

IN THE SUPREME COURT OF MISSOURI

No. SC94462

G. STEVEN COX,

Appellant,

v.

KANSAS CITY CHIEFS FOOTBALL CLUB, INC.,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE JAMES F. KANATZAR, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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I. COX HAS NOT WAIVED OR ALTERED ANY CLAIMS IN POINT I.

Cox's "claim" in Point I has remained the same throughout: Before the trial court heard from a single witness, it issued a blanket, pretrial order barring Cox, and essentially all of Cox's witnesses, from testifying about their ages, circumstances of their terminations (or departures) from the Chiefs, and the fact two other employees filed age discrimination lawsuits against the Chiefs. The trial court never wavered from its blanket ruling, and never reversed its position with respect to a single witness.

The blanket ruling barred Cox from presenting highly probative evidence of the basic organizational context surrounding Cox's termination, which bore on the Chiefs' discriminatory motives and intent in terminating Cox, and that the Chiefs' proffered reasons for terminating Cox are pretextual. Cox could not corroborate Clark Hunt's plan "to go in a more youthful direction" with evidence that the Chiefs carried out that plan. Cox's briefing here (and below) shows why blanket exclusions of this type *in and of themselves* constitute an abuse of the trial court's discretion—because the trial court fails to weigh the evidence on a case-by-case basis. The basis for Point I remains the same.

The Chiefs' waiver arguments are destroyed by their *own* expressed understanding of the issues presented on appeal: The Chiefs acknowledge that "**an alleged 'blanket exclusion' is the only error identified in Plaintiff's first Point Relied On.**" Resp.Subst.Br. p. 27. The Chiefs well understood Cox's claim in Point I when the parties were before the Western District. See Resp.Br. at p. 21 ("Plaintiff's first point challenges the trial court's decision to limit certain testimony about 17 Chiefs employees who were older than 40 and who were no longer employed by the Chiefs..."); pp. 27-28 ("As part

of his ‘blanket exclusion’ argument, Plaintiff invokes the evidentiary error made in *Estes v. Dick Smith Ford*...to claim that the trial court here made a similarly sweeping ruling that excluded relevant evidence.”). *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 338 (Mo.banc 1998) holds:

This Court’s policy is to decide a case on its merits rather than technical deficiencies in the brief. Generally, this Court will not exercise discretion to disregard a defective point unless the deficiency impeded disposition on the merits. A brief impedes disposition on the merits where it is so deficient that it fails to give notice to this Court and to the other parties as to the issue presented on appeal.

Cox’s repeating the same legal principles cannot be a deficiency that somehow “impede[s] disposition on the merits.”

The Constitution and Rules allow Cox to improve previous arguments. On transfer, this Court reviews a case “the same as on original appeal.” Mo.Const.Art.V, §10. Mo.R.Civ.P. 83.09. *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 127 (Mo.banc 1985). *See also Bakewell v. Mercantile Trust Co.*, 319 S.W.2d 600, 602 (Mo.banc 1958) (“On transfer of a case from a court of appeals...the case is considered *de novo* in this court.”); *Cornet & Zeibig, Inc. v. 430 Withers Realty Co.*, 415 S.W.2d 751, 753 (Mo.banc 1967) (“The entire case will be determined here.”).

“This means that the transfer immediately renders the court of appeals’ decision (if any) a nullity...parties must proceed in this Court as though the appeal properly been filed here in the first instance.” *Williams v. Hubbard*, 2015 WL 468326 at *3 (Mo.banc

Feb. 3, 2015). Rule 83.08(b) permits, and this Court “encourages” substitute briefs. *Williams*, 2015 WL 468326 at 3. Rule 83.08(b) is grounded in the “premise of orderly litigation.” *State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 691 n. 2 (Mo.banc 2005).

None of the cases in the Rule 83.08(b) headnotes support the Chiefs’ argument. *See Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo.banc 2009) (dismissing part of appellants’ brief because of entirely new claims of error in appellants’ substitute brief); *Barkley v. McKeever Enterprises, Inc.*, 2015 WL 778421 at *7-8 (Mo.banc Feb. 24, 2015) (dismissing three entirely-new claims not raised in the trial court, nor in a motion for new trial, nor before the court of appeals); *Williams v. Hubbard*, 2015 WL 468326 at *3 (refusing a substitute brief which failed to even identify the trial court rulings at issue, calling the deficiencies “not subtle or technical”); *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo.banc 1999) (dismissing entirely-new argument not raised in court of appeals); *Linzenni v. Hoffman*, 937 S.W.2d 723, 726-27 (Mo.banc 1997) (dismissing new attacks on three separate trial court rulings).

Cox’s Brief more fully develops crucial concepts underlying the same claims raised below. Rule 83.08(b) permits the parties to refine—**and improve**—their arguments provided they do not alter the basis of their claims. This Court’s Constitutional command to review Cox’s claims “the same as on original appeal” should prevail.

Standard of Review

The Chiefs also seek to insulate themselves from this Court’s independent prerogative to follow the appropriate standard of review—by arguing Cox “failed to

argue below for *de novo* review,” and therefore “waived” his right to raise it here. Resp.Subst.Br. p. 21-22. The Chiefs cite no legal authority for the notion a party can somehow “waive” his right to have this Court apply the appropriate standard of review. This argument makes no logical sense—a party should never be able to force this Court to follow the incorrect standard of review.

“The appropriate standard of review is a basic and critical concern in any appeal.” *Anglin Family Investments v. Hobbs*, 375 S.W.3d 244, 249 (Mo.App.2012); *see also Kesler-Ferguson v. Hy-Vee, Inc.*, 271 S.W.3d 556, 558 (Mo.banc 2008) (“[w]hether the circuit court applied the correct legal standard is a question of law that is reviewed *de novo*.”). This Court’s constitutional command to decide cases “the same as on original appeal” should proceed despite the Chiefs’ suggestions that this Court can disregard a determination of the true standard of review.

Additionally, Cox has always argued (and continues to argue now) that the trial court’s erroneous blanket ruling was an abuse of discretion *under any standard of review* because it failed to consider witnesses one-by-one—showing “a lack of careful, deliberate consideration.” *St. Louis Cnty. v. River Bend Estates Homeowners’ Ass’n*, 408 S.W.3d 116, 123 (Mo. 2013).

II. THE BLANKET RULING CONSTITUTES REVERSIBLE ERROR.

Incredibly, the Chiefs argue an “overarching difficulty with Point I is that it fails to explain which ruling or rulings Plaintiff claims were prejudicially erroneous.” Resp.Subst.Br. p. 25. The Chiefs also argue “the record shows that there was no ‘blanket

exclusion’ of circumstantial evidence of age discrimination.” *Id.* These claims are wrong.

A. Cox has identified the trial court’s error.

Cox has carefully addressed the erroneous blanket ruling, and demonstrated how it was not just reinforced—but expanded throughout trial. Cox starts with the reversible error the Chiefs inserted into the case *ab initio*:

- The *Chiefs* requested a pretrial order excluding evidence “regarding the terminations of and possible allegations of discrimination by 17 non-Plaintiffs.” Appl.Subst.Br. p. 4-7.
- The *Chiefs* argued “[Cox] did not allege a pattern and practice of discrimination or hostile work environment in either his Charge of Discrimination with the [MCHR] or his Petition,” and “should not be allowed to introduce testimony from any individuals whose terminations are wholly unrelated to [Cox’s] termination.” *Id.* at 7.
- The *Chiefs* argued “none of the...[17 former] employees [were] similarly situated to [Cox]” meaning (as the trial court later explained) that the people who terminated them “were [the same] decisionmakers in the termination of [Cox].” *Id.*
- The *Chiefs* requested a pretrial order excluding evidence of two age discrimination lawsuits brought by witnesses Brenda Sniezek and Larry Clemmons. *Id.* at 8-9.

Cox opposed the Chiefs’ pretrial requests, but the Chiefs got what they wanted. Appl.Subst.Br. p. 8-9. Before it heard testimony from a single witness, the trial court

entered its pretrial Order granting, without explanation, both of the Chiefs' motions *in limine*. *Id.* When Cox asked to revisit the unexplained rulings, the court explained Cox could not “call[] these 17 witnesses to testify that they were terminated, that they have a case of discrimination pending against the Chiefs, and I suppose they’re over 40.” *Id.* at 9-10. The trial court was so unwavering in its blanket ruling that it also ruled: “**I don’t think it’s necessary that you make an offer of proof for each and every one of these 17 witnesses.**” *Id.* at 10.

The court’s pretrial order was regularly reinforced and frequently expanded throughout trial to exclude a broad range of additional evidence at the Chiefs’ request and, in each instance, over Cox’s objections. *Id.* The order expanded to silence four additional witnesses not originally mentioned in the Chiefs’ motions *in limine*—including Steve Cox himself. Appl.Subst.Br. p. 10-11.¹ The trial court *never wavered* from its original, blanket ruling. The Chiefs fail to cite a single example of the trial court ever reversing its position with respect to any witness. **It never happened.**

B. The trial court never evaluated the evidence on a case-by-case basis.

After planting the seeds of error,² the Chiefs now seek to avoid the consequences of their misdirections on the law, urging the trial court “painstakingly revisited its *in*

¹ Steve Cox, Heather Coleman, Denny Thum, and Steve Schneider.

² As discussed *infra* at pp.23-28, the Chiefs now abandon their erroneous “pattern and practice” and “similarly situated” arguments.

limine ruling [throughout trial] with respect to the individual witnesses,” performing a careful individualized evaluation of the evidence. Resp.Subst.Br. p. 26-51. For 29 pages, the Chiefs cleverly reference what appear to be 10 different examples of the trial court engaging in a thoughtful probative-value vs. unfairly-prejudicial analysis. *Id.* at 22-51 (referring several times to Tr. 1101:21-23, 1347:6-1349:5, and 2067:21-2068:1). The Chiefs argue “[n]umerous other examples exist,” but none are cited. *Id.* at 38.

Truth is the Chiefs rehash *the same three passages ten different times*. Individualized weighing never happened. Resp.Subst.Br. p. 22-51 (referring repeatedly to Tr. 1347:6-1349:5, 1101:21-23, and 2067:21-2068:1). All three passages concern only Brenda Sniezek and Steve Schneider, and Schneider was never among the original 17 witnesses within the Chiefs’ motion *in limine*. (LF1110-1175). In two of the three passages, the trial court makes only a bare statement *before any offer of proof was ever presented* that the anticipated response to a particular question would be more prejudicial than probative—**based on the rationale for its *in limine* rulings**. (Tr. 1101:21-23, 1347:6-1349:5). In the third passage, the trial court simply requests more argument related to Schneider. (Tr. 2067:21-2068:1). Twenty pages later, however, the trial court lumps in Schneider and Sniezek with nine (9) other witnesses, rejecting every offer of proof for the same reasons cited in support of its pretrial order. (Tr. 2087:16-2089:23).

The trial court never discusses or evaluates the proffered testimony on an individualized basis—never acknowledges any similarities between Cox and the proffered witnesses.³

The Chiefs’ emphasis on Sniezek and Schneider is especially surprising because both serve as compelling examples of the trial court’s steadfast refusal to make evidentiary decisions on a “case-by-case” basis. Regarding Sniezek, the trial court admonished Cox’s counsel for getting into a “forbidden” topic (her termination), stating *before any offer of proof was ever presented from Sniezek* that her testimony was “not coming in.” (Tr. 1101:8-19). Sniezek’s testimony never “came in.” (Tr. 2087:16-2089:23).

The trial court also went out of its way during Schneider’s testimony to instruct counsel for the parties: “I assume that both sides are warning their witnesses about things that are off limits based upon my rulings in motions *in limine*” and to “do a better job of preparing your witnesses when they come up here as to what’s off limits based upon my [pretrial] rulings.” (Tr. 1329:17-19, 1348:3-15). Later, after Schneider’s offer of proof, the court never discussed or evaluated his testimony on an individualized basis, instead reemphasizing the erroneous legal principles supporting its blanket ruling:

I anticipate that [Cox’s] counsel is going to make these offers of proof on all the 17 people the Court has ruled certain areas of their testimony are not admissible...

³ Numerous similarities existed, but they were never considered by the trial court. *See* pp. 11-14, *infra*.

And just to reiterate so the record is clear, the ruling is based upon the fact that these peoples' terminations, the people who terminated them were not decisionmakers in the termination of the plaintiff in this case and also because [Cox] did not plead a pattern and practice, did not plead pattern and practice....

(Tr. 1426:2-19).

When Cox noted Mark Donovan's extensive involvement in the terminations of nearly all of the affected witnesses (including Cox), the trial court clarified:

And you're right and I'm sorry...I think that some of them may have been terminated by people that weren't decisionmakers and that also came into my consideration, **but the primary thing was that you didn't plead pattern and practice and that these employees were not similarly situated to Mr. Cox.**

(Tr. 1427:13-23).

Contrary to the Chiefs' misportrayal, the Sniezek and Schneider exchanges do not reflect the trial court's "careful, deliberate consideration." They reflect a steadfast refusal to reconsider the court's "one-size-fits-all" pretrial order—regardless of their testimony about the circumstances of their termination, and regardless of who terminated them. Like Cox, Sniezek and Schneider (both over 40) were both terminated on Mark Donovan's orders. (Tr. 1044:9-1045:12, 3330:7-20, 1702:8-1713:4, 3334:22-3336:4).

C. The remainder of the transcript leaves no further room for doubt.

On February 18, after additional offers of proof, the trial court entertained another lengthy discussion on the legal basis for its blanket exclusion. (Tr. 1600:6, 1733:18-1785:18). Cox explained again the fallacy of the Chiefs’ continuing reliance on their legally-based “pattern and practice” and “similarly situated” arguments. *Id.* The Chiefs’ counsel then doubled-down on the unsupported *legal* arguments in their motions *in limine*:

There’s nothing about what they’ve argued that’s different than what they argued when we were briefing these issues on motions *in limine*.

Nothing. They put in their papers all of this evidence that they expected would be coming out of these witnesses’ mouths on the stand. Nothing has changed. The only thing that's changed is you're seeing in person now as opposed to seeing in black and white. The case law being cited is the same.

These folks are not similarly situated.

(Tr. 1775:7-21).

The next morning (2/19), the trial court announced: **“Well, I am not changing my ruling, so if that helps you answer the question [about the length of trial] more accurately, what would be your answer...?”** (Tr. 1791:22-24). The same day—8 days after the trial began and after twelve witnesses testified in open court and through offers of proof (which were never evaluated on an individualized basis)—the trial court offered the additional explanation set forth in Cox’s Substitute Brief. Appl.Subst.Br. p. 12-13.

In that summary explanation and throughout the entire trial, the court never discussed the excluded witnesses or their testimony on an individualized one-by-one basis.

Many basic similarities were never acknowledged. For example, Steve Schneider, Heather Coleman, and Gene Barr were in exactly the same department as Steve Cox. Appl.Subst.Br. p. 23-26. Cox, Coleman, and Barr also shared a common supervisor (Schneider) before Schneider was fired by Mark Donovan. *Id.* Cox, Coleman, and Barr also shared Mark Donovan as a common supervisor until Donovan hired David Young (age 34) to be their new common supervisor in Stadium Operations. *Id.* at 22-28, 39-43. The trial court never discussed or acknowledged these similarities.

The trial court also refused to consider more significant similarities. For example: (1) Schneider, Coleman and Barr were in Cox's department; (2) most importantly, Steve Cox, an exemplary, protected-group employee during the first 11 years of his employment, was fired for bogus pretextual reasons (according to Cox's theory of the case), and replaced with a new employee in his 30's. Cox presented at least nine offers of proof from other protected-group employees who, like Cox, had lengthy (and often exemplary) careers with the Chiefs, but were fired (or forced out) for arguably bogus reasons and replaced with much younger employees in their 20's and 30's: Anita Bailey (age 59), Carol Modean (age 48), Ann Roach (age 63), Steve Schneider (age 51), Gene Barr (age 58), Tom Stephens (age 52), Brenda Sniezek (age 51), Evelyn Bray (age 55), and Heather Coleman (age 45). Appl.Subst.Br. p. 19-42. The trial court never discussed or acknowledged these similarities.

Cox also argued below one of the most enduring mysteries: The trial court’s (and the Chiefs’) inexplicable position that Mark Donovan was somehow simultaneously a **decisionmaker in the firing of Cox**—and yet **not a decisionmaker** in the firing of Cox, when it came to evaluating whether or not a multitude of other witnesses were “sufficiently similar” to Cox for purposes of testifying (even under the Chiefs’ erroneous same decision-maker/same supervisor theory). Donovan was **directly involved in terminating** at least 11 of the co-workers affected by the trial court’s blanket ruling, all of whom were in their late 40’s, 50’s, and 60’s. Appl.Subst.Br. p. 19-45, 70 (chart).

Donovan was also directly involved in hiring at least seven of their younger replacements (including Cox’s): Jason Stone (age 31), Rob Alberino (age 40), Brandon Hamilton (age 39), David Young (age 34), Rocco Mazzella (age 37), Chuck Castellano (age 32), and Brian Dunn (age 36). *Id.* These crucial similarities were never acknowledged. Nor was the undisputed evidence that these terminations and hirings all occurred after Scott Pioli and Mark Donovan began “working at the same time towards a common goal” to restructure the Chiefs’ front office at Clark Hunt’s instruction to “go in a more youthful direction.”

The Chiefs’ misleading statements about the record have also precluded a meaningful determination on the merits. The Chiefs falsely claim “many” of the 17 witnesses affected by the pretrial order “**had left [their employment] around the time of Carl Peterson’s resignation [in 2008].**” Resp.Subst.Br. p. 2, 8 (emphasis added). That is patently false, and unsupported by any references to the record. With the exception of perhaps two employees (Ken Blume and Bill Newman), **ALL** of the affected

witnesses discussed in Cox’s Substitute Brief were employed with the Chiefs **throughout 2009, 2010, and 2011**. Appl.Subst.Br. p. 14-47. The Chiefs also make the false statement that “literally none of the former employees whose testimony was limited shared a job title, job duties, or a supervisor with Plaintiff...” Resp.Subst.Br. p. 43. As discussed herein, this claim is also patently false; there were several common supervisors, and Mark Donovan was chief among them.

The Chiefs’ also misled the Western District into several erroneous conclusions. For example, the Western District wrongly concluded that none of the affected co-workers “were accused of poor performance or insubordination.” Op., p. 22. Even the Chiefs acknowledge five of the affected witnesses were purportedly “terminated for performance-related issues”—just like Steve Cox. Resp.Subst.Br. p. 9.

The Western District also wrongly concluded that none of the affected co-workers “were employed in the Maintenance Department.” Op., p. 22. This is also factually incorrect; as discussed above, several worked in exactly the same department as Steve Cox.

The trial court simply **never** acknowledged, evaluated, or discussed *any* similarities between the numerous protected-group employees in their late 40’s, 50’s, and 60’s who were all terminated as part of an undisputed organizational restructuring. It **never** acknowledged that many were eliminated for reasons that were unexplained, defied logic, or (in the case of some) that were outright lies. It **never** acknowledged that many were replaced with younger employees after they were informed their “departments” and “positions” were being eliminated. It **never** discussed Donovan’s

central role in terminating at least 11 of them, and hiring at least seven younger replacements.

The record instead demonstrates the trial court embraced the Chiefs’ erroneous “pattern and practice” and “similarly situated” arguments—before it heard a word of testimony—and maintained its steadfast refusal to waver from that original position throughout trial. The Chiefs’ argument that the court somehow “painstakingly revisited its in limine ruling [throughout trial] with respect to the individual witnesses” and engaged in a careful evaluation of the evidence on an individualized basis is fanciful.

D. The blanket ruling constituted an impermissible blanket exclusion of circumstantial evidence of age discrimination.

The Chiefs make no attempt to challenge key principles discussed throughout Cox’s Substitute Brief:

- This Court recognizes “a liberal approach” to administrative requirements under the “remedial” MHRA.⁴ Appl.Subst.Br. p. 61-62.
- Direct evidence of employment discrimination is *rare*. *Id.* at 63.

⁴ The Court has recognized that the MHRA “protects important societal interests in prohibiting discrimination in employment.” *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 565 (Mo.banc 2006). The Court has also scrupulously developed this important area of Missouri law in at least ten decisions in the last decade, beginning with *Daugherty v. City of Maryland Heights*, 231 S.W. 3d 814 (Mo.banc 2007).

- For more 100 years, Missouri courts have held that where motive or intent for a particular action are at issue, other similar acts by a party are both relevant and admissible. *Id.*
- State and federal courts in Missouri have long applied this principle of law in discrimination cases, recognizing the often-critical value of *other acts of discrimination* in proving motive or intent. *Id.* at 63-65.
- Wholesale blanket exclusions run afoul of a long line of Missouri cases approving “other acts evidence” in a multitude of contexts, including employment discrimination. *Id.* at 65-66.
- A plaintiff must be allowed to demonstrate motive and intent for purposes of proving punitive damages. *Id.*
- Anecdotal evidence of the treatment of others is often critical for proving MHRA claims and punitive conduct, and blanket exclusions of such evidence are inappropriate. *Id.* at 66.
- **“[T]he relevancy of such [circumstantial] evidence must [instead] be reviewed on a case-by-case basis.”** *Hurst v. Kansas City, Missouri School Dist.*, 437 S.W.3d 327, 342-43 (Mo.App.2014) (citing *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008)). *Id.*
- **“The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer’s account of its**

own motives.” *Estes v. Dick Smith Ford*, 856 F.2d 1097, 1103 (8th Cir. 1988).
*Id.*⁵

Rather than challenge any of these pivotal concepts, the Chiefs wrongly assert “the record shows that there was no ‘blanket exclusion’ of circumstantial evidence of age discrimination.” Resp.Subst.Br. p. 25. The record actually reflects steadfast enforcement of the court’s “one-size-fits-all” pretrial order regardless of who the witnesses were, regardless of their common ages, regardless of the circumstances surrounding their

⁵ This Court should also consider the rule announced in *McKenzie v. Carroll Intn’l Corp.*, 610 S.E.2d 341 (W.Va. 2004), where the West Virginia Supreme Court reversed for abuse of discretion, because the trial court issued a blanket, pretrial ruling barring testimony from six witnesses prepared to testify about “other acts” evidence of discrimination. *Id.*:

In an action brought for employment discrimination, a plaintiff may call witnesses to testify specifically about any incident of employment discrimination that the witnesses believe the defendant perpetrated against them, so long as the testimony is relevant to the type of employment discrimination that the plaintiff has alleged. There are, however, limitations to the admissibility of such evidence. Incidents that are too remote in time or too dissimilar from a plaintiff’s situation are not relevant.

Id. at 346-47.

terminations, regardless of how they were replaced, and regardless of who terminated them.

The trial court's blanket ruling barred Cox and other witnesses from showing:

- The Chiefs eliminated numerous, protected-group employees in their late 40's, 50's, and 60's, including Cox (age 61), after Chiefs executives began "working at the same time towards a common goal" to restructure the Chiefs' front office based on the express instructions of the Chiefs' owner who wanted to take his front office "in a more youthful direction";
- The Chiefs eliminated these employees for reasons that were unexplained, defied logic, or (in the case of some) for reasons that were simply untrue;
- The Chiefs inserted/hired younger replacements after older employees were falsely informed their "departments" and "positions" were being eliminated; and,
- Heather Coleman, who was in the same department as Cox, learned of a "hit list" in 2010, and was informed by Kirsten Krug's "right-hand person in Human Resources" that "there was a list of employees that they were going to terminate and they knew who and they knew when." (Tr. 2692:13-25); and
- Larry Clemmons was told "you are the last." Appl.Subst.Br. p. 29.

E. Logical and Legal Relevance

The Chiefs now argue "Point I engages in no individualized discussion of what the excluded testimony would have been, or why that testimony was logically relevant to establish the Chiefs' discriminatory animus." Resp.Subst.Br. p. 24. This argument is wrong, for many reasons.

First, this claim ignores a 30-page section in Cox’s Substitute Brief titled **“SUMMARY OF THE EVIDENCE EXCLUDED AS A RESULT OF THE TRIAL COURT’S BLANKET EXCLUSION”** in which Cox exhaustively sets forth actual and potential witness testimony and the manner in which the trial court’s blanket exclusion affected the testimony of at least 15 employees. App.Subst.Br. p. 14-45. It also ignores Cox’s careful effort to *italicize* the matters excluded from the evidence based on the trial court’s blanket ruling, Cox’s references to the italicized matters in his Statement of Facts throughout the argument portions of his brief, and multiple passages in which Cox further explains how the court’s blanket ruling barred him and others from explaining the pivotal concepts above. Appl.Subst.Br. p. 68-74. The excluded evidence was logically relevant for proving Cox’s claim of age discrimination and the Chiefs’ punitive conduct. Appl.Subst.Br. p. 57-81.⁶ The low threshold for logical relevance is easily met. *State v. Anderson*, 76 S.W.3d 275, 277 (Mo. 2002).

Evidence in the italicized portions of Cox’s Statement of Facts is also *highly probative* for demonstrating the basic organizational context surrounding Cox’s termination, the Chiefs’ discriminatory motives in terminating Cox, and how the Chiefs’ proffered reasons for terminating Cox are pretextual. This is also discussed in Cox’s Substitute Brief. Appl.Subst.Br. p. 68-74.

The Chiefs do not challenge law holding “[t]he effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which

⁶ Cox has no need and no room to reargue the same points.

plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." *Estes*, 856 F.2d at 1103. Here, the Chiefs restricted and isolated Cox from his co-workers, continually belaboring the pretextual basis for his termination: his purported "insubordination" in giving a \$1.89/hr. pay raise to an hourly employee without seeking approval in advance. Applt.Subst.Br. p. 68-74. Cox testified he gave Russell Crowley a pay raise because it was mandatory under the terms of the Chiefs' union contract (the CBA), but Cox was **completely handcuffed** in his ability to explain why the stated reason for his termination was pretext based on the evidence excluded by the blanket ruling.⁷

The prejudice associated with Cox's inability to counter these arguments was severe, and best demonstrated by the Chiefs' closing arguments where the Chiefs referenced the terms "CBA," "collective bargaining agreement," and "Crowley" at least 31 times, making at least 25 references to Crowley's "pay raise." (Tr. 3936-3983). The jury was forced to evaluate the Chiefs' claim of purported "insubordination" in a vacuum, without the benefit of understanding other dramatic changes undertaken throughout the organization.

⁷ The Chiefs also misrepresent the record four separate times on this issue, insisting Cox purportedly admitted that the pay raise was *not* mandatory under the terms of the CBA. Resp.Subst.Br. at 6; 6 fn. 2; 18; 53. This argument is directly contradicted by Cox's unequivocal testimony that he believed "[i]t **mandated that you move him up according to the CBA.**" (Tr. 2185:20-2186:10).

The Chiefs' counsel also exploited Cox's inability to corroborate Clark Hunt's plan to go "in a more youthful direction":

They want to bring in Ann Roach...she blurted out on the stand that Carl Peterson told me that Clark Hunt had told him that the Chiefs were going to go young, or some such thing like that. Bam. Throw it against the wall. See if it sticks...they never even claimed he was a decisionmaker. If that suggestion was made, and I'll suggest to you that it wasn't, but if it was made, what difference does it make? What difference does it make? It has nothing to do with Steve Cox. They presented not one shred of evidence that the Chiefs' motivation in terminating this man was based upon his age. None.

(Tr. 3948:3-22). (See also 3939:40; 3945-46; 3947; 3951-52; 3957; 3961).

F. The remaining issues raised by the Chiefs are immaterial.

The Chiefs devote little effort disputing the highly probative nature of the excluded evidence, instead focusing upon the purported dangers of unfair prejudice, confusion of the issues, undue delay, and needless presentation of cumulative evidence. Resp.Subst.Br. p. 22-23, 31-33, 47-51. These issues are easily addressed. Unfair prejudice occurs when evidence tends to induce decision on an improper, usually emotional, basis. *Midwest Materials Co. v. Village Development Co.*, 806 S.W.2d 477, 495 (Mo.App. 1991). See also Fed. R. Evid. 403 advisory committee's notes. ("Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."). Neither the trial

court nor the Chiefs ever explained how *any* of the excluded evidence at trial may have caused the jury to reach its decision on an improper basis.⁸ The Chiefs provide no examples.⁹

The Chiefs also raise purported “delay” concerns by describing this trial as lasting “nearly three weeks.” Resp.Subst.Br. p. 2. There were, however, only 9 ½ days of evidence with the jury present as the length of trial was prolonged due to two court holidays and two separate blizzards. Index p. 7-26. *See also* Appendix at pp. A5-A6. The Chiefs are also mistaken in their arguments that: (1) the evidence was properly excluded to prevent against the jury “hear[ing] and resolv[ing] 17 mini-trials,” and (2) to prevent against the Chiefs having “to call approximately 38 [additional] witnesses of their

⁸ The Chiefs point to one exchange related to Steve Schneider, but never explain how getting into that “collateral” issue presented a danger of unfair prejudice *to the Chiefs* at trial. Resp.Subst.Br. p. 51. It would have been good cross-examination for the Chiefs. The Chiefs cite no other examples.

⁹ As to a risk of “confusion” or “unfair prejudice,” trial courts routinely employ the well-known tool of limiting instructions. *Philipp v. ANR Freight System, Inc.*, 61 F. 3d 669, 676 (8th Cir. 1995) (Limiting instruction set out in full); *Heyne v. Caruso*, 69 F.3d 1475, 1481 (9th Cir. 1995); *Phillips v. Smalley*, 711 F.2d 1524, 1532 (11th Cir. 1983); *Madison v. IBP*, 257 F.2d 780, 794, fn 10 (8th Cir. 2001).

own who were over 40 and who were *not* terminated.” Resp.Subst.Br. at 22, n.6., 51. Both arguments are wrong, and grossly exaggerated.

A trial court’s concern about “mini-trials” may be legitimate, but “[that] concern cannot, by itself, serve as blanket grounds for exclusion.” *Griffin v. Finkbeiner*, 689 F.3d 584, 600 (6th Cir. 2012).¹⁰ The trial court must “consider the admissibility of evidence regarding each employee individually rather than issue a blanket ruling as to all proposed ‘other acts’ evidence.” *Id.* at 599. Here, the trial court erroneously relied on the Chiefs’ concern about mini-trials “to serve as blanket grounds for exclusion,” and failed to consider the admissibility of evidence regarding each employee individually.

The Chiefs also exaggerate the amount of additional time necessary to present the excluded evidence. First, most of the affected witnesses shared a common decisionmaker (e.g. Mark Donovan), and many of the trial witnesses would have been exactly the same. Next, summary charts and data can be used. Selectively-chosen anecdotal evidence

¹⁰ The “mini-trials” argument is flawed. Blanket exclusions of “other acts” evidence in state and federal cases have been prohibited for more than three decades—as courts have acknowledged the importance of a trial court’s individualized weighing of often critical other acts evidence. Many such cases discuss the use of limiting instructions, presentation of contrary evidence, and cross examination as the tools of the adversary system to maintain balance and fairness in a trial involving anecdotal other acts evidence. A representative list of authority is included in Appellant’s Substitute Reply Brief Appendix at pp. A1-A4.

would have likely taken no more than a few additional days (at most) based upon the length of time it took to present the offers of proof (in which the Chiefs' counsel often conducted full cross-examinations).

Finally, the Chiefs include again their exaggerated claim that they would be forced to call "38 witnesses of their own who were over 40 and who were *not* terminated." Resp.Subst.Br. p. 22, n.6. Statistical evidence of this type can be presented in a matter of minutes through a single witness, or through a single exhibit sponsored by someone like Human Resources Director Kirsten Krug. The excluded evidence discussed in Cox's Substitute Brief was *highly probative*, and easily satisfied the requirements of logical and legal relevance.

III. THE CHIEFS NOW ACKNOWLEDGE THAT THEIR "PATTERN AND PRACTICE CLAIM" ARGUMENT FINDS NO SUPPORT IN THE LAW.

Never before has an employment discrimination plaintiff in Missouri been required to invoke a "**claim**" of "pattern and practice" in their charge of discrimination or petition as a precondition to using circumstantial evidence of a defendant's discriminatory treatment of other employees, but the trial court embraced this concept at the Chiefs' urging, and continually reinforced it as a basis for its blanket ruling.

In support of this erroneous argument, the Chiefs cited and relied exclusively on the **federal** decision in *Young v. Time Warner Cable Capital, L.P.*, 443 F.Supp.2d 1109 (W.D.Mo. 2006)—during discovery (Tr. 7:22-8:7, 8:23-9:3, 21:9-20), in Suggestions in Opposition to Plaintiff's Motion for a New Trial (LF1747-1778), and throughout briefing

to the court of appeals. Resp.Br. p. 39-40. The court of appeals embraced this erroneous reliance on *Young* in holding Cox purportedly failed to “exhaust his administrative remedies” for the purpose of an “unpreserved **claim** of pattern-or-practice discrimination.” Op, pp. 16; 18-19; 27 n. 21 (emphasis added).

Now, for the very first time, the Chiefs have completely abandoned their reliance on this federal decision. **It appears nowhere in their brief.**¹¹ The Chiefs’ new strategy is to insist the trial court “painstakingly revisited its *in limine* ruling [throughout trial] with respect to the individual witnesses,” Resp.Subst.Br. p. 26, and engaged in a careful evaluation of the evidence on an individualized basis. *Id.* at 26-51. For the reasons discussed above, their argument fails.

¹¹ The Chiefs also now strangely seek to blame Cox for the Chiefs’ misleading the trial court with *their* “pattern and practice” theory. Resp.Subst.Br. p. 28-29 (arguing the “parties” “conflated” the concepts of a hostile work environment claim and a pattern and practice claim.). The Chiefs now argue Cox took the “contrary” position earlier that a “pattern and practice” claim is *not* “purely a federal term of art.” *Id.* at 29. Not so.

The Chiefs’ arguments could not be further from the truth. Cox consistently argued that the Chiefs’ “reliance on a legal term of art for a rare, class action-style cause of action predicted on federal statutes under which [Cox] has not sought relief is unfounded.” (LF263-65, 643, 1700-02) (Tr. 210:4-215:5); Appl.Rep.Br. p 10.

Abandoning the only authority on which they previously relied, the Chiefs cite no Missouri or federal authority supporting their argument that an employment discrimination plaintiff is required to invoke a “**claim**” of “pattern and practice” in their charge of discrimination or petition as a precondition to using circumstantial evidence of a defendant’s treatment of other employees. The Chiefs injected error in this case from the very beginning.

Cox’s charge of discrimination and petition allege *age discrimination*, and that alone is sufficient under the authorities discussed in Cox’s Substitute Brief. The trial court’s newly announced pleading requirement flat-out alters the landscape of admissible evidence in all MHRA cases, and prejudicially cripples a plaintiff’s ability to introduce relevant, circumstantial evidence in support of his claims. This Court should reject the trial court’s erroneous exclusion of evidence premised on non-existent law, and correct the erroneous rules announced in the Western District’s opinion; they will negatively impact all future MHRA cases.

IV. THE CHIEFS HAVE ALSO ABANDONED THEIR ORIGINAL “SIMILARLY SITUATED” THEORY.

The trial court repeatedly enforced its blanket exclusion on the alternative basis that Cox failed to demonstrate that the affected witnesses were “similarly situated” to Cox—meaning that the people who terminated them “were [the same] decisionmakers in the termination of [Cox].” Appl.Subst.Br. p. 4-13. At trial, the Chiefs never advanced the “sufficient similarity” theory they now embrace in their Substitute Brief. Resp.Subst.Br. p. 33-47. The Chiefs instead argued in support of the far more strict

federal same decision-maker/supervisor theory discussed in Cox’s Substitute Brief. At trial, the Chiefs said:

- “Well, the facts will show and the motions will indicate to you, Judge, when we finally file them, if you allow these people even to be considered, **they didn't have the same supervisors. The same decisionmakers weren't involved as Mr. Cox. And as you so eloquently said, Judge, in one of your orders, similarly situated employees are the only ones that can bear evidence as to alleged age animus.**” (Tr. 101:6-12).
- “Brenda Snizek...coming in here **when she doesn't have the same supervisor,** the same set of folks, the same set of facts, and taking the stand against the Chiefs when she has an ax to grind **but she's not similarly situated is an expansion of this case beyond the pale.**” (Tr. 104:17-105:1).
- “But the law as you quoted it, Your Honor, **says they have to be in a similar situation. What does that mean? Same supervisors. Same timeframe. Same reasons for termination.**” (Tr. 244:25-245:3).
- “Our arguments on the seventeen were they **didn't have the same supervisor, they weren't in the same department, in some cases their terminations were remote, and all the rest.** ... That's the whole reasoning of these motions, Judge. The seventeen were **not similarly situated,** so they add nothing to this discussion about age animus and the motivation.” (Tr. 290:25-291:11).

- “That's why there is so much emphasis put on **similarly situated**, because in order for these witnesses-- You heard every one of these witnesses today, Judge. ...[T]hey didn't have **common supervisors, they didn't do common jobs, and none of them--** And this goes to *Williams v. Trans*. Is that what it's called?” (Tr. 1769:18-1770:13).
- ...There is no way. **There is no way that any of these witnesses are similarly situated to Mr. Cox.** He worked--As you know, he worked in Stadium Operations. He was a Maintenance Manager. **They did different jobs. They had different supervisors. They had different criteria of scrutiny or evaluation.** (Tr. 1771:1-6).

The Chiefs' current arguments completely ignore all previous arguments to the trial court—which formed the alternative basis for the trial court's blanket ruling. Throughout the *entire* trial, the Chiefs stubbornly held to their same supervisor/decision-maker theory, and continued incanting the legally-based phrases “pattern and practice” and “similarly situated.” Appl.Subst.Br. p. 13. Time and again, the trial court sustained the Chiefs' objections based on those legally-based phrases, and reaffirmed its erroneous blanket ruling. *Id.*

V. THE TRIAL COURT NEVER ENGAGED IN A “SUFFICIENT SIMILARITY” ANALYSIS.

Even if the trial court premised its blanket exclusion on a “sufficiently similar” test under *Williams v. Trans States Airlines*, its evidentiary determinations were entirely belied by the record, and the trial court's abuse of discretion is clear (1) because it

ignored an ocean of similarities between Cox and the other affected employees (as discussed above at pages 11-14, *infra.*), and (2) because it never discussed or considered any of the affected co-workers on an individualized basis. **The trial court turned a blind eye to ALL of those similarities, and never weighed the evidence on a case-by-case basis.** Its blanket ruling was clearly against the “logic of the circumstances,” and demonstrated “a lack of careful, deliberate consideration.” *St. Louis Cnty. v. River Bend Estates Homeowners’ Ass’n*, 408 S.W.3d 116, 123 (Mo. 2013).

VI. SCOTT PIOLI’S ADMISSION SHOULD HAVE BEEN CONSIDERED BY THE JURY.

The Chiefs’ Substitute Brief strains again to defend the trial court’s exclusion of Scott Pioli’s statement: “I need to make major changes in this organization as so many employees of [Carl Peterson] are over 40 years old.” (LF1021). Clear principles of Missouri law warrant the statement’s consideration by the jury as an admission, and as corroborative circumstantial evidence of the Chiefs’ plan to “go in a more youthful direction.”

A. Pioli’s statement was an admission by an executive within the scope of his authority.

For the very first time, the Chiefs acknowledge in their Substitute Brief that *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117 (Mo.banc 1995) is the controlling authority for statements of this type. Resp.Subs.Br. p. 55-56. But the Chiefs stubbornly insist Pioli’s statement is not an admission because it “fall[s] outside the scope of his authority.” *Id.* at 56. The Chiefs cite *Skay v. St. Louis Parking Company*, 130

S.W.3d 22 (Mo.App. 2004) as the sole authority supporting their position. In *Skay*, the declarant's statements were outside the scope of the declarant's authority because, at the time they were made, **the declarant was not even employed by the defendant.** *Id.* at 27.

Pioli's 2009 statement is starkly much different. Pioli was one of the highest-ranking executives in the entire organization, and had substantial, general authority in his role. (Tr. 1152:24-1153:1, 1155:3-13). Beginning in May 2009, the Chiefs' Chairman and CEO Clark Hunt met monthly with his executive team: Denny Thum, Scott Pioli, and Mark Donovan discussing the Chiefs' reorganization and restructuring. (Tr. 899:19-904:14). Clark Hunt explained that he "wanted to make changes" to "become more efficient," because he felt the organization was "heavy in a number of departments and they needed to revalue the number of people [within the organization]." *Id.* Donovan and Pioli were "**working at the same time towards a common goal**" which would necessarily include the replacement of some individuals within the organization. (Tr. 910:3-10) (emphasis added). Pioli was empowered to hire and fire managers in the Stadium Operations Department where Cox worked, and he interacted regularly with Stadium Operations employees. (Tr. 1163:3-1164:23, 1173:16-1180:6).¹²

In *Bynote*, this Court held that an employee must be "acting within the scope of his authority" in making the admission at issue. *Bynote*, 891 S.W.2d at 124. *Bynote* also

¹² The Chiefs' claim that Pioli "had nothing to do with stadium operations" is false. Resp.Subst.Br. p. 57.

held that “a person with executive capacity is generally an agent for the entity he or she serves and has broad authority to bind the principal by his or her statements.” *Id.* Pioli’s statement was unquestionably made in his executive capacity in the months following his participation in formative monthly management meetings.

When a major company executive speaks, everybody listens in the corporate hierarchy, and when the executive’s comments prove to be disadvantageous to a company’s subsequent litigation posture, it cannot compartmentalize this executive as if he had nothing more to do with company policy than the janitor or watchman.

Morse v. Southern Union Co., 174 F.3d 917, 922-23 (8th Cir. 1999). Pioli’s statement should have been considered by the jury according to the same rationale, and under the plain authority of *Bynote*.¹³

B. The Chiefs’ analysis of “stray remarks” is flawed.

The Chiefs now also claim that Cox unfairly criticizes the use of the term “stray remark” while at the same time arguing in favor of the federal authority on this subject. Resp.Subs.Br. p. 58. The Chiefs miss the point. The trial court plainly applied the label “stray remark” to Pioli’s admission—in a negative context—and as a benchmark for the

¹³ The Chiefs’ argument that the statement is necessarily outside the scope of Pioli’s authority because he was not “involved in Plaintiff’s termination” is unrecognized by any concept or reading of Missouri law. Resp.Subst.Br. p. 57.

inadmissibility of workplace statements generally.¹⁴ In fact, similarly relevant “stray remarks” which demonstrate intent have regularly been held to constitute corroborative evidence of discrimination. *See, e.g., Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 923 (8th Cir. 2000) (“Stray remarks...may give rise to a reasonable inference of age discrimination.”). Cox’s fundamental point on the subject of the “stray remarks” doctrine remains: The Chiefs should not be allowed to take advantage of the trial court’s misapplication of this unique line of federal authority to justify the exclusion of a plainly relevant admission.

C. The Chiefs’ claims of unreliability are baseless.

Once again, the Chiefs raise the baseless argument that Herman Suhr is an unreliable witness because he testified he is “old and forgetful.” This argument was debunked long ago, and has no legal merit. (LF1508-1516). The Chiefs’ counsel spent nearly an entire day taking Mr. Suhr’s deposition, and attempted—6 separate times—to elicit Mr. Suhr’s categorical agreement that he is simply “old and forgetful.” In each instance, Suhr refused agreement, and clarified that his “old and forgetful” statement was nothing more than colloquial “shop talk” used when speaking with his retired friends in Concordia, Missouri. *Id.* Regardless, the **jury** must assess cross examination, credibility, and reliability.

¹⁴ “Therefore, it was my position then and it’s my position now that the disputed statement falls into the category of a stray remark and is therefore inadmissible...” (Tr. 948:2-4).

VII. CLARK HUNT WAS CENTRAL TO COX'S THEORY OF THE CASE, AND HIS TESTIMONY SHOULD HAVE BEEN REQUIRED.

The Chiefs still fail to cite any Missouri authority applicable to quashing a **trial subpoena**. Section 491.100 imposes no limit on the right of a trial litigant to subpoena an adverse witness to trial. That rule makes good sense; it dovetails with a plaintiff's right to present offers of proof. The Chiefs also fail to explain how there is any other conceivable method of obtaining someone's testimony. There is none.

In all other respects, Cox stands on his previous arguments. Clark Hunt played a pivotal role in Cox's theory of this case, and it was error for the trial court to summarily exclude him for all purposes.

VIII. THE TRIAL COURT ERRED IN FAILING TO RESTRAIN AND PURGE THE ARGUMENTS OF THE CHIEFS' COUNSEL.

The Chiefs do not address their misstatements of the law in closing argument, and do not challenge the rule that misstatements of the law are so potentially damaging, and so universally condemned, that highly prejudicial examples merit reversal and a new trial *even if* the trial objections were sustained and the jury was instructed to disregard. Resp.Subs.Br. p. 73-74. Cox should be allowed a new trial on this basis alone and/or based on this Court's consideration of the cumulative effect of all errors specified above. *Koontz v. Ferber*, 870 S.W.2d 885 (Mo.App. 1993). In all other respects, Cox stands on his previous arguments.

CONCLUSION

This Court should vacate the judgment and jury verdict entered below, reverse the trial court, and remand this case for a new trial on the merits consistent with the legal principles discussed herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Rule of Civil Procedure 84.06(c), the undersigned counsel hereby certifies that Appellant's Substitute Reply Brief includes the information required by Rule 55.03, complies with the requirements of Missouri Rule 84.06(b). The brief was completed using Microsoft Office Word 2010 in Times New Roman size 13-point font. Excluding the cover page, the signature block, this certificate of compliance and service and the appendix, this brief in its entirety contains 7,113 words, and does not exceed the 7,750 words allowed for an appellant's reply brief under Rule 84.06(b).

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CERTIFICATE OF SERVICE

The foregoing was filed with the captioned court in accordance with the rules of its electronic filing system on April 6, 2015, and was contemporaneously served electronically upon all counsel of record.

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