

For Immediate Release, October 26, 2016  
Jefferson City, Missouri

## HIGH COURT REJECTS STAN KROENKE'S EMERGENCY APPEAL

Yesterday at 2:21 p.m., the Missouri Supreme Court denied a petition filed by Stan Kroenke, and his employee, Otto Maly, to stop discovery of their financial statements and income tax returns in a Boone County, Missouri, lawsuit filed in 2014 by one of Kroenke's real estate partners, James Alabach. Kroenke and Maly petitioned the Supreme Court for relief after the trial judge held "it is more likely than not" that Alabach can make a case for punitive damages at trial against Kroenke and Maly, and ordered them to produce financial documents to support Alabach's punitive damages claim. The Supreme Court Order, Kroenke's and Maly's Petition, Alabach's brief opposing the petition, and the trial court Order are attached.

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Attachments:  
Supreme Court Order (October 25, 2016)  
Kroenke's and Maly's Petition (October 21, 2016)  
Suggestions in Opposition (October 24, 2016)  
Trial Court Order (October 3, 2016)



3. On August 8, 2016, Relators jointly filed a SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT on Plaintiff's breach of fiduciary duty claim and related punitive damage claim. Copies of the motion and suggestions in support are attached as Exhibit D (Writ Exhibits 54-61). The motion contends that pursuant to section 347.088.2(2) and *Hibbs v. Berger*, 430 S.W.3d 296 (Mo. Ct. App. 2014), when the parties negotiated and executed operating agreements for the limited liability companies at issue, the parties validly "contracted out" of common law fiduciary duties and limited their liability to each other, so that as a matter of law Alabach cannot state a claim against Relators for breach of fiduciary duty and cannot recover punitive damages in this case.

4. On August 2, 2016, Relators jointly filed a FIRST MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS challenging the legal sufficiency of Plaintiff's breach of fiduciary duty claim. A copy is attached as Exhibit E (Writ Exhibits 62). The motion contends that pursuant to *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997), Alabach's breach of fiduciary duty claim is pleaded improperly and is insufficient as a matter of law.

5. On August 9, 2016, the trial court heard a discovery dispute concerning Plaintiff's attempts to obtain discovery of Relators' "financial condition" without first obtaining a finding from the trial court, as required by section 510.263.8. During the evidentiary hearing (not yet transcribed): (i) the trial court suggested that Plaintiff's burden was equivalent to the State's modest evidentiary burden to show "probable cause" in a criminal case; (ii) Plaintiff submitted an evidentiary record that Plaintiff previously submitted in support of a motion for summary judgment; (iii) Plaintiff announced on the

record that Plaintiff was seeking financial discovery in relation to his breach of fiduciary duty claim only; (iv) Relators argued that their pending dispositive motions directed at that claim (which were not ripe for ruling because Plaintiff had yet to respond) would eventually be granted as a matter of law, regardless of the evidentiary record made by Plaintiff, such that Plaintiff was certain to have no submissible claim for punitive damages at trial. The trial court agreed with Relator's logic, ordered Plaintiff to respond to the dispositive motions, and entered the following docket order after the hearing concluded:

Argument presented on Motion to Discover relative to punitive damages.  
Ruling on same held in abeyance pending receipt of suggestions from  
Plaintiff.

(Exhibit F; Writ Exhibit 66).

6. On September 28, 2016, the trial court held a status conference and entered the following docket order afterward:

Plaintiff granted leave to file 2nd Amended Petition over objections of Defendants, same due within ten (10) days. Defendants allowed 30 days thereafter to file answer. Pending Motions denied without prejudice pending reconsideration due to new pleadings. Counsel instructed to prepare order regarding discovery related to punitives.

(Exhibit G; Writ Exhibit 67).

7. On October 3, 2016, Respondent (the Honorable Jon Beetem) entered the DISPUTED ORDER compelling discovery of Relators' personal finances, including

ordering: (i) Relators to produce federal income tax returns filed from 2014 through the time of trial; (ii) Relators to produce "personal financial statements"; (iii) Relators or Boone County National Bank to produce an unredacted copy of a certain financial statement submitted to the bank in July 2011; and (iv) Relators to give depositions "on financial condition." A copy of the DISPUTED ORDER is attached as Exhibit A (Writ Exhibits 1-2).

8. The DISPUTED ORDER granted Plaintiff ten days to file a second amended petition, and it denied Relators' pending dispositive motions (*see above*) as moot. (*See Exhibit A*; Writ Exhibits 2).

9. On October 12, 2016, Plaintiff filed a SECOND AMENDED PETITION.

10. Relators have until November 11, 2016 to re-file their dispositive motions (*see above*), which if granted will eliminate from this case Plaintiff's claim for punitive damages.

## **II. Relief Sought**

Relators seek the full measure of protection against financial disclosure that the legislature intended when it enacted section 510.263.<sup>1</sup> Realtors also seek the benefit of section 347.088.2(2), pursuant to which they have "contracted out" of Alabach's punitive damage claim altogether. The trial judge should apply the section 510.263 standard correctly; the legal sufficiency of Plaintiff's punitive damage claim (and whether the claim will remain in the case) should be determined before personal financial disclosure

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<sup>1</sup> All statutory references are to the current version of the Missouri Revised Statutes.

is compelled; and if disclosure is compelled, disclosure should be limited to a relevant snapshot of Relators' "assets" per section 510.263.8.

Specifically, Relators seek a writ of prohibition (or, in the alternative, a writ of mandamus) to Respondent Jon Beetem: (i) vacating his Order dated October 3, 2016 (Exhibit A); (ii) explaining the meaning of the statutory standard "more likely than not that the plaintiff will be able to present a submissible case to the trier of fact on the plaintiff's claim of punitive damages" and prohibiting Respondent from applying a lesser, different, or purely evidentiary standard that ignores the legal sufficiency of Plaintiff's claims; and (iii) explaining the meaning of the statutory term "assets" and prohibiting Respondent from ordering Relators to disclose anything other than a snapshot of Relators' assets at a single, relevant point in time.

### **III. Statement of Reasons Why the Writ Should Issue**

A. There is confusion and uncertainty in trial courts, including the trial court below, concerning how to interpret and apply the statutory standard, "more likely than not that the plaintiff will be able to present a submissible case to the trier of fact on the plaintiff's claim of punitive damages."

B. There is confusion and uncertainty in trial courts, including the trial court below, concerning the scope of discovery authorized by the statutory phrase, "discovery as to a defendant's assets."

C. Respondent has misinterpreted section 510.263.8 and misapplied it to Relators, compelling them to make unwarranted disclosure of personal financial information unrelated to the facts of the underlying lawsuit without first determining the

legal sufficiency of Plaintiff's punitive damage claim—precisely the kind of routine personal financial disclosure that the legislature intended to abrogate when it enacted section 510.263.

D. Respondent has misinterpreted section 510.263.8 and misapplied it to Relators, compelling them to disclose personal financial information unrelated to a determination of punitive damages, including misleading and potentially prejudicial information such as amounts and sources of income, income tax deductions, the nature and identity of specific assets, the identities of lenders, changes in net worth over time, and any matter into which Plaintiff's counsel might inquire during a deposition "on financial condition"—precisely the kind of overly broad disclosure that the legislature intended to abrogate when it enacted section 510.263.

E. Respondent has denied Relators the benefit of section 347.088.2(2), compelling them to engage in discovery on a punitive damage claim as to which they have "contracted out" of all possible liability as a matter of law.

Respectfully submitted:

BROWN LAW OFFICE LC

By: */s/ David G. Brown*

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IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

JAMES ALABACH, )  
INDIVIDUALLY AND AS )  
MEMBER OF )  
TKG 7<sup>TH</sup> STREET, LLC )

Plaintiff, )

v. )

CASE NO. 14BA-CV04205

E. STANLEY "STAN" KROENKE, )  
et al., )

Defendants. )

**ORDER PERMITTING DISCOVERY INTO FINANCIAL CONDITION,  
GRANTING PLAINTIFF LEAVE TO AMEND, AND DENYING  
DEFENDANTS' MOTIONS FOR PARTIAL JUDGMENT ON THE  
PLEADINGS AND FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff moves for a finding under Section 510.263.8, RSMo., that "it is more likely than not that the plaintiff will be able to present a submissible case to the trier of fact on the plaintiff's claim of punitive damages" against defendants Kroenke and Maly.

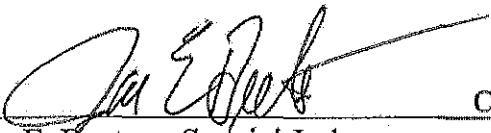
The Court has considered all briefs, documents and argument relating to that motion; considered plaintiff's motion for leave to file a second amended petition and all briefs relating to that motion; and considered motions filed by defendants Kroenke and Maly for partial judgment on the pleadings and partial summary judgment, and all briefs and documents relating to those motions.

The Court grants plaintiff's motion for leave to amend, orders plaintiff to file his second amended petition within ten days, and grants defendants thirty days to answer. All dispositive motions directed to the first amended petition are denied as moot.

The Court finds that it is more likely than not that plaintiff will be able to present a submissible case on the issue of punitive damages against defendants Kroenke and Maly, and grants plaintiff's motion for discovery into the financial condition of these defendants, subject to the terms of a protective order previously entered.

The Court orders defendants Kroenke and Maly within ten days to produce a copy of the federal income tax returns filed by each of them during years 2014 through the time of trial, redacted to remove personal identifying information and any information about income for spouses if returns are jointly filed, and to produce a current financial statement for defendants Kroenke and Maly. Defendant Kroenke shall provide plaintiff with an unredacted copy of the financial statement Kroenke gave Boone County National Bank in connection with a loan guaranteed by him and plaintiff in July, 2011, or plaintiff may obtain this document directly from the bank. Defendants Kroenke and Maly shall be available for plaintiff to take a deposition on financial condition, at a mutually agreed location or by video conference arranged by defendants during the next thirty days.

It is so ORDRED.

  
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Jon E. Beetem, Special Judge,  
Circuit Court of Boone County, Missouri

COURT SEAL OF



BOONE COUNTY

Supreme Court of Missouri  
en banc

September Session, 2016

State ex rel. E. Stanley Kroenke and  
R. Otto Maly,

Relators,

No. SC95993        PROHIBITION  
Boone County Circuit Court No. 14BA-CV04205  
Western District Court of Appeals No. WD80133

The Honorable Jon Beetem,

Respondent.

Now at this day, on consideration of the petition for a writ of prohibition herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied.

Wilson, J., not participating.

STATE OF MISSOURI-Sct.

I, BILL L. THOMPSON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 2016, and on the 25<sup>th</sup> day of October, 2016, in the above-entitled cause.



Given under my hand and seal of  
said Court, at the City of Jefferson,  
this 25<sup>th</sup> day of October, 2016.

Bill L. Thompson Clerk

Christina Luma Deputy Clerk

**IN THE SUPREME COURT OF MISSOURI**

<b>STATE OF MISSOURI, ex rel.</b>	)	
<b>E. STANLY KROENKE, et al.,</b>	)	
	)	
<b>Relator,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. SC95993</b>
	)	
<b>THE HONORABLE</b>	)	
<b>JON E. BEETEM,</b>	)	
	)	
<b>Respondent.</b>	)	

**RESPONDENT’S SUGGESTIONS IN OPPOSITION TO  
RELATORS’ PETITION FOR WRIT OF PROHIBITION**

**I INTRODUCTION**

James Alabach filed this suit on December 18, 2014. Trial is set for July 18, 2017. Relators Stan Kroenke and Otto Maly previously sought prohibition in this Court through Kroenke’s company, BCMO Investors, LLC, to block a different discovery order. That earlier petition was denied without preliminary writ in Case No. SC95644.

Relators now challenge a trial court Order of October 3, 2016, wherein respondent, the Honorable Jon E. Beetem, Special Judge, ordered limited discovery into relators’ financial condition, subject to protective order, on Alabach’s claim for punitive damages. Relators’ Ex. A.

Prohibition is proper to stop a trial court from abusing its “broad discretion in administering rules of discovery.” *State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner*, 239 S.W.3d 608, 610 (Mo. banc. 2007).

The only precondition for the discovery here ordered is a finding required by Section 510.263.8, RSMo., “that it is more likely than not that the plaintiff will be able to present a submissible case to the trier of fact on the plaintiff’s claim of punitive damages.” See *State ex rel. Rehnquist Design & Build, Inc. v. Siwak*, 2016 WL 5377887, at \*1 (Mo. App., E. D. Sept. 27, 2016)(prohibition granted because the trial court ordered financial discovery without making finding required by Section 510.263.8).

Respondent’s Order makes the necessary finding, and is reasonable in scope. Respondent therefore acted within his discretion and prohibition should be denied.

## **II RELATORS’ ASSERTED GROUNDS FOR PROHIBITION**

Relators’ Writ Summary states prohibition should issue to stop respondent from “misinterpreting and misapplying” Section 510.263.8, in that: 1) respondent ordered discovery even though relators continue to assert Alabach has not established that he has an actionable claim upon which to base punitive damages (Supporting Suggestions at 5-8); and 2) the scope of discovery exceeds what the statute allows (Supporting Suggestions at 8-11). In their Writ Summary, relators acknowledge that both grounds raise matters of “first impression.” Neither is grounds for the writ.

## **III SUMMARY OF THE UNDERLYING FACTS**

Kroenke is the majority owner and controlling member of three limited liability companies owning real estate in Columbia, Missouri (known respectively as “7<sup>th</sup> Street,” “Hall Theatre,” and “9<sup>th</sup> Street”), and one company owning real estate in Springfield (known as “Springfield”). Kroenke and Maly both served as managers of these

companies, or in the case of Springfield, as the managers of a corporate manager which Kroenke wholly owns and controls, TKG Management, Inc.

For two years before Alabach file suit, Kroenke and Maly repeatedly withheld Alabach's cash distributions. When Alabach complained, Kroenke and Maly retaliated. They began by stopping payment on and failing to renew a promissory note owed by 7<sup>th</sup> Street to a local lender, Boone County National Bank. Alabach and Kroenke personally guaranteed the 7<sup>th</sup> Street loan. Instead of renewing the 7<sup>th</sup> Street note, Kroenke bought it from the lender for \$4,980,799.14, and titled it to his wholly owned company, BCMO Investors, LLC. Kroenke and Maly did that so they could declare a default against Alabach on his personal guarantee for the entire unpaid balance, default charges of \$247,250.80, penalty interest, and other charges.

Alabach brought suit over this action and for money he was owed. Kroenke and Maly retaliated by suing Alabach on his guaranty of the 7<sup>th</sup> Street note for \$5,409,164.83.

On March 31, 2016, respondent's predecessor as trial judge in this case, the Honorable Gary Oxenhandler, ordered BCMO to produce documents BCMO claimed to be privileged. Kroenke and Maly caused BCMO to seek prohibition in this Court. After this Court denied prohibition on June 28, 2016, Alabach moved on June 29, 2016 for the discovery order here at issue. Relators began immediate damage control by purporting to "reinstate" the past-due 7<sup>th</sup> Street loan on July 12, 2016, and dismissing the \$5.4 Million BCMO counterclaim against Alabach on his guaranty on July 18, 2016. Alabach moved for leave to file a second amended petition on July 28, 2016.

#### **IV DISCUSSION**

**A. Respondent acted within his discretion in finding it more likely than not that plaintiff can present a submissible case for punitive damages at trial (Responding to Relators' Argument point A, at Supporting Suggestions at p. 5-8).**

Respondent considered the threshold issue of whether Alabach has a viable cause of action upon which to base punitive damages, as raised in four dispositive motions directed to Alabach's claim for breach of fiduciary duty. Respondent's Order cites to these motions, which included two fully briefed summary judgment motions. Relators' Ex. A ("The Court has considered motions filed by defendants Kroenke and Maly for partial judgment on the pleadings and partial summary judgment, and all briefs and documents relating to those motions").

Alabach's claim for breach of fiduciary duty is not the only tort cause of action pending against the relators. Alabach sought and respondent granted leave to assert additional tort causes of action for malicious prosecution and abuse of process which also support punitive damages. In granting discovery into relators' financial condition respondent "considered plaintiff's motion for leave to file a second amended petition and all briefs relating to that." Relators' Ex. A.

Respondent did not overlook, but instead rejected, relators' contention that Alabach will be unable to go to trial on a claim supporting punitive damages.

The heart of relators' argument is that Alabach "contracted out" of fiduciary duty claims on entering into operating agreements with Kroenke.

Alabach is not asserting fiduciary duties based on contract rights alone. By law, those who control a Missouri limited liability company owe members a duty of “good faith” and an obligation to act in the “best interests” of the company, subject to the right of members to agree otherwise within an operating agreement. Section 347.088.1- 2, RSMo., *Hibbs v. Berger*, 430 S.W.3d 296, 314, 316 (Mo. App., E. D. 2014). Missouri’s Limited Liability Company Law preserves fiduciary duties unless agreed otherwise. Section 347.088.2.(2), RSMo. (“To the extent that, at law or equity, a member or manager or other person has duties, including fiduciary duties ...[t]he member's, manager's or other person's duties and liabilities may be expanded or restricted by provision in the operating agreement.” (Emphasis added)).

Nothing within the relevant operating agreements restricts Kroenke’s and Maly’s fiduciary duties. Compare, *Peterson v. Cont'l Boiler Works, Inc.*, 783 S.W.2d 896, 905 (Mo. 1990)(no breach of fiduciary duty for breach of stock purchase agreement). The *Peterson* Court found no cause of action because “[t]he fiduciary duty [did not] exist separately from and independently of contractual obligations.” *Id.*

Respondent’s Order reflects a sound application of the law, and recognition that the relevant operating agreements have no provisions restricting applicable fiduciary duties.

**B. Section 510.263 is procedural only, establishing a right to bifurcated trial of punitive damages and placing one previously-discussed precondition on pretrial discovery of evidence to support an award of punitive damages; it does not abrogate existing substantive law and plays no role in limiting the scope of discovery (Responding to relators’ point III B, Supporting Suggestions at 8-11).**

Relators mistakenly believe that Subsection 8 of Section 510.263 was enacted in 1987, and that judges laboring in “confusion” about the statute consistently fail to “acknowledge” that it abrogated existing law governing scope evidence to support punitive damages. Supporting Suggestions at 3. The cases discussed by relators in that connection all predate Subsection 8, which was not enacted until 2005, in House Bill 393.

In 1987 Missouri caselaw held evidence of “the defendant's worth or financial condition” to be relevant and admissible in assessing punitive damages. See *Beggs v. Universal C. I. T. Credit Corp.*, 409 S.W.2d 719, 724 (Mo. 1966).

As enacted by House Bill 700, the 1987 statute granted a right to bifurcated trial on punitive damages. Section 510.263.1. It made no changes to substantive law or rules of evidence. It did not abrogate anything. To the contrary, Subsections 2 and 3 of Section 510.263 incorporate almost verbatim the statement of substantive law from *Beggs*. “2. ...Evidence of defendant's financial condition shall not be admissible in the first stage... Section 520.263.2 (emphasis added). “3. If...the jury determines that a defendant is liable for punitive damages...[e]vidence of such defendant's net worth shall be admissible during the second stage of such trial.” Section 510.263.3(emphasis added).

In passing Section 510.263 in 1987 the General Assembly codified existing caselaw on the scope of evidence which is admissible to support punitive damages, while at the same time creating new bifurcated trial procedures for presenting that evidence.

After 1987 the substantive law remained unchanged. See, *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc. 1996)(“evidence of a defendant's financial status is admissible as an indication of the amount of damages necessary to punish the

defendant”); see also, *Collins v. Hertenstein*, 90 S.W.3d 87, 97 (Mo. App., W. D. 2002)(“Any evidence of a defendant's financial status—not just his net worth—is relevant and admissible”).

In 2005 the General Assembly passed HB 393 and thereby added the pretrial discovery procedure of subsection 8 which is here at issue:

8. Discovery as to a defendant's assets shall be allowed only after a finding by the trial court that it is more likely than not that the plaintiff will be able to present a submissible case to the trier of fact on the plaintiff's claim of punitive damages.

Section 510.263.8, RSMo. (emphasis added).

Importantly, HB 393 reenacted subsections 2 and 3 of Section 510.263 without change. The General Assembly is presumed to have done so knowing the law at the time of reenactment. See *Citizens Elec. Corp. v. Dir. of Dep't of Revenue*, 766 S.W.2d 450, 452 (Mo. banc. 1989)(the legislature is presumed to have reenacted laws knowing prior legislative and judicial interpretation of terms used). The 2005 amendment made no change to the scope of evidence admissible on the issue of punitive damages.

If relators were correct that Section 510.263 “authorizes discovery only as to the ‘defendant’s assets’” (Supporting Suggestions at 8), a litigant has no way of discovering admissible evidence of “defendant’s net worth,” or overall “financial condition.”

Because a defendant’s financial condition is still admissible during the punitive damages phase of trial, respondent properly ordered relators to give depositions on their financial condition, and to produce: 1) income tax returns for 2014 through the time of

trial; 2) one current financial statement each; and 3) the financial statement Kroenke gave in connection with the loan over which he sued Alabach through BCMO.

Respondent's discovery Order is reasonable in scope. See *State ex rel. Newman v. O'Malley*, 54 S.W.3d 695, 699 (Mo. App., W. D. 2001)(five years of income tax returns and financial statements discoverable on issue of punitive damages). Respondent also properly ordered relators to be deposed. See *Id.* (the trial court must give the party seeking discovery a chance to determine "whether discoverable information is complete, and satisfactory or should be further investigated or inquired about").

## V CONCLUSION

Respondent made the one necessary finding before ordering discovery into relators' financial condition. The Order strikes a fair balance by permitting limited but reasonable discovery, subject to protective order. It was entered long after discovery began and after the case was set for trial. Respondent thereby properly exercised his discretion and acted within his jurisdiction. The writ should be denied.

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