

IN THE SUPREME COURT OF MISSOURI

Supreme Court No. SC89925

MISSOURI MILITARY ACADEMY,
Appellant/Cross-Respondent,
vs.
MICHAEL KEVENEY,
Respondent/Cross-Appellant.

Transferred from the Missouri Court of Appeals, Eastern District
Court of Appeals No. ED90595

On Appeal from the Circuit Court of Audrain County
12th Judicial Circuit, State of Missouri
Honorable Keith Sutherland
Case No. 04AU-CV00024

**THE SUBSTITUTE REPLY BRIEF OF
APPELLANT/CROSS-RESPONDENT MISSOURI MILITARY ACADEMY**

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JURISDICTIONAL STATEMENT

Missouri Military Academy (the “Academy”) incorporates its Jurisdictional Statement as set forth in page 1 of its opening brief.

STATEMENT OF FACTS

The Academy incorporates its Statement of Facts as set forth in pages 2 - 21 of its opening brief.

POINTS RELIED ON

ARGUMENT IN SUPPORT OF THE ACADEMY’S APPEAL

I. The Trial Court Erred in Denying the Missouri Military Academy’s Motion for Directed Verdict at the Close of All the Evidence and Motion for Judgment Notwithstanding the Verdict Because the Evidence Established That Plaintiff Failed to Perform His Contractual Obligations and Thus Failed to Make a Submissible Case of Breach of the Employment Agreement Between Plaintiff and the Academy.

Coleman v. Jackson County, 160 S.W.2d 691 (Mo. 1942)

Craig v. Thompson, 244 S.W.2d 37 (Mo. Banc 1951)

Rodgers v. Seidlitz Paint & Varnish Co., 404 S.W.2d 191 (Mo. 1966)

II. The Trial Court Erred in Denying the Missouri Military Academy’s Motion for Directed Verdict at the Close of All the Evidence and Motion for Judgment Notwithstanding the Verdict as the Evidence Established That Plaintiff Engaged in Misconduct That Constituted “Cause” for Termination of Agreement Under the Terms of the Employment Contract Between Plaintiff and the Academy.

Craig v. Thompson, 244 S.W.2d 37 (Mo. Banc 1951)

Zubres Radiology v. Providers Ins. Consultants, 276 S.W.3d 335 (Mo. App. 2009)

ARGUMENT IN RESPONSE TO KEVENEY’S CROSS-APPEAL

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Brawner v. Brawner, 327 S.W.2d 808 (Mo. 1959)

Farmers' Elec. Coop. v. Mo. Dep't of Corr., 59 S.W.3d 520 (Mo. 2001)

Luethans v. Washington University, 894 S.W.2d 169 (Mo. banc 1995)

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A. Admissions at trial may constitute grounds for a directed verdict or judgment notwithstanding the verdict.

Keveney states in his Substitute Brief that he “does not quarrel” with the proposition that “a party to a contract cannot claim its benefits when he is the first to violate it.” Keveney’s Substitute Brief, at p. 16. Keveney argues, however, that whether a party has breached an agreement is “a question for the jury.” *Id.* It is clear, however, that a party’s admissions at trial may require entry of a directed verdict or judgment notwithstanding the verdict. *See Coleman v. Jackson County*, 160 S.W.2d 691 (Mo. 1942); *see also Rodgers v. Seidlitz Paint & Varnish Co.*, 404 S.W.2d 191, 198 (Mo. 1966) (affirming judgment notwithstanding verdict in favor of employer on plaintiff employee’s claim for breach of a written employment contract based on admissions at trial).

Moreover, this Court’s decision in *Craig v. Thompson*, 244 S.W.2d 37 (Mo. 1951), clearly stands for the proposition that a plaintiff employee’s admissions at trial that he engaged in conduct that violated workplace rules requires, as a matter of law, the entry of judgment for the defendant employer. Keveney’s Substitute Brief states that in *Craig*, “there was not dispute about the facts that led to plaintiff’s termination.” Keveney’s Substitute Brief, at p. 19. In actuality, in *Craig*, there was no dispute that the plaintiff’s employment contract incorporated work place rules, and that the plaintiff’s conduct violated those rules. The same is true here – Keveney admitted his contract required him to refrain from outbursts at work, and Keveney admits he had multiple outbursts on the day of his termination.

B. The Academy relies only on Keveney’s admissions at trial to establish the absence of a triable issue of fact regarding Keveney’s breach of contract claim.

Keveney’s Substitute Brief ignores the thrust of the Academy’s argument by pointing out various supposed “conflicts” in the evidence at trial. For instance, Keveney claims that he received “excellent performance reviews” and “never received any written warnings.” Keveney’s Substitute Brief, at p. 17. Keveney also argues that the credibility of Academy witnesses, such as President Kelly and Commandant Medley, was called into question and was for the jury to decide. Keveney’s Substitute Brief, at p. 19. Keveney’s performance reviews, lack of

“written warnings”, and the credibility of the Academy’s witnesses are all irrelevant because of Keveney’s admissions. (Tr. 227-229, 236-237, 261).

Plaintiff next argues that there are “conflicting versions of what occurred during the meetings on October 29, 2003” and, as a result, it was for the jury to decide whether Keveney breached the agreement. Keveney’s Substitute Brief, at p. 20. That argument again misses the point. The details of witnesses’ recollections of the events on that date are unimportant when reviewing *Keveney’s* testimony. There is *no conflict* in the record before this Court regarding the following admissions made by Keveney at trial:

- Keveney admitted that his contract obligations included refraining from outbursts and inappropriate, disrespectful behavior. (Tr. 236).
- Keveney admitted that he knew that any additional misconduct would be deemed violations of his contract, and could result in the termination of his employment with the Academy. (Tr. 261).
- Keveney admitted he understood the importance of decorum, especially in the setting of a military academy. (Tr. 224, 258-259).
- Keveney admitted that President Kelly reminded Keveney of his obligation to refrain from outbursts on at least two occasions months before Keveney’s termination. (Tr. 227-229, 237).

- Keveney admitted that his direct supervisor, Dean of Students Richard Ray, also reminded Keveney of his obligations prior to Keveney's termination. **(Tr. 233)**.
- Keveney admitted that he was agitated during his first meeting with President Kelly on October 29, 2003, and that during the first meeting with President Kelly, Keveney engaged in, what he himself acknowledged was inappropriate conduct. **(Tr. 247-250)**.
- Keveney admitted that his first statement to Commandant Medley on October 29, 2003, was "What the hell is going on in the barracks." **(Tr. 252-253)**.
- Keveney admitted that his own conduct was disrespectful, especially to a superior officer, and that he made the "what the hell" comment in front of a student. *Id.*
- Keveney admitted that he was yelling so loudly at Commandant Medley that students and other personnel could hear Keveney's outburst outside of Commandant Medley's office. **(Tr. 254-255)**.
- Keveney admitted that after yelling and cursing at Commandant Medley, Keveney left the Commandant's office and returned immediately to President Kelly's office. **(Tr. 255-256)**.

- Keveney admitted that during his second meeting with President Kelley on October 29, 2003, he “blew up” at President Kelly. (**Tr. 256**).

Keveney weakly argues that he never actually admitted he breached the employment agreement. Keveney’s Substitute Brief, at p. 17. The Academy does not argue now, and has never argued, that Keveney said at trial “I breached the employment contract.” Instead, the Academy’s argument has always been that Keveney admitted (1) what his contractual obligations were, and (2) that he engaged in conduct that was contrary to his contractual obligations. That is clearly enough to establish Keveney’s breach. *Coleman, supra*, 160 S.W.2d at 693; *Craig, supra*, 244 S.W.2d at 43.¹

C. Keveney’s “excuses” for his failure to perform are legally irrelevant to the issue of whether Keveney breached the agreement.

¹ The cases cited by Keveney in his Substitute Brief do not involve admissions at trial by the plaintiff of both the nature of his contractual obligations, and conduct that breached the agreement. *See, e.g., Stegemann v. Helbig*, 625 S.W.2d 677, 679 (Mo. App. E.D. 1981); *Tony Thornton Auction Serv., Inc. v. Quinitis*, 760 S.W.2d 202 (Mo. App. S.D. 1988).

Keveney argues in his Substitute Brief that his misconduct was either provoked or justified because it was based on good intentions. For instance, Keveney argues that he only “blew up” when his job was threatened. Keveney also argues that he was agitated because of his concern for the well-being of a student. While Keveney boldly asserts in his Brief that he “has never argued . . . that his own state of mind has anything to do with his breach of contract claim,” (Keveney’s Substitute Brief, at p. 22), four pages earlier in his Substitute Brief Keveney argues that “[t]here was certainly enough evidence at trial for the jury to have found that Keveney was *justifiably upset* during his meeting with Medley on October 29 . . .” (Keveney’s Substitute Brief, at p. 18).

Keveney’s *reasons* for blowing up at his supervisors three times on October 29, 2003, and thereby breaching his contract, are irrelevant to the issue of *whether* Keveney breached the agreement in the first instance. Put another way, because the facts demonstrate that Keveney’s conduct, as a matter of law, constituted a breach of his contractual obligations, it is legally irrelevant whether Keveney was provoked or had good intentions in yelling at his superiors.

In sum, the facts mandating reversal of the jury’s verdict and the entry of judgment on Count II of Plaintiff’s Petition in favor of the Academy all come from Keveney’s own testimony. Keveney’s arguments and invitations to consider Keveney’s “motivation” or other irrelevant evidence and testimony do nothing to

alter the undisputed facts relevant to the disposition of this case. His admissions demonstrate beyond dispute that Keveney's conduct constituted prior breach of the employment agreement. Keveney concedes that if he was the first to breach the agreement, he may not claim its benefits. Keveney's Substitute Brief, at p. 16. The Academy is entitled to judgment as a matter of law on Keveney's breach of contract claim.

II. The Trial Court Erred in Denying the Missouri Military Academy's Motion for Directed Verdict at the Close of All the Evidence and Motion for Judgment Notwithstanding the Verdict as the Evidence Established That Plaintiff Engaged in Misconduct That Constituted "Cause" for Termination of Agreement Under the Terms of the Employment Contract Between Plaintiff and the Academy.

Because Keveney breached his employment agreement with the Academy, the Academy had "cause" to terminate Keveney's employment. In response to the Academy's second point on appeal, Keveney repeats his efforts to excuse his own breaches of the agreement. For instance, Keveney argues that Commandant Medley allegedly stated "you ought to worry about your job." (Tr. 254-255). Keveney argues, in essence, that he only *really* acted unprofessionally after his employment was threatened. Keveney seemingly claims he was somehow induced by the Academy to act in a manner constituting "cause" for termination of the employment agreement.

Keveney's argument has been foreclosed by additional admissions made by Keveney at trial. For instance, Keveney admitted that during his discussions with his supervisors on October 29, 2003, he had a choice – whether to engage in inappropriate behavior or not to engage in inappropriate behavior. (Tr. 227).

Keveney chose to engage in outbursts. Keveney's arguments regarding induced breach or "justification," to the extent he attempts to articulate such arguments, simply have no factual or legal basis.

Keveney next contends in his Substitute Brief that the Academy's "true motive" in terminating Keveney is relevant to whether or not "cause" existed to terminate Keveney's employment under the agreement. Keveney's Substitute Brief, at pp. 22-23. Keveney contends that under this Court's decision in *Craig*, the Academy was required to act in "good faith" for there to be "cause" to terminate Keveney's employment.

Keveney's argument badly misunderstands contract law – and the *Craig* decision. "Good faith" – in the setting of contract terminations for "cause" – does not require that the motivations of employers be subjectively "pure" or "fair." Rather, it is clear from a reading of the *Craig* decision that what this Court was talking about was equating "good faith" with "real" and not made-up or whimsical. Keveney does not cite any authority, nor can any be found, for the proposition that analyzing "cause" for termination of an employment agreement requires an examination of the subjective "motivation" of the employer.

In a similar context, courts have described what the concept of "good faith and fair dealing" means with respect to enforcement of contractual obligations. In

Zubres Radiology v. Providers Ins. Consultants, 276 S.W.3d 335 (Mo. App. 2009), the court of appeals held:

The covenant of good faith and fair dealing is not an overflowing cornucopia of wished-for legal duties. Rather, it encompasses only an obligation imposed by law to prevent opportunistic behavior, that is, the exploitation of changing economic conditions to ensure gains in excess of those reasonably expected at the time of contracting. That duty prevents one party to the contract to exercise a judgment conferred by the express terms of agreement in such a manner as to evade the spirit of the transaction or so as to deny the other party the expected benefit of the contract.

Id., 276 S.W.3d at 340 (internal citations omitted). There is nothing in the law of the implied covenant of “good faith and fair dealing” that requires examination of contracting parties’ motivations. Indeed, contract law focuses on *performance* of contractual obligations, not on the motives of the parties. Parties with absolutely fantastic motives may fall short in their contractual performance, while other parties with disreputable motives may fully perform their contractual obligations.²

² Keveney did not plead in his Petition that the Academy breached the covenant of “good faith and fair dealing.”

Even were this Court to consider the “motives” of the Academy, there is not one scintilla of evidence that the decision-maker in this case, President Kelly, ever acted in “bad faith” in any way. Rather, the only evidence offered at trial, was that President Kelly counseled Keveney on numerous occasions regarding his obligations under the contract (**Tr. 227-229, 237**), that Keveney was reminded by others, including Dean Ray, regarding those obligations (**Tr. 233**), and that when Keveney acted in a way that violated his agreement, his employment with the Academy ended (**Tr. 261**). Moreover, the only evidence that Keveney offers of alleged “bad faith” (Medley’s alleged job threatening statement) is not attributable to President Kelly, nor was President Kelly even aware of Commandant Medley’s alleged statement. (**Tr. 356-358, 363-364**).

In sum, Keveney’s argument that in the context of termination for “cause,” “good faith” means “good motivation” misapprehends Missouri law. Injecting an examination of the subjective “motives” of contracting parties in this context is contrary to the very essence of actions for breach of contract. The focus in this case with respect to the Academy’s “cause” for termination of Keveney’s employment agreement must be on Keveney’s performance, not on the Academy’s supposed unfair motivation. The Academy had a “good faith” reason to terminate Keveney’s employment because the evidence establishes that the Academy had a

“real” reason (rather than made-up) for terminating Keveney’s employment based on Keveney’s admitted misconduct.

ARGUMENT IN RESPONSE TO KEVENEY’S CROSS-APPEAL

I. The Trial Court Did Not Err in Granting the Academy’s Motion to Dismiss Count I of Keveney’s Petition Because Count I of the Petition Fails to State a Tort Claim for Wrongful Discharge Under Missouri Statutory and Common Law, and This Court Should Not Create a New Cause of Action in Favor of Keveney.

On October 29, 2003, the Academy terminated Keveney’s employment after Keveney breached his contractual obligations by yelling at his superiors in front of students and other Academy employees. Keveney thereafter filed a Petition against the Academy in two counts. (*Legal File 08 (hereinafter “L.F. __”*)). Count II was entitled “breach of contract” and sought contract damages, as well as “emotional distress” damages and punitive damages. *Id.* Count I of the Petition, entitled “termination in violation of public policy,” also sought tort-type damages, including punitive damages. *Id.* Plaintiff claims he was terminated for “insisting” that the Academy report bruises on a student’s arms to the Division of Family Services. *Id.*

The trial court properly dismissed Keveney’s tort claim in Count I, and struck Keveney’s requests for “emotional distress” and punitive damages for breach of contract. (*L.F. 36*). Keveney pleaded, and it remains undisputed, that Keveney was employed pursuant to a one-year employment agreement, with a

fixed duration and a fixed sum to be paid to Keveney if he performed his obligations. *See Tr. Exhibit 5*. The trial court permitted Keveney's breach of contract claims to proceed to trial, however, during which Keveney obtained a judgment in the amount of \$13,300. (*L.F. 49*).

Keveney now seeks reversal of the trial court's dismissal of his wrongful discharge tort claim. But in doing so, Keveney asks this Court to abandon its prior decision in *Luethans v. Washington University*, 894 S.W.2d 169 (Mo. banc 1995), and invites this Court to create a tort cause of action for what amounts to "tortious breach of contract" – where such claims have never before been recognized in Missouri – and in fact have been explicitly rejected.

In making his plea to create new law, throughout his Substitute Brief Keveney describes himself as a defender of Missouri "public policy" while making the Academy out to be a disreputable law breaker. Ignoring his own admitted misconduct leading up to his termination, Keveney claims that the real reason he was terminated is that he demanded that the Academy report alleged student-on-student hazing of one of the cadets to the Division of Family Services.

The irony is that there can be little doubt that Keveney's cross-appeal is really about the amount of money Keveney wants to recover as damages in this case. Keveney admits as much, but again, makes the reader feel good about Keveney's motives by complaining that Keveney's "only remedy" is "the amount

of money he would have earned under his contract through the end of the 2003-2004 school year.” Keveney’s Substitute Brief, at p. 38.

If the “public interest,” as opposed to Keveney’s “pecuniary interest,” is what this case is really about then Keveney fails to explain why the *criminal penalties* under R.S. Mo. Chapter 210 for failure to report suspected child abuse do not adequately protect the public. The Missouri legislature has determined what is needed to protect the public and deter wrongdoing in this context, yet Keveney speculates (with no evidence) that alleged wrongdoers will not be adequately deterred.³ And even more revealing is Keveney’s argument that contract damages are inadequate to compensate him for his alleged losses.⁴

No Missouri court, including this one, has *ever* recognized a cause of action for “tortious breach of contract” or “tortious breach of contract in violation of

³ Keveney’s argument that the \$13,300 verdict against the Academy represents the cost to the Academy of this litigation is unfounded. Keveney ignores the attorneys’ fees, court costs, time, effort and other unquantifiable effects (such as damage to the Academy’s reputation) the Academy has incurred in defending against Keveney’s claims.

⁴ If Keveney had an employment agreement with the Academy paying an annual salary equal to Albert Pujols’s, it seems very doubtful that Keveney would be pursuing his “public policy” claims with such apparent vigor.

public policy.” Moreover, Keveney does not dispute that the Missouri legislature has not created a tort cause of action for wrongful discharge of contractual employees, or tort remedies, to discharged contract employees. But were such a cause of action to be considered, the Missouri legislature would be the appropriate venue for the consideration of the need for such a cause of action, the scope of such a right of action, and the appropriate remedies for a violation of any statutory prohibitions.

Before addressing Keveney’s novel arguments relating to his request that a new cause of action be created in his favor, it is important to observe that this Court need not even reach that issue. As is argued fully in Part II of this section of the Academy’s Brief, *infra*, even assuming *arguendo* such a contract employee could assert a tort claim for wrongful discharge, Keveney could not state a claim in light of the facts he has pleaded in his Petition.

Should this Court address Keveney’s arguments relating to tortious breach of employment contracts, there are at least six reasons why Keveney’s propositions should be rejected: (1) this Court explicitly held in *Luethans* that a tort cause of action for the discharge of contract employees does not exist; (2) other courts applying Missouri law have also rejected the existence of a tort cause of action for wrongful discharge in favor of contract employees; (3) the purpose of the public policy exception to the employment at-will doctrine is to provide a remedy to

employees who have no contractual remedies; (4) the public policy exception is “narrow” and “limited” and should not be expanded under the circumstances of this case; (5) the Missouri legislature has not created a tort cause of action applicable to Keveney’s claims – but has protected the public interests under Chapter 210; and (6) cases from other jurisdictions have no precedential or persuasive value, but many support limiting the remedies of discharged contract employees to the benefit of their bargain, even when the employees claim they were discharged in violation of public policy.

A. The trial court properly dismissed Count I of Plaintiff’s Petition because the Missouri Supreme Court has explicitly rejected the existence of a wrongful discharge tort claim for contract employees.

The trial court granted the Academy’s motion to dismiss Count I of Keveney’s Petition for failure to state a claim.⁵ In so doing, the trial court simply

⁵ The procedural rules regarding review of dismissed petitions are no doubt familiar to the Court. Briefly, a petition that does not state a claim upon which relief may be granted confers no subject matter jurisdiction to the court and must be dismissed. *Green v. Missouri Depart. of Transp.*, 151 S.W.3d 877, 881 (Mo. App. S.D. 2004). The failure of a petition to state a claim may be raised at any time – even for the first time on appeal. *Harding v. State Farm Mut. Auto. Ins.*

applied the rule announced by this Court in *Luethans, supra*. In *Luethans*, this Court wrote:

The facts establish that appellant was a contractual employee and not one at will. Appellant was paid through the end of his contract period when the parties' rights and duties under the contract expired. ***Because a wrongful discharge action is only available to an employee at-will, respondent is entitled to judgment as a matter of law.***

Luethans, 894 S.W.2d at 172 (emphasis added).

Amazingly, Keveney contends on appeal that this Court did not actually rule that contract employees are foreclosed from asserting tort claims for wrongful discharge – despite the fact that this Court held that “a wrongful discharge action is only available to an employee at-will,” and despite the fact that this holding appears in the opinion under the heading “CONCLUSIONS.” *Id.* The Academy respectfully submits that this Court could not have said it any clearer.

In a tortured reading of this Court's holding in *Luethans*, Keveney argues that this Court's statement that “a wrongful discharge action is only available to an

Co., 448 S.W.2d 5, 7-8 (Mo. 1969). As a result, it is axiomatic that this Court may uphold the dismissal of Keveney's tort claims on any basis under the law.

employee at-will” is mere “dicta.”⁶ Keveney’s Substitute Brief, at p. 33. The Academy respectfully submits that this Court’s challenged holding is not “dicta.”

This Court in *Luethans* was required to decide whether there were grounds to affirm the trial court’s summary judgment. Needless to say, this Court could have done so on one ground or multiple grounds, each of which could independently support affirmance. The plaintiff in *Luethans* claimed *both* that he was an “at-will employee” *and* that he had been “discharged.” But the plaintiff alternatively argued on appeal (and not in the trial court in his pleadings) that he had a right to assert a claim for the wrongful “non-renewal” of his contract. This Court held that because Mr. Luethans was a contract employee, he had no cause of action in tort for wrongful discharge. This Court *also held* that because Luethans failed to plead that his contract had not been renewed, he could not attempt to assert a new, alternative theory of “wrongful (tortious) failure to renew” a contract. 894 S.W.2d at 172. These claims are actually two different claims – and both were addressed and rejected by this Court for different reasons. Indeed, the only fair reading of this Court’s decision in *Luethans* is that this Court intended to foreclose contract employees from asserting tort claims for “wrongful discharge” but left

⁶ “Dicta” means a view expressed by a judge in an opinion on a point not necessarily arising from or involved in a case or necessary for determining the rights of the parties involved. Merriam-Webster's Dictionary of Law (1996).

open the issue of whether a “wrongful failure to renew” claim could be asserted upon proper pleadings.

Moreover, the Missouri Court of Appeals has twice held that this Court’s holding in *Luethans* forecloses contract employees from asserting tort claims for wrongful discharge.⁷ *See Adcock v. Newtec, Inc.*, 939 S.W.2d 426 (Mo. App. E.D. 1997), and *Mischia v. St. John’s Mercy Medical Center*, 30 S.W.3d 848 (Mo. App. E.D. 2000).

In *Adcock*, Judges Karohl, Russell and Simon held that “Adcock is protected by [the wrongful discharge tort cause of action] only if he was a discharged at-will employee,” citing this Court’s holding in *Luethans*. *Adcock*, 939 S.W.2d at 428 [per Karohl, J.]. The Court of Appeals concluded that because Adcock was a contractual employee he had “no cause of action for wrongful discharge.” *Id.* Clearly, the Court of Appeal’s decision in *Adcock* seemingly undercuts any argument that this Court’s holding in *Luethans* barring tort claims by contract employees is mere “dicta.”

⁷ Judges Pudlowski, Stefan and Crist held in *Luethans v. Washington University*, 838 S.W.2d 117 (Mo. App. E.D. 1992), that “Missouri does not recognize the public policy exception to the employment at-will doctrine for contract employees.” *Id.* at 120, n.1 [per Pudlowski, P.J.].

In *Misischia*, Judges Gaertner, Simon and Russell held that “generally, it has been held that a contractual employee cannot maintain a cause of action for wrongful discharge,” again citing this Court’s decision in *Luethans*. 30 S.W.3d at 862-63 [per Gaertner, J.]. The Court of Appeals also held that the plaintiff had failed to plead sufficient facts to raise the issue of whether a cause of action for “wrongful failure to renew” a contract existed. *Id.*⁸

In sum, this Court’s holding in *Luethans* that “a wrongful discharge action is only available to an employee at-will” cannot be simply cast aside, as Keveney suggests. The decision of this Court is binding precedent and controls the disposition of Keveney’s appeal of the dismissal of Count I of his Petition. Moreover, as is argued fully below, more than *stare decisis* supports affirmance of the trial court’s dismissal of Keveney’s tort claims.

B. The principal underlying the “public policy exception to the at-will doctrine” is to provide a “judicial protection” – which contract employees have.

A fundamental reason for the judicial adoption of “public policy exception” to the at-will doctrine by the Western District Court of Appeals in the *Boyle v. Vista Eyewear, Inc.* decision in 1985 was the absence of any remedy for

⁸ See also *Egan v. Wells Fargo Alarm Services*, 23 F.3d 1444 (8th Cir. 1994); and *Komm v. McFliker*, 662 F.Supp. 924, 924-925 (W.D.Mo. 1987).

terminated at-will employees.⁹ In *Clark v. Beverly Enterprises-Missouri, Inc.*, 872 S.W.2d 522 (Mo. App. W.D. 1994), the Court wrote:

The significance of the public policy exception is that it protects “a myriad” of employees *without the bargaining power to command employment contracts* and are “entitled to a modicum of judicial protection when their conduct as good citizens is punished by their employers.”

Id. at 525 (emphasis added). In other words, the *Clark* Court recognized that contract employees have “judicial protection” in the form of contract remedies and, as a result, there is no sound basis for judicially creating causes of action in tort in

⁹ *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. W.D. 1985). As Keveney points out in his Substitute Brief, this Court has never expressly adopted a cause of action for wrongful discharge in violation of public policy. The Academy respectfully submits, consistent with its arguments, *infra*, that the Missouri legislature, rather than appeals courts, should create whistleblower protection provisions, as has been done by many other states, and by the federal government. Legislatures are equipped to carefully balance a variety of public interests, such as sovereign immunity, the nature and scope of remedies, limitations of actions, and many other considerations appropriate to legislative enactments.

favor of contract employees. On the other hand, employees at-will have no “judicial protection” and, absent the creation of the “public policy exception,” no possible remedy relating to their wrongful discharge.

This rationale for the public policy exception was recognized again in *Olinger v. General Heating & Cooling Co.*, 896 S.W.2d 43 (Mo. App. W.D. 1994), and *Williams v. George Thomas, M.D.*, 961 S.W.2d 869 (Mo. App. S.D. 1998). Thus Missouri courts have consistently recognized that where an employee has the benefit of an enforceable agreement, the employee has “judicial protection” such that further judicial intervention in the name of “public policy” would be inappropriate.

Keveney argues that there is no basis for differentiating between contract employees and at-will employees with respect to what remedies should be available to them. But where employees have protection in the form of bargained-for contract remedies, there is every reason to treat the employees differently, as has been recognized repeatedly by Missouri courts.

C. The tort of wrongful discharge has been consistently described as a “narrow” and “limited” exception to the at-will doctrine.

The court of appeals in *Boyle* - widely credited with defining the parameters of the tort of wrongful discharge in Missouri - held that the tort of wrongful discharge based on public policy “is a narrow exception to the at-will employment

doctrine.” 700 S.W.2d at 871. Numerous cases decided in the aftermath of *Boyle* have repeated that the exception is “narrow” and “limited” and have declined to further expand the scope of the judicially created cause of action.¹⁰ Moreover, in *Luethans*, this Court described the cause of action as a “limited public policy exception to the at-will employment doctrine.” 894 S.W.2d at FN 2.

¹⁰ *Crockett v. Mid-America Health Services*, 780 S.W.2d 656, 657 (Mo. App. W.D. 1989) (affirming summary judgment for employer); *Luethans v. Washington University*, 838 S.W.2d 117, 119-120 (Mo. App. E.D. 1992); *Yow v. Village of Eolia, Mo.*, 859 S.W.2d 920, 922 (Mo. App. E.D. 1993) (affirming summary judgment for employer); *Lay v. St. Louis Helicopter Airways, Inc.*, 869 S.W.2d 173, 176 (Mo. App. E.D. 1993) (affirming summary judgment for employer); *Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147, 151-152 (Mo. App. E.D. 1995); *Adolphsen v. Hallmark Cards, Inc.*, 907 S.W.2d 333, 336 (Mo. App. W.D. 1995) (affirming dismissal of employee’s claim); *Faust v. Ryder Commercial Leasing & Serv.*, 954 S.W.2d 383 (Mo. App. W.D. 1997) (affirming jnov for employer); *Williams v. George Thomas, M.D.*, 961 S.W.2d 869 (Mo. App. S.D. 1998) (affirming summary judgment for employer); *Bell v. Dynamite Foods*, 969 S.W.2d 847, 852 (Mo. App. E.D. 1998) (affirming summary judgment for employer).

The importance of the mantra from Missouri courts that the public policy exception is “narrow” and “limited” is that it recognizes the careful balance between the judicial and legislative powers. Courts have limited power to create new causes of action which permit litigants to recover damages from other persons and entities under the banner of furthering “public policy.” In *Brawner v. Brawner*, 327 S.W.2d 808 (Mo. 1959), this Court cited Judge Benjamin Cardozo, “one of the great students and authorities on the development and function of the common law,” who wrote: “We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance.” *Id.* at 812.

A “narrow” and “limited” exception to the employment at-will doctrine provides a remedy to discharged employees where none heretofore existed. A court, therefore, may arguably be justified in providing a “remedy” for a “wrong” where none exists. Parties to contracts have well established remedies for breach and thus the Court’s extraordinary power to create causes of action need not, and should not, be exercised.

D. Damages for breach of contract are limited to the economic “benefit of the bargain.”

For more than a hundred years, Missouri courts have consistently held that the measure of damages for breach of contract is the *economic* benefit the plaintiff would have obtained had the defendant performed the contract. *See, e.g.,*

Hammond v. Beeson, 20 S.W. 474, 476 (Mo. 1892). Put another way, parties who suffer breaches of contract are entitled to the “benefit of their bargain” – the value they expected to obtain had performance been completed. *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 669 (Mo. 1999). “Speculative” or “remote” damages - and damages not within the contemplation of the parties at the time of contracting - are not recoverable in contract actions, following the rule of *Hadley v. Baxendale*, 9 Exch. 343 (1845). *Farmers' Elec. Coop. v. Mo. Dep't of Corr.*, 59 S.W.3d 520, 522 (Mo. 2001). By definition, tort damages (such as emotional distress) and exemplary damages are not reasonably ascertainable by contracting parties at the time of execution of the agreement.

Employees whose employment is governed by contracts should not be provided any greater benefits at common law than other contracting parties. Fairness and equity demands that all parties to contracts have the same rights and responsibilities. As Justice Cardozo noted, there is virtue and value in consistency – and it is in the public interest to have certainty and consistency in the rights, obligations and remedies attendant to contracts in Missouri.

E. The Missouri legislature has the power to create whistleblower protection statutes, and has done so where deemed necessary.

For at least the last thirteen years, the law of Missouri, as confirmed by this Court in *Luethans*, has been that contract employees have no tort cause of action

for wrongful discharge. During that time, the Missouri legislature has had the opportunity to adopt whistleblower legislation. However, rather than enact broad legislation, the Missouri legislature has enacted focused legislation prohibiting retaliation where deemed necessary.

For instance, the Missouri legislature has enacted statutes protecting employees from retaliation for reporting abuse in nursing homes. Mo. Rev. Stat. §198.070 requires employees of nursing homes to report abuse of patients. The statute explicitly prohibits retaliatory discharge of employees who report abuse:

11. No person who directs or exercises any authority in a facility shall evict, harass, dismiss or retaliate against a resident or employee because such resident or employee or any member of such resident's or employee's family has made a report of any violation or suspected violation of laws, ordinances or regulations applying to the facility which the resident, the resident's family or an employee has reasonably cause to believe has been committed or has occurred.

Mo. Rev. Stat. § 198.070.11 (2008). In *Bachtel v. Miller County Nursing Home District*, 110 S.W.3d 799 (Mo. 2003), this Court held that the foregoing provision created a private right of action in tort to nursing home employees who are wrongfully discharged by their employers in retaliation for reporting patient abuse.

The Missouri Human Rights Act also provides remedies to employees who suffer adverse employment actions for reporting discrimination. *See* R.S.Mo. 213.070.2. The MHRA has a broad remedial scheme that permits actual and punitive damages, as well as injunctive relief. *See, e.g., Hill v. Ford Motor Co.*, 277 S.W.3d 659 (Mo. 2009).

Chapter 210 requires teachers and school administrators to report suspected child abuse. However, unlike Chapter 198, Chapter 210 contains no provision which addresses the discharge of persons who report suspected child abuse. The Missouri legislature has had the power and the opportunity to enact non-retaliation legislation in this context but has, for whatever reason, not done so.

Nothing in the record before the Court demonstrates that the interests of Missouri citizens requires the Court to take immediate action and step into an area where the legislature has both the power and opportunity to act. No statistics are in the record before the Court concerning employees who have lost their jobs for reporting child abuse. No information is in the record before the Court relating to the effectiveness of prosecution of persons who fail to report child abuse. No opportunity has been afforded to citizens of the State of Missouri to address the need for non-retaliation provisions under Chapter 210. No law enforcement personnel have been given the opportunity to address the effectiveness of Chapter 210.

If legislation to protect those who claim they were discharged for reporting suspected child abuse is deemed prudent “public policy,” then the legislature should act. But the record before this Court contains nothing other than Keveney’s speculation that “public policy” favors providing Mr. Keveney with additional claims for money damages.

F. The unpublished decision of a Judge in the Circuit Court of the City of St. Louis and cases Keveney cites from other jurisdictions have no precedential or persuasive value.

In his final effort to have this Court create a new cause of action, Keveney invites the Court to examine an unpublished decision from a Circuit Court judge in Missouri, along with several cases from other jurisdictions. Keveney Substitute Brief, at pp. 33- 38. Keveney claims these decisions support his right to assert a wrongful discharge tort claim against the Academy in this case. They do not.

First, as to the unpublished decision in *Thompson v. Saint Louis University* (attached to Keveney’s Appendix), the Hon. Thomas Grady’s Order in *Thompson* has no precedential or persuasive value.¹¹ It is clear that a trial court’s decision in

¹¹ Indeed it seems as though Keveney and his counsel are grasping at straws here. To rely on the uncertified, unpublished Order of a trial judge in an unrelated case in the face of this Court’s decision in *Luethans*, and the Court of Appeals’ decisions in *Luethans*, *Adcock*, *Misischia*, is chutzpah if nothing else.

an unrelated case has no precedential value in Missouri. But moreover, the *Thompson* case is clearly distinguishable because it did not involve a claim by a contract employee – as is the case here. Indeed, Dr. Thompson’s employment contract was not renewed and he thus asserted a claim for “wrongful failure to renew” his employment contract.

Second, the decisions from other jurisdictions are equally unhelpful to Keveney or this Court. Decisions of the courts of other states are not controlling on Missouri courts. *United Fire & Casualty Co. v. Tharp*, 46 S.W.3d 99, 105 (Mo. App. S.D. 2001). Such decisions may be persuasive depending upon the given facts and if they are based on sound principles and good reason. *Id.*

As to the cases from other jurisdictions,¹² virtually all of them are distinguishable. For instance, in *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330

¹² It is distressing that while Keveney cites cases from other jurisdictions which purportedly support his claim, he fails to point out that other jurisdictions, like Missouri, have rejected permitting contract employees to assert tort claims for wrongful discharge. *See e.g., Willits v. Archbishop of Boston*, 581 N.E.2d 475 (Mass. 1991); *Valot v. S.E. Local School Dist. Bd. of Education*, 706 N.E.2d 805 (Ohio App. 1997); *Trexler v. Norfolk S. Ry. Co.*, 145 N.C. App. 466, 471 (N.C. App. 2001); *Ross v. Montour R. Co.*, 357 Pa. Super. 376, 383 (Pa. Super. Ct.

(Cal. 1980), the California court makes no mention of whether the plaintiff therein was even a contract employee. Moreover, the distinction between contract and at-will employees is clearly different in California, and that state has a complex statutory framework to deal with wrongful discharge claims. In *Norris v. Hawaiian Airlines, Inc.*, 442 P.2d 634 (Haw. 1992), the Hawaii court addressed the application of the Hawaii Whistleblower Protection Act to an employee who, as a union member, was subject to a collective bargaining agreement. In *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280 (Ill. 1984), the Illinois court permitted union members to sue for wrongful discharge for filing workers' compensation laws. The court emphasized that the Illinois workers' compensation statutes provide broad protection to workers.¹³ In *Bednarek v. United Food and*

1986); *Temple v. Med. Univ.* 2004 U.S. Dist. LEXIS 27831 (D.S.C. February 6, 2004); *Hermreck v. United Parcel Service, Inc.*, 938 P.2d 863, 865 (Wyo. 1997).

¹³ Subsequent Illinois cases have declined to expand the tort further than the facts of the holding in *Midgett*. See *Barr v. Kelso-Burnett, Co.*, 478 N.E.2d 1354, 1356 (Ill. 1985) (no free speech retaliation claim; not strongly support expansion of the tort); *Hartlein v. Illinois Power Co.* 601 N.E.2d 720, 730 (Ill. 1992) (no "constructive discharge" wrongful discharge claim); and *Zimmerman v. Bucheit of Sparta, Inc.*, 645 N.E.2d 877, 881 (Ill. 1995) (no wrongful demotion tort claim).

Commercial Workers Int'l., 780 S.W.2d 630 (Ky. Ct. App. 1989), the Kentucky court held, without analysis, that a union employee could assert a tort claim for wrongful discharge despite the benefits of a collective bargaining agreement. In *Ewing v. Koppers Company, Inc.*, 537 A.2d 1173 (Md. 1988), the Maryland court also held that a union employee with a collective bargaining agreement could assert a wrongful discharge tort claim for filing a workers' compensation claim. In *Lepore v. National Tool and Mfg. Co.*, 540 A.2d 1296 (N.J. Super. Ct. App. Div. 1998), the New Jersey court held that a union employee's wrongful discharge tort action was not preempted by OSHA or the LMRA.

None of the cases from other jurisdictions cited by Keveney reference a similar development of the common law doctrine of wrongful discharge as has taken place in Missouri. None of the jurisdictions referred to by Keveney have clear pronouncements by the highest Court of the state that "a wrongful discharge action is only available to an employee at-will." *Luethans, supra*, 894 S.W.2d at 169. Moreover, there are decisions from other jurisdictions that do not support the

It should also be noted that the Illinois legislature has enacted the Illinois Whistleblower Protection Act, 740 ILCS 174/15 (West 2004).

extension of tort remedies to contract employees who claim they were discharged in violation of public policy.¹⁴

¹⁴ See e.g., *Sterling Drug v. Oxford*, 294 Ark. 239, 249 (Ark. 1988) (contract employee terminated in violation of public policy must sue under contract theory and is limited to contract damages); *Ferguson Transp. v. North Am. Van Lines*, 687 S.2d 821, 822 (Fla. 1996) (only if a party to a contract proves a tort independent from the acts that breach the contract is the party entitled to recover punitive damages); *Halco v. Davey*, 919 A.2d 626, 631 (Me. 2007) (no matter how egregious the breach, punitive damages are unavailable under Maine law for breach of contract); *DeRose v. Putnam Mgmt. Co.*, 496 N.E.2d 428, 432 (Mass. 1986) (there are no punitive damages in contract, and a former employee suing under a breach-of-contract theory is not entitled to punitive damages); *Shore v. Farmer*, 351 N.C. 166, 170 (N.C. 1999) (punitive damages are only recoverable in breach of contract cases where the breach also constitutes or is accompanied by an identifiable tort, and the tortious conduct is accompanied by some element of aggravation).

In summary, the *Luethans* decision is determinative of Point I of Keveney's cross-appeal. This Court should decline to overturn this decision for the many reasons discussed herein.

II. The Trial Court Did Not Err in Granting the Academy's Motion to Dismiss Count I of Keveney's Petition Because Count I of the Petition Fails to Allege Facts That Could Support a Tort Claim for Wrongful Discharge Under any Theory Recognized By Missouri Courts.

As noted above, this Court need not reach the issue of whether contractual employees may assert tort claims arising out of their discharge absent statute. Keveney has not pleaded facts which fall within any of the wrongful discharge claims recognized by Missouri courts.

It should be noted here that Missouri courts have repeatedly imposed strict pleading requirements with respect to wrongful discharge claims. For instance, in *Grimes v. City of Tarkio*, 246 S.W.3d 533, 536-537 (Mo. App. S.D. 2008), the Court held that "in order to prevail on a whistleblower claim, the specific facts giving rise to liability must be plead with particularity." *See also Johnson v. Kraft General Foods, Inc.*, 885 S.W.2d 334 (Mo. banc 1994) (petition insufficient where only pleaded a violation of R.S.Mo. §454.505 which, the Court held, did not support a cause of action); *Adolphsen v. Hallmark Cards, Inc.*, 907 S.W.2d 333, 335 (Mo. App. W.D. 1995) (must plead public policy claim with specificity

because “narrow exception” to the at-will doctrine); *Lay v. St. Louis Helicopters*, 869 S.W.2d 173 (Mo. App. E.D. 1993); *Rothweil v. Wetterau, Inc.*, 820 S.W.2d 557 (Mo. App. E.D. 1991); *Crockett v. Mid-America Health Services*, 780 S.W.2d 656, (Mo. App. W.D. 1989).

Missouri appeals courts have recognized four *limited exceptions* to the *employment at-will doctrine* permitting employees to sue former employer in tort for wrongful discharge: (1) refusing to perform an illegal act or an act contrary to public policy; (2) reporting violations of law or public policy to superiors or public authorities (the “whistleblower” claim); (3) participating in acts encouraged by public policy, such as jury duty, seeking public office, or joining a labor union; and (4) filing a workers’ compensation claim. *Boyle*, 700 S.W.2d at 863.

A careful review the allegations in Keveney’s Petition, even if taken as true, make it clear that Plaintiff’s alleged conduct was not protected under Missouri statutory or common law. The essence of his claim, as set forth in Count I of his Petition, is that Keveney reported to three persons that a student at the Academy had bruises on his arm. The three persons to whom Keveney reported the bruises were his supervisors at the Academy - Richard Ray, Jim Medley and Ronald Kelley. *L.F. 08-13, ¶¶ 10, 11, and 13*. Keveney further alleges that each of these persons had an independent duty, under Missouri statutes, to report the bruises to

the Division of Family Services (“DFS”). *Id.* Most importantly, Keveney alleges that he was discharged because he insisted that those persons report the bruises:

“Because of Plaintiff’s continued insistence that the student’s bruises be reported to DFS in accordance with the laws of Missouri, Plaintiff was terminated on October 29, 2003.”

L.F. 08-13, ¶ 16. Keveney is bound on appeal by these allegations.

Thus the essence of Keveney’s claim is (1) that he “insisted” that his supervisors do what they were required by Missouri law to do – report suspected child abuse – and, (2) because of his “continued insistence” he was terminated.

A. Keveney cannot assert a claim under the third public policy exception to the employment at-will doctrine.

Keveney argues on appeal that he was terminated “for acting in a manner that public policy would encourage” – the third public policy exception to the employment at-will doctrine. Keveney Substitute Brief, at p. 40. That argument is easily disposed of.

Importantly, Keveney does *not* allege that he was terminated for participating in any activities *required by law* such as jury service or providing truthful testimony. The statute cited by Keveney in his Petition and relied upon by Keveney on appeal, Mo. Rev. Stat. § 210.115, does not require persons to “insist” that others report the suspected abuse to the DFS. Moreover, it is critical to

remember that Keveney did not allege in his Petition that he was terminated for complying with Mo. Rev. Stat. § 210.115 – he admits he did not report the bruises on the student’s arms to DFS until *after* he was terminated. Keveney Substitute Brief, at p. 41.

The third public policy exception – discharge for engaging in activities supported by public policy – has never been applied in Missouri under the facts asserted by Keveney. Rather, this exception has been only held to apply to persons participating in activities such as testimony, jury duty, seeking public office, or joining a labor union. *See Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 873-874 (Mo. App. 1985). *See also Entwistle v. Mo. Youth Soccer Ass’n*, 2008 Mo. App. LEXIS 925 (Mo. App. E.D. July 8, 2008) (trial testimony).

In order to constitute activity that “public policy would encourage” such activity must be clearly protected under the law. Here are several examples of such activities:

- Serving as jurors – Mo. Rev. Stat. § 494.460 (2008) prohibits employers from terminating or disciplining employees who serve on juries and creates an action for damages.
- Voting – Mo. Rev. Stat. § 115.639 (2008) prohibits employers from restricting employees’ voting activities and creates criminal penalties.

- Testifying – Mo. Rev. Stat. § 213.070 (2008) prohibits employers from retaliating against persons who testify in any investigation, proceeding or hearing under the MHRA.
- Participating in unions – 29 U.S.C. § 158 (National Labor Relations Act) prohibits retaliation against persons who participate in union activities; 29 U.S. C. § 211 (Labor-Management Reporting and Disclosure Act) protects union members so that they may freely meet and express views, nominate officers, vote, etc. with unions.

In sum, there is no statutory or common law support for a claim that “insisting” that others comply with Chapter 210 constitutes “protected activity” under common law wrongful discharge exceptions to the at-will doctrine.

B. Keveney’s Petition does not state a claim as a person who refused to commit an illegal act.

Keveney also makes the claim on appeal that his Petition alleges facts demonstrating that he falls within the first “public policy” exception – that he refused to perform an illegal act and was therefore protected from discharge.¹⁵

¹⁵ Keveney states in his appeal brief that his claim for “wrongful discharge” is brought under the “whistleblower” exception to the at-will doctrine – which protects those who report illegal conduct. *Keveney Brief, at p. 43.*

However, the factual allegations pleaded in Keveney's Petition do not bring his claims within this exception to the employment at-will doctrine.

Keveney does *not* allege in his Petition that he was fired for refusing to engage in illegal conduct. To the contrary, Keveney alleges that he was fired because he insisted that others report child abuse. *L.F. 08-13, ¶16*. Keveney did not allege anywhere in his Petition that he stated to his superiors that he refused not to report what he perceived was child abuse and was then fired.

Moreover, Keveney admits he never alleged that he "blew the whistle" to any persons other than his supervisors – the persons he claims had a duty to report the bruises to the DFS. There is no allegation anywhere in the Petition that Keveney complained to anyone other than his supervisors prior to his termination.

It has long been held by courts of appeal in Missouri that "blowing the whistle" to the alleged wrongdoers is not protected conduct. Indeed, in *Faust v. Ryder Commercial Leasing & Serv.*, 954 S.W.2d 383 (Mo. App. 1997), the court wrote:

The reporting of criminal wrongdoing to the wrongdoer does not logically fit within the framework of the exception [to the at-will doctrine] as 'whistleblowing,' such framework being structured to meet a clear mandate of public policy implicated in a given factual situation. Thus, expansion of the exception to include reports of

criminal wrongdoing to the wrongdoer himself or herself simply is illogical.

Id. at p. 392.

The *Faust* court affirmed a judgment notwithstanding a verdict in favor of an employer where the employee (Faust) allegedly complained to his supervisors that those supervisors were stealing from their mutual employer. *Id.* at 386. After Faust confronted his supervisors with the theft allegation, his supervisors allegedly threatened Faust's job stating, "you ever mention that again to anybody, and that's going to be your career choice." *Id.* Faust claimed he was thereafter continually retaliated against until Faust was constructively discharged.

Like the plaintiff in *Faust*, Keveney never engaged in protected conduct because he only claims he confronted the alleged wrongdoers - his supervisors. *See also Brenneke v. Dep't of Mo., Vet. Of Foreign Wars*, 984 S.W.2d 134, 139 (Mo. App. W.D. 1998) (employee in *Faust* not "blow the whistle").

In sum, the facts pleaded in Count I of Plaintiff's Petition, even taken as true for purposes of this appeal, can not support an independent tort cause of action. As a result, this Court need not, and should not, reach the issue of whether persons who are employed pursuant to written contracts may sue under both contract and tort theories for the discharge.

III. The Trial Court Properly Granted the Academy’s Motion to Strike Keveney’s Claims for Emotional Distress and Punitive Damages in Count II of His Petition, Because Missouri Law Does Not Recognize A Claim For Such Damages Under the Facts Pleaded by Keveney.

Keveney acknowledges that Missouri law does not permit tort damages in breach of contract claims such as his. Keveney’s Substitute Brief, at p. 46. While Keveney dredged up two anomalous appeals court decisions that make reference to permitting tort damages in breach of contract cases, those decisions are extreme outliers. Indeed, this Court in *Luethans* specifically acknowledged that tort damages for an alleged “whistleblower” breach of contract claim were not recognized in Missouri. *Luethans v. Washington University*, 894 S.W.2d 169; 172. In upholding the grant of summary judgment to the defendant employer, this Court stated, “we decline to consider whether a separate unpled and as yet **unrecognized** tort and **theory of damages** should have been alleged in their place.” *Id.* (emphasis added).

Because Keveney cannot argue that the trial court erred in applying current law, Keveney asks this Court to expand the very narrow exceptions that currently exist to the rule that tort damages may not be awarded for breach of contract. Because Missouri courts have already reached the appropriate balance for allowing

tort damages in breach of contract claims, this Court should decline Keveney's invitation.

A. Missouri courts only recognize tort damages in breach of contract claims where the breach constitutes an independent tort.

It is well established that the appropriate measure of damages for the breach of an employment contract claim is “the contract price for services to be rendered minus the income the employee earned, or with diligence could have earned, during the contract term.” *Hendler v. Manageable Info. Sys.*, 838 S.W.2d 486, 488 (Mo. App. E.D. 1992). As a rule, punitive damages are not recoverable in breach of contract actions. *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 902 (Mo. 1990).

This Court, however, has recognized two narrow exceptions to the rule prohibiting tort damages in contract actions: (1) where the breaching party's conduct, apart from an intentional breach of contract, amounts to a “separate, independent tort,” and (2) where the breach of contract is coupled with “violations of a fiduciary duty.” *Id.* at 902-903.

With regard to the first exception, this Court has explicitly held that to permit the award of tort damages, the breach must be accompanied by an independent, willful tort, *and* there must be allegations of malice, wantonness, or oppression as to that independent tort. *Id.* at 903. The *Peterson* court emphasized

that it is *not enough that the breach of contract is “intentional or malicious”*:
“punitive damages are not available where the basis of the complaint is breach of contract, even where the breach is intentional, willful, wanton or malicious.” *Id.*
Other courts have stated: “it would seem the independent tort arising from the breach should be alleged, proved, and the ultimate facts thereof submitted to the jury as a predicate for the award of punitive damages.” *Stamps v. Southwestern Bell Tel.*, 667 S.W.2d 12, 13 (Mo. App. E.D. 1984).

It is difficult to find any cases actually applying this narrow exception. No case has been found where a court actually awarded tort damages for breach of an employment agreement. The obscurity of this exception is demonstrated by the lack of Missouri decisions upholding the award of tort damages in the context of breach of contract cases. On the other hand, the digests are full of cases holding that the measure of damages in breach of contract actions is the benefit of the parties’ bargain.

To fall within the second exception, a plaintiff must demonstrate a breach of a “fiduciary breach involving a public trust.” *Peterson*, 783 S.W.2d at 903. This fiduciary duty must exist separately and independently of the contractual obligations. *Id.* at 905. This Court’s analysis in *Peterson* also indicates that as with the previous exception, a plaintiff must demonstrate that the alleged conduct amounts to an *independent* tort: “where a breach of contract merges with, and

assumes the character of, a wilful [sic] tort, calculated rather than inadvertent, flagrant, and in disregard of obligations of trust punitive damages may be assessed.” *Id.* at 903 quoting *Brown v. Coates*, 253 F.2d 36, 39 (D.C. Cir. 1958).

Again, no Missouri court has apparently ever actually upheld the award of tort damages for breach of contract under this exception. Instead, Missouri courts have, as they should, uniformly applied the well established measure of damages in breach of contract claims.

Of critical importance is that both of these standards require that a plaintiff prove something beyond simply a breach of contract and require that a plaintiff plead, and prove, what amounts to an “independent tort.” Keveney’s breach of contract claim and tort claim are not independent – he claims in both instances that he was improperly discharged as an employee in violation of his contract. The identical facts have been plead to support Keveney’s breach of contract and “wrongful discharge” tort claims. Yet Keveney now claims that the single act of discharge gives rise to two independent causes of action.

B. Missouri courts have reached the correct balance with regard to tort damages in breach of contract claims.

In a breach of contract claim, a plaintiff must simply prove: (1) the existence of a contract and the terms of that agreement; (2) that the plaintiff performed or tendered performance; (3) that defendant did not perform; and (4) that the

defendant's failure to perform caused the plaintiff damage. *Venable v. Hickerson Phelps Kirtley & Assoc., Inc.*, 903 S.W.2d 659, 664 (Mo. App. W.D. 1995)

The purpose of a breach of contract claim is to place the non-breaching party in the position he or she would have been in, had no breach occurred. *Tony Thornton Auction Service, Inc. v. Quintis*, 760 S.W.2d 202, 206 (Mo. App. S.D. 1988). Given the elements of a breach of contract claim, the parties are not required to put forth evidence of motivation, nor do juries reach issues of motivation in determining whether a breach has occurred.

Because juries do not examine issues of motivation in breach of contract cases, it is not appropriate to extend tort-type damages in the absence of proof that the breach resulted in a truly "independent" tort. The facts of the present case demonstrate the intrinsic problem with permitting Keveney to seek tort damages in the context of this case. For instance, during arguments regarding the parties' motions in limine, the parties discussed with the trial court the difficulty of certain evidentiary issues, including the fact the DFS found no probable cause with regard to the student's bruises. (Tr. 9). Counsel for Keveney argued that the introduction of such evidence would cause the case to devolve into a mini-trial regarding the sufficiency of DFS's investigation. *Id.* However, allowing tort-type damages in a contract case, such as the present case, would require this type of evidence as

defendants would inevitably need to offer proof regarding their intentions and motivations related to the contract at issue.

When evidence of the parties' intentions comes before the jury, the cause of action necessarily changes dramatically. The current measure of damages in contract action applied Missouri courts appropriately addresses these concerns because it recognizes that an award of punitive damages necessarily involves proof of intent, motivation and other matters relevant only to tort causes of action.

The Indiana Supreme Court has recognized this essential difficulty in *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975 (Ind. 1993), a case in which Indiana's high court abandoned the language of *Vernon Fire & Casualty Ins. Co., v. A.W. Sharp*, 349 N.E.2d 173 (Ind. 1976), a case cited by Keveney in his brief. In *Miller*, the court rejected the holding in *Vernon* as dicta, and held that to receive punitive damages in a contract action, a plaintiff had to "establish each element of a recognized tort for which Indiana law would permit the recovery of punitive damages." *Miller*, 608 N.E.2d at 983. The court went on to state that the rule put forth in *Vernon* "rests on an unwise policy." *Id.* In its reasoning, the Miller court recognized that:

[u]nlike torts, where the duty is owed to all and a broad measure of damages is available, contract obligations are owed only to the parties

to the contract and damages are limited to those reasonably within the expectations of the parties where the contract is made.

Miller, 608 N.E.2d at 984. Indeed, the *Miller* court recognized that when tort damages are awarded in breach of contract cases, they are awarded “for the tort, and not for the breach of contract.” *Id.* at 981. To meet the requirement of establishing an “independent” tort, Indiana courts require a plaintiff to prove both the existence of the independent tort, and that the tort “resulted in an injury distinct from that resulting from the breach.” *America's Directories Incorporated, Inc. v. Stellhorn One Hour Photo, Inc.*, 833 N.E.2d 1059, 1067 (Ind. Ct. App. 2005). Such a holding is in keeping with the reasoning adopted by Missouri courts and ensures that tort damages may only be awarded in situations where the breach of contract is truly independent of and distinguishable from the alleged tort.

C. The holdings of the courts of Mississippi and Vermont are inapplicable to Missouri courts because they rest on principles already rejected by the Missouri Supreme Court.

Keveney cites to decisions from other jurisdictions in support of his invitation to expand Missouri law. For instance, he cites *Paracelsus Health Care Corporation v. Willard*, 754 So.2d 437 (Miss. 1999), where the court adopted the view that “punitive damage awards arising out of breach of contract require proof of an independent tort.” *Id.* at 447. However, the *Willard* court diverges with

Missouri courts by finding that retaliatory discharge is an independent tort. *Id.* As discussed *supra* in Section I.A., the Missouri Supreme Court has specifically rejected this finding, making *Willard* inapplicable to the present case.

Similarly, the Vermont Supreme Court in *Glidden v. Skinner*, 142 Vt. 644, 627 (Vt. 1983) held that punitive damages may be appropriate in breach of contract claims sounding in tort. Again, this holding is inapplicable to the present case because the Missouri Supreme Court has rejected the contention that contract employees have a tort claim for wrongful discharge.

D. Damages for emotional distress are not appropriate in breach of contract actions.

Keveney also argues that the Court should allow damages for emotional distress because such damages are reasonably foreseeable in a breach of an employment contract. In support of his claim, he cites *Ackerman v. Thompson*, 202 S.W.2d 795 (Mo. 1947). However, *Ackerman* is inapplicable, because the court addressed the appropriate measure of damages in a service letter claim, not a breach of contract claim.

It could be argued that any job termination naturally results in “emotional distress” damages. Yet Missouri remains an at-will jurisdiction where persons who lose their jobs, as a rule, have no cause of action for “emotional distress.” In Missouri employees may not circumvent the employment at-will doctrine by

claiming that they suffered “emotional distress” as a result of their termination. *See Neighbors v. Kirksville College of Osteopathic Medicine*, 694 S.W.2d 822, 823 (Mo. App. E.D. 1985) (rejecting effort to obtain emotional distress damages in common law tort action by at-will employee relating to discharge).

Similarly, employees whose relationships with their employers are governed by contracts should not be permitted to circumvent their contracts by seeking “emotional distress” damages for breach of their employment contracts. Put more broadly, there are no doubt numerous contracts in business the termination of which will cause persons distress, but our courts simply do not provide for the recovery of such damages for the breach of those agreements.

In sum, Missouri law does not permit the award of tort damages, including punitive damages, in breach of contract actions absent two very narrow exceptions, neither of which applies here. Indeed, the Academy has not located any case in the history of Missouri jurisprudence that permitted the award of tort damages and punitive damages for the breach of an employment contract.

CONCLUSION

The Academy respectfully requests that this Court reverse the trial court’s award of damages to Keveney for breach of contract under Count II of the Petition, affirm the trial court’s dismissal of Count I of the Petition, and affirm the order

striking all claims for emotional distress and punitive damages for breach of contract in Count II.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

- (1) This brief contains the information required by Rule 55.03;
- (2) This brief complies with the limitations contained in Rule 84.06(b);
- (3) There are 11,597 words in this brief;
- (4) The electronic mail file containing a copy of this brief filed contemporaneously herewith has been scanned for viruses and is virus free.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct printed copy of the foregoing, as well as an electronic file copy, were served by first-class U.S. mail, postage pre-paid, this 24th of June, 2009 to:

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