

**IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT**

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<b>PAUL ULLRICH,</b>	)	
	)	
<b>Appellant/Plaintiff,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>CADCO, INC., d/b/a IMPERIAL HOMES, INC., BANKERS NATIONAL INCORPORATED, CORT ANTHONY DIETZ,</b>	)	<b>Appeal #ED89395</b>
	)	
<b>Respondents/Defendants,</b>	)	
	)	
<b>and</b>	)	
	)	
<b>WILLIAM C. JACKSON,</b>	)	
	)	
<b>Respondent/Third Party Defendant.</b>	)	

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**ON APPEAL FROM THE CIRCUIT COURT  
OF JEFFERSON COUNTY  
HONORABLE TIMOTHY J. PATTERSON, PRESIDING**

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**BRIEF OF APPELLANT PAUL ULLRICH**

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a Judgment entered by Judge Timothy J. Patterson of the Jefferson County Circuit Court (the “trial court”) on disputes over the sale of a modular home. (L.F. 86-95) The trial court awarded Appellant/Plaintiff Paul Ullrich (“Ullrich”) compensatory damages of \$15,686.50 on his breach of contract claim. (L.F. 94) But the trial court ruled in favor of Respondents/Defendants Cadco, Inc.(“Cadco”), Bankers National, Inc. (“Bankers National”) and Cort Anthony Dietz (“Dietz”)<sup>1</sup> on claims for punitive damages, fraud, violations of the Missouri Merchandising Practices Act and to pierce that corporate veil. (L.F. 94) The trial court ruled in favor of Respondent/Third Party Defendant William C. Jackson (“Jackson”) on a claim against him. (L.F. 94) The Judgment was entered November 7, 2006. (L.F. 94) On December 6, 2006, Ullrich filed a motion for a new trial. (L.F. 96-99) Because the trial court never ruled on the motion, it was deemed denied after 90 days under Rule 78.06. Ullrich filed his notice of appeal on March 2, 2007. (L.F. 101-105) This case does not involve the validity of a statute or constitutional provision, nor does it involve the construction of revenue laws or title to any state office. Therefore, the grounds for conferring exclusive jurisdiction in the Missouri Supreme Court do not apply and jurisdiction of this Court is properly invoked pursuant to Article 5, §3 of the Missouri Constitution.

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<sup>1</sup> Cadco and Bankers National are referred to collectively in this brief by their shared name, “Imperial Homes.” (Tr. 246)

## **STATEMENT OF FACTS**

### **A. Nature of the Case**

This is an appeal from the Judgment entered by the trial court on disputes over the sale of a modular home. The trial court awarded Ullrich compensatory damages of \$15,686.50 on his breach of contract claim, but denied Ulrich's claims for consequential damages. (L.F. 90, 94) The trial court ruled in favor of Imperial Homes on Ullrich's claims for punitive damages, fraud, violations of the Merchandising Practices Act, and in favor of Dietz on a claim to pierce the corporate veil. (L.F. 94)

Ullrich raises six points in his appeal. Ullrich charges that the trial court erred (1) in rejecting Ullrich's Missouri Merchandising Practices Act claim based on the pleadings and the evidence, (2) in ruling that the MPA claim was barred by the five-year statute of limitations under §516.120<sup>2</sup>; (3) in rejecting Ullrich claim for attorney's fees under the MPA based on a purported insufficiency of evidence; (4) in limiting Ullrich to compensatory damages of only \$15,686.50; (5) in improperly admitting into evidence settlement offers presented by Imperial Homes to Ullrich in February, 2000; and (6) in refusing to allow Ullrich to introduce into evidence a prior judgment against Imperial Homes for fraud.

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<sup>2</sup> Because the original closing date for the sale of the modular home occurred in 1999, all statutory references are to RSMo (1994).

## **B. Procedural History**

In November, 2000, Ullrich commenced this action by filing a petition against Cadco, d/b/a Imperial Homes, Inc. (Supp. L.F. 121) In his original petition, Ullrich was asking for specific performance of Cadco's duties as a general contractor to do site construction work for the modular home purchased by Ullrich. In the alternative, Ullrich requested damages for breach of the contract. (Supp. L.F. 121-126) The original petition was dismissed, in part, but Ullrich amended his petition to seek specific performance, compensatory and punitive damages. (Supp. L.F. 130-137) Ullrich amended his petition three more times before the case was tried. (L.F. 3-6) By the time of trial, Ullrich was proceeding on his Fourth Amended Petition. (L.F. 12-25)

Ullrich raised six counts in his Fourth Amended Petition. Five of those counts were directed against Cadco and Bankers National, and the sixth count was directed against Dietz individually. In Count I, Ullrich charged Cadco and Bankers National with breaching their contractual obligations associated with the sale of the modular home. (L.F. 12-16) In Count II, Ullrich requested punitive damages from these corporate defendants for their willful breach of the contract. (L.F. 17-18) In Count III, Ullrich charged the corporate defendants with fraud. (L.F. 18-19) In Count IV, Ullrich requested punitive damages for the fraudulent conduct. (L.F. 19-20) In Count V, Ullrich charged the corporate defendants with violating the Merchandising Practices Act. (L.F. 20-22) And in Count VI, Ullrich

sought to pierce the corporate veil and recover damages from Dietz individually.  
(L.F. 23-25)

Because the trial court ruled that the Missouri Merchandising Practice Act claims were barred by the statute of limitations, the filing dates for some of Ullrich's amended pleadings are relevant to the disposition of this appeal. On March 26, 2004, Ullrich filed a motion for leave to file his Third Amended Petition to raise the issue of fraud. (Supp. L.F. 156-165) Ullrich filed his Third Amended Petition by leave of court on April 1, 2004. (Supp. L.F. 166) Several days later, Ullrich filed a motion to amend his petition again to add Bankers National as necessary party. (Supp. L.F. 167-173) On September 1, 2004, Ullrich amended his motion requesting leave to file his Fourth Amended Petition (L.F. 5) In his Fourth Amended Petition, Ullrich alleged that the fraudulent and deceptive practices of the Cadco and Bankers National violated the Missouri Merchandising Practices Act. (L.F. 21-22) Ullrich filed his Fourth Amended Petition by leave of court on February 1, 2005. (L.F. 6)

After the Fourth Amended Petition was filed, Bankers National filed a Counterclaim against Ullrich and named Jackson as a third party defendant. (L.F. 58-60) In the Counterclaim, Bankers National charged Ullrich and Jackson with conspiring to build evidence for Ullrich's lawsuit by having Jackson misrepresent his interest in purchasing the same modular home that was the subject of Ullrich's lawsuit. (L.F. 59)

The trial court heard evidence during a two-day non-jury trial in the summer of 2006. (L.F. 86) Before the trial started, both sides filed timely requests for findings of fact and conclusions of law. (L.F. 78-84) Four months after the matter was under submission, the trial court issued its Findings of Fact, Conclusions of Law and Judgment. (L.F. 86-95)

On Ullrich's breach of contract claim, the trial court awarded Ullrich a judgment for his direct damages of \$15, 686.50, but denied Ullrich's request for consequential damages as remote and speculative. (L.F. 90-94) The trial court ruled in favor of Cadco and Bankers National on counts II, III, IV and V of Ullrich's Fourth Amended Petition, and in favor of Dietz on count VI. (L.F. 90) Because the trial court found that Bankers National sustained no damages on its counterclaim directed against Jackson, the trial court entered a judgment in favor of Jackson. (L.F. 94) Ullrich filed a timely motion for a new trial and then appealed. (L.F. 96-99, 101-105)

### **C. Summary of the Evidence**

#### **1. The Parties**

Ullrich is a resident of the City of St. Louis. (Tr. 26) He is employed as a senior programmer for Express Scripts. (Tr. 26) He also serves as a church organist for a Christian Science church. (Tr. 26)

Jackson is a resident of St. Louis County. (Tr. 3) Jackson is retired, but formerly served as a director of development for a home for abused children. (Tr. 3). Ullrich and Jackson are close personal friends. (Tr. 4)

Dietz is a resident of DeSoto in Jefferson County. (Tr. 237) Cadco and Bankers National are Missouri corporations. (L.F. 12-13, 26, 38) Dietz owns all of the Cadco stock through his grantor trust. (Tr. 237-239) And Cadco is a holding company that owns all of the stock of Bankers National. (Tr. 246) As a holding company, Cadco did not have any employees. (Tr. 268) But Cadco and Bankers National shared the same offices. (Tr. 267) Dietz served as the President, sole director and registered agent for both corporations. (Tr. 270). And Dietz used the registered fictitious name of Imperial Homes interchangeably for both Cadco and Bankers National. (Tr. 246)

Dietz testified that the seller in the modular home transaction at issue here was Bankers National, d/b/a Imperial Homes. (Tr. 270) But the Cadco name also was used in some of the documents. (Tr. 241-242) For instance, Cadco was identified as the “dealer” in the title application, and Cadco was named as Ullrich’s attorney in fact to secure legal title under a limited power of attorney. (Tr. 241-242) Cadco and its subsidiaries were identified as the “seller” in a setup agreement. (Tr. 24-245)

By the time of trial, Bankers National was out of the modular home sale business. (Tr. 264) Dietz admitted that the net worth of Bankers National was not very much. (Tr. 263) Cadco’s primary asset was a judgment for \$1.7 million which was being appealed at the time of trial. (Tr. 265-266) The trial court found that Ullrich failed to offer evidence to pierce the corporate veils either of Cadco or Bankers National. (L.F. 91)

## **2. The Modular Home Sale Agreement, Real Estate Purchase and Site**

### **Construction Transaction**

Ullrich expressed an interest in purchasing a modular home from Imperial Homes in early 1999. (Tr. 31) Ullrich wanted to move to a location where he could care for his ill mother and there would be less crime. (Tr. 30-31) Ullrich initially spoke with a salesman named Steve (later identified as Steve Schmaltz). (Tr. 31, 272) Schmaltz showed Ullrich a variety of homes, and Ullrich signed a contract for a particular model. (Tr. 32-33)

Because Ullrich did not yet own any land on which to place his modular home, Ullrich had second thoughts and decided to cancel the initial contract. (Tr. 34, 36) Schmaltz called Ullrich and asked him why he had cancelled. (Tr. 37) Ullrich responded that he was not an expert in these matters, that he had two jobs and did not have time to find the land, that he did not know who to contact and did not know how to do the building associated with the modular home. (Tr. 37)

According to Ulrich, Schmaltz then represented, “We’ll act like the general contractor. We’ll find you the land, we’ll take charge of the well, the septic, we’ll take care of everything. You won’t have to worry about anything.” (Tr. 37)

Ullrich returned five to seven days later and signed another contract to purchase the modular home. (Tr. 38, 69-70) (Plaintiff’s Exhibit 5)

The contract called for Ullrich to purchase from Imperial Homes a Fleetwood model modular home, with a specified serial number, for a purchase price of \$42,900, excluding some additional sums spelled out for sales tax, title,

fees and insurance. (Plaintiff's Exhibit 5) Ullrich was required to post a cash down-payment of \$13,026, which left a remaining balance of \$32,900.11. (Tr. 70) The Contract referred to some additional equipment, labor and accessories, including the requirement that the home be delivered and set up on a prepared level site under a separate set up Agreement. (Plaintiff's Exhibit 5) At the time he signed the original contract, Ullrich also signed a credit application, insurance application, Missouri title and license application, limited power of attorney appointing Cadco as his attorney in fact to transfer title, and the set up agreement with Cadco. (Plaintiff's Exhibit 5A) (Tr. 72-77)

To induce Ullrich to enter into this transaction, Ullrich testified that Schmaltz made a series of oral representations about Imperial Homes' qualifications as general contractor. Schmaltz initially told Ullrich that they would take care of everything and keep Ullrich's budgeted payments within an affordable range of \$350 per month. (Tr. 53) Schmaltz told Ullrich that they would do the septic tank, do the well, take care of the driveway and the financing. (Tr. 55) Schmaltz described this arrangement as a "turn key package." Tr. 55-56) At one point, Schmalt told Ullrich that all he had to do was pick the land and that he would be in by May 16<sup>th</sup>. (Tr. 57)

Ullrich also spoke with another Imperial Homes employee who identified herself as Tammie (later identified as Tammie K. Collier, the finance manager). (Tr. 58, 271-272) Ullrich testified that Schmaltz and Collier told Ullrich that they did this all the time, that this was very common in their practice, there was no



problem whatsoever, and that this was something they handled this every day in business. (Tr. 58) Dietz admitted that Imperial Homes assumed the role of the general contractor in the transaction. (Tr. 262)

Shortly after Ullrich signed the modular home sales agreement with Imperial Homes, Ullrich entered into a contract with Frank and Carol Lennaman to purchase a tract of vacant land in Dittmer, Missouri for the sum of \$11,900. (Plaintiff's Exhibit 4) After Ullrich entered into this contract, he learned of a septic tank issue where the selected land was too small to comply with planning and zoning requirements. (Tr. 62) Jim Bennett of Missouri Land Sales confirmed that a boundary adjustment was required to get enough square footage for the septic tank. (Tr. 209-212) Ullrich was upset because this adjustment caused his financing costs to go up. (Tr. 62) Schmaltz assured Ullrich that there would be no more surprises. (Tr. 62)

Unbeknownst to Ullrich, Imperial Homes obtained the results of a percolation test done on the Lennaman property prior to closing that stated: "Due to the amount of dark red clay in the soil, the site does not lend itself to conventional systems." (Tr. 256-257) Dietz admitted that this report should have generated a bid for an unconventional system. (Tr. 258) Imperial Homes proceeded to closing on the basis of a bid from Costello Construction which included a septic tank estimate of \$7,500. (Tr. 259) Costello did not state in its estimate that this figure was for an unconventional system. (Plaintiff's Exhibit 41)

The parties closed on the purchase of the modular home and real estate on June 10, 1999. (Tr. 84) At the closing, Schmaltz reviewed everything with Ullrich, told him that drawings and bids were in place for the well and septic tank, and that they had an extra \$10,000 built into the contract for unexpected costs like blasting. (Tr. 65) Ullrich was upset that his monthly finance costs went up from \$585 to \$614.98, but he decided to go ahead with the deal. (Tr. 65-66) Schmaltz assured Ullrich at the closing that he would be in the home by July 4<sup>th</sup>. (Tr. 64, 85)

Imperial Homes introduced evidence of the actual closing disbursements. Before the real estate closing, Ullrich paid Imperial Homes the sum of \$11,026 for the balance then due on his down-payment for the modular home. (Tr. 150) Ullrich then closed on the real estate sale and the construction financing loan with IndyMac Mortgage Holdings, Inc. According to Defendants' Exhibit K, IndyMac brought loan proceeds to the closing of \$15,252 and Ullrich paid another \$434. (Tr. 151) (Defendants' Exhibit K) The closing statement showed that this total sum of \$15,686.50 was disbursed to cover the balance owed to the Lannemans as sellers, the fees for the survey, appraisal and engineering costs, and \$1,552.50 was disbursed to Imperial Homes for title transfer fees and the hazard insurance premium for the modular home. (Defendants' Exhibit K). Another \$775 was disbursed from the IndyMac loan proceeds after closing to cover the cost of clearing the land. (Tr. 152) Ullrich believed that he remained liable to IndyMac for these disbursements. (Tr. 152)

At the closing, Ullrich signed a note and deed of trust to secure the financing loan from IndyMac in the sum of \$87,952.51. (Plaintiff's Exhibits 7 and 11) This loan covered, not only the amounts actually disbursed at the real estate closing, but the anticipated charges for the remaining balance due for the purchase of the modular home and the construction costs. (Plaintiff's Exhibit 4) In addition, Ullrich, Imperial Homes and IndyMac signed a Construction Loan Agreement to cover the terms for future advances on the construction portion of the loan. (Plaintiff's Exhibit 8) Collier signed the Agreement on behalf of Imperial Homes as its financial manager. (Plaintiff's Exhibit 8) No dollar figures were included in the schedule of advances. (Tr. 348) (See, Plaintiff's Exhibit 8, Schedule B) Dietz blamed this omission on the lender. (Tr. 348)

### **3. The Parties' Post-Closing Conduct**

After the closing, Ullrich learned from Jeff Costello of Costello Construction that there were no septic tank drawings. (Tr. 86) Ullrich testified that he called Imperial Homes when he found out about the septic tank issue. (Tr. 87) Imperial Homes assured Ullrich that he did not need to worry and that Imperial Homes was taking care of it. (Tr. 87-88) But Dietz testified that Costello had stopped returning phone calls and would not return to the job. (Tr. 261)

About one month after the closing, Ullrich began having conversations with Nathan Govero of Imperial Homes. (Tr. 89-90) Govero told Ullrich that he was taking over for Schmaltz. (Tr. 89) Initially, Govero guaranteed that Ullrich would be in the home by the end of the year and that the project would be on cost. (Tr.

90) But about four months after the closing, Govero told Ullrich that he would need to come up with another \$8,000 or \$9,000 to cover the cost of the septic tank. (Tr. 90-91) Because Ullrich had been told before that there was \$10,000 built into the contract for these kinds of contingencies, Ullrich refused and said that he would not pay another dime. (Tr. 91) Ullrich then sought legal counsel. (Tr. 92)

Dietz testified that there were misunderstandings about what Ullrich was expecting versus what Imperial Homes thought he originally wanted. (Tr. 305) Dietz claimed the original estimates did not include Ullrich's later requests for electrical 400-amp service, or for a nine or ten foot basement wall. (Tr. 308) But Ullrich testified that he and Schmaltz originally agreed that the lowest beam in the basement would have a clearance of no more than 7 feet 10 inches. (Tr. 353) Ullrich also testified that Schmaltz had agreed to the existing plan for 200-amp service for the house, and another 200-amp circuit box in the basement for Ullrich's pipe organ. (Tr. 355-356) Ullrich told Govero about his agreements on these two points. (Tr. 363) Dietz was not present during these discussions, but he claimed to have discussed the alleged misunderstandings with Schmaltz. (Tr. 332-333)

Shortly after Ullrich initiated this lawsuit, Jackson and his wife went to Imperial Homes and expressed an interest in purchasing a modular home. (Tr. 6) Despite Ullrich's ongoing conflicts with Imperial Homes, Ullrich and Jackson both testified that Ullrich encouraged Jackson to go see Imperial Homes. (Tr. 6, 164) Ullrich admitted that he initially asked Jackson to look for his own modular

home and see if they were using it as a demo. (Tr. 165) Jackson reported back to Ullrich that Imperial Homes referred to a particular model as the “Ullrich home.” (Tr. 9-10, 165) Jackson then returned to Imperial Homes and signed a contract for the same modular home. (Tr. 17, 18) (Plaintiff’s Exhibit 1) Jackson testified that he cancelled the contract a few days later because his mother-in-law refused to move there. (Tr. 24)

The trial court found that Ullrich and Jackson concealed their relationship from Imperial Homes, and they also concealed that Jackson did not intend to purchase the home. (L.F. 90) But because the trial court found that no economic loss occurred, the trial court entered a judgment in favor of Jackson on the claim against him. (L.F. 94)

While this dispute remained in litigation, Imperial Homes sold the Ullrich modular home to Joseph Mitchell. (Tr. 274) Dietz admitted that Imperial Homes retained Ullrich’s cash deposit of \$13,026 and sold the home for another \$29,900. (Tr. 274-276)

During the litigation, in 2005, Ullrich obtained a duplicate title to his modular home from the Missouri Department of Revenue. (Tr. 188) The lienholder shown on the title was Oakwood Acceptance Corporation, the apparent successor to IndyMac.<sup>3</sup> (Tr. 118) But the serial number for the modular home

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<sup>3</sup> Imperial Homes is not listed as a lienholder for any balance owed under its sale contract. (Plaintiff’s Exhibit 21)

does not match the serial number shown on Ullrich's original title application. (Tr. 119) (Plaintiff's Exhibits 5A and 21) Dietz admitted this title defect, but again blamed the lender for the error. (Tr. 343-344)

#### **4. Ullrich's Damage Claims**

The trial court awarded Ullrich \$15,686.50 on his breach of contract claim. (L.F. 94) This figure corresponds to those funds which IndyMac disbursed at the real estate closing. (L.F. 88) Dietz and Ullrich both testified that Ullrich owed IndyMac, or its successor, Oakwood Acceptance, over \$15,000. (Tr. 152, 309) But the trial court found that Ullrich was entitled to a different figure based on a refund of his down-payment, the hazard insurance premium and the title fee paid to Imperial Homes. (L.F. 91) The evidence showed that Ullrich's down-payment was \$13,026 (Tr. 96)(L.F. 87) and that Imperial Homes received another \$1,552.50 for the title fees and hazard insurance premium. (Defendant's Exhibit K) The trial court did not find any damages for the additional \$775 that Oakwood Acceptance disbursed to Costello on the construction loan after closing. (Tr. 95, 152) (L.F. 88) Nor did the trial court find any damages for the \$434 that Ullrich brought to the closing. (Tr. 151)

The trial court rejected Ullrich's remaining damage claims as remote and speculative and not proper consequential damages. (L.F. 90) Ullrich presented or attempted to present evidence of those particular claims for consequential damages

being raised in this appeal.<sup>4</sup> For instance, in anticipation of his being able to move into his modular home by July 4<sup>th</sup>, 1999, Ullrich stored an electric range and futon in the home. (Tr. 96) The combined cost of these items was \$1,300. (Tr. 96) Imperial Homes retained control over the modular home, presumably with its contents, for five years before selling it. (Tr. 250) But the range and futon were never returned. (Tr. 96-97)

The trial court also rejected Ullrich's claim for storage costs. Ullrich testified that in anticipation of the move, he purchased a refrigerator, washer, dryer, four recliners, various oil paintings and full-length mirrors. (Tr. 99) Because he was unable to make the move as planned, Ullrich has had to store these items in a storage locker. (Tr. 99) The trial court sustained an objection when Ullrich attempt to offer evidence of his storage costs. (Tr. 99-100) But Ullrich made an offer of proof to show that he was initially paying \$100 per

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<sup>4</sup> Ullrich also presented evidence of other consequential damages rejected by the trial court. For instance, Ullrich testified that he sustained damages or losses associated with personal property, including a motor vehicle, which he was forced to store on the Dittmer property (Tr. 105-108), that his pipe organ was damaged because Ullrich was unable to store it in the modular home (Tr. 103-104), that his home in the City of St. Louis diminished in value because he was unable to sell it (Tr. 104-105), and that he has suffered damages from having changed his mailing address to Dittmer. (Tr. 108-109)

month, that this figure was up to \$214 at the time of trial, and that his total storage costs have been about \$12,000. (Tr. 100-101)

The trial court rejected Ullrich's attempt to present evidence of his excess utility costs and taxes in having to maintain both the Dittmer property and his residence in the City of St. Louis. (Tr.109-111) As part of an offer of proof, Ullrich attempted to present evidence that he discussed with Schmaltz before the closing that Ullrich expected to have savings in utility costs and taxes of \$6,965 per year. (Tr. 41-46) (Plaintiff's Exhibit 34) The trial court rejected this evidence under the parol evidence rule. (Tr. 38, 48) In another offer of proof, Ullrich later attempted to testify to the amount of additional utility costs and taxes he incurred from not being able to move his residence. (Tr. 109-110) Ullrich estimated that his excess water bills have added up to about \$3,000, and that he has incurred another \$1,800 in sewer costs. (Tr. 110) Ullrich also testified that he has incurred real estate taxes in the City of St. Louis of \$3,700, and another \$2,500 in taxes on the Dittmer property. (Tr. 110-111) Ullrich's offer of proof on these matters was denied. (Tr. 112)

Ullrich also attempted to present evidence of his damages to remove the cloud on the title to his Dittmer property. Title records show that Lot 2 of Ullrich's Dittmer property remains encumbered by the IndyMac deed of trust. (Tr. 83, 121) (Plaintiff's Exhibit 11) Ullrich described this as a \$102,000 lien against his property. (Tr. 193-194) The trial court sustained an objection to Ullrich's attempt to introduce evidence of his anticipated costs to remove this cloud on the



title to his property. (Tr. 121-122) Ullrich made an offer of proof that his anticipated attorney's fees for a simple action to remove the cloud on the title would be a minimum of \$5,000. (Tr. 122) If the action proved to be more complex, Ullrich believed that his attorney's fees could be as much as \$25,000. (Tr. 122)

The trial court also rejected Ullrich's damage claim for any loan balance owed to IndyMac or its successor, Oakwood Acceptance. Ullrich testified that he never received a payment book or made a payment on this loan. (Tr. 149) Oakwood sent Ullrich a demand letter for the full loan balance of \$87,952.51. (Tr. 153) (Defendants' Exhibit I) Because Ullrich never received either his modular home or the benefit of the construction loan, Ullrich denied owing the full amount demanded. (Tr. 153-154) But Ullrich testified that he is obligated for over \$15,000 in loan proceeds disbursed at the real estate closing and the additional \$775 disbursed to Costello Construction for clearing the land. (Tr. 152-154) The interest rate on the IndyMac loan was 7.5% per annum. (Plaintiff's Exhibit 7) The trial court found that Ullrich offered no evidence of the amount owing on the construction loan. (L.F. 88)

##### **5. Ullrich's Attorney's Fees**

As part of his claim under the Missouri Merchandising Practices Act, Ullrich requested attorney's fees. (L.F. 22) Ullrich testified that he has incurred attorney's fees of \$27,500. (Tr. 138) Stanley Schnaare charged Ullrich around \$14,000 of those fees, and the balance was charged by Ullrich's prior counsel,

David Yates. (Tr. 138) The trial court acknowledged this testimony about the amount of Ullrich's fees, but found no evidence of the hours of time or other actions with which to judge the reasonableness of the fees. (L.F. 93) The trial court also denied Ullrich's request for fees because Ullrich was not the prevailing party under §407.025. (L.F. 93)

## **6. The Trial Court's Admission of Settlement Offers**

The trial court permitted Imperial Homes to offer into evidence, over objection, a letter directed to Ullrich's attorney dated February 1, 2000, marked as Defendants' Exhibit G. (Tr. 306-307) Dietz described a meeting at the office of Ullrich's counsel "to come to a final and complete understanding of what our customer was expecting us to perform." (Tr. 308) Following this negotiation, Dietz wrote the letter to present Ullrich with four settlement proposals. (Tr. 309) Dietz testified that the first proposal was to sue Costello. (Tr. 309) The second proposal was to give Ullrich his money back and unwind his existing loan to IndyMac with an existing balance of \$15,000. (Tr. 309) The third proposal was to proceed with new contractors at a higher price than originally estimated. (Tr. 310) And the last proposal was to find new contractors and obtain financing from another source. (Tr. 310)

Ullrich's counsel objected to the admission of this evidence because this was an offer of compromise. (Tr. 306-307) But the trial court overruled this objection and admitted the evidence to refute Ullrich's allegation that Imperial Homes never intended to do anything in the first place. (Tr. 306-307) During

cross-examination, Dietz admitted that he deliberately left out of Defendants' Exhibit G a fifth option of completing the transaction according to what Imperial Homes originally had promised. (Tr. 327)

The trial court considered the evidence of the settlement offers in its findings. The trial court found that the purpose of the meeting at the office of Ullrich's counsel was "to resolve the miscommunications about what was to be done about the site of the home." (L.F. 89) The trial court also found from Defendants' Exhibit G that Imperial Homes offered to return the money paid by Ullrich, but that offer was declined. (L.F. 89)

#### **7. The Trial Court's Refusal to Admit Fraud Judgment**

The trial court sustained an objection when Ullrich's counsel attempted to cross-examine Dietz about a judgment against Imperial Homes for fraud. (Tr. 278) As part of his offer of proof, Ullrich's counsel obtained an admission from Dietz that the jury returned a verdict against Imperial Homes for \$84,000 on allegations of fraud. (Tr. 279) As another part of his offer, Ullrich's counsel presented the trial court with a certified copy of the court record marked as Plaintiff's Exhibit 44. (Tr. 279-280) (Plaintiff's Exhibit 44) The trial court denied the offer of proof, but stated that Plaintiff's Exhibit 44 may be a part of the record for appellate purposes. (Tr. 280) The trial court ultimately ruled against Ullrich on his claims for fraud and punitive damages. (L.F. 91-92)

**POINTS RELIED ON**

**I**

**THE TRIAL COURT ERRED IN ENTERING ITS JUDGMENT AGAINST ULLRICH ON HIS CLAIMS UNDER THE MISSOURI MERCHANDIZING PRACTICES ACT BECAUSE THIS DECISION WAS CONTRARY TO LAW, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE TRIAL COURT MISAPPLIED RULE 55.15 IN HOLDING THAT ULLRICH HAD TO PLEAD MPA VIOLATIONS WITH THE SAME PARTICULARITY AS COMMON LAW FRAUD, AND THE TRIAL COURT IGNORED EVIDENCE CONSISTENT WITH THE PLEADINGS THAT IMPERIAL HOMES ENGAGED IN UNFAIR AND DECEPTIVE PRACTICES BOTH BEFORE AND AFTER CLOSING BY PROMISING TO SERVE AS A GENERAL CONTRACTOR TO ENSURE THAT ULLRICH WOULD BE IN THE MODULAR HOME IN A “TURN-KEY” ARRANGEMENT WITHIN A BUDGETED PRICE, BY CONCEALING DEFECTS IN THE BID FOR THE SEPTIC TANK SYSTEM KNOWN PRIOR TO CLOSING, BY PRESENTING ULLRICH WITH NO DOLLAR FIGURES FOR THE SCHEDULE OF ADVANCES IN THE CONSTRUCTION LOAN AGREEMENT, BY REFUSING TO TAKE PROMPT ACTION AFTER CLOSING AS THE GENERAL CONTRACTOR TO INSTALL THE MODULAR HOME ON ULLRICH’S**

**PROPERTY AT THE PRICE AND SPECIFICATIONS ORIGINALLY PROMISED, BY FAILING TO MEET THEIR DUTY AS THE DEALER UNDER §700.100.3(6) RSMO (1994), TO ARRANGE FOR THE PROPER INITIAL SETUP OF THE MODULAR HOME, BY FAILING TO USE THE POWER OF ATTORNEY SECURED FROM ULLRICH TO GIVE HIM THE PROPER LEGAL TITLE WITH THE CORRECT SERIAL NUMBER, BY ATTEMPTING TO SELL THE SAME MODULAR HOME TO THIRD PARTY DEFENDANT JACKSON WHEN IT STILL WAS UNDER CONTRACT TO ULLRICH AND EVENTUALLY BY SELLING THE MODULAR HOME TO ANOTHER THIRD PARTY WHEN THIS DISPUTE STILL WAS IN LITIGATION.**

*Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228 (Mo.App.W.D. 2006)

*Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898 (Mo.App. E.D. 2003)

*Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883 (Mo.App. E.D. 1994)

*Antle v. Reynolds*, 15 S.W.3d 762 (Mo.App.W.D. 2000)

§407.020 RSMo (1994)

§407.025 RSMo (1994)

§700.100 RSMo (1994)

Rule 55.15

## II

**THE TRIAL COURT ERRED IN CONCLUDING THAT ULRICH'S CLAIMS UNDER THE MISSOURI MERCHANDISING PRACTICES ACT WERE BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THIS DECISION WAS CONTRARY TO LAW, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT ULLRICH'S MPA ALLEGATIONS AROSE FROM THE SAME CONDUCT, TRANSACTIONS AND OCCURRENCES AS ULLRICH'S FRAUD CLAIMS IN HIS THIRD AMENDED PETITION, THOSE MPA CLAIMS RELATED BACK TO THE EARLIER PETITION UNDER RULE 55.33(c) AND THE THIRD AMENDED PETITION WAS FILED WITHIN FIVE YEARS OF CLOSING, BUT EVEN IF THE RELATION BACK RULE DID NOT APPLY, THE TRIAL COURT IGNORED EVIDENCE THAT ULLRICH COULD NOT REASONABLY HAVE DISCOVERED MORE THAN FIVE YEARS PRIOR TO THE FILING OF HIS FOURTH AMENDED PETITION THAT IMPERIAL HOMES COMMITTED SOME MPA VIOLATIONS AFTER CLOSING.**

*Mogley v. Fleming*, 11 S.W.3d 740 (Mo.App.E.D. 1999)

*Craig v. Missouri Department of Mental Health*, 80 S.W.3d 457 (Mo. banc 2002)

*Johnson v. GMAC Mortgage Corporation*, 162 S.W.3d 110 (Mo.App.W.D. 2005)

§516.120 RSMo (1994)

Rule 55.33(c)

### III

**THE TRIAL COURT ERRED IN REJECTING ULLRICH'S CLAIM FOR ATTORNEY'S FEES UNDER THE MISSOURI MERCHANDISING PRACTICES ACT BASED ON THE PURPORTED INSUFFICIENCY OF THE EVIDENCE BECAUSE THIS DECISION IS CONTRARY TO LAW, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT, ASSUMING ULLRICH PREVAILS IN HAVING HIS MPA CLAIMS REINSTATED IN THIS APPEAL, ULLRICH'S TESTIMONY OF THE AMOUNT PAID FOR HIS FEES IS SUBSTANTIAL EVIDENCE THAT THE CHARGES INCURRED WERE REASONABLE AND NECESSARY, BUT EVEN IF THIS COURT REJECTS THIS ARGUMENT, THE TRIAL COURT HAD INDEPENDENT AUTHORITY AS AN EXPERT TO SET FEES WITHOUT THE AID OF EVIDENCE, AND THIS COURT MAY REMAND WITH DIRECTIONS FOR THE TRIAL COURT TO DETERMINE SUCH FEES AND TO TAKE SUCH ADDITIONAL EVIDENCE AS IT DEEMS PROPER.**

*Eagle v. Redmond Building Corporation*, 946 S.W.2d 291 (Mo.App. W.D. 1997)

*Howard Construction Company v. Teddy Woods Construction Company*,  
817 S.W.2d 556 (Mo.App. W.D. 1991)

*Industry Financial Corporation v. Ozark Community Mental Health  
Center*, 778 S.W.2d 413 (Mo.App. S.D. 1989)

#### IV

**THE TRIAL COURT ERRED IN LIMITING ULLRICH'S  
COMPENSATORY DAMAGES TO \$15,686.50 BECAUSE THIS  
LIMITATION WAS CONTRARY TO LAW, NOT SUPPORTED BY  
SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE  
EVIDENCE IN THAT CONSEQUENTIAL DAMAGES ARE  
RECOVERABLE EITHER FOR BREACH OF CONTRACT OR FROM A  
MISSOURI MERCHANDISING PRACTICES ACT VIOLATION UNDER  
§407.025 RSMo (1994), AND ULRICH PRESENTED OR ATTEMPTED TO  
PRESENT SUBSTANTIAL EVIDENCE OF HIS CONSEQUENTIAL  
DAMAGES, INCLUDING DAMAGE FOR THE LOSS OF HIS PERSONAL  
PROPERTY LEFT IN THE MODULAR HOME, HIS STORAGE COSTS,  
HIS CONTINUED UTILITY COSTS AND TAXES, THE ESTIMATED  
COST TO CLEAR THE CLOUD ON HIS TITLE TO THE DITTMER  
PROPERTY AND THE OUTSTANDING BALANCE STILL OWED, WITH  
INTEREST, ON THE CONSTRUCTION PORTION OF HIS INDYMAC  
LOAN.**



*Cooper v. Bluff City Mobile Home Sales, Inc.* 78 S.W.3d 157 (Mo.App. S.D. 2002)

*Universal C.I.T. Credit Corporation v. State Farm Mut. Auto Ins. Co.*, 493 S.W.2d 385 (Mo.App. K.C.D. 1973)

*Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898 (Mo.App. E.D. 2003)  
§407.025 R.S.Mo. (1994)

*Davis v. Cleary Building Corporation*, 143 S.W.3d 659 (Mo.App.W.D. 2004)

§407.025 RSMo 1994)

## V

**THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF A SERIES OF SETTLEMENT PROPOSALS PRESENTED BY IMPERIAL HOMES TO ULLRICH PRIOR TO THE LITIGATION BECAUSE THE ADMISSION OF THIS EVIDENCE WAS CONTRARY TO LAW IN THAT THE GENERAL RULE PROHIBITS ADMISSION OF A SETTLEMENT OFFER UNLESS ITS HAS SOME INDEPENDENT RELEVANCE, BUT THIS NARROW EXCEPTION DOES JUSTIFY THE USE OF THE SETTLEMENT OFFERS HERE ON THE PURPORTED GROUND THAT THEY WERE OFFERED TO DISPROVE ULLRICH'S ALLEGATION THAT IMPERIAL HOMES NEVER INTENDED TO HONOR THEIR ORIGINAL PROMISES; THAT DEFENDANT DIETZ ADMITTED HE DELIBERATELY LEFT OUT OF HIS LIST OF**

**SETTLEMENT OPTIONS AN OFFER TO HONOR THOSE ORIGINAL PROMISES, AND THE ADMISSION OF THIS EVIDENCE WAS PREJUDICIAL IN THAT THE TRIAL COURT CONSIDERED THIS IMPROPER EVIDENCE IN CONCLUDING THAT THE DISPUTES HERE WERE NO MORE THAN MISCOMMUNICATIONS OVER WHAT WAS EXPECTED.**

*J.A. Tobin Construction Company v. State Highway Commission of Missouri*, 697 S.W.2d 183 (Mo.App. W.D. 1985)

*McPherson Redevelopment Corporation v. Watkins*, 743 S.W.2d 509 (Mo.App. E.D. 1987)

*State ex rel. Malan v. Huesemann*, 942 S.W.2d 424 (Mo.App. W.D. 1997)

## **VI**

**THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW ULLRICH TO INTRODUCE INTO EVIDENCE A PRIOR JUDGMENT AGAINST IMPERIAL HOMES FOR FRAUD BECAUSE THE REJECTION OF THIS EVIDENCE WAS CONTRARY TO LAW IN THAT EVIDENCE OF PRIOR FRAUDULENT CONDUCT IN ANOTHER CASE IS RELEVANT TO SHOW FRAUDULENT INTENT WHERE, AS HERE, THERE ARE ALLEGATIONS OF FRAUD IN THE PLEADINGS AND THE TRIAL COURT'S REFUSAL TO CONSIDER THIS EVIDENCE WAS PREJUDICIAL IN THAT THE TRIAL COURT FOUND AGAINST ULLRICH ON HIS CLAIMS FOR FRAUD AND PUNITIVE DAMAGES.**

*Brockman v. Regency Financial Corp.*, 124 S.W.3d 43 (Mo.App. W.D. 2004)

*Rice v. Lammers*, 65 S.W.2d 151 (Mo.App. St.L.D. 1933)

## **ARGUMENT**

### **I**

**THE TRIAL COURT ERRED IN ENTERING ITS JUDGMENT AGAINST ULLRICH ON HIS CLAIMS UNDER THE MISSOURI MERCHANDIZING PRACTICES ACT BECAUSE THIS DECISION WAS CONTRARY TO LAW, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE TRIAL COURT MISAPPLIED RULE 55.15 IN HOLDING THAT ULLRICH HAD TO PLEAD MPA VIOLATIONS WITH THE SAME PARTICULARITY AS COMMON LAW FRAUD, AND THE TRIAL COURT IGNORED EVIDENCE CONSISTENT WITH THE PLEADINGS THAT IMPERIAL HOMES ENGAGED IN UNFAIR AND DECEPTIVE PRACTICES BOTH BEFORE AND AFTER CLOSING BY PROMISING TO SERVE AS A GENERAL CONTRACTOR TO ENSURE THAT ULLRICH WOULD BE IN THE MODULAR HOME IN A “TURN-KEY” ARRANGEMENT WITHIN A BUDGETED PRICE, BY CONCEALING DEFECTS IN THE BID FOR THE SEPTIC TANK SYSTEM KNOWN PRIOR TO CLOSING, BY PRESENTING ULLRICH WITH NO DOLLAR FIGURES FOR THE SCHEDULE OF ADVANCES IN THE**

**CONSTRUCTION LOAN AGREEMENT, BY REFUSING TO TAKE PROMPT ACTION AFTER CLOSING AS THE GENERAL CONTRACTOR TO INSTALL THE MODULAR HOME ON ULLRICH'S PROPERTY AT THE PRICE AND SPECIFICATIONS ORIGINALLY PROMISED, BY FAILING TO MEET THEIR DUTY AS THE DEALER UNDER §700.100.3(6) RSMO (1994), TO ARRANGE FOR THE PROPER INITIAL SETUP OF THE MODULAR HOME, BY FAILING TO USE THE POWER OF ATTORNEY SECURED FROM ULLRICH TO GIVE HIM THE PROPER LEGAL TITLE WITH THE CORRECT SERIAL NUMBER, BY ATTEMPTING TO SELL THE SAME MODULAR HOME TO THIRD PARTY DEFENDANT JACKSON WHEN IT STILL WAS UNDER CONTRACT TO ULLRICH AND EVENTUALLY BY SELLING THE MODULAR HOME TO ANOTHER THIRD PARTY WHEN THIS DISPUTE STILL WAS IN LITIGATION.**

In his first point, Ullrich challenges the trial court's decision to deny Ullrich relief under the Missouri Merchandising Practices Act. The trial court erred in rejecting the sufficiency of Ullrich's MPA allegations on the ground that they were not pled with the specificity required for common law fraud under Rule 55.15. (L.F. 93) And the trial court misinterpreted Ullrich's MPA allegations as limited to (1) fraudulent misrepresentations on or prior to the closing and (2) breach of contract. (L.F. 93) Because of these errors, the trial court never

addressed evidence consistent with the pleadings that Imperial Homes engaged in unfair and deceptive practices both prior to and after the closing.

#### **A. Standard of Review**

Under the standard of review in a bench-tryed case, the trial court's judgment will be sustained on appeal unless there is no substantial evidence to support it, it is against the weight of the evidence or it erroneously applies the law. *Davis v. Cleary Building Corporation*, 143 S.W.3d 659, 665 (Mo.App. W.D. 2004) (reversing judgment to rescind contract and to require election of remedies); *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883, 885 (Mo.App. E.D. 1994) (judgment under Missouri Merchandising Practices Act reversed, in part, on damages). This Court reviews questions of law under this standard de novo. *Reece & Nichols Realtors v. Zoll*, 201 S.W.3d 516, 518 (Mo.App. W.D. 2006) And insofar as the trial court attacked the sufficiency of Ullrich's MPA allegations, this Court reviews the petition "to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in the case." *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 899 (Mo.App.E.D. 2003) (reversed dismissal of MPA claim where plaintiff adequately pleaded statutory violations and damages).

#### **B. The Trial Court erred in rejecting Ullrich's MPA claims based on the pleadings and the evidence.**

The trial court challenged the sufficiency of Ullrich's MPA allegations in two ways. First, the trial court attacked the sufficiency of Ullrich's allegation that

Imperial Homes misrepresented their qualifications to act as general contractors. (L.F. 92-93) The trial court held that allegations of fraud must be strictly pleaded and Ullrich's pleading failed to describe what was said. (L.F. 93) And then trial court found the balance of Ullrich's claim under §407.025 to be no more than recitations of the claim in his breach of contract action, not fraud. (L.F. 93) By attacking Ullrich's petition on these erroneous grounds, the trial court never addressed whether the evidence showed that Imperial Homes engaged in unfair and deceptive practices in violation of the MPA.

**1. Ullrich's MPA Pleadings**

In Count V of his Fourth Amended Petition, Ullrich alleged that Imperial Homes engaged in unlawful practices under §407.025 “by misrepresenting their qualifications to act a general contractors in the aforementioned contract; by failing to provide financing at a rate which [Ullich] could afford having originally negotiated a lower rate; by failing to deliver the modular home to the construction site and erecting it; by failing to remain within budget for the construction process; and by failing to perform the terms of the contract as originally agreed by the parties.” (L.F. 22)

**2. The Trial Court misapplied Rule 55.15 in holding that Ullrich had to plead MPA violations with the same particularity as common law fraud.**

The trial court misapplied Rule 55.15 in attacking Ullrich's misrepresentation charge on the theory it was not pled with the specificity required for common law fraud. (L.F. 93) Because causes of action for fraud

and mistake are disfavored, Rule 55.15 imposes stricter pleading requirements for these two types of claims. *Kersey v. Harbin*, 531 S.W.2d 76, 79-80 (Mo.App. Spr.D. 1975) But Ullrich can find no authority that this strict pleading rule applies to MPA allegations. And Imperial Homes waived any purported deficiency in Ullrich's pleading by not filing a motion for a more definite statement. *Clark v. Olson*, 726 S.W.2d 718 (Mo. banc 1987)

If this Court were to expand Rule 55.15 to cover MPA allegations, this holding would be inconsistent with the broad remedial purposes of the consumer protection statute. The purpose of the MPA is to supplement common law fraud remedies in consumer transactions “to preserve fundamental honesty, fair play and right dealings” in such transactions. *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo.App. K.C.D. 1973) Because of its remedial purpose, the statute should be construed liberally to cover transactions aimed at by the legislation. *Antle v. Reynolds*, 15 S.W.3d 762, 766 (Mo.App. W.D. 2000) The statute and regulation paint in broad strokes to prevent evasion due to overly meticulous definitions. *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 233 (Mo.App. S.D. 2006) And to establish an “unlawful practice” prohibited by the MPA, the plaintiff does not need to prove the elements of common law fraud. *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d at 899 (Mo.App.E.D. 2003)

The Southern District rejected any strict pleading standard for MPA violations in *Schuchmann v. Air Services Heating & Conditioning, Inc.*, 199

S.W.3d at 232, n.7. The *Schuchmann* court criticized the plaintiff's petition because it was not a model of clarity, but held that the plaintiff did plead, *in general*, that the failure to honor a lifetime warranty violated §407.020. *Id.* (emphasis in original) The court found it sufficient that the issue was raised generally in the pleadings, that defendant knew this was the central issue in the case and it was a tenable basis supported by the evidence. *Id.*

Here, Ullrich pled generally that Imperial Homes misrepresented their qualifications to act as a general contractors. (L.F. 22) Like the defendant in *Schuchmann*, Imperial Homes knew that any alleged misrepresentation on this subject was central to the case. (Tr. 50-51) And like the plaintiff in *Schuchmann*, Ullrich presented evidence to support this tenable basis for recovery.

Ullrich testified that Steve Schmaltz and Tammie Collier of Imperial Homes made a series of oral misrepresentations about their qualifications as general contractors. According to Ullrich, Schmaltz induced Ullrich to buy the modular home by the following misrepresentation: "We'll act like the general contractor. We'll find you the land, we'll take charge of the well, the septic, we'll take care of everything." (Tr. 37) Ullrich also testified that Schmaltz assured him that they would take care of everything and keep Ullrich's budgeted payments with the affordable range of \$350 per month. (Tr. 53) Schmaltz told Ullrich that they would do the septic tank, do the well, take care of the driveway and the financing. (Tr. 55) Schmaltz described this arrangement as a "turn key" package.



(Tr. 55-56) At one point, Schmaltz told Ullrich that all he had to do was pick the land and he would be in by May 16<sup>th</sup>. (Tr. 57)

Ullrich also testified that Schmaltz and Collier told Ullrich that they did this all the time, that this was very common in their practice, there was no problem whatsoever, and that this was something they handled every day in business. (Tr. 58) On the date of closing, Schmaltz reviewed everything with Ullrich, told him, it turns out falsely, that drawings and bids were in place for the well and septic tank, and that they had an extra \$10,000 built into the contract for unexpected contingencies. (Tr. 65)

Ullrich did not learn until after closing that Imperial Homes had misrepresented their qualifications and conduct as the general contractor. For instance, Ullrich testified that he did not learn until after closing that there were no septic tank drawings. (Tr. 86) And Dietz admitted that Imperial Homes received a percolation test report prior to closing that should have generated a bid for an unconventional septic system. (Tr. 258) But as the general contractor, Imperial Homes proceeded to closing with a bid for the project did not state that it was for an unconventional system. (Plaintiff's Exhibit 41) And as general contractor, Imperial Homes signed a Construction Loan Agreement that omitted any dollar figures for the schedule of advances. (Plaintiff's Exhibit 8) It was months later when Imperial Homes told Ullrich that he would need to come up with another \$8,000 or \$9,000 for the septic tank system. (Tr. 90-91)

Because the trial court misapplied Rule 55.15 and found Ullrich's pleading to be deficient, the trial court never addressed whether Ullrich's evidence showed that Imperial Homes engaged unfair and deceptive practices in violation of §407.020, in part, by misrepresenting their qualifications to act as general contractors. (L.F. 93) Instead, the trial court found Ullrich's evidence "failed to disclose any statement made to [Ullrich] with regard to any specific qualifications at all." (L.F. 93) This finding is not supported by substantial evidence and is against the weight of the evidence.

**3. The Trial Court misapplied §407.020 by rejecting the balance of Ullrich's allegations as no more than recitations of Ulrich's claim in his breach of contract action.**

The trial court also failed to address Ullrich's evidence that Imperial Homes violated the MPA by engaging in deceptive and unfair practices after the closing. Instead, the trial court stated that the last representations alleged by Ullrich were prior to the closing. (L.F. 93) And the trial court disposed of the balance of Ullrich's MPA allegations by characterizing them as no more than "recitations of [Ullrich's] claim in his breach of contract action, not fraud." (L.F. 93) These findings showed that the trial court misinterpreted the scope of deceptive and unfair practices prohibited by the MPA.

By drawing its arbitrary line between allegations of fraud and breach of contract, the trial court misapplied the broad definition of an "unlawful practice" prohibited by §407.020. Under the MPA, a plaintiff seeking private relief under

§407.025 does not have to prove that the seller intentionally made a fraudulent misrepresentation prior to the sale of merchandise. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 774 (Mo. banc 2007) (proof of omission of material fact under MPA requires less proof than common law fraud); *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d at 900 (unnecessary to prove elements of common law fraud).

Under §407.020, an “unlawful practice” is defined broadly as “[t]he act, use or employment by any person of any *deception*, fraud, misrepresentation, *unfair practice* or the concealment, suppression or omission of any material fact *in connection with the sale* or advertisement of any merchandise in trade or commerce....” (emphasis supplied) And the last sentence of §407.020.1 establishes that any act, use or employment declared unlawful by the subsection violates the MPA “whether committed before, during or after the sale...” Because of the broad remedial purposes of the legislation, the seller’s unethical failure to honor its contractual promises after the sale may be deemed an “unlawful practice” under the facts of the particular case. *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d at 232-233 (refusal to honor lifetime warranty after sale was an actionable “unfair practice”).

By construing the MPA too restrictively, the trial never addressed Ullrich’s evidence that Imperial Homes engaged in “unlawful practices” after closing by refusing to honor their original promises and by attempting to restructure the deal. As previously stated, Ullrich testified that Imperial Homes made a series of oral

representations prior to closing that they would act as a general contractor, take care of everything and keep Ullrich's finance payments within a budgeted amount as a "turn key package." (Tr. 37, 53, 55-56) And at closing, Imperial Homes assured Ullrich that drawings and bids were in place for the well and septic tank, that they had an extra \$10,000 built into the contract for unexpected costs, and that his monthly finance costs would be \$614.98. (Tr. 65-66) But Ullrich presented evidence, not only that these prior promises were false and deceptive, but that Imperial Homes engaged in deceptive practices after closing by refusing to honor these promises and by insisting the Ullrich come up with another \$8,000 or \$9,000 to cover the cost of the septic tank. (Tr. 92)

Aside from evidence that Imperial Homes tried to restructure the deal, Ullrich presented other evidence consistent with his pleadings that Imperial Homes engaged in deceptive practices after closing. For instance, when Ullrich learned after closing that there were no septic tank drawings, Imperial Homes gave Ullrich false assurances that Ullrich did not need to worry and they were taking care of it. (Tr. 87-88) But during this same time period, Dietz admitted that their contractor, Jeff Costello, had stopped returning phone calls and would not return to the job. (Tr. 261)

When Nathan Govero took over for Steve Schmaltz, Govero initially guaranteed Ullrich that he would be in the home by the end of the year and that it would be on cost. (Tr. 90) It was not until four months after closing when Govero told Ullrich that he would need to come up with more money for the septic tank.

(Tr. 90-91) Even in later negotiations, Dietz admitted that Imperial Homes never offered to complete the transaction according to what they originally had promised. (Tr. 327) And Imperial Homes never met their statutory obligation as a mobile home dealer under §700.100.3(6) to arrange for the set-up of Ullrich's home.<sup>5</sup>

Ullrich later learned from the Department of Revenue that Imperial Homes failed to secure a proper legal title with the correct serial number for Ullrich's modular home. (Tr. 119) (Plaintiff's Exhibit 5A and 21) Dietz admitted this title defect, but tried to blame the lender. (Tr. 343,344) At the time Ullrich signed his contract to purchase the modular home, he gave Cadco a limited power of attorney to secure legal title for him. (Plaintiff's Exhibit 5A) (Tr. 72-77) Dietz's attempt to deflect blame to the lender ignores Cadco's role as Ullrich's attorney in fact. (Plaintiff's Exhibit 5A) Ullrich has an independent ground for proceeding under the MPA where, as here, Imperial Homes misrepresented that they would deliver title. *Antle v. Reynolds*, 15 S.W.3d 762, 767 (Mo.App. W.D. 2000) (rejecting

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<sup>5</sup> Section 700.100.3(6), which was in effect at the time of closing, provides that a mobile home dealer's registration may be subject to discipline for "...failing to arrange for the proper initial setup or any new or used manufactured home or modular unit sold from or in the State of Missouri, unless the dealer receives a written waiver of that service from the purchaser or his authorized agent...."

argument that there was no purchase under the MPA because the failure to deliver title rendered transaction void)

Lastly, Ullrich presented evidence that Imperial Homes attempted to sell the modular home to Jackson when it still was under contract to Ullrich. (Tr. 17, 18)<sup>6</sup> Eventually, Imperial Homes sold the home to another third party while this matter still was in litigation. (Tr. 274) The trial court never addressed Ullrich's charge that these acts constituted "unlawful practices" under §407.020. (L.F. 93)

Imperial Homes may argue that the trial court was free to reject Ullrich's evidence under the standard of review. See, e.g., *Davis v. Cleary Building Corporation*, 143 S.W.3d at 665 (evidence on appeal viewed in light most favorable to the judgment). But by misinterpreting §407.020, the trial court never addressed whether Imperial Homes violated the statute by engaging in unfair and deceptive practices. (L.F. 93) Statutory construction is a question of law, not judicial discretion. *In re Incorporation of Village of Table Rock*, 201 S.W.3d 543, 549 (Mo.App. S.D. 2006).

Because the trial court viewed the definition of an "unlawful practice" too restrictively, it never addressed whether some or all of the post-closing acts of

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<sup>6</sup> The trial court made findings that Ullrich and Jackson concealed information from Imperial Homes in this transaction, but never addressed the underlying question of whether Imperial Homes had a right to offer Ullrich's home for sale. (See, L.F. 90)

Imperial Homes violated the MPA. This omission requires a remand for reconsideration of Ullrich's MPA claims.

## II

**THE TRIAL COURT ERRED IN CONCLUDING THAT ULLRICH'S CLAIMS UNDER THE MISSOURI MERCHANDISING PRACTICES ACT WERE BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THIS DECISION WAS CONTRARY TO LAW, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT ULLRICH'S MPA ALLEGATIONS AROSE FROM THE SAME CONDUCT, TRANSACTIONS AND OCCURRENCES AS ULLRICH'S FRAUD CLAIMS IN HIS THIRD AMENDED PETITION, THOSE MMPA CLAIMS RELATED BACK TO THE EARLIER PETITION UNDER RULE 55.33(c) AND THE THIRD AMENDED PETITION WAS FILED WITHIN FIVE YEARS OF CLOSING, BUT EVEN IF THE RELATION BACK RULE DID NOT APPLY, THE TRIAL COURT IGNORED EVIDENCE THAT ULLRICH COULD NOT REASONABLY HAVE DISCOVERED MORE THAN FIVE YEARS PRIOR TO THE FILING OF HIS FOURTH AMENDED PETITION THAT THE IMPERIAL HOMES DEFENDANTS COMMITTED SOME MPA VIOLATIONS AFTER CLOSING.**

In his second point, Ullrich challenges the trial court's decision to bar his MPA claims under the five-year statute of limitations in §516.120. In reaching

this decision, the trial court ignored the relation-back rule under Rule 55.33(c). But even if the relation-back rule did not apply, the trial court erred in holding that Ullrich's cause of action under the MPA accrued on the date of closing. Ullrich could not have discovered that he sustained an injury from some of those violations more than five years before the filing of Ullrich's Fourth Amended Petition.

**A. Standard of Review**

The standard of review in a bench-trying case is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). This standard applies to the trial court's ruling on a statute of limitations issue. *Elton v. Davis*, 123 S.W.3d 205, 210 (Mo.App. W.D. 2003)

**B. Ullrich's MPA claims related back to his fraud claim under Rule 55.33(c).**

In ruling that Ullrich's MPA claims were time-barred, the trial court found that Ullrich's cause of action accrued on the date of the closing in June, 1999. (L.F. 93) The trial court stated this was the last date when Ullrich alleged that representations were made (L.F. 93) Because Ullrich did not raise his MPA claims until he was granted leave to file his Fourth Amended Petition on January 21, 2005, the trial court determined that the MPA claims were time-barred. (L.F. 93) But the trial court never addressed Ullrich's relation-back argument under Rule 55.33(c). (L.F. 100)



Rule 55.33(c) establishes when an amended pleading relates back to an original pleading for statute of limitations purposes. This rule provides: “Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the original pleading.” When the Missouri Supreme Court adopted this rule in 1973, it abrogated the former “same evidence” or “theory of law” test in favor of the “conduct, transaction or occurrence” test in the current rule. *Mogley v. Fleming*, 11 S.W.3d 740, 750 (Mo.App. E.D. 1999) The language, “conduct, transaction or occurrence” is accorded a broad and liberal construction. *Id.*

Because of the liberal construction required under the rule, plaintiffs may amend pleadings to state a new theory of relief arising from the same conduct, transaction or occurrence as the original pleading. *Mogley v. Fleming*, 11 S.W.3d at 750 (amended fraud count was timely because it related back to original pleading for legal malpractice); *Craig v. Missouri Department of Health*, 80 S.W.3d 457, 461 (Mo. banc 2002) (amended claim under Missouri Human Rights Act related back to original timely claim under Americans with Disabilities Act because it arose out of same conduct); *Johnson v GMAC Mortgage Corporation*, 162 S.W.3d 110, 117-119 (Truth in Lending Act claims in amended petition related back to original petition raising different theories).

The trial court never gave Ullrich the benefit of the liberal construction required under Rule 55.33(c). Ullrich first raised the issue of fraud in his Third

Amended Petition filed on April 1, 2004. (Supp. L.F. 156-166) And the Third Amended Petition was filed less than five years from the date of the closing on June 10, 1999. (Tr. 84) Because Ullrich's MPA claims in his Fourth Amended Petition arose out of the same conduct, transaction and occurrence as the prior fraud claim, the trial court erred in refusing to apply to relation back rule.

**C. Ullrich could not have discovered some of his damage from MPA violations more than five years before the filing of his Fourth Amended Petition.**

Even if the relation-back rule did not apply, the trial court erred in refusing to recognize that at least a portion of Ullrich's damages from the MPA violations could not have been discovered more than five years from the date of the Fourth Amended Petition. In this respect, the trial court was wrong in finding that Ullrich's MPA claims accrued on the date of the closing in June, 1999. Under §516.100, the cause of action accrues and the statute of limitations begins to run "when the damage resulting therefrom is sustained and is capable of ascertainment." For an MPA claim, this means that the cause of action does not accrue when the merchandise is sold, but at a later date when the plaintiff capable of discovering the damage. *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 237-238) (rejected argument that the harm for an MPA violation occurred when merchandise was sold, instead of later date when the defendant refused to honor its lifetime warranty)

Here, the record shows that Ullrich could not have discovered at least some of his damages until after January 21, 2000. Ullrich first learned that Imperial Homes was demanding more money for the septic tank about four months after closing. (Tr. 90-91) Ullrich realized there was an issue at that point and sought legal counsel. (Tr. 92) But Ullrich did not learn that Imperial Homes had attempted to sell his modular home to Jackson until November, 2000. (Tr. 128-129) Ullrich did not learn until September, 2005, that his title to the modular home had the wrong serial number. (Tr. 118-119) And Ullrich did not learn that Dietz sold the modular home to another third party until Dietz made this admission at trial. (Tr. 274) Because Ullrich could not have ascertained his damage from these independent MPA violations before the limitations period commenced, his MPA claims on these matters cannot be time-barred.

### **III**

**THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING ULLRICH'S CLAIM FOR ATTORNEY'S FEES UNDER THE MISSOURI MERCHANDISING PRACTICES ACT BASED ON THE PURPORTED INSUFFICIENCY OF THE EVIDENCE BECAUSE THIS DECISION IS CONTRARY TO LAW, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT, ASSUMING ULLRICH PREVAILS IN HAVING HIS MPA CLAIMS REINSTATED IN THIS APPEAL, ULLRICH'S TESTIMONY OF THE AMOUNT PAID FOR HIS FEES IS SUBSTANTIAL EVIDENCE**

**THAT THE CHARGES INCURRED WERE REASONABLE AND NECESSARY, BUT EVEN IF THIS COURT REJECTS THIS ARGUMENT, THE TRIAL COURT HAD INDEPENDENT AUTHORITY AS AN EXPERT TO SET FEES WITHOUT THE AID OF EVIDENCE, AND THIS COURT MAY REMAND WITH DIRECTIONS FOR THE TRIAL COURT TO DETERMINE SUCH FEES AND TO TAKE SUCH ADDITIONAL EVIDENCE AS IT DEEMS PROPER.**

In his third point, Ullrich challenges the trial court's decision to reject his MPA request for attorneys' fees based on a purported insufficiency of evidence. Ullrich's testimony about the amount of fees created a presumption that those fees were reasonable and necessary. But if this Court rejects that argument, the trial court is deemed an expert on fees and could set the fee award even without evidence. If Ullrich's MPA claims are reinstated in this appeal, the trial court should be instructed on remand to reconsider the question of whether Ullrich may recover his attorneys' fees under §407.025.1.

**A. Standard of Review**

Under §407.025.1, the trial court may award the prevailing party attorney's fees in private actions under the MPA. When the legislature allows for an award of attorney's fees, the decision to grant or refuse the award is reviewed for an abuse of discretion. *Tate v. Golden Rule Insurance Co.*, 859 S.W.2d 831, 835 (Mo.App. W.D. 1993).

**B. Ullrich's payment of his attorneys' fees is presumptive evidence that the fees were reasonable and necessary.**

Ullrich testified that he incurred attorneys' fees of \$27,500. (Tr. 138) Stanley Schnaare charged Ullrich around \$14,000 of those fees, and the balance was charged by Ullrich's prior counsel, David Yates. (Tr. 138) The trial court acknowledged this testimony, but rejected Ullrich's fee request, in part, because "there was no evidence of the hours of time or other actions with which to judge the reasonableness of the fees." (L.F. 93) The trial court also rejected Ullrich's fee request because he was not a prevailing party. (L.F. 93) But if Ullrich is successful in having his MPA claims reinstated in this appeal, this would reopen the prevailing party issue. If so, the trial court's decision to deny fees cannot be justified by its alternative finding that Ullrich did not present sufficient evidence.

The trial court abused its discretion in rejecting Ullrich's fee request based on the purported insufficiency of his evidence. Evidence of payment of attorney's fees is substantial evidence that the charges incurred were reasonable and necessary. *Howard Construction Company v. Teddy Woods Construction Company*, 817 S.W.2d 556, 564 (Mo.App. W.D. 1991); *Eagle v. Redmond Building Corp.*, 946 S.W.2d 291, 293-294 (Mo.App. W.D. 1997) Because Ullrich presented evidence of the amount of his fees, Ullrich made a prima facie case justifying his fee request. *Id.*

**C. The Trial Court had independent authority as an expert to set the fee without the aid of evidence.**

Even if this Court rejects Ullrich's argument that he made a prima facie case, the trial court is considered an expert on the question of attorney fees and is presumably familiar with the issues involved. *Industry Financial Corporation v. Ozark Community Mental Health Center, Inc.*, 778 S.W.2d 413, 417 (Mo.App. S.D. 1989) Because of this expertise, the trial court may set attorneys' fees without the aid of any evidence. *Id.*; Accord, *Tate v. Golden Rule Insurance Co.*, 859 S.W.2d 831, 835 (Mo.App. W.D. 1993).

If this Court reinstates Ullrich's MPA claims, this Court should instruct the trial court to reconsider the question of whether Ullrich should be awarded his attorneys' fees under §407.025.1. On remand, this Court also has authority to instruct the trial court to determine the amount of the fees, if they are to be awarded, and to take additional evidence regarding them as it deems proper. See, *Industry Financial Corporation*, 778 S.W.2d at 417.

**IV**

**THE TRIAL COURT ERRED IN LIMITING ULLRICH'S  
COMPENSATORY DAMAGES TO \$15,686.50 BECAUSE THIS  
LIMITATION WAS CONTRARY TO LAW, NOT SUPPORTED BY  
SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE  
EVIDENCE IN THAT CONSEQUENTIAL DAMAGES ARE  
RECOVERABLE EITHER FOR BREACH OF CONTRACT OR FOR A**

**MISSOURI MERCHANDISING PRACTICES ACT VIOLATION UNDER §407.025 RSMo (1994), AND ULRICH PRESENTED OR ATTEMPTED TO PRESENT SUBSTANTIAL EVIDENCE OF HIS CONSEQUENTIAL DAMAGES, INCLUDING DAMAGE FOR THE LOSS OF HIS PERSONAL PROPERTY LEFT IN THE MODULAR HOME, HIS STORAGE COSTS, HIS CONTINUED UTILITY COSTS AND TAXES, THE ESTIMATED COST TO CLEAR THE CLOUD ON HIS TITLE TO THE DITTMER PROPERTY AND THE OUTSTANDING BALANCE STILL OWED, WITH INTEREST, ON THE CONSTRUCTION PORTION OF HIS INDYMAC LOAN.**

In his fourth point, Ullrich challenges the trial court's decision to deny any consequential damages. Upon a proper showing, the plaintiff may recover consequential damages either for breach of contract or for an MPA violation under §407.025.1. Here, Ullrich presented or attempted to present evidence of his consequential damages. But the trial court erred by refusing to allow Ullrich to present most of this evidence, and then by rejecting the balance as remote and speculative.

**A. Standard of Review**

The standard of review of a bench-tryed case is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) This standard applies to the trial court's rulings on remedy and damage claims. *Davis v. Cleary Building Corporation*, 143 S.W.3d 659, 665 (Mo.App. W.D. 2004)

**B. Upon a proper showing, a buyer may recover consequential damages either for breach of contract or for MPA violations.**

Under both the Uniform Commercial Code and the common law, a buyer may recover incidental and consequential damages proximately caused by the seller's breach of contract. *Cooper v. Bluff City Mobile Home Sales, Inc.*, 78 S.W.3d 157, 166 (Mo.App. S.D. 2002) (applying §400.2-715); *Universal C.I.T. Credit Corporation v. State Farm Mutual Automobile Insurance Co.*, 493 S.W.2d 385, 391 (Mo.App. K.C.D. 1973) (recognizing same rule under common law). Consequential damages are defined as “any loss resulting from general or particular requirements and needs which the seller at the time of contracting had reason to know...” *Id.* at 391, citing §400.2-715(2)(a). This statutory definition is essentially the same under the common law. *Universal C.I.T. Credit Corporation*, 493 S.W.2d at 391.

Imperial Homes may argue that they excluded consequential damages in their modular home sales contract. (See, Plaintiff's Exhibit 5) But this limitation of damages in the sales contract only applied to claims for breach of warranty. (Plaintiff's Exhibit 5) Imperial Homes could not rely on this limitation to avoid consequential damages when they breached their oral promises to serve as a general contractor. See, *Helterbrand v. Five Star Mobile Home Sales, Inc.*, 48 S.W.3d 649, 661-662 (Mo.App. W.D. 2001) (paragraph in mobile home sales contract limiting damages for breach of warranty had no application to claims for breach of duties as general contractor).



A private plaintiff suing under the MPA also may recover consequential damages. Section 407.025.1 provides that a private plaintiff meeting the definition of a consumer who “suffers an ascertainable loss of money or property” as a result of the use or employment of an unlawful practice under the Act may recover actual damages. The general rule, in cases of fraud or deceit, is that the defendant is responsible for consequential damages on the theory that those results, injurious to the plaintiff, are presumed to have been within his contemplation at the time of the fraud. *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 182 (Mo.App. W.D. 2006); *Davis v. Cleary Building Corporation*, 143 S.W.3d 659, 667, n. 4 (Mo.App. W.D. 2004) (consequential damages recoverable on fraud claims if properly pled as special damages). Because the MPA was created to supplement the definition of common law fraud, the courts have permitted these same kinds of damages in private MPA actions. See, *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 900 (Mo.App. E.D. 2003) (continued lease payments recoverable when plaintiff was threatened with penalties if she terminated lease) This Court observed in *Clement*: “It is true that this may make the amount of damages somewhat nebulous, but it does not necessarily remove the case from the category of compensable damages.” *Id.* at 900 (citations omitted).

**C. The Trial Court erred by refusing to allow Ullrich to present most of his evidence of consequential damages, and by rejecting the balance as remote and speculative.**

By sustaining a series of objections, the trial court refused to allow Ullrich to present evidence on most of his claims for consequential damages. The trial court refused to allow Ullrich to present evidence on the amount of his storage costs. (Tr. 99-100) Ullrich testified that he purchased appliances and furniture in anticipation of his move to the modular home, but he was forced to incur monthly storage costs when he was unable to make the move as planned. (T. 99) The trial court also rejected Ullrich's attempt to present evidence of his excess utility costs and taxes in having to maintain both the Dittmer property and his residence in the City of St. Louis. (Tr. 109-111) The trial court refused to allow Ullrich to present evidence that these were contemplated damages because Ullrich discussed his anticipated savings on these kinds of expenses with Steve Schmaltz prior to the closing. (Tr. 41-46) (Plaintiff's Exhibit 34) And the trial court refused to allow Ullrich to present evidence of his anticipated legal costs to remove the cloud on his title to the Dittmer property. (121-122) Ullrich described the IndyMac deed of trust as a \$102,000 lien against his property. (Tr. 193-194) (Plaintiff's Exhibit 11) Ullrich made offers of proof to preserve the issues on each of these disallowed damage claims. (Tr. 100-101, 109-112, 121-122)

The trial court rejected the balance of Ullrich's claims as remote and speculative and improper consequential damages. (L.F. 90) For instance, the trial

court refused to allow Ullrich any damages for the loss of the electric range and futon that he had stored in the modular home. (Tr. 96-97) The trial court rejected this claim even though Imperial Homes retained control over the modular home, presumably with its contents, for over five years before selling it. (Tr. 250)

Finally, the trial court rejected any damages for the balance owed on the IndyMac loan. (L.F. 88) The trial court found that Ullrich offered no evidence of the amount owing on this construction loan. (L.F. 88) This finding is against the weight of the evidence. Ullrich and Dietz both testified that Ullrich owes over \$15,000 for loan proceeds disbursed at the real estate closing. (Tr. 152, 309) Ullrich also testified that he owes an additional \$775 disbursed to Costello Construction for clearing the land. (Tr. 152-154). The interest rate on this loan was 7.5% per annum. (Plaintiff's Exhibit 7) Amounts owed to the buyer's financier are a proper element of consequential damages where, as here, the seller knew of the loan. *Cooper v. Bluff City Mobile Home Sales, Inc.*, 78 S.W.3d 157, 166 (Mo.App. S.D. 2002)

The trial court abused its discretion in refusing to allow Ullrich to present evidence on most of consequential damage claims. And the trial court's decision to reject the balance of Ullrich's damage claims was contrary to law and against the weight of the evidence.

## V

### **THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF A SERIES OF SETTLEMENT PROPOSALS PRESENTED**

**BY IMPERIAL HOMES TO ULLRICH PRIOR TO THE LITIGATION BECAUSE THE ADMISSION OF THIS EVIDENCE WAS CONTRARY TO LAW IN THAT THE GENERAL RULE PROHIBITS ADMISSION OF A SETTLEMENT OFFER UNLESS ITS HAS SOME INDEPENDENT RELEVANCE, BUT THIS NARROW EXCEPTION DOES JUSTIFY THE USE OF THE SETTLEMENT OFFERS HERE ON THE PURPORTED GROUND THAT THEY WERE OFFERED TO DISPROVE ULLRICH'S ALLEGATION THAT IMPERIAL HOMES NEVER INTENDED TO HONOR THEIR ORIGINAL PROMISES; THAT DEFENDANT DIETZ ADMITTED HE DELIBERATELY LEFT OUT OF HIS LIST OF SETTLEMENT OPTIONS AN OFFER TO HONOR THOSE ORIGINAL PROMISES, AND THE ADMISSION OF THIS EVIDENCE WAS PREJUDICIAL IN THAT THE TRIAL COURT CONSIDERED THIS IMPROPER EVIDENCE IN CONCLUDING THAT THE DISPUTES HERE WERE NO MORE THAN MISCOMMUNICATIONS OVER WHAT WAS EXPECTED.**

In his fifth point, Ullrich challenges the trial court's decision to allow Imperial Homes to introduce evidence of their settlement offers. The trial court's decision violated the rule that such evidence is inadmissible. And the trial court's admission of this improper evidence was prejudicial because it was considered in the trial court's findings.

### **A. Standard of Review**

The standard of review of an evidentiary ruling is whether the trial court abused its discretion. *Sherar v. Zipper* 98 S.W.3d 628, 632 (Mo.App. W.D. 2003) If the trial court erred in admitting evidence, this Court also must determine if the erroneous admission of the evidence was prejudicial. *Golliwitzer v. Theodoro*, 675 S.W.2d 109, 112 (Mo.App. E.D. 1984)

### **B. The general rule prohibits admission of settlement offers.**

In order to further the public policy favoring settlement of disputes, it is well-established that settlement offers are not admissible in evidence. *State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 427 (Mo.App. W.D. 1997); *McPherson Redevelopment Corporation v. Watkins*, 743 S.W.2d 509, 510-511 (Mo.App. E.D. 1987). If an offer of settlement also constitutes an admission of an independent fact, then the offer is deemed admissible under an exception to the general rule. *J.A. Tobin Construction Company v. State Highway Commission of Missouri*, 679 S.W.2d 183, 187 (Mo.App. W.D. 1985) But this is a narrow exception, requiring unusual facts to permit its application. *Id.* at 188.

### **C. Imperial Homes cannot justify the admission of the settlement offers on the purported ground of independent relevance.**

Here, the trial court permitted Imperial Homes to offer into evidence, over objection, a letter directed to Ullrich's attorney marked as Defendants' Exhibit G. (Tr. 306-307) This letter was prepared during negotiations and presented Ullrich with four settlement options. (Tr. 308-309) Ullrich objected to the admission of

this evidence because it was an offer in compromise, but the trial court overruled the objection and admitted the evidence in violation of the general rule. (Tr. 306-307)

Imperial Homes cannot justify the trial court's ruling under the narrow independent evidence exception. In overruling Ullrich's objection, the trial court asserted that that the evidence of these settlement options was relevant to refute Ullrich's allegation that Imperial Homes never intended to do anything in the first place. (Tr. 306-307) But the evidence did not show that Imperial Homes was prepared to complete the transaction according to what they originally promised. Dietz admitted that he deliberately left that fifth option out of Defendants' Exhibit G. (Tr. 327)

**D. The Trial Court's admission of this improper evidence had a prejudicial effect.**

The trial court's admission of this improper evidence had a prejudicial effect because the trial court considered the settlement negotiations and offers in its findings. The trial court found that purpose of the meeting at the office of Ullrich's counsel was "to resolve the miscommunications about what was to be done about the site of the home." (L.F. 89) This was critical to the trial court's belief that Ullrich's complaints of fraud and MPA violations were no more than miscommunications. (L.F. 89) The trial court's admission of Defendants' Exhibit G also had a prejudicial effect because the trial court used this document to find

that Imperial Homes offered to return Ullrich's money, but the offer was declined.  
(L.F. 89)

## VI

**THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW ULLRICH TO INTRODUCE INTO EVIDENCE A PRIOR JUDGMENT AGAINST IMPERIAL HOMES FOR FRAUD BECAUSE THE REJECTION OF THIS EVIDENCE WAS CONTRARY TO LAW IN THAT EVIDENCE OF PRIOR FRAUDULENT CONDUCT IN ANOTHER CASE IS RELEVANT TO SHOW FRAUDULENT INTENT WHERE, AS HERE, THERE ARE ALLEGATIONS OF FRAUD IN THE PLEADINGS AND THE TRIAL COURT'S REFUSAL TO CONSIDER THIS EVIDENCE WAS PREJUDICIAL IN THAT THE TRIAL COURT FOUND AGAINST ULLRICH ON HIS CLAIMS FOR FRAUD AND PUNITIVE DAMAGES.**

In his sixth point, Ullrich challenges the trial court's refusal to admit evidence of a prior fraud judgment entered against Imperial Homes. This evidence was relevant to show motive on Ullrich's claims for fraud and punitive damages.

### **A. Standard of Review**

The standard of review of an evidentiary ruling is whether the trial court abused its discretion. *Sherar v. Zipper* 98 S.W.3d 628, 632 (Mo.App. W.D. 2003) If the exclusion of the plaintiff's evidence was improper, this Court must determine if the plaintiff was prejudiced by the exclusion. *Id.* at 632.

**B. Prior fraudulent conduct is relevant where there are allegations of fraud in the pleadings.**

Historically, Missouri courts have long recognized an exception to the general rule against the admission of prior transactions when there are allegations of fraud. 33 Mo. Prac., Courtroom Handbook on Mo. Evid. §401.6 (2006 ed.), citing *Rice v. Lammers*, 65 S.W.2d 151, 154 (Mo.App. St.L. 1933). When fraud is alleged, fraudulent intent becomes the gist of the inquiry and “the evidence should be allowed to take a wide range.” *Id.* at 154. See also, *McCormick’s Handbook of the Law of Evidence*, §197 (2d ed. 1972) (when intent is an essential ingredient for liability, prior misrepresentations tend to show that the misrepresentations in suit were made with knowledge of falsity and with intent to deceive) This exception also has been applied where, as here, the allegations support a claim for punitive damages. *Brockman v. Regency Financial Corp.*, 124 S.W.3d 43, 50-51 (Mo.App. W.D. 2004)

The trial court here erred when it sustained an objection and refused to allow Ullrich to introduce evidence of a prior fraud judgment. As part of his offer of proof, Ullrich’s counsel obtained an admission from Dietz that a jury returned a verdict against Imperial Homes for \$84,000 on allegations of fraud. (Tr. 279) As part of his offer, Ullrich’s counsel also presented the trial court with a certified copy of the court record. (Tr. 279-280) (Plaintiff’s Exhibit 44) The trial court denied the offer of proof, but stated that Plaintiff’s Exhibit 44 would be part of the record for purposes of this appeal. (Tr. 280)



**C. The Trial Court's refusal to consider this evidence of fraudulent intent had a prejudicial effect.**

Because fraudulent intent was the gist Ullrich's claims for fraud and punitive damages, the trial court's refusal to consider this evidence had a prejudicial effect. The trial court ultimately ruled against Ullrich on his claims for fraud and punitive damages. (L.F. 91-92)

**CONCLUSION**

Ullrich requests this Court to reverse the judgment and to remand the case for a new trial.

Respectfully submitted,

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**CERTIFICATE UNDER RULE 84.06(c)**

I, Daniel R. Schramm, hereby certify that I am one of the attorneys for Appellant Paul Ullrich and that the foregoing Brief of Appellant:

- (1) Includes the information required by Rule 55.03;
- (2) Complies with the Limitations contained in Special Rule 360; and
- (3) Contains 14,315 words.

The undersigned further certifies that the disk submitted with this Brief has been scanned for viruses and is virus-free.

/s/ Daniel R. Schramm  
**DANIEL R. SCHRAMM**

**CERTIFICATE OF SERVICE**

I, **DANIEL R. SCHRAMM**, hereby certify that I am one of the attorneys for Appellant Paul Ullrich and that on the 9<sup>th</sup> day of July, 2007, I caused a true copy of the aforesaid Brief of Appellant Paul Ullrich together with a floppy disk of the Brief to be served upon respondents' counsel and upon the pro se respondent by depositing the same in the United States Mail, postage prepaid, addressed as follows:

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