

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. Seigel**

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**AMENDED SUBSTITUTE BRIEF OF  
APPELLANT PEPOSE VISION INSTITUTE, P.C.**

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## **JURISDICTIONAL STATEMENT**

Plaintiff Michelle Fleshner filed an action for wrongful termination against defendant Pepose Vision Institute, P.C. (“PVI”). The jury awarded plaintiff Fleshner \$30,000 in compensatory damages and \$95,000 in punitive damages. PVI filed a timely appeal to the Missouri Court of Appeals, Eastern District. On January 20, 2009, the court of appeals reversed the judgment of the trial court and remanded for a new trial. On May 5, 2009, this Court granted plaintiff’s application for transfer.

## **PROCEDURAL BACKGROUND**

On June 23, 2004, plaintiff filed a two-count action against PVI for alleged wrongful termination (Count I) and alleged failure to pay overtime (Count II). L.F. 0009-0015. On July 26, 2004, PVI removed the action to the United States District Court for the Eastern District of Missouri. L.F. 0016-0020. Plaintiff’s motion to remand was granted on August 24, 2004. L.F. 0029-0032. Plaintiff voluntarily dismissed the overtime-pay count prior to trial and proceeded to trial only on the claim for wrongful termination. L.F. 0109.

On October 9, 2007, judgment was entered against PVI on plaintiff’s wrongful-termination claim in the amount of \$30,000 for actual damages and \$95,000 for punitive damages. On both verdict forms, the jury was divided 9 to 3. L.F. 0477-0478, 0514; App. A9.

PVI filed a notice of appeal on December 26, 2007. L.F. 0631-0633. After the Missouri Court of Appeals, Eastern District, reversed and remanded for a new trial, this Court granted plaintiff’s application for transfer.

## STATEMENT OF FACTS

### **A. Michelle Fleshner's Employment At Pepose Vision Institute, P.C.**

Dr. Jay Pepose is an ophthalmologist who provides general vision care services, including refractive surgeries and LASIK procedures. He is the president and sole owner of defendant Pepose Vision Institute ("PVI"). Tr. at 642-643, 646-647, 714-715.<sup>1</sup> Susan Feigenbaum is Dr. Pepose's wife. She is employed by the University of Missouri-St. Louis as a professor of economics, and also serves as PVI's corporate Secretary and as a consultant to PVI. Tr. 317, 361-362, 467-468, 646.

Plaintiff Michelle Fleshner was employed by PVI from September 2000 through May 2003. Tr. 161. Plaintiff was initially hired to be the Refractive Services Coordinator, and later became Director of Patient and Community Outreach. Tr. 186, 207, 210-211. Dr. Pepose was plaintiff's supervisor until the fall of 2002, when Jake Cedergreen was hired as PVI's Practice Administrator. From that point, plaintiff reported to Mr. Cedergreen. Tr. 213. In her position, plaintiff promoted, developed, and monitored all professional outreach and patient relations of PVI's practice relating to the provision and growth of refractive, cornea, and cataract surgery. Tr. 211-213; L.F. 0179-0182. Refractive surgery is a medical procedure, usually performed with a laser, to help reduce or eliminate a patient's need for eye-glasses. Tr. 175.

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

**B. Downturn in LASIK Surgeries at PVI and Layoff Decisions.**

PVI kept statistics on a month-to-month basis regarding the change in the number of LASIK surgeries performed. Tr. 475-476, 513, 649; L.F. 0415. Between 1999 and 2001, the number of LASIK surgeries PVI performed grew rapidly. Tr. 647. However, most LASIK procedures are elective, and thus not covered by insurance. Tr. 635. Many at PVI, including plaintiff, became concerned with a noticeable decrease in LASIK procedures requested by patients after September 11, 2001, part of a nationwide decrease in elective surgeries. Tr. 217-218, 314, 319-320, 388, 469, 605-606, 647-649. PVI performed 21.6% fewer LASIK surgeries in 2002 than it had in 2001. L.F. 0415. LASIK surgeries, which accounted for 85% of PVI's revenue, continued to decrease at the end of 2002 and into early 2003. Tr. 323-325, 649. For example, PVI performed 45.4% fewer LASIK surgeries in March 2003 than it had in March 2002. L.F. 0415.

Dawn Cavanaugh, an external ophthalmic consultant to PVI in 2002 and 2003, was retained to make recommendations for improving PVI's profitability. Tr. 465-466, 596, 599. Ms. Cavanaugh analyzed the LASIK "growth chart" (L.F. 0415) on a monthly basis to track the number of LASIK surgeries performed each month. Tr. 603-604. PVI needed about 150 LASIK surgeries per month to break even, but the practice never reached that threshold from July 2002 through the rest of that year. Tr. 477, 649; L.F. 0415.

In mid-2002, Ms. Cavanaugh expressed concerns that the practice must make cost-cutting steps in response to the downturn in LASIK surgeries. Tr. 606. Ms. Cavanaugh recommended stopping all consulting payments to Ms. Feigenbaum, closing the St. Peters

office, decreasing or freezing employee wages, and requiring increased health insurance contributions from employees. Tr. 325, 466-467, 607-609. PVI decided to stop providing any compensation to Ms. Feigenbaum for her consulting services as of mid-June 2002, and it was decided that the St. Peters office would operate fewer days each week. Tr. 466-468. However, at that time Dr. Pepose rejected Ms. Cavanaugh's recommendations regarding employee salaries and insurance benefit premiums. Tr. 466-467, 651-652.

In December 2002, Dr. Pepose again became concerned about the practice. Tr. 650. In January 2003, the number of LASIK surgeries performed continued to decrease as compared to January 2002. Tr. 480. Dr. Pepose asked Ms. Cavanaugh for additional proposals to cut costs in the beginning of 2003. Tr. 481, 653-656. Among other things, Ms. Cavanaugh recommended that Dr. Steven Lee not be replaced when he left the practice in January 2003, and Dr. Pepose agreed. Tr. 655-656. In December 2002, Ms. Cavanaugh also had begun discussing elimination of some of the mid-level management positions, including the one held by plaintiff. Tr. 390-391, 482-483, 608-611, 660-662; L.F. 0189. Dr. Pepose eventually accepted the recommendation and made the final decision to eliminate three positions, including the plaintiff's. Tr. 611-612, 660-664. Ms. Cavanaugh put this recommendation into writing in a letter dated March 17, 2003:

I reviewed all mid-level management positions in all divisions of the practice [and] I am recommending that the following positions be eliminated and tasks be reallocated to nonmanagement employees:

Office Manager, St. Peters (Sharon Hardcastle)

Optical Manager (Kathy White)

Director of Patient and Community Outreach (Michelle Fleshner). . .

L.F. 0189.

Time was needed to transition the job responsibilities for those whose jobs were being eliminated. Tr. 677-681. Ms. Cavanaugh told Mr. Cedergreen about the layoffs in April 2003 so that the transitions could begin. Tr. 612. It took longer than expected to effectuate the layoffs because, for example, a transition period was needed to reduce operations in the St. Peters office from five days to two days per week. Tr. 504-505.

On Monday, May 20, 2003, Mr. Cedergreen proposed that both plaintiff and another manager whose position was being eliminated be told that week about the layoffs. Tr. 401-403, 491-492; L.F. 0214. On that date, Mr. Cedergreen sent the following e-mail to Ms. Feigenbaum:

The plan is to talk to both Michelle [Fleshner] and Kathy, this week.

Michelle asked what was happening with her job today. I told her that it would be changing.

My plan is to eliminate both of these jobs, and treat them as layoffs. They will be free to interview for the other positions that we have available.

Technical assistant and receptionist.

L.F. 0214.

On May 22, 2003, Ms. Feigenbaum received another e-mail from Mr. Cedergreen:

Michelle came into my office again and asked me if I was going to fire her. I told her that was not my plan. I think we have everything we need from her, and she knows what is about to happen. So, in order to limit and [sic] potential damage or the chance for her to copy everything, including our database, if she hasn't already, I think that we should let her go sooner, rather than later. So, unless you think otherwise, I would like to give her notice tomorrow.

Jan told me that Michelle had approached Stacy and told her that she better start looking for a job, because management was starting to "phase her out." (!) Stacy told Jan this recently and stated that she just ignored Michelle, because she knew Michelle made claims like this in the past.

We are short at the front desk and we need someone to work the optical on Friday. So, I'm going to wait until next week to let Kathy go.

Let me know what you think.

L.F. 0213.

Ms. Feigenbaum responded to Mr. Cedergreen the same day:

It's your call. Given the latest Stacey incident, I would use this.. as well as the prior incidents concerning Linda and Jan..to let Michelle go. She has clearly violated the terms of her appointment per JSP. I am much less kindly towards her since you have told me this and have no preference as to whether you lay her off or fire her at this point..and pay her whatever you want..and escort her out tomorrow..

L.F. 0213.

Because of Ms. Feigenbaum's position as Department Chair at the University of Missouri, during this time period she had to attend to scheduling classes for the following semester, staffing the department, preparing performance reviews of faculty members, making recommendations for raises, and wrapping up final grades for her own classes. Tr. 485-488. In May 2003, Ms. Feigenbaum also was undergoing medical tests and procedures required by her obstetrician/gynecologist Tr. 490. During the week of May 20, 2003, Ms. Feigenbaum was not in the PVI office at all because she had just had major surgery the Friday before and was trying to focus on her health and her children. Tr. 495-496.

Plaintiff's job was eliminated, and she was terminated on the afternoon of May 23, 2003. Tr. 256-257. Plaintiff received three weeks of severance pay upon the elimination of her position. Tr. 257; 322. Dr. Pepose explained to plaintiff that her job was being eliminated due to economic conditions and a downturn in the number of LASIK procedures being performed at the practice. Tr. 307-308; 388; 469. The tasks that plaintiff performed were assigned to other staff and surgeons at the practice. Tr. 616-617. Through the date of trial, PVI had not filled either plaintiff's job or the other two jobs that were eliminated in 2003. Tr. 516-517, 615-616.

### **C. Investigation by the USDOL.**

By letter dated March 19, 2003, Maggie Murray, a wage-hour investigator with the U.S. Department of Labor (“USDOL”), informed PVI that she would be visiting PVI’s business on April 9, 2003, to determine PVI’s compliance with the Fair Labor Standards Act (“FLSA”). Tr. 639; L.F. 0424. The letter did not refer to plaintiff or the names of any other employees of PVI. L.F. 0424. In April, 2003, Ms. Feigenbaum became aware that the USDOL was investigating PVI. Tr. 406-407.

Ms. Murray, the investigator with the USDOL, talked to several employees at PVI. Tr. 309-310. Plaintiff did not file a complaint against PVI with the USDOL, but she was one of the employees who spoke to Ms. Murray. Tr. 239-241, 243, 309. The first time plaintiff had any interaction with the USDOL was in mid-April of 2003, when she was interviewed by Ms. Murray. Tr. 308. Plaintiff did not talk to anyone working with the State of Missouri Department of Labor (“MODOL”). Tr. 309.

The next time plaintiff talked to Ms. Murray was on the evening of May 21, 2003, when plaintiff received a telephone call from Murray at home. Tr. 243-244, 249-250, 311; L.F. 0186-0188. The next morning plaintiff told her supervisor Mr. Cedergreen about the call from the USDOL investigator. Tr. 252-253. Plaintiff asked Mr. Cedergreen if she would lose her job because of the telephone call with the investigator, and he replied “no.” Tr. 255.

Prior to the date on which plaintiff’s job was eliminated and her employment terminated, Ms. Feigenbaum did not know to whom the USDOL had talked or whether plaintiff had talked to the investigator. Tr. 515-516. Dr. Pepose was not aware of the

USDOL audit either at the time he agreed to eliminate the three mid-management positions or at the time plaintiff's position was eliminated and her employment terminated. Tr. 709-711. Plaintiff received a written summary of her USDOL interview a couple of months after her job was eliminated and her employment was terminated, and so never provided Dr. Pepose with a copy of her statement to the USDOL prior to her termination. Tr. 316-317; L.F. 0186-0188.

**D. Plaintiff's Non-Competition Agreement.**

At her prior employers, plaintiff had helped to build refractive-surgery practices and developed seminars for prospective clients. Tr. 176-182, 364-365, 664-665. When interviewing for her position at PVI, plaintiff explained that her previous job duties included helping to grow her prior employers' LASIK surgery volumes. Tr. 313; 364-365; 664-665. With PVI, plaintiff signed a non-competition agreement that prohibited her from working within fifty miles of PVI in a substantially similar 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." Tr. 270-272, 446-447; L.F. 0167-0171.

At the time of her termination, plaintiff asked Mr. Cedergreen if she could be released from her non-competition agreement restrictions, and he replied "no." Tr. 257. When she left PVI, plaintiff understood that her non-competition agreement prohibited her from applying for employment with refractive surgery practices. Tr. 272-273. After

leaving PVI, she became employed by Drs. Joan and Flavius Pernoud, who operate a general ophthalmology practice that performs some refractive surgeries. Tr. 272-274. The Pernouds hired plaintiff to be their practice administrator, which involved overseeing their entire practice. Tr. 276-277, 551. Plaintiff sought legal advice regarding her non-competition restrictions and her employment with the Pernouds. Tr. 275.

Dr. Pepose discovered that plaintiff was working in the Pernouds' ophthalmology practice. Tr. 690-691. He performed a web search on the Pernouds' practice and saw that the Pernouds advertised refractive surgeries and LASIK procedures. Tr. 447, 650-91, 693-702; L.F. 0425-0428. The Pernouds' practice did business as "Refractive Surgery Center" and performed refractive surgery in 2003. Tr. 555-556. The Pernouds' website indicated that LASIK surgeries were performed in 2003 and the practice's 2002 Yellow Pages ad specifically mentions LASIK surgeries. Tr. 557-559; L.F. 0416-0418. Additionally, Dr. Flavius Pernoud was a part-owner of the St. Louis Refractive Surgery Center LLC, and he had business partners who performed LASIK. Tr. 559-564.

When Dr. Pepose discovered that plaintiff was working for the Pernouds, PVI's attorney sent a letter to the Pernouds putting them on notice that plaintiff's employment with the Pernouds was in violation of her non-competition restrictions and that the agreement would be enforced. Tr. 285-286, 448-449; L.F. 0196-0197. After communications between lawyers failed to resolve the matter, PVI filed an action to have the non-competition agreement enforced against plaintiff. Tr. 288-289, 292; L.F. 0196-0212, 0388, 0408-0410. As a result of the filing, the Pernouds terminated plaintiff's employment. Tr. 293-294, 453; L.F. 0388.

Because plaintiff had experience growing LASIK practices at her prior employers, Dr. Pepose was concerned about her working for an ophthalmologist who advertised the ability to perform LASIK surgery and other refractive procedures. Tr. 364-365, 664-665, 760-761. Dr. Pepose would not have sought to enforce the non-competition agreement against plaintiff if she had been working for an ophthalmologist who was not performing LASIK procedures. Tr. 697. PVI had also enforced Dr. Lee's non-competition agreement when Dr. Lee left PVI at the beginning of 2003. Tr. 325-326, 659.

In order to regain her employment with the Pernouds, plaintiff then filed a petition for declaratory judgment and injunctive relief against PVI. Tr. 297-298; L.F. 0389-0396. During that litigation, Dr. Flavius Pernoud admitted in deposition testimony that he performed LASIK surgeries. Tr. 299-300, 459-460, 542, 545. The parties eventually entered into a settlement agreement pursuant to which plaintiff could return to work with the Pernouds as long as she was not involved in any way with LASIK procedures or other refractive surgeries and she agreed not to disclose any confidential information or documentation that she received during her employment with PVI. Tr. 300-303, 506-507, 703-705, 709; L.F. 0413-0414, 0420-0423.

Because of the large amount of evidence Plaintiff introduced at trial concerning enforcement of the non-competition agreement, PVI requested an instruction informing the jurors that they could not consider evidence of the non-competition lawsuits on the issue of liability. L.F. 0457. The trial court rejected the proposed instruction, concluding that the effort to enforce the non-competition agreement was evidence of PVI's

“motivation in discharging or eliminating the [plaintiff’s] employment,” even though it had occurred after plaintiff’s discharge. Tr. 778-780.

In both closing argument and rebuttal, plaintiff’s counsel highlighted PVI’s enforcement of the non-competition agreement and characterized it as evidence of PVI’s alleged desire to punish PVI for talking to the USDOL. Tr. 784, 798, 799, 825. During jury deliberations, the non-competition agreement (L.F. 0167-0171) was one of the four exhibits the jury asked to see. Tr. 827.

**E. Juror Misconduct.**

On October 9, 2007, immediately after the jury was dismissed by the trial judge, Juror Number 9 approached PVI’s defense attorneys and reported that anti-Semitic comments were made during both phases of jury deliberations. L.F. 0539-0540 (sealed), 0541-0542. Specifically, Juror Number 9 indicated that, during deliberations, a juror made the following comments about Ms. Feigenbaum:

- “She is a Jewish witch.”
- “She is a Jewish bitch.”
- “She is a penny-pinching Jew.”
- “She was such a cheap Jew that she did not want to pay plaintiff unemployment compensation.”

L.F. 0539 (sealed).<sup>2</sup> Juror Number 9 reported other anti-Semitic comments from jurors throughout both phases of the deliberations, including the statement that “the Jew, Pepose, makes \$5 million per year and should pay money to the plaintiff in this case.” L.F. 0539-0540 (sealed).

On October 9, 2007, Juror Number 12 contacted one of PVI’s defense attorneys by telephone and corroborated Juror Number 9’s reports of repeated anti-Semitic comments during the jury’s deliberations. L.F. 0541-0542. Juror Number 12 confirmed that several anti-Semitic comments were made. L.F. 0542. Juror Number 12 indicated that “the deliberation experience was a very negative one for her because of the anti-Semitic remarks and because the conversations during deliberations became heated and personal.” L.F. 0542.

In its motion for new trial, PVI argued that a new trial was necessary because of the anti-Semitic statements made during the jury’s deliberations. L.F. 0535-0537, 0586-0587. PVI requested that, at a minimum, the trial court conduct an evidentiary hearing to determine whether those statements improperly bore on and influenced the jury’s decision-making during deliberations. L.F. 0536.

At the December 14, 2007, hearing on PVI’s post-trial motions, both PVI and plaintiff were prepared to offer testimony from some of the jurors about the anti-Semitic

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<sup>2</sup> The Affidavit of Juror Number 9 was filed “under seal” in the trial court below, and the Affidavit has also been sealed as a separate portion of the Record on Appeal in this case because it identifies Juror Number 9 by name.

remarks made during their deliberations. Dec. 14, 2007 Tr. at 2-7; L.F. 0584. No evidence was taken at the hearing. Dec. 14, 2007 Tr. at 2-7. Instead, while acknowledging that the remarks, if made, were “reprehensible,” the trial court ruled that any affidavits or testimony by the jurors would not make any difference because “jury deliberations are sacrosanct and I do not believe – I don’t know if this constitutes that kind of jury misconduct that is contemplated by a court’s consideration of setting a verdict aside.” Dec. 14, 2007 Tr. at 5. The trial court concluded that, as a matter of law, he was precluded from considering evidence of anti-Semitic comments made during jury deliberations and had no authority to set aside the verdict even if he concluded that jurors had openly expressed and been motivated by anti-Semitic bias. Dec. 14, 2007 Tr. at 3, 4.

The trial court denied PVI’s motion for new trial based on juror misconduct and “decline[d] to hold an evidentiary hearing on allegations of anti-Semitic 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 & 78.05, RSMo.” L.F. 0625.

PVI filed a notice of appeal. L.F. 0631.

**POINTS RELIED ON**

- I.** THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION FOR NEW TRIAL BECAUSE DEFENDANT WAS DEPRIVED OF ITS DUE PROCESS RIGHTS IN THAT JURY MISCONDUCT IN THE FORM OF ANTI-SEMITIC REMARKS IMPAIRED DEFENDANT’S ABILITY TO HAVE ITS CASE HEARD BY AN IMPARTIAL JURY.

Mo. R. Civ. P. 78.01

*Catlett v. Illinois Central Gulf Railroad*, 793 S.W.2d 351 (Mo. banc 1990)

*Brown v. Collins*, 46 S.W.3d. 650 (Mo. App. 2001)

Federal Rule of Evidence 606(b)

- II.** THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTIONS FOR DIRECTED VERDICT AND FOR JNOV ON PLAINTIFF’S CLAIM FOR WRONGFUL TERMINATION BECAUSE HER PUBLIC POLICY ARGUMENT IS PREEMPTED BY FEDERAL LAW IN THAT THE FAIR LABOR STANDARDS ACT PROVIDES A COMPLETE RANGE OF REMEDIES FOR PLAINTIFF’S CLAIM.

29 U.S.C. § 216

*Prewitt v. Factory Motor Parts, Inc.*, 747 F.Supp. 560 (W.D. Mo. 1990)

*Shawcross v. Pyro Products, Inc.*, 916 S.W.2d 342 (Mo. App. 1995)

*Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108 (7th Cir.1990)

**III.** THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTIONS FOR DIRECTED VERDICT AND FOR JNOV ON PLAINTIFF’S CLAIM FOR WRONGFUL TERMINATION BECAUSE PLAINTIFF DID NOT OFFER SUBSTANTIAL EVIDENCE TO SUPPORT THE ELEMENTS NECESSARY TO RECOVER FOR WRONGFUL TERMINATION FOR ACTIVITY PROTECTED BY MISSOURI PUBLIC POLICY IN THAT PLAINTIFF’S UNDERLYING ACTIONS WERE NOT COVERED BY THE MISSOURI MINIMUM WAGE LAW.

*Adolphsen v. Hallmark Cards, Inc.*, 907 S.W.2d 333 (Mo. App. 1995)

R.S.Mo. § 290.525

*Dick v. Children’s Mercy Hospital*, 140 S.W.3d 131 (Mo. App. 2004)

*New Hampshire v. Maine*, 532 U.S. 742 (2001)

**IV.** THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION FOR NEW TRIAL BECAUSE THE TRIAL COURT REJECTED DEFENDANT’S VERDICT DIRECTOR, IN THAT DEFENDANT’S VERDICT DIRECTOR PROPERLY STATED THE LAW OF MISSOURI THAT PLAINTIFF MUST PROVE THAT HER ALLEGEDLY PROTECTED ACTIVITY WAS THE EXCLUSIVE CAUSE OF HER TERMINATION.

*Crabtree v. Bugby*, 967 S.W.2d 66 (Mo. banc 1998)

*Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147 (Mo. App. 1995)

*Grimes v. City of Tarkio*, 246 S.W.3d 533 (Mo. App. 2008)

*Means v. Sears, Roebuck & Co.*, 550 S.W.2d 780 (Mo. 1977)

- V. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE THE TRIAL COURT ALLOWED EVIDENCE REGARDING DEFENDANT'S ENFORCEMENT OF THE NON-COMPETITION AGREEMENT WITH PLAINTIFF AND REJECTED DEFENDANT'S LIMITING INSTRUCTION IN THAT SUCH EVIDENCE WAS NOT RELEVANT, NOR LEGALLY RELEVANT, AT LEAST WITH REGARD TO THE ISSUE OF LIABILITY.

*Cullen v. Olin Corp.*, 195 F.3d 317 (7th Cir. 1999)

*Jones v. Coleman Co.*, 183 S.W.3d 600 (Mo. App. 2005)

*Eltiste v. Ford Motor Co.*, 167 S.W.3d 742 (Mo. App. 2005)

*Darnaby v. Sunstrum, M.D.*, 875 S.W.2d 195 (Mo. App. 1994)

## ARGUMENT

### **I. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION FOR NEW TRIAL BECAUSE DEFENDANT WAS DEPRIVED OF ITS DUE PROCESS RIGHTS IN THAT JURY MISCONDUCT IN THE FORM OF ANTI-SEMITIC REMARKS IMPAIRED DEFENDANT’S ABILITY TO HAVE ITS CASE HEARD BY AN IMPARTIAL JURY.**

The trial court erroneously concluded that, as a matter of law, it had no authority to consider evidence that the verdict for plaintiff was tainted by anti-Semitic bias against PVI and its witness. A juror’s expression of racial, ethnic, gender, or religious bias must be recognized as juror misconduct that can justify a new trial. The Court should hold that, in the face of evidence that jurors openly expressed impermissible bias during deliberations, the trial court has the authority to conduct a hearing to determine whether expressions of bias occurred and to order a new trial on those grounds. Because the trial court erroneously believed it did not have authority to conduct a hearing to determine if PVI had been denied a fair and impartial trial, this Court should reverse and remand for a new trial.

#### **A. Standard of review.**

The trial court ruled as a matter of law that jurors’ expressions of anti-Semitic bias during deliberations could not constitute juror misconduct justifying a new trial, and declined to hold a hearing. Because the trial court decided this issue as a matter of law and not in the exercise of its discretion, the Court reviews this issue *de novo*. See *Murrell*

*v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007); *Brown v. Brown*, 152 S.W.3d 911, 914 (Mo. App. 2005); *McBride v. Farley*, 154 S.W.3d 404, 410 (Mo. App. 2004).

The Court should also review *de novo* the proffered evidence of jury misconduct because the trial court did not conduct an independent examination of the evidence. See *Catlett v. Illinois Cent. Gulf R.R.*, 793 S.W.2d 351, 353 (Mo. banc 1990). When it comes to juror misconduct issues involving extraneous evidence, reviewing courts do not always defer to the trial court's assessment as to whether a new trial should be ordered. *Dorsey v. State*, 156 S.W.3d 825, 833 (Mo. App. 2005).

**B. The evidence of anti-Semitic bias indicated juror misconduct requiring a hearing.**

At the cornerstone of our judicial system lies the constitutional right to a fair and impartial jury, composed of twelve qualified jurors. *Williams v. Barnes Hosp.*, 736 S.W.2d 33, 36 (Mo. banc 1987); see Mo. Const. art. I, § 22(a); *Beggs v. Universal C.I.T. Credit Corp.*, 387 S.W.2d 499, 503 (Mo. banc 1965). It is essential that a juror be disinterested and free from bias or prejudice. The guarantee of procedural due process under the Fourteenth Amendment of the United States Constitution and Article 1, §10 of the Missouri Constitution requires that no person shall be deprived of life, liberty or property without due process of law. Procedural due process requires fair trials by fair tribunals for all litigants regardless of race or nationality. See *Peters v. Kiff*, 407 U.S. 493, 501-02 (1972). The right to a fair and impartial trial is accorded to both individuals and corporations. See *Green v. Ralston Purina Co.*, 376 S.W.2d 119, 127 (Mo. 1964).

Under Rule 78.01, the court may grant a new trial of any issue upon good cause shown. Good cause includes juror misconduct when that misconduct tends to prevent “a fair and due consideration of the case,” section 547.020(2), RSMo, and when the verdict has been decided by a means other than the fair expression of opinion on the part of all of the jurors, section 547.020(3), RSMo.

PVI presented evidence that during deliberations jurors expressed and were motivated by anti-Semitic bias, depriving PVI of an impartial jury and a fair trial. In light of this evidence, the trial court at least should have conducted a hearing to determine whether there was juror misconduct requiring a new trial.

As part of PVI’s motion for a new trial, the trial judge had before him an affidavit from a juror containing allegations that another juror made several comments about Ms. Feigenbaum, who was Dr. Pepose’s wife, testified at trial, and was substantively involved in PVI’s operations. Ms. Feigenbaum was called “a Jewish witch,” “a Jewish bitch,” and “a penny-pinching Jew.” She was accused of being “such a cheap Jew that she did not want to pay plaintiff unemployment compensation.” L.F. 0539-0540 (sealed). PVI presented evidence that other jurors made anti-Semitic remarks, including a statement that “the Jew, Pepose, makes \$5 million per year and should pay money to the plaintiff in this case.” L.F. 0539-0540. Another juror corroborated the fact that anti-Semitic comments were made during jury deliberations. L.F. 0541-0542.

Juror Number 9’s sworn statement and the corroborative statements by Juror Number 12 are evidence that the 9-to-3 jury verdicts on liability for both compensatory and punitive damages were tainted by religious and ethnic prejudice, depriving PVI of its

due process rights in violation of both the United States Constitution and the Missouri Constitution, and its right to a fair and impartial trial by jury. *See Rodgers v. Jackson County Orthopedics, Inc.*, 904 S.W.2d 385, 388 n.5 (Mo. App. 1995) (even if jury is unanimous in returning a verdict, a party would be entitled to a new trial if one or more of the persons who actually sat on the jury was not qualified). The trial judge decided not to hold a hearing to consider this evidence and determine whether a new trial was warranted, based on his conclusion that he was prohibited from considering this type of juror misconduct. L.F. 0625.

Based on fundamental due process principles and a long line of Missouri cases recognizing a party's right to an unbiased jury, this Court should hold that expressions of racial, religious, gender, or ethnic bias during jury deliberations constitute evidence of juror misconduct and good cause for granting a new trial. Because the trial court failed to conduct a hearing despite the evidence that juror misconduct had deprived PVI of its rights to due process and a fair and impartial jury, the Court should reverse and remand for a new trial.

**C. Expressions of prejudice during deliberations are juror misconduct.**

Missouri courts have consistently held that parties are entitled to an impartial jury panel free of prejudice or bias. In *Catlett v. Illinois Central Gulf Railroad*, 793 S.W.2d 351, 353-34 (Mo. banc 1990), this Court held that the trial court committed reversible error in summarily denying a defendant's motion to strike for cause a venireperson who was equivocal about her ability to serve as an impartial juror. In *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 411-12 (Mo. App. 1996), the court of appeals held that the trial

court had committed reversible error in denying plaintiff's motion to strike a potential juror who was equivocal about putting aside his favoritism toward individuals over corporations.

*Brown v. Collins*, 46 S.W.3d. 650 (Mo. App. 2001), involved a venireperson who was permitted to remain on the jury even after stating she could not be impartial because the expert in the case was a chiropractor. In reversing the trial court, the court of appeals emphasized that jurors free from bias and prejudice are essential to our jury system. *Id.* at 652. The court noted that, even in a civil trial in which unanimity is not required and a verdict can be reached by a three-fourths majority, a litigant is still entitled to a jury of twelve impartial persons. *Id.*; see also *Triplett v. St. Louis Public Serv. Co.*, 343 S.W.2d 670, 672-73 (Mo. App. 1961).

The same principles apply here to discriminatory bias expressed during deliberations. If any juror in this matter had revealed during voir dire a bias against Jewish people like that reflected in the statements reported by Juror No. 9, the trial court surely would have been obligated to grant a motion to strike the juror for cause, even if the potential juror claimed that he or she could put the anti-Semitism aside in deciding a case involving a Jewish defendant. PVI should not be denied its right to an impartial jury because the jurors' virulent prejudices went undetected until after deliberations began. In *Makey v. Dryden*, 128 S.W. 633, 635 (Tex. Civ. App. 1910), for example, a juror suppressed his racial bias on voir dire, but later indicated that he would not believe what a black person said when opposed to the statement of any white person. The court

explained that had the juror disclosed his prejudice he would have been excluded from sitting on the jury and that a motion for new trial should be granted for this reason alone.

Anti-Semitic remarks made by jurors during deliberations also would support the finding that their prejudices made them unable to follow court's instructions, in violation of section 494.470, RSMo, which states: "Persons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions are ineligible to serve as jurors on that case." *See Joy v. Morrison*, 254 S.W.3d 885, 889 (Mo. banc 2008). In this case, if the jurors made comments as recounted in Juror 9's affidavit, then their beliefs precluded them from following the law as instructed by the trial court.

Express injections of racial, ethnic, gender, or religious prejudices into the jury deliberation process have been and should continue to be an area of particular concern and diligence. A racially or religiously biased person harbors negative stereotypes that, despite protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and the law as our jury system requires. *Florida v. Davis*, 872 So.2d 250, 254 (Fla. 2004). Even if the bias is not revealed until after the jurors begin their deliberations, the Court should recognize an institutional intolerance for bias and allow the trial court to investigate the alleged juror misconduct and order a new trial if the court concludes that the verdict was tainted.

**D. The "No Impeachment Rule" must be balanced against the need to ensure fair and impartial decision-making.**

Based on a desire to protect the deliberative process, this Court has held that jurors are not competent to impeach a verdict by the making of an affidavit or testifying as to

“matters inherent in the verdict” (the “Mansfield Rule”). *Baumle v. Smith*, 420 S.W.2d. 341, 348 (Mo. 1967); *see also Stotts v. Meyer*, 822 S.W.2d 887, 889 (Mo. App 1991). In *Baumle*, this Court determined that matters inherent in the verdict include circumstances when the juror (1) did not understand the law as contained in the court’s instructions; (2) did not join in the verdict; (3) voted a certain way due to a misconception of the evidence; (4) misunderstood the statements of a witness; (5) was mistaken in his calculations; or (6) other matters “resting alone in the juror’s breast.” “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.” *Baumle*, 420 S.W.2d. at 348. However, a juror who has reached his conclusions based on an anti-Semitic bias openly expressed to the other jurors cannot be entitled to the same protection.

Notwithstanding the Mansfield Rule, Missouri courts have allowed jurors to testify about (1) extraneous prejudicial information improperly brought to the jury’s attention and (2) any outside influence improperly brought to bear upon any juror. *See e.g. Stotts*, 822 S.W.2d at 889 (juror visited scene of accident about which evidence had been heard); *McBride v. Farley*, 154 S.W.3d 404 (Mo. App. 2004) (jury coordinator’s remarks to jury about the case outside of the court room were presumptively prejudicial). Federal Rule of Evidence 606(b) permits a juror to testify about whether extraneous prejudicial information was improperly brought to the jury’s attention and whether any outside influence was improperly brought to bear upon any juror. Courts have interpreted the phrases “extraneous prejudicial information” and “improper outside influence” to

include information received by the jury other than that received at trial. *Stotts*, 822 S.W.2d at 889; *see also United States v. Hall*, 85 F.3d 367 (8th Cir. 1996) (allowing affidavit showing that at least one juror overheard prejudicial information not in evidence, and the information was discussed among the jurors).

The trial court in this case should have considered the evidence of anti-Semitic motives of some of the jurors, because such vile prejudices, once openly expressed during deliberations, are no longer matters “resting alone in the juror’s breast” or matters inherent in the verdict. The prejudicial misconduct in this case does not relate to the mental processes or innermost thoughts of the jurors, and the affidavits do not reveal any protected subjective reasoning behind the jury verdict. The outright appeals to anti-Semitism constituted overt acts of misconduct and fairly fall within the scope of “extraneous prejudicial information” and “improper outside influence,” no different than if a juror had relied on outside information obtained about a witness or a party that was not part of the evidence at trial.

If improper bias manifests itself in the form of a comment made by jurors during deliberations that may affect the vote of other jurors, the comments are the equivalent of improper outside information. *See* 27 Wright & Gold, *Federal Practice & Procedure* § 6074 at 507-08 (2007). Religious, ethnic, or other biases are outside information because they constitute an influence from impermissible factors that are not part of the trial record and are outside the parameters of constitutionally acceptable grounds for jury verdicts. Surely expressions of religious, ethnic, gender, or racial bias are even more insidious to

the judicial process than other types of extraneous prejudicial information brought into the jury room.

There are no practical or policy reasons for extending the “Mansfield Rule” to circumstances in which jurors openly express racist or other discriminatory beliefs that taint the entire deliberation process. When such juror misconduct comes to light, the trial court must have the authority to conduct a hearing, consider the evidence of improper bias and motive, and decide whether a new trial is warranted. Otherwise, trial courts will be helpless even if the record indicates that all nine jurors openly voted against a party because the party was African-American or Hispanic or Jewish or a woman.

If a court is not allowed at least to conduct a hearing when this type of juror misconduct occurs, then the bigot most dangerous to the process – the one whose prejudice is not expressed until deliberations begin – also will be the most protected. The Court should strike a balance between protecting the integrity of jury deliberations and eradicating prejudice from the process.

**E. Other courts have held that a court may order a hearing and a new trial when confronted with evidence that jurors expressed discriminatory bias during deliberations.**

Courts in other states have recognized that a juror’s expression of bias and improper discriminatory motivation during deliberations is juror misconduct and violates the constitutional guarantees of a fair and impartial jury and due process of law.

In *After Hour Welding, Inc. v. Laneil Management Co.*, 324 N.W.2d 686 (Wis. 1992), the trial court denied the defendants’ motion for a new trial based on the affidavit

of a juror that during deliberations a juror referred to a party as “a cheap Jew.” In reversing the trial court, the Wisconsin Supreme Court explained that whenever a trial court becomes aware that a jury verdict may be a product of racial, religious, or gender-based discrimination, judges should be especially sensitive to allegations of prejudice and conduct an investigation to “ferret out the truth.” *Id.* at 690. The Court explained that prejudice cannot be allowed to infect the jury room:

The common knowledge jurors are allowed and encouraged to bring to their deliberations does not include prejudicial information. Our system of justice seeks the truth, whatever the jury finds the truth to be, but that truth cannot be determined when the jury is exposed to extraneous prejudices or information that the judge finds clearly and convincingly might have affected the hypothetical average jury. The voir dire is designed to eliminate prospective jurors who hold prejudices by striking such jurors from the panel. Having done that, prejudices should not be allowed to creep into the jury room by extraneous information that the judge determines would have affected the hypothetical average jury.

*Id.* at 692. The court went on to state that the right to a trial by jury is impaired even if only one member of a jury harbors a material prejudice. “[T]rial courts should do all within their means to ensure that verdicts have not been compromised by jurors who harbor prejudice toward any minority.” *Id.* at 691-692. The Wisconsin court remanded the case to the trial court with instructions to conduct an evidentiary hearing. *Id.* at 692.

Similarly, in *Powell v. Allstate Insurance Company*, 652 So.2d 354 (Fla. 1995), the Florida Supreme Court held that racial “jokes” and other appeals to racial bias made by white jurors in reference to black plaintiffs during deliberations constituted overt acts of misconduct sufficient to permit trial court inquiry and action:

But when appeals to racial bias are made openly among the jurors, they constitute overt acts of misconduct. This is one way that we attempt to draw a bright line. This line may not keep improper bias from being a silent factor with a particular juror, but, hopefully, it will act as a check on such bias and prevent the bias from being expressed so as to overtly influence others.

*Id.* at 357-58. The court held that, if the alleged conduct could be established, it violated federal and state constitutional provisions that ensure that all litigants have a right to a fair and impartial jury and equal protection under the law. *Id.* at 358.

Citing *Powell*, the Florida Supreme Court in *Marshall v. State* recognized the key difference between an unspoken discriminatory animus that may motivate a juror, and open expressions of prejudice that are extrinsic to the record but become a part of and may influence the verdict. 854 So. 2d 1235, 1240 (Fla. 2003). The court again held that such comments constituted overt acts of misconduct that may justify granting a new trial. *Id.* at 1241. Recognizing the devastating impact of racial, ethnic, and religious bias on the integrity of the judicial process, the court concluded that the trial judge erred in summarily denying the juror misconduct claims and remanded for an evidentiary hearing on those claims. *Id.* The court of appeals in *Wright v. CTL Distribution*, 650 So.2d 641,

643 (Fla. App. 1995), also remanded for an evidentiary hearing based on evidence that a juror had stated that plaintiff was not entitled to recovery because she was “a fat black woman on welfare.”

In *Sanchez v. International Park Condominium Association*, 563 So.2d 197 (Fla. App. 1990), a juror made derogatory comments about persons of Cuban descent. The court determined that such remarks concerning racial or ethnic bias constituted juror misconduct, reversed the judgment, and remanded for a new trial. *Id.* at 199 (“The plaintiff was entitled to have her case heard by an impartial jury”).

A Texas appellate court reached a similar conclusion when a juror displayed religious prejudice during deliberations. In *Evans v. Galbraith-Foxworth Lumber Co.*, 31 S.W.2d 496, 500 (Tex. Civ. App. 1929), a juror stated that one of the plaintiffs was “a Jew,” that one of the jurors was “a Jew,” and that he could understand why that juror would be “for the Jews,” but could not understand why any other jurors would be “partial to Jews.” *Id.* at 499. The court explained that setting aside the verdict was the proper remedy if an effect on the outcome was even reasonably doubtful:

It may be clear that eleven (or a lesser number) of the jurors were not, to any degree, influenced by the improper conduct; yet if it remains reasonably doubtful whether one (or a larger number) was, or was not, influenced, the vice remains and the verdict must be set aside because each juror can rightly agree to the verdict only when guided solely by the instructions of the trial judge and the evidence heard in open court.

*Id.* at 500 (internal citation omitted).

Juror misconduct based on religious prejudice has also mandated new trials in criminal cases, based on the Sixth Amendment guarantee to a fair and impartial jury. The Supreme Court of New Jersey upheld a trial court's order for new trial where the trial judge was shown that religion was introduced into the jury room. *State v. Levitt*, 176 A.2d 465, 468 (N.J. 1962). Similarly, the Eleventh Circuit held that the trial court abused its discretion in refusing to declare a mistrial where a juror commented during deliberations, "Well, the fellow we are trying is a Jew. I say 'Let's hang him.'" *U.S. v. Heller*, 785 F.2d 1524 (11th Cir. 1986). In *State v. Santiago*, 715 A.2d 1, 22 (Conn. 1998), the Supreme Court of Connecticut exercised its supervisory authority to establish guidelines for conducting an inquiry into a claim that racial slurs were made during jury deliberations. Although the request for a new trial was eventually denied based on credibility determinations, the district court in *United States v. Rouse*, 100 F.3d 560, 578 (8th Cir. 1996), held a number of hearings and took witness testimony about racial jokes made by jurors during deliberations.

This Court should reach the same conclusion as these other courts. Where a trial court receives evidence that jurors expressed and were motivated by discriminatory bias during deliberations, compromising the parties' right to a fair and impartial jury, the trial court should conduct a hearing regarding the alleged misconduct to determine whether a new trial is warranted. The discriminatory comments made during jury deliberations in this case show pernicious stereotyping of Jewish people, link the verdicts to such bias (e.g., "the Jew, Pepose, makes \$5 million per year and should pay money to the plaintiff

in this case” (L.F. 0539-0540)), and reasonably indicate that PVI did not receive a fair and impartial trial.

Trial courts in Missouri have the authority to investigate evidence of juror misconduct and the discretion to grant a new trial based on that misconduct. *See Moore v. Bi-State Dev. Agency*, 87 S.W.3d 279, 291 (Mo. App. 2002); *Mathis v. Jones Store Co.*, 952 S.W.2d 360, 364 (Mo. App. 1997). This Court should hold that evidence that one or more jurors expressed anti-Semitic animus and motivation during deliberations required a hearing to determine whether juror misconduct deprived PVI of its due process rights. The evidence of a verdict tainted by ethnic or religious bias, and the failure to hold a hearing, require a new trial.

**F. Reversal and remand for a new trial is warranted. In the alternative, the court should remand for a hearing on juror misconduct.**

As the Court has stated, the constitutional right to trial by jury, if it is to be worth anything, must mean the right to a fair and impartial jury. *Lee v. Baltimore Hotel Co.*, 136 S.W. 2d 695, 698 (Mo. 1939). The impartiality of jurors in the trial of cases is one of the highest duties of courts. *Id.* The general rule limiting evidence regarding deliberations should not be interpreted as completely foreclosing inquiry into jury deliberations where there is evidence that racial, religious, gender, or ethnic prejudice infected the jury’s verdict. *See Tobias v. Smith*, 468 F. Supp. 1287, 1290 (W. D. N.Y. 1979).

The statements by two jurors required the trial court to conduct a hearing to determine whether the alleged comments were actually made. Because the trial court

erroneously concluded that it could not consider evidence of anti-Semitic bias and failed to conduct a hearing, and because the passage of time since the conclusion of the trial makes it impractical to conduct an inquiry now, the Court should reverse and remand for a new trial.

A less desirable alternative is for the Court to reverse and remand for a hearing on the juror misconduct. During the hearing, the trial court may consider evidence of any facts bearing upon the existence of any extraneous influence or extra-record facts introduced into the jury room. The trial court may then decide whether any juror misconduct was prejudicial to PVI's constitutional right to an unbiased and unprejudiced jury. *See Smith v. Brewer*, 444 F. Supp. 482 (S.D. Ia. 1978).

**II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S  
MOTIONS FOR DIRECTED VERDICT AND FOR JNOV ON  
PLAINTIFF'S CLAIM FOR WRONGFUL TERMINATION  
BECAUSE HER PUBLIC POLICY ARGUMENT IS PREEMPTED  
BY THE FAIR LABOR STANDARDS ACT.**

**A. Standard of review.**

The standard of review of the trial court's denial of a motion for JNOV and directed verdict is de novo. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279-280 (Mo. banc 2007).

**B. Plaintiff's claims are preempted by federal law.**

The longstanding rule under Missouri law is that an employee who does not have a contract of employment stating otherwise is employed at will and may generally be terminated for any reason or no reason. *Nichols v. American National Ins. Co.*, 945 F. Supp. 1242, 1246 (E.D. Mo. 1996). The Missouri Court of Appeals has recognized a narrow public policy exception to Missouri's employment-at-will doctrine providing that when an employer has a statutory, regulatory, or constitutional duty to refrain from discharging an employee for a specified reason and the employer breaches that duty, the at-will employee may have a cause of action for wrongful discharge. *Trapp v. Von Hoffmann Press, Inc.*, 2002 WL 1969650, \*2-3 (W.D. Mo. June 12, 2002). In order to qualify under this narrow exception, an employee must show that he or she was discharged for: (1) refusing to perform an illegal act or an act contrary to a strong mandate of public policy; (2) reporting wrongdoing or violations of law or public policy

by the employer or fellow employees to superiors or third parties; (3) acting in a manner public policy would encourage, such as performing jury duty, seeking public office, or joining a labor union; or (4) filing a workers' compensation claim. *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 936-937 (Mo. App. 1998).

The rationale behind the public-policy exception is the vindication or protection of certain well articulated policies of the State of Missouri. *Nichols*, 945 F. Supp. at 1246. The purpose of the cause of action is to provide a remedy when no other exists. However, if these policies or goals are preserved by other remedies, then the public policy is sufficiently served. Therefore, application of the public-policy exception requires two factors: (1) that the discharge violates some well-established public policy; and (2) that there be no remedy to protect the interests of the aggrieved employee or society. *Id.*

Plaintiff alleges she was terminated, in part, for participating in the federal USDOL's investigation concerning PVI's alleged failure to fully compensate its employees for overtime. L.F. 0010. Because the federal law provides a comprehensive statutory remedy for the same conduct plaintiff alleges, she cannot maintain a claim under the public-policy exception to the employment-at-will doctrine.

In *Nichols*, the employee asserted that Title VII created a public policy that prohibited his termination for complaints of discrimination. The court held that his claim was preempted: "Because the statute upon which Plaintiff relies, i.e., Title VII, contains a comprehensive remedial provision, the Court concludes that allowing Plaintiff's claim

for wrongful discharge based on a violation of public policy evinced by such statute would be duplicative and unwarranted.” *Id.*

In *Osborne v. Professional Services Industries, Inc.*, 872 F. Supp. 679, 681 (W.D. Mo. 1994), the court made clear that the same principle is applicable when an employee seeks to bring a public-policy claim based on an alleged public policy set forth in one statute, but a separate statute provides a comprehensive remedy. In *Osborne*, the employee alleged violation of a public policy against age discrimination evinced in the Missouri Constitution and the United States Constitution. *Id.* The court rejected the employee’s claim, noting that the Age Discrimination in Employment Act provided a comprehensive statutory remedy for age discrimination. *Id.* The court emphasized that a public-policy claim is only available in the absence of a statutory remedy: “In order to survive a motion to dismiss, a claim of wrongful termination based on the public policy exception must be based on a policy which has no remedy in any statute, regulation, or constitutional provision. It is not enough to show that the constitutional provision exists which creates a policy but does not provide a remedy. Plaintiff must show that no remedy for that wrong exists anywhere, not just that no remedy for that wrong exists in the constitutional provision.” *Id.*; see *Trapp*, 2002 WL 1969650, at \*2-3; *Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560 (W.D. Mo. 1990).

Similar to this case, in *Prewitt*, 747 F. Supp. at 565, the employee argued that he was wrongfully discharged in violation of Missouri public policy for contacting the USDOL. In dismissing the claim, the court held that the FLSA provided a complete remedy: “The public policy which plaintiff relies upon to avoid application of Missouri’s

employment-at-will doctrine is the policy underlying the FLSA. The FLSA provides a complete range of remedies to an employee who can establish a claim under the FLSA. Under these circumstances, the complete statutory remedy replaces the common law remedy.” *Id.*; see *Lucht v. Encompass Corp.*, 491 F. Supp. 2d 856, 867 (S.D. Iowa 2007); *O’Neill v. Major Brands, Inc.*, 2006 WL 1134476, \*2 (E.D. Mo. April 26, 2006).

Missouri cases agree that the federal FLSA preempts the common law exception to the employment-at-will doctrine. In *Shawcross v. Pyro Products, Inc.*, 916 S.W.2d 342, 345 (Mo. App. 1995), the court contrasted the Occupational Safety and Health Act (“OSHA”) with the FLSA: “It is obvious from the language of the two statutes that although an employee may obtain any type of relief possible under FLSA through the employee’s own actions, the relief available under OSHA is limited to what the Secretary of Labor deems appropriate. It should also be noted that unless an employee acts immediately and files a complaint with the Secretary of Labor, there is no remedy available without the public policy exception.” *Id.* In cases within the scope of the FLSA, such as *Prewitt*, the common law remedy is supplanted by the complete statutory remedy. *Id.*

In *Kirk v. Mercy Hospital Tri-County*, 851 S.W.2d 617, 620 (Mo. App. 1993), the court discussed *Prewitt* and agreed that since the FLSA provided a statutory remedy for the alleged violation, “the public policy exception to the employment-at-will doctrine was inapplicable.” The court went on to explain that *Prewitt* demonstrated that if a specific law or regulation existed that prohibited the action on which an employee based a wrongful-termination claim, the employee’s remedy would flow from the alleged

violation itself, not from the public-policy exception to the employment-at-will doctrine.  
*Id.*

**C. The FLSA provides a complete remedy.**

The opinion of the Missouri Court of Appeals in this case stated that statutory actions failing to provide the identical remedies as those available under common law do not preempt the common law. However, that is not the situation here.

First, it is not true that the FLSA fails to provide for punitive damages. As originally enacted, the FLSA did not allow for punitive damages. *Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990). That situation no longer exists. In 1977, Congress amended 29 U.S.C. § 216(b) to add a provision that an employer that violates the FLSA is liable for legal relief, “without limitation.” “Legal relief” has traditionally been defined to include punitive damages. *Travis*, 921 F.2d at 111; *Marrow v. Allstate Sec. & Inv. Serv., Inc.*, 167 F. Supp. 2d 838, 842-843 (E.D. Pa. 2001). Thus, the 1977 amendment “did away with the old limitations on damages without establishing new ones.” *Travis*, 921 F.2d at 112; see *O’Brien v. Dekalb-Clinton Counties Ambulance Dist.*, 1996 WL 565817, \*6 (W.D. Mo. June 24, 1996).

Accordingly, in *Travis*, the Seventh Circuit affirmed a punitive damages award in favor of an employee on her FLSA retaliation claim because punitive damages “effectuate the purposes” of the FLSA pursuant to the statutory language contained in 29 U.S.C. § 216(b). *Travis*, 921 F.2d at 112.

The Ninth Circuit similarly affirmed an award of punitive damages on an FLSA retaliation claim in *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999). Although the

court ultimately affirmed the punitive damages awarded by the jury because the defendant waived objection to the availability of punitive damages, the court also found that the Seventh Circuit Court’s reasoning in *Travis* was “persuasive.” *Id.* at 1011. The current law interpreting section 216(b) allows punitive damages.

**D. The *Snapp* case is not persuasive.**

In this case, the Missouri Court of Appeals was persuaded by a case from the Eleventh Circuit holding that section 216(b) does not allow for punitive damages. *See Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928 (11th Cir. 2000). In *Snapp*, the court addressed the provision of section 216(b) providing that an employer could be held liable for “for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.” This clear statutory language, which by its terms is “*without limitation*,” authorizes the full panoply of relief, including punitive damages. *See Travis*, 921 F.2d at 112.

The *Snapp* court recognized that “it is clear that Congress did not limit a court in retaliation cases to the enumerated forms of relief.” 208 F.3d at 934. However, the *Snapp* court held that the clear statutory dictate to provide relief “without limitation” should be read to foreclose the availability of punitive damages, noting that “there is something that all of the relief provided in section 216(b) has in common: it is meant to compensate the plaintiff. Awards of unpaid minimum wages, unpaid overtime compensation, employment, reinstatement, promotion, and the payment of wages lost all

attempt to put plaintiff in the place she would have been absent the employer's misconduct. Even the liquidated damages provision is compensatory in nature. . . . Given that the evident purpose of section 216(b) is compensation, we reject plaintiff's argument that 'legal relief' includes punitive damages." *Id.*

*Snapp* is not persuasive because of its misuse of the doctrine of ejusdem generis, which holds that a general statutory term should be interpreted in light of the specific terms that surround it. When there is no ambiguity within a statute itself, Missouri courts decline to apply the rule of ejusdem generis. *State ex rel. C. C. G. Mgmt. Corp. v. City of Overland*, 624 S.W.2d 50, 53 (Mo. App. 1981). That rule is merely a rule of construction and is only applicable where the legislative intent or the language expressing that intent is unclear. *Id.* When the intent manifested by the statute's language is clear, rules of construction such as ejusdem generis should not be used to nullify the legislative intent. *Id.*

The use of ejusdem generis in *Snapp* is misplaced. Section 216(b) specifically states that its remedies are "without limitation." "The most sensible reading of that phrase leads to the conclusion that by listing several potential forms of relief, Congress did not mean to exclude others." *Marrow*, 167 F. Supp. 2d at 844.

The *Snapp* court declares that since § 216(a), which discusses criminal provisions under the FLSA, includes damages that are punitive in nature, while § 216(b) does not, punitive damages are not available. 208 F.3d at 935. This proposition would force courts to infer that when Congress decides to set out specific criminal penalties, it intends to preclude punitive damages in the civil setting. This is certainly not the case.

Lastly, the *Snapp* court asserts that punitive damages are not available through the comparison between 29 U.S.C. § 626(b) and § 216(b). *Id.* at 937. Unlike § 216(b), § 626(b) allows liquidated damages only for willful violations. This limitation allows the inference that liquidated damages are the only remedy for willful violations. In contrast, § 216(b) does not require a showing of willfulness in order to receive liquidated damages.

This Court should apply the rationale used by the court in *Travis* and disregard the illogical result reached by the court in *Snapp*. The case that is most persuasive and applicable is *Shawcross*, 916 S.W.2d at 345. Plaintiff's claim in this case is plainly barred. The alleged conduct on which plaintiff's claim is based -- termination for participating in the USDOL's investigation -- would, if true, indisputably be protected, and a full remedy provided, by the FLSA. *See* 29 U.S.C. § 215(a)(3), 29 U.S.C. § 216(b). Because the FLSA contains a comprehensive remedial scheme providing a complete remedy for any retaliation, plaintiff's claim fails as a matter of law. *Prewitt*, 747 F. Supp. at 566; *Trapp*, 2002 WL 1969650 at \*2-3; *Osborne*, 872 F. Supp. at 681; *Shawcross*, 916 S.W.2d at 345.

**E. Even without punitive damages, the FLSA is an adequate remedy.**

Even if *Snapp* were correct, the FLSA's failure to provide an identical panoply of damages is not equivalent to there being "no remedy" to protect the interests of the aggrieved employee. In other words, if it were true that the damages were different, it is not true that the damages under the FLSA—even under the restrictive reading of the court of appeals—are the equivalent of no remedy.

There is no dispute that the FLSA provides for both actual damages and injunctive relief. The FLSA further provides for an award of attorney fees, a significant element of damages not granted under Missouri common law. Indeed, given that the FLSA provides for a statutory award of attorneys fees for all prevailing plaintiffs, it could be more properly said that the FLSA provides for enhanced, not diminished, damage awards.

The FLSA inarguably provides an acceptable remedy; there is no reason for an expansion of Missouri law to cover a situation already addressed under federal law.

**III. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTIONS FOR DIRECTED VERDICT AND FOR JNOV ON PLAINTIFF’S CLAIM FOR WRONGFUL TERMINATION BECAUSE PLAINTIFF DID NOT OFFER SUBSTANTIAL EVIDENCE TO SUPPORT THE ELEMENTS NECESSARY TO RECOVER FOR WRONGFUL TERMINATION FOR ACTIVITY PROTECTED BY MISSOURI PUBLIC POLICY IN THAT PLAINTIFF’S UNDERLYING ACTIONS WERE NOT COVERED BY THE MISSOURI MINIMUM WAGE LAW.**

**A. Standard of review.**

The standard of review of the trial court’s denial of a motion for JNOV and directed verdict is de novo; the Court must determine whether the plaintiff made a submissible case. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279-280 (Mo. banc 2007).

**B. Plaintiff must point to a public policy embodied in Missouri law.**

A number of decisions of the Missouri Court of Appeals following *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 870 (Mo.App.1985), have adopted a limited public-policy exception to the employment-at-will doctrine. *Luethans v. Washington Univ.*, 894 S.W.2d 169, 171 n.2 (Mo. banc 1995). The exception is generally stated to require reference to “a constitutional provision, a statute, or a regulation based on a statute.” *Luethans*, 894 S.W.2d at 171 n.2; *see Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661 (Mo. banc 1988). In order to state a claim for wrongful discharge under the exception, “the specific facts on which liability is based must be pleaded with

particularity.” *Adolphsen v. Hallmark Cards, Inc.*, 907 S.W.2d 333, 338 (Mo. App. 1995).

**C. The evidence did not show a violation of Missouri public policy.**

Even if the Court determines that plaintiff’s claim is not preempted by the federal Fair Labor Standards Act (see Point II), plaintiff has alleged facts with particularity that do not state a claim under state law. Plaintiff has not pointed to any Missouri public policy embodied in any provision of state law that would bring her case within the public-policy exception to the at-will doctrine.

Plaintiff has bounced back and forth on whether her claim is based on federal or state law. The FLSA creates a cause of action under federal law for retaliation for cooperating with the United States Department of Labor. 29 U.S.C. § 216. However, in seeking remand from the federal court, plaintiff specifically disclaimed her reliance on the FLSA in order to escape federal jurisdiction. Supp. L.F. 0637. Having opted out of any reliance on the protections afforded by the federal statute, plaintiff was then obligated to refer to an articulated constitutional provision, statute, or regulation based on a state statute.

At the time of plaintiff’s termination and at the time she filed her lawsuit she was not covered by the Missouri Minimum Wage law specifically because she was covered by the FLSA. *See* § 290.500 (3)(d) RSMo (2003). Plaintiff’s counsel admitted as much at plaintiff’s deposition, and plaintiff voluntarily dismissed Count II of her petition. L.F. 0052-0053, 0082, 0109. As a result, when seeking a state policy basis for her claim, plaintiff could not credibly rely on some general policy in the Missouri statute favoring

the payment of overtime pay. Instead, plaintiff cited the statutory provision that protects employees who aid an investigation by the Missouri Department of Labor. Plaintiff explicitly and strategically chose to rely only on the Missouri Minimum Wage Law, § 290.500, *et seq.*, as the source of public policy for her wrongful discharge claim, even though she was not covered by the statute. In her petition, plaintiff specifically relies on “290.500, R.S.Mo., *et seq.* including but not limited to 290.505, 290.520, and 290.525 R.S. Mo. (2003),” as the source of Missouri’s public policy under which she claims protection. L.F. 0011. However, the plain reading of that statute protects those who cooperate with state, but not federal, authorities. Only the Director of the MODOL administers and enforces the Missouri Minimum Wage Law. §§ 290.500(2), 290.510, RSMo. The USDOL separately administers only the FLSA. 29 U.S.C. §§204(a), 211(a). Plaintiff’s disclaimer of the applicability of federal law necessarily took her cooperation with the federal authorities out of the scope of her lawsuit, and placed the focus on her cooperation with state authorities, which was not at issue.

At trial, plaintiff testified that the investigators with whom she cooperated were from the United States Department of Labor. Tr. 239-256. Indeed, plaintiff admitted that she never spoke to anybody from the Missouri Department Labor. Tr. 309. In her petition, plaintiff alleged that the USDOL was investigating possible violations of a *federal* law -- the FLSA. L.F. 0010. She did not allege that the USDOL was investigating any possible violations of any *state* law, like the Missouri Minimum Wage Law. She did not allege that the USDOL was an agent of the MODOL. She did not allege that she had notified the Director of the MODOL of any violations of the Missouri

Minimum Wage Law. She did not allege that she had caused any proceeding to be instituted under or related to the Missouri Minimum Wage Law. She did not allege that she had testified or was about to testify in any such proceeding. In short, she never engaged in any activity that was the subject of Missouri law, and specifically disclaimed reliance on any comparable provision under federal law.

Missouri's public policy is established not only by what the legislature has deemed worthy of regulation but also by what the legislature has explicitly excluded from regulation. Plaintiff should not be permitted to claim public-policy protection under a state statute that expressly excluded her from the class of employees within its scope, particularly (a) when she had no interaction with state employees, (b) when her only contact was with federal employees investigating potential violations of federal law, (c) when that federal law provided plaintiff with a specific cause of action and remedies for wrongful discharge, and (d) when plaintiff has affirmatively disclaimed any claims under that federal law.

On these facts, the Court should reject plaintiff's attempt to stretch what Missouri courts have consistently described as a narrow exception. The judgment in favor of plaintiff should be reversed because the Missouri statute upon which plaintiff explicitly relied does not state a public policy prohibiting retaliation against those who cooperate with federal authorities.

**D. Plaintiff's federal claim is barred by judicial estoppel.**

Plaintiff cannot now claim that her wrongful-discharge claim is based on a public policy embodied in the FLSA. Her pleadings show, with particularity, that her claim is

under the Missouri statute. Plaintiff represented to the federal court that the federal statute was inapplicable. Supp. L.F. 0637. Plaintiff is bound by the allegations in her petition and her arguments to the federal court that her wrongful-discharge claim relies only upon state law as the source of public policy. She is estopped from now claiming that federal law is the source of the public policy. *See Dick v. Children's Mercy Hospital*, 140 S.W.3d 131, 141 n. 5 (Mo. App. 2004) (judicial estoppel prohibits parties from deliberately changing positions according to the exigencies of the moment).

Plaintiff's decision to forego a claim under the FLSA was no mere accident. In order to obtain remand of her claim back to state court, plaintiff insisted to the federal court that "she invokes and seeks relief only under state law." L.F. 0030. The federal court warned that plaintiff's reliance on the Minimum Wage Law might be grounds for dismissal of the claim on the merits, but noted that plaintiff 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 allegations." L.F. 0030-0031. Having made unequivocal representations that she was not relying on federal law, but solely on the purported public policies provided by the now admittedly inapplicable Missouri state law, she cannot reverse course yet again and rely on public policies allegedly created only by federal law. L.F. 0011; Supp. L.F. 0640-647.

The Court should not permit any such about-face. Judicial estoppel applies to prevent litigants from taking a position to obtain benefits in one judicial proceeding and later, in a second proceeding, taking a contrary position in order to obtain benefits at that time. *Vinson v. Vinson*, 243 S.W.3d 418, 422 (Mo. App. 2007). While judicial estoppel

cannot be reduced to a precise formula, the United States Supreme Court has indicated that judicial estoppel requires the consideration of three factors. First, a party's later position must be clearly inconsistent with its earlier position. Second, the party must succeed in persuading a court to accept the earlier position. Third, the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* (quoting *Zedner v. United States*, 547 U.S. 489, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006)).

In this case, plaintiff's new position is clearly inconsistent with her position before the federal court, the federal court accepted the earlier position, and the unfair detriment to PVI is clear – the trial court entered judgment in favor of plaintiff based on plaintiff's change in position. Plaintiff should not be allowed to have her cake and eat it too.

**E. *Porter and Kirk do not support plaintiff's position.***

In the Missouri Court of Appeals, plaintiff relied on *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932 (Mo. App. 1998), a case involving an employee bringing a claim under the whistleblower category of the public-policy exception. Plaintiff in this case has never claimed to be an alleged whistleblower. She has never alleged that she reported any violation of law to any authority. Instead, she alleges simply that she provided information to federal authorities and thus is protected due to her "cooperation."

In *Porter* the court noted that the employee must "demonstrate that he was fired because he reported the violation of a law, as embodied in a statute, regulation, or constitutional provision, and that the firing was in violation of a clear mandate of public

policy.” *Id.* at 939. The court specifically held that a plaintiff attempting to prove a wrongful termination claim must show which legal provision was allegedly violated. *Id.*

In this case, plaintiff cited the exact statute on which she based her claim of public policy: “290.500, RSMo., et seq., including but not limited to 290.505, 290.520, and 290.525 RSMo. (2003).” L.F. 0011. The obvious problem for plaintiff in articulating a specific statutory provision is that she fell outside the scope of the Missouri law she cited. At the time of plaintiff’s pleading Missouri’s statute did not cover plaintiff and she never participated in an investigation by Missouri authorities.

The opinion of the Missouri Court of Appeals mistakenly relies on *Kirk v. Mercy Hospital Tri-County*, 851 S.W.2d 617 (Mo. App. 1993). Contrary to the court of appeal’s conclusion, *Kirk* shows why the judgment in this case should be reversed. *Kirk* emphasizes that an employee may not maintain an action for wrongful discharge in violation of public policy unless the employee can demonstrate the existence of a statute, regulation, or constitutional provision that clearly mandates the implication of such a policy. *Id.* at 620.

The employee in *Kirk* claimed that her discharge violated a clear mandate of public policy as reflected in a Missouri statute, the Nursing Practice Act (NPA), §§ 335.011-335.096. *Id.* The employee was a registered nurse, licensed under the provisions of the NPA. *Id.* at 621. The appellate court held that the employee in *Kirk* “could clearly risk discipline and prosecution by the State Board of Nursing if she ignored improper treatment of a patient under her care.” *Id.* at 622. Inaction in that situation could be viewed as incompetence, gross negligence, misconduct in violation of

specific provisions of the NPA and its regulations. *Id.* The appellate court concluded: “We are convinced the NPA and regulations thereunder sets forth a clear mandate of public policy that Plaintiff not ‘stay out’ of a dying patient’s improper treatment. Plaintiff’s constant and immediate involvement in seeking proper treatment for Debbie Crain was her absolute duty. Common sense dictates this is the highest duty in the nursing profession.” *Id.*

*Kirk* merely holds that, while the statute did not specifically make the employer’s underlying actions illegal, the statute and regulation showed that the plaintiff would face discipline and prosecution if she did not conduct herself in the fashion that caused her termination. The difference between *Kirk* and this case is clear -- the Missouri statute and regulations on which the employee in *Kirk* relied as a source of public policy ***directly applied to the employee***. In this case, by plaintiff’s own admission, there is no relationship between plaintiff and any provision of the Minimum Wage Law.

**F. The judgment should be reversed.**

Plaintiff is attempting to broaden a statute that specifies violations of the Missouri Minimum Wage Law to include a generalized notion about discharge of an employee who speaks to ***any*** governmental agency about ***any*** law regarding minimum wages and overtime. By its plain terms, the Missouri legislature chose not to include plaintiff within its coverage and to only protect dealings with state authorities – not dealings with federal authorities concerning federal law. § 290.500, *et seq.* Plaintiff’s claim would amount to an unprecedented and unnecessary rejection of prior Missouri law and would expand a purposefully narrow public-policy exception. *See Trapp v. Von Hoffmann Press, Inc.*,

2002 WL 1969650, \*2-3 (W.D. Mo. June 12, 2002); *Porter*, 962 S.W.2d at 936-937;  
*Osborne v. Professional Services Indus., Inc.*, 872 F. Supp. 679, 681 (W.D. Mo. 1994).

Without any action of the Missouri legislature to expand the stated public policy of the state, the plaintiff is asking the Court to broaden the scope of that statute.

Plaintiff failed to offer substantial evidence in support of her claim that she was discharged in violation of any public policy expressed in the Missouri Minimum Wage Law. The judgment in this case should be reversed.

**IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE THE TRIAL COURT REJECTED DEFENDANT'S VERDICT DIRECTOR, IN THAT DEFENDANT'S VERDICT DIRECTOR PROPERLY STATED THE LAW OF MISSOURI THAT PLAINTIFF MUST PROVE THAT HER ALLEGEDLY PROTECTED ACTIVITY WAS THE EXCLUSIVE CAUSE OF HER TERMINATION.**

In accordance with a long line of Missouri appellate decisions, PVI offered a verdict director patterned after M.A.I. 23.13 that required plaintiff to prove that her communication with the USDOL investigator was the exclusive cause of her discharge. L.F. 0456; Tr. 776; App. at A4. The verdict director proposed by PVI reads as follows:

Your verdict must be for Plaintiff if you believe:

First, Plaintiff was employed by Defendant, and

Second, Plaintiff communicated with a U.S. Department of Labor investigator;

and

Third, Defendant discharged Plaintiff, and

Fourth, the exclusive cause of such discharge was Plaintiff's communication with

a U.S. Department of Labor investigator, and

Fifth, as a direct result of such discharge Plaintiff sustained damage.

*Id.* The trial court rejected this instruction.

Meanwhile, plaintiff offered two verdict directors, neither of which required an exclusive causal connection between plaintiff's termination and her allegedly protected conduct. L.F. 0455, 0465; Tr. 776-777. One was based on M.A.I. 31.24 and required only a showing that the alleged protected conduct was "a contributing factor" in plaintiff's termination. L.F. 0455; App. at A3. This instruction reads as follows:

On plaintiff Michelle Fleshner's claim of termination in violation of public policy against defendant Pepose Vision Institute, your verdict must be for plaintiff Michelle Fleshner if you believe:

First, plaintiff Michelle Fleshner communicated with the United States Department of Labor;

Second, defendant Pepose Vision Institute terminated plaintiff Michelle Fleshner;

Third, plaintiff Michelle Fleshner's communication with the United States Department of Labor was a contributing factor in defendant Pepose Vision Institute's decision to terminate plaintiff Michelle Fleshner; and

Fourth, as a direct result of such conduct, plaintiff Michelle Fleshner sustained damage.

*Id.* Plaintiff's second proposed verdict director, which was a not-in-M.A.I. instruction that required only a showing that plaintiff was discharged "because" of the protected conduct, reads as follows:

Your verdict must be for the Plaintiff Michelle Fleshner on her wrongful termination claim if you believe:

First, Plaintiff Michelle Fleshner communicated with the United States Department of Labor, and

Second, Defendant Pepose Vision Institute terminated Plaintiff Michelle Fleshner's employment because she communicated with the United States Department of Labor, and

Third, Plaintiff Michelle Fleshner was thereby damaged.

L.F. 0465; App. at A6.

The trial court rejected plaintiff's instruction based on M.A.I. 31.24, and instead gave plaintiff's not-in-M.A.I. instruction using the "because" language. L.F. 0465; Tr. 776-777. Because Missouri courts have consistently required proof that the plaintiff's protected conduct was the exclusive cause of discharge, the trial court's failure to give the instruction tendered by PVI patterned on M.A.I. 23.13 was prejudicial error requiring reversal and remand for a new trial.

**A. Standard of review.**

Review of the trial court's refusal to use a proffered verdict director is *de novo*. *Ploch v. Hamai*, 213 S.W.3d 135, 139 (Mo. App. 2006); Rule 70.02(a). The proper review is whether the instruction was supported by the evidence and the law. *Id.* Reversal is called for if the error resulted in prejudice and materially affected the merits of the action. *Id.*

Where a Missouri Approved Jury Instruction is applicable, its use is mandatory and failure to use the mandatory instruction is presumed to be prejudicial error. *Karashin v. Haggard Hauling & Rigging, Inc.*, 653 S.W.2d 203, 206 (Mo. banc. 1983); *Jarrell v.*

*Fort Worth Steel & Mfg. Co.*, 666 S.W.2d 828, 837 (Mo. App. 1984); Rule 70.02(b). If there is no applicable MAI instruction, then the Court should reverse if the instruction given misdirected, misled, or confused the jury. *Cornell v. Texaco, Inc.*, 712 S.W.2d 680, 682 (Mo. banc. 1986).

**B. Plaintiff was required to prove that her protected conduct was the exclusive cause of her discharge.**

Under Missouri law, employees whose term of employment are not protected by contract are employees at will. *See Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 663 (Mo. banc 1988); *Dake v. Tuell*, 687 S.W.2d 191, 192-93 (Mo. banc 1985).

Under the employment at will doctrine “an employer can discharge – for cause or without cause – an at-will employee . . . and still not be subject to liability for wrongful discharge.” *Dake*, 687 S.W.2d at 193.

In 1985, the Western District of the Missouri Court of Appeals adopted a limited public-policy exception to the employment-at-will doctrine. *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. 1985). The Missouri courts of appeals recognize that to qualify under the public policy exception an employee must prove that he or she was discharged for: (1) refusing to perform an illegal act; (2) reporting violations of law or public policy to superiors or public authorities; (3) participating in acts that public policy would encourage; or (4) filing a workers’ compensation claim. *See e.g.*

*Luethans v. Washington University*, 894 S.W.2d 169, 171 n. 2 (Mo. banc 1995); *Boyle*, 700 S.W.3d at 873-75; *Bell v. Dynamite Foods*, 969 S.W.2d 847, 853 (Mo. App. 1998); *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 936-37 (Mo. App. 1998); *Lynch v. Blanke*

*Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147, 150 (Mo. App. 1995). The public policy exception to the employment-at-will doctrine is narrow. *Lynch*, 901 S.W.2d at 151; *Faust v. Ryder Commercial Leasing & Serv.*, 954 S.W.2d 383, 392 (Mo. App. 1997) (“the Missouri Supreme Court has emphatically declared Missouri to be an employment at-will doctrine state . . . and that the public policy exception to the doctrine . . . is a narrow and limited exception”).

The elements of a claim under the public policy exception to the employment-at-will doctrine may be traced to this Court’s opinion in *Hansome v. Northwestern Cooperage Company*, 679 S.W.2d 273 (Mo. banc 1984), which involved a retaliatory discharge claim under the Workers Compensation Law, section 287.780. In *Hansome*, the Court held that a claim under section 287.780 has four elements: (1) the plaintiff’s status as an employer of defendant before injury; (2) the plaintiff’s exercise of a right granted by chapter 287; (3) the employer’s discharge of or discrimination against the plaintiff; and (4) an exclusive causal relationship between plaintiff’s activities and defendant’s actions. *Id.* at 275.

In *Crabtree v. Bugby*, 967 S.W.2d 66 (Mo. banc 1998), the Court reaffirmed the requirement that the plaintiff prove that the filing of the workers’ compensation claim was the exclusive cause of discharge, rejecting an instruction that required only that the defendant discharged the plaintiff “as a direct result” of the filing of the compensation claim. *Id.* at 71. In both *Hansome* and *Crabtree*, the Court recognized that section 287.780 had been enacted against the backdrop of the at-will doctrine and provided only a “limited exception which allows an action where there was an exclusive causal

connection between the discharge and the employee’s exercise of rights granted under chapter 287.” *Crabtree*, 967 S.W.2d at 70, citing *Hansome*, 679 S.W.2d at 275 n. 2.

After *Crabtree* was decided, the Court approved M.A.I. 23.13, which requires exclusive causation to be proven as an element of a retaliatory discharge or discrimination case.

The instruction PVI tendered in this case was based on M.A.I. 23.13.

Since *Boyle*, the court of appeals has applied the elements identified in *Hansome* and *Crabtree* to all four of the public policy exceptions to the at-will doctrine. *Lynch*, 901 S.W.2d at 151-152; M.A.I. 23.13. Under these decisions, a plaintiff asserting a claim under the public-policy exception to the employment-at-will doctrine must “establish an exclusive causal relationship between the discharge and the allegation of violation of public policy.” *Lynch*, 901 S.W.2d at 151-152; *see also Bell*, 969 S.W.2d at 852; *Grimes v. City of Tarkio*, 246 S.W.3d 533, 536 (Mo. App. 2008) (“there exists an exclusive causal connection between his discharge and the violation that he reported”); *Faust*, 954 S.W.2d at 391. In *Lynch*, the court specifically rejected an instruction containing requiring only a “direct” causal connection, and held that an “exclusive causal connection” is required. 901 S.W.2d at 151-152.

**C. There is no basis for overruling long-standing precedent and adopting different causation standards for different claims under the public-policy exception.**

Plaintiff asks the Court to overrule this long line of decisions. In doing so, plaintiff apparently advocates the application of one causation standard to a workers’ compensation retaliatory discharge claim and a different, lesser standard to the three

other public policy exceptions to the employment-at-will doctrine. There is no logic or policy supporting different causation standards for the different types of claims under the public-policy exception to the at-will doctrine.

Adoption of a lesser causation standard would contradict the policy underlying the narrow exceptions to the employment-at-will doctrine at issue. If an employee simply had to prove that the employee's reports of allegedly illegal conduct played any minor role in the employee's discharge, the limited exception to the employment-at-will doctrine could well swallow the rule. Notwithstanding the employment-at-will doctrine, employees could effectively safeguard against a future discharge by reporting alleged minor or frivolous violations of statutes or regulations or other public policy and create a claim for relief, despite overwhelming evidence of other grounds for termination.

This Court expressed these concerns in *Crabtree*, when it reaffirmed the exclusive causation standard in cases based on a discharge for filing a workers' compensation claim under 287.780. Noting that "injustice" and "absurdity" would result if it abandoned the exclusivity requirement in these cases, the Court stated:

[A]n employee who admittedly was fired for tardiness, absenteeism, or incompetence at work would still be able to maintain a cause of action for discharge if the worker could persuade a factfinder that, in addition to other causes, *a* cause of discharge was the exercise of rights under the workers' compensation law. Such rule would encourage marginally competent employees to file the most petty claims in order to enjoy the benefits of heightened job security.

*Id.* at 72.

Unlike a workers' compensation retaliation claim, the other public-policy exceptions are not articulated with any degree of specificity. Eliminating the exclusivity requirement in the common law framework of these public-policy exceptions could lead to even more absurd results than those the Court warned about in *Crabtree*. The conduct that gives rise to a statutory claim under section 287.780 is clearly delineated and employers are on notice of what type of motivation is prohibited. There is no risk that a later public policy will be cobbled together, as has been done in this case, that will expand upon that prohibited conduct. In contrast, the other public-policy exceptions to the at-will doctrine are judicially created, and the conduct that supports a claim under those exceptions is subject to further unanticipated expansion. For these reasons, it is particularly important that the exclusive causal connection be maintained.

Reducing the causation standard in these types of cases also would effectively and improperly shift the burden to the defendant to prove that the alleged protected conduct played no role in the employee's termination, in essence to prove a negative. This would unreasonably expand this limited exception to the employment-at-will doctrine. The employment-at-will doctrine has long been an important policy recognized in Missouri and left inviolate by the state legislature. *See Faust*, 954 S.W.2d at 392. Accordingly, the judiciary should continue to treat the public-policy exception as a narrow exception to this doctrine, wisely limiting judicial interference with an employer's personnel decisions.

**D. The causation standard under the MHRA does not apply to the public policy exceptions to the at-will doctrine.**

As reflected in her transfer application, plaintiff would have the Court ignore the cases consistently approving the exclusive causation standard and instead look to the recently-developed standard used in statutory employment discrimination cases under the Missouri Human Rights Act (MHRA), section 213.055 RSMo. But there are analytical distinctions underlying the causation standard under the MHRA and the causation standard applicable to the four exceptions to the at-will doctrine. The fact that these distinct causes of action have different causation standards creates no conflict under Missouri law.

The standard for causation in discrimination cases was developed with reference to the specific underlying statutory language. The statute creates a cause of action for an employee discriminated against because of age, sex, or other enumerated factors. § 213.055 RSMo. Based on the plain language of the MHRA and the standards set forth in the applicable M.A.I. jury instruction, this Court has held that a plaintiff must prove that the discrimination was a contributing factor in the plaintiff's damages. *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 819 (Mo. banc 2007) (citing M.A.I. 31.24). The Missouri legislature could have also codified the common law wrongful discharge exception by including it in the MHRA, but chose not to do so. The legislature apparently did not view the common law claims in the same light as the discrimination claims addressed in the MHRA.

The narrow purpose of the common law cause of action – to provide a judicially created limited exception to the employment-at-will doctrine – is different from the more broadly-based statutory cause of action under the MHRA created by the Missouri legislature. In addressing common law claims, the exclusive causation standard, adopted by this Court and restated in M.A.I. 23.13, was developed with an understanding and recognition of the countervailing policy embodied in the longstanding employment-at-will doctrine. *Crabtree*, 967 S.W. 2d at 70; *Lynch*, 901 S.W.2d at 151. To the extent that there ever was a similar countervailing policy against which the protections of the MHRA were measured, those countervailing considerations were reflected in the legislature’s determination of the statutory language. Based on the fundamental differences between the source and context of discrimination claims under the MHRA and the common law exceptions to the employment-at-will doctrine, it is appropriate to require a plaintiff to overcome a heightened burden of proof in common law wrongful discharge cases, reflecting the essential balance between public policy concerns and the employment-at-will doctrine.

Moreover, claims under the MHRA are limited to statutorily defined conduct – workplace discrimination. The risk of being held accountable for unknown, unanticipated, or even unarticulated public policies does not exist. In contrast, the public policy exception in wrongful discharge cases is amorphous, less capable of certainty, and more subject to abuse. Indeed, this case epitomizes exactly that risk of unforeseen expansion of a narrow exception. Here, plaintiff claims the protection of an alleged

public policy behind a statute that does not apply to her and that addresses conduct – contact with a State agency – that never occurred.

Plaintiff’s advocacy of a lowered causation standard presents a stark contrast to her position regarding juror misconduct. As discussed above, certain of the jurors openly expressed anti-Semitic bias during deliberations. Plaintiff’s position in this case is that this Court should lower the bar for proving liability for an alleged wrongful discharge while simultaneously adopting a legal barrier to proving corruption of the judicial process by bigotry.

When there is an applicable MAI instruction, deviation from MAI is not only error, “it is presumptively prejudicial error.” *Means v. Sears, Roebuck & Co.*, 550 S.W.2d 780, 786 (Mo. 1977); Rule 70.02(b). The verdict director given to the jury was not in accord with either the M.A.I. requirements or the consistent holdings of Missouri courts. *Crabtree*, 967 S.W.2d at 70; *Bell*, 969 S.W.2d at 852; *Lynch*, 901 S.W.2d at 151. PVI offered an approved M.A.I. instruction – M.A.I. 23.13 – that followed the legal standards applicable to a *prima facie* case for wrongful discharge under the public policy exception. *Crabtree*, 967 S.W.2d at 70; *Lynch*, 901 S.W.2d at 151-152. The trial court’s failure to give that instruction is presumptively prejudicial. Even if there were no presumption of prejudice, prejudice results when an instruction directs the jury to make a finding on an essential element under a lesser standard than the law requires, as plaintiff’s verdict director did here. *Schoor v. Wilson*, 731 S.W.2d 308, 313-314 (Mo. App. 1987).

The trial court erred in rejecting PVI’s instruction and giving the not-in-M.A.I. instruction offered by plaintiff. The Court should order a new trial.

**V. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION FOR NEW TRIAL BECAUSE THE TRIAL COURT ALLOWED EVIDENCE REGARDING DEFENDANT’S ENFORCEMENT OF THE NON-COMPETITION AGREEMENT WITH PLAINTIFF AND REJECTED DEFENDANT’S LIMITING INSTRUCTION, IN THAT SUCH EVIDENCE WAS NOT RELEVANT OR WAS LEGALLY RELEVANT ONLY WITH REGARD TO THE ISSUE OF LIABILITY.**

The judgment should be reversed for evidentiary error. During plaintiff’s employment with PVI, she entered into an enforceable non-competition agreement with PVI. L.F. 0167-0171. After plaintiff’s job was eliminated in May 2003, she took a position with a competitor of PVI, and PVI initiated a court proceeding to enforce its non-competition agreement with plaintiff. L.F. 0198-0212; Tr. 273, 292. Evidence of the enforcement action was not relevant to the trial in this matter. Any probative value the evidence had was far outweighed by its prejudicial and confusing effect. The Court should reverse the judgment and remand for a trial free of this improper evidence.

**A. Standard of review.**

An appellate court reviews a trial court’s decisions regarding the admission of evidence for abuse of discretion. *State v. Reed*, 282 S.W.3d 835, 836 (Mo. 2009); *Kehr v. Knapp*, 136 S.W.3d 118, 122 (Mo. App. 2004). Under the abuse of discretion standard, reversal of the trial court’s decision is proper if a substantial or glaring injustice occurred. *Id.*

**B. Post-termination evidence is not relevant to PVI's state of mind at the time of plaintiff's discharge.**

Evidence of other lawsuits or claims typically is not relevant to a later lawsuit, because it distracts the jury from the specific conduct relevant to the issues that the jury must decide. See *Darnaby v. Sundstrom, M.D.*, 875 S.W.2d 195, 198, 199 (Mo. App. 1994). Evidence of PVI's attempt to enforce its non-competition agreement was not relevant to any issue concerning plaintiff's claim that PVI discharged plaintiff for talking to the USDOL.

In *Cullen v. Olin Corp.*, 195 F.3d 317 (7th Cir. 1999), the plaintiff's job was eliminated in a reduction in force ("RIF"), and she was passed over for a newly-created position. Another individual was selected for that newly created position. *Id.* at 320. Over the defendant-employer's objection, the trial court permitted the plaintiff to introduce evidence of the new employee's subsequent poor performance in the newly created position (to allow the jury to consider whether the plaintiff was better suited for the newly-created position). *Id.* at 323.

On the defendant's appeal from a plaintiff's verdict, the court in *Cullen* held that the trial court abused its discretion in admitting evidence of the later events that followed the RIF. *Id.* at 324. The court reasoned that the other individual's unsatisfactory performance after the RIF did not have any "bearing on management's state of mind at the time the decision to terminate [the plaintiff] was made, and thus that evidence is totally irrelevant to a determination of whether [the plaintiff] was terminated in violation of the [age discrimination law]." *Id.* at 324. "Because the post-RIF evidence was

irrelevant to the reasons [defendant] terminated [plaintiff], it should not have been admitted, and its admission was prejudicial.” *Id.* at 324-25; *see also Kaveler v. U.S. Bancorp Ins. Serv.*, 2008 WL 2414858 at \*2 (S.D. Ill. June 12, 2008) (“post-dismissal evidence cannot demonstrate the employer’s motivation relative to the [p]laintiff and is, therefore, irrelevant”).

In this case, plaintiff spent a substantial portion of the trial discussing PVI’s efforts to enforce the non-competition agreement. *See* L.F. 167-171, 196-212, 388-410, 413-414, 416-418, 420-423, 425-428. PVI’s attempts to enforce the non-competition agreement almost three months after plaintiff’s employment ended was not probative of whether the earlier decision to terminate plaintiff’s employment was caused by her purported cooperation with the USDOL. The sole issue in this case is PVI’s state of mind at the time it made the decision to discharge plaintiff, not its thought processes months later when it found out that plaintiff was working for a competitor. Here, as in *Cullen* and *Kaveler*, evidence of events that occurred well after plaintiff’s employment with PVI ended could not have had any bearing on management’s state of mind at the time the decision to terminate plaintiff was made. As a result, that evidence is not relevant to a determination of why plaintiff’s employment was terminated, and its admission was prejudicial error. Plaintiff’s own attorney objected to testimony at trial concerning a subsequent discharge of another employee by stating: “Your Honor, I will renew my objection, insofar as the termination occurred after the plaintiff’s termination. I object on the grounds of relevance.” Tr. 688. The same theory applies to the evidence

that the trial court allowed plaintiff to submit to the jury on the issue of the non-competition agreement.

In its opinion, the court of appeals stated that PVI had waived this issue by failing to make a timely objection to evidence of the non-competition agreement. In finding waiver, however, the court of appeals focused on the lack of an objection to evidence of the non-competition agreement from the earliest possible moment. PVI did not initially object to basic evidence of the agreement, because it explained a period of unemployment after plaintiff was let go by the Pernouds during the dispute over the non-competition agreement, and arguably was relevant to the issue of plaintiff's claim for back pay. But PVI did timely and consistently object when plaintiff introduced evidence of enforcement of the agreement for a new and improper purpose. PVI properly objected when it became clear that plaintiff was offering the evidence to argue that PVI's later actions demonstrated PVI's improper motive in discharging plaintiff. L.F. 0139-0143; Tr. 286, 288-289, 292, 294, 298-299, 303. Plaintiff never claimed in the trial court or the court of appeals that PVI had failed to preserve the issue for review.

The trial court erred in allowing plaintiff to introduce this collateral, irrelevant and inflammatory evidence, and a new trial is warranted.

**C. Any probative value of the evidence was outweighed by prejudice and confusion.**

Even if the evidence relating to the enforcement of the non-competition agreement were somehow relevant to plaintiff's wrongful termination allegation, the evidence should have been excluded because any probative value of the evidence was outweighed

by the dangers of unfair prejudice and confusion. *Murrell v. State*, 215 S.W.3d 96, 116 (Mo. 2007); *Jones v. Coleman Co.*, 183 S.W.3d 600, 608 (Mo. App. E.D. 2005). It is an abuse of discretion to admit arguably relevant evidence if its probative value is outweighed by its unfairly prejudicial effects. *Jones*, 183 S.W.3d at 608. Plaintiff used the evidence of PVI's efforts to enforce the non-competition agreement and the extensive testimony regarding the merits of those efforts simply to inflame the jurors about conduct not related to the issues before them.

Plaintiff committed a substantial portion of the trial – and admitted numerous exhibits into evidence – to explore issues related to the non-competition agreement and whether Dr. Flavius Pernoud was a “competitor” implicated by the agreement. Between 20-30% of the main witnesses' testimony pertained to the non-competition agreement issue. Plaintiff called Dr. Flavius Pernoud to testify exclusively on this issue, and almost one-third of the trial exhibits related to the non-competition agreement and its enforcement. *See generally*, Tr. 161-346, 444-465, 542-569, 641-772; L.F. 167-171, 196-212, 388-410, 413-414, 416-418, 420-423, 425-428. Plaintiff's closing argument repeatedly focused on this issue as relevant to both liability and damages. Tr. 784, 798-799, 825, 827. It would not be an exaggeration to say that the trial court allowed this case to become as much a retrial of the prior lawsuit over the non-competition agreement as it was a trial over plaintiff's termination. PVI timely objected to the evidence when it began to overcome the proceedings and became unfairly prejudicial.

Plaintiff's inappropriate focus on the attempt to enforce the non-competition agreement only served to confuse the jury regarding the issue at hand, which was whether

plaintiff's termination was exclusively caused by her participation in the USDOL investigation. Plaintiff's focus on enforcement of the agreement improperly created a virtual trial within a trial, and diverted the jury from the true issue at trial – why plaintiff was laid off by PVI. Courts must avoid having such mini-trials consume jurors' decisions. *See, e.g., State v. Couch*, 256 S.W.3d 64, 70 (Mo. 2008) (rather than speaking to a witness' truthfulness, evidence of other allegations “could have led to a distracting mini-trial”); *Olson v. Ford Motor Co.*, 481 F.3d 619, 623-24 (8th Cir. 2007) (explaining that “no judge wants to see one trial turn into several”).

The admission of this evidence in an attempt to show PVI's motive for prior conduct is particularly troublesome and prejudicial in this case because there was no judicial determination that the non-competition agreement was inapplicable to plaintiff's employment by the Pernouds. The parties voluntarily resolved the prior litigation by agreeing that plaintiff could work for Dr. Pernoud but could not work for him – or any other competing business – in the area of laser vision correction. L.F. 0420-0423. Because the matter was settled – with PVI receiving the protection it sought – there was no basis for arguing that PVI wrongly or maliciously attempted to enforce an invalid or unenforceable non-competition agreement, and therefore must have acted improperly in discharging plaintiff in the first place. It was prejudicial error to allow this evidence at trial, and the Court should reverse the judgment, and order that on remand plaintiff not be permitted to introduce evidence of PVI's attempt to enforce the non-competition agreement.

**D. The trial court further erred in rejecting PVI's proposed limiting jury instruction.**

An opponent of evidence improperly admitted has a right to a withdrawal or limiting instruction regarding that evidence. M.A.I. 34.02. Before the case was submitted to the jury, PVI offered an instruction advising the jury that it could not consider the evidence of the litigation over the non-competition agreement on the issue of liability. L.F. 0457. The trial court refused to submit the limiting instruction to the jury. *Id.*

Where evidence is admissible for one purpose or one issue but would be improper for other purposes, the party opposing the evidence has a right to an instruction limiting the extent to which and the purpose for which the jury may consider such evidence. *State v. Shain*, 134 S.W.2d 58, 61 (Mo. 1939); *see also Eltiste v. Ford Motor Co.*, 167 S.W.3d 742, 755 (Mo. App. E.D. 2005); *Pope v. Pope*, 179 S.W.3d 442, 464 (Mo. App. W.D. 2005).

If the Court believes that the extensive evidence plaintiff presented regarding enforcement of the non-competition agreement was relevant to the issue of damages, then PVI was entitled to an instruction directing the jury to consider the evidence only with regard to damages. L.F. 0009, 0198-0212. If the admission of the evidence was not error, it was error to refuse PVI's proffered limiting instruction.

**CONCLUSION**

For the forgoing reasons, the Court should reverse the decision of the trial court and enter judgment in favor of PVI. If the Court does not reverse and remand for entry of

judgment in favor of PVI, the Court should reverse the judgment and order a new trial on all issues. If the Court does not reverse the judgment outright or remand for a new trial, then the Court should reverse the judgment of the trial court and remand for a hearing regarding juror misconduct.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this Brief is typed in Times New Roman, 13 point type, Microsoft Word. This brief contains 18,477 words. This brief is otherwise in compliance with Rule 84.06(b). The undersigned certifies that the electronic copy has been scanned for viruses and that it is virus-free.

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a true and accurate copy of the foregoing brief and a disk containing the brief were mailed to the undersigned attorneys of record this \_\_\_\_ day of July, 2009, to:

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