

SC90032

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IN THE SUPREME COURT OF MISSOURI

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**MICHELLE FLESHNER,**

**Plaintiff-Respondent,**

**v.**

**PEPOSE VISION INSTITUTE, P.C.,**

**Defendant-Appellant.**

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**Appeal from the Circuit Court of St. Louis County, Missouri  
The Honorable Mark D. Siegel**

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**SUBSTITUTE BRIEF OF  
RESPONDENT MICHELLE FLESHNER**

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## **JURISDICTIONAL STATEMENT**

Plaintiff Michelle Fleshner (hereinafter “Fleshner”) brought this action against Pepose Vision Institute, P.C. ("PVI") alleging that she was wrongfully terminated in violation of public policy (Count I). Fleshner also filed a claim for failure to pay overtime compensation in violation of Section 290.505 R.S. Mo. (2003) (Count II) L.F. 0009-0015. Fleshner dismissed her overtime compensation claim prior to trial. L.F. 0109. On October 5, 2007, a jury returned a verdict in favor of Fleshner on her claim of wrongful termination in violation of public policy. The jury awarded Fleshner \$30,000 for actual damages and assessed \$95,000 in punitive damages. L.F. 0477-78. Final Judgment was entered on October 9, 2007, consistent with the jury’s verdict. L.F. 0514.

On October 26, 2007, PVI filed a Motion to Set Aside the Verdict or for New Trial. L.F. 0516-0534. PVI also filed a Motion for New Trial based on juror misconduct. L.F. 0535-0537.

On December 14, 2007, the trial court denied PVI’s post-trial motions. L.F. 0625. On December 26, 2007, PVI filed a Notice of Appeal to the Missouri Court of Appeals, Eastern District. L.F. 0631-0633. The Court of Appeals reversed and remanded for a new trial. This Court then granted Fleshner’s application for transfer. The jurisdiction of the Court of Appeals was based on the general appellate jurisdiction provided by Article V, Section 3 of the Missouri Constitution. This Court has jurisdiction to consider this appeal pursuant to Article V, Section 10 of the Missouri Constitution.

## **STATEMENT OF FACTS**

Michelle Fleshner (hereinafter “Fleshner”) was employed by Pepose Vision Institute, P.C. (hereinafter "PVI") from September 2000 until May 2003.<sup>1</sup> (Tr. p. 161). She received highly rated evaluations and was considered a valuable employee. (Tr. pp. 205-206, 207, 215). As late as April 2003, PVI valued Fleshner enough to pay for her to attend an expensive seminar in San Francisco. (Tr. pp. 225-226).

Beginning in March 2003, the United States Department of Labor ("DOL") began an investigation into PVI's pay practices and began interviewing employees. (Tr. pp. 716-718; Tr. p. 240). On the evening of May 21, 2003, Fleshner spoke with a DOL Investigator by phone and provided the investigator with critical information regarding the time worked by PVI's employees. (Tr. pp. 244, 246-247). Fleshner told her supervisor about her conversation with DOL the next day, fully disclosing the information she had provided. The day after Fleshner told PVI about her conversation with the DOL, PVI terminated Fleshner. (Tr. p.256). Even after firing Fleshner, PVI continued to pursue her and maliciously sought to enforce a non-compete agreement even though Fleshner was not employed with a competitor. (Tr. p. 292).

**A. Fleshner’s Employment History**

Fleshner began her employment in health care by working for Sterling Optical

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<sup>1</sup>References to Volumes 1-4 of the Transcript on Appeal are designated as “Tr.\_\_\_\_.”  
References to the Transcript on December 14, 2007 are designated as “December 14,  
2007 Tr.\_\_\_\_.”

when she was in high school. (Tr. p. 163). At Sterling Optical, Fleshner trained as an Optician, selling, repairing and fitting eyeglasses and dispensing contact lenses. (Tr. p. 163). After high school, Fleshner worked for Group Health Plan ("GHP") as an Optician and trained to become an Optometric Assistant to help evaluate patients for an Optometrist. (Tr. pp. 163-164). While at GHP, Fleshner also began learning coding which assured that the appropriate code was documented on bills. (Tr. p. 165).

During her employment with GHP, Fleshner filled in at different locations and positions when employees were sick or on vacation. (Tr. p. 167). Fleshner left GHP and went to work for Washington University Medical School in the Department of Ophthalmology as a Clinical Therapy Technician, assisting the Optometrists. (Tr. pp. 167-168). In 2004, Respondent became a Certified Ophthalmic Assistant. (Tr. pp. 165-66, 170). Fleshner then left Washington University and began employment with West County Ophthalmology as an Ophthalmic Technician. (Tr. p. 173). There, in addition to all the duties she had been performing as an Ophthalmic Assistant, Fleshner assisted with minor surgeries and dealt with more complicated patient issues. (Tr. p. 174). West County Ophthalmology promoted Fleshner to OSHA Safety Manager. (Tr. p. 174). As OSHA Safety Manager, Fleshner conducted annual staff training and maintained OSHA data staff sheets. (Tr. p. 175). She also began to help West County Ophthalmology build a refractive surgery practice and was promoted to the position of Refractive Surgery Coordinator. (Tr. pp. 175-176). Fleshner was then recruited to work as Refractive Surgery Coordinator for NovaMed Eye Care Management. (Tr. p.180). In September

2000, PVI hired Fleshner as Coordinator of Vision Corrective Services. (Tr. p. 190).

## **B. Pepose Vision Institute**

PVI is a refractive surgery practice, also known as Lasik surgery. (Tr. p. 642). Dr. Jay Pepose ("Dr. Pepose") is an Ophthalmologist who is the President of PVI and owns 100% of its stock. (Tr. pp. 642, 715). The practice was initiated in 1999 after Dr. Pepose left his employment with Washington University School of Medicine. (Tr. p. 643).

Dr. Pepose is married to Susan Feigenbaum, an economist, who was a major decision maker and force at PVI. (Tr. pp. 190, 361, 646). Feigenbaum was closely attuned to all aspects of PVI's operations. (Tr. p. 621). Feigenbaum interviewed Fleshner, gave Fleshner her daily assignments, provided her orientation and directed how Fleshner's position would fit in at PVI. (Tr. pp. 190-191, 363). Feigenbaum routinely sat down each evening with Dr. Pepose and discussed what occurred in the office that day. (Tr. p. 374).

Jacob Cedergreen ("Cedergreen") was initially hired by PVI as Office Manager. In 2002 Cedergreen became PVI's Practice Manager, where he served as Fleshner's direct supervisor. (Tr. p. 252, 715). Cedergreen was the Practice Manager for PVI from October 2002 until August of 2003. (Tr. p. 13). Cedergreen consulted with Feigenbaum on numerous staffing decisions, but on none with Dr. Pepose. (Tr. p. 23). Cedergreen testified that if Feigenbaum "wants a position eliminated, the position gets eliminated. She is the owner." (Tr. p. 65). Most decisions to terminate employment were made by Feigenbaum. (Tr. p. 76). Feigenbaum was Cedergreen's boss when it came to day-to-day

activities. (Tr. p. 125). Feigenbaum looked over Cedergreen's shoulder with regard to the decisions he made as Practice Administrator. (Tr. p. 125). Feigenbaum was at PVI once a week. (Tr. p. 148).

### **C. Fleshner's Employment at PVI**

Fleshner was employed by PVI from the beginning of September 2000 until May 2003. (Tr. p. 161). Fleshner's first year performance review was excellent. (Tr. pp. 205-206). She was given a raise in October 2001 in recognition of her efforts. (Tr. p. 207). In 2002, Fleshner's title changed to Director of Patient and Community Outreach which primarily involved internal marketing. (Tr. pp. 207, 209). In her new position, Respondent continued to report to Feigenbaum. (Tr. p. 213). At the end of her second year of employment in October 2002, Fleshner received a review where her overall rating was outstanding, the highest possible rating. (Tr. p. 215).

In April 2003, Feigenbaum asked Fleshner to attend a symposium sponsored by the American Society of Ophthalmic Administrators and the American Society of Cataract and Refractive Surgeons. (Tr. pp. 223-224, 227). Fleshner, Dr. Pepose and two other PVI employees attended the symposium in San Francisco. (Tr. p. 224). PVI paid a substantial amount of money for Fleshner to attend the seminar in San Francisco. (Tr. pp. 225-226).

### **D. The DOL's Investigation of PVI**

By letter dated March 19, 2003 addressed to Dr. Pepose, the DOL notified PVI that it intended to conduct an investigation or audit of the company to determine whether

PVI was failing to pay its employees overtime when they worked more than forty hours per week. (Tr. pp. 716-717, 718). The letter stated that the DOL would visit PVI beginning on April 9, 2003. Cedergreen was asked to help the DOL investigator gather information and consulted with Feigenbaum to provide the requested information. (Tr. p. 82). Feigenbaum became aware in April 2003 that the DOL was investigating PVI's pay practices. (Tr. pp. 406-407). Dr. Pepose, however, testified that he did not become aware of the DOL investigation into his company until August 2003 and that he had not seen the letter directed to his attention from the DOL. (Tr. pp. 717, 719).

Fleshner learned of the DOL's investigation after she returned from the symposium in San Francisco. (Tr. pp. 238-239). Cedergreen came into Fleshner's office and stated that an investigator for the DOL was in the conference room and it was her turn to speak with the investigator. (Tr. p. 240). Cedergreen told Fleshner to keep it short and tell the investigator she was very busy, had other things to do and excuse herself quickly. (Tr. p. 240). Fleshner met with the investigator for about five minutes. (Tr. p. 241). After meeting with the investigator, Fleshner spoke with Cedergreen who complained about the DOL investigation and stated "Who do they think they are, investigating us? We're PVI." (Tr. p. 242). Cedergreen questioned Fleshner about the information she provided to the DOL and told her to notify him immediately if she was contacted in the future by the DOL. (Tr. p. 243).

**E. Fleshner Provides Information to DOL and Is Terminated Shortly Thereafter**

On May 20, 2003, Cedergreen sent an email to Feigenbaum stating that he intended to eliminate Fleshner's position and that of Office Manager Kathy White. (L.F. Vol. II, p. 214<sup>2</sup>; Tr. p. 340, 401). Cedergreen stated he planned to treat both employees as layoffs and allow them to interview for other available positions, including Technical Assistant and Receptionist. *Id.* On May 21, 2003, Feigenbaum responded to Cedergreen's email and instructed Cedergreen not to treat Ms. White as a layoff given her poor management. (Tr. p. 404; L.F. Vol. II, p. 214). In her response, Feigenbaum expressed no objection to treating Fleshner as a layoff and allowing her to interview for another position. (Tr. p. 414).

On the evening of May 21, 2003, Fleshner received a telephone call at home from Maggie Murray ("Murray"), the DOL Investigator. (Tr. p. 244). Fleshner answered many questions from Murray including background information on PVI and questions regarding time studies done by Fleshner and other employees. (Tr. pp. 246-247). PVI employees were often asked to do time studies where they were expected to write down every activity they did, sometimes for several months at a time. (Tr. p. 237). Fleshner had been told by the Office Manager she should take the time studies home at the end of each day. (Tr. p. 237). Therefore, when Murray asked Fleshner about the time studies, she was able to read some of her time studies and those of other employees to Murray.

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<sup>2</sup>References to the volume and page numbers of the Legal File shall be designated as L.F. Vol. \_\_\_\_\_, p. \_\_\_\_\_.

(Tr. pp. 246-247). Fleshner provided this information to the DOL because she felt it was her duty to give accurate and truthful information to a government representative in the course of an official investigation. (Tr. p. 247). Later, Fleshner was sent a written statement with a partial summary of the telephone conversation which she was asked to sign. (Tr. pp. 250-251; L.F. Vol. I, p. 186).

Early the next day, May 22, 2003, Fleshner went to Cedergreen's office and waited for him to arrive. (Tr. p. 252). Fleshner told Cedergreen that she had been contacted the previous evening by the DOL and gave him a full accounting of her conversation with the DOL. (Tr. p. 253). Fleshner's report of her DOL conversation to Cedergreen accorded with his instructions that she report to him any contact by the DOL. (Tr. p. 256).

Cedergreen questioned Fleshner about the times studies, asking how the DOL knew about the time studies and why she had read the time studies to the DOL investigator. (Tr. p. 254). Cedergreen was agitated and very unhappy that Fleshner had cooperated with the Department of Labor investigator. (Tr. p. 255). Fleshner could see that Cedergreen was unhappy and asked him whether she was going to lose her job for cooperating with the DOL. (Tr. p. 255). Cedergreen said no, but, immediately after Fleshner left his office, she saw Cedergreen get on the phone and make a phone call. (Tr. p.255). Cedergreen admits he would have promptly notified Feigenbaum of this information. (Tr. pp. 123-124).

Later, at 3:12pm on May 22, 2003, Cedergreen sent an email to Feigenbaum informing her that Fleshner had come into his office and asked if he was going to fire her. (Tr. p. 412; L.F. Vol. II, p. 213). Cedergreen also wrote he had informed Fleshner that

they did not intend to fire her, but told Feigenbaum he would like to terminate Fleshner sooner rather than later and that if Feigenbaum did not object he intended to terminate Fleshner the next day on May 23, 2003. (L.F. Vol. II, p. 213). Feigenbaum responded that she had no objection to terminating Fleshner rather than laying her off and suggested that Cedergreen escort Fleshner out the next day. (Tr. p. 415; L.F. Vol. II, p. 213). On May 20, Feigenbaum had no objection to allowing Fleshner to apply for available jobs, but on May 22, the day after Fleshner spoke with the DOL, Feigenbaum and Cedergreen had decided to terminate Fleshner. (L.F. Vol. II, pp. 213-14).

Feigenbaum claimed her sudden change was due to alleged interpersonal issues between Fleshner and other staff members which had occurred more than a year prior. (Tr. pp. 416-417, 420-421; L.F. Vol. II, p. 213). Notably, during her deposition, Feigenbaum failed to identify the series of emails between her and Cedergreen. (Tr. p. 431). At her deposition, Feigenbaum was asked whether she was aware of any documents reflecting discussions between herself and Cedergreen regarding the timing of the elimination of the three job positions. (Tr. pp. 430-431). Feigenbaum answered no. (Tr. p. 431). And when PVI was asked in written discovery to identify all persons who participated in the decision to terminate Fleshner, PVI identified only Dr. Pepose and consultant Dawn Cavanaugh, failing to disclose Feigenbaum or Cedergreen. (Tr. p. 426; L.F. Vol. II, pp. 229, 250). That discovery response was signed and verified by Dr. Pepose. (L.F. Vol. II, p. 256).

On May 23, 2003, the day after Fleshner reported to PVI that she had cooperated

with the DOL investigation, Fleshner was terminated. (Tr. p. 256). Cedergreen came to Fleshner's office, shut the door and told Fleshner that her position was being eliminated. (Tr. pp. 256-257). Fleshner asked to be released from her non-compete agreement but was told no. (Tr. p. 257). Fleshner was then allowed to take just a few of her personal items from her desk and was escorted out of the building by Cedergreen. (Tr. p. 258).

At the time Fleshner was terminated, PVI had a number of open and available positions for which Fleshner was qualified. (Tr. p. 258). Several positions as a Technician (or Certified Ophthalmic Assistant) were vacant and Fleshner was certified for the position and had performed it for years. (Tr. pp. 260, 263). Positions at the front desk and in billing and coding were also vacant and Fleshner was fully qualified to perform all of those jobs. (Tr. pp. 262-264). However, Fleshner was not offered any of those positions and was not told she could apply for those jobs. (Tr. p. 264).

Fleshner was shocked and devastated by her termination. (Tr. p. 265). She cried a lot and often spent all day in bed. (Tr. p. 266). She was constantly tired and either slept too much or not at all. She was reluctant to leave the house. (Tr. pp. 266-267). Prior to her termination, Fleshner had been a social, fun-loving, outgoing and friendly person. (Tr. p. 351). After her termination, her close friend Patricia Fontana testified that she was not nearly as social, lost interest in her appearance and normal social activities and was anxious. (Tr. p. 252). Despite her emotional state, Fleshner immediately began looking for work. (Tr. pp. 266, 268). After three weeks, Fleshner was able to get a job outside of the health care field with St. Charles Magazine making substantially less than her position

with PVI. (Tr. p.269). However, she was not happy with the job. (Tr. p. 270).

#### **F. Evidence of Economic Issues at PVI**

PVI argued at trial that Fleshner was terminated because a reduction in its business spurred an analysis by a consultant who recommended certain jobs be eliminated. There is no dispute PVI experienced a fall off in business after September 11, 2001. (Tr. p. 217).

After the downturn in business, PVI hired Dawn Cavanaugh ("Cavanaugh") as a consultant to analyze the business and see where savings could be achieved. (Tr. pp. 288-389. Cavanaugh did an initial evaluation sometime in the middle of 2002 and made recommendations to Feigenbaum. (Tr. pp. 383, 389). Cavanaugh had no authority to implement these recommendations. (Tr. p. 383). Cavanaugh made most of her recommendations orally, some of which PVI accepted and implemented, while others were either rejected or simply not acted upon. (Tr. p. 622). In fact, not one of Cavanaugh's 2002 recommendations was accepted or implemented. (Tr. pp. 624-625).

The only written recommendation PVI was able to produce or identify was prepared by Cavanaugh on March 17, 2003. (Tr. p. 626). That document contained Cavanaugh's recommendation that three different jobs be eliminated, that of Office Manager Sharon Hardcastle, Optical Manager Kathy White, and Fleshner's position as Director of Patient and Community Outreach. (Tr. pp. 389-391). Cavanaugh strongly urged that the three positions be eliminated at the same time in order to minimize morale issues. (Tr. p. 393). In that recommendation, Cavanaugh stated that she would prepare a

transition plan for the elimination of the three positions. (Tr. p. 391). However, no written transition plan was ever prepared. (Tr. p. 391). After receiving the recommendation, PVI sent Fleshner to the expensive training seminar in San Francisco. (Tr. pp. 225-26). And when PVI terminated Fleshner, the other two positions had not been eliminated. (Tr. p. 394).

#### **G. PVI Enforces Fleshner's Non-Compete Agreement**

As part of her employment with PVI, Fleshner had signed a Confidentiality, Non-Solicitation and Non-Compete Agreement which prohibited her from working for refractive surgery practices. (Tr. pp. 271, 272; L.F. Vol. II, pp. 167-171). The Non-Compete Agreement prohibited Fleshner from working for:

“any endeavor which is substantially similar to [PVI], or competes with Corporation in its operation of the Business, including but not limited to, consulting practices engaged in the provision of refractive surgery marketing services, ophthalmic practices engaged in the provision of refractive surgery services, or optometric or ophthalmic practices or corporate entities and affiliates that have any financial or ownership interest in, or operate directly or through a subsidiary or franchisee, refractive surgery centers, within fifty (50) miles in any direction of any office of Corporation.” (Tr. p. 272; L.F. Vol. II, p. 168).

The Non-Compete Agreement hampered Fleshner’s job search because it prevented her from applying for employment with companies that did a large number of refractive surgeries. (Tr. p. 273).

After working at St. Charles Magazine for about four weeks, Fleshner was offered the position of Practice Administrator with Pernoud Eye Care, which was owned and operated by Doctors Flavious and Joan Pernoud, a husband and wife team practicing general ophthalmology, cataract surgery, corneal surgery, glaucoma surgery and ocular plastic surgery. (Tr. pp. 273, 276). The Pernoud's office was located in the City of St. Louis, more than twenty miles from PVI. (Tr. p. 543). Dr. Flavious Pernoud did less than twelve refractive surgeries per year compared to Dr. Pepose who performed over a hundred refractive surgeries per month. (Tr. p. 274). Before accepting a position with the Pernouds, Fleshner questioned them about the extent of their refractive surgery practice and consulted Chris Swenson, an attorney, who assured her that she could accept a position with the Pernouds without violating her non-compete with PVI. (Tr. pp. 274-275).

Fleshner was aware that other employees who had signed Non-Compete Agreements with PVI had left their employment and gone to work for other ophthalmologists. (Tr. p. 280). Some employees had even gone to work for direct competitors who had refractive surgery or Lasik practices and PVI had not pursued their non-competition agreements. (Tr. pp. 280-281). For example, Stephanie Olsen, a former employee at PVI, went to work first for an ocular plastic surgeon and then for Dr. Steven Wexler, a Lasik surgeon in direct competition with PVI, but PVI had not sought to enforce or pursue Ms. Olsen's non-compete agreement. (Tr. pp. 280-281).

After assuring herself that she could work for the Pernouds without violating the

Non-Compete Agreement, Fleshner accepted the position with the Pernouds and began on July 12, 2003. (Tr. p. 278). Fleshner was hired as a Front Office Administrator to be in charge of the business office with no involvement in marketing. (Tr. p. 545).

Soon after she began her new job with the Pernouds, Fleshner was contacted by Geraldine Rhodes, a former PVI employee, who informed her that the Peposes had found out where Fleshner was working and were going to sue her. (Tr. p. 279). The next day, Fleshner received a letter from Ira Blank ("Blank"), an attorney for Dr. Pepose. (Tr. p. 282). Fleshner called Blank who informed her that Dr. Pepose believed she was working for Dr. Larry Ganz in violation of her non-compete agreement. *Id.* Fleshner informed Blank that she was not employed with Dr. Ganz. However, Blank responded that she was lying and insisted that if Fleshner did not tell him where she was working, he would send the police after her. (Tr. pp. 283-284). Fleshner reluctantly told Blank she was working for the Pernouds and that they were not a refractive surgery or Lasik practice. (Tr. p. 284). Fleshner also informed Blank she had consulted Chris Swenson for a legal opinion and that she was not in violation of her non-compete. (Tr. p. 284). Blank however, insisted that, if the Pernouds were ophthalmologists, she was in violation of her agreement. (Tr. p. 284).

Soon after this telephone call, Blank sent a letter dated August 18, 2003 to the Pernouds. (Tr. p. 285; L.F. Vol. II, p. 186-7). This letter informed the Pernouds that Fleshner had signed a Non-Compete agreement and alleged that Fleshner was in violation of her Non-Compete Agreement. (Tr. p. 287). In response, the Pernouds retained Sherri

Strand ("Strand") at Thompson Coburn as legal counsel. (Tr. p. 289). Strand sent Blank a letter advising that Fleshner was working in a completely different position than she had been when employed by PVI and was not in any way involved with the limited refractive surgery Dr. Flavious Pernoud performed. (Tr. pp. 289-290; L.F. Vol. III, pp. 408-09). Strand's correspondence also stated that the Pernouds' practice was a general ophthalmology practice, did not widely advertise, was not engaged in refractive surgery marketing and was not a direct competitor of PVI. (Tr. p. 291). In response, Pepose filed a lawsuit against Fleshner in which PVI asked, in part, for an injunction to prohibit Fleshner from working for the Pernouds. (Tr. p. 292; L.F. Vol. II, pp. 198-207).

As a result of PVI's lawsuit, Fleshner was terminated by the Pernouds on September 23, 2003. (Tr. pp. 293-294). Dr. Flavious Pernoud felt that because of the Pernoud's legal exposure, he had no choice but to discharge Fleshner despite the fact that she was an excellent worker and the best employee they had had in their practice. (Tr. pp. 546-547). PVI dismissed its suit after Fleshner was fired.

Fleshner was devastated by the loss of her job and hurt, angry, frustrated and depressed, worrying that the Peposes would haunt her forever. (Tr. p. 296). In order to determine her legal rights under the Non-Compete Agreement, Fleshner retained her current counsel, Jerome Dobson, and filed suit for a declaratory judgment to determine whether her Non-Compete Agreement prohibited her from working for the Pernouds. (Tr. pp. 297-298). PVI understood Fleshner sought no money in that litigation, only the right to work for the Pernouds. (Tr. p. 458). In response, PVI filed a counterclaim asking

for attorneys fees and costs. (Tr. pp. 298, 459). As part of that litigation, PVI's attorney deposed the Pernouds. (Tr. p. 299). Both Feigenbaum and Dr. Pepose were present at those depositions. (Tr. p. 299, 459). Dr. Joan Pernoud testified that she did not perform any Lasik surgeries. (Tr. p. 300, 460). Dr. Flavious Pernoud testified that he performed less than ten Lasik surgeries per year. (Tr. p. 300, 461). Despite hearing this testimony, the Peposes continued to insist that Fleshner's non-compete prohibited her from working for the Pernouds. (Tr. p. 300, 462).

A hearing on Fleshner's declaratory judgment action was held on December 9, 2003 but was not completed. (Tr. pp. 300-301). However, as a result of that hearing, PVI agreed to a settlement in which Fleshner would be allowed to work for the Pernouds. (Tr. p. 302). The next morning, after the agreement was signed, Fleshner went back to work for the Pernouds. (Tr. p. 304). However, during the litigation, Fleshner was unemployed from September 24, 2003 until December 10, 2003, and she lost wages, benefits and incurred legal fees. (Tr. p.306).

#### **H. PVI's Credibility**

As in all jury trials, the jury was charged with assessing and evaluating the credibility of the witnesses and the motivations of those witnesses. Feigenbaum testified inconsistently on a number of occasions during the trial on several critical issues. Feigenbaum first testified that she was not aware that Fleshner had spoken with the DOL until Fleshner's deposition in 2006. (Tr. p. 441). However, Feigenbaum was present at the hearing on Fleshner's declaratory judgment action in December 2003 in which

Fleshner sought clarification of her legal rights under the non-compete agreement. (Tr. p. 441). The petition filed in that litigation specifically alleged that Fleshner was terminated shortly after PVI learned that Fleshner had spoken with an investigator from the DOL. (L.F. Vol. III, pp. 389-96; Tr. p. 442). When pressed on cross-examination, Feigenbaum acknowledged that she learned in late 2003 after Fleshner filed the declaratory judgment action that Fleshner had spoken with the DOL. (Tr. p. 442). Then later, in response to questioning by her own counsel, Feigenbaum acknowledged she had actually learned that Fleshner spoke with the DOL in July 2003 when Feigenbaum received the DOL report. (Tr. pp. 509, 537-539). Feigenbaum admitted at trial that learning an employee had been terminated two days after speaking with the DOL would be an event that she would have remembered and would have asked someone to look into. (Tr. p. 538). Despite the importance of this fact, in three hours of testimony Feigenbaum provided three different dates on which she allegedly first learned of this information. (Tr. p. 538).

Dr. Pepose's testimony regarding when he learned Fleshner had spoken with a DOL investigator strained credibility. Dr. Pepose testified during his deposition on February 10, 2007, that he first learned that day during his deposition that Fleshner had spoken with the DOL shortly before she was terminated. (Tr. p. 728). Yet Dr. Pepose acknowledged Fleshner's declaratory action was filed October 20, 2003 and contained the allegation that she was fired after she spoke with the DOL. (Tr. p. 764). Dr. Pepose was also present at the hearing in December 2003. (Tr. p. 730). However, he testified at trial that he never read the Petition in that litigation. (Tr. p. 730). Dr. Pepose also testified

that even though Fleshner filed this lawsuit in early 2004, he did not understand the basis for her allegations of public policy violation until the day his deposition was taken in February 2007. (Tr. p. 731).

Feigenbaum initially testified that in 2003 PVI was averaging 100 Lasik surgeries a month, or 1200 per year and PVI was receiving approximately \$1,600.00 per eye from the Lasik surgery. (Tr. pp. 452-453). Feigenbaum later acknowledged that the total fee is actually \$2,500.00 per eye, and the remainder of the fee went to the laser facility which is held by a trust established by Dr. Pepose's uncle, who is deceased. (Tr. p. 521).

Feigenbaum also stated that at the peak of business, before the 2001 downturn, Dr. Pepose was performing at most 2000 surgeries per year. (Tr. p. 452). However, Feigenbaum later admitted that Dr. Pepose performed 2070 surgeries in 2002 (after the downturn began) and that contrary to her claim of only 100 surgeries per month in 2003, Dr. Pepose performed 247 surgeries in January 2003, 146 in February, 118 in March, 147 in April, 111 in May and 134 in June 2003. (Tr. pp. 480-481, 519).

## **I. Jury Deliberations**

The trial commenced on Monday, October 1, 2007. (Tr. p. 1). The matter was submitted to the jury at 2:30 p.m. on Friday, October 5, 2007. (Tr. p. 827). The jury returned its verdict on liability at 5:30 p.m. on Friday, October 5, 2007, finding in favor of Fleshner and awarding actual damages of thirty thousand dollars \$30,000). (Tr. pp. 830-31). The jury also found PVI liable for punitive damages. (Tr. p. 831). Juror No. 9 voted against Fleshner on liability and whether punitive damages should be awarded. (Tr.

p. 832). Because it was late on Friday and Monday was a state holiday, the Court ordered the jury to return on Tuesday, October 9 to deliberate regarding punitive damages. (Tr. pp. 832-33). On Tuesday, October 9, the jury awarded Fleshner ninety five thousand dollars (\$95,000) in punitive damages. (L.F. 0478; Transcript on October 9, 2007.) Juror No. 9 voted in favor of Fleshner in awarding punitive damages of \$95,000. (L.F. 0478).

On October 26, 2007, PVI filed its Motion for New Trial-Juror Misconduct, based upon the affidavit of Juror No. 9 (L.F. 535-537; 539-40). Juror No. 9 alleges anti-Semitic comments were made during both phases of jury deliberations, both on Friday, October 5 and Tuesday, October 9. (L.F. 0535-0540). Prior to filing the Motion for New Trial-Juror Misconduct, there is no evidence that Juror No. 9 informed the trial court or any court personnel of alleged anti-Semitic comments in the jury room.

### **ARGUMENT**

#### **I. THE TRIAL COURT PROPERLY DENIED PVI'S MOTION FOR NEW TRIAL ON THE ISSUE OF JUROR MISCONDUCT BECAUSE JUROR TESTIMONY ALLEGING JUROR MISCONDUCT CANNOT BE USED TO IMPEACH A VERDICT.**

After the conclusion of the trial, PVI filed a motion for new trial based on the assertion that the unsupported affidavit of a single disgruntled juror should be taken at face value and used to set aside a jury verdict despite the clear and long standing common-law rule against the admission of jury testimony to impeach a verdict. *Baumle v. Smith*, 420 S.W.2d 341, 348 (Mo. 1967). In its Amended Substitute Brief, PVI argues that this Court

should hold that the trial court had the authority to conduct a hearing to determine whether expressions of bias occurred and order a new trial on those grounds. PVI's position stems from the erroneous assertion that the trial court believed it did not have the authority to conduct a hearing to determine if PVI had been denied a fair and impartial trial. (Amended Substitute Brief of Appellant p. 33). This position is not supported by the record below. During the hearing on PVI's motion for new trial, the Honorable Mark Siegel stated that if the remarks were made "they are of course reprehensible" but that "jury deliberations are sacrosanct" and that this is not the type of jury misconduct which allows for the setting aside of a verdict. (Dec. 14, 2007 Tr. p. 4). In the Order denying Defendant's Motion for New Trial, the trial court held:

"Defendant's Motion for New Trial based on juror misconduct is denied and the court declines to hold an evidentiary hearing on allegations of anti-semetic[sic] comments made during deliberation because as a matter of law, even if true, those allegations do not constitute juror misconduct justifying a new trial pursuant to Rules 78.04 and 78.05 RSMO."

(Appendix to Appellant's Amended Substitute Brief, p. A10).

Judge Siegel did not assert he had no authority to order a new trial or hold a hearing. Instead, his Order clearly states that even if true the allegations are not sufficient to overcome the longstanding rule against allowing jurors to impeach their own verdict.

### **Standard of Review**

A motion for new trial based on allegations of juror misconduct is left to the sound

discretion of the trial court. *Travis v. Stone*, 66 S.W.3d 1, 3 (Mo. banc 2002). The action of a trial court in ruling on a motion for new trial based on the ground of juror misconduct will not be interfered with on appeal absent a showing of an abuse of that discretion. *Baumle*, 420 S.W.2d at 341; *Middleton v. Kansas City Public Service Company*, 348 Mo. 107, 152 S.W.2d 154 (1941); *Kelley v. Prince*, 379 S.W.2d 508, 513 (Mo. 1964); *Dysart-Cook Mule Company v. Reed & Heckenlively*, 114 Mo.App. 296, 89 S.W. 591 (1905).

In its brief to the Missouri Court of Appeals, PVI erroneously asserted that the standard of review is de novo. (Appellant's Brief, p. 33). Interestingly, the Substitute Brief of Amicus Curiae Anti-Defamation League in support of PVI's position on the issue of juror misconduct disagrees with PVI and correctly states that the applicable standard is whether the trial court abused its discretion. (Substitute Brief of Amicus Curiae Anti-Defamation League, p. 13). In the Amended Substitute Brief filed with this Court, PVI continues to assert that the standard of review is de novo. PVI argues that the standard of review is de novo, because the "trial court ruled as a matter of law that jurors' expression of Anti-Semitic bias during deliberation could not constitute juror misconduct justifying a new trial and declined to hold a hearing." (Amended Substitute Brief, p. 33). This assertion twists the Judge's Order which only states that "as a matter of law, even if true, those allegations do not constitute juror misconduct justifying a new trial." This is quite a different holding than the one PVI is arguing was made. PVI asserts the judge's position was that juror bias could not constitute misconduct whereas it is clear that Judge Siegel

was holding that this particular conduct, even if assumed to be true, is not sufficient to overturn the verdict. Given the trial court's ruling, the standard of review is whether the trial court abused its discretion. *Baumle*, at 341. PVI, in asserting that the review is de novo, continues to rely on *Brown v. Brown*, 152 S.W.3d 911, 914 (Mo. App. W.D. 2005). However, *Brown* did not involve juror misconduct and is inapplicable. *Brown* addressed whether the judge in a court-tried matter had erroneously ruled on points of law dealing with the imposition of a constructive trust. *Id.*

PVI also cites *Catlett v. Illinois Cent. Gulf R.R. Co.*, 793 S.W.2d 351 (Mo. 1990) in support of the de novo standard. However *Catlett* dealt with a trial court's denial of a motion to strike a venire person for cause which, as argued infra, is subject to an entirely different standard. Nowhere in *Catlett* is de novo review even mentioned. Instead the court there held that denial by a trial court of a legitimate challenge to excuse a prejudiced venire person may constitute reversible error. *Id.* at 353.

Finally, PVI cites *Dorsey v. State of Missouri*, 156 S.W.3d 825, 833 (Mo. App. W.D. 2005) for the proposition that in juror misconduct issues, reviewing courts do not always defer to the trial court's assessment of whether a new trial should be ordered. *Dorsey* involved extraneous evidence brought into jury deliberations which is a different standard than juror misconduct involving the internal deliberation of the jurors. *Id.* at 833.

### **Argument**

PVI's argues that juror misconduct tainted the verdict below. While Amicus claims

this is an issue of first impression, and both Amicus and PVI attempt to shoe-horn the facts into Missouri case law dealing with the introduction of extrinsic evidence into jury deliberations, Missouri law on the real issue is quite clear. The general rule in Missouri is that a juror's testimony about jury misconduct allegedly affecting deliberations may not be used to impeach the jury's verdict. *Travis*, 66 S.W.3d at 4. “[A] juror’s testimony or affidavit may not be used to impeach the verdict as to misconduct inside or outside the jury room whether before or after the jury is discharged.” *Stuart Stotts v. Melissa Meyer*, 822 S.W.2d 887 (Mo.App. 1991). Citing: *McDaniel v. Lovelace*, 439 S.W.2d 906, 909 (Mo. 1969); *State v. Babb*, 680 S.W.2d 150, 152 (Mo. banc 1984); *Gardner v. Reynolds*, 775 S.W.2d 173, 177 (Mo. App. 1989); *Shearin v. Fletcher/Mayo/Associates*, 687 S.W.2d 198, 203 (Mo. App. 1984). This rule applies whether the juror concurred in or dissented from the verdict. *Reed v. Sale Mem. Hosp. and Clinic*, 741 S.W.2d 819, 824 (Mo.App. 1987); *see also Wingate v. Lester E. Cox Med. Ctr.*, 853 S.W.2d 912, 916 (Mo. banc 1993).

This rule, which has been adopted by Missouri courts since as early as 1883, is known as the Mansfield Rule and was based on a ruling in 1785 in England by Lord Mansfield in *Vaise v. Delaval*, 1 T.R. 11, 1785. *McDonald v. Pless*, 238 U.S. 264, 268 (1915). This law has been almost universally adopted in common-law in nearly every jurisdiction in the United States and in a number of other countries. *Id.*, and *see Tanner v. United States*, 483 U.S. 107 (1987). The Mansfield rule is based on the clear necessity of shielding jury deliberations from public scrutiny and reexamination. The policy behind the rule is eloquently set out in *McDonald v. Pless* where the U.S. Supreme Court noted:

But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation -- to the destruction of all frankness and freedom of discussion and conference.

*Id.* at 267-268.

Numerous cases have outlined public policy reasons for the rule against allowing juror testimony to impeach jury verdicts in addition to those set out in the *McDonald* ruling. In addition to disrupting full and frank discussion during jury deliberations, community trust in the system that relies on the decisions of a jury of peers would be undermined. *Tanner*, 483 U.S. at 121. There would be no finality to verdicts or any end to litigation if verdicts could be set aside with such ease. *Baumle*, 420 S.W.2d at 348. No verdict would be safe and allowing such inquiries would open the door to harassment of jurors by every unhappy litigant. *McDonald*, 238 U.S. at 268.

This Court has interpreted the Mansfield Rule to mean that “no one is competent to impeach a verdict by the making of an affidavit as to matters inherent in the verdict.”

*Baumle*, 420 S.W.2d at 348. Matters inherent in the verdict include: that a juror did not understand the verdict, that he did not join the verdict, that he voted because he misunderstood the evidence, law or witness statements or any other matter “resting alone in the jurors’s breast.” *Id.* The rationale behind this rule is set forth clearly in *Baumle*:

A juror who has reached his conclusions on the basis of evidence presented for his consideration may not have his mental processes and innermost thoughts put on a slide for examination under the judicial microscope. Proof of such a fact is excluded for at least two reasons: first, because there would be no end to litigation if verdicts could be set aside because one juror did not correctly understand the law or accurately weigh the evidence; second, the proof of his mental process is locked in the breast of the juror, and is not capable of refutation or corroboration.

*Baumle*, 420 S.W.2d at 348. (Citations omitted).

The facts in this case are a clear example of the type of internal mental process which this Court has expressly determined should not be examined through juror affidavits or testimony. In its motion for new trial, PVI sought to introduce two affidavits. The first, an affidavit by Juror No. 9 alleging that during jury deliberations, another juror made anti-Semitic comments is clearly an affidavit by a juror seeking to impeach the verdict based on the mental processes of the jury. The second affidavit is the affidavit of counsel for PVI relating what he was told by another juror about the mental processes of the jury. This

second affidavit should not only be disregarded due to the clear rule against allowing a juror to impeach a verdict but also because it is hearsay and inadmissible.<sup>3</sup>

PVI looks to several sources in support of its novel position. First, PVI looks to Missouri case law dealing with a trial court's refusal to strike a venire person who has indicated bias or prejudice during voir dire or lied in response to questioning during voir dire. As set out below, the standard, rationale and public policy behind reviewing the events during voir dire are completely different from that applied where a party seeks to delve into the internal debates within the jury room. Second, PVI turns to cases where extrinsic evidence is brought into jury deliberations. These cases have long been held to be an exception to the Mansfield rule, but do not apply where, as here, internal deliberations are at issue.

**A. Cases Dealing with a Trial Court's Refusal to Strike Clearly Prejudiced Jurors During Voir Dire or Reviewing Deliberate Deception by Jurors During Voir Dire Do Not Provide Guidance in Reviewing Impeachment**

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<sup>3</sup>PVI alleges its evidence of juror misconduct consisted of "statements by two jurors," Amended Substitute Brief, p. 46, and that Juror's No. 9's allegations of anti-Semitic comments were corroborated by another juror. *Id.* at 35. PVI proffered no admissible evidence to corroborate Juror No. 9's allegations, only an affidavit from its lead trial attorney. Not one of the other eleven jurors gave PVI an affidavit supporting Juror No. 9's claims.

### **of a Jury Verdict by a Juror Affidavit.**

PVI asserts that this Court should look to cases dealing with empaneling juries for guidance on the issue of juror misconduct. PVI's argument is misguided. First, as noted above, Missouri case law already provides guidance on the issue of impeachment by a juror of the jury verdict. Second, PVI looks for guidance to cases where jurors were either not stricken for cause after expressing clear bias or prejudice against a party or where jurors lied when questioned on voir dire about their biases or prejudices. These cases do not provide guidance where, as here, the bias allegedly held by a single juror was not raised in voir dire questioning. Nor is there any issue in this case regarding the trial court failing to strike a panel member for cause.

PVI cites *Catlett v. Illinois Central Gulf Railroad*, 793 S.W. 2d 351 (Mo. 1990) and *Brown v. Vollins*, 46 S.W.3d 650 (Mo. App. 2001) as examples of the importance of juror impartiality. However, the circumstances in *Catlett* and *Brown* have no relationship to the issues in this case. In both cases, the issue before the appellate court was the trial judge's failure during voir dire to address expressed prejudices by the jurors. In *Catlett* the trial judge refused to strike for cause a juror who stated unequivocally that she could not be impartial. *Catlett*, 793 S.W. 2d at 353. Similarly in *Brown* the appellate court overturned a trial court's refusal to strike for cause a juror who stated she could not be fair to one of the parties. PVI then makes a leap from expressed prejudices to unexpressed prejudices and states that if a juror in this matter had revealed religious-based prejudices the trial court would have allowed a strike for cause; therefore, PVI reasons, any juror with a hidden bias

was also not qualified to serve and the verdict should be set aside. PVI's suggestion not only departs from clearly established law, but would open a Pandora's box and allow every jury verdict to be questioned on the possible biases of every juror, whether a party raised questions about that bias during voir dire or not. The post-trial ferreting out of possible connections, biases and previous experiences would be endless. This is exactly the prospect the U.S. Supreme Court ominously predicted when they explained the reasoning for the Mansfield Rule in *McDonald*.

PVI notes that the constitutional right to a fair and impartial jury entitles both parties to unbiased jurors whose experiences will not prejudice the determination of the trial. *Wemott v. Tonkens*, 26 S.W.3d 303, 307 (Mo. App. 2000). To allow the parties to determine which jurors may not be qualified to sit in judgment on the case before them, voir dire is permitted and the jurors have the duty to fully, fairly and truthfully answer the questions asked. *Id.* A party may then raise the issue of non-disclosure of information and the court determines first, whether the non-disclosure was intentional or unintentional in order to determine whether the non-disclosure was prejudicial. *Brines v. Cibis*, 882 S.W.2d 138, 139 (Mo. Banc 1994). However, non-disclosure, whether intentional or unintentional can only occur if the question is actually asked upon voir dire. *Id.* at 139. No questions were asked on voir dire regarding the jurors' religious or ethnic prejudices. PVI does not argue that non-disclosure of information during voir dire, either intentional or unintentional is an issue in this case as no questions regarding the religious or ethnic background of any party was posed during voir

dire.<sup>4</sup>

**B. Juror Misconduct Dealing with Extrinsic Evidence Is a Long Standing Exception to the Mansfield Rule Which Does Not Apply Where Pvi Seeks to Reveal the Internal Deliberations of the Jury Room.**

Exceptions to the common-law Mansfield Rule are recognized only in situation, in which an extraneous influence is alleged to have affected the jury. *Tanner*, 483 U.S. at 117. PVI and Amicus seek to expand the definition of extraneous evidence to include juror statements of bias or prejudice. Such an expansive definition is not supported by Missouri case law or by public policy. In order to fall under the exception to the Mansfield Rule as defined by Missouri courts, juror testimony must demonstrate that extrinsic evidentiary facts not properly introduced at trial were interjected into the jury's deliberations. *Neighbors v. Wolfson*, 926 S.W.2d 35, 37 (Mo.App. 1996). It is not sufficient to merely allege that jurors acted on improper motives, reasoning, beliefs or mental operations as these are matters

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<sup>4</sup> Both PVI and Amicus fail to explain any relationship between the anti-Semitic comments allegedly made by a juror and any evidence presented at trial or in the record regarding the religious or ethnic background of Pepose or Feigenbaum. Whether Pepose or Feigenbaum are in fact Jewish is not part of the record at trial or on appeal. It is further not clear whether PVI is arguing that the jury had some knowledge on this matter or simply made assumptions and on what basis the jury might have made such an assumption.

inherent in the verdict and are not subject to impeachment by juror testimony. *McBride v. Farley*, 154 S.W.3d 404, 407 (Mo. App. 2004). Extrinsic evidentiary facts enter a jury's deliberations when, for example, a juror visits an accident scene without the court's authorization and then shares his observations with his fellow jurors. *Neighbors*, 926 S.W.2d at 37 (citations omitted) (quoting *Baumle*, 420 S.W.2d at 348); *Stotts*, 822 S.W.2d at 889-91; *see also Douglass v. Missouri Cafeteria, Inc.*, 532 S.W.2d 811, 813 (Mo.App. 1975); *Thorn v. Cross*, 201 S.W.2d 492, 497 (Mo.App. 1947).

*Dorsey v. State of Missouri*, 156 S.W.3d 825 (Mo. App. 2005) provides an excellent example of juror misconduct involving extraneous evidence. In *Dorsey* the defendant was charged with a number of crimes, including kidnaping, sexual abuse and attempted forcible rape. *Id.* at 827. A factual question raised in the case was whether his victim had gotten lost on the street where the defendant committed the crime or had in fact been down the street for the purpose of purchasing drugs or eliciting sex. *Id.* at 827. A juror in the case took it upon himself, despite the trial court's instructions, to visit the scene of the crime and survey the street on which the incident occurred in order to determine how hard it would be to get lost in that area. *Id.* at 828. The juror then reported back to the other jurors on his findings. *Id.* The court held that this constituted extraneous evidence. *Id.* at 832.

In contrast, this case involves statements allegedly made by a juror, within the jury room, during jury deliberations, about the juror's thoughts and personal feelings about the evidence presented and the parties. While the statements, if made, were indeed reprehensible, they clearly fall within the category of improper motives, reasoning, beliefs

or mental operations which are inherent in the verdict and are not subject to impeachment by juror testimony. *McBride*, 154 S.W.3d at 407.

**II. FLESHNER’S CLAIM FOR WRONGFUL TERMINATION IS NOT PREEMPTED BY THE FAIR LABOR STANDARDS ACT BECAUSE IT DOES NOT PROVIDE A REMEDY WHICH FULLY COMPREHENDS AND ENVELOPS AVAILABLE COMMON LAW REMEDIES**

**A. The Fair Labor Standards Act Does Not Provide a Complete Range of Remedies in That it Does Not Allow for Punitive Damages under the Controlling Law.**

PVI ignores important case law as it asks this Court to find that the Fair Labor Standard Act (“FLSA”) preempts the public policy exception under Missouri common law because the FLSA allegedly provides for punitive damages. In its brief, PVI does not even acknowledge that a Missouri federal district court has held that punitive damages are not available under the FLSA or that the Missouri public policy exception is not pre-empted by the FLSA. *Huang v. Gateway Holdings*, 520 F.Supp. 2d 1137 (E.D. Mo. 2007). In *Huang*, U.S. District Judge E. Richard Webber of the Eastern District of Missouri determined that punitive damages are not available under the FLSA.<sup>5</sup> Judge

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<sup>5</sup>In its brief to the Court of Appeals, PVI conceded that the issue of whether the FLSA preempts Missouri's public policy exception had already been decided by the United States District Court for the Eastern District of Missouri. Appellant’s Brief to

Webber held that “[t]he Missouri public policy exception provides a narrow safeguard, but it is a narrow safeguard that is not enveloped by the FLSA.” *Id.* at 1145. In so ruling, the court noted that the standard in Missouri as to whether the public policy exception applies is not that no other remedy is available, but instead is “whether the ‘statutory remedy fully comprehends and envelops’ available common law remedies.” *Id.* at 1142, citing *Dierkes v. Blue Cross and Blue Shield of Mo.*, 991 S.W.2d 662, 668 (Mo. banc 1999); *Shawcross v. Pyro Products, Inc.*, 916 S.W.2d 342, 345 (Mo. Ct. App. 1995); *Gentry v. Home Depot, Inc.*, 2007 U.S. Dist. LEXIS 17469, 2007 WL 781829, at \*3 (W.D. Mo. 2007). The court in *Huang*, citing numerous Missouri cases noted that:

These decisions recognize that the Missouri public policy exception is a narrow safeguard and declare that a statute, such as the FLSA, will not displace common law remedies in the absence of language to that effect unless the statutory remedy fully comprehends and envelops the remedies provided by common law.

*Id.* at 1142. (Citations omitted).

In addition to not providing for punitive damages, the court also noted that FLSA does not provide for pain or suffering or emotional distress damages. *Id.*, citing *Tucker v. Monsanto Co.*, 2007 U.S. Dist. LEXIS 41806, 2007 WL 1686957 (E.D. Mo. 2007)(pain

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Missouri Court of Appeals, p. 66, ftn. 8. That acknowledgment is absent in PVI’s brief to this Court.

and suffering and emotional distress damages are likewise not recoverable. *Tucker* at 10, 11.)

The District Court's opinion in *Huang* accords with the decision of the Eleventh Circuit Court of Appeals *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 934 (11<sup>th</sup> Cir. 2000), cert denied, 532 U.S. 975, 121 S.Ct. 1609, 149 L.Ed.2d 474 (2001). In *Snapp*, the Eleventh Circuit, after a thorough analysis, held that punitive damages are not available for retaliatory discharge under the FLSA. *Id.* at 928.

The public policy exception protects Missouri employees where there is no fully adequate remedy to protect the interests of society. The FLSA does not provide a fully adequate remedy which would protect the public policy of Missouri because punitive damages and damages for emotional distress are not available. Therefore Fleshner's claim is not preempted by the FLSA.

**B. A Federal District Judge Has Already Rejected PVI's Assertion That Federal Subject Matter Jurisdiction Existed.**

After Fleshner filed her claim in St. Louis County Court, PVI filed a Notice of Removal seeking to recharacterize Fleshner's claim as a claim under the FLSA. In its Notice of Removal, PVI did not contend that plaintiff's public policy claim was preempted by the FLSA or that the statutory remedy in the FLSA displaces Missouri's common law remedy. *Id.* Rather, PVI argued that Fleshner's public policy claim was a "sham" and that plaintiff's action was an FLSA retaliation claim, not based on Missouri's minimum wage law. L.F. 0017-18. Fleshner moved to remand the matter to state court.

PVI re-raises this assertion in its appeal. In making this argument, PVI misinterprets the public policy exception to the employment at will doctrine and improperly attempts to recharacterize Fleshner's claim as a federal claim. Because there are no federal issues involved in this case, the federal court did not have subject matter jurisdiction and Fleshner's claim is not preempted by the FLSA. Fleshner does not and has not ever claimed that her wrongful discharge claim is based on the FLSA.

PVI's argument was roundly rejected by United States District Judge Donald J. Stohr. In an Order issued August 25, 2004 granting Fleshner's Motion to Remand, Judge Stohr held that:

[Fleshner] alleges facts which might constitute a violation of federal law, but she invokes and seeks relief only under state law. [Fleshner] is the master of her own claims, and is free to choose to assert only state law claims, even where there might exist federal causes of action based on the same factual allegation. L.F. 0030.

Order, p.2.

It is clear from the face of Fleshner's Petition that she is not asserting a claim that was created by federal law. Her wrongful discharge claim is a common law claim created by Missouri courts. *See Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 878 (Mo.App.W.D. 1985) (recognizing cause of action for wrongful discharge in violation of public policy). It is telling that PVI did not allege preemption as a basis for removal or that the FLSA's statutory remedy displaces Missouri's common law remedy when PVI

removed the matter to federal court. At that time, the federal court could and likely would have ruled that punitive damages are not available under the FLSA and that because of this, the FLSA's statutory remedy does not comprehend and envelope Missouri's common law remedy. *Dierkes*, 991 S.W.2d at 668.

**III. THE TRIAL COURT DID NOT ERR IN DENYING PVI'S MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS FLESHNER OFFERED SUBSTANTIAL EVIDENCE TO SUPPORT HER CLAIM FOR TERMINATION IN VIOLATION OF PUBLIC POLICY IN THAT THE MISSOURI MINIMUM WAGE LAW EXPRESSES A PUBLIC POLICY AGAINST TERMINATING EMPLOYEES WHO COOPERATE IN GOVERNMENT INVESTIGATIONS AT BOTH THE STATE AND FEDERAL LEVEL.**

The trial court properly denied PVI's motion for directed verdict at the close of all the evidence and motion for judgment notwithstanding the verdict. The standard of review of the denial of both motions is essentially the same. *Giddens v. Kansas City S. Ry. Co.*, 29 S.W.3d 813, 818 (Mo. 2000). "Judgment notwithstanding the verdict for the defendant is appropriate only if the plaintiff fails to make a submissible case." *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. 1996). "To make a submissible case, the plaintiff must present substantial evidence for every fact essential to liability." *Cuslidge v. Union Pac. R.R. Co.*, 197 S.W.3d 206, 209 (Mo. App. E.D. 2006). "Substantial evidence is that which, if true, has probative force upon the issues, and from

which the trier of fact can reasonably decide the case.’” *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 814 (Mo. 2003) (quoting *Zeigenbein v. Thornsberry*, 401 S.W.2d 389, 393 (Mo. 1966)).

“In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict.” *Giddens*, 29 S.W.3d at 818. “The jury is the sole judge of the credibility of the witnesses and the weight and value of their testimony and may believe or disbelieve any portion of that testimony.” *Altenhofen v. Fabricor, Inc.*, 81 S.W.3d 578, 584 (Mo. App. W.D. 2002). “A judgment notwithstanding the verdict is a drastic action, and will only be granted when reasonable persons could not differ on a correct disposition of the case.” *Payne v. Cornhusker Motor Lines, Inc.*, 177 S.W.3d 820, 832 (Mo. App. E.D. 2005).

PVI argues that the trial court erred in denying its Motion for New Trial in that Fleshner failed to state a claim upon which relief can be granted because her claim is based on a statute which does not apply to her. PVI appears to argue that Fleshner must show that PVI violated a specific statute and since Fleshner is not covered by the Missouri Minimum Wage Law she has therefore not stated a claim upon relief can be granted. PVI misstates the standard for a submissible public policy claim. Fleshner does not base her claim on a violation of the Missouri Minimum Wage Law but instead bases her claim on violation of Missouri public policy as clearly expressed by the Missouri

Minimum Wage Law § 290.505 et. seq. Mo. Rev. Stat. The Missouri Minimum Wage Law clearly expresses the public policy of Missouri which encourages employees to participate in investigations by government agencies into possible violations of law by employers. Fleshner did not file her claim under the Missouri Minimum Wage Law and did not need to show it was violated. She must show that she was acting in a manner that Missouri public policy encourages and was terminated because of her conduct.

In *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932 (Mo.App.W.D. 1998), the court held that the plaintiff in a wrongful discharge case is “not required to show that his discharge was explicitly prohibited by statute.” *Id.* at 939. *See also Kirk, supra*, 851 S.W.2d at 621 (holding that the plaintiff was entitled to pursue her wrongful discharge claim “without reliance on any direct violation of ‘law or regulation’” by the plaintiff). Thus, Fleshner can rely upon § 290.525 as a source of public policy without showing that PVI’s conduct violated that particular statute. To make a submissible claim for wrongful discharge in violation of public policy, Fleshner need only present “proof of violation of a constitutional provision, a statute, a regulation, or other clear mandate of public policy,” and “[t]his requirement can be met by proof that the discharge itself was specifically prohibited by constitution, statute, or regulation.” *Porter*, 962 S.W.2d at 938. Section 290.525(7) clearly expresses the public policy of Missouri that an employer may not discharge an employee who testifies or is about to testify in proceedings concerning potential wage and hour violations by the employer. This public policy is expressed so strongly by the Missouri legislature that the violation of this statute constitutes a criminal

offense. The statute provides that it is a Class C misdemeanor for an employer to engage in:

"Discharging or in any other manner discriminating against any employee who has notified the director that he has not been paid wages in accordance with the provisions of sections 290.500 to 290.530, or who has caused to be instituted any proceeding under or related to sections 290.500 to 290.530, or who has testified or is about to testify in any such proceeding."

Mo. Rev. Stat. § 290.525.

Fleshner testified that she spoke to an investigator from the United States DOL regarding PVI's failure to pay its employees overtime compensation. She reported that conversation to Cedergreen, PVI's practice administrator on May 22, 2003. That same day, Cedergreen reported his conversation with Fleshner to Feigenbaum, Dr. Pepose's wife and a decision maker at PVI. A series of emails following Cedergreen's report to Feigenbaum shows a change in PVI's plans for Fleshner's job and an intent to fire Fleshner rather than lay her off and offer her an alternative position. On May 23, 2003 Fleshner was terminated and was not offered any other position by PVI.

Fleshner's Petition also alleged that PVI's failure to pay overtime compensation violated Mo. Rev. Stat. § 290.505, which states that "[n]o employer shall employ any of his employees for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Mo.Rev.Stat. §

290.505.1. It is clear that § 290.505 involves a clear mandate of public policy. “Public policy has been defined as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against public good.”

*Petersimes v. Crane Co.*, 835 S.W.2d 514, 515 n.1 (Mo.App.E.D. 1992). “Public policy finds its sources ‘in the letter and purpose of a constitutional, statutory or regulatory provision or scheme.’” *Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617, 622

(Mo.App.S.D. 1993) (quoting *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 871

(Mo.App.W.D. 1985)). The Missouri legislature has unequivocally demonstrated that §

290.505 involves a clear mandate of public policy because the legislature has made it a

criminal offense for an employer to interfere with the enforcement of this statute. *See*

Mo. Rev. Stat. § 290.525. The public policy of Missouri prohibits discharging an

employee who testifies or is about to testify in a proceeding by a governmental agency to

enforce the laws requiring payment of overtime. Missouri’s public policy is the same,

regardless of whether the proceeding is initiated by the Missouri DOL and Industrial

Relations or the U.S. DOL.

In order to establish a claim for wrongful discharge of public policy Fleshner had to show that: 1) she was acting in a manner public policy would encourage; 2) she was

discharged; and 3) she was discharged because she was acting in a manner public policy

would encourage. *Brenneke v. Dpt. of Missouri*, 984 S.W.2d 134 (1993), *Dunn v.*

*Enterprise Rent-A-Car Company*, 170 S.W.3d 1 (Mo. App. 2005). As noted above,

Fleshner did not have to show violation of a specific law or statute but needed only show

that she was acting in a way that Missouri public policy would encourage. The public policy of Missouri as expressed in the Missouri Minimum Wage Law clearly encourages employees to speak freely with government officials investigating violations of wage and hour laws.

**IV. THE TRIAL COURT DID NOT ERR IN SUBMITTING A VERDICT  
DIRECTOR UTILIZING THE BECAUSE OF STANDARD.**

The Court of Appeals held that the trial court erred by giving a verdict director utilizing a because of rather than exclusive causation standard for wrongful termination in violation of public policy. *Fleshner v. Pepose Vision Inst.*, No. ED90853, 2009 Mo. App. LEXIS 27, at \*12-13 (Mo. App. E.D. Jan. 20, 2009). If this Court adopts an exclusive causation standard for public policy claims, wrongful activity by employers will go unreported, unremedied, and unsanctioned. This Court should reject the exclusive causation standard, adopt a contributing factor standard, and affirm the trial court verdict. In the alternative, this Court should adopt the because of standard used by the lower court.

**Standard of Review**

Whether a jury is properly instructed is a matter of law subject to *de novo* review by the Court. *Hampton*, 2008 Mo. App. LEXIS 22, at \*5-6. In reviewing a challenge to the lower court's refusal to submit an instruction, the Court should reverse only if it determines that error resulted in prejudice and "materially" affected the merits of the action. *Marion v. Marcus*, 199 S.W.3d 887, 893-894 (Mo. App. W.D. 2006); *see also*

Rules 70.02(c) and 84.13(b). To reverse a jury verdict on grounds of instructional error, PVI must show that: 1) the instruction as submitted misled, misdirected, or confused the jury, and 2) prejudice resulted from the instruction. *Cornell v. Texaco, Inc.*, 712 S.W.2d 680, 682 (Mo. banc 1986); *Judy v. Arkansas Log Homes, Inc.*, 923 S.W.2d 409, 420 (Mo. App. W.D. 1996). Prejudice results when the jury is directed to make a finding on an essential element under a lesser standard than the law requires. *See Schoor v. Wilson*, 731 S.W.2d 308, 313-14 (Mo. App. W.D. 1987). The burden of proof rests with the party alleging the error. *Cornell*, 712 S.W.2d at 682.

Furthermore, “instructional error, even if clear and obvious, is rarely found to result in manifest injustice or a miscarriage of justice requiring reversal for plain error.” *State v. Smith*, 154 S.W.3d 461, 465 (Mo. App. W.D. 2005). “For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict.” *State v. Deck*, 994 S.W.2d 527, 540 (Mo. 1999). “The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for . . . review.” *Smith*, 154 S.W.3d at 464.

### **Argument**

Fleshner submitted two verdict directors at trial. Fleshner first submitted an instruction based on Missouri Approved Instruction (“MAI”) 31.24 using the contributing factor standard approved for cases under the Missouri Human Rights Act (“MHRA”). In the alternative, Fleshner submitted an instruction using a because of standard. (Tr. pp.

776-777; App. pp. 1-2).<sup>6</sup> The verdict directed given by the trial court required plaintiff to prove that she was terminated because of her protected activity. L.F. 0465. PVI argues that the trial court erred in giving the jury a verdict directed utilizing the because of standard rather than the exclusive causation standard. Fleshner urges this Court to adopt a contributing factor causation standard in public policy cases, or alternatively, a because of causation standard.

**A. This Court Should Reject The Eastern District’s Exclusive Causation Standard and Instead Apply A Contributing Factor or Because Of Causation Standard In Public Policy Discharge Cases.**

The issue of which standard applies in public policy cases is not entirely clear. The districts of the Missouri Court of Appeals have disagreed about the appropriate causation standard to apply in public policy discharge cases.

**1. The Exclusive Causation Standard Employed by the Eastern District in Public Policy Discharge Cases Is Based on the Law Applicable to Workers Compensation Discharge Cases.**

The Eastern District has applied an exclusive causation standard to claims for wrongful termination in violation of public policy. *Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147, 150 (Mo. App. E.D. 1995); *See, e.g., Fleshner*, No. ED90853, 2009 Mo. App. LEXIS 27, at \*12-13, *Bell v. Dynamite Foods*, 969 S.W.2d 847,

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<sup>6</sup>References to the page numbers of the Appendix shall be designated as App. p. \_\_\_\_\_.

852 (Mo. App. E.D. 1998). In *Lynch*, the Court of Appeals relied on *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 878 (Mo. App. W.D. 1985), *Clark v. Beverley Enterprises-Missouri, Inc.*, 872 S.W.2d 522, 524-527 (Ct. App. W.D. 1994), and *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. banc 1984), to support its holding that exclusive causation is the proper standard for public policy claims. 901 S.W.2d at 151-152. *Boyle* held that the plaintiff in a public policy action must show that the employer discharged the employee *because* the employee engaged in the whistle blowing activity. 700 S.W.2d at 878. *Clark* did not address whether exclusive causation is the proper standard. 872 S.W.2d at 525-527. Rather, the issue in *Clark* was whether requiring proof of damages in the verdict director was error. *Id.* at 526. In *Hansome*, a workers' compensation retaliatory discharge case arising under Mo. Rev. Stat. § 287.780, this Court considered whether plaintiff established an exclusive causal relationship for his discharge at trial. 679 S.W.2d at 275. The *Lynch* case lacked additional reasoning or authority for adopting a standard as stringent as exclusive causation in public policy cases.

In this case, the Court of Appeals relied on *Lynch* and *Crabtree v. Bagby*, 967 S.W.2d 66 (Mo. 1998), in holding that exclusive causation is the proper standard. *Fleshner*, No. ED90853, 2009 Mo. App. LEXIS 27, at \*13-14. *Crabtree v. Bagby*, like *Hansome*, was a case involving a retaliatory discharge claim arising under a provision of the Workers' Compensation Act, Mo. Rev. Stat. § 287.780. 967 S.W.2d at 69. *Crabtree* held that the plaintiff in such an action must show that the exclusive cause of plaintiff's

discharge was the filing of the workers' compensation claim. *Id.* at 71. Under § 287.780:

No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter [the Workers' Compensation Act]. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

The exclusive causation requirement adopted in *Hansome* and *Crabtree* was founded on, and limited to, this statutory language. Moreover, in *Crabtree* this Court made clear that it sought to strictly construe § 287.780 because the central purpose of the Workers' Compensation Act is to provide benefits for work-related injuries and not to provide job security. *Crabtree*, 967 S.W.2d at 72. Thus, the Court's decision to strictly construe this statutory provision and adopt the exclusive causation standard was largely based upon, and closely tied to, the legislative purpose for the Workers' Compensation Act. Accordingly, the Court's application of the exclusive causation standard in *Crabtree* and *Hansome* is specific to § 287.780 and is not applicable in other contexts.<sup>7</sup> Because public policy discharge claims arise in tort and not by statute, there is no legislative purpose compelling the application of the exclusive causation standard in common law

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<sup>7</sup>In addition, as pointed out by then-Judge White, the language of § 287.780 does not compel, or even suggest, that exclusive causation is required for workers' compensation retaliation claims. *See Crabtree*, 967 S.W.2d at 74 (White, J., dissenting).

public policy cases.

**2. The Western District Suggests a Contributing Factor Standard Is Appropriate in Public Policy Discharge Cases Because Public Policy Claims Arise under Tort Law, Which Rejects an Exclusive Causation Standard.**

The Western District, on the other hand, has suggested that exclusive causation is not required. In doing so, it explained why the Courts of Appeals that have held that exclusive causation is the proper standard are misguided. *See Brenneke*, 984 S.W.2d at 140; *see also Boyle*, 700 S.W.2d at 878. In dicta, the court in *Brenneke* rejected the idea that the plaintiff had to show her firing was motivated solely and exclusively by her whistleblowing. 984 S.W.2d at 139-140. The court acknowledged that a number of other Missouri Court of Appeals decisions hold exclusive causation to be the proper standard in public policy cases. However, it said:

Although many of these cases cite to the adoption of this public policy exception in *Boyle* to support the requirement of proof of exclusive causation, such proof was not required by *Boyle*. The latter utilized a direct, rather than an exclusive, causation analysis in stating that a person can maintain an action for wrongful discharge under the public policy exception by establishing that the “employer discharged the employee...*because* the employee reported to his superiors or to public authorities the serious misconduct.” *Boyle*, 700 S.W.2d at 878 (emphasis added).

*Id.* at 139-140. The court went on to explain “that cases decided after *Boyle* borrowed the exclusive causation requirement from this Court’s cases interpreting *statutory actions* for retaliatory discharge due to filing a workers’ compensation claim.” *Id.* at 140. Such cases, the court pointed out, are distinguishable from whistleblower cases, since the whistleblower exception to the employee-at-will rule arises under the common law of torts. *Id.* Tort law requires that the plaintiff prove only that defendant’s conduct was the “contributing,” not “sole” cause of her injury and rejects exclusive causation as inconsistent with its compensatory and deterrent purposes. The *Brenneke* court said “in part for this reason, some of the jurisdictions which, like Missouri, treat public policy claims as arising in tort, do not require proof of exclusive causation, but rather, they require the employee to prove by a preponderance of the evidence that the discharge was for an impermissible reason.” *Id.*

**B. Because Public Policy Discharge Claims, Like MHRA Claims, Arise In Tort And Seek To Remedy Improper Employment Decisions, The Same Causation Standard Should Be Employed In Public Policy Claims And MHRA claims.**

As this Court has emphasized, claims arising under the MHRA are also analogous to other intentional tort claims. *Diehl v. O’Malley*, 95 S.W.3d 82, 87 (Mo. 2003). In determining the proper causation standard to use in public policy claims, it is logical to look to employment discrimination claims arising under the MHRA because the MHRA, like the public policy cause of action, seeks to eliminate employment decisions based upon

criteria that society has deemed intolerable. As such, the laws provide a limited job protection against employers who use these illegal criteria in their decision making processes.

Indeed, the MHRA's statutory language defining unlawful discrimination is similar to the language found in *Boyle v. Vista Eyewear, Inc.*, the seminal Court of Appeals decision first recognizing the public policy discharge claim in Missouri. Compare Mo. Rev. Stat. § 213.055(1) (it shall be an unlawful employment practice for an employer, "because of the race, color, religion, national origin, sex, ancestry, age or disability or any individual . . . to fail or refuse to hire or to discharge any individual . . .") (emphasis supplied) with *Boyle*, 700 S.W.2d at 878 ("employer discharged the employee . . . because the employee reported to his superiors or to public authorities serious misconduct") (emphasis supplied).

The type and presentation of evidence in these cases is similar. Because the employer's liability in both types of cases usually turns on whether the illegal criterion played a role in the decision making process, the critical issue is the intent of the individuals who made the challenged employment decision. As a result, most of the parties' evidence directly relates to the decision maker's intent or motivation. Moreover, because most employers are sophisticated enough not to admit reliance on an illegal criterion in an employment action, the employee's evidence relating to intent almost always involves circumstantial evidence. Based on these fundamental similarities between discrimination claims and public policy wrongful discharge claims, it is logical to apply to

public policy wrongful discharge claims the same causation standard used in MHRA claims.

This Court has rejected the exclusive causation standard in the statutory context of the MHRA. *See* MAI 31.24. Under MAI 31.24, an employment discrimination plaintiff is required to prove that (1) the employee engaged in an employment action within the scope of § 213.055; (2) an illegal discriminatory animus was “a contributing factor” in such employment action; and (3) as a direct result of such conduct, the employee sustained damage. In *Daugherty v. City of Maryland Heights*, this Court approved the contributing factor standard as set forth in MAI 31.24. 231 S.W.3d 814, 818 (Mo. banc 2007). Because of the strong similarities between discrimination and public policy claims, this Court should not apply a more stringent “exclusive causation” standard in public policy wrongful discharge cases.

**C. The Contributing Factor Causation Standard, Or Alternatively, The Because Of Standard, Best Furthers The Public Policy Giving Rise To Public Policy Discharge Claims.**

The contributing factor or because of standards are more practical than exclusive causation. Employers rarely make a conscious decision, especially one as significant as the discharge of an employee, because of a single motivation. Instead, significant decisions are usually based on a constellation of motivations and factors, some more substantial than others. Requiring an employee to show that a decision is solely and exclusively motivated by the employee’s protected activity would ignore, and divorce the

legal standard from, the reality of human decision making.

Furthermore, the exclusive causation standard is contrary to the public policy giving rise to public policy discharge claims. If adopted, it will have a tremendous chilling effect on employees and undermine the remedial goals of the public policy tort. The purpose of a public policy discharge claim is to allow an employee to engage in protected activity without fear of retribution from his or her employer based on the protected activity. An exclusive causation standard, however, will allow employers to legally fire employees for refusing to engage in or reporting illegal conduct, simply by showing that some other factor—no matter how trivial—played a role in the employee’s discharge. Once an employee’s protected conduct has directly resulted in, or contributed to, his or her discharge, the very outcome that public policy seeks to prevent has in fact occurred. The employee has lost his or her job because of the protected activity. The presence of other factors in the decision should not be relevant to the issue of whether the employer engaged in illegal conduct if the protected activity contributed to the termination. If employees are afraid to report wrongdoing by their employers, employers’ illegal activity will remain unchecked. This result is directly contrary to public policy.

For these reasons Plaintiff asks this Court to affirm the lower court’s jury verdict, reject an exclusive causation standard and adopt the contributing factor standard.

Alternatively, the Plaintiff asks this Court to adopt the because of standard.

**V. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF THE NON-COMPETE AGREEMENT OR IN REJECTING PVI’S LIMITING**

**INSTRUCTION AS THE EVIDENCE WAS RELEVANT TO MOTIVE,  
DAMAGES AND PUNITIVE DAMAGES.**

PVI asserts that the trial court erred in denying its Motion for New Trial because the trial court allowed evidence regarding PVI's enforcement of the non-compete agreement Fleshner signed as part of her employment. "A trial court possesses great discretion in its determination of whether evidence should be excluded." *Aliff v. Cody*, 26 S.W.3d 309, 314 (Mo.App.W.D. 2000). "The trial court's decision to admit or exclude evidence is given substantial deference on appeal." *Id.* Furthermore, "[t]he trial court's ruling is upheld when there exists any recognizable ground on which the trial judge could have rejected the evidence." *Id.* at 314-15. Even if the trial court erred in admitting evidence of enforcement of the non-compete, any such error was harmless. *See Romeo v. Jones*, 144 S.W.3d 324, 332 (Mo.App.E.D. 2004) (holding that trial court's error in excluding evidence will not be reversed unless the error was "prejudicial and not harmless").

Relevant evidence is evidence that tends to prove or disprove a fact that is at issue or of consequence. *Ashby v. Johnson*, 792 S.W.2d 7, 8 (Mo. App. E.D. 1990). Evidence is relevant if it logically tends to prove or disprove a fact in issue. *State v. Brown*, 103 S.W.3d 923, 928-29 (Mo. App. W.D. 2003). Evidence tends to prove a material fact if, as a matter of logic, it makes the existence of that fact more or less probable than it would be without the evidence. *See State v. Fanning*, 939 S.W.2d 941, 948 n.14 (Mo. App. W.D. 1997). Accordingly, a trial court is afforded broad discretion in determining the relevance

of proffered evidence. *State v. Parkhurst*, 845 S.W.2d 31, 36 (Mo. 1992).

The evidence of PVI's malicious pursuit of a non-compete agreement even after PVI had been presented with information and sworn testimony indicating that Fleshner was not in violation is evidence of PVI's motive in terminating Fleshner. The fact that PVI vigorously pursued enforcement of the non-compete against Fleshner when it chose not to do so against other non-surgeon employees who left PVI is evidence that PVI sought to punish Fleshner for cooperating with DOL. This makes it more likely than not that PVI fired Fleshner and didn't let her apply for other available positions, as they planned to do before Fleshner spoke with DOL, because she cooperated with DOL's investigation.

The enforcement of the non-compete was also relevant to punitive damages. In order to submit on the issue of punitive damages, Fleshner needed to show the intent or motive behind PVI's actions. "A submissible case is made if the evidence and the inferences drawn therefrom are sufficient to permit a reasonable jury 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."

*Brady v. Curators of University of Missouri*, 213 S.W.3d 101, 109 (Mo. App. E.D. 2006) (quoting *Fabricor*, 24 S.W.3d at 96-97). When intent or mental culpability must be proven, a party's actions at other times tending to demonstrate the intent with which the party may have acted in the present become relevant. *Brockman v. Regency Fin. Corp.*, 124 S.W.3d 43, 51 (Mo.App. 2004). "Evidence of other acts of defendant are admissible

if those acts are sufficiently connected with the wrongful acts that they may tend to show defendant's disposition, intention, or motive in the commission of the acts for which [punitive] damages are claimed." *Boyer v. Grandview Manor Care Ctr., Inc.*, 759 S.W.2d 230, 234 (Mo. App. W.D. 1988).

PVI's pursuit of the non-compete agreement was also relevant to the issue of damages. Both lost wages and damages for emotional distress are available in a claim for termination in violation of public policy. As a result of the lawsuit filed by PVI, Fleshner was terminated by the Pernouds on September 23, 2003 causing her to lose wages. (Tr. pp. 293-294). In addition, Fleshner was devastated by the loss of her job with the Pernauds, and was hurt, angry frustrated and depressed worrying that the Peposes would haunt her forever. (Tr. p. 296). Fleshner's demeanor changed. She became sad and lost interest in normal daily activities. (Tr. p. 356). The pursuit of the non-compete agreement explains why Fleshner's emotional distress damages continued and why she was unable to maintain the job she had obtained after being terminated by PVI.

PVI further argues that even if the evidence was relevant the trial court below should have given a limiting instruction. "Instructional error, even if clear and obvious, is rarely found to result in manifest injustice or a miscarriage of justice requiring reversal for plain error." *State of Missouri v. Smith*, 154 S.W.3d 461, 2005 Mo. App. LEXIS 169, at \*7-8 (Mo.App.W.D. 2005). "For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict." *State of Missouri v. Deck*, 994 S.W.2d 527,

540 (Mo. 1999). “The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for...review.” *Smith*, 2005 Mo. App. LEXIS 169, at \*5-6. PVI has not put forth any argument that the purported instructional error here affected the verdict.

Finally, PVI argues that the trial court’s “unfair imbalance” on evidentiary issues is demonstrated by the exclusion of testimony regarding Feigenbaum’s diagnosis of and treatment for breast cancer. The trial court did allow Feigenbaum to testify that she was undergoing medical tests and procedures required by her obstetrician/gynecologist and that she had just had major surgery and was trying to focus on her health. (Tr. pp. 485-488, 490, 495-496). Feigenbaum was simply not allowed to state that she had breast cancer which would simply have engendered sympathy from the jury and had no probative value. Feigenbaum was allowed to testify as to the events which were occurring which were probative to her actions at the time.

### **CONCLUSION**

For the reasons set forth above, the Court should affirm the judgment of the trial court. In addition, the Court should find that the contributing factor standard applies to common law claims for public policy discharge. If the Court does not adopt the contributing factor standard, then the Court should affirm the trial court’s submission of the “because of” causation standard.

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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that the Substitute Brief of Respondent complies with the limitations set forth in Rul 84.06(b). According to the word count function of Core WordPerfect 10, the foregoing brief, from the Table of Contents through the Conclusion, contains 15421 words.

The undersigned also certifies that the floppy disk filed with the Substitute Brief of Respondent has been scanned for viruses and is virus-free.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on October 13, 2009, one copy of the foregoing document and one floppy disk containing the foregoing document were mailed postage prepaid to:

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