IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

SOPHIAN PLAZA ASSOCIATION, et al.,	)	
Respondents,	)	
	)	
v.	)	**WD80678**
	)	
CITY OF KANSAS CITY, MISSOURI,	)	**FILED: November 6, 2018**
Appellant.	)	

Appeal from the Circuit Court of Platte County
The Honorable James W. Van Amburg, Judge

Before Division Two: Karen King Mitchell, C.J., and Alok Ahuja and Edward R. Ardini, Jr., JJ.

In 1976, the Circuit Court of Platte County entered a judgment requiring the City of Kansas City to provide trash collection services to multi-unit apartment buildings and trailer parks, or to make cash payments to the owners of those facilities if the City did not provide trash collection. The City paid trash rebates to property owners for more than thirty years, but discontinued the rebate program in 2010. After the City terminated the rebate program, the Class Plaintiffs[1] sued the City in the Circuit Court of Platte County for breach of contract and contempt of court. The circuit court certified the case as a class action, and conducted a bench trial. The court found that the City had willfully violated the 1976 judgment, and that class members had suffered damages of $10,274,704.00. The court also awarded attorney's fees to the plaintiffs' attorneys in the amount of $4,109,881.60,

[1] Sophian Plaza Association, Townsend Place Condominium Association, Inc., and Stadium View Apartments.

with $1,421,598.06 to be paid by the City in addition to the compensatory damages award, and the remainder to be paid from the class recovery.

The City appeals. We affirm.

Factual Background

On January 15, 1971, the City of Kansas City enacted an ordinance providing for the collection of solid waste from all residences. City Code § 16.20(a) provided, however, that the City would not collect "residential refuse from trailer parks or buildings containing seven or more dwelling units."

In 1974, two groups of Kansas City apartment building owners sued the City in the Circuit Court of Platte County, alleging that City Code § 16.20(a) was unconstitutional. In 1975, owners of trailer parks filed a similar lawsuit. All three suits were pleaded as class actions. The circuit court consolidated the three actions.

On February 20, 1976, the court entered an order finding § 16.20(a) unconstitutional because the discrimination against trailer parks and multi-unit residential buildings constituted an arbitrary and unreasonable classification. The court also found, however, that "the collection of refuse . . . is a governmental function for which the City cannot be held to answer for damages."

Both the plaintiffs and the City appealed to the Missouri Supreme Court from the circuit court's February 20, 1976 order.

On April 7, 1976, the circuit court entered judgment in the consolidated cases. The judgment recited that the court's February 20, 1976 order was not intended as a final disposition, because the plaintiffs' request for permanent injunctive relief remained pending. The judgment recited that,

> It was the Court's hope that with the position of the Court being known through its Order that the parties might be able to arrive at a satisfactory solution to the trash collection problem. It has now become apparent that the parties are unable to do so and the Court must now enter its Judgment reaching the final issue as to whether or not a Mandatory Injunction should be issued.

The judgment declared that City Code § 16.20(a) "is unconstitutional and invalid." The court also entered an injunction "directing the City of Kansas City, Missouri to provide refuse collection services to the plaintiffs unless and until the City enacts a valid ordinance which establishes a reasonable and justifiable classification for those persons who are not entitled to refuse collection by the City." The judgment repeated the court's earlier conclusion that "the City is not liable to the plaintiffs for damages since the collection of trash and refuse is a governmental function."

On May 5, 1976, counsel for the City advised the court that

> the City Council and City Manager have expressed their preference to working out some system for the collection of all residential refuse in the city, after a reasonable interval for formulating and implementing a program therefor, and for arranging the necessary financing, with the understanding that, when this shall have been accomplished, the perfection of the appeals noticed in the above matters will ultimately be abandoned by the parties. We have some reason to believe that such an arrangement can be worked out with the plaintiffs.

On August 31, 1976, the City and the plaintiffs entered into a "Stipulation and Agreement" to resolve the pending lawsuits. The Stipulation recited that

> The parties have agreed that the City will either (a) furnish refuse services to all buildings containing seven or more dwelling units and to all trailer parks containing dwelling units, located in Kansas City, or (b) make cash payments to the owners of such buildings and trailer parks in lieu of such services.

The Stipulation defined "Owners" as "the owners or authorized managing agents of the owners of apartment buildings containing seven or more dwelling units and the owners or authorized managing agents of trailer parks located within the City of Kansas City, Missouri." The Stipulation provided that, beginning on February 1, 1977, "the City shall either provide [refuse-collection] services[2] to

[2] The Stipulation defined "Services" to mean "residential refuse collection and disposal services which meet or exceed criteria now established by the provisions of Chapter 16 of the Code of General Ordinances of Kansas City, or which meet or exceed criteria hereafter established by any ordinance of city-wide application, by state law or by other lawful regulation issued pursuant thereto relating to residential refuse collection."

dwelling units of the owners or pay $1.15 per month per occupied dwelling unit to owners in lieu of providing services," "provided . . . that such owners at the time of such payments are providing [refuse-collection] services to the dwelling units in their buildings or trailer parks." The Stipulation provided for periodic future adjustments to the amount of the per-unit rebate payment, based on the City's cost for providing trash service to other residences.

The Stipulation also provides that, "[i]f the City terminates city-wide services to privately-owned dwelling units," then "the City shall have no further obligation hereunder to make the cash payments or to provide direct [refuse-collection] services."

The Stipulation included a provision whereby "[t]he parties jointly request the Court to incorporate this Stipulation and Agreement in a judgment entered herein and to make compliance with the provisions hereof mandatory." Upon entry of the requested judgment, the parties agreed "to dismiss any appeals presently pending based on this [*sic*] subject matter of this suit and refrain from hereafter entering any appeals from such judgment."

Based on the parties' request, the circuit court entered a Modified Judgment on September 1, 1976, which incorporated the terms of the Stipulation and Agreement. The Modified Judgment noted that the Stipulation and Agreement proposed "a system of cash payments or refuse services for the properties of plaintiffs and others similarly situated." The court stated that the Stipulation resolved "the refuse collection problem" in a manner "satisfactory to the Court as well as to the parties, particularly since it extends beyond the issues herein to address the matter on a city-wide basis, providing just and equitable relief not only to the plaintiffs, but also to owners of similarly situated properties not parties in this litigation."

The Modified Judgment repeated the court's earlier declaration that City Code § 16.20(a) was unconstitutional. The court entered a mandatory injunction "directing the City of Kansas City to provide refuse collection services, or the cash equivalent thereof, to the properties of the plaintiffs and to the properties of others similarly situated, and to dwelling units located in trailer parks, under the terms and conditions specified in the Stipulation and Agreement filed herein." The Modified Judgment again refused to award plaintiffs any compensatory damages based on the City's failure to provide trash collection services in the past, on the basis that the provision of refuse collection services was a governmental function for which the City could not be held liable for damages.

After the entry of the Modified Judgment, the parties dismissed their appeals of the February 20, 1976 order. The City also amended its refuse collection ordinances, effective December 1, 1977, to incorporate the language and intent of the Stipulation and Modified Judgment.

For over thirty years following the entry of the Modified Judgment, the City made trash rebate payments to the owners and managers of multi-dwelling-unit buildings, including condominium associations, and to the owners of trailer parks. In response to budgetary issues in 2008, the City Council initially proposed elimination of the trash rebate program. The program was not immediately terminated, however. Instead, on January 28, 2010 the City adopted Ordinance No. 080935, as amended, effective May 1, 2010, which effectively eliminated the trash rebate program through repeal of City Code §§ 62-41(a)(3) and 62-42.

The trash rebate program was not discontinued with respect to all multi-unit building owners, however. Between 2008 and 2010, the Heartland Apartment Association, an organization representing the owners of approximately 40,000 apartment units in Kansas City, negotiated a settlement with the City under which the trash rebate program would continue with respect to the dwelling units owned

by Heartland's members. The settlement between the City and Heartland was documented in a Settlement Agreement entered on March 2, 2010.

The Heartland Settlement Agreement recited that the City's creation and maintenance of a city-wide trash rebate program, applicable to all owners of multi-unit buildings, was mandated by the 1976 Stipulation and Agreement, and by the Modified Judgment. Thus, the Heartland Settlement Agreement stated that, in the 1976 Stipulation, the parties agreed that "as long as the City provides city-wide collection and removal services, the City shall provide residential collection and removal services to the dwellings excluded by City Code § 16.20(a) or pay a certain amount per month in lieu of such services." The Heartland Settlement Agreement further recited that the Modified Judgment "require[d] the City to provide refuse collection and disposal services, or the cash equivalent thereof, to the properties of the plaintiffs in the Lawsuits and the properties of others similarly situated," and that "the City enacted the provisions of the Stipulation, including the Trash Rebate Program, as mandated by the Modified Judgment," through the adoption of new refuse collection ordinances. The central provision of the Heartland Settlement provided that "the City shall administratively continue in full force and effect and without protracted interruption the Trash Rebate Program as provided by the Stipulation and as mandated by the Modified Judgment solely with regard to those members of [Heartland] identified in the list attached to this Settlement Agreement as Exhibit A."

The Class Plaintiffs in this action (Sophian Plaza Association, Townsend Place Condominium Association, Inc., and Stadium View Apartments) were not members of the Heartland Apartment Association, and therefore did not receive the benefit of Heartland's settlement with the City. On February 27, 2015, the Class Plaintiffs filed their petition in this action in the Circuit Court of Platte County, claiming that the City's termination of the trash rebate program as to non-members

of the Heartland Apartment Association breached the Stipulation and Agreement, and violated the Modified Judgment. The circuit court certified a class consisting of all managers and owners of trailer parks, condominiums, apartments, and buildings containing seven or more dwelling units located in Kansas City during the class period from May 1, 2010 to the present, excluding members of the Heartland Apartment Association.

The case was tried to the court in December 2016. At trial, the circuit court heard evidence indicating that the City was aware that it would be in violation of the Stipulation and Modified Judgment when it chose to discontinue the trash rebate program, and that various City officials advocated that the City ask the circuit court to modify or terminate the injunction contained in the Modified Judgment, before unilaterally terminating the trash rebates. Professor Emeritus John O. Ward testified on behalf of the Class Plaintiffs with respect to his calculation of past and future damages. The City did not call any witness to testify concerning damages.

In its judgment, the circuit court found that "[t]he City made a deliberate, purposeful decision to eliminate the Trash Rebate Program from the budget, knowing that there was a Court Order and contract that mandated the benefits." The court found that "the City knowingly, intentionally, and deliberately chose to not comply with the Modified Judgment by eliminating the trash rebate program," and "knowingly violated the Mandatory Injunction and Modified Judgment." The circuit court entered judgment in favor of the class on their claims for Breach of Injunction (Count I); Breach of Contract (Count II); Specific Performance (Count III); and Civil Contempt (Count VI). Relying on the middle of three damage scenarios offered by Dr. Ward, the circuit court entered judgment for $10,274,704.00 in compensatory damages, and specified that the City would owe an additional $2,846.00 per day "until it complies with its trash collection obligations" "to provide

trash collection services or the cash equivalent thereof." The circuit court also declared that the Class Plaintiffs' counsel was entitled to an attorney's fee award of $4,109,881.60, with $1,421,598.06 to be paid by the City in addition to the compensatory damages award, and the remainder to be paid from the class recovery.

The City appeals.

Analysis

I.

The City raises nine Points on appeal, many of which raise multiple different legal arguments.[3] In its first Point, the City argues that the Class Plaintiffs lack standing to bring an action for breach of contract or civil contempt, because the Class Plaintiffs were not parties to the Stipulation, or to the Modified Judgment, entered in 1976.

It is unnecessary for us to address the Class Plaintiffs' standing to pursue both contract and contempt remedies. The City acknowledges that the Class Plaintiffs sought, and were awarded, the identical relief on their contractual and contempt-based claims. Therefore, if they had standing to pursue either category of claim, it is irrelevant whether they also had standing to pursue the other theory.

The City argues that the Class Plaintiffs lacked standing to prosecute an action for contempt based on the City's violation of the 1976 Modified Judgment, because the Class Plaintiffs were not parties to the 1976 litigation. The City cites to cases which hold that "[c]ivil contempt is intended to benefit a party for whom an order, judgment, or decree was entered," *State ex rel. Chassaing v. Mummert*, 887

[3] Many of the City's Points Relied On raise multiple "separate and distinct claims"; such "'[m]ultifarious points relied on are noncompliant with Rule 84.04(d) and preserve nothing for review.'" *Griffits v. Old Republ. Ins. Co.*, 550 S.W.3d 474, 478 n.6 (Mo. banc 2018) (quoting *Kirk v. State*, 520 S.W.3d 443, 450 n.3 (Mo. banc 2017)). We have nevertheless chosen to separately address each of the City's claims of error.

S.W.2d 573, 578 (Mo. banc 1994) (citation omitted), and that "[c]ivil contempt is 'instituted to preserve and enforce the rights of a private party to an action and to compel obedience to a judgment or decree intended to benefit such a private party litigant.'" *D.R.P. v. M.P.P.*, 484 S.W.3d 822, 826 (Mo. App. W.D. 2016) (citation omitted).

The City's claim that the Class Plaintiffs lack standing to enforce the Modified Judgment ignores the language of the judgment, the context in which it was entered, and the City's actions following entry of the Modified Judgment. Consideration of the terms of the Modified Judgment, and the circumstances before and after its entry, demonstrate that the Modified Judgment was intended to provide relief to <u>*all*</u> owners of multiple-dwelling-unit buildings, and trailer parks, which had been excluded from City trash collection services by virtue of City Code § 16.20(a). Class Plaintiffs have standing to enforce provisions of the Modified Judgment entered for their benefit.

Each of the petitions in the 1970s litigation contained class-action allegations. The circuit court's original judgment, entered on April 7, 1976, declared City Code § 16.20(a) to be unconstitutional, and thus would have prevented the City from denying refuse collection services to <u>*any*</u> owner of a multi-unit building or trailer park. The April 2016 judgment only awarded injunctive relief to the named plaintiffs, however. In response, the City's attorney informed the court that "the City Council and City Manager have expressed their preference to working out some system for the collection of <u>*all*</u> residential refuse in the city." (Emphasis added.) Consistent with the City's preference for a global resolution, the Stipulation and Agreement recited that,

> The parties have agreed that the City will either (a) furnish refuse services to *all buildings* containing seven or more dwelling units and to all trailer parks containing dwelling united, located in Kansas

> City, or (b) make cash payments to the owners of such buildings and trailer parks in lieu of such services.

(Emphasis added.)

When it entered its Modified Judgment incorporating the terms of the parties' Stipulation, the circuit court stated that it approved the Stipulation because "it extends beyond the issues herein to address the matter on a city-wide basis, providing just and equitable relief not only to the plaintiffs, but also to owners of similarly situated properties not parties in this litigation." Recognizing the scope of the parties' agreement, the Modified Judgment enjoined the City to provide trash-collection services, or cash payments, "to the properties of the plaintiffs and to the properties of others similarly situated."

Following entry of the Modified Judgment, the City enacted ordinances which established a trash rebate program applicable to *all* owners of multiple-unit buildings and trailer parks. It made payments to all such property owners, including to each of the Class Plaintiffs, for more than thirty years. And in 2010, in its Settlement Agreement with the Heartland Apartment Association, the City acknowledged that the Modified Judgment "requir[ed] the City to provide refuse collection and disposal services, or the cash equivalent thereof, to the properties of the plaintiffs in the Lawsuits and the properties of others similarly situated," and that the City adopted the trash rebate program "as mandated by the Modified Judgment."

Thus, the events preceding the entry of the Modified Judgment, the terms of the Modified Judgment itself, and the City's conduct and statements subsequent to entry of the Modified Judgment, all demonstrate that the Modified Judgment was intended and designed to afford relief to *all* owners of relevant properties. In the circumstances of this case, the Modified Judgment treated all such owners as members of a class for whose benefit the Modified Judgment was entered. Those

owners were entitled to enforce the terms of the Modified Judgment which were adopted for their benefit, and in which they had a direct pecuniary interest.

The City objects that the Class Plaintiffs and other property owners were not formally made parties to the earlier litigation, and that no class of similarly situated property owners was ever certified by the court in the 1970s litigation. The lack of any formal class-certification order is not relevant at this stage of the litigation. The plaintiffs in the earlier litigation pleaded class-action claims, and the parties proposed to the court a resolution which resolved the plaintiffs' claims on a class-wide basis. The City cannot now complain about the circuit court's failure to adhere to various formalities surrounding the certification of a class, when the City invited the court to enter a judgment containing class-wide relief. *See, e.g.*, *Taylor v. Taylor*, 525 S.W.3d 608, 613 (Mo. App. S.D. 2017) ("The general rule is that a party cannot rely on 'invited error' on appeal. That is, a party cannot lead a trial court into error and then employ the error as a source of complaint on appeal.") (citations, brackets, ellipsis, and internal quotation marks omitted); *Wilson v. Union Pac. R.R. Co.*, 509 S.W.3d 862, 875–76 (Mo. App. E.D. 2017).

The City is also barred by principles of judicial estoppel from now arguing that class action procedures were not properly followed prior to the entry of the Modified Judgment.

> Judicial estoppel embodies the notions of common sense and fair play. Missouri courts in particular have consistently refused to allow litigants to take contrary positions in separate proceedings to ensure the integrity of the judicial process. There is no precise formula for determining whether judicial estoppel applies, but three considerations have commonly been used to guide the determination: (1) a party's later position was clearly inconsistent with its earlier position, (2) the party succeeded in persuading a court to accept the earlier position, and (3) the party asserting inconsistent positions would derive an unfair advantage or impose an unfair detriment on the opposing party.

Berger v. Emerson Climate Techs., 508 S.W.3d 136, 142–43 (Mo. App. S.D. 2016) (citations, brackets, ellipsis, and internal quotation marks omitted). In "unusual circumstances,"[4] judicial estoppel can be applied to prevent a party from raising arguments, even if acceptance of those arguments would render the judgment void:

> The parties to a void judgment are estopped from raising a claim of lack of jurisdiction to enter a judgment in some circumstances.
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> > "It has often been said that a void judgment is no judgment; that it may be attacked directly or collaterally . . . . It neither binds nor bars anyone . . . . [Y]et, notwithstanding, a party to such judgment may voluntarily perform it, by paying the amount adjudged against him and, when paid, no inquiry will be made as to the validity of the judgment; or he may perform the acts required by a void decree, or accept its benefits, and thereby estop himself from questioning the decree. In other words, a party to a void judgment or decree may be estopped from attacking it, either directly or indirectly."
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> *Tremayne v. City of St. Louis*, 320 Mo. 120, 6 S.W.2d 935, 936 (1928) (quoting *Mohler v. Shank*, 93 Iowa 273, 61 N.W. 981, 984 (1895)); *see also RCA Mut. Ins. Co. v. Sanborn*, 918 S.W.2d 893, 897 n.6 (Mo. App. 1996), and *Matter of Estate of Tapp*, 569 S.W.2d 281, 285 (Mo. App. 1978) (one accepting and retaining benefits of a void judgment is estopped to deny the validity of any part thereof, or any burdensome consequences, even where invalidity arises from want of subject matter jurisdiction).

State ex rel. York v. Daugherty, 969 S.W.2d 223, 225 (Mo. banc 1998); *accord Smith v. Smith*, 524 S.W.3d 95, 100 (Mo. App. E.D. 2017) ("[T]he parties to a void judgment may be estopped from challenging the validity of a judgment under certain circumstances. Indeed, a party may estop himself or herself from challenging the validity of the judgment by taking voluntary acts that expressly or impliedly recognize the validity of the judgment.") (citation omitted); *Perkel v. Stringfellow*, 19 S.W.3d 141, 149–50 (Mo. App. S.D. 2000).

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[4] *Kubley v. Brooks*, 141 S.W.3d 21, 28 (Mo. banc 2004).

This case involves circumstances which justify the application of judicial estoppel to prevent the City from challenging the validity of the 1976 Modified Judgment. The Modified Judgment was entered after an earlier judgment which declared unconstitutional the City ordinance excluding multi-unit buildings and trailer parks from trash collection services. Under the original judgment, the City would have been required to provide refuse collection services to all multi-unit residential buildings and trailer parks, since its exclusion of such facilities from trash collection had been invalidated. The earlier judgment also held that the City was not liable for compensatory damages for the five-year-period in which it had failed to provide trash services to those facilities.

Following entry of the April 1976 judgment, the City informed the court that it desired to resolve the refuse collection issue on a City-wide basis. The City then entered into a Stipulation and Agreement in which it explicitly undertook to "furnish refuse services to *all* buildings containing seven or more dwelling units and to *all* trailer parks containing dwelling units, located in Kansas City," or to make rebate payments to the owners of such facilities. While the Stipulation retained the result of the earlier judgment, which required the City to provide trash service to all residential buildings, the City obtained the plaintiffs' agreement to an alternate means of performance: the payment of trash rebates. The City also assured that it would be immune from liability for compensatory damages, since the plaintiffs agreed to dismiss their appeals of the original judgment. The parties agreed to a specific trash rebate amount, subject to adjustment in future years according to a particular formula. The Stipulation and Agreement also permitted the City to discontinue its trash collection program, or to modify the level of service it provided. The parties to the Stipulation jointly asked the circuit court "to incorporate this Stipulation and Agreement in a judgment entered herein and to make compliance with the provisions hereof mandatory."

Following entry of the Modified Judgment which incorporated the terms of the Stipulation, the parties performed their obligation under it: the plaintiffs dismissed their appeals; and the City instituted a trash rebate program incorporating the salient terms of the Stipulation and Modified Judgment, under which it made payments to multi-unit building and trailer park owners for more than thirty-two years. When it discontinued its trash rebate program, the circuit court found that the City did so with full knowledge that its actions violated the Modified Judgment, and despite the recommendations of various City officials that the City should ask the circuit court to modify or terminate the City's obligations under the Modified Judgment, before unilaterally ending its compliance.

Thus, the City affirmatively requested that the court enter the Modified Judgment providing class-wide relief; it reaped the benefits of that judgment when the plaintiffs dismissed their appeals and accepted trash rebate payments calculated in the manner specified in the Stipulation; and the City accepted the burdens imposed by the Modified Judgment, and acquiesced in the validity of that judgment, when it instituted its trash rebate program, and then operated that program without interruption for more than three decades. In these circumstances, it would be unjust to now permit the City to argue that the Modified Judgment was void or erroneous on procedural grounds, when the judgment provided precisely the relief which the City had agreed to, and which it explicitly asked the circuit court to award.

Accordingly, we hold that the Class Plaintiffs had standing to prosecute this action for contempt, based on the City's failure to comply with a judgment which intentionally, and explicitly, provided relief to the Class Plaintiffs as part of the resolution of a lawsuit in which class claims had been pleaded. To the extent the Modified Judgment in 1976 failed to scrupulously adhere to the procedures for the certification of a class or for the award of class-wide relief, the City invited any

procedural error, and is estopped from raising any supposed procedural deficiencies more than three decades later, where it requested the entry of the judgment it now attacks, reaped the benefits of that judgment, and acquiesced in the obligations imposed on it by the judgment for more than three decades.

Point I is denied.

II.

In its second Point, the City challenges the validity of the 1976 Modified Judgment on two distinct grounds: *first*, that the circuit court in 1976 "lacked personal jurisdiction over 'similarly situated' properties" belonging to persons other than the named plaintiffs; and *second*, that the Modified Judgment violated the separation of powers, because the circuit court "usurp[ed] . . . the City's legislative powers" by "direct[ing] the City to provide services to the properties of the plaintiffs and others similar situated," and by denying the City the power to terminate the trash rebate program without court approval.[5] In its third Point, the City contends that the circuit court erroneously held that the City was estopped from raising its separation of powers argument.

The City's personal jurisdiction argument repeats the argument we have addressed above: that the Modified Judgment was entered without complying with the procedural requirements for certification and litigation of the case as a class action. As we explained above, however, the City by its conduct is precluded from now challenging the 1976 Modified Judgment on the basis of these procedural objections.

The same preclusion principles apply to the City's separation of powers arguments. The City is barred from raising these objections to the Modified Judgment forty years after that judgment was entered at the City's request.

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[5] Like many of the City's Points Relied On, its second Point is improperly multifarious. *See* note 3, above.

Even if the City were free to now raise a separation of powers argument, its concerns are vastly overstated. The Modified Judgment does not require the City to provide refuse collection services, or a monetary equivalent, to the owners of multi-unit buildings or trailer parks. Instead, under the Modified Judgment, the City is fully entitled to discontinue refuse collection services, and the trash rebate program, or to alter the level of trash collection services it provides. All that the Modified Judgment requires is that the City provide refuse collection services to all similarly situated persons on an equal basis. The circuit court imposed that obligation on the City based on the court's interpretation of the constitutional provisions requiring the City to treat similarly situated persons equally. Requiring the City's actions in the exercise of its police power to comply with the state and federal Constitutions does not violate the separation of powers—instead, it constitutes the proper, and time-honored, role of the judiciary in our tripartite form of government.[6] To the extent the Modified Judgment gave the City the option of making cash payments to multi-unit building and trailer park owners instead of providing refuse collection services, that option was (a) requested by the City; and (b) gave the City greater—not lesser—flexibility in managing its operations. The City's separation of powers

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[6] As the Missouri Supreme Court explained in response to a similar argument:

> [W]e reject the contention that courts do not have jurisdiction to decide constitutional issues in areas in which the legislature is entitled to supremacy by reason of the separation of powers doctrine under Article II, Section 1, of the Missouri Constitution. In *State ex rel. Cason v. Bond*, 495 S.W.2d 385, 389 (Mo. banc 1973), this Court said, "Courts regularly pass upon the constitutionality of acts enacted by the General Assembly and signed by the Governor. This is a proper function of the judicial branch of government and does not violate the separation of powers provision in the Constitution." *See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). Determining the constitutionality of such a statute is not only the prerogative, but the duty, of this Court.

Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1, 3–4 (Mo. banc 1992); *see also, e.g.*, *Murnane v. City of St. Louis*, 27 S.W. 711, 713 (Mo. banc 1894) ("Every reasonable intendment should be made to uphold an act of the general assembly; but, if it clearly appears to be in conflict with the organic law, our duty demands that we so declare, notwithstanding our respect for the other branches of the state government.").

arguments are overblown, and unpersuasive, even if the City were entitled to raise them at this late date.[7]

Points II and III are denied.

III.

In its fourth Point, the City argues that the 1976 Stipulation and Agreement was invalid, because it failed to comply with § 432.070, RSMo, which governs the execution of contracts by municipalities. As we have explained above, however, the circuit court awarded identical relief to the Class Plaintiffs based on their contract-based and judgment-based theories. Because we conclude that the judgment is sustainable as a remedy for the City's contempt of the Modified Judgment, we need not address the City's arguments addressed to the Class Plaintiffs' contract-based claims.

In addition, we note that, when the Stipulation and Agreement was incorporated into the Modified Judgment, the contract merged into the judgment, and was no longer separately enforceable.

> Where a contract of settlement does not require court approval to render the terms of the contract enforceable, court "approval" of the contract does not summarily merge the contract with the decree, leaving the contract of settlement subject to independent enforcement via a breach of contract action. Even in such circumstances, however, the parties can elect to have a settlement contract incorporated into a decree, in which case the contract merges with the decree, and is thereafter only subject to enforcement or modification by the court. Whether a settlement agreement remains contractual or becomes decretal depends on the intention of the parties.

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[7] In its seventh Point, the City argues that trial court erred in ordering specific performance of the Modified Judgment, because doing so violates the doctrine of separation of powers. That argument fails for the reasons discussed in the text. We also note that a circuit court has the inherent authority to enforce its own judgments, including by way of civil contempt proceedings. *See Deane v. Mo. Employers Mut. Ins. Co.*, 437 S.W.3d 321, 326 (Mo. App. W.D. 2014); *State ex rel. Abdullah v. Roldan*, 207 S.W.3d 642, 646 (Mo. App. W.D. 2006).

State ex rel. Koster v. Cain, 383 S.W.3d 105, 114–15 (Mo. App. W.D. 2012) (citations omitted); *accord*, *Sch. Dist. of Kansas City v. Mo. Bd. of Fund Comm'rs*, 384 S.W.3d 238, 261 n.21 (Mo. App. W.D. 2012).

Here, the parties' clear intent in entering the Stipulation and Agreement was that their agreement would be incorporated into, and be enforceable as, a judgment of the court. In the Stipulation, "[t]he parties jointly request[ed] the Court to incorporate this Stipulation and Agreement in a judgment . . . and to make compliance with the provisions hereof mandatory"; they also specified that their obligations to dismiss their respective appeals would only accrue *after* the circuit court entered the requested judgment. In these circumstances, the parties plainly intended that the terms of the Stipulation would be enforceable as a judgment of the court, not through a breach of contract claim.[8]

Point IV is denied.

IV.

In its fifth Point, the City argues that condominium associations are not entitled to relief under the Modified Judgment, because multi-unit condominium buildings do not constitute "apartment buildings containing seven or more dwelling units" within the definition of "Owners" contained in the Stipulation and Agreement (which was incorporated into the Modified Judgment).

Interpretation of the Stipulation and Agreement, as incorporated and merged into the Modified Judgment, is an issue of law which we review *de novo*. *Laenen v. Laenen*, 451 S.W.3d 715, 720 (Mo. App. E.D. 2014); *Carlson v. Fischer*, 149 S.W.3d 603, 608 (Mo. App. W.D. 2004).

[8] We note that, in its fourth Point, the City makes no argument that, if the Stipulation and Agreement were invalid or unenforceable, this would affect the validity or enforceability of the Modified Judgment. Instead, the fourth Point is explicitly directed solely at the validity of the Stipulation and Agreement itself. Our opinion should not be read to address an argument the City does not make.

The City simply asserts, without citation of authority, that a condominium building could not fall within the Stipulation's reference to "apartment buildings containing seven or more dwelling units." We disagree. A common dictionary definition of an "apartment building" is "a building containing a number of separate residential units and usu[ally] having conveniences (as heat and elevators) in common." WEBSTER'S THIRD NEW INT'L DICTIONARY 98 (unabridged ed. 1993). Without any contrary argument from the City, this definition would appear to apply to multiple-unit condominium buildings. To the extent that the City intended by its argument to suggest that "apartment buildings" can only consist of rental units, it offers no justification for that reading of the term, and it appears to be inconsistent with the term's commonly understood meaning.

The City's argument is also inconsistent with the Modified Judgment as a whole. *Thomas v. Lloyd*, 17 S.W.3d 177, 187 (Mo. App. S.D. 2000) ("[J]udgments are to be construed with reference to the record as a whole, including the pleadings."). The Modified Judgment declares City Code § 16.20(a) – which excluded *all* multi-unit residential buildings from trash services – to be unconstitutional. The Modified Judgment, and the Stipulation and Agreement it incorporates, were plainly intended to provide a remedy to <u>*all*</u> properties which had been excluded from trash service by virtue of the invalid ordinance. Thus, the Stipulation recites that the City had agreed to "furnish refuse services [or a cash payment] to <u>*all*</u> buildings containing seven or more dwelling units . . . located in Kansas City." (Emphasis added.) The Modified Judgment extols the fact that, under the Stipulation, "the refuse collection problem" was being addressed "on a city-wide basis." Reading the Modified Judgment as a whole, there is no basis to read the reference to "apartment buildings" narrowly, to exclude condominium buildings from its reach. We note that the circuit court found that the City made trash rebate program payments to condominium buildings for more than thirty

years prior to discontinuing the program in 2010, apparently on the understanding that such payments were required by the Modified Judgment.

The circuit court did not err in construing the Modified Judgment to provide relief to condominium associations. Point V is denied.

V.

In its sixth Point, the City argues that the circuit court erred in awarding relief to the class, because the Class Plaintiffs failed to prove that they, or the other class members, complied with the conditions for receipt of trash rebate payments.

The Stipulation states that property owners would be entitled to trash rebate payments "provided . . . that such owners at the time of such payments are providing services to the dwelling units in their buildings or trailer parks." "Services" are defined in the Stipulation to mean:

> residential refuse collection and disposal services which meet or exceed criteria now established by the provisions of Chapter 16 of the Code of General Ordinances of Kansas City, or which meet or exceed criteria hereafter established by any ordinance of city-wide application, by state law or by other lawful regulation issued pursuant thereto relating to residential refuse collection.

The City argues that, "[a]t the time of the alleged breach, the City allowed residents two bags of trash, provided for free curb-side recycling, and provided ancillary services." Although evidence was admitted at trial that the Class Plaintiffs provide building occupants with trash and (in some cases) recycling services, the City complains that there was no evidence that the Class Plaintiffs "limited their residents to two trash bags per week, provided *free* recycling to residents, or provided any of the ancillary services." Because the Class Plaintiffs purportedly failed to prove that they provide trash and recycling services equivalent or greater than those which the City now provides, the City contends that the Class Plaintiffs failed to prove that they were "providing services to the dwelling units in their buildings" at the time when trash rebate payments were due.

There are at least two problems with the City's argument. First, the definition of "services" in the Stipulation states that the required services must meet or exceed "criteria now [*i.e.*, in 1976] established by the provisions of Chapter 16 of the Code of General Ordinances of Kansas City," *or* "criteria hereafter established by any ordinance of city-wide application, by state law or by other lawful regulation issued pursuant thereto." "'The disjunctive "or" . . . in its ordinary sense marks an alternative which generally corresponds to the word "either."'" *State v. Hardin*, 429 S.W.3d 417, 419 (Mo. banc 2014) (citation omitted); *see also, e.g.*, *Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm'n*, 555 S.W.3d 469, 472 (Mo. banc 2018) (according significance to legislature's use of the disjunctive "or" in a statute). Thus, it appears from the wording of the Stipulation that building owners could provide qualifying "services" *either* by providing a level of service that complied with standards in effect when the Stipulation was adopted in 1976, *or* by providing the level of service required by current law. The fact that Class Plaintiffs failed to prove that they provide the same level of waste removal services as the City provides today, does not necessarily indicate that they fail to provide appropriate "services."

The second flaw in the City's argument is that it failed to present any evidence that the level of trash and recycling services which it provides to residents today is required "by any ordinance of city-wide application, by state law or by other lawful regulation issued pursuant thereto." City witnesses testified to the level of service which the City today provides to residential customers. And the City offered into evidence a "Long-Term Solid Waste Management Strategic Plan" prepared for the City by a consulting firm in 2008, which advocated the waste collection and recycling services the City now provides. But the Stipulation does not require building owners to comply with the level of trash service recommended by City consultants, or which City officials voluntarily choose to provide. Instead, under the

Stipulation, building owners are required to provide services consistent with criteria established by law either at the time the Stipulation was entered, or at a later date. The Class Plaintiffs' failure to present evidence that they provided services similar to those the City currently provides was not fatal to their claim to recover lost trash rebate payments.

Point VI is denied.

VI.

In its eighth Point, the City argues that the trial court's damages award is not supported by substantial evidence.

> A fine for civil contempt is remedial and provides a coercive means of compelling compliance with a court order and/or of compensating complainant for losses sustained due to noncompliance.
>
> . . .
>
> The amount of a fine charged against a civil contemnor "must be related to the actual damages suffered by the injured party [as a result of the contemnor's failure to obey the judgment] and must be payable to [the injured] party."

Deane v. Mo. Employers Mut. Ins. Co., 437 S.W.3d 321, 326 & n.7 (Mo. App. W.D. 2014) (citations omitted).

University of Missouri-Kansas City Professor Emeritus John Ward, an expert in forensic economics, testified with respect to damages on behalf of the Class Plaintiffs. The City argues that Dr. Ward's testimony cannot provide a substantial evidentiary basis for the damages award because, among other things, he included condominium associations in his damage calculations. As explained in § IV above, however, condominium associations are entitled to trash rebate payments under the Modified Judgment, and Dr. Ward therefore did not err in including them in his calculations.

Besides arguing that condominium associations should have been excluded, the City points to two unsupported assumptions which Dr. Ward purportedly

employed in his damage calculations: (1) an assumption that 100% of eligible residential units would participate in the trash rebate program; and (2) an assumption that units for which construction permits had been issued were in fact constructed, and were occupied one year after the construction permit was issued.

The City's challenges to the assumptions underlying Dr. Ward's damages calculations do not raise an issue of sufficiency of the evidence, but instead challenge the admissibility or competence of his testimony. The City did not object to the admissibility of Dr. Ward's testimony on these grounds, however.

> "If a question exists as to whether the proffered opinion testimony of an expert is supported by a sufficient factual or scientific foundation, the question is one of admissibility. It must be raised by a timely objection or motion to strike." "Once opinion testimony has been admitted, as other evidence, it may be relied upon for purposes of determining the submissibility of the case."

Sanders v. Ahmed, 364 S.W.3d 195, 208–09 (Mo. banc 2012) (quoting *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 616 (Mo. banc 1995)); *see also, e.g.*, *In re Care and Treatment of Bradley*, 554 S.W.3d 440, 454–55 (Mo. App. W.D. 2018); *Peters v. Gen. Motors Corp.*, 200 S.W.3d 1, 19 (Mo. App. W.D. 2006). "'An appellant cannot 'back-door' an issue relating to the admissibility of expert testimony under the guise of a sufficiency of the evidence argument.'" *In re Care and Treatment of Mitchell*, 544 S.W.3d 250, 257 (Mo. App. S.D. 2017) (quoting *In re Care and Treatment of Bradshaw*, 375 S.W.3d 237, 243 (Mo. App. S.D. 2012)).

The City's arguments that Dr. Ward's assumptions are unsupported, or that they are contrary to the evidence, raise challenges to the admissibility of his testimony, and should have been raised at trial. *Lacy v. Fed. Mogul*, 278 S.W.3d 691, 700 (Mo. App. S.D. 2009) (appellant argued that expert's "testimony was not competent and substantial evidence because it was based upon improper assumptions"; "While Claimant's point purports to challenge the sufficiency of the evidence, the thrust of her argument is that Dr. Wagner's testimony did not meet

the requirements necessary for the admission of expert testimony."). The City did not object to the admissibility of Professor Ward's testimony or damages calculations, however, except to make a generalized "hearsay" objection when the Class Plaintiffs moved to admit Professor Ward's damages exhibits *en masse* at the conclusion of his direct testimony. This generalized objection failed to preserve the specific arguments the City now raises. *See, e.g.*, *Courtney v. Dir. of Revenue*, 477 S.W.3d 659, 667–68 (Mo. App. W.D. 2015) (to preserve error for appeal, objections to evidence must be "sufficiently clear and definite to enable the trial court to understand the reason for the objection . . . . In applying the 'specificity' rule, Missouri appellate courts have ruled that general objections such as 'lacks a foundation,' 'irrelevant,' 'calls for speculation,' 'is self serving,' and the like, are not sufficiently specific objections.") (citations and internal quotation marks omitted); *Baker v. Gonzalez*, 315 S.W.3d 427, 435 (Mo. App. S.D. 2010); *Catroppa v. Metal Bldg. Supply Inc.*, 267 S.W.3d 812, 816 (Mo. App. S.D. 2008).

Even if we considered the City's arguments to be properly preserved, they are unpersuasive. "The decision to admit or exclude expert testimony is within the trial court's discretion, and we will not reverse the decision absent an abuse of discretion." *Payne v. Fiesta Corp.*, 543 S.W.3d 109, 119 (Mo. App. E.D. 2018) (citation and internal quotation marks omitted). Contrary to the City's arguments, Dr. Ward did not assume that 100% of eligible apartment units would participate in the trash rebate program. Dr. Ward testified to three different damages scenarios; the circuit court accepted the scenario which resulted in a damages figure between the other two scenarios. Under the intermediate damages scenario which the circuit court adopted, Dr. Ward started with the number of non-Heartland Apartment Association housing units (38,901) identified on a list prepared by the City; Dr. Ward testified that this list identified the units which were receiving trash rebate payments in 2010. Dr. Ward testified that, based on the construction permit

applications he had reviewed for the time period from 2000 to 2010, an additional 12,000 apartment units in multi-unit buildings existed in 2010, but were apparently not participating in the trash rebate program at that time. Dr. Ward *excluded* those additional 12,000 units from the damage scenario on which the circuit court relied, however. In addition, where the documents on which he relied did not specifically list the number of units in an apartment building, Dr. Ward assumed that the building contained seven units—the lowest number of units which would make the property eligible for the trash rebate program.

Because additional apartment units were being constructed in the City, and added to the housing stock, after the trash rebate program was discontinued, Dr. Ward reviewed post-May 2010 construction permit applications, and added those additional units to his count (after assuming that the additional units became available for occupancy twelve months after the permits were issued).

Dr. Ward then applied a 72% occupancy rate to all of the non-Heartland units which he included in his damage calculation for a particular month. Dr. Ward testified that he relied on this 72% occupancy rate because it was a figure provided by a City witness. He testified that all three of the Class Plaintiffs experienced significantly *higher* occupancy rates, from 85% to 100%, but that he used the more conservative occupancy figure coming from the City's witness.

Thus, from Dr. Ward's testimony, it appears that his damages calculations relied solely on dwelling units which were actually participating in the trash rebate program as of 2010, excluding an additional 12,000 units which he testified had been constructed between 2000 and 2010, but which were not included on the City list on which he relied. By excluding these 12,000 units, Dr. Ward eliminated from his calculation more than 23% of the units which were in existence, and which were eligible to participate in the trash rebate program, as of May 2010. Where the available records did not establish the actual number of units in an apartment

building, Dr. Ward assumed that the building contained the smallest possible number. In addition, he then applied a conservative 72% occupancy rate to the units he included in his calculation, even though the Class Plaintiffs' own experience would have justified a substantially higher occupancy rate (which would have substantially increased the total damages estimate). It is simply inaccurate for the City to claim that Dr. Ward relied on a "100% participation rate."

The City also challenges Dr. Ward's assumption that, after May 2010, every planned apartment building for which a construction permit was issued was built, and was ready for occupancy twelve months after the permit's issuance. "The trial court has discretion in deferring to an expert's assessment of what data is reasonably reliable." *Care and Treatment of Bradley*, 554 S.W.3d at 454 (citation and internal quotation marks omitted). Dr. Ward testified that he relied on three articles concerning the construction cycle as support for his assumption that properties would be ready for occupancy within twelve months. He also testified that he conducted "spot checks" of a sampling of the properties for which construction permits had been issued, to verify that the permitted buildings had in fact been constructed. He testified that, in this verification process, every building for which a permit had been issued had in fact been constructed. Dr. Ward offered a plausible explanation for his reliance on construction permit applications to update the 2010 housing stock with later apartment construction, and for his assumption that permitted buildings were constructed within twelve months of permitting.

Particularly without a contemporaneous objection by the City, or any argument on appeal that Dr. Ward's assumptions rendered his expert damages testimony inadmissible, we conclude that his testimony provided a substantial evidentiary basis for the circuit court's compensatory damage award.

Point VIII is denied.

VII.

Finally, in its ninth Point, the City argues that the trial court erred in awarding attorney's fees.

Generally, each party in civil litigation must bear his or her own attorney's fees, under what is known as the "American Rule." *Tupper v. City of St. Louis*, 468 S.W.3d 360, 374 (Mo. banc 2015). Exceptions to the general rule exists where a statute or contract authorizes fee-shifting, or "in cases involving 'special circumstances,' such as '[w]here the natural and proximate result of a wrong . . . is to involve the wronged party in collateral litigation.'" *Id*. (citation omitted). "Intentional misconduct is a 'special circumstance' that may justify an award of attorney's fees." *Id*. (citing *O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400, 419 (Mo. App. W.D. 2013)).[9]

The City contends that "special circumstances" did not exist in this case to justify a fee award. "'Where the award of attorneys' fees is not mandatory, the granting or refusal to grant attorneys' fees by the trial judge is primarily discretionary and will not be disturbed absent the showing of an abuse of discretion.'" *Tupper*, 468 S.W.3d at 374 (citation omitted). We find no abuse of discretion. The City operated for more than thirty years under an interpretation of the Modified Judgment which recognized that <u>*all*</u> owners of multi-unit buildings

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[9] The City argues that attorney's fees may not be assessed against it under the "special circumstances" principle, because the City is entitled to sovereign immunity. Notably, the City did not make this argument in the circuit court in response to the Class Plaintiffs' motion for recovery of attorney's fees. We also note that the Supreme Court and this Court have each addressed the recovery of attorney's fees against the Cities of Kansas City and St. Louis under the "special circumstances" exception, without any suggestion that sovereign immunity would bar such a claim. *See Tupper*, 468 S.W.3d at 374–75; *K.C. Air Cargo Services, Inc. v. City of Kansas City*, 523 S.W.3d 1, 12–13 (Mo. App. W.D. 2017). Indeed, in *K.C. Air Cargo*, we remanded a motion for attorney's fees against the City of Kansas City to the circuit court, "for further proceedings to determine whether special circumstances existed, giving the parties the opportunity to present evidence." 523 S.W.3d at 13. In non-tort cases, "[s]tatutory authority to sue and be sued is sufficient consent to suit to waive the doctrine of immunity of the sovereign from suit without its consent." *Kubley v. Brooks*, 141 S.W.3d 21, 31 (Mo. banc 2004). The City does not contend that it was not subject to suit in this contempt proceeding.

and trailer parks were entitled to trash rebate payments; the City only proposed to abandon its decades-long interpretation, and eliminate the program, when it faced budgetary constraints. In factual findings the City does not challenge, the circuit court found that the City knowingly and intentionally chose to unilaterally terminate the trash rebate program in violation of the Modified Judgment. The circuit court found that the City took this unilateral action despite the fact that City employees advocated that the City first ask the circuit court to modify or terminate the Modified Judgment, and with the expectation that it would be sued by aggrieved property owners.

The City then entered into a settlement agreement providing for the continuance of the trash rebate program, but only with respect to members of the Heartland Apartment Association. The circuit court found that the City settled with the "economically and politically prominent Kansas City residents" who made up Heartland's membership "for political reasons," while leaving property owners like the Class Plaintiffs "out in the cold." The Heartland Settlement Agreement expressly acknowledged that operation of the trash rebate program, available to all multi-unit building owners, was mandated by the Modified Judgment; yet despite this admission the City persisted in its plan to terminate the program as to non-Heartland members. As the City anticipated, the Class Plaintiffs were forced by the City's actions to file this suit, and incur the attorney's fees the circuit court awarded, to secure the benefits to which the City had agreed in the Modified Judgment.

Given the unusual circumstances in this case, the circuit court did not abuse its discretion in finding the existence of "special circumstances" justifying a fee award. *See, e.g.*, *Goellner v. Goellner Printing*, 226 S.W.3d 176, 179 (Mo. App. E.D. 2007) (special circumstances existed where employer ceased paying health insurance premiums for 92-year-old widow of deceased retiree after making those

payments for twenty years, which "forced [the widow] to bring a declaratory judgment action"); *Temple Stephens Co. v. Westenhaver*, 776 S.W.2d 438, 443 (Mo. App. W.D. 1989) (finding "special circumstances" where plaintiff "incurred attorney fee expenses which it would not have incurred except for [the defendant's] intentional omission of its name from the list of property owners filed with the rezoning application").

The City separately argues that the trial court's award of attorney's fees was excessive because "there was no underlying evidentiary support offered" for the requested fees and expenses. We review an award of attorney's fees for abuse of discretion. *See Kristen Nicole Props. v. Shafinia*, 500 S.W.3d 902, 907 (Mo. App. W.D. 2016) ("[T]he trial court is granted 'broad discretion' to award or deny such fees."). An "award of attorneys' fees is presumed correct, and the complaining party bears the burden to prove an abuse of discretion." *Selleck v. Keith M. Evans Ins., Inc.*, 535 S.W.3d 779, 783 (Mo. App. E.D. 2017) (citation omitted).

> In the absence of a contrary showing, the trial court is presumed to know "the character of the services rendered in duration, zeal, and ability. [The trial court] presumptively knew the value of them according to custom, place, and circumstance." The trial court is considered to be an expert on the question of attorney fees; the court that "tries a case and is acquainted with all the issues involved may 'fix the amount of attorneys' fees without the aid of evidence.'" . . . The setting of such a fee is in the sound discretion of the trial court and should not be reversed unless the amount awarded is arbitrarily arrived at or is so unreasonable as to indicate indifference and a lack of proper judicial consideration. "In the absence of evidence to the contrary it is presumed that the allowance for attorney fees was for compensable services . . . and that no allowance was made for noncompensable services."

Essex Contracting, Inc. v. Jefferson Cnty., 277 S.W.3d 647, 656–57 (Mo. banc 2009) (citation omitted).

The City's claim that "[c]lass counsel did not provide any evidence to support its fees" misstates the record. In addition to the Class Plaintiffs' fee motion, which

contained a summary of counsel's work on the case, Class Plaintiffs also submitted to the court a series of affidavits from their primary trial counsel, which explained the amount of attorney hours, staff hours, and expenses incurred in representing the Class Plaintiffs in this case. The circuit court had an evidentiary basis for the fee award that it made.

In addition to the evidence before the circuit court supporting a "lodestar" fee amount, Class Plaintiffs' motion for attorney's fees also argued that they should be entitled to a multiple of the "lodestar" figure because of the nature of the litigation. Such a multiplier may be appropriate in certain circumstances. *See Berry v. Volkswagen Group of Am., Inc.*, 397 S.W.3d 425, 432–33 (Mo. banc 2013) (affirming trial court's award of attorney's fees based on a lodestar multiplier of 2.0). Yet, despite the fact that Class Plaintiffs requested a lodestar multiplier in this case, and that caselaw may support such an award in appropriate circumstances, the City does not argue that application of a lodestar multiplier was unjustified in this case.

Finally, in their motion for attorney's fees, Class Plaintiffs also attached the contingent fee agreements which had been entered between the Class Plaintiffs and their counsel. The contingent-fee agreements between Class Plaintiffs and their counsel were an appropriate factor for the circuit court to consider in making its fee award, and "an award based on a percentage of the recovery is not . . . *per se* unreasonable." *Selleck*, 535 S.W.3d at 785–87. Although the City cites to unpublished federal district-court cases which describe empirical studies showing that "fee awards in class actions average around one-third of the recovery," the City offers no other authority to suggest that, in the circumstances of this case, the circuit court abused its discretion in awarding counsel a contingent-fee recovery from the common fund created through counsel's efforts. The mere existence of a

purported national average fee amount does not, by itself, establish an abuse of discretion in this case.

Point IX is denied.

Conclusion

The judgment of the circuit court is affirmed.

Alok Ahuja, Judge

All concur.