

IN THE SUPREME COURT OF MISSOURI

NO. SC90762

MELISSA HOWARD,

Respondent

v.

CITY OF KANSAS CITY, MISSOURI,

Appellant.

**Appeal from the Honorable Gerald D. McBeth
Visiting Judge, Circuit Court of Platte County, Missouri at Platte City
Case No. 07AECV02320**

REPODENT'S SUBSTITUTE BRIEF

Edward D. Robertson, Jr., MO #27183
Mary D. Winter, MO #38328
Anthony L. DeWitt, MO #41612
Bartimus, Frickleton, Robertson & Gorny, P.C.
715 Swifts Highway
Jefferson City, Missouri 65109

Mark A. Jess
Law Offices of Mark A. Jess, LLC
Kansas City Livestock Exchange Building
Post Office Box 025639
1600 Genessee, Suite 842
Kansas City, Missouri 64102

Attorneys for Plaintiff/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES7

JURISDICTIONAL STATEMENT..... 17

STATEMENT OF FACTS..... 17

 Appellant’s Council Refuses to Consider Judicial Applicants 17

 Appellant’s Council Again Refuses to Consider Judicial Applicants..... 23

 Appellant’s Decision-Makers Are Warned Their Acts Are Illegal 26

 After It Expired, the Commission Resubmits the Same Panel..... 28

 Impact of Appellant’s Conduct on Howard 29

 Appellant’s Admissions Concerning Its Employment of Municipal Judges 31

 Evidence and Argument Regarding Municipal Judges’ Pay and Benefits..... 34

 The Trial Court’s Ruling on Attorneys’ Fees..... 34

ARGUMENT 36

 I. 36

 Introduction..... 36

 Standard of Review..... 38

- 1. The Controlling Statute..... 38
- 2. Applicable Rules of Statutory Construction 39
- 3. The City of Kansas City is the Defendant, not the City Council..... 41
- 4. Who is Protected by the MHRA? 42
 - A. The Plain, Ordinary Meaning of “Employee” Provides Protection to Plaintiff in this Case..... 42
 - B. Application of the Common Law Test For Employee Does not Remove the Plaintiff from the Protections of the Act..... 43
 - C. The City’s Proposed Public Official Exception..... 68
 - E. The Sunshine Law Does Not Determine The Meaning Of The MHRA.. 77
- Conclusion..... 78
- II..... 79
 - A. Introduction 79
 - B. Standard of Review 80
 - C. Punitive Damages Against a Political Subdivision Are Permitted Under the MHRA. 82
 - D. The Case Law Supports An Award of Punitive Damages 83

E. The Direct Evidence Adduced At Trial Supported Punitive Damages..... 85

Conclusion 93

III..... 94

A. Introduction 94

B. Standard of Review 95

C. The Challenge Mounted On Appeal Was Not Preserved Below 95

D. The Evidence Was Properly Received 100

E. Conclusion..... 103

IV..... 104

A. Standard of Review 104

B. Concerns About a Single Panelist Do Not Justify Rejection of an Entire
Panel..... 105

C. The Rumor Evidence Was Not Admissible Evidence..... 106

D. Conclusion..... 109

V..... 110

A. Standard of Review 110

B.	Background: The Nature of the Damages Sought by Plaintiff.....	112
1.	Appellant Has Not Preserved an Instructional Error Claim for Appellate Review	113
a.	The City Never Objected to Instruction 6.....	113
b.	Appellant Failed to Raise the Submissibility of Future Damages in Its Motion for a Directed Verdict.....	115
2.	Howard Made a Submissible Case for Damages	117
C.	Conclusion.....	122
VI.	123
A.	Introduction	123
B.	Standard Of Review.....	125
C.	Ample Evidence Supported The Jury’s Compensatory Damages Verdict. 127	
1.	Plaintiff’s Damages Theory	127
2.	Remittitur Practice	130
VII.	132
A.	Introduction	132

B. Standard of Review 132

C. Attorneys' Fees Were Not Arbitrarily Awarded..... 133

D. The Amount Awarded for Attorneys' Fees was not Unreasonable..... 134

E. Conclusion..... 135

CONCLUSION..... 135

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C) 136

CERTIFICATE OF SERVICE..... 137

TABLE OF AUTHORITIES

Cases

<i>Abrams v. Ohio Pacific Express</i> , 819 S.W.2d 338, 341 (Mo. banc 1991).....	40, 63
<i>Anderson v. Burlington Northern R.Co.</i> , 700 S.W.2d 469, 477 (Mo.App.E.D. 1985)..	121
<i>Asbury v. Lombardi</i> , 846 S.W.2d 196 (Mo. banc 1993).....	40, 42
<i>Auto Owners Mut. Ins. Co. v. Wieners</i> , 791 S.W.2d 751, 755 (Mo. App. S.D. 1990)	45
<i>Beets v. Hamilton County Board</i> , 897 F.2d 1380, 1382 (6th Cir. 1990)	76
<i>Brady v. Curators of Univ. of Mo.</i> , 213 S.W.3d 101, 112-13 (Mo.App.2006) ...	75, 83, 85, 92
<i>Bredesen v. Tenn. Judicial Selection Commission</i> , 214 S.W.3d 419 (Tenn. 2007)	72
<i>Brenneke v. Department of Missouri, Veterans of Foreign Wars of U.S. of American</i> , 984 S.W.2d 134 (Mo.App.W.D. 1998).....	112, 119, 120, 121
<i>Brewer v. Raynor Manufacturing</i> , 23 S.W.3d 915, 917 (Mo. App. S.D. 2000)	117
<i>Brown v. Ameristar Casino Kansas City, Inc.</i> , 211 S.W.3d 145, 148 (Mo.App. W.D. 2007)	124, 134
<i>Burden v. Burden</i> , 811 S.W.2d 818, 822 (Mo.App.1991).....	132

<i>Burnett v. Griffith</i> , 769 S.W.2d 780, 789 (Mo. banc 1989).....	81
<i>Caban-Wheeler v. Elsea</i> , 904 F.2d 1549 (11th Cir.1990)	86
<i>Callahan v. Cardinal Glennon Hospital</i> , 863 S.W.2d 852, 871 (Mo. 1993).....	126
<i>Carpenter v. Chrysler Corp.</i> , 853 S.W.2d 346, 364 (Mo.App.1993).....	81
<i>Carter v. City of Miami</i> , 870 F.2d 578, 581-82 (11th Cir.1989).....	85
<i>City of St. Louis v. Carpenter</i> , 341 S.W.2d 786, 788 (Mo.1961).....	40
<i>Clark v. Beverly Enterprises-Missouri, Inc.</i> 872 S.W.2d 522, 525 (Mo.App. W.D. 1994)	65, 67
<i>Clarkson v. Kehrs Mill Transportation Development Dist.</i> , 308 S.W.3d 748 (Mo. App. E.D. 2010)	98
<i>Cohen v. Express Financial Services, Inc.</i> 145 S.W.3d 857, 865 -866 (Mo.App. W.D. 2004)	81
<i>Community for Creative Non-Violence v. Reid</i> , 490 U.S. 730, 751-52 (1989)	46, 49
<i>Daugherty v. City of Maryland Heights</i> , 231 S.W.2d 814, 819 (Mo. banc 2007).....	75
<i>Drury v. Mo. Youth Soccer Ass'n</i> , 259 S.W.3d 558, 573 (Mo.App. E.D.2008).....	81
<i>Emery v. Wal-Mart Stores, Inc.</i> , 976 S.W.2d 439, 448 (Mo. banc 1998).....	125

Enos v. Ryder Automotive Operations, 73 S.W.3d 784, 788-89 (Mo. App. E.D. 2002)
..... 117

Environmental Protection, Inspection, and Consulting, Inc. v. City of Kansas City, 37
S.W.3d 360, 356 (Mo.App. W.D. 2000)..... 110

Farmers' & Laborers' v. Director of Revenue, 742 S.W.2d 141, 145 (Mo. banc 1987). 39

Faust v. Ryder Commercial Leasing & Servs., 954 S.W.2d 383, 388 (Mo.App.1997).... 80

Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99, 109 (Mo. banc 1985)
..... 125

Fust v. Francois, 913 S.W.2d 38, 49 (Mo. App. 1995) 125

George Weis Co. v. Stratum Design-Build, Inc., 227 S.W.3d 486, 489 (Mo. banc 2007)
..... 38

Gilliland v. Missouri Athletic Club, 273 S.W.3d 516 (Mo. banc 2009)..... 123

Glasgow Enterprises, Inc. v. Bowers, 196 S.W.3d 625, 631 (Mo.App. E.D.2006) 80

Glorioso v. Ford, CV95-27296 (Jackson County)(April 22, 1996). 77

Gomez v. Construction Design, Inc., 126 S.W.3d 366, 371 (Mo. banc 2004) 114

Gramex Corp. v. Green Supply, Inc. 89 S.W.3d 432 (Mo. banc 2002)..... 114

Gregory v. Ashcroft, 501 U.S. 452 (1991)..... 74

<i>Guerrero v. Refugio County</i> , 946 S.W.2d 558 (Tex. App. Corpus Christi 1997).....	69, 70
<i>H.S. v. Board of Regents, Southeast Missouri State University</i> , 967 S.W.2d 665, 672 (Mo. App. E.D. 1998).....	83
<i>Hagan v. Director of Revenue</i> , 968 S.W.2d 704, 706 (Mo. banc 1998).....	40
<i>Hart v. United Steel Workers of America</i> , 350 F.Supp. 294 (W.D.Pa.1972).....	76
<i>Hensley v. Eckerhart</i> , 461 U.S. 424, 103 S.Ct. 1933 (1983)	134
<i>Herrera v. DiMayuga</i> , 904 S.W.2d 490, 492 (Mo.App. S.D.1995).....	95
<i>Hipp v. Liberty Nat. Life Ins. Co.</i> , 65 F.Supp.2d 1314, 1334 (M.D.Fla.1999).....	86
<i>Howard v. Winebrenner</i> , 499 S.W2d 389, 395 (Mo. 1973).....	63
<i>Hoyt v. GE Capital Mortgage Servs., Inc.</i> , 193 S.W.3d 315, 322 (Mo.App. E.D.2006)...	91
<i>In re Marriage of Spears</i> , 995 S.W.2d 500, 503 (Mo.App.1999).....	134
<i>Industry Fin. Corp. v. Ozark Community Mental Health Center, Inc.</i> , 778 S.W.2d 413, 717 (Mo.App.1989).....	132
<i>Johnson v. Moore</i> , 931 S.W.2d 191, 195 (Mo. App. 1996)	126
<i>Jordan v. Robert Half Personnel Agencies of Kansas City, Inc.</i> , 615 S.W.2d 574 (Mo. App. W.D. 1981)	123, 130

<i>K & D Auto Body, Inc. v. Div. of Employment Security</i> , 171 S.W.3d 100, 104-114 (Mo.App.W.D. 2005).....	passim
<i>Kearney v. City of Simpsonville</i> , 209 S.W.3d 483 (Ky.App. 2006).....	73
<i>Kirksville Pub. Co. v. Div. of Employment Sec.</i> , 950 S.W.2d 891, 897 (Mo.App. W.D.1997).....	50
<i>Klausner v. Brockman</i> , 58 S.W.3d 671, 679 (Mo.App. W.D.2001)	49
<i>Kline v. City of Kansas City</i> , 175 F.3d 660 (8 th Cir. 1999)	83
<i>Laws v. Secretary of State</i> , 895 S.W.2d 43, 46 (Mo.App.W.D. 1995).....	40
<i>Leslie v. School Services and Leasing, Inc.</i> , 947 S.W.2d 97, 101 (Mo. App. 1997)	66
<i>Letz v. Turbomeca Engine Corp.</i> , 975 S.W.2d 155, 163 (Mo.App. W.D. <i>en banc</i> 1997)	116
<i>Lindsey v. American Cast Iron Pipe Co.</i> , 772 F.2d 799 (11th Cir.1985).....	86
<i>Lynn v. TNT Logistics North America Inc.</i> 275 S.W.3d 304, 309 (Mo.App. W.D.,2008)	81, 111, 117
<i>Maltz v. Jackoway-Katz Cap Co.</i> , 82 S.W.2d 909, 916 (Mo. 1934).....	46
<i>Martinez v. State</i> , 24 S.W.3d 10, 16 (Mo.App. E.D.2000)	80, 82
<i>Mathis v. Jones Store Co.</i> , 952 S.W.2d 360, 366 (Mo.App.1997)	81

<i>Meyer v. McGarvie</i> , 856 S.W.2d 904, 908 (Mo.App.1993).....	125
<i>Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc.</i> , 991 S.W.2d 161, 166-167 (Mo. App. W.D. 1999)	40, 62, 74, 77
<i>Mitchell v. Kardesch</i> , ___ S.W.3d ___, 2010 WL 2513791, 6 (Mo.banc 2010).....	104
<i>Nat'l Heritage Enters., Inc. v. Div. of Employment Sec.</i> , 164 S.W.3d 160, 167 (Mo.App. W.D.2005).....	49, 51
<i>NME Hospitals, Inc. v. Rennels</i> , 994 S.W.2d 142, (Tex. 1999).....	69
<i>Perez v. Missouri State Bd. of Registration for Healing Arts</i> , 803 S.W.2d 160, 165 (Mo.App.1991).....	39
<i>Pierce v. Platte-Clay Electric Co-op., Inc.</i> , 769 S.W.2d 769, 774 (Mo. banc 1989)	95, 101
<i>Pollard v. Whitener</i> , 965 S.W.2d 281, 289 (Mo. App. W.D. 1998).....	98, 99
<i>Pope v. Pope</i> , 179 S.W.3d 442 (Mo.App.W.D. 2005).....	116
<i>Pryor v. American Oil Co.</i> , 471 S.W.2d 492 (Mo.App. 1971).....	112
<i>Richardson v. State Highway & Transp. Comm'n</i> , 863 S.W.2d 876, 881 (Mo. banc 1993)	103
<i>Savory v. Hensick</i> , 143 S.W.3d 712, 716 (Mo.App.E.D. 2004).....	111

<i>Schmitz v. Director of Revenue</i> , 889 S.W.2d 883, 886 (Mo.App.1994).....	98
<i>Schrieber v. Alsup</i> , 721 S.W.3d 235 (Mo. App. S.D. 1986)	99
<i>Sibley Memorial Hosp. v. Wilson</i> , 488 F.2d 1338, 1341 (D.C. Cir. 1973).....	76
<i>Sloan v. Banker’s Life & Cas. Co.</i> , 1 S.W.3d 555, 563 (Mo. App. 1999).....	44, 67
<i>Sparkman v. Columbia Mutual Ins. Co.</i> , 271 S.W.3d 619, 624 (Mo.App. S.D. 2008)..	114
<i>State ex rel. Ford v. Wenskay</i> , 824 S.W.2d 99, 100 (Mo.App.1992).....	39
<i>State v. Anderson</i> , 76 S.W.3d 275, 276 (Mo. banc 2002).....	104
<i>State v. Bernard</i> , 849 S.W.2d 10, 13 (Mo. banc 1993).....	106
<i>State v. Forrest</i> , 183 S.W.3d 218, 223 (Mo. banc 2006)	104
<i>State v. Freeman</i> , 269 S.W.3d 422, 426-27 (Mo. banc 2008)	104
<i>State v. Jordan</i> , 751 S.W.2d 68, 75 (Mo.App.1988)	98
<i>State v. Kinder</i> , 942 S.W.2d 313, 329 (Mo. banc 1996).....	130
<i>State v. Reed</i> , 282 S.W.3d 835, 837 (Mo. banc 2009)	105
<i>State v. Sladek</i> , 835 S.W.2d 308, 314 (Mo. banc 1992).....	106
<i>Steva v. Steva</i> , 332 S.W.2d 924 (Mo. 1960).....	112
<i>Tate v. Golden Rule Ins. Co.</i> , 859 S.W.2d 831, 835 (Mo.App. W.D. 1993)	133

<i>Taylor v. Runyon</i> , 175 F.3d 861, 867 (11th Cir.1999).....	86
<i>Thompson v. Austin</i> , 979 S.W.2d 676 (Tex. App. 1998)	69, 72
<i>Thummel v. King</i> , 570 S.W.2d 679, 687 (Mo. banc 1978).....	124, 134
<i>Trotter v. Board of Trustees</i> , 91 F.3d 1449, 1453 (11th Cir.1996).....	86
<i>Twin Chimneys Homeowners Ass'n v. J.E. Jones Const. Co.</i> 168 S.W.3d 488, 497-98 (Mo. App. E.D. 2005).....	111
<i>Ward v. Curry</i> , 341 S.W.2d 830, 835-836 (Mo.1960)	45
<i>Washington v. Barnes Hospital</i> , 897 S.W.2d 611, 615 (Mo. banc 1995).....	81, 111
<i>Wiley v. Homfeld</i> , 307 S.W.3d 145, 150 (Mo. App. W.D. 2009).....	126
<i>Woods v. Friendly Ford, Inc.</i> , 248 S.W.3d 699, 704 (Mo.App. S.D.2008).....	98
<i>Wulfing v. Kansas City Southern Indus.</i> , 842 S.W.2d 133 (Mo. App. W.D. 1992) 99, 100, 102	

Statutes

§213.010(7) RSMo. (2005).....	41, 82
§213.055 RSMo (2005).....	38
§213.055.1(1)(b), RSMo (2005).....	36, 37, 75

§213.055.1(c) RSMo. (2005).....	39
§213.065 RSMo. (2005)	39
§213.111, RSMo (2000)	79, 82
29 U.S.C. §§ 621-634.....	74
42 U.S.C.A. § 2000e(f).....	74
Tex. Lab. Code Ann. § 21.002(7) (Vernon 1996)	70

Other Authorities

CHARTER OF KANSAS CITY, MISSOURI § 3.05(2006)	57
CHARTER OF KANSAS CITY, MISSOURI § 3.12(c)(2006)	61
CHARTER OF KANSAS CITY, MISSOURI §§ 3.04 & 3.07 (2006)	54, 55
CHARTER OF KANSAS CITY, MISSOURI §3.01 (2006)	53, 56
CHARTER OF KANSAS CITY, MISSOURI §3.13 (2006)	54, 57
MAI 31.24.....	75
THE FEDERALIST No. 47 (1788) (Madison).....	53
WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 743 (2002)	42, 75

Rules

IRS Rev. Rul. 87-41.....	46
Rule 70.03.....	113, 114
Rule 72.01(a).....	115, 116
Rule 78.09.....	113
Rule 84.04(d)	79, 110, 124
Rule 84.13(a).....	99

JURISDICTIONAL STATEMENT

Respondent adopts the jurisdictional statement of Appellant.

STATEMENT OF FACTS

Appellant's statement of facts fails to fairly and concisely provide the Court with the evidence supporting the jury's verdict in contravention of Missouri Supreme Court Rule 84.04(c). Accordingly, pursuant to Rule 84.04(f), Respondent Melissa Howard ("Howard") provides the following supplemental statement of facts:

Appellant's Council Refuses to Consider Judicial Applicants

On October 30, 2006, the Kansas City Municipal Judicial Nominating Commission (the "Commission") interviewed thirteen applicants for the opening in Division 205 of the Kansas City Municipal Court. Trial Ex. 2; TR145.

Howard became aware of the opening and decided to apply. TR117-18; Trial Ex. 1.

In a September 13, 2006, letter to Judge J.D. Williamson (Presiding Judge of the Municipal Court) then Mayor Kay Barnes stated:

"On behalf of the City of Kansas City, Missouri, I am requesting that the...Commission initiate its process for seeking applications of

persons qualified to serve as a judge of the Kansas City Municipal Division and interviewing those applicants [sic].”

Trial Ex. 1.

Division 205 was vacant because of the retirement of Judge Marcia Walsh, a Caucasian female. TR118; LF 39; Trial Ex. 1.

At the time, Judge Walsh was the only Caucasian female on the court. TR118. Three of the six judges then on the court were minorities. TR125-26.

Of the thirteen applicants for Judge Walsh’s position, six were minorities. TR145. The Commission selected Howard, Katherine Emke and Marti Rigby, three Caucasian females, as the most qualified three applicants. Trial Ex. 124.

Upon hearing of the panel’s selection, Mayor Barnes issued a press release stating, “I am very disappointed we are receiving a panel without a minority woman as one of the three finalists.” Trial Ex. 3; TR143. Barnes’ statement was later printed in a November 1, 2006 article in the *Kansas City Star*. *Id.* Howard read Barnes’ statement and it made her feel terrible. TR121-22; Trial Ex. 3. Howard was particularly upset because her race was something she was powerless to change. TR128.

As a part of the process for applying for the position, Howard was interviewed by Councilman Alvin Brooks. TR123. Brooks questioned why she

would apply for the opening when she wasn't black and stated that he would not vote for anyone on the panel because there was no African-American on it. TR123.

Brooks also told another witness that Howard "would be a great Municipal Court Judge" but that she wasn't "diverse enough." TR214.

Marty Rigby had a similar experience with Councilman Terry Riley. TR340-41. Riley indicated he had received Rigby's resume, as well as those of the other two applicants, and that he had even taken them home. *Id.* Rigby had put extra effort in developing her resume and at first was pleased by Riley's evident interest in it. *Id.* Riley then explained that he had used her resume and the resumes of Howard and Emke "to keep myself warm, hah, hah." *Id.*

Howard and the other applicants were summoned to a November 9, 2006, business meeting of Appellant's City Council, ostensibly to be interviewed by the Council as a whole. TR123-24; Trial Ex. 5.

Rather than interviewing the three final applicants, Appellant's Council voted seven to six in favor of not considering any of them. Trial Ex. 5; LF41, 55 (admitting the allegations in ¶ 25 of Respondent's First Amended Petition).

In refusing to consider any of the final applicants, Appellant's Council made the following statements:

- “There is no diversity whatsoever on. . .within the panel of contestants who have been referred to us.” (Councilwoman Sandra McFadden-Weaver, who voted not to consider the panel). Trial Ex. 5;
- “I feel as though at this point I’m given. . .a very narrow opportunity for selection because I only have a sampling of one demographic of our city and that is Caucasian females. . .” (McFadden-Weaver). *Id.*
- “For me there is an issue of equity related to racial mix, when you have thirteen candidates and you have six of color and none appear on the panel, it’s hard for me to believe that you have six of those candidates of color none of whom would qualify to be in the top three. I just don’t believe that is the case.” (Then Mayor Barnes, who voted not to consider the panel). *Id.*
- “We have not established any diversity, we have not recognized any diversity, that is my concern. . .the fact remains this panel has no diversity whatsoever. . .I move that we reject. . .this panel back to the committee and not make a selection at this time.” (McFadden-Weaver). *Id.*
- “All one need do is look at the numbers, race matters in America, it matters in the State of Missouri and it matters in Kansas City.” (Councilman Troy Nash, who voted not to consider the panel). *Id.*

- “We need to send this panel back and show that this city, of Kansas City, is fair in its diversity practices.” (Councilman Terry Riley, who voted not to consider the panel). *Id.*
- “This [panel] does not reflect the diversity of Kansas City.” (Riley). *Id.*
- “When we talk about diversity, do we include women?” (Councilwoman Bonnie Cooper, who voted to consider the panel). *Id.*
- “Are we concerned because there’s not a man on the panel?” (Cooper). *Id.*
- “I’m not.” (Barnes) (laughing). *Id.*
- “If there were three qualified black candidates on this panel, I would not be voting to reject the panel because they were simply – did not represent the exact demographics of this city.” (Councilman John Fairfield, who voted to consider the panel). *Id.*
- “I have a hunch that if this [the panel] is returned to the Commission that there is a message there. . . .” (Barnes). *Id.*

At trial, Mayor Barnes admitted “race was a factor in [her] decision to reject the panel. . . .” TR146 (Q: “If the Commission had chosen to place an African-American candidate on that panel of three, you would have voted to select one of the top three candidates at the session, correct?” A: “I anticipate I would have.”), TR151

(Q: “Mayor, race was a factor in your decision to reject the panel of candidates in November and December of 2006, correct?” A: “Yes.”). Barnes also admitted she had no personal knowledge of how the Commission selected the top three applicants or what factors it considered. TR146. *See also* TR162.

Likewise, Councilman Brooks admitted that if the Commission had placed a minority on the panel of final applicants, he would have voted to consider the panel. TR324. He explained that he voted NOT to consider the panel even though he had no personal knowledge of what procedures the Commission used in selecting the finalist or even how the applicants had performed. TR325.

Howard and the other two finalists for the position were required to wait in the foyer while the Council decided not to consider them. TR124-25. It was hot and very crowded with a lot of media present as the Council was also considering the light rail amendment. *Id.* Emke had her head between her legs and said she was hyperventilating. *Id.* Rigby indicated she couldn’t catch her breath. *Id.*

Howard had friends and family present. *Id.* It was uncomfortable physically and very stressful as people would go in and out of the Council session and report back statements made by Council members. TR125.

The Council’s racial statements about rejecting the panel of final applicants were broadcast on Appellant’s television channel and posted on Appellant’s website.

TR127-28. Some of the statements were also included in a November 10, 2006, *Kansas City Star* article. *Id.*; Trial Ex. 6. The racial statements made Howard “sick to [her] stomach” because they involved a characteristic she could do nothing about – her race. TR127-28.

On November 16, 2006, Councilman Skaggs introduced a proposed ordinance declaring the Council’s intent NOT to fill the vacancy in Division 205. TR129; Trial Ex. 7. The next day the *Kansas City Star* published an article regarding the proposed ordinance and noted: “On a 7-6 vote, the City Council rejected the group and sent the matter back to the [C]ommission after concerns were raised that no racial minorities were included.” Trial Ex. 8.

On December 7, 2006, Councilman Brooks proposed a resolution that Howard testified was the “most hurtful thing of all.” TR130; Trial Ex. 10. It proposed filling the vacancies in Divisions 206 and 207 of the municipal court, but leaving the vacancy for Division 205 – the Division to which the panel of Howard, Emke and Rigby had already been named – vacant. *Id.*

Appellant’s Council Again Refuses to Consider Judicial Applicants

On December 14, 2006, Appellant’s Council met again to consider the panel of final applicants for Division 205. TR133-34; Trial Ex. 14. Again, Appellant’s Council

voted to refuse to consider the applicants for the vacancy. *Id.* In doing so, Council members stated:

- “This has nothing to do with your [the panelists’] qualifications.” (Councilman Alvin Brooks, who again voted not to consider the panel). Trial Ex. 14;
- “I think you all are qualified.” (Brooks). *Id.*
- “We continue to talk about divisiveness. . .in terms of race relations. The divisiveness took place when the panel was presented.” (Brooks). *Id.*
- “We have been in line for a long time. A lot of people have been in line just to be represented.” (Councilwoman Sandra McFadden-Weaver, who again voted not to consider the panel). *Id.*
- “I think it’s a . . .shame, I think it might even be illegal for us to sit here and not have the courage to [s]elect a judge today.” (Councilman Bill Skaggs, who voted to consider the panel). *Id.*
- “So I’m disappointed that we don’t feel you’re [the panel] minority enough – that you’re not diverse enough.” (Councilwoman Becky Nace, who voted to consider the panel). *Id.*

- “It has nothing to do with their credentials; I think all of them are highly qualified.” (McFadden-Weaver). *Id.*
- “Diversity. . .being an African-American in America it’s a whole lot different than you can ever imagine and so you really can’t say I understand where you are. . .” (Councilman Terry Riley, who again voted not to consider the panel). *Id.*
- “It’s not about these women. Each of these women have gone to college, earned degrees and made a very good life for themselves and have good reputations.” (Riley). *Id.*

Howard and the other final applicants were present and heard Appellant’s Council’s statements. TR 133-34. Again, these statements, like the statements made on November 9, 2006, were broadcast and available on Appellant’s website. TR127-28, 134-35. At trial, Howard explained to the jury how that affected her:

“Q: Melissa, if you could, I know you were there that day and you had to kind of sit through the same thing again. But could you explain to the jury what it felt like to hear that and hear the discussion based on race and the decision that appeared to be based on race.

A: It was distressing. I thought that it wouldn’t be a part of this process at this point. I thought that it would be them voting on us.

That they would interview us and it'd be a professional setting and that's what it would be like especially after the last fiasco. And instead it was just more of the same and honestly it was – unless somebody sees it or goes through it it's hard to imagine that they're doing it at this level while they're being recorded. If I said things like that, I would be fired in a minute.

Q: And this is something that, again friends, colleagues, people that you work with heard about, saw on the website, saw on television?

A: I deal weekly with over a hundred attorneys and the majority of those attorneys would ask me, meaning well, what's going on? Have they made any progress, all sorts of things? But you could not get away from it. Everywhere my husband and I went – (witness crying).”

TR134-35.

Appellant's Decision-Makers Are Warned Their Acts Are Illegal

At trial, former Mayor Barnes told the jury that despite her twenty years of previous experience as a human resources consultant, she did not know whether, in general, it would be illegal for an employer to discriminate against an applicant based on the applicant's race. TR150-51,157-58. She admitted she and the other

council members did have the opportunity to consult with city attorney, Galen Beaufort, on issues like this. TR151.

Councilman Brooks testified at trial that he had previously served for sixteen years as Director of Human Relations for the City and that, as a consequence, he had some familiarity with the laws that prohibit race discrimination. TR318-19. Brooks admitted that in general he knew it would be illegal for an employer to take race into account when making decisions on whom to hire. *Id.*

On December 15, 2007, Patrick McClarney, former managing partner of Shook, Hardy & Bacon LLP (and, at the time of trial, the firm's civic affairs partner), emailed Beaufort and urged him to inform Appellant's Council that they were violating the law by, among other things, "[d]iscriminating against White females." TR218-22; Trial Ex. 22. McClarney also repeatedly warned Appellant's council members directly that they were violating the law by discriminating against white females. TR220-22. He had direct conversations with Council members Skaggs, Brooks, Eddy, Riley and Glover on this issue. *Id.*

McClarney was not engaged by Howard as an expert witness at any time. Rather, Mayor Barnes had asked McClarney to assist Appellant with problems at the Municipal Court and to assist in getting vacancies there filled. TR264.

After It Expired, the Commission Resubmits the Same Panel

Under Appellant's Charter, the Council has only sixty days after a panel is submitted to select a municipal judge. LF99 (Section 310 of Article III of the City Charter). Thus, the panel of final applicants for Division 205 expired sixty days after October 30, 2006, or on December 29, 2006. LF99; Trial Ex. 124.

On January 9, 2007, the Commission resubmitted the same panel of final applicants: Howard, Emke and Rigby. TR165; Trial Ex. 125.

Appellant's Council Refuses to Consider Judicial Applicants a Third Time

On March 8, 2007, the Council refused – for the third time – to consider the panel of Howard, Emke and Rigby for the vacancy in Division 205. TR170-71.

As of the date of trial (beginning March 31, 2008), Appellant had never filled the opening in Division 205. TR1, 162.

At trial, Councilman Skaggs admitted that race “was involved” in the Council's debate concerning its refusal to consider the applicants the Commission had deemed to be the top three. TR417. He also admitted that a “majority of the Council. . .said. . .on three separate occasions we reject that panel and we refuse to vote on those three candidates.” *Id.*

Impact of Appellant's Conduct on Howard

Howard was distressed by the acts and statements of Appellant's agents, both those made directly to her and those distributed throughout the media, because they concerned a characteristic which she could do nothing to change: the color of her skin. TR127-28.

She explained to the jury that Appellant's acts, based on her race, had a physical impact on her. TR163. She suffered a sudden loss of weight, could not sleep and even as of the date of her trial testimony would "still get sick to [her] stomach." *Id.*

Without objection, Howard testified that as a Kansas City municipal judge she would have made \$133,842 per year plus health and life insurance and a retirement benefit. TR136-38; Trial Ex. 24. This compared to the \$46,000 per year she was currently making. TR137.

Without objection, Howard explained that at 46 years of age, had she obtained the position, she would have remained in it until she reached the mandatory retirement age of 65 years. TR118, 138.

Without objection, Howard shared with the jury that Appellant had segregated, classified and eliminated her and the other two applicants from the open position based on race. TR138-39.

In particular, Howard told the jury about her ongoing concern and distress about her career in the future. TR172. Her husband, Judge Victor Howard, expressed to the jury how Mrs. Howard had concerns about her future. TR232.

Judge Howard also explained to the jury, without objection, how Mrs. Howard's loss of opportunity for a job that paid significantly more "added a lot to the stress" she was suffering. TR232-33.

In response to opening statements made by Appellant's counsel, Judge Howard testified, without objection, that the emotional distress Mrs. Howard was suffering from could not be turned "off like a light switch." TR233. Rather, he explained that because of the public nature of Appellant's statements and Mrs. Howard's position, the stress was ongoing and occurred on a nearly daily basis. TR233-34.

Even up to the date Howard filed this Respondent's Brief (December 15, 2008), Appellant's racial and hurtful statements are broadcast to anyone in the world with Internet access. The November 9, 2006 session is at:

http://kansascity.granicus.com/MediaPlayer.php?view_id=4&clip_id=267.

The December 14, 2006 session is at:

http://kansascity.granicus.com/MediaPlayer.php?view_id=4&clip_id=419.

Judge Howard explained how November 9, 2006, a day which “should have been an exciting time in the life of all three of these ladies[,]” was instead “embarrassing” and “devastat[ing]” to them. TR234-35.

Finally, Judge Howard told the jury of the physical impact on Mrs. Howard he observed from Appellant’s conduct: she lost weight, couldn’t sleep normally and was uncharacteristically emotional. TR237-38.

Appellant’s Admissions Concerning Its Employment of Municipal Judges

In responding to Appellant’s motion for summary judgment and its post-trial motions, Howard made the trial court aware of the following admissions by Appellant in depositions conducted pursuant to Missouri Supreme Court Rule 57.03(b)(4):¹

¹ Howard first set forth these facts in her opposition to Appellant’s motion for summary judgment. LF178-80. Appellant admitted each of the facts in its reply suggestions in support of its motion for summary judgment. LF192-95. Howard reiterated these facts to the trial court in her opposition to Appellant’s post-trial motions. LF559-60. As Appellant did not include the exhibits to Howard’s suggestions in opposition to summary judgment in the record on appeal, she included those exhibits in her supplemental record on appeal. SLF1-26.

- Kansas City Municipal Judges are required to complete various “employment” forms that include their signatures as “employees” and their “employee” identification number and some of these forms are required to be forwarded to Appellant’s Human Resources Department so they can be placed in the judges’ “personnel” files. LF178, 559.
- One of the employment forms to be signed by municipal judges states: “As an active employee of the City of Kansas City, Missouri, I hereby designate the following as my pension beneficiaries.” LF178-79, 559.
- Pursuant to another of Appellant’s employment forms, the ten day enrollment period for insurance begins running the day after the municipal judge’s first day of “employment” with Appellant. LF179, 559.
- Yet another of Appellant’s employment forms, specifically applicable to municipal judges, notes it applies only to “unmarried city employees.” *Id.*
- Kansas City Municipal Judges are eligible for life insurance under a group policy with Appellant and, as such, they must meet both the “member” and “active work” requirements of the policy. To be a “member” municipal judges must be “[a]n active employee of the employer regularly working at least 40 hours each week, or” be a retired employee of the city. The “employer” for purposes of this policy is Appellant. Under the policy’s active work

provisions, "Active work and actively at work mean performing the material duties of your own occupation at your employer's usual place of business." LF179, 559-60.

- Unlike municipal judges, neither City Council members nor the Mayor meet the "member" provisions of this insurance policy because they are not "regular full-time employees" of Appellant. LF180.
- Appellant construes applicable Internal Revenue Service rules and related Missouri Department of Revenue rules to require that Appellant treat municipal judges as "employees" for federal and state tax purposes. LF180, 560.
- Appellant pays municipal judges on a salaried basis. Trial Ex.24, p. 2.
- Appellant provides municipal judges with the work space in which they perform their duties. LF180, 560.
- Appellant provides municipal judges with the office equipment they use. *Id.*
- Appellant provides municipal judges with the staff with whom they work. *Id.*
- Appellant requires that municipal judges provide it with full-time and exclusive services to be personally performed. *Id.*

Finally, Appellant admitted it is an “employer” within the meaning of the Missouri Human Rights Act. LF54, ¶ 3.

Evidence and Argument Regarding Municipal Judges’ Pay and Benefits

In her opening statement, Appellant’s counsel stated that Howard had a one in three chance of being selected as municipal judge. TR110.

At trial and without objection, Howard provided testimony and introduced documentary evidence illustrating the pay and benefits Appellant provides to municipal judges. TR136-38; Trial Ex.24.

Howard also testified, without objection, what she was earning as a municipal judge in Lawson, Missouri and as a part-time prosecutor in Clay and Jackson counties as well as how long she would have remained in the position as Appellant’s municipal judge had she been selected. TR118, 136-38.

In closing argument, without objection, Howard’s counsel argued the jury could consider the evidence concerning the pay and benefits Howard lost. TR430-33.

The Trial Court’s Ruling on Attorneys’ Fees

In oral argument on various post-trial motions, Appellant raised the issue of what it claimed were attorneys’ fees sought by Howard for her previous attorney’s

work that Appellant argued related solely to an unrelated case. Post Trial Motions Transcript, 16.

Howard's counsel offered to delete from her request any entries from her prior counsel that related solely to the other case. *Id.* at 17.

The trial court directed Howard's counsel to do so. *Id.* at 17.

Howard's counsel thereafter filed an amended motion for attorneys' fees that deducted \$35,784.51 in attorneys' fees and \$748.90 in costs related solely to prior counsel's work in the other case. LF579-92.

The trial court awarded fees and costs in those reduced amounts. LF593.

ARGUMENT

I.

Introduction

The jury found that Kansas City (“the City”) discriminated against the Plaintiff on the basis of race. This factual conclusion binds this Court as it considers the legal issues raised by the City in Point I.

The City’s Point I asserts that §213.055.1(1)(b), RSMo (2005) does not apply to a person who is an applicant for Kansas City Municipal Judge (“Judge”) because, the City asserts, a Judge is not an employee of the City. The City advances four reasons for this conclusion:

(1) The common law test for distinguishing between an employee and an independent contractor applies and a Judge is more akin to an independent contractor than an employee.

But the law of Missouri is clear. Undefined words of a statute must be given the meaning assigned them by the dictionary, not a common law meaning available only to those versed in the esoterica of the law. If the City is correct that a Judge is not an employee, then the statute permits only one other conclusion – that a Judge is an independent contractor. That conclusion is fraught with all manner of difficulties,

including eligibility for health, life, and workers' compensation insurance coverage and retirement benefits.

(2) If Judges are employees, this Court ought to engraft a “public official” exception onto §213.055.1(1)(b) to remove Judges from the protections of the MHRA.

Apparently realizing that there are only two choices under the statute – between employee and independent contractor – the City suggests that this Court should adopt a middle ground. But the middle ground – a public official exception—has no textual support in the statute. Further, the exception would be necessary only if and precisely because such officials would otherwise be considered employees under the accepted meaning of that word.

(3) Other states, applying their statutes, have found that municipal judges are not employees covered by anti-discrimination laws.

The meaning of the Missouri Human Rights Act (“MHRA”) is for this Court to decide, not a Texas or Tennessee court. Differences in statutes often determine how other states’ laws are applied or interpreted by state courts. Moreover, a Kentucky appellate decision agrees with the trial court’s conclusion here that a statute similarly worded to the MHRA includes public officials as employees.

(4) “[C]ivil rights laws do not apply to all individuals and they were not intended to apply to all individuals.” City Br. at 27.

Civil Rights laws are intended to apply to all of the persons to whom they apply. In this case, the MHRA is intended to apply to “individuals,” “employees” and “employment applicants” for” employment opportunities.” There is no license to discriminate against these categories of persons under Missouri law.

Standard of Review

Where the relevant facts are not contested, review of the applicability of a statute is *de novo*. *George Weis Co. v. Stratum Design-Build, Inc.*, 227 S.W.3d 486, 489 (Mo. banc 2007). In asserting *de novo* review, the City necessarily concedes that the facts found by the jury are not in dispute.

1. The Controlling Statute

The MHRA prohibits “unlawful employment practices.” Specifically, §213.055 RSMo (2005) makes it an “unlawful employment practice” for an employer to “***refuse to hire ... any individual***, or otherwise discriminate against any individual ... because of such individual's race....” §213.055.1(b)(emphasis added). It is also an “unlawful employment practice” for an employer

to limit, segregate, or classify his ***employees or his employment applicants*** in any way which would deprive or tend to deprive ***any individual*** of ***employment opportunities*** or otherwise affect his status as an employee, because of ... race....

§213.055.1(c) RSMo. (2005) (emphasis added).

The City concedes that it is an employer and, as such, is covered under the MHRA. The City's Point I argument turns on whether an applicant for municipal judge is an "employee," an "employee applicant", or an "individual" seeking an "employment opportunity." The MHRA provides no definition of the word "employee" or of the phrases "employee applicant" or "employment opportunity." The meaning of those statutory terms thus turns on application of the rules of statutory construction.

2. Applicable Rules of Statutory Construction

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." *Farmers' & Laborers' v. Director of Revenue*, 742 S.W.2d 141, 145 (Mo. banc 1987).

In determining legislative intent, this court must bear in mind that **"[r]emedial statutes should be construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case."** *State ex rel. Ford v. Wensky*, 824 S.W.2d 99, 100 (Mo.App.1992). See also *Perez v. Missouri State Bd. of Registration for Healing Arts*, 803 S.W.2d 160, 165 (Mo.App.1991). Section 213.065 RSMo. (2005) of the

MHRA was enacted to provide “[a]ll persons within the jurisdiction of the state of Missouri ... the full and equal use and enjoyment within this state of any place of public accommodation...” Section 213.065.1. This mandate that all persons be treated equally in public accommodations was enacted “in the interest of public welfare,” *Hagan v. Director of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998), and “ ‘introduce[s] some new regulation conducive to the public good[...].’ ” *Ford*, 824 S.W.2d at 100 (quoting *City of St. Louis v. Carpenter*, 341 S.W.2d 786, 788 (Mo.1961)). Therefore, the statute is remedial and we must afford it a broad interpretation “in order to accomplish the greatest public good.” *Hagan*, 968 S.W.2d at 706; *Ford*, 824 S.W.2d at 100.

Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc., 991 S.W.2d 161, 166-167 (Mo. App. W.D. 1999); accord, *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338, 341 (Mo. banc 1991)(remedial statutes are interpreted liberally to give broad meaning to their remedial purpose).

Further, “[u]ndefined words are given their plain and ordinary meaning as found in the dictionary in order to ascertain the intent of lawmakers.” *Laws v. Secretary of State*, 895 S.W.2d 43, 46 (Mo.App.W.D. 1995) citing *Asbury v. Lombardi*, 846 S.W.2d 196 (Mo. banc 1993).

3. The City of Kansas City is the Defendant, not the City Council

The City's brief continually argues as though the City Council is the Defendant in the case. It is not. The City of Kansas City is the Defendant. LF38. It is the "employer," which it admits and which §213.010(7) RSMo. (2005) defines to include "the state, or any political or civil subdivision thereof,...." The City Council could not be an employer within the meaning of the statute. Thus, Plaintiff's claim is that the City, acting through its various actors, discriminated against Plaintiff on the basis of race. As will be discussed as necessary, the fact that the Mayor (who announced the vacancy and sought applications for the Judgeship), the Municipal Nominating Judicial Commission (which selected the three qualified nominees and submitted them to the Mayor and City Council) and the Mayor and Council together (the majority of whom used racial grounds to reject the panel as a whole) does not relieve the City of liability.

All of these entities acted for the City, under authority granted them by the City's Charter, and did so functioning together to fulfill their constituent duties under the City's Charter. Said differently, the fact that the City Council alone does not exercise the full authority of the City on judicial selection and removal issues does not mean that the City qua City is not acting when all of the components each perform their assigned responsibilities toward a single purpose. More on this later.

4. Who is Protected by the MHRA?

A. The Plain, Ordinary Meaning of “Employee” Provides Protection to Plaintiff in this Case.

We begin where the case law tells us to begin – with the dictionary. *Asbury*, 846 S.W.2d at 201. An “employee” is “one employed by another, usu. in a position below the executive level and usu. for wages.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 743 (2002). This definition invites clarifications by learning the meaning of two other words used in the definition: (1) “employ” means “to provide with a job that pays wages or a salary or with a means of earning a living....” *Id.* (2) Outside of a government/separation of powers context, “executive” means “designed or fitted for or relating to execution or carrying into effect.... Active, effectual or skillful in managing, directing or accomplishing....” *Id.* at 794. And obviously, in a governmental setting, “executive” does not encompass the judiciary. “Executive” in a governmental context means “qualified for, concerned with or relating to the execution of laws....” *Id.*

Reading these definitions together, the word “employee” means “one who is provided by another with a job that pays wages or a salary in a position that is not an executive position.”

A Kansas City Municipal Judge holds a job with a salary provided by an employer (the City) that is not an executive job. Under the plain meaning of “employee,” that Judge is an employee of Kansas City.

B. Application of the Common Law Test For Employee Does not Remove the Plaintiff from the Protections of the Act.

Rather than the dictionary definition, the City insists that the common law definition of “employee” ought to apply to determine the scope of the MHRA’s protections. This Court has never reached that conclusion and for good reason. The common law definition is not readily available to the general public. A statute designed to protect the public from discrimination in all its varieties ought to use words that are readily accessible to the public’s understanding. Any other definition risks permitting the statute to fail to apprise those whom it was designed to protect of the protections the legislature intended for them.

Indeed, the more esoteric common law definitions advanced by the City are offered because they read them to serve the City’s purposes in this litigation, i.e. the City hopes those definitions will limit the reach of the MHRA, not serve its broad, remedial purpose. But even that hope is false, if the common law definitions are carefully and honestly applied.

Indeed, whether the Court ought to go outside the dictionary to find a meaning for “employee” does not change the outcome in this case, though it surely

matters for purposes of the precedent it creates for other cases. A prudential concern for the unintended reach of precedent is sufficient alone to counsel for rejection of the City's invitation to wander through the backwoods of the law in search of a definition that serves a predetermined purpose. But the point here is that even a misdirected application of the common law will permit the Court to reach the same, proper legal result. Under any test, a Kansas City Missouri Municipal Judge is an employee of the City.

The one case in which a Missouri appellate court has applied the common law definition to determine whether a MHRA claimant was an employee involved a case in which the written contract between the claimant and the company expressly recited that the claimant was an independent contractor. *Sloan v. Banker's Life & Cas. Co.*, 1 S.W.3d 555, 563 (Mo. App. 1999). That explicit contractual provision left little room for the judicial imagination to wander.

Sloan involved a commission-only insurance salesperson who claimed age discrimination. *Sloan* used the common law tests not to define the relationship but as a check to assure itself that a commission-only insurance salesman, for whom the company provided no office or supplies, who claimed age discrimination, had not actually been treated by the insurance company as an employee, rather than as an independent contractor.

Sloan aside, the common law definitions have generally been employed to answer a different question than is posed in this case – usually in a workers'

compensation setting or where the issue is the vicarious liability of the employer. In those contexts, the question is: Is the worker an employee or an independent contractor? The answer is always either one or the other, not neither.

These classes of cases show that the specific term at issue in this statute, “employee,” has caused the law untold difficulties. Indeed, it has different meanings in different contexts. The meaning ultimately assigned by a Court is thus contextually and factually specific and reflects a judicial hope to reach the intent of the legislature, to provide comprehensible notice to those a statute is designed to protect, or, where a statute is not at issue, to serve the purposes of the common law.

The term “employee” is used as an element in many legal relationships. For example, it is used in the concept of master-servant, workers’ compensation, the borrowed servant doctrine, and the independent contractor doctrine. The emphasis in the definition of the term may vary according to the factor or factors critical to the relationship being considered. “The word ‘employee’ may and frequently does have many different meanings in the multitude of varying connections in which it is used.” *Ward v. Curry*, 341 S.W.2d 830, 835-836 (Mo.1960).

Auto Owners Mut. Ins. Co. v. Wieners, 791 S.W.2d 751, 755 (Mo. App. S.D. 1990).

The common law tests recognized in Missouri come in at least two forms – an eight-factor test² or a twelve factor test.³ Not to be outdone, the IRS has created a twenty factor test to distinguish between employees and independent contractors.⁴ These three tests are discussed in *Sloan. K & D Auto Body, Inc. v. Div. of Employment Security*, 171 S.W.3d 100, 104-114 (Mo.App.W.D. 2005) (and other cases) employs the twenty-factor test and adds two additional factors in a worker’s compensation setting.

The increasing number of factors results from increasing degrees of refinement in the inquiry. As will be shown, application of any of the tests actually favors the conclusion that a Judge is an employee of the City, particularly when the factors are read under the remedial purposes of the MHRA.

More importantly, however, these tests require a court to come down on one side or the other of a binary choice. A Judge will either be an employee or an independent contractor. *See, Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 742 (1989)(employee and independent contractor status are “mutually

² *Maltz v. Jackoway-Katz Cap Co.*, 82 S.W.2d 909, 916 (Mo. 1934)

³ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)

⁴ IRS Rev. Rul. 87-41; *K & D Auto Body, Inc. v. Div. of Employment Security*, 171 S.W.3d 100, 104-114 (Mo.App.W.D. 2005).

exclusive”). For this reason, no court has concluded that a judge is an independent contractor – and for good reason. Such a conclusion would lead to all manner of mischief in the benefit/retirement arena; the availability of those emoluments is dependent on employee status and could be destroyed by independent contractor status.

The City’s own treatment of judges for benefit purposes makes this point. The City thinks the Judges are employees for purposes of budgeting and benefits.

1. The City Considers Judges Employees for Purposes of Benefits

Kansas City Municipal Judges are required to complete various “employment” forms that include their signatures as “employees” and their “employee” identification number. Some of these forms must be forwarded to the City’s Human Resources Department and are placed in judges’ “personnel” files. LF178, 559.

- One of the employment forms relates to pension benefits. The Judge is required to sign a form as an employee that states: “As an active employee of the City of Kansas City, Missouri, I hereby designate the following as my pension beneficiaries.” LF178-79, 559.
- Pursuant to another of the City’s employment forms, the ten day enrollment period for insurance begins running the day after the municipal judge’s first day of “employment” with the City. LF179, 559.

- Yet another of the City’s employment forms, specifically applicable to municipal judges, notes it applies only to “unmarried city employees” *Id.*

- Judges are eligible for life insurance under a group policy with the City and, as such, they must meet both the “member” and “active work” requirements of the policy. To be a “member” municipal judges must be “[a]n active employee of the employer regularly working at least 40 hours each week, or” be a retired employee of the city. The “employer” for purposes of this policy is the City. Under the policy’s active work provisions, “Active work and actively at work mean performing the material duties of your own occupation at your employer’s usual place of business.” LF179, 559-60.

- Unlike municipal judges, neither City Council members nor the Mayor meet the “member” provisions of this insurance policy because they are not “regular full-time employees” of the City. LF180.

- The City construes applicable Internal Revenue Service rules and related Missouri Department of Revenue rules to require that the City treat its municipal judges as “employees” for federal and state tax purposes. LF180, 560.

2. Application of the Twenty/Twenty-Two Factor Test

K & D Auto Body, 171 S.W.3d 105, states:

Missouri courts routinely apply the [IRS Rev. Rul. 87-41] twenty-factor test in determining the nature of the employment relationship for purposes of tax liability,” [*Nat'l Heritage Enters., Inc. v. Div. of Employment Sec.*, 164 S.W.3d 160, 167 (Mo.App. W.D.2005)].... and those factors “have been consistently used as an aid for determining whether an individual is an employee or independent contractor under the common law rules[.]” *Klausner v. Brockman*, 58 S.W.3d 671, 679 (Mo.App. W.D.2001), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. banc 2003).

* * *

Two such additional factors, which were set forth by the United States Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), are “(1) the provision of employee benefits, and (2) the tax treatment of the hired party.” *Fritts*, 992 S.W.2d at 385 (citing *Reid*, 490 U.S. at 751-52, 109 S.Ct. at 2178-79).

Id. at 112-13.

The tedious task of measuring the ingredients in the 20/22 ingredient legal recipe follows:

(1) instructions: “A worker who is required to comply with other persons’ instructions about when, where, and how he or she is to work is ordinarily an employee.” *K & D Auto Body*, 171 S.W.3d at 106.

There are three elements of this factor: when (time), where (place) and how (manner). Two of the three show significant control in the City. The City provides the courthouse (place) and determines the hours (time) the courthouse is open. The Judge must decide the cases on their merits applying his/her legal training (manner). Because the City does not control the decisional aspects of the Judge’s duties, the first factor likely favors independent contractor status. However, the same could be said for a CPA employed in the City’s Finance Department.

(2) training: “The ‘training’ factor refers to an experienced worker giving guidance to new workers to demonstrate how the instructions ... must be followed.” *Kirksville Pub. Co. v. Div. of Employment Sec.*, 950 S.W.2d 891, 897 (Mo.App. W.D.1997).

As was the Plaintiff in this case, the City hires only highly skilled and experienced lawyers as Judges and relies on their judgment. Thus, it does not train them. This factor likewise favors independent contractor status. Again, the same could be said for a CPA employed in the City’s Finance Department.

(3) integration: “The integration factor refers to whether a business could continue without the contribution of the services in question; as such, integral

services are more likely to be subject to the business' control." *Nat'l Heritage Enters., Inc. v. Div. of Employment Sec.*, 164 S.W.3d 160, 168 (Mo.App. W.D.2005).

The City's claim that adjudication of municipal ordinance violations "is not part of the City's regular business" is so far wrong as to be beyond reasoned response. (City Br. at 22).

First, the Kansas City Municipal Court is a department of the City.⁵ It has its own budgetary line item for expenditures of City money from the general treasury.⁶ Judges are part of the 78.3 Full Time Equivalent employees budgeted by the City.⁷ The City counts on its Court to generate revenue – indeed a profit – for the City's operations. For example, the FY 2005-2006 budgeted City expenditures for its Municipal Court were \$6,249,633 – less than 1% of the City's budget. Appendix A42. The budgeted general revenue generated by court fines for fiscal year 2005-2006

⁵

<http://www.kcmo.org/CKCMO/Depts/CityManagersOffice/Office%20of%20Management%20and%20Budget/AdoptedCityBudgetforFiscalYear2005-06/index.htm>. Appendix A20.

⁶<http://www.kcmo.org/idc/groups/citymanager/documents/citymanagersoffice/adoptedbudget05-06.pdf#page=277>. Appendix A21-23.

⁷ *Id.*

was expected at \$18,330,140 – approximately 4% of the City’s budget. Appendix A41.

The City describes the operations of the Municipal Court as part of its Public Safety function, a priority of the City.

Council Priority: Public Safety

Desired Community Outcome: *Kansas City is, in fact and in the perception of its citizens, one of the safest urban centers in the United States.*

*Public Safety encompasses services which every city must have to secure the public’s sense of well-being, including fire suppression and prevention, police protection, **adjudication of ordinance violations**, incarceration of sentenced individuals, emergency medical treatment, and disaster planning and coordination. Effective inter-agency coordination and cooperation exists both locally and regionally to respond to and/or solve specific safety issues and problems. A strong orientation toward prevention of both crime and fire is evident. Partnerships between the city’s neighborhoods and the public safety agencies are essential in order to provide effective public safety.*

The **departments** whose services can be attributed to the provision of Public Safety include Police, Fire, Health, **Municipal Court**, City Manager’s Office, and Neighborhood and Community Services.

App. A47-48: City Manager's Submitted Budget for Fiscal Year 2005- 06 (Feb. 10, 2005) 24-5 (Emphasis added).

Even absent these statements by the City, it is clear as a matter of basic government structure that the Municipal Court is part of the business of Kansas City. That Court is created by the City Charter to exercise "the judicial power of the City." CHARTER OF KANSAS CITY, MISSOURI §3.01 (2006) (Tr. Ex. 25). The judicial power is one of the three constituent powers, which, taken together, comprise the total power of the City. The division of these core functions – "the distribution of this mass of power among its constituent parts" in the words of James Madison – is the essence of separation of powers within a unitary government. THE FEDERALIST NO. 47 (1788) (Madison).

Governments do three things: Make laws, execute them and adjudicate violations of them. The Municipal Court is a fundamental, core function of the City. The exercise of the judicial power is fundamentally the City's business.

The success and continuation of the City's exercise of its judicial power depends upon the performance of these core services by its Judges. Since those services are also an integral part of the City's regular "business" operations, Factor 3 favors employee status.

(4) Services Rendered Personally: "If the services must be rendered personally, presumably the person or persons for whom the services are performed

are interested in the methods used to accomplish the work as well as in the results.”
K & D Auto Body, 171 S.W.3d at 107.

Judges are required to render their services personally. Factor 4 favors employee status as well.

(5) Hiring, Supervising, and Paying Assistants: “If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job.” *K & D Auto Body*, 171 S.W.3d at 108.

The City hires, supervises and pays assistants for the judges. A Court Administrator answers directly to the City Manager, not the judges. Under the City Charter, the administrator performs “such other duties as may be prescribed by ordinance.” CHARTER OF KANSAS CITY, MISSOURI §3.13 (2006). Factor 5 favors employee status.

(6) Continuing Relationship: “A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists.” *K & D Auto Body*, 171 S.W.3d at 108.

Judges of the City serve 4-year terms and must devote their exclusive legal service to the City. “No judge of the Kansas City Municipal Division, other than a part-time judge, shall engage in the private practice of law or do law business.” CHARTER OF KANSAS CITY, MISSOURI §§ 3.04 & 3.07 (2006). Factor 6 suggests that Judges are employees.

(7) Set Hours of Work: “The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.” *K & D Auto Body*, 171 S.W.3d at 108.

The Kansas City Municipal Court has set hours of operation. Judges have regular, set dockets within the normal hours of operation. Factor 7 favors employee status.

(8) Full Time Required: “If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.” *K & D Auto Body*, 171 S.W.3d at 109.

“No judge of the Kansas City Municipal Division, other than a part-time judge, shall engage in the private practice of law or do law business.” CHARTER OF KANSAS CITY, MISSOURI § 3.07 (2006). Factor 8 points to employee status.

(9) Doing Work on Employer’s Premises: “If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere.” *K & D Auto Body*, 171 S.W.3d at 109.

Judges perform their work at the Kansas City Municipal Court building. Factor 9 favors employee status.

(10) Order or Sequence Set: “If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.” *K & D Auto Body*, 171 S.W.3d at 109.

The administrative functioning of the Kansas City Municipal Court is under the control of the Administrator of the Municipal Court. This is a position created by the Kansas City Charter. CHARTER OF KANSAS CITY, MISSOURI § 3.13 (2006). The administrator is selected by the City Manager, not the Judges. Moreover, the City Council retains the authority to establish divisions of the Municipal Court. “(1) *Divisions may be established by Council.* The Council may establish additional divisions, may establish one or more specialized divisions, and may establish part-time divisions.” CHARTER OF KANSAS CITY, MISSOURI § 3.01(b)(2006). This factor likewise shows that Judges are employees of the City.

(11) Oral or Written Reports: “A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.” *K & D Auto Body*, 171 S.W.3d at 110.

“The Court Administrator shall keep a complete record of each case, showing the final disposition thereof....” CHARTER OF KANSAS CITY, MISSOURI § 3.13(2006). This Charter requirement necessarily requires a Judge to provide a report of the disposition of each case to the Administrator – who serves the City Manager, not the Court under the Charter. Factor 11 favors employee status.

(12) Payment by Hour, Week, Month: “Payment by the hour, week, or month generally points to an employer-employee relationship....” *K & D Auto Body*, 171 S.W.3d at 110.

Judges are paid a salary fixed by the City Council.

Sec. 305. Compensation of judges.

The compensation of the judges of the Kansas City Municipal Division shall be fixed by the City Council, and the salaries for all judges, other than a part-time judge, shall be equal. The compensation of a judge shall not be diminished during a term of office. A judge shall receive no other income for public service, other than a pension representing past service, during a term of office.

CHARTER OF KANSAS CITY, MISSOURI § 3.05(2006). Thus, Factor 12 favors employee status.

(13) Payment of Business and/or Traveling Expenses: “If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee.”

The record is silent on this score. Factor 13 is undetermined.

(14) Furnishing of Tools and Materials: “The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.” *K & D Auto Body*, 171 S.W.3d at 110.

The City put on no evidence that Judges were required to furnish their own pens and pencils, computers and paper, or library or computer research provisions. Factor 14 favors employee status.

(15) Significant Investment: “If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as maintenance of an office rented at fair market value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. Special scrutiny is required with respect to certain types of facilities, such as home offices.” *K & D Auto Body*, 171 S.W.3d at 110-11.

Judges are provided offices and courtrooms at the City’s expense. Accordingly, this factor also favors employee status.

(16) Realization of Profit or Loss: “A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss

ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee.” *K & D Auto Body*, 171 S.W.3d at 111.

As previously discussed, the Court is a profit center for the City. Judges receive a flat salary. The compensation of a Judge neither rises nor falls based on the level of fines meted out or the number of cases handled. Factor 16 militates in favor of the conclusion that the Judge is an employee.

(17) Working for More Than One Firm at a Time: “If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.” *K & D Auto Body*, 171 S.W.3d at 111.

Judges are bound to work exclusively for the City on the matters for which they were hired. “No judge of the Kansas City Municipal Division, other than a part-time judge, shall engage in the private practice of law or do law business.” CHARTER OF KANSAS CITY, MISSOURI § 3.07 (2006). Factor 17 shows that Judges are employees.

(18) Making Service Available to General Public: “The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.” *K & D Auto Body*, 171 S.W.3d at 111.

The general public prefers not to experience the services of the Judges! But, feeble attempts at levity aside, the Judges are not generally for hire to adjudicate ordinance violations; they are exclusively kept for that purpose by the City. Factor 18 favors employee status.

(19) Right to Discharge: “The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer.... An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. *K & D Auto Body*, 171 S.W.3d at 112.

Though it can only do so in a manner consistent with the Charter, the City Council, acting as the City, maintains the ultimate power to discharge a Judge.

(c) *Removal based on charges of misconduct.*

(1) *Charges brought by the Municipal Judicial Nominating Commission.* Four members of the Municipal Judicial Nominating Commission may vote to bring charges against a judge of the Kansas City Municipal Division seeking that judge’s removal from office by submitting written charges to the City Council.

(2) *Grounds for removal.* Judges are subject to removal by the Council for nonfeasance, malfeasance or misfeasance in the performance of official duties or engaging in conduct which

brings discredit on the Kansas City Municipal Division, or violating any prohibition established by this Charter for judges.

(3) ***Procedure.*** The Council, and not a committee of the Council, shall hold an appropriate hearing sitting as a board of review for the purpose of hearing evidence and testimony relating to the charges. The Mayor will preside and may cast a vote. Unless at least seven members of the Council vote for the removal of a judge, the judge will not be removed from office.

CHARTER OF KANSAS CITY, MISSOURI § 3.12(c)(2006). These procedures are in place to assure judicial independence by protecting Judges from arbitrary or politically motivated firings by the political branches of the City. The fact that the Council may not instigate the charges and that that responsibility is lodged in another entity created by and acting for the City, does not militate in favor of a legal conclusion that the power to discharge is not lodged in the City operating through its constituent parts. The City is the City whether it is the Commission acting or the Council, or both in concert.

Indeed in this regard, a Judge is little different than an employee hired by a company under a union contract that permits termination only for cause and includes procedural steps and protections to guard against arbitrary discharges by the employer.

Factor 19 favors employee status.

(20) Right to Terminate: “If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.” *K & D Auto Body*, 171 S.W.3d at 112.

No provision of the Charter prohibits a Judge from resigning for any reasons mid-term. Because a Judge can terminate his or her judgeship without incurring any financial liability, for breach of contract or otherwise, Factor 20 favors employee status.

(21) The Provision of Employee Benefits: As shown previously, a Judge receives certain insurance and pension benefits from the City. (LF180, 560). This factor also shows employee status.

(22) The Tax Treatment of the Hired Party: Judges are treated as employees for tax purposes as well, with federal withholding and federal matching of those withholdings made by the City. (LF180, 560).

Of these factors, 19 of the 22 favor employee status, a single factor is neutral or undetermined and only 2 support a conclusion that a Judge is an independent contractor.

This weighing of factors makes the decision to conclude that Judges enjoy employee status an easy one. But even if it were close, which it is not, courts have emphasized that “all reasonable doubts should be construed in favor of applicability [of the MHRA] to the case.” *Red Dragon Restaurant, Inc.* 991 S.W.2d at 166-167

(emphasis added); *accord, Abrams v. Ohio Pacific Express*, 819 S.W.2d 338, 341 (Mo. banc 1991)(remedial statutes are interpreted liberally to give broad meaning to their remedial purpose).

Moreover, the City often makes the argument that many of these factors would weigh in favor of including the Mayor and the Members of the City Council as employees. While there are a number of factors that would not point to employee status for some of those persons, the status of those persons is not at issue in this case. Moreover, the application of these factors to an assistant city attorney – a person who all agree is an employee of the City – would reach a nearly identical result and same, proper conclusion: Both the Judge and the assistant city attorney are employees of the City. It is the nature of the exercise of legal judgment inherent in both jobs that separates both Judges and assistant city attorneys from all 22 factors pointing to employee status.

3. Application of the Eight Factor Test

The City suggests application of the eight factor test applied in *Howard v. Winebrenner*, 499 S.W2d 389, 395 (Mo. 1973), a worker’s compensation case. As this Court is abundantly aware, the worker’s compensation statutes are read liberally to accomplish the remedial purposes of the statute. And so is the MHRA.

Howard’s eight-factor test is a less precise instrument than the IRS test. Nevertheless, its application leads to the conclusion that Judges are protected from racial discrimination by the MHRA.

(1) the extent of control: Under *Howard*, this element focuses on theoretical control. Does the power of control exist in the putative employer? As discussed at Factor 1 of the *K & D Auto Body* test, this factor actually includes a number of elements including hours of work (time), place of work (place) and manner in which the work is done. The City argues as though the only issue is the manner in which the work is done. Two of the three show significant control in the City. The City provides the courthouse (place) and determines the hours (time) the courthouse is open. The Judge must decide the cases on their merits applying his/her legal training (manner). Because the City does not control the decisional aspects of the Judge's duties, the first factor likely favors independent contractor status.

(2) actual exercise of control: The City does not actually exercise control over the work of the Judge. This factor, too, favors independent contractor status.

(3) duration of employment: The City seems to assume that this factor addresses the manner in which a Judge achieves retention in office after the City has hired the Judge for the initial term. In this regard, the City misreads the focus of this factor. The proper focus is whether the period of work is of short duration, which would suggest independent contractor status, or for an extended period of time. Because the initial term is a minimum of one year (and can be as long as 1 year and 364 days before the next general election), this factor favors the conclusion that a Judge is an employee.

(4) right to discharge: Though there are procedural protections against arbitrary dismissal by the City – as there are for many workers who are not at will employees – the City has the authority to discharge a Judge for cause. The City’s argument is reduced to this – any employee who is not an at-will employee must be an independent contractor because the person cannot be fired whenever the City wants to fire them. Under the City’s argument, any employee protected by a union contract or a merit system is not an employee. No law supports this conclusion. “[E]mployees that do not have a contract for a definite period of time are considered at-will employees....” *Clark v. Beverly Enterprises-Missouri, Inc.* 872 S.W.2d 522, 525 (Mo.App. W.D. 1994). They are employees. This factor favors employee status.

(5) method of payment for services: Here again, the City reads this factor to mean that the City must have complete flexibility to set salaries or a person is an independent contractor. The proper focus is whether the person is paid a salary or paid on a commission/piecework basis. First, the City sets the salary, not the Judge. Second, a salaried individual who cannot work for another is an employee. Moreover, because judges cannot be paid by number of cases decided or amount of fines collected, which the City cites as proof that the Judge cannot be on piecework, actually shows that the Judge is an employee. *See K & D Auto Body* factor 16, *supra*.

(6) the degree to which the alleged employer furnished equipment: The City admits that it furnishes the offices, equipment and staff for the Judge. This factor shows an employer/employee relationship between the Judge and the City.

(7) whether the work is part of the alleged employer’s regular business:

Remarkably, the City tries to turn this factor into a discussion of the duties of the City Council. “[T]he duties of a municipal court judge are not integrally tied to the duties of the City Council.” City Br. at 22. It is readily conceded that the judicial branch cannot perform either a legislative or executive duty. Nor does a pilot at Southwest Airlines change out jet engines. But that is not the issue. The issue is whether what a court does is part of the regular business of the City. It is enough to answer that question by turning to the City Charter – the organic governing document of the City. The Court is described there as holding the judicial authority of the City. It follows, then, that the exercise of that authority is the regular business of the City.

Moreover, as discussed in *K & D Auto Body* factor 3 above, the City counts on the Municipal Court for a profit. The City includes the Court as part of its priority public safety purposes. What the Court does, as the judicial branch of the unitary City government, is part of the City’s core function.

This factor, too, favors employee status.

(8) the contract of employment: The City says there is no contract of employment and that *Leslie v. School Services and Leasing, Inc.*, 947 S.W.2d 97, 101 (Mo. App. 1997) requires the conclusion that no employer/employee relationship exists. This argument is incorrect on every score.

First, at-will employees have no contract either. They are, nevertheless, employees. Again, “employees that do not have a contract for a definite period of time are considered at-will employees....” *Clark v. Beverly Enterprises-Missouri, Inc.* 872 S.W.2d 522, 525 (Mo.App. W.D. 1994).

Second, *Leslie* involved a person who was not yet an employee. That she had not yet been hired was the critical fact in that case, in which she sought worker’s compensation benefits under a statute that did not extend the statute to “employment applicants” as does the MHRA. *Leslie* did not turn on the absence of a contract of employment.

Third, this factor shows another reason why *Sloan* does not apply at all in this case. There the contract expressly recited that Mr. Sloan was an independent contractor, not an employee. The Court determined that that was his status even when checked against the multi-factor tests courts have used to define “employee.” Application of the eight-factor test to Mr. Sloan’s relationship with Banker’s Life resulted in no factors pointing toward employee status. *Sloan*, 1 S.W.3d at 563-64.

Indeed, the most the City can hope for is a conclusion that this eighth factor is neutral.

Five of the eight factors favor employee status. One is neutral. Two favor independent contractor status. A fair reading shows that Judges are employees of the City, especially when the remedial purposes of the MHRA are considered.

C. The City's Proposed Public Official Exception.

The City argues that a “public official” exception ought to apply to any definition of “employee” adopted by the Court for the MHRA.

First, there is, of course, no textual support for this argument in the statute. Despite inclusion of such an exception in the federal law,⁸ the Missouri General Assembly has not adopted such language.

Second, the argument that there is a need for a judicially engrafted exception necessarily admits that without the exception a Judge is an employee within the meaning of the MHRA.

⁸ Federal law includes an express exclusion from the definition of “employee” for “public officials” for purposes of the federal Civil Rights Act.

(f) The term “employee” means an individual employed by an employer, except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

42 U.S.C.A. § 2000e(f). (Emphasis added).

Third, the City's arguments for a "public official" category implicitly acknowledges that the binary choice between employee/independent contractor cannot work. The City apparently is unconcerned with the legal consequences of the tests it asks the Court to apply and thus seeks a third category --public official-- that has neither legal nor textual support. This is because too much of what is provided Judges as employees in the way of benefits by the City would not be available were Judges held to be independent contractors. For example, neither City Council members nor the Mayor meet the "member" provisions of the group life insurance policy because they are not "regular full-time employees" of Appellant and the policy permits coverage only for such employees. LF180. Judges are provided that benefit.

Fourth, the City finds a rationale for its public official exception in two cases from sister states. But the precedent setting case interprets a state-specific human rights statute that contains a public official exception different from the MHRA.

Thompson v. Austin, 979 S.W.2d 676 (Tex. App. 1998) relied on *Guerrero v. Refugio County*, 946 S.W.2d 558 (Tex. App. Corpus Christi 1997), *reversed on other grounds by NME Hospitals, Inc. v. Rennels*, 994 S.W.2d 142, (Tex. 1999). *Guerrero* is the first Texas case to consider whether a public official (a county auditor) is an employee under the Texas Commission on Human Rights Act ("TCHRA").

The relevant Texas statute included an express exception for public officials. Section 21.002 defines “employee” as “an individual employed by an employer, including an individual subject to the civil service laws of this state or a political subdivision of this state, except that the term [employee] does not include an individual elected to public office in this state or a political subdivision of this state.” Tex. Lab. Code Ann. § 21.002(7) (Vernon 1996). **This language is absent from the Missouri statute.**

Guerrero involved the reappointment of a county auditor. When he was not reappointed to a twelfth two-year term, he sued Refugio County and others, including the appointing authorities, the District Court judges serving the County. These District Judges had no legal responsibility for the County. (In Missouri, this would be the equivalent of the Jackson County Circuit Court Judges appointing the Jackson County auditor.) “The auditor is not appointed by any elected body or officer who administers or determines county policy and is to be left entirely free from the control of these officers.” *Guerrero*, 946 S.W.2d at 567. The County paid the auditor’s salary, but the District Judges determined the amount of the salary. Indeed, the District Judges determined whether the County needed assistant auditors. The auditor approved all of the expenditures of the County before they could be paid. As *Guerrero* noted “it would indeed be strange to have an ‘employee’ exercise such control over an employer's finances as a county auditor does over a county's fiscal matters.” *Guerrero*, 946 S.W.2d at 568. Finally, the auditor possessed

an independent right to furnish his office and require the County to pay for it, subject only to a standard of reasonableness. *Id.* at 567.

Guerrero concluded that the employer of the auditor was not the County. Instead, the District Judges were the auditor's employer! *Id.* Because, however, the "auditor's work is not an integral part of the business of the district judges,"⁹ the auditor could not be an employee of the district judges either. 946 S.W.2d 569. Since, the auditor was not an independent contractor, *Guerrero* was left with the only choice the Texas statute permitted – and found that the auditor was a "public official." But it was Texas' cobbled up system in which *judicial* officers appointed an *executive* branch official of a County, set the salary for that officer, determined the need for that officer to have assistants but did not pay the officer nor provide any tools for him to do his work that left the auditor an employee of no one.

⁹ This quoted language is important; it finds its way into *Thompson*, where the Texas court neatly substitutes "City Council" substituted for "district judges" and, despite the strange facts of *Guerrero*, extends that case to certain Texas municipal judges. From there *Guerrero* makes its way *sub silentio* into the City's brief by way of *Thompson*. The City says: "the duties of a municipal court judge are not integrally tied to the duties of the City Council." City Br. at 22. This is, of course, nonsense under Missouri law, where it is the City that is both the hiring authority and, by its own admission, the employer under the MHRA.

Thompson involved two municipal judges not reappointed by the City of Austin, Texas. The judges sued for discrimination on the basis of handicap. The court applied a federal, hybrid “economic realities-common law control” test employed in *Guerrero*. That test permitted only two mutually exclusive options – either a person is an employee or an independent contractor. But since the former judges were not employees under *Thompson’s* application of that test (but certainly could not be independent contractors), *Guerrero* gave the *Thompson* court a third option. Voila! Municipal judges became public officials under Texas law.

But this fact remains: The federal hybrid test is not designed to determine whether a person is a public official. It is, like the common law tests, binary--designed to determine whether a person is either an employee or an independent contractor. Public official is not an option under the hybrid test.

Both *Guerrero* and *Thompson* are results in search of a rationale. In their defense, Texas law at least recognized a public official category by statute. But there is simply no statutory basis to import Texas law into Missouri, where our statute rejects a public official category.

The City’s other case, *Bredesen v. Tenn. Judicial Selection Commission*, 214 S.W.3d 419 (Tenn. 2007) simply adopts the reasoning of *Thompson* to conclude that a nominee for a judgeship under Tennessee’s modified Missouri Plan is not an employee of the state of Tennessee.

Kearney v. City of Simpsonville, 209 S.W.3d 483 (Ky.App. 2006), reaches a different conclusion than either *Thompson* or *Bredesen*. *Kearney* considered whether the elected mayor and elected city commissioners (just the sort of positions the City would describe as “public officials”) were “employees” of the city for purposes of meeting the threshold number of employees necessary to be an “employer” as defined by the Kentucky Civil Rights Act. *Id.* 483.

As do our courts, the Kentucky court observed it must “interpret the [Kentucky Act] according to its plain language and to effectuate the General Assembly's legislative intent.” *Id.* at 485. The court instead held that the elected mayors and commissioners (despite being public officials) were “employees” for purposes of the Kentucky Civil Rights Act. *Kearney* reasoned that “by virtue of the fact that the General Assembly chose not to exclude elected local officials from being employees under the KCRA while otherwise closely tracking the federal statutes, we must conclude that the General Assembly did not intend for such elected officials to be excluded from coverage as ‘employees.’” *Id.* In addition, the Court reasoned, “if we adopt the City's position [that elected officials are not employees], local elected officials are placed in a legislative limbo where they are neither employers nor employees. Such a construction is illogical since one who earns a salary from a municipality must logically be working as an employer or an employee.” *Id.*

Kearney also employed the rules of construction for remedial statutes required by Missouri law. “[W]e acknowledge that the KCRA is to be interpreted

broadly in order best to achieve its anti-discriminatory goals. Were we to adopt the City's position, then the alleged wrong suffered by Kearney would be outside the bounds of the KCRA, through no fault of Kearney's." *Id.* at 485-86.

The interpretation required for remedial statutes casts *Gregory v. Ashcroft*, 501 U.S. 452 (1991) in a much different light than the City suggests. *Gregory* expressly rejects the conclusion under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, that judges unambiguously fall within the federal statutory exception for public officials. The 29 U.S.C. §630(f) definition of employee is identical to the definition of employee found in Title VII. *See*, 42 U.S.C.A. § 2000e(f). Nevertheless, the Supreme Court concluded that "it is at least ambiguous whether a state judge is an "appointee on the policymaking level" for purposes of the exclusion. 501 U.S. at 467. *Gregory* then went on to hold that principles of federalism prohibited an extension of the ADEA to overrule a state constitutional mandatory retirement provision absent a clear Congressional intent that judges are covered by the ADEA.

The important point is that the Supreme Court concluded that whether the federal public official exception applied to state judges was not clear, though presumptively applicable to judges. But where there is an ambiguity in a remedial statute, *Red Dragon* counsels that under Missouri law, the MHRA must be read to cover the person about whom coverage is not sure. Thus, even if there were some textual support in the Missouri law for a public official exception based on federal

precedent – which there is not – the ambiguity of that exception would require coverage of the Plaintiff in this case.

It is important here to recall the teaching of *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 112-13 (Mo.App.2006) and *Daugherty v. City of Maryland Heights*, 231 S.W.2d 814, 819 (Mo. banc 2007). “Missouri’s discrimination safeguards under the MHRA, however, are not identical to the federal standards and can offer greater discrimination protection. ... Missouri employment discrimination law in a post-MAI 31.24 environment should more closely reflect the plain language of the MHRA and the standards set forth in MAI 31.24 and rely less on analysis developed through federal caselaw.” *Daugherty*, 231 S.W.3d at 819.

D. Even if the Plaintiff was not an “Employee,” She was an “Employment Applicant” and Entitled to Protection Under the Act.

Section 213.055.1(1)(b) makes it an “unlawful employment practice” for an employer to “limit, segregate, or classify his ...employment applicants in any way which would deprive or tend to deprive any *individual* of employment opportunities....” *Id.* (emphasis added). Well-accepted definitions of “employment” define “employment” to mean “activity in which one employs his time and energies ... as (1) work ... in which one’s services are paid for by an employer....” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 743 (2002). Thus, the legislature underscored its intention to broaden the reach of the

MHRA (1) when it included “employment applicant” within the category of persons against whom racial discrimination was an “unlawful employment act” and (2) used the word “individual” rather than employee to discuss those who could become claimants. *See, Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973)(use of the word “individual” in 42 U.S.C. § 2000(e)-2(a)(1) “is a strong indication that the proscriptions contemplated ... reach beyond the immediate employment relationship”).

Thus, the opportunity to obtain work for pay (employment) does not require the existence of an employer-employee relationship as a predicate for application of the MHRA. Indeed, courts have held that an "employment opportunity" is both broader than a job and does not depend on an individual being a current employee. *See, Beets v. Hamilton County Board*, 897 F.2d 1380, 1382 (6th Cir. 1990)(age discrimination)(benefits are an "employment opportunity") and *Hart v. United Steel Workers of America*, 350 F.Supp. 294 (W.D.Pa.1972)(age discrimination)("[t]here is no dispute that ... running for an International office is an “employment opportunity” for purposes of § 623(c)(2)").

The evidence shows that the Plaintiff was an “employment applicant” within the meaning of the MHRA. The judgeship she sought was an “employment opportunity.” The City limited, segregated or classified the panel members on the basis of race. This is an unlawful employment practice condemned by the MHRA. As such, Plaintiff falls within the protections of the act as an employment applicant.

E. The Sunshine Law Does Not Determine The Meaning Of The MHRA.

Last, the City cites an unappealed 1996 state trial court opinion interpreting the Sunshine Law, §§ 610.010, et seq, RSMo (2000), to require an open meeting to discuss the appointment of a municipal judge by the City. *Glorioso v. Ford*, CV95-27296 (Jackson County)(April 22, 1996). The City Council had argued that the personnel exception permitted a closed meeting.

Section 610.011 expresses a bias for open meetings. “[T]he deliberations of public governmental bodies [must] be open unless otherwise prescribed by law.” *Id.* “The narrowed exception [to the open meeting bias] concerning employees must be ... strictly construed.” *Glorioso*, at 8, citing *Kansas City Star Co. v. Fulson*, 859 S.W.2d 934, 939 (Mo. App. W.D. 1993). *Glorioso* never holds that Judges are employees, only that “the personnel exception of Section 610.021, does not authorize the Council to hold closed meetings in regards to the selection of municipal judges.” *Id.* at 9.

The MHRA does not express an exception for judges or public officials from its broad, remedial reach. Thus, ambiguities as to coverage of the Act are resolved in favor of coverage. *Red Dragon Restaurant*, 991 S.W.2d at 166-67.

Glorioso interprets a different statute with different interpretive directions from the caselaw. It is inapposite to the issues in this case.

Conclusion

The City's Point I should be denied.

II.

A. Introduction

The City's Point II is not an instructional error point, despite the claim of the Point Relied On. Were this Court to enforce Rule 84.04(d), there would be nothing to review.

What Point II is, is a two-pronged submissibility argument. First, it asserts that Missouri law does not permit a jury to award punitive damages against a municipality. Second, it claims that the evidence did not support punitive damages.

The answer to the first issue is simple and direct: Section 213.111, RSMo (2000) expressly permits an award of punitive damages against an employer. The City is an employer under the MRHA. Therefore, punitive damages are available against the City.

The second issue requires a review of the evidence. That evidence does not rely on inference or supposition. The City's Council rejected an entire panel of qualified persons for the Judgeship on the grounds of race. And they did it on television. Indeed, the City does not deny that this is so. Instead, the City argues that its Council was justified in doing so for political reasons. It might have been

politically expedient to maintain segregated schools in 1954 in Topeka, Kansas. But political necessity never creates legal – or moral – justification. Never.

B. Standard of Review

Where the issue presented is one of statutory interpretation, a question of law, the Court's review is *de novo*. *Glasgow Enterprises, Inc. v. Bowers*, 196 S.W.3d 625, 631 (Mo.App. E.D.2006). When construing a statute, the Court's primary role is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent. *Martinez v. State*, 24 S.W.3d 10, 16 (Mo.App. E.D.2000). In determining legislative intent, words and phrases used in the statute are to be construed in their plain, ordinary and usual sense. *Id.* There is no room for construction when the words are plain and admit to but one meaning. *Id.* Accordingly, where the language of a statute is unambiguous, this Court will give effect to the language as written and will not resort to rules of statutory construction. *Id.*

In reviewing for a submissible case, the Court must view the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable inferences that can be drawn from the evidence, while disregarding all unfavorable evidence and inferences. *Faust v. Ryder Commercial Leasing & Servs.*, 954 S.W.2d 383, 388 (Mo.App.1997). To make a submissible case for punitive damages, the plaintiff must present substantial evidence establishing that the defendant's conduct

was “outrageous because of [the] defendant's evil motive or reckless indifference to the rights of others.” *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 364 (Mo.App.1993) (citing *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. banc 1989)). Substantial evidence is competent evidence from which the trier-of-fact can reasonably decide the case. *Mathis v. Jones Store Co.*, 952 S.W.2d 360, 366 (Mo.App.1997). *Cohen v. Express Financial Services, Inc.* 145 S.W.3d 857, 865 -866 (Mo.App. W.D. 2004).

A submissible case is made if the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity that the defendant's conduct was outrageous because of evil motive or reckless indifference.

Lynn v. TNT Logistics North America Inc. 275 S.W.3d 304, 309 (Mo.App. W.D.,2008)(citing *Drury v. Mo. Youth Soccer Ass'n*, 259 S.W.3d 558, 573 (Mo.App. E.D.2008)). A "case may not be withdrawn from the jury unless there is no room for reasonable minds to differ" *Washington v. Barnes Hospital*, 897 S.W.2d 611, 615 (Mo. banc 1995).

C. Punitive Damages Against a Political Subdivision Are Permitted Under the MHRA.

Section 213.010(7) R.S.Mo. (2005) defines employer to include “the state, or any political or civil subdivision thereof...”

Section 213.111 provides in relevant part:

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award court costs and reasonable attorney fees to the prevailing party, other than a state agency or commission or a local commission;

Id. (Emphasis added). The clear language of the statute provides that punitive damages are available.

In § 213.111, the legislature also expressly provided that costs and attorney’s fees could be awarded to a prevailing party, but not to a prevailing state agency. Had the legislature intended to restrict the applicability of punitive damages, it could easily have placed that same limiting language in the statute. It did not.

The plain language of the statute is clear and permits punitive damages against a municipality. There is nothing to construe. *Martinez*, 24 S.W.3d at 16.

D. The Case Law Supports An Award of Punitive Damages

The City begins with *Kline v. City of Kansas City*, 175 F.3d 660 (8th Cir. 1999). There, the Eight Circuit attempted an *Erie* guess as to Missouri law on the issue whether a judgment under the MHRA against a municipality – ironically Kansas City – may include punitive damages. The Eighth Circuit concluded that Missouri law did not permit punitive damages against a city.

There are plenty of reasons to suspect the accuracy of the Eighth Circuit's guess, not the least of which is that court's abject failure to apply settled rules of statutory construction under Missouri law. All of that discussion is, however, unnecessary in light of *Brady v. Curators of the University of Missouri*, 213 S.W.3d 101,107 (Mo.App.E.D. 2007). *Brady* showed that the Eighth Circuit's guess in *Kline* was wrong.

Brady expressly resolved the question whether the MHRA permitted an award of punitive damages against a public employer. Relying on its prior holding in *H.S. v. Board of Regents, Southeast Missouri State University*, 967 S.W.2d 665, 672 (Mo. App. E.D. 1998), the Eastern District examined the policy behind the MHRA and held that the plain language of the statute permitted an award of punitive damages against a political subdivision:

The MHRA, Section 213.010 et seq., protects important societal interests in prohibiting discrimination in employment, public accommodation, and other interests on the basis of sex, race, color, religion, national origin, ancestry, age as it relates to employment, disability, or familial status as it relates to housing. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 565 (Mo. banc 2006). The Act provides for broad enforcement authority in the Missouri Human Rights Commission and for administrative remedies. *Id.* In addition, to further this societal interest in eliminating discrimination, the Act allows a claimant to seek damages for actual and punitive damages, court costs, and reasonable attorney fees. *Id.* at 565-566. The Act, in allowing a claim for damages, shows legislative intent to include private claims for relief by aggrieved employees and others, to further the enforcement of the statute. *Id.*

This court upheld an award of punitive damages assessed against a state university in *H.S. v. Board of Regents, Southeast Missouri State University*, 967 S.W.2d 665, 672 (Mo.App.E.D.1998). In examining the issue of punitive damages, we found that, under Missouri law, a plaintiff is entitled to a punitive damages award if he shows that the

defendant's conduct toward him was outrageous because of the defendant's evil motive or reckless indifference to the rights of others. *Id.* Punitive damage awards have been sustained when the Court found that (1) management participated in the discriminatory conduct, and (2) treated the Plaintiff differently from others. *Id.*

Brady, 213 S.W.3d at 107. (statutory language omitted).

The law of Missouri is now well settled that the MHRA applies to employers, that a political subdivision of the state is an employer, that the City is a political subdivision of the state and that an employer may be liable for punitive damages. To the extent that Point II is predicated in part on an assertion to the contrary, the argument is without merit.

E. The Direct Evidence Adduced At Trial Supported Punitive Damages

In most discrimination cases there are no smoking guns. This case is different.

Direct evidence of discrimination is “evidence which, if believed, would prove the existence of discrimination without inference or presumption.” *Carter v. City of Miami*, 870 F.2d 578, 581-82 (11th Cir.1989). Blatant remarks “whose intent could be nothing other than to discriminate” constitute direct evidence of discrimination. *Id.* at 582. When such remarks are made by a decision maker, directly related to the

challenged employment decision, and in temporal proximity to those decisions, the evidence is direct evidence. See *Trotter v. Board of Trustees*, 91 F.3d 1449, 1453 (11th Cir.1996); *Hipp v. Liberty Nat. Life Ins. Co.*, 65 F.Supp.2d 1314, 1334 (M.D.Fla.1999). See, e.g., *Taylor v. Runyon*, 175 F.3d 861, 867 (11th Cir.1999) (direct evidence of sex discrimination where decision maker told plaintiff she was denied promotion because her male competitor, who had a wife and children, needed the money more than plaintiff); *Caban-Wheeler v. Elsea*, 904 F.2d 1549 (11th Cir.1990) (direct evidence of race discrimination where decision maker told Hispanic plaintiff that he “needed a black director”); *Lindsey v. American Cast Iron Pipe Co.*, 772 F.2d 799 (11th Cir.1985) (direct evidence of age discrimination where decision maker told plaintiff that company wanted someone younger than plaintiff to fill assistant manager position).

Here there was ample direct evidence of discriminatory motive among the decision-makers. Indeed, these events took place over several meetings and show a consistency of purpose over several months’ time . The jury heard and credited the following facts:

- While interviewing her, Councilman Brooks asked one panel member why she would apply when she was not black and said he would not vote for anyone on the panel because there was no African-American on it. TR123.

- Councilman Brooks said that Howard would be “a great Municipal Court judge” but that she wasn’t “diverse enough.” TR214.
- Mayor Barnes testified that race was a factor in the City’s decision not to select Howard. TR151.
- Mayor Barnes also testified that after nearly twenty years of consulting in the field of human resources she was unsure if discrimination on the basis of race was illegal. TR157-158
- Victoria Thomas testified that Councilman Brooks told her that his constituents were “really demanding a black person for this job.” TR214.
- Councilman Brooks testified that he knew that it was illegal for an employer to take race into account when making decisions on whom to hire. TR319
- Councilman Brooks testified that the refusal to select the panel had nothing to do with qualifications. TR323.
- Councilman Brooks testified that he thought all three candidates were qualified. TR323

- Councilman Brooks testified that he made the statement “We continue to talk about divisiveness in terms of race relations. The divisiveness took place when the panel was selected.” TR323.
- Councilman Brooks testified that when he made that statement, it was in terms of race relations.¹⁰ TR323-24.
- Councilman Terry Riley told the applicants he was going to use their resumes to keep himself warm. TR340-41
- In its November 9, 2006 Business Session, the City’s agents made numerous racial statements while deciding to refuse to consider any of the applicants based on their race. Trial Ex. 5. Those racial statements included:
 - “For me there is an issue of equity related to racial mix.”

¹⁰ Q. And you were talking about race, right?

A. I was talking about race relations. That means race relations in terms of the City and in terms of the country, the state.

Q. What was divisive in terms of race relations about that panel?

A. Because it was not a diverse panel.

Q. Because all three were white females, right?

A. Yes, because it wasn’t a diverse panel, which means it wouldn’t have been represented by both race and ethnicity as well as gender.” TR323-324.

- “All one need do is look at the numbers, race matters in America, it matters in the State of Missouri and it matters in Kansas City.”
- “We need to send this panel back.”
- “This [panel] does not reflect the diversity of Kansas City.”
- “When we talk about diversity, do we include women?”
- “Are we concerned because there’s not a man on the panel?”
- “I’m not.” (Mayor Barnes, laughing)
- “If there were three qualified black candidates on this panel, I would not be voting to reject the panel because they were simply – did not represent the exact demographics of this city.”
- “I have a hunch that if this [the panel] is returned to the Commission that there is a message there.”
- Councilman Brooks admitted he had no information about how the Commission had chosen the candidates. TR325.
- On December 14, 2006 the City’s Council again met and again refused to consider the panel of final applicants. TR133-134; Trial Ex. 14.

- In its December 14, 2006 meeting Council members emphasized repeatedly that the issue was about race¹¹. They said:
 - “This has nothing to do with your [the panelists’] qualifications.”
 - “So, I’m disappointed that we don’t feel you’re [the panel] minority enough – that you’re not diverse enough.”
 - It’s not about these women. Each of these women have gone to college, earned degrees, and made a very good life for themselves and have good reputations.”
- Councilman Skaggs stated to the rest of the Council on December 14, 2006, that the City’s actions taken by the Council and statements “might even be illegal.” *Id.*
- Councilman Skaggs testified at trial that race was involved in refusing to consider the three candidates on the panel. TR417.
- Councilman Skaggs admitted at trial that the majority of the Council representing the City said “on three separate occasions we reject that panel and we refuse to vote on those three candidates.” TR417.

¹¹ Although camouflaged in the euphemism of “diversity” the unvarnished comments of the Counsel indicate that race – not diversity – was the true motivating factor in rejecting the panel.

- Patrick McClarney, a managing partner at Shook, Hardy & Bacon and the firm’s civic affairs partner, had been asked by Mayor Barnes to help improve diversity in judicial selection. TR222
- McClarney specifically warned in Exhibit 22, an email sent to Galen Beaufort, the City Attorney for Kansas City, that the city council would be discriminating against white females by rejecting the panel. TR221.
- McClarney testified that he had conversations with Councilmen Skaggs, Brooks, Ford, Eddy, and Riley telling each of them that they were discriminating against white females and that this was illegal. TR222.
- The City Attorney, Galen Beaufort, testified at trial that he did not disagree with McClarney’s statement to the effect that discriminating against white females is also against the law. TR291.
- City Attorney Beaufort admitted hearing the racial statements set out above (TR293) but testified at trial that “nothing like that was said,” and this formed the basis for his opinion that the City was acting lawfully. TR292-294.

Whether there is sufficient evidence for an award of punitive damages is a question of law. *Hoyt v. GE Capital Mortgage Servs., Inc.*, 193 S.W.3d 315, 322 (Mo.App. E.D.2006). This Court reviews the evidence presented to determine whether, as a matter of law, it was sufficient to submit the claim for punitive

damages. *Id.* In doing so, the Court views the evidence and all reasonable inferences in the light most favorable to submissibility. *Id.* A submissible case is made if the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity--that is, that it was highly probable--that the defendant's conduct was outrageous because of evil motive or reckless indifference. *Id.*

Here the City's Council was put on notice by a prominent lawyer that it could not base its appointing decision on race. Here there is direct evidence – not just circumstantial evidence – that the panel was rejected on the basis of race. In reaching its decision the Council focused on race and race alone as the sole test for its judicial candidates. It admitted this in open session, it admitted it at trial, and does not seriously contest the issue here.

The City recognizes that for punitive damages to apply it must have intentionally committed a wrongful act without just cause or excuse. App. Br. at 31-32, *citing Downey v. McKee*, 219 S.W.3d at 497. It then suggests – without any citation to legal authority or otherwise – that consideration of race as a selection criteria was not outrageous or in reckless disregard of the rights of Howard. The City claims that using race as a selection criteria was proper.

In *Brady*, the Court found the numerous ways that the defendant discriminated against Brady in his job as a coach that were sufficient to submit the

issue of punitive damages to the jury, even though there was no direct proof of discrimination. *Brady*, 213 S.W.3d at 109-110.

Here, by contrast, the members of the Council openly admitted that race was the determining criteria for rejecting the panel. It had notice that using race as a basis for rejecting the panel would be an illegal act. There is only one logical conclusion that flows from this evidence – and it flows in a clear and convincing way. The City was acting deliberately, consciously, willfully, wantonly and in open and blatant disregard for the rights of Ms. Howard. Under those circumstances the imposition of punitive damages is fully supported by the evidence.

Conclusion

The City's Point II should be denied.

III.

A. Introduction

Patrick McClarney testified that he provided his opinion that it was illegal to discriminate against white females to Council members and to City Attorney Galen Beaufort. The City objected to his testimony on grounds of relevance only. TR217. The trial court admitted the evidence (1) as notice to the Council and the City of the potential illegality of rejecting the panel on racial grounds and (2) to rebut the Mayor's testimony that she did not know that rejection of the panel risked violating the laws against racial discrimination.

On appeal, the City has changed its assignment of error. Now the City argues that Mr. McClarney's testimony constituted improper expert opinion that invaded the province of the jury. City Br. 36-37. That issue is neither preserved for appellate review because of the failure of the objection to suggest this ground nor factually accurate in that Mr. McClarney did not offer his testimony as expert testimony.

B. Standard of Review

A trial court has broad discretion in the admissibility of evidence, and evidentiary rulings will not be disturbed on appeal in the absence of an abuse of that discretion. *Herrera v. DiMayuga*, 904 S.W.2d 490, 492 (Mo.App. S.D.1995). *Pierce v. Platte-Clay Electric Co-op., Inc.*, 769 S.W.2d 769, 774 (Mo. banc 1989).

C. The Challenge Mounted On Appeal Was Not Preserved Below

Prior to Mr. McClarney's testimony, the defendant objected on the grounds of relevance and prejudice only. The City did not object on the basis of McClarney's testimony being "an opinion of law." The specific objections made are as follows:

MS. JACOBSE: The counsel did not follow the Missouri Plan and the proper form for that would be that Mr. McClarney is not going to testify that she was illegally discriminated against and **I think this is entirely irrelevant.**

MR. JESS: Judge, that's not what he's going to testify to. Judge, it's completely relevant and that's what he's going to testify to.

THE COURT: What is he going to testify to?

MR. JESS: He's going to testify to the fact that he made the Council aware that their acts of discriminating against the three women were illegal.

MS. JACOBSE: That's his opinion and it's not relevant because I've got to show, Judge, that they were worried that their acts were recklessly indifferent for punitive damages and whether they had knowledge of what they did was illegal. If so, then it would be proper to submit the issue of punitive damages to the jury. Judge, this is completely prejudicial. If they were discriminated against, that is exactly what they have to decide first before she gets punitive damages.

MR. JESS: Is this going to be testimony that actually shows reckless indifference?

MS. JACOBSE: That's why it should not go before the jury. We could make an offer of proof but it should not go before the jury. Judge, I beg to disagree. In every human rights trial that I've had, you have to show that they were recklessly indifferent; they knew what they were doing was wrong and it goes directly --

MR. JESS: Judge, you were saying you needed expert testimony. **It's not expert testimony. It's the fact that he made them**

aware and the fact that there were e-mails that he sent to Galen Beaufort and to the City Council and he's going to testify about what he told them. I think it's completely appropriate and shows the issue to the jury whether they knew or should have known that they were violating the law.

MS. JACOBSE: But if he has to testify that it was actually illegal, that it is prejudicial. He is going to say that he told Galen Beaufort that it was illegal. It was in an e-mail. He's got a copy of it. It's the first time we're hearing it. That's not admissible. In fact, you're going to have Galen Beaufort testify. And I'm raising it for her any such evidence. He's going to testify that he made them aware that what they were doing violated the law in his opinion.

MR. JESS: (Shakes head.)

THE COURT: I really feel strongly both ways.

MR. JESS: Judge, how am I supposed to show they were recklessly indifferent? It goes directly to one of my client. We had the mayor here testifying that she didn't know that it would be illegal for an employer to discriminate on the basis of race.

THE COURT: If he's going to refute that with the mayor
then I'm going to allow it.

TR216-218.

Nowhere in this colloquy did the City object to Mr. McClarney testifying to “an ultimate issue of law,” as suggested in Appellant’s brief. City Br. 36.

Similarly, in the motion for new trial the City raised the issue of McClarney’s personal opinion testimony (¶ 6, LF355) without reference to an “issue of law.” No reference was made to that issue in the memorandum in support either. LF372.

It is axiomatic that an appellate court will not rule on a claim of error not presented to the trial court by proper objection. *Clarkson v. Kehrs Mill Transportation Development Dist.*, 308 S.W.3d 748 (Mo. App. E.D. 2010); *Woods v. Friendly Ford, Inc.*, 248 S.W.3d 699, 704 (Mo.App. S.D.2008). The purpose of an objection is to eliminate error, if possible, by allowing the trial court to rule intelligently. *See Schmitz v. Director of Revenue*, 889 S.W.2d 883, 886 (Mo.App.1994). *Pollard v. Whitener*, 965 S.W.2d 281, 289 (Mo. App. W.D. 1998). It is a settled principle of Missouri trial practice that to preserve trial court error it is necessary to give the trial court the first opportunity to correct the error, *State v. Jordan*, 751 S.W.2d 68, 75 (Mo.App.1988), without the delay, expense, and hardship of appeal and retrial. *See Pruitt v. Community Tire Co.*, 678 S.W.2d 424, 429 (Mo.App.1984).

Missouri courts have said that the rule “will be strictly enforced to effectuate [its] intended purpose.” *Id.* (citations omitted). Its purpose is the delivery of expeditious, and expectantly, a fair trial. *Pollard*, 965 S.W.2d at 289. Otherwise, the purpose of the rule is defeated if the error receives its first review in the appellate court. *Id.*

The requirement that the trial court be given the first opportunity to correct the error proceeds from this Court’s rules. “[A]llegations of error *not presented to or expressly decided by the trial court shall not be considered in any civil appeal from a jury tried case.*” Rule 84.13(a) V.A.M.R. (emphasis added). Similarly, an appellant is not allowed to enlarge on appeal that which has not been specifically set out in the motion for new trial. *Schrieber v. Alsup*, 721 S.W.3d 235 (Mo. App. S.D. 1986); *Turcol v. Shoney’s Enterprises, Inc.*, 640 S.W.2d 503, 507 (Mo.App.1982). See also *Wulfin v. Kansas City Southern Indus.*, 842 S.W.2d 133 (Mo. App. W.D. 1992)(deficiency in new trial motion cannot be ameliorated by brief for purposes of rule that, in case tried to a jury, party may not argue on appeal assertion of error not properly presented to trial court).

The objection by the City was to relevance and relevance in combination with some ill-described prejudice. It was not an objection to either improper opinion evidence or improper expert witness testimony. Similarly, the motion for new trial failed to address the issue. Having failed to make the objection at trial and failed to preserve the error in a motion for new trial, the claim that it was improper expert

testimony under *Wulfing v. Kansas City Southern Indus.*, 842 S.W.2d 133 (Mo. App. W.D. 1992) is not preserved and presents nothing for review. *Id.*

D. The Evidence Was Properly Received

Plaintiff pleaded punitive damages. Whether the defendant acted in a manner sufficient to warrant punitive damages is decided by the jury in the initial phase of the trial. Thus, one issue before the jury at trial was whether the City recklessly disregarded Howard's rights when it unlawfully discriminated against her on the basis of race. Although some of the Council members freely admitted that discrimination on the basis of race was actionable and illegal, the former mayor, when called to the stand, professed not to know the answer to this very simple question.

Q So you think that if there's an employer and I'm just asking about your knowledge, you think that if an employer makes a decision to hire somebody and they hire someone who's less qualified because they're white and they pass over a more qualified African American, you think that would be legal under the law as you understand it?

A I'm not sure.

TR150-151. These statements provided a sufficient predicate for the admission of the McClarney evidence for the purpose of rebutting the Mayor's professed lack of knowledge about the law prohibiting racial discrimination. Once the Mayor gave this testimony, Plaintiff had a right to counter it by showing that she – and not only her, but the City Council and the City Attorney – had received notice that making race a consideration in an employment decision was unlawful.

“Evidence admissible for one purpose may be admitted even though it may be improper for other purposes.” *Pierce v. Platte-Clay Elec. Coop., Inc.*, 769 S.W.2d 769, 775 (Mo. banc 1989). Thus, even if Mr. McClarney's testimony should not have been admitted as expert testimony, it was admissible to rebut any claim by the City that it had no knowledge of the law.

But Mr. McClarney's testimony, standing alone, should have been admitted for purposes of notice. It was not “opinion evidence of an expert,” as the City hopes to characterize it. City Br. 36.

The purpose of Mr. McClarney's testimony, in addition to rebuttal, was to show that the City had notice that its planned action risked violating the MHRA. The presence of notice created the legal predicate for a conclusion by the jury that the City acted knowing that it risked violating the law. This evidence was both legally and logically relevant to the issue whether the City acted in reckless disregard of the rights of the Plaintiff.

For this reason, the City's reliance on *Wulfing v. Kansas City Southern Ind., Inc.*, 842 S.W.2d 133, 153 (Mo. App.W.D.1992) is curious. *Wulfing* stands for the unremarkable proposition that an expert may not give an opinion on a matter of law. This statement, while a legal truism, is also irrelevant to Mr. McClarney's testimony.

In *Wulfing* the plaintiff called an expert to testify about the step-by-step practices ordinarily followed by lawyers and corporations in shepherding a registration statement through the SEC. *Id.* Testimony concerning these ordinary practices was deemed admissible even though it touched on an issue of law, i.e. what the law required for registering a security. *Id.* at 154.

Here, Mr. McClarney's direct testimony occupied barely more than three pages of transcript. TR219-223. He was never asked his opinion on any subject. Instead, he focused on contacts with various City officials in which he informed them that "discrimination against white females" was against the law. TR221. Mr. McClarney further testified as to the number of City officials to whom he had provided this information. But Plaintiff's counsel never asked him to testify to the jury whether the acts of the City actually violated the law. TR218-222. Thus, the only issue he addressed was whether the City had knowledge, prior to taking any action, of the potential wrongfulness of rejecting the panel as a whole because it contained only Caucasian applicants. When the City took that action with full

knowledge that such racial discrimination was not permitted under the law, Mr. McClarney's pre-act statements were legally and logically probative of the City's state of mind – that is, of the question whether the City acted in reckless disregard for the rights of the Plaintiff. Because that was an issue properly before and left to the jury, the trial court's ruling on admissibility was correct.

There was no error in the trial court's ruling, much less an abuse of discretion. *See, Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876, 881 (Mo. banc 1993)(Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration”).

E. Conclusion

The City's Point III should be denied.

IV.

The City attempted at trial to introduce “evidence” regarding an untrue rumor about Respondent and now argues that the trial court erred in excluding it.

A. Standard of Review

As this Court recently reminded the bar, “[t]he admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion.” *Mitchell v. Kardesch*, ___ S.W.3d ___, 2010 WL 2513791, 6 (Mo.banc 2010).

This standard gives the trial court "broad leeway in choosing to admit evidence," and its exercise of discretion will not be disturbed unless it "is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." " *State v. Freeman*, 269 S.W.3d 422, 426-27 (Mo. banc 2008), *quoting*, *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. banc 2006). In part, such broad leeway is granted to ensure the probative value of admitted evidence outweighs any unfair prejudice. *Freeman*, 269 S.W.3d at 427, *quoting*, *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002). "For evidentiary error

to cause reversal, prejudice must be demonstrated." *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009).

Mitchell at 6.

B. Concerns About a Single Panelist Do Not Justify Rejection of an Entire Panel.

The Plaintiff submitted this case on the theory that the City violated the MHRA because it "limited, segregated or classified plaintiff..." and that "race was a contributing factor in such limitation, segregation or classification...." Instruction 5, LF238. It was the City's racial classification of the panel and rejection of the panel that denied Plaintiff an employment opportunity, not the merits of any individual panelist, that created the violation of the MHRA.

The City now suggests that concern over a rumor that Ms. Howard had committed arson, obtained from a blog site, provided the real motivation for the Council's rejection of the entire panel. First, this evidence was not germane to the legal theory submitted to the jury. Second, had concerns about (or for) Ms. Howard truly motivated the Council, it could have considered the panel and appointed another panelist as Judge. Rejection of the entire panel is not consistent with concerns about a single panelist. It is consistent with classification by race – and with racial discrimination.

Nor do the recordings of Council proceedings suggest that there was an excuse other than race for the Council's rejection of the entire panel of three Caucasian women. That evidence, too, reveals only a racial motivation for the rejection of the entire panel.

C. The Rumor Evidence Was Not Admissible Evidence.

To be admissible, evidence must have logical and legal relevancy. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). Even relevant evidence may be excluded if its probative value (logical relevance) is substantially outweighed by the risk of undue prejudice (legal relevance). *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992)(Thomas, J., concurring).

First, the rumor regarding Mrs. Howard that The City sought to introduce is not admissible on grounds of legal relevance – that is, on grounds that its logical relevance is outweighed by the propensity of the evidence to mislead the jury in its search for truth. *Id.* If the evidence were true (which it is not), or had some corroboration (which it does not), the admissibility calculus might be different. However, the source of the information was Kansas City Prime Buzz Blog. TR372. A blogger said that Ms. Howard was involved in an arson; the blog also reported that Ms. Howard denied the allegation, as she did under oath during an offer of proof at trial. TR356. That was all that supported the City's claim. The City introduced no evidence that any charges were filed against her or any civil suits resulted from an

arson event. It was the blog alone that served as the basis for the concerns. The City's attempt at an offer of proof revealed that the City's own witnesses had no idea whether the rumor was accurate. TR393.

Simply put: Whether or not a Council member believed an unfounded and untrue rumor about one of the candidates does not explain the Council's complete rejection of the entire panel of three Caucasian candidates, twice.

Second, the City attempts to argue that it was prejudiced by the exclusion of evidence of the unfounded rumor because it left the jury with only Howard's side of the story. This ignores the fact that the City's own Council members placed the City's side of the story on record, in public, on numerous occasions – and the jury heard it.

- “This has nothing to do with your [the panelists'] qualifications.” (Councilman Alvin Brooks, who voted three times not to consider the panel). Trial Ex. 14.
- “I think you all are qualified.” (Brooks). *Id.*
- “I think it's a ... shame, I think it might even be illegal for us to sit here and not have the courage to [s]elect a judge today.” (Councilman Bill Skaggs, who voted to consider the panel). *Id.*
- “It has nothing to do with their credentials; I think all of them are highly qualified.” (Councilwoman McFadden-Weaner, who voted three times not to consider the panel). *Id.*

- “Diversity ... being an African-American in America it’s a whole lot different than you can ever imagine and so you really can’t say I understand where you are ...” (Councilman Terry Riley, who voted three times not to consider the panel). *Id.*
- “It’s not about these women. Each of these women have gone to college, earned degrees and made a very good life for themselves and have good reputations.” (Riley – who was aware of the blog). *Id.*

The evidence was that all of the panelists were qualified – not only two of them. It was not qualifications for the job – which necessarily includes integrity issues – that caused the rejection of all three applicants who made the panel. It was classification by race.

Review of the decision is of the trial court’s exercise of discretion. Given the paucity of support for the rumor, the trial court certainly had every reason to be wary of admitting uncorroborated evidence of arson obtained from a blog. Moreover, Plaintiff’s theory of the case – that the City violated the MHRA by classifying the panel by race – made the evidence irrelevant.

The trial court was fully informed on the issue. It received briefing on whether evidence of the rumor was admissible and heard oral argument from both parties on the issue. LF211-16; TR352-55. It also heard the City’s offer of proof. After careful consideration, the trial court ruled that evidence of the alleged rumor was not admissible. TR352-55, 400.

The trial court did not abuse its discretion in excluding witnesses' speculation regarding an incident rumored to have occurred decades before the facts at issue in the case.

D. Conclusion

Because the City cannot show that the trial court's ruling "is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration", the Court should deny Appellant's fourth point on appeal.

V.

The City's Point V appears to be a submissibility point dressed up as a claim of instructional error as to future damages. This is not clear, however, in that the City's standard of review speaks only to instructional error. Two things are clear, however. First, if the City's claim is instructional error, the City waived that assignment of error when it failed to object to Instruction 6. Second, if the City's claim is that the evidence did not present a submissible case of future damages, that issue was waived when the City failed to include it in its motion for directed verdict.

And for the record, application of Rule 84.04 would require that this multifarious point be struck.

A. Standard of Review

Although sometimes intertwined, instructional error and submissibility are subject to differing standards of review. *Environmental Protection, Inspection, and Consulting, Inc. v. City of Kansas City*, 37 S.W.3d 360, 356 (Mo.App. W.D. 2000).

As to instructional error:

Whether or not a jury was properly instructed is a question of law....

The test is whether the instruction follows the substantive law and can be readily understood by the jury. [[T]he evidence must be reviewed]

most favorably to the instruction, ... disregard[ing] contrary evidence, and revers[ing only] if the party challenging the instruction shows that the instruction misdirected, misled, or confused the jury, and there is a substantial indication of prejudice.

Twin Chimneys Homeowners Ass'n v. J.E. Jones Const. Co. 168 S.W.3d 488, 497-98 (Mo. App. E.D. 2005) (citations omitted). Thus, review is *de novo*.

Submissibility review asks the Court to consider whether the plaintiff made a submissible case. This review is *de novo* review, not of the evidence, but of whether the evidence in the case was substantial evidence in support of the supposition to be proved by the evidence. An appellate court “will not overturn a jury verdict unless there is a complete absence of probative facts to support the jury’s verdict.” *Savory v. Hensick*, 143 S.W.3d 712, 716 (Mo.App.E.D. 2004).

In determining whether the plaintiff has made a submissible case, the court reviews the evidence “in a light most favorable to the plaintiff and gives the plaintiff ‘the benefit of every reasonable inference which the evidence tends to support, disregarding all contrary evidence.’” *Lynn v. TNT Logistics North America, Inc.*, 275 S.W.3d 304, 307 (Mo.App.W.D. 2008)(citation omitted); see also, *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 615 (Mo. 1994).

Where defendant contends that future damages are without evidentiary support, “[p]laintiffs are entitled to that view of the evidence most favorable to the verdict and the ruling of the trial court on the motion for new trial when

determining the question of submissibility.” *Pryor v. American Oil Co.*, 471 S.W.2d 492 (Mo.App. 1971), quoting *Steva v. Steva*, 332 S.W.2d 924 (Mo. 1960).

B. Background: The Nature of the Damages Sought by Plaintiff

Without saying it directly, the City argues as though the damages in this case were for lost past and future wages. The primary case it argues, *Brenneke v. Department of Missouri, Veterans of Foreign Wars of U.S. of American*, 984 S.W.2d 134 (Mo.App.W.D. 1998), is a lost wages case.

But this is not a wages case. It is an emotional distress case.

Plaintiff’s closing argument on damages focused on damages for emotional distress. Her counsel argued:

You [the jury] are the ones to decide what a year and a half of being publicly humiliated and broadcast on TV [is] worth. What is that worth?

Their own witnesses came in here and told you, yes, it was emotionally devastating. [Here there is a description of evidence of emotional distress].... What is that worth? One way to look at it and something that you’re absolutely entitled to consider when you’re trying to determine what that value is [the value of the emotional distress] is what was the lost employment opportunity?

TR430-31.

What Plaintiff's counsel suggested was a way to measure the *emotional distress* damages, not lost wages. He suggested that the jury could take what she would have earned as a Judge and divide it by three to determine the value of the emotional distress. R.432. Importantly, there was no objection to this argument. More on this subject in Point VI. But the important point for purposes of Point V is that arguments by the City related to lost future wages are misdirected.

1. Appellant Has Not Preserved an Instructional Error Claim for Appellate Review

The City failed to preserve any claim that Instruction 6 was error.

a. The City Never Objected to Instruction 6.

Rule 70.03 provides in relevant part: "Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Rule 78.09 provides in relevant part: "[I]t is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court ... objections to the action of the court and grounds therefor..."

Although the City submitted an alternative version of the instruction which the trial court refused, there is no record of any objection to Instruction 6 (LF240) by Appellant or of any grounds therefore that were presented at trial to the trial

court. City Br. 8; Tr.418-22. The City's counsel objected to three other instructions and provided grounds for those objections. *Id.*

In order to preserve an alleged instructional error for review on appeal, however, a party 'must make **specific** objections to the giving or failure to give instructions before the jury retires to consider its verdict; the objections and grounds therefore must be stated **distinctly** on the record, and the objections must also be raised in the motion for new trial.'

Sparkman v. Columbia Mutual Ins. Co., 271 S.W.3d 619, 624 (Mo.App. S.D. 2008)(emphasis in original). See also, *Gomez v. Construction Design, Inc.*, 126 S.W.3d 366, 371 (Mo. banc 2004); *Gramex Corp. v. Green Supply, Inc.* 89 S.W.3d 432 (Mo. banc 2002). Accordingly, the City failed to preserve this point for appeal.

The City's Motion for New Trial argues that future damages should not have been included in the damages instruction. A trial court would reasonably believe, however, that this is a submissibility argument, not a claim of instructional error. LF376. Thus, this post-trial statement is the first hint from the City that it has a challenge to the submissibility of future damages. But no matter how broadly the Court wants to read the Motion for New Trial, a statement in that motion standing alone cannot preserve a claim of instructional error. *Sparkman*, 271 S.W.3d at 624; Rule 70.03. And that statement does stand alone. There was no objection to the trial court prior to the jury retiring.

Further, it is not enough to offer an alternative instruction. An alternative instruction does not give the trial court the specific reasons Rule 70.03 requires to reject or modify the instruction it has chosen – that is, to correct the error at the earliest time. The alternative instruction merely states a party’s preference, not a legal rationale for rejecting an alternative MAI-approved instruction. The City failed to preserve any alleged error with regard to Instruction 6. That failure created a procedural bar to this Court’s consideration of any instructional error issue.

b. Appellant Failed to Raise the Submissibility of Future Damages in Its Motion for a Directed Verdict

Apparently attempting to overcome its procedural default on the instruction issue, the City tries to argue against the award of future damages by the jury on the grounds of submissibility. Once again, however, the City is too late. As noted, the City did not raise the submissibility of future damages in its motion for directed verdict at the close of all the evidence. It is absent from the written papers. LF222-32; the oral motion merely renewed the written motion without stating any grounds. TR418.

Rule 72.01(a) provides that “[a] motion for directed verdict shall state the specific grounds therefor.” “[A] motion for directed verdict that does not comply with requirements of Rule 72.01(a) neither presents a basis for relief in the trial court nor preserves the issue in the appellate court.” *Letz v. Turbomeca Engine*

Corp., 975 S.W.2d 155, 163 (Mo.App. W.D. *en banc* 1997)(internal citations omitted). Thus, “[w]here an insufficient motion for directed verdict has been made, a subsequent post-verdict motion is without basis and preserves nothing for review.” *Id.*

Under settled law, the City cannot raise the issue of the submissibility of future damages for the first time in its post-trial motion. So says *Pope v. Pope*, 179 S.W.3d 442 (Mo.App.W.D. 2005). That case dealt with the same issue presented here. In *Pope*, the appellant asserted that the trial court erred in submitting a verdict director because there was insufficient evidence to support the giving of part of the instruction pertaining to an issue of partnership. *Id.* at 450. Because appellant’s motion for directed verdict contained no specific grounds relating to the issue raised in the appeal, *i.e.*, the issue of partnership, it was nothing more than “boilerplate generalities and naked conclusions” and preserved nothing for appellate review. *Id.* at 452. *Pope* also concluded that the appellant’s attempt to raise the issue for the first time in post-trial motions was of no consequence: “[I]n the absence of a motion for directed verdict which complies with the mandates of Rule 72.01(a), ... [a] post-verdict motion for judgment n.o.v. is without basis and preserves nothing for appellate review.” *Id.* at 457.

The City’s motion for directed verdict was devoid of any mention of the submissibility of future damages. The motion did not even contain “boilerplate generalities and naked conclusions” regarding the issue of the submissibility of

future damages. Consequently, it failed to preserve anything for appeal and Appellant's fifth point on appeal should be denied of a procedural bar.

2. Howard Made a Submissible Case for Damages

Even if the City had preserved the issue for review, its point is still without merit.

Considerable evidence was presented to the jury to support the submissibility of damages, especially when viewed "in a light most favorable to the plaintiff [that] gives the plaintiff 'the benefit of every reasonable inference which the evidence tends to support, disregarding all contrary evidence.'"¹² *Lynn*, 275 S.W.3d at 307.

¹² For this reason, all of the "evidence" and inferences the City cites on this point must be disregarded. City Br. 42-43. Moreover, as discussed in more detail in response to the City's sixth point, *infra*, the City has failed to preserve **any** issue for review concerning Howard's counsel's closing argument because it **failed to make any objection** to the introduction of the underlying evidence (Tr.136-38; Trial Ex. 24) or to counsel's argument (Tr.430-33). *Brewer v. Raynor Manufacturing*, 23 S.W.3d 915, 917 (Mo. App. S.D. 2000) ("To preserve evidentiary questions for appeal, there must be an objection giving the grounds at the time the evidence is sought to be introduced, and the same objection must be set out in the motion for new trial then carried forward in the appeal brief."); *Enos v. Ryder Automotive Operations*, 73 S.W.3d 784, 788-89 (Mo. App. E.D. 2002).

Although the City belittled Plaintiff's ordeal, which began in September 2006 and continues to this day, Plaintiff suffered the substantial distress of being publicly refused consideration for a job three separate times based on a characteristic she could do nothing to change: the color of her skin. TR127-28. Her emotional distress manifested itself in physical ways: She suffered a sudden loss of weight, could not sleep and even as of the date of her trial testimony would "still get sick to [her] stomach." *Id.* She also testified that her emotional distress would go forward beyond the trial as she sought other job opportunities.

Without objection, Plaintiff testified that the City had limited, segregated, classified and eliminated her and the other two Caucasian applicants from the open position based on race. TR138-39. In particular, Howard told the jury about her *ongoing concern and distress about her career in the future.* TR172. Her husband, Victor Howard, also expressed to the jury how Mrs. Howard had concerns about her future. TR232. Mr. Howard explained to the jury, *without objection*, how Mrs. Howard's loss of opportunity for a job that paid significantly more "added a lot to the stress" she was suffering. TR232-33.

In response to opening statements made by the City's counsel, Mr. Howard testified, without objection, that the emotional distress Mrs. Howard was suffering from *could not be turned "off like a light switch."* TR233. Rather, he explained that because of the public nature of Appellant's statements and Mrs. Howard's position, the stress was ongoing and still occurred on a nearly daily basis. TR33-34.

The City's public humiliation of Howard continues. Even up to the date Howard filed her brief in this Court (August 9, 2010), the City's racially motivated and hurtful statements are available to anyone in the world with internet access.

The November 9, 2006 session is at:

http://kansascity.granicus.com/MediaPlayer.php?view_id=4&clip_id=267

The December 14, 2006 session is at:

http://kansascity.granicus.com/MediaPlayer.php?view_id=4&clip_id=419

Mr. Howard explained how November 9, 2006, a day which "should have been an exciting time in the life of all three of these ladies[,] " was instead "embarrassing" and "devastate[ing]" to them. TR234-35. Finally, Mr. Howard told the jury of the physical impact on Mrs. Howard he observed as a result of the City's Appellant's conduct: she lost weight, couldn't sleep normally and was uncharacteristically emotional. TR237-38.

The primary case relied upon by the City regarding the issue of submissibility of future damages is *Brenneke*, 984 S.W.2d 134. The City's brief says: "The Court of Appeals agreed with the trial court that this testimony [by the plaintiff in *Brenneke* concerning lost future wages] was not enough to submit an instruction on future damages." City Br. 42. The City misapplies and misreads *Brenneke*.

First, the City misapplies *Brenneke* because it is a lost wages case, not an emotional distress case. The damages sought in this case were not for lost wages, but for emotional distress. And while the damages would go forward beyond the

trial, they remained emotional distress damages. As the City's closing argument noted: "Melissa Howard testified that she was not asking for lost wages." TR449.

For this reason alone, *Brenneke* need not be discussed; it does not apply to an emotional distress damages claim.

Second, but only because *Brenneke*, read broadly, supports the notion that a plaintiff's testimony about her own damages is admissible, Plaintiff discusses that case. The City misreads *Brenneke*, which holds exactly the opposite of the City's claim. "Here ... we have found that the evidence did support the submission of future lost wages" and "[t]he [trial] court should have given the instruction with the future damages clause included..." *Brenneke*, 984 S.W.2d at 143.

In *Brenneke*, the defendant persuaded the trial judge to use the exact modification to MAI 4.01 that City offered in this case, excising the phrase "*and is reasonably certain to sustain in the future.*"¹³ *Id.* at 142-43; LF239. *Brenneke* held that the excision from the instruction was error because the plaintiff, a victim of

¹³ MAI 4.01 states:

"If you find the issues in favor of the plaintiff, then you must award the plaintiff such sum as you believe will fairly and justly compensate the plaintiff for any damages you believe she sustained *and is reasonably certain to sustain in the future* as a direct result of (the occurrence mentioned in the evidence.)"

retaliation and wrongful discharge testified (without expert witness corroboration) to her own reduced wages since the discharge, and her future prospects, which she believed were limited by her prior employer's bad references. *Id.* at 142. The court stated that the testimony "was not exact" but:

'Inevitably there is a degree of speculation to the determination of a fairly approximated present-value award compensating plaintiff for what he would have earned by for his injury, but we do not find such speculation, when based upon the use of facts in reasonable calculations, to be so purely conjectural as to improperly influence the jury's verdict on damages...'

Id. at 142, quoting *Anderson v. Burlington Northern R.Co.*, 700 S.W.2d 469, 477 (Mo.App.E.D. 1985).

On this basis *Brenneke* found that plaintiff's testimony was adequate to submit her claim for future damages and noted the defendant was free to attack the grounds on which she claimed loss concluding that "any deficiencies in her testimony go to its weight, not its admissibility, however." *Id.* at 143.

Thus, *Brennecke* stands for the proposition that even in a situation where the evidence of future damages is "not strong," the proper response is not to modify MAI 4.01 but instead to give the instruction as written and let "defense counsel ... argue that future damages were not merited on the evidence presented." *Id.* at 143.

And on the record in this case, that is exactly what the City did. The City argued: “Plaintiff is seeking future damages for possible lost future economic opportunity... She says she’s worried that this could affect her future opportunities... She’s worried and that’s not enough for you to award future damages to her.” TR452.

What the City loses sight of is that it is the worry – including the worry going forward – that constitutes the damages when emotional distress is claimed, not lost wages.

Even if the Court were to find that the City preserved this point for appeal (which it assuredly did not), Howard made a submissible case of damages for emotional distress.

C. Conclusion

For each of these reasons, the Court should deny Appellant’s fifth point on appeal.

VI.

A. Introduction

The City's Point VI is a mystery. It purports to assign error to the trial court's decision in "upholding the jury verdict on damages." City Br. 43. It positions the error in an odd way, however. The City asserts that "the evidence did not support the compensatory damages awarded." Is this submissibility of damages altogether? Is this error in failing to grant remittitur? The City ends its Point VI with these words: "Therefore, the damages calculated using back pay and front pay calculations was [sic] not supported by the evidence and the verdict should be reduced by the amount of \$533,000.00." City Br. 45. The requested action implicates remittitur. But why? Remittitur is limited to cases in which the jury made an honest mistake in assessing the damages based on the evidence properly admitted. *Jordan v. Robert Half Personnel Agencies of Kansas City, Inc.*, 615 S.W.2d 574 (Mo. App. W.D. 1981). The City never addresses this standard.

The Point also says that Plaintiff was "not entitled to front pay or back pay." Is this because the law does not allow either? Is it because the evidence did not support those damages at all? Or perhaps it is a claim that only the trial court could award "front pay," since "front pay" is an equitable remedy. *Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516 (Mo. banc 2009).

As written the point relied on does not comply with Rule 84.04(d)(1). The words “the trial court erred in overruling Appellant’s remittitur motion” appear nowhere in the Point or in the argument. Nowhere does the Appellant suggest there is any case or statute that stands for the proposition that front pay and back pay cannot be awarded in an action under the MHRA.

An appellant has an obligation to cite appropriate and available precedent if it expects to prevail, and, if no authority is available to cite, it should explain the reason for the absence of citations. *Thummel v. King*, 570 S.W.2d 679, 687 (Mo. banc 1978). When “the appellant neither cites relevant authority nor explains why such authority is not available, the appellate court is justified in considering the points abandoned and dismiss[ing] the appeal.” *In re Marriage of Spears*, 995 S.W.2d 500, 503 (Mo.App.1999); *Brown v. Ameristar Casino Kansas City, Inc.*, 211 S.W.3d 145, 148 (Mo.App. W.D. 2007).

These arguments are not an attempt to ask the Court to call a technical foul on the City. As previously noted in this brief, Rule 84.04 has been honored mostly in its breach by the City. Yet in previous points, where there is some hope of understanding the assignment of error, Plaintiff has responded without more than passing comment about the technical violations of the Rule.

Here, the task is most difficult. Plaintiff is left to guess as to what is at stake – and hope that that guess is sufficiently correct to permit the Court to consider both sides of the intended argument, assuming the Court engages in *ex gratia* review.

B. Standard Of Review

Plaintiff thinks this Point is about remittitur.

Remittitur constitutes an invasion of the jury's function and should not be ordered unless the verdict is so outlandish as to shock the conscience of the court. *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 448 (Mo. banc 1998); *Fust v. Francois*, 913 S.W.2d 38, 49 (Mo. App. 1995).

The trial court has broad discretion whether to refuse to enter remittitur and its decision will not be disturbed on appeal absent an abuse of that discretion. *Meyer v. McGarvie*, 856 S.W.2d 904, 908 (Mo.App.1993). When remittitur is refused, appellate courts properly exercise the power to interfere with the judgment of the jury and trial court with caution and only when the verdict is manifestly unjust. *Rusk Farms, Inc. v. Ralston Purina Co.*, 689 S.W.2d 671, 682 (Mo.App.1985). Generally: "The jury is vested with a broad discretion in fixing fair and reasonable compensation to an injured party" *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 109 (Mo. banc 1985).¹⁴

¹⁴ In violation of this standard of review, the City not only argues "evidence" contrary to the verdict, it attempts to argue evidence that was not even presented to the jury. City Br. 44 (presenting only evidence contrary to the verdict and evidence that Howard did not apply for a separate, vacant position in Division 206 to which Katherine Emke was eventually appointed). The City has not appealed the trial

When reviewing a case for remittitur, the reviewing Court must consider all of the evidence in the most favorable light for plaintiff and ignore any inferences that do not support the verdict. *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852, 871 (Mo. 1993). “The evidence is properly viewed in the light most favorable to the jury's verdict.” *Wiley v. Homfeld*, 307 S.W.3d 145, 150 (Mo. App. W.D. 2009). Further, defendant cannot complain of self-inflicted error. *See Johnson v. Moore*, 931 S.W.2d 191, 195 (Mo. App. 1996) (holding that a party cannot complain on appeal of any alleged error in which, by his or her own conduct at trial, he or she joined in or acquiesced to).

court’s decision to exclude evidence that Howard did not apply for Division 206 and that it was awarded to Emke. Presumably, this is why City did not explain that this “evidence” was relevant only to whether Howard mitigated her damages – an affirmative defense it never pled. LF 58, 566-67. Appellant may have also decided not to appeal the trial court’s decision to exclude this evidence because Emke did not obtain the position in Division 206 until she explained her “multi-racial background” to Appellant’s Council. LF 567; http://kansascity.granicus.com/MediaPlayer.php?view_id=4&clip_id=1666 (2/14/2008 Business Session).

C. Ample Evidence Supported The Jury's Compensatory Damages Verdict.

1. Plaintiff's Damages Theory

The City argued this case as though it was a lost wages case. It never was. It was an emotional distress case. Plaintiff claimed that the classification of the panel of which she was a member on the basis of race caused her emotional distress that manifested itself in physical symptoms.

The jury heard ample evidence of non-economic injury:

- Howard was emotionally devastated by the Appellant's refusal, on the basis of race, to consider her or the other applicants. TR127-28.
- Howard felt publicly humiliated and this humiliating affected her physically. She suffered sudden weight loss, anorexia, insomnia and got sick to her stomach. TR127-28.
- Howard had an ongoing concern and emotional distress about her career in the future. TR172, TR232.
- Howard's loss of the judicial opportunity and the increase in pay added to her stress level. TR232-33.
- Respondent's emotional distress that arose could not be turned "off like a light switch," TR233. Rather, because of the public nature of the Appellant's statements and Howard's position, the stress was ongoing and occurred on a nearly daily basis. TR233-34.

- Even to this day Appellant’s racial and hurtful statements continue to be broadcast to anyone in the world with internet access. See, e.g., November 9, 2006 session, http://kansascity.granicus.com/MediaPlayer.php?view_id=4&clip_id=267; See also, December 14, 2006 session, http://kansascity.granicus.com/MediaPlayer.php?view_id=4&clip_id=419.
- November 9, 2006, a day which should have been an exciting time in the lives of all three of these ladies was instead “embarrassing” and “devastat[ing]” to them. TR234-35.

For this reason, the City’s admission that Plaintiff testified that she was not seeking “lost wages” is both true and important. TR173. In order to receive wages, one must be employed first. Howard was never employed by the City. Rather, she was an “employment applicant” under the MHRA.

In full recognition that she was not entitled to lost wages, Plaintiff’s closing argument on damages focused instead on damages for emotional distress. Her counsel argued:

You [the jury] are the ones to decide what a year and a half of being publicly humiliated and broadcast on TV [is] worth. What is that worth?

Their own witnesses came in here and told you, yes, it was emotionally devastating. [Here there is a description of evidence of emotional distress]... What is that worth? One way to look at it and something that you're absolutely entitled to consider when you're trying to determine what that value is [the value of the emotional distress] is what was the lost employment opportunity?

TR430-31.

What Plaintiff's counsel suggested was a way to measure the *emotional distress* damages, not lost wages. What he suggested was a way to value the violation of the statute which condemns classification of persons seeking employment opportunities. He suggested that the jury could take what she would have earned as a Judge and divide it by three to determine the value of the emotional distress or the lost employment opportunity. TR432.

Importantly, there was no objection to this argument. The City sat silent. Why? The City may have concluded that the argument was not objectionable. Or, the City may have made a strategic decision that it wanted to pooh-pooh these damages, to tie them to a claim for lost wages and hope that the jury would agree that since Plaintiff never got the job, she should not be entitled to any damages.

Thus, the City argued:

Now she may couch it as lost opportunities but the opportunities she's talking about are the lost wages of being a Municipal Court judge in

Kansas City. Her request for damages based on the lost opportunity of the Municipal Court Judgeship was pure speculation. In order to award those kinds of damages, you must believe she would have gotten the job.

TR449-450.

Strategic decisions not to object to closing argument waive any claim for appeal that the jury erred in deciding to use the evidence as the Plaintiff suggests. *See, State v. Kinder*, 942 S.W.2d 313, 329 (Mo. banc 1996)(“trial strategy looms as an important consideration [for objection to closing argument] and such assertions are generally denied without explanation”).

The jury chose to credit Plaintiff’s counsel’s way of measuring emotional distress damages. The City is now upset with its strategy. But the jury understood what the City does not – that Plaintiff was not asking for wages – past or future.

2. Remittitur Practice

If the City’s claim is for remittitur, the law is clear. Remittitur may only be considered when the defendant asks for both a new trial and suggests remittitur as an alternative to a new trial on grounds that the jury made an honest mistake in assessing the evidence. *Jordan*, 615 S.W.2d 574. Remittitur is based on the claim that admissible evidence resulted in a jury’s miscalculation, however. By seeking remittitur, the City necessarily conceded that the evidence of damages was

admissible. And it was. Without objection, Howard introduced evidence of the salary and benefits the City provides to its municipal court judges. TR136-138. In closing, she suggested that the way to measure her emotional distress damages was to divide that number by three. TR432, She asked for \$533,000 for emotional distress damages; the jury awarded \$633,333 in compensatory damages. The jury did not tie the damages to the salary schedule.

D. Conclusion

This court should refuse to consider the asserted errors and deny Point VI. Even if the Court conducts an *ex gratia* or plain error review, the evidence received without objection supported the jury's verdict. No basis for remittitur was presented to the trial court or exists on appellate review.

VII.

A. Introduction

The City's Point VII fails to inform the Court that the trial court based its decision to award attorneys' fees on an amended fee application. The amended application attempted to resolve the City's initial objections to the first-filed fee application. Yet the City's Point VII never discusses the amended fee application. The City's motives for that failure aside, the City never shows that any of the hours in the amended fee application are either duplicative or improperly submitted. Because the hours were properly submitted, Appellant's Point VII must be denied.

B. Standard of Review

A trial court's award of attorney's fees should not be reversed unless the amount awarded is either arbitrarily arrived at or so unreasonable as to indicate indifference and lack of proper judicial consideration. *Burden v. Burden*, 811 S.W.2d 818, 822 (Mo.App.1991). The court's award is presumed to be correct and the complaining party has the burden of proving otherwise. *Id.* The trial court is also presumed to know the character and value of attorney services rendered. *Industry Fin. Corp. v. Ozark Community Mental Health Center, Inc.*, 778 S.W.2d 413, 717 (Mo.App.1989). "The trial court is considered an expert on the question of attorney fees and as it tried the case, and presumably is acquainted with all the issues

involved, may set those fees without the aid of evidence.” *Id. See also, Tate v. Golden Rule Ins. Co.*, 859 S.W.2d 831, 835 (Mo.App. W.D. 1993).

C. Attorneys’ Fees Were Not Arbitrarily Awarded.

The City claims that the fee application granted by the court included hours worked by Mr. Nicewanger solely on a different federal case. The City knows better. The legal file citations on page 47 of Appellant’s brief are all to the initial motion for attorney’s fees submitted by Respondent’s counsel. An amended motion appears at LF579. That motion removed all the hours worked by Brian Nicewanger on Ms. Howard’s federal case: a reduction of \$35,784.51. The City notes the reduction on page 48 of its brief, and then launches a vague charge that Mr. Nicewanger’s record-keeping is poor. Yet it provides no evidence of this purportedly bad recordkeeping, and does not specify anywhere in its brief where an hour of attorney time was mischaracterized.

The best the City can do in its brief is suggest that Nicewanger’s billing for preparing the charge and the amended charge of discrimination before the Missouri Human Rights Commission should be reduced because Howard testified that she pulled together the charge. City Br. 47. Nicewanger’s hourly charges related to the MHRC charge are not significant in terms of the attorneys’ fee award. See, e.g., LF582 (review Ms. Howard’s draft of charge: 0.90 hours); LF583-84 (work on amended charge approximately 4.6 hours).

The City's complaint that Mr. Nicewanger should not be compensated for reviewing the original charge of discrimination or preparing the amended charge is not supported with competent authority. The City cites *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), a case under the Civil Rights Act in which the plaintiff obtained relief on only a few of the claims brought under the Act. *Hensley* cautions that federal district courts should exclude from fee applications hours that were not reasonably expended in pursuit of the plaintiff's goals. *Id.* at 434. The trial court did that in this case. LF579, ¶ 1. Howard prevailed on the amended charge of discrimination. The City has produced no evidence or documentation suggesting that the trial court erred in a definite or identifiable way in its fee award.

D. The Amount Awarded for Attorneys' Fees was not Unreasonable.

The City's Point claims that the fees awarded were "excessive." To the extent that the allegation is based on the hourly rates of the lawyers, it is not supported in the argument portion of the brief, does not identify any hourly rate that is excessive, and should be deemed abandoned. An appellant has an obligation to cite appropriate and available precedent. *Thummel v. King*, 570 S.W.2d 679, 687 (Mo. banc 1978). When an appellant fails in this regard, dismissal is proper. *In re Marriage of Spears*, 995 S.W.2d 500, 503 (Mo.App.1999); *Brown v. Ameristar Casino Kansas City, Inc.* 211 S.W.3d 145, 148 (Mo.App. W.D.,2007).

E. Conclusion

Point VII should be denied.

CONCLUSION

Respectfully, for the reasons stated, the judgment of the trial court should be affirmed.

Respectfully submitted,

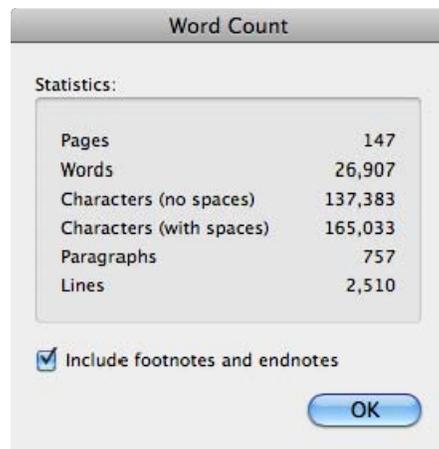
Edward D. Robertson, Jr. #27183
Mary D. Winter #38328
Anthony L. DeWitt #41612
BARTIMUS, FRICKLETON, ROBERTSON & GORNY,
P.C.
715 Swifts Highway
Jefferson City, MO 65109
573-659-4454
573-659-4460 Fax

Mark A. Jess
Law Offices of Mark A. Jess, LLC
Kansas City Livestock Exchange Building
Post Office Box 025639
1600 Genessee, Suite 842
Kansas City, Missouri 64102

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that beginning with the Table of Contents and concluding with the last sentence before the signature block the brief contains 26,907 words. The word count was derived from Microsoft Word.



Disks were prepared using Norton Anti-Virus and were scanned and certified as virus free.

Respectfully submitted,

Edward D. Robertson, Jr. #27183
Mary D. Winter, # 38328
Anthony L. DeWitt, # 41612
BARTIMUS, FRICKLETON, ROBERTSON &
GORN, P.C.
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454 (office)
(573) 659-4460 (fax)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and accurate copy of the foregoing document was served via prepaid United States mail and by electronic mail where an electronic mail address is shown this 9th day of August, 2010, to the following:

GALEN BEAUFORT, City Attorney
SASKIA C.M. JACOBSE, #49284
JAMIE L. COOK, #58885
Assistant City Attorneys
414 E. 12th Street
Kansas City, Missouri 64016
Telephone: (816) 513-3121
Facsimile: (816) 513-2716
e-mail: saskia_jacobse@kcmo.org

ATTORNEYS FOR DEFENDANT/APPELLANT CITY OF KANSAS CITY, MISSOURI
