41.[22] Vuchetich indicated that the Fund would be responsible for payment of $135,571, which was calculated by subtracting Rose-Lan's cost of the relevant section of pipe from the cost of Midwest Remediation's work.[23]

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[12] *Id.* at *3-4.
[13] *Id.* at *4.
[14] *Id.* at *7.
[15] *Id.* at *4.
[16] The environmental engineer was Bob Fine. *Id.*
[17] *Id.*
[18] *Id.* at *4-5.
[19] *Id.* at *5.
[20] *Id.*
[21] Original bid to install the petroleum-resistant pipes was made by BV Construction for $190,226.38. However, Vuchetich decided to encourage the City to hire Midwest Remediation instead. *Id.* at *5-6.
[22] *Id.* at *6.
[23] *Id.*

On April 15, 2004, the City held a meeting with all parties.[24] During this meeting, Vuchetich expressed concerns that Rose-Lan's initial bid was too low. [25] Rose-Lan subsequently revised the bid upward to $25,138.41.[26] This revised bid would effectively reduce the amount the Fund would be responsible for as contaminated-related costs because the Fund was paying the City for the costs of Midwest Remediation's work minus the cost of Rose-Lan's bid for constructing the relevant section of piping.[27] The City administrator, City engineer, and the Rose-Lan representative "left the meeting with the understanding that the Fund wanted the City to hire Midwest Remediation for the project." [28] Further, they understood that "the Fund would reimburse the City for Midwest Remediation's costs, less the amount that the City would otherwise have paid Rose-Lan for the affected portion of the sewer project."[29]

Various discussions regarding payment of the project between the City and the Fund occurred in the following months. [30] On at least two occasions, Vuchetich offered to settle the Fund's liability by paying $50,000 to the City.[31] However, after the City authorized Rose-Lan to subcontract with Midwest Remediation, the City's attorney sent a letter to Vuchetich, "stating that the City was going forward in reliance on his promise that the Fund would pay the full amount of Midwest Remediation's costs."[32] Ultimately, the Fund did not reimburse the City for Midwest Remediation's work.[33]

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[24] All parties included: Pat Vuchetich, representing the Fund; Dianna Wright, the City administrator; Ted Martin, the City engineer; Steve Mauer, the City's attorney; Shaun Thomas, representing Midwest Remediation; and Willman Rextroat, representing Rose-Lan Construction. *Id.* at *7.
[25] *Id*.
[26] The original bid for the sewer upgrade project was $19,061.31. *Id*.
[27] *Id*.
[28] *Id.*
[29] *Id.*
[30] *Id*. at *7-8.
[31] *Id*. at *8.
[32] Letter was written on August 4, 2004. The City's attorney also made a demand for payment. *Id.*
[33] *Id.*

In November 2005, the City filed suit against the Fund for fraudulent and negligent misrepresentation.[34] It also filed suit against McCall and Fleming, the former and present service station owners, for nuisance and trespass.[35] The City sought compensatory and punitive damages against all defendants.[36] During a jury trial, the circuit court granted the City's motion for a directed verdict on liability regarding the nuisance and trespass claims against the service station owners.[37]

The jury returned a verdict in favor of the City on all claims and awarded the City a total of $172,100.98 in compensatory damages against McCall, Fleming, and the Fund.[38] Further, the jury awarded punitive damages of $100 against McCall, $100 against Fleming, and $8,000,000 against the Fund.[39] The circuit court entered judgment accordingly.[40]

McCall, Fleming, and the Fund each filed post-trial motions.[41] Among other things, the Fund argued that the punitive damages award exceeded the cap on punitive damages found in MO. REV. STAT. § 510.265.1(2), which limited punitive damages to "[f]ive times the net amount of the judgment awarded to the plaintiff against the defendant."[42] The Fund also argued that the punitive damages award violated the due process requirements of the United States and Missouri Constitutions.[43] The trial court remitted the punitive damages award to $2,500,000, dismissing the § 510.265.1(2) argument because the City's cause of action occurred before 2005, when the cap on punitive damages was enacted.[44] The trial court denied all remaining post-trial motions.[45] McCall, Fleming, and the Fund

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at *8-9.
[38] *Id.* at *9.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] "No award of punitive damages against any defendant shall exceed the greater of: (1) Five hundred thousand dollars; or (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant." MO. REV. STAT. § 510.265.1 (2000); *see also McCall*, 2014 Mo. App. LEXIS 192, at *9.
[43] *Id*.
[44] *Id.*
[45] *Id.*

appealed.[46] The City cross-appealed the trial court's remitter of punitive damages.[47]

McCall and Fleming filed a consolidated brief and did not challenge the trial court's finding of liability, but instead raised three other points on appeal.[48] In their first point, McCall and Fleming argued that the trial court erred in submitting the damages instructions on the City's nuisance and trespass claims.[49] The appellate court denied this argument.[50] The appellate court also denied McCall and Fleming's second point, holding that the trial court did not abuse its discretion by failing to grant their motions for a directed verdict and for judgment notwithstanding the verdict.[51] Similarly, the appellate court denied McCall and Fleming's third point, holding that the trial court did not err in failing to order remittitur of the jury award of compensatory damages.[52]

The Fund raised an additional seven points on appeal.[53] The appellate court denied the first six points, agreeing only with the Fund's seventh and final point on appeal that the trial court erred in limiting punitive damages in accordance with § 510.265.1(2).[54] The appellate court denied the Fund's first

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[46] *Id.*
[47] *Id.*
[48] *McCall*, 2014 Mo. App. LEXIS 192, at *10.
[49] *Id.*
[50] *Id.* at *21. The appellate court held that the trial court's damages instruction did not misstate Missouri trespass law because "substantive trespass law authorizes the recovery of consequential damages proximately caused by a trespass." *Id.* at *15. The court held further that the reference to consequential damages was sufficiently definite "to inform he jury of the legal standard [the jury] was required to apply" and thus did not constitute a prohibited "roving commission." *Id.* at *19.
[51] *Id.* at *21. The testimony of Shaun Thomas, former employee of Midwest Remediation, relating to the contamination-related costs did not prevent the jury from crediting the City's evidence relating to the contamination-related costs; thus, the City made a "submissible case" and defendants were not entitled to a directed verdict nor a judgment notwithstanding the verdict. *Id.* at *21, *24, *57.
[52] *Id.* at *27. McCall and Fleming argued that the compensatory damages should be remitted in accordance with Shaun Thomas's testimony regarding the contamination-related costs, but the appellate court found once again that Thomas's testimony did not prevent the jury from awarding the City the greater amount sought. *Id.* at *28.
[53] *Id.* at *28-*57.
[54] *Id.* at *31-*57.

point on appeal because when "the Fund failed to move for a directed verdict during trial on the basis asserted in its first point, it did not preserve that issue as a basis for [judgment notwithstanding the verdict], or for appellate review."[55] The Fund's second point was also denied, holding that the trial court did not err in denying the Fund's motion for a directed verdict because the City presented substantial evidence to establish that the City relied on Vuchetich's representations.[56] The appellate court also held that § 319.131.5 did not prevent a judgment against the Fund for compensatory and punitive damages "based on its own fraud or negligent misrepresentations," thus denying the Fund's third point on appeal.[57] In its fourth point, the Fund argued, and the appellate court denied, that the statements made by Vuchetich on April 15, 2004, were too vague and uncertain to support a causes of action for fraudulent or negligent misrepresentation, and the instructions given to the jury on those claims were impermissible roving commissions.[58] The appellate court also denied the Fund's fifth point, holding that the trial court did not abuse its discretion by excluding evidence of settlement discussions following the April 15, 2004 meeting between the City and the Fund.[59] The appellate court's final denial was of the Fund's sixth

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[55] *Id.* at *30-*31. The Fund argued in its first point that the City "could not have actually or justifiably relied on any statements made by Vuchetich at the April 15, 2004 meeting that the Fund would indemnify the City for the entirety of Midwest Remediation's net costs" because such reliance was prevented by Vuchetich's later letter offering to settle the Fund's liability for $50,000. *Id.* at *29.

[56] *Id.* at *34-*35. The appellate court reasoned that the City's submissible case included evidence that the City relied on the Fund's representations when it decided to "hire Midwest Remediation…without a competitive bidding process; and to accept the less costly alternative of leaving much of the contaminated soil in place, rather than excavating all of it." *Id.* at *34.

[57] *Id.* at *39. "The fund shall not compensate . . . any third party . . . for any loss or damages of an intangible nature, including . . . punitive damages." Mo. Rev. Stat. § 319.131.5 (2000).

[58] *Id.* at *40. Evidence that the City Administrator, City Engineer, and Rose-Lan representative all took Vuchetich's statements at the meeting to mean the Fund would pay for all costs incurred by the City if it hired Midwest Remediation, less what Rose-Lan would have charged made the statements not too vague or uncertain, thus supporting a cause of action for fraudulent and negligent misrepresentation. *Id*. at *40-*41. Additionally, the instructions used in the verdict director was not misleading in the context of the evidence and thus did not involve a roving commission. *Id.*

[59] *Id.* at *42-*43. The appellate court found that the exclusion of evidence did not prejudice the Fund because the excluded evidence was "merely additional evidence of the same kind bearing upon the same point." *Id.* at *47-*49 (internal citations omitted).

point, which argued that the trial court erred in submitting punitive damages to the jury because there was insufficient evidence of malicious conduct.[60]

However, the Missouri Western District Court of Appeals agreed with the Fund's argument that the trial court erred "by entering judgment against [the Fund] for punitive damages of $2,500,000, because under § 510.265.1(2), punitive damages are limited to . . . five times the net amount of the damages awarded to the plaintiff."[61] The court reasoned that § 510.265.1 applied in this case because the legislature specified the cap on punitive damages would apply to "all causes of action *filed* after August 28, 2005."[62] The City filed its lawsuit in November of 2005; therefore, the punitive damages cap is applicable.[63]

The Western District Court of Appeals thereafter affirmed the trial court's judgment, but modified the judgment pursuant to Rule 84.14[64] to reduce the punitive damages awarded against the Fund to $860,504.90, rejecting the trial court's refusal to apply § 510.265.1(2).[65] Thus, when a statute limiting punitive damages has an enactment date and a plaintiff files a cause of action after that enactment date, the statute is applicable even if the harm relating to the cause of action accrued prior to the day of enactment.

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[60] *Id.* at *49-*50. The appellate court held the City had a submissible case for punitive damages of the evidence because the evidence involved Vuchetich's encouragement to hire Midwest Remediation, his advice that Midwest Remediation's bid was reasonable, his statements that the Fund would pay, the Fund's refusal to pay because remedial costs were too high, the Fund's continuance on the basis that it was not responsible for contamination north of the creek, and the unreasonable delay caused by the Fund. *Id.* at *49-*56.

[61] *Id.* at *56.

[62] Mo. Rev. Stat. § 538.305 (2000) (emphasis added); *id.* at *57.

[63] *McCall*, 2014 Mo. App. LEXIS 192, at *57.

[64] "The appellate court shall award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, in whole or in part, or give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case." MO. SUP. CT. R. 84.14.

[65] *McCall*, 2014 Mo. App. LEXIS 192, at *70-*71.

III. LEGAL BACKGROUND

The Missouri Constitution provides "[t]hat no ex post facto law, no law impairing the obligation of contract, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."[66] Therefore, the general rule is that statutes are not applied retroactively.[67] The two exceptions that would for retroactive application include: "(1) where the legislature shows an intent that it be applied retroactive[ly], and (2) where the statute is *procedural* only and does not affect any *substantive* rights of the parties."[68] Therefore, the law is settled on the fact that the legislature cannot change the "substantive" law for a category of damages after a cause of action has accrued.[69] A substantive law "relates to rights and duties giving rise to the cause of action, while procedural statutes supply the machinery used to effect the suit."[70] Stated another way, "[s]ubstantive laws fix and declare primary rights and remedies of individuals concerning their person or property, while remedial statutes affect only the remedy provided, including laws that substitute a new or more appropriate remedy for the enforcement of an existing right."[71]

However, regarding procedural provisions, the law is quite clear that "[n]o person can claim a vested right in any particular mode of procedure . . . and where a statute deals only with procedure it applies to all actions, including those pending or filed in the future."[72] The Fourteenth Amendment only guarantees a party, "the preservation of his substantial right to redress by some effective procedure."[73] Thus, the U.S. Constitution does not prevent a procedural or remedial provision from being applied retroactively.[74]

The Missouri Supreme Court, in *Vaughan v. Taft Broadcasting, Co.*, expressly stated that under Missouri law, "punitive damages are remedial and

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[66] MO. CONST. ART. I, § 13.
[67] *In re* Estate of Wilkinson, 843 S.W.2d 377, 382 (Mo. App. E.D. 1992).
[68] *Id*. (emphasis added).
[69] Klotz v. St. Anthony's Med. Ctr., 311 S.W.3d 752, 760 (Mo. 2010).
[70] Patrick v. Clark Oil & Ref. Co., 965 S.W.2d 414, 416 (Mo. App. S.D. 1998) (quoting Stark v. Missouri State Treasurer, 954 S.W.2d 645 (Mo. App. 1997)..
[71] Files v. Wetterau, Inc., 998 S.W.2d 95, 97 (Mo. App. E.D. 1999).
[72] Scheidegger v. Greene, 451 S.W.2d 135, 137 (Mo. 1970).
[73] Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933).
[74] Vaughan v. Taft Broadcasting Co., 708 S.W.2d 656, 660 (Mo. 1986).

a plaintiff has no vested right to such damages prior to the entry of judgment."[75] Further, "the purpose of punitive damages is to inflict punishment and to serve as an example and deterrent to similar conduct."[76]

Rather than to compensate the victim, punitive damages follow a public policy rationale, which is that punitive damages should be awarded in some cases in the interest of society.[77] Thus, an act barring or limiting punitive damages "cannot be said to deny any constitutional right."[78] Instead, punitive damages are awarded wholly within the discretion of the trier of fact and the remedial nature of punitive damages make them never allowable as a matter of right.[79]

However, punitive damages can also be labeled as substantive. In another Missouri Supreme Court decision, *Hess v. Chase Manhattan Bank, USA, N.A.*, the court did not allow for a punitive damages statute to be applied retroactively because it affected a substantive right.[80] The court in *Hess* stated that because the Missouri Constitution prohibits laws that are retrospective in operation, the Constitution prohibits a law "if it takes away or impairs vested or substantial rights acquired under existing laws or imposes new obligations, duties, or disabilities with respect to past transactions."[81] Typically, a law is described as either procedural or substantive with "substantive law relat[ing] to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit."[82] Procedural and remedial statutes may be applied retroactively, while laws that provide for new penalties are substantive and cannot be applied retroactively.[83] However, it is possible for the statute to be read in both a remedial and substantive way.[84] "When a statute is . . .

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[75] *Id.*
[76] *Id.*
[77] Smith v. Hill, 147 N.E.2d 321, 327 (Ill. 1958).
[78] *Id.*
[79] *Vaughan*, 708 S.W.2d at 660.
[80] Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 769-771 (Mo. banc 2007).
[81] *Id*. at 769.
[82] *Id*. (internal quotations omitted).
[83] *Id.*
[84] *Id.*

remedial in one part while penal in another, it should be considered a remedial statute when enforcement of the remedy is sought" and applied retroactively, but considered "penal when enforcement of the penalty is sought" and applied prospectively.[85] Thus, while punitive damages are remedial in nature to the plaintiff, a statute authorizing the award of punitive damages imposes a new obligation on the defendant, creating a substantive issue and, therefore, does not allow for retrospective application.[86]

IV. INSTANT DECISION

In the instant case, the Missouri Western District Court of Appeals found that the trial court erred by refusing to apply MO. REV. STAT. § 510.265.1(2).[87] Therefore, because § 510.265.1(2) should have been applied, the punitive damages should have been limited to five times the net amount of the damages awarded to the plaintiff.[88]

The court noted that the legislature specified that § 510.265.1(2)'s cap on punitive damages would apply to "all causes of action *filed* after August 28, 2005."[89] After the punitive damages cap became effective, the City filed its lawsuit in November of 2005. As such, the court is required to apply the punitive damages cap.[90]

The court also noted that although "it is well established the Missouri Constitution prohibits laws that are retrospective in operation," the Missouri Supreme Court has not characterized a plaintiff's right to punitive damages as "substantive."[91] The court relied on precedent that stated, "[U]nder Missouri law, punitive damages are remedial and a plaintiff has no vested

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[85] *Id*. (internal quotations omitted).
[86] *Id.* at 771-72.
[87] City of Harrisonville v. McCall Serv. Stations, No. WD 74429, 2014 Mo. App. LEXIS 192, at *2 (Mo. App. W.D. Feb. 25, 2014).
[88] *Id.*
[89] MO. REV. STAT. § 538.305 (2000). Sections 510.265 and 538.305 were both enacted as part of H.B. 292, 98th Gen. Assemb., Reg. and Veto Sess. (Mo. 2000). *See* 2005 Mo. Laws. 641, 647, 655. *McCall*, 2014 Mo. App. LEXIS 192, at *57 (emphasis added).
[90] *Id.* at *57.
[91] *Id.* at *58-60 (quoting Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752, 759-760 (Mo. 2010)); *See* Mo Const. art. I, sec. 13.

right to such damages prior to the entry of judgment."[92] Further, according to *Vaughan*, "Punitive damages are never allowable as a matter of right and their award lies wholly within the discretion of the trier of fact."[93] The court then concluded that punitive damages are remedial and in this case "the City had no vested right to punitive damages at the time the 2005 statute went into effect."[94]

Therefore, the well-established rule that the Missouri Constitution prohibits laws that are retrospective does not prevent § 510.265.1(2) from being applied in this case because the Constitutional provision does not apply to a statute dealing with only a remedial measure.[95] The court thus reduced the punitive damages awarded against the Fund to be in compliance with § 510.265.1(2), reducing the amount awarded to the City to $860,504.90.[96]

V. COMMENT

Section 538.300 states that all provisions of the new tort reform act,[97] including § 510.265.1's cap on punitive damages, "applies to all actions *filed* after August 28, 2005."[98] However, "this provision makes no distinction for cases in which the cause of action *accrued* prior to August 28."[99] In this case, the constitutional challenge against retroactive legislation arose because the

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[92] City of Harrisonville v. McCall Serv. Stations, No. WD 74429, 2014 Mo. App. LEXIS 192, at *61 (Mo. App. W.D. Feb. 25, 2014) (quoting *Vaughan*, 708 S.W.2d at 660-661).
[93] *Id.* (quoting *Vaughan*, 708 S.W.2d at 660).
[94] *McCall*, 2014 Mo. App. LEXIS 192, at *64-65.
[95] *Id.* The City did argue that the statute violates its right to trial by jury and is therefore unconstitutional. *Id.* at *65. However, the City failed to make this argument at any time in the trial court and thus "where a party first challenges the constitutionality of a statute on appeal, the issue has not been preserved for appellate review." *Id.* at *67-69 (internal quotations omitted).
[96] *Id.* at *70-71.
[97] The Tort Reform Act included sections 510.265 and 538.305, which were both enacted as part of H.B. 393. *See*
H.B. 393, 2005 93rd Gen. Assemb., First Reg. Sess.; *McCall*, 2014 Mo. App. LEXIS 192, at *3 and *57.
[98] Paul J. Passanante & Dawn M. Mefford, *Anticipated Constitutional Challenges to Tort Reform*, 62 J. MO. B. 206, 211 (2006); MO. ANN. STAT. § 538.305 (West 2015) (emphasis added).
[99] Paul J. Passanante & Dawn M. Mefford, *Anticipated Constitutional Challenges to Tort Reform*, 62 J. MO. B. 206, 211 (2006).

cause of action accrued prior to August 28, 2005, but the City did not file an action until November of 2005, after the punitive damages limitation cap became effective.[100]

The Missouri Western District Court of Appeals considered itself bound to follow the specific holding of *Vaughan*, "despite more general statements in other cases which arguably point in the different direction."[101]Although *Vaughan* specifically addressed "whether a statute limiting the recovery of punitive damages may be retrospectively applied to a cause of action *accruing* before the statute's enactment," the Missouri Supreme Court's emphasis on punitive damages being procedural or remedial in nature does not agree with earlier Missouri Supreme Court statements.[102] In fact, Missouri courts are generally reluctant to retroactively apply newly enacted legislation.[103]

Specifically, the Missouri Supreme Court has asserted that "[m]erely to label certain consequences as substantive and others as procedural" is not decisive of the retrospectivity question.[104] Missouri law has not clearly distinguished procedural rights from substantive rights.[105] The court has instead stated that the distinction between procedural and substantive law "has frequently proved elusive."[106]

Rather than merely labeling consequences as substantive or procedural, the court suggests that in order to analyze whether or not retroactivity exists, the court should be guided by the principle "than an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to different set of effects *which alter* the rights and *liabilities* of the parties."[107]

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[100] *McCall*, 2014 Mo. App. LEXIS 192, at *57.
[101] *Id.* at *64 & n.10.
[102] *Id.* (emphasis added).
[103] Cook v. Newman, 142 S.W.3d 880, 893 (Mo. App. W.D. 2004).
[104] *McCall*, 2014 Mo. App. LEXIS 192, at *63-64 (quoting State ex rel. St. Louis-San Francisco Railway Co. v. Buder, 515 S.W.2d 409, 411 (Mo. banc 1974)).
[105] PASSANANTE & MEFFORD, *supra* note 98, at 213.
[106] State *ex. rel.* St. Louis-San Francisco Railway Co. v. Buder, 515 S.W.2d 409, 410 (Mo. banc 1974).
[107] *McCall*, 2014 Mo. App. LEXIS 192, at *64 and *3 (quoting *Buder*, 515 S.W.2d at 411) (emphasis added).

Further within a court's analysis, the "notions of justice and fair play in a particular case are always germane."[108] This language seems to blur the distinction between substantive and procedural law even more.

The notion that punitive damages are a procedural right was conflicted in *Hess*, which held that a statute authorizing the award of punitive damages created a substantive issue and could not be applied retroactively.[109] Notably, the decision in *Hess* is distinguishable from the instant case because *Hess* involved a new statute that authorized the imposition of punitive damages for the first time, whereas in this case punitive damages were simply limited.[110] However, other states have disregarded the distinction between the imposition of punitive damages and the limitations of such damages.

The Supreme Court of Oklahoma, in *Majors v. Good,* held that limitations on punitive damages constitute changes in substantive rights.[111] In a case previous to *Majors*, the Oklahoma Supreme Court held "statutory *increases* in damage limitations are changes in substantive rights and not mere remedial changes."[112] The *Majors* court thus reasoned that "[o]f no less effect are the statutory limitations on all recoverable damages."[113] Concluding that the amendment limiting punitive damages should be applied prospectively only because "[l]imitations on damages, whether actual or punitive, can constitute changes in substantive rights."[114]

The Supreme Court of Florida also held that limitations on punitive damages constitute changes in substantive rights.[115] In *Alamo Rent-A-Car v. Mancusi*, the Florida court considered the issue of retroactivity regarding a cause of action that *accrued* before the enactment of a statute limiting

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[108] *Buder*, 515 S.W.2d at 411.
[109] Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 769-772 (Mo. banc 2007).
[110] *McCall*, 2014 Mo. App. LEXIS 192, at *62-63 and *3.
[111] Majors v. Good, 832 P.2d 420, 422 (Okla. 1992).
[112] *Id.* (quoting Thomas v. Cumberland Operating Co., 569 P.2d 974, 976 (Okla. 1977)) (emphasis added).
[113] *Id.*
[114] *Id.*
[115] Alamo Rent-A-Car v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994).

punitive damages but was *filed* after the statute was in place.[116] The court ultimately found that a punitive damages cap did not apply retroactively to a cause of action even though the cause of action was filed after the effective date of the cap.[117] Florida's punitive damages limitation statute, section 768.73(1)(a), was enacted by the legislature in 1986 and "applies only to causes of action *arising* on or after July 1, 1986, and does not apply to any cause of action arising before that date."[118] In *Alamo*, the cause of action arose in September 1986.[119] However, *Alamo* involved misconduct in commercial transactions, and the punitive damages cap did not include "misconduct in commercial transactions" language when it was first enacted.[120] Instead, an amendment was added to include such misconduct, but the amendment did not become effective until October 1, 1987.[121] One day after this amendment became effective; the plaintiff filed the cause of action.[122]

The Florida Supreme Court examined whether the amendment was one of substantive or procedural law in order to determine whether the amendment applied to the cause of action.[123] In its analysis, the court laid out the differences between substantive and procedural law[124] by stating that "substantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights."[125] Following this rationale, the court found that the punitive damages cap is substantive rather than procedural, thus the amendment to the punitive damages cap did not apply retroactively.[126] The court further stated, "punitive damages are assessed not as compensation to an injured party but as punishment against the wrongdoer."[127] Consequently, the court determined that the establishment or elimination of a punitive damages claim "is clearly a

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[116] *Id.*
[117] *Id.*
[118] *Id.* (emphasis added) (quoting Fla. Sta. § 768.71(2)).
[119] *Id.*
[120] *Id.* (quoting Fla. Stat. §768.73(1)(a) (1987)).
[121] *Id.*
[122] Plaintiff filed action on October 2, 1987. *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*

substantive, rather than procedural, decision of the legislature because such a decision does, in fact, grant or eliminate a right or entitlement."[128]

Ohio case law also supports applying limitations on punitive damages only prospectively.[129] In a case in the Ohio Court of Appeals, the court held that it could not apply a punitive damages cap to "causes of action that *arose* before the statute's effective date even if some of the conduct giving rise to the cause of action occurred after the effective date."[130] In *Blair*, the cause of action accrued starting in 2001.[131] The punitive damages cap in R.C. 2315.21(D) became effective on April 7, 2005.[132] The lawsuit was filed in September 2005.[133] Therefore, the court found "the current version of R.C. 2315.21 could not have been applied retroactively to that conduct."[134] Thus, the Ohio court stressed the importance of the timing of the conduct, which warranted claims for punitive damages in relation to the enactment of punitive damages cap, rather than focusing on when the cause of action was filed.

The Supreme Court of Alabama also examined when the cause of action accrued in relation to the application of the punitive damages cap.[135] Alabama's cap on punitive damages under Alabama Code 1975 § 6-11-20 specifically provides that the cap "does not apply to a plaintiff whose cause of action accrued prior to the date the act became effective — June 11, 1987."[136] Thus, the court found that because the plaintiff's "cause of action *accrued* prior to that date . . . her recovery is not limited by this cap."[137]

Georgia's punitive damages limitation also provides language that determines applicability by when the cause of action accrued, rather than when it was filed. Section 51-12-5.1(h) provides, "[t]his Code section shall

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[128] *Id.*
[129] Blair v. McDonagh, 894 N.E.2d 377, 391 (Ohio Ct. App. 2008).
[130] *Id*. (emphasis added).
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] Fuller v. Preferred Risk Life Ins. Co., 577 So. 2d 878, 883 (Ala. 1991).
[136] *Id.*
[137] *Id.* (emphasis added).

apply only to causes of action *arising* on or after April 14, 1997."[138] In *Scriver v. Lister*, the Georgia Court of Appeals found no error in the trial court's award of punitive damages when the trial court refused to retroactively apply a cap on punitive damages.[139] The court upheld the trial court's finding that "the cause of action in this case *arose* from [the defendant's] actions in 1985 and 1986; therefore, this case is not subject to the current . . . cap on punitive damage awards."[140]

The Supreme Court of Montana is yet another state that has held limitations on punitive damages does not apply retroactively.[141] In *Murphy Homes, Inc. v. Mueller*, all of the relevant events in the case, including the filing of the lawsuit, took place before the amendment limiting punitive damages was in effect.[142] However, the timing of the filing still did not seem to affect the court's reasoning. Instead, the court simply looked to Montana law, which provides that "[n]o law contained in any of the statutes of Montana is retroactive unless expressly so declared."[143] Thus, the court held the statutory limitation on punitive damages did not apply.[144]

A number of states have implemented statutes similar to MO. REV. STAT. § 510.265.1, limiting the amount of recovery for punitive damages.[145] However, within these states there is limited case law regarding the issue of retroactively applying such limitations on causes of action that were filed after the enactment date of the punitive damages cap but accrued prior to the date of enactment.

Under the Missouri Constitution, it is a general rule that statutes are not applied retroactively.[146] However, the Missouri Western District Court of

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[138] O.C.G.A. § 51-12-5.1 (2010).
[139] Scriver v. Lister, 510 S.E.2d 59, 62-3 (Ga. Ct. App. 1998).
[140] *Id*.
[141] Murphy Homes, Inc. v. Muller, 162 P.3d 106, 120 (Mont. 2007).
[142] *Id*.
[143] *Id*. (quoting § 1-2-109, MCA).
[144] *Murphy Homes, Inc.*, 162 P.3d at 120.
[145] These states include: Alabama, Alaska, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Montana, Nevada, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. JOHN J. KIRCHER & CHRISTINE M. WISEMAN, *Limitations on Recovery—Limiting the Dollar Amount*, Punitive Damages: Law and Prac. 2d § 21:17 (2015 ed.).
[146] In re Estate of Wilkinson, 843 S.W.2d 377 (Mo. Ct. App. 1992).

Appeals in this case followed the reasoning of *Vaughan*, allowing for the statute limiting punitive damages to be applied retroactively.[147] The court merely labeled limitations of punitive damages as remedial and determined the City had no vested right to such damages prior to the entry of judgment,[148] even though the Missouri Supreme Court asserted that merely labeling consequences is not decisive of retrospectivity.[149] The Western District Court of Appeals seemed to ignore the principle that "an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not . . . be subject to different set of effects *which alter* the rights and *liabilities* of the parties."[150] Here, the punitive damages cap altered the liability of the Fund.

Additionally, in *Vaughan*, the Missouri Supreme Court stated punitive damages are awarded wholly within the discretion of the trier of fact.[151] Here, the trier of fact acted within its discretion and gave a punitive damages award to the City. However, this award was retroactively limited by the legislature, simply because the City *filed* their claim after the statute was enacted even though the harm relating to the cause of action *accrued* prior to that date. This seems counterintuitive to the "notions of justice and fair play." Missouri has blurred the distinction between substantive and procedural law by this language and by its holding in *Hess*.

In *Majors v. Good*, the Supreme Court of Oklahoma held similarly to *Hess*, finding that the increases in damage limitations are changes in substantive rights and not mere remedial changes.[152] However, instead of attempting to make a distinction between increases and limitations on punitive damages or reading the statute in such a way that it is both remedial and substantive, Oklahoma held all limitations on damages, whether actual or punitive, are substantive and should only be applied prospectively.[153]

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[147] City of Harrisonville v. McCall Serv. Stations, 2014 Mo. App. LEXIS 192, at *61 (Mo. App. W.D. Feb. 25, 2014).
[148] *Id*.
[149] *Id.* at 63-64, n.10 (quoting Buder, 515 S.W.2d at 411) (emphasis added).
[150] *Id*.
[151] Vaughan v. Taft Broadcasting Co., 708 S.W.2d 656, 660 (Mo. 1986).
[152] Majors v. Good, 832 P.2d 420 (Okla. 1992).
[153] *Id*.

The Supreme Court of Florida, like the Supreme Court of Missouri, also examined whether a law is substantive or procedural in order to determine whether the law applied to the cause of action. The Florida Supreme Court stated the difference is that "substantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights."[154] The Missouri Supreme Court stated the difference is that a substantive law "relates to rights and duties giving rise to the cause of action, while procedural statutes supply the machinery used to effect the suit."[155] Both courts use essentially the exact same language when describing the difference between substantive and procedural law. Further, the Florida Supreme Court stated "punitive damages are assessed not as compensation to an injured party but as punishment against the wrongdoer."[156] The Missouri Supreme Court stated "the purpose of punitive damages is to inflict punishment and to serve as an example and deterrent to similar conduct."[157] Like in *Alamo,* where the punitive damages limitation statue affected a substantive law and where the plaintiff filed suit after the limitation was enacted, Missouri's punitive damages limitation affected a substantive law. Therefore, this limitation should not be applied retroactively, regardless of the fact that the City filed after the statute's enactment date.[158]

Like in the Ohio case, *Blair v. McDonagh*, where the cause of action accrued before the statute's effective date, but was filed after the enactment of the statute, here the cause of action against the Fund accrued before the statute's effective date.[159] The Fund made fraudulent and negligent misrepresentations to the City during the negotiations in which Vuchetich, representing the Fund, convinced the City to leave the contaminated soil in place and substitute petroleum-resistant piping. These misrepresentations continued and were clearly evidenced by the testimony of individuals at the April 15, 2004 meeting. Further, on August 4, 2004, the City's attorney sent a letter to Vuchetich stating that the City was going forward in reliance on his promise that the Fund would pay the full amount of Midwest Remediation's costs, and the Fund still did not reimburse the City for Midwest

[154] Alamo Rent-A-Car v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994).
[155] Patrick v. Clark Oil & Ref. Co., 965 S.W.2d 414, 416 (Mo. Ct. App. 1998).
[156] *Alamo Rent-A-Car*, 632 So. 2d at 1358.
[157] Vaughan v. Taft Broadcasting Co., 708 S.W.2d 656, 660 (Mo. 1986).
[158] *See Alamo Rent-A-Car*, 632 So. 2d 1352.
[159] *See* Blair v. McDonagh, 894 N.E.2d 377 (Ohio Ct. App. 2008).

Remediation's work. Although the City did not file this action until September of 2015, the cause of action still *accrued* before the effective date of the statute and therefore "could not have applied retroactively to that conduct."[160]

Further, in both Alabama and Georgia, the punitive damages cap's application is determined by when the cause of action *accrued* rather than was filed.[161] Like the Georgia Court of Appeals, the court here should have found no error in the trial court's award of punitive damages when the trial court refused to retroactively apply the punitive damages cap.

VI. CONCLUSION

Retroactively applying the statutory cap on punitive damages, imposed by MO. REV. STAT. § 510.265, raises the issue of whether this application violates the Missouri Constitution. In *City of Harrisonville v. McCall Serv. Stations*, the Missouri Western District Court of Appeals allowed for retroactive application because it deemed the statutory cap on punitive damages as a procedural issue and not one of substantive law. With this decision, Missouri follows some historical decisions while seeming to go against others. Further, Missouri departs from rulings of other states that apply statutory caps on punitive damages prospectively. The Missouri Supreme Court recently ordered the cause transferred on September 30, 2014, so it remains to be seen if Missouri will take the side of the defendants and continue to protect defendants by retroactively applying limitations on punitive damages.

[160] *Id*. at 282.
[161] Fuller v. Preferred Risk Life Ins. Co., 577 So. 2d 878, 883 (Ala. 1991); Scriver v. Lister, 510 S.E.2d 59, 62 (Ga. Ct. App. 1998).