IN THE SUPREME COURT OF MISSOURI

No. SC93132

JOHN TEMPLEMIRE,

Appellant,

v.

W&M WELDING, INC.,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF PETTIS COUNTY, MISSOURI
THE HONORABLE ROBERT L. KOFFMAN, JUDGE

SUBSTITUTE REPLY BRIEF OF APPELLANT JOHN TEMPLEMIRE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Jury Instructions

ARGUMENT IN REPLY

I. Neither *Stare Decisis* Nor Legislative Inaction Prevent The Court From Correcting An Erroneous Interpretation Of Section 287.780

Appellant Templemire agrees with Respondent and its amici curiae that there has been certainty in the law for the past thirty (30) years. Appellant disagrees, however, that the "certainty" is acceptable or that it supports adherence to exclusive causation. Under an exclusive causal standard, the certainty is that employers can discriminate against employees for filing a workers' compensation claim if they simply wait for, or create, a non-discriminatory factor to point to prior to taking the adverse employment action. The certainty is that employees are deprived of their statutory rights. The certainty is that a standard imposing liability only when the exercise of workers' compensation rights was the sole basis for the adverse employment decision necessarily tolerates discrimination. The certainty is that "[e]xclusive causation fails to accomplish the task of protecting employees . . . ." Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 93 (Mo. banc 2010).

Evidently these certainties are acceptable to businesses because employees seeking to enforce their rights, including Appellant Templemire, are viewed as "advantageous, litigious, marginal employees" hoping for job security. [Amicus Br. of

Mo. Org. of Defense Lawyers, at 20].[1] Evidently speculation about the possibility of "advantageous, litigious, marginal employees" filing lawsuits demands that every Missouri employee be denied his or her rights and keys to the courthouses.

Appellant, however, views these "certainties" and the exclusive causation standard as unacceptable. Like this Court, Appellant views the discrimination tolerated by the exclusive causation standard as reprehensible. *See* Fleshner, 304 S.W.3d at 94-95 (employer's actions are "reprehensible" if the improper motive plays any part in the employer's decision to terminate an employee). The "certainty" that has existed for thirty (30) years is the undeniable injustice that needs to be remedied and requires a change in the current state of the law.

A. *Stare Decisis* Should Not Prevent the Court From Correcting Injustice and Overruling Incorrect Precedent

The rights of Missouri citizens and employees are important. Their rights are just as important as the rights of the businesses where they work and work hard. Their rights are just as important as the doctrine of *stare decisis* and adherence to precedent. *Stare decisis* is never a bar to overruling statutory interpretations that are objectively wrong, and incorrect interpretations should not remain simply because they have been incorrect for an extended period of time. *See* Med. Shoppe Int'l, Inc. v. Dir. of Revenue, 156

[1] This unnecessary criticism of Appellant Templemire seems to ignore his supervisor's characterization of him as a good employee who completed the tasks he was assigned. [Tr. 284, 286].

S.W.3d 333, 335 (Mo. banc 2005) ("the adherence to precedent is not absolute . . . [and] American history is replete with examples of instances where experience and the changing needs of society trump adherence to precedent and demonstrate the fallacy of an earlier interpretation."). This principle was articulated recently by Chief Justice John Roberts, who wrote:

> *stare decisis* is neither an 'inexorable command,' nor 'a mechanical formula of adherence to the latest decision[]' [and] [i]f it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants.
>
> . . .
>
> *Stare decisis* is instead a 'principle of policy[]' [and] [w]hen considering whether to reexamine a prior erroneous holding, we must balance the importance of having . . . questions *decided* against the importance of having them *decided right*.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 377-78, (2010) (emphasis in original) (internal citations omitted).

Respondent's primary argument is that the "excusive causation" standard should remain because the statute has been interpreted to require exclusive causation for thirty (30) years and that employees are free to seek redress in the legislature. That argument, however, incorrectly assumes the statute was properly interpreted thirty (30) years ago. Appellant is not limited to seeking redress in the legislature because the language of

section 287.780 is not the problem; it is the longstanding interpretation of that language that is incorrect.

"In addition to seeking legislative change of an incorrectly interpreted statute, a party in a subsequent case may ask the court to re-examine and overrule its previous case." Med. Shoppe Int'l, Inc., 156 S.W.3d at 334. For the reasons set forth in Appellant's Substitute Brief, Appellant believes the prior interpretation of section 287.780 is incorrect and the Court may re-examine and overrule that interpretation. *See* Independence-Nat. Educ. Ass'n v. Independence Sch. Dist., 223 S.W.3d 131, 137 (Mo. banc 2007) ("the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course.") (changing restrictive interpretation of constitution); *see also* State v. Jackson, 697 S.E.2d 757, 767 (Ga. 2010) ("Certainly, stare decisis should not be applied to the extent that an error in the law is perpetuated . . . .").

Appellant does not ask the Court to disturb the casual standard because he "merely disagrees" with the current statutory analysis. Rather, Appellant asks the Court to correct an error in the law and bring the outdated and unjust standard in line with the causal standard used in connection with other wrongful termination claims in Missouri. When there is a statutory prohibition on discrimination, a standard that tolerates discrimination is wrong and should be rejected, regardless of the length of time it has been in place. Rejection of the exclusive causal standard and adoption of the "contributing factor" standard would accomplish section 287.780's purpose of eliminating discrimination, and would bring employee rights in this area of the law in line with the rights afforded to, and

understood by, both employees and employers in the other areas of Missouri employment law.

B. Legislative Inaction Does Not Amount to Tacit Endorsement of the Exclusive Causal Standard

Respondent argues that the General Assembly has "tacitly approved" the prior interpretation of section 287.780 and the exclusive causation standard because the statute has remained unchanged while other portions of the workers' compensation laws have been amended. [Resp't Substitute Br. at 12]. However, legislative inaction is not a factor that trumps other rules of statutory construction. This Court recently wrote that legislative inaction does not amount to conclusive endorsement of the Court's prior interpretation of a statute. *See* Med. Shoppe Int'l, Inc., 156 S.W.3d at 334; S. Metro. Fire Prot. Dist. v. City of Lee's Summit, 278 S.W.3d 659, 669 n.11 (Mo. banc 2009).

In Med. Shoppe Int'l, Inc., 156 S.W.3d 333, the Court acknowledged that "[t]he General Assembly's inaction has sometimes been interpreted to be approval of the Court's reading of a statute." Id. at 334. However, the Court further recognized that inaction could just as well mean that the forces in favor of changing the law are matched by the forces against it, and that "the legislative process in our republican form of government is designed more to prevent the passage of legislation than to encourage it." Id. Or, incorrect interpretation of a statute may remain unchanged "simply because the legislature has paid no attention to it." Id. For these reasons, this Court stated that "it is speculative to infer legislative approval from legislative inaction." Id.

Other courts have likewise questioned reliance on legislative inaction. *See* Zuber v. Allen, 396 U.S. 168, 185, 185 n.21 (1969) ("Legislative silence is a poor beacon to follow in discerning the proper statutory route . . . [t]his Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."); Wenke v. Gehl Co., 682 N.W.2d 405, 416 (Wis. 2004) (Legislative acquiescence . . . is subsidiary to a more important principle—that the goal of statutory interpretation is to ascertain and give effect to the statute's intended purpose . . . [and] [i]n any event, a subsequent legislature's approval of a judicial construction is not as probative as the intent of the legislature *when it enacted the statute*.") (emphasis in original); Donajkowski v. Alpena Power Co., 596 N.W.2d 574, 583 (Mich. 1999) ("we wish to make it clear now: 'legislative acquiescence' is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence."); DiDonato v. Wortman, 358 S.E.2d 489, 490 (N.C. 1987) ("We cannot assume that our legislators spend their time poring over appellate decisions so as not to miss one they might wish to correct . . . [o]ur inquiry, therefore, must focus on the words of the statute itself . . . .").

Accordingly, Appellant submits that inaction by the legislature does not determine approval or the correctness of the Court's prior interpretation of section 287.780. The legislators in office today, or 10 years ago, are not the legislators who wrote the statute in 1973 and so the courts must look at the actual words of the statute to determine its intent. Furthermore, legislative inaction alone cannot outweigh the compelling factors calling for

abandonment of the current interpretation: (1) the current interpretation is inconsistent with the statutory text and violates rules of statutory construction, (2) the current interpretation defeats the intent of the statute, in that discrimination is acceptable, tolerated and can be a contributing, motivating or the primary reason for an adverse employment decision as long as it is not the only reason, and (3) the current interpretation conflicts with this Court's recent opinions on the causal standard applied in other types of employment discrimination and wrongful discharge claims under Missouri law.

When a prior interpretation of statutory language is incorrect, and remains incorrect, it may be corrected by this Court regardless of action or inaction by the legislature to change the text itself. *See* Med. Shoppe Int'l, Inc., 156 S.W.3d at 334 ("In addition to seeking legislative change of an incorrectly interpreted statute, a party in a subsequent case may ask the court to re-examine and overrule its previous case."). Appellant respectfully submits that under the circumstances presented here, legislative inaction should not be a determining factor as to the proper interpretation of section 287.780.

C. The Recent Amendments to the Missouri Approved Instructions are Not a Renewed Endorsement of the Exclusive Causal Standard

Respondent points out that on April 2, 2012, this Court approved and adopted amended Missouri Approved Jury Instructions and that as part of those instructions, the exclusive casual standard remains for workers' compensation retaliation claims in M.A.I. No. 38.04. Appellant respectfully submits the fact the causal standard remains unchanged in M.A.I. does not, itself, indicate a renewed endorsement of the instruction

by the Court. Of course, the Court cannot reaffirm or change the law without an actual case to consider. *Cf.* Missouri Approved Jury Instructions, at LI, "How to Use This Book" ("Changes in the law may render an applicable MAI instruction a misstatement of the then current law.").

II. There Is No Basis On Which To Distinguish Claims Under Section 287.780 From Claims In Other Areas Of Employment Law

A. The Contributing Factor Standard May Be (and Has Been) Applied to a Statutory Cause of Action

Respondent and its amici curiae argue that the "contributing factor" standard should not apply to a claim for discrimination under section 287.780 because that claim is a statutory claim, and not a claim developed under the common law. Respondent argues the distinction is significant, and cites Brenneke v. Dept. of Missouri, Veterans of Foreign Wars of United States of America, 984 S.W.2d 134 (Mo. App. 1998), as support for its argument that the exclusive causal standard should remain.

Appellant Templemire respectfully submits that Brenneke's discussion of causation and how it relates to statutory actions versus common law actions was dicta, in that the Court ultimately stated it "need not resolve in this case whether the Missouri Supreme Court would apply [contributing or exclusive] causation, to a whistleblower claim." Id. at 140-41 (also holding a submissible case was made under either causal standard).

Likewise, in Margiotta v. Christian Hosp. Northeast Northwest, 315 S.W.3d 342 (Mo. banc 2010), also cited by Respondent, this Court simply mentioned in a footnote that workers' compensation retaliation is controlled by statute and, in that way, distinct from the other wrongful discharge scenarios it was historically linked with in cases like Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo. App. 1985). Appellant respectfully submits that Margiotta is another example of the Court simply distancing the wrongful discharge actions actually at issue in the particular case before the Court from the existing, but disfavored, exclusive causation standard applicable to actions for workers' compensation retaliation not before the Court in the particular case.[2]

In other words, Respondent overstates the support Brenneke (and the other cases discussing the tort v. common law distinction in wrongful discharge cases) provide

[2] The other example is reflected in Fleshner (handed down the same day as Margiotta), where the Court selected the contributing factor standard for public policy cases even though the public policy exception was historically linked in the case law with workers' compensation retaliation protection as exceptions to the at-will employment doctrine. *See*, *e.g.* Porter v. Reardon Mach. Co., 962 S.W.2d 932, 936-37 (Mo. App. 1998). Appellant believes Fleshner's reference to the workers' compensation standard was not an endorsement, as reflected by the Court's comment that the exclusive causation standard does not appear anywhere in the workers' compensation laws and its reference to Judge White's criticism of the standard in his dissent in Crabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998) (White, J., dissenting). Fleshner, 304 S.W.3d at 92, n.10.

Respondent in this context and in this particular case. Brenneke, Fleshner and Margiotta cite the distinction as a way to **reject** application of a disfavored exclusive causal standard (currently existing in one setting) to the particular facts and issues before those Courts. Those cases should not be interpreted to endorse the exclusive causal standard in statutory actions. Instead, the recent case law reflects the current belief that the exclusive causal standard should be rejected, not expanded, going forward. *See* Fleshner, 304 S.W.3d at 93 ("'Exclusive causation' would result in an exception that fails to accomplish the task of protecting employees . . . .").[3]

In any event, it is apparent that the statutory/common law distinction is not a determining factor in selecting the appropriate causal standard. First, M.A.I. No. 31.24 adopted the contributing factor standard for statutory claims under the Missouri Human Rights Act ("MHRA") in 2005 (following Brenneke). More recently, in Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 818 (Mo. banc 2007), this Court confirmed that statutory actions for discrimination under the MHRA require application of the

[3] Again, Appellant acknowledges that in Fleshner, 304 S.W.3d at 93, this Court noted Brenneke's observation of the apparent statutory/common law causal distinction. As stated above, however, it appears Court's reference to the distinction was not for purposes of commenting on the appropriateness of the current workers' compensation standard, but rather only to distinguish the public-policy exception at issue from that current workers' compensation standard (the appropriateness of which was not before the Court). Indeed, the Court declined to adopt the exclusive casual standard in that case.

"contributing factor" standard. *See* Daugherty, 231 S.W.3d at 820 ("the 'contributing factor' language used in M.A.I. No. 31.24 is consistent with the plain meaning of the MHRA."). In Hill v. Ford Motor Co., 277 S.W.3d 659 (Mo. banc 2009), this Court confirmed that statutory actions for retaliation under the MHRA require application of the contributing factor standard. Hill, 277 S.W.3d at 665, 668. Daugherty and Hill demonstrate the statutory language and the conduct to be prohibited are the determining factors with respect to the appropriate causal standard; whether the claim arises under statute or common law is not controlling.

If exclusive causation was meant to be the standard, it should have been written into the statute. *See* Flesher, 304 S.W.3d at 92 ("[n]owhere in the workers' compensation laws does "exclusive causal' or exclusive causation appear."); Crabtree, 967 S.W.2d at 73 (White, J. dissenting) ("section [287.780] does not contain any language suggesting that an employee is entitled to an action when they have been discharged 'solely' or 'exclusively' because they sought the protection afforded by workers' compensation. At a minimum, an employee has suffered discrimination when the employee is discharged even in part for filing a claim."). Even federal courts, to which Respondent's amici curiae state this Court should look to as a guide, recognize that the exclusive causal standard should not be applied to statutory causes of action that do not contain the words "solely" or "exclusively." *See*, *e.g.*, Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 315-16 (6th Cir. 2012) ("The longer we have stood by this standard, the more out of touch it has become with the standards used by our sister circuits . . . [and] [a] law establishing liability against employers who discriminate 'because of' an employee's

disability does not require the employee to show that the disability was the 'sole' cause of the adverse employment action.").

Abandoning the exclusive causation standard would finally give effect to the statute as written and afford employees their statutory rights while at the same time preserving the right of businesses to terminate employees for legitimate reasons. Protecting employees from actual, illegal discrimination outweighs theoretical concerns about "guaranteed employment." The settled law in Missouri is that in both (1) statutory employment actions and (2) common law employment actions, liability is imposed when an illegal consideration is a contributing factor in an adverse employment decision. Discrimination under section 287.780 is the sole, remaining outlier and this case provides the Court the opportunity to correct that injustice.

B. The Contributing Factor Standard Should be Applied to Section 287.780

There should be no question section 287.780 was meant to eliminate discrimination and retaliation for exercising workers' compensation rights, just as the MHRA and public-policy protection are meant to eliminate discrimination and retaliation in those areas of the law. Appellant will not reargue the point in reply, but as set forth in Appellant's Substitute Brief, the language in section 287.780 is the same as the language used by this Court regarding the wrongful discharge claim recognized in Fleshner and markedly similar to the language contained in the MHRA. The Court should adopt the contributing factor standard that fulfils the statutory purpose and protects employees, consistent with its recent opinions.

C. A "Motivating Factor" Standard is Not Used in Other Areas of Missouri Employment Law and There is No Basis for its Adoption Here

Respondent's amici curiae argue that if the Court decides to abandon the exclusive causal standard, it should adopt a "heightened," "motivating factor" standard instead of the contributing factor standard applied in other areas of Missouri employment law. The reality is that a request for a heightened standard is a request for a standard that will continue to tolerate discrimination. It is a request that should be rejected, because a liability standard that tolerates decisions based in part on an illegal factor does not eliminate discrimination, but instead fosters it.

One argument is that the statutory language calls for a heightened standard. Respondent mentions that section 287.780 does not expressly contain the term "contributing factor." That may be, but the "contributing factor" standard is the causal standard that this Court applies when the cause of action prohibits discrimination in **any** way and prohibits discrimination **for** engaging in certain activity. Daugherty, 231 S.W.3d at 819; Fleshner, 304 S.W.3d at 93. Respondent's amici curiae seem to ignore these holdings, instead claiming the Court should follow standards adopted by courts in certain other jurisdictions. And yet, neither Respondent nor its amici curiae articulate a justifiable legal basis under current Missouri law on which this Court may distinguish discrimination in the workers' compensation context from this Court's recent opinions on discrimination in other areas of Missouri law. *Cf.* Hill, 277 S.W.3d at 665 ("Defendant does not point to anything in the MHRA that would lead to this result . . . [and] defendant

does not explain why a claim for retaliation brought under section 213.070 should be treated differently from a claim for discrimination brought under section 213.055.").

Appellant submits that the motivating factor standard finds no support under current Missouri law. As discussed by the Court in Fleshner, the motivating factor standard was abandoned in favor of a contributing factor standard in MHRA cases nearly ten (10) years ago with the adoption of M.A.I. No. 31.24. Fleshner, 304 S.W.3d at 94. Later, in Daugherty, this Court held that the contributing factor standard was consistent with the plain language of the MHRA. Daugherty, 231 S.W.3d at 819; *see also* McBryde v. Ritenour Sch. Dist., 207 S.W.3d 162, 170 (Mo. App. 2006) ("in enacting the MHRA, the legislature sought to prohibit any consideration of race or other improper characteristic no matter how slight in employment decisions."). Two years later in 2009, in Hill v. Ford Motor Co., this Court held that the contributing factor standard applies to hostile work environment sexual harassment claims and that a plaintiff may prevail on a retaliation claim under the MHRA if the plaintiff's opposition to the discrimination (or filing a complaint) was a contributing factor in the retaliation. Hill, 277 S.W.3d at 665-666, 668 (holding the contributing factor standard applies when an employer retaliates against a person "because" the person has opposed prohibited practices).

The following year, in Fleshner the Court again endorsed the contributing factor standard, abrogated cases applying the exclusive causal standard, and held the contributing factor standard should apply in cases under the public-policy exception to the employment at-will doctrine. Fleshner, 304 S.W.3d at 93-94. In doing so, the Court all but expressly rejected a "motivating factor" standard by declaring that an employment

decision that was **in any way based on an illegal factor** is "reprehensible," regardless of the other factors considered:

> [I]f an employee reports violations of law or refuses to violate the law or public policy as described herein, it is a "contributing factor" to the discharge, and **the discharge is still reprehensible regardless of any other reasons of the employer.**

Fleshner, 304 S.W.3d at 94-95 (emphasis added).

The Court in Fleshner could have chosen the motivating factor standard for the public-policy exception to employment at-will, but did not. To the contrary, the foregoing excerpt establishes that a motivating factor standard would not go far enough in protecting employees. That standard would allow discrimination to be a factor in an adverse employment decision, as long as it was not the motivating, or substantial factor, and would thereby tolerate reprehensible conduct not tolerated in any other area of employment law. Like exclusive causation, a "motivating factor" standard violates both the rules of statutory construction and the relevant policy concerns. Arguing that a heightened standard is required because the contributing factor standard gives employees "too low a burden" is just a different (and less obvious) way of saying "a heightened standard is needed because employees in Missouri should have to tolerate being subjected to even small amounts of discrimination." "Some discrimination," or a "small amount of discrimination," is still discrimination and it is still prohibited by statute.

Simply put, there is no support in current Missouri employment law for adoption of a motivating factor standard in claims brought under section 287.780. This Court has

held that the contributing factor standard applies when employees suffer discrimination (1) in "any" way (Daugherty, 231 S.W.3d at 819), (2) "for" doing certain things (Fleshner, 304 S.W.3d at 92), and (3) "because" they have done certain things (Hill, 277 S.W.3d at 665). Accordingly, the appropriate standard under section 287.780, as articulated by Judge White, is that "an employee has suffered discrimination when the employee is discharged even in part for filing a claim." Crabtree, 967 S.W.2d at 73 (White, J. dissenting). Section 287.780, like the MHRA, seeks to prohibit discrimination "in any way" against an employee and there is nothing in the statute that requires proof that discrimination was a substantial or motivating factor in the employment decision; if it contributed to the unfair treatment, that is sufficient.

The recent opinions handed down by this Court provide ample support for adoption of a contributing factor standard and rejection of a "heightened" motivating factor standard. An employee who proves he or she exercised workers' compensation rights, was terminated, and that the termination decision was based in part on the fact the employee exercised his or her rights has suffered discrimination and is entitled to a remedy. The contributing factor standard is the only causal standard that can be reconciled with the purpose of section 287.780, which is to eliminate discrimination.

III. The Pretext Instruction Is Required Under an Exclusive Causation Standard

A. The Instruction Did Not Inappropriately Focus on Respondent

Respondent attempts to persuade the Court that Appellant's pretext instruction was improper and unfair because it referred to the credibility of the Respondent/Defendant

alone. That is an irrelevant concern in this context, however, because the fourth paragraph of the verdict director to which the pretext instruction relates focuses solely on the Respondent/Defendant as well. In other words, the pretext instruction focuses on the defendant, not the plaintiff, because it is the defendant's actions and intentions that are in issue:

> **Fourth, the exclusive cause of such discharge was plaintiff's filing of the worker's compensation claim.**

[A 14, LF 0053].

The pretext instruction was offered in reliance on Wiedower v. ACF Industries, 715 S.W.2d 303 (Mo. App. 1986), where the court stated that when "an employer produces evidence of a legitimate reason for the employee's discharge, the plaintiff who is able to persuade the jury that **the employer's reason** is pretextual and not causal is entitled to a verdict." Wiedower, 715 S.W.2d at 307 (emphasis added). The employer's reason is the critical issue and, therefore, it is not improper to focus the jury on the employer alone in this context.

B. McCollough Does Not Require Refusal of the Pretext Instruction

Respondent notes that the Western District Court of Appeals recently affirmed a trial court's refusal to give a pretext instruction in McCollough v. Commerce Bank, 349 S.W.3d 389 (Mo. App. 2011). As noted in Appellant's Substitute Brief, McCullough is factually distinguishable and its holding should be limited to cases under the MHRA. [Appellant's Substitute Br. at 44-47].

C. Appellant's Proposed Pretext Instruction Did Not Provide the Jury With a Roving Commission

Respondent also claims Appellant's pretext instruction was improper because it gave the jury a roving commission. Because error on this ground does not appear to have been discussed at the trial court level, Appellant respectfully submits Respondent's argument on this point should not be considered by the Court. [*See* Tr. 658-660].

In any event, the pretext instruction was not a roving commission in view of the evidence in this case. The instruction stated:

> **You may find that plaintiff exercising his workers compensation rights was the exclusive cause of defendant's decision to discharge plaintiff if the defendant's stated reasons are not the true reasons, but are a pretext to hide retaliation against plaintiff for exercising his workers compensation rights.**

[LF 0131]. Respondent claims this instruction gave the jury a roving commission because it used the word "reasons" instead of "reason." Respondent asserts there was only one "reason" for the termination and, therefore, the instruction improperly implies the existence of other "reasons" and improperly encourages the jury to search the record for other facts that would lead to Respondent's liability.

First, the instruction did not need to contain a factual recitation of the purported specific reason or reasons for Appellant's termination. Instructing the jury that they may find the stated reasons are not the true reasons is no different than instructing the jury that they may find a defendant "failed to keep a careful lookout." The plaintiff is not required

to tell the jury in the instruction what specific facts can establish that failure. This same should be true with respect to Appellant's pretext instruction.

Second, based on the evidence in this case, the jury knew exactly which reasons the instruction said they could believe or disbelieve: Respondent's stated reasons. At trial, Respondent's evidence was that Gary McMullin terminated Appellant during a heated exchange because he was sitting down and failed to wash a railing in a timely manner. [Tr. 595-97]. It was clear that McMullin and Respondent *claimed* Appellant was terminated during this exchange because the railing had not yet been washed.[4] Accordingly, the jury knew what facts to weigh when deciding why Appellant was terminated. They were not free to "search through the evidence." To find "defendant's stated reasons," all they had to do was recall the testimony of Respondent's witnesses and the closing argument of defense counsel.

Simply put, no roving commission was given, and Respondent's argument that the inclusion of an "s" on the end of "reason" (to imply multiple "reasons") highlights a distinction that makes no difference in this case. The instruction was proper, in that it limited the jury to considering "defendant's stated reasons." In other words, the only

[4] Appellant disputes Respondent's repeated assertion or insinuation that Appellant believed he was actually terminated for insubordination, rather than in retaliation for filings a workers' compensation claim. [Resp't Substitute Br. at 18, 25]. The record, and the lawsuit itself, reflect Appellant's belief he was terminated in retaliation for filing his workers' compensation claim. [Tr. 524-25, 535].

thing the jury could consider was whatever reason or reasons Respondent gave and, therefore, the instruction was clearly limited to the evidence developed in the case.

CONCLUSION

The exclusive causation standard is contrary to the plain language of section 287.780 and conflicts with the protections provided to Missouri employees under the other exceptions to the employment at-will doctrine. Appellant Templemire respectfully requests that this Court hold that the exclusive causation standard is contrary to the plain language of section 287.780 and the intent of the legislature and should be abandoned in favor of the contributing factor standard applicable to Missouri's other exceptions to the employment at-will doctrine. The trial court's rejection of Appellant Templemire's verdict directors and the "contributing factor" standard, and the trial court's giving of unmodified M.A.I. No. 23.13, constitutes prejudicial error. Alternatively, when the trial court decided to give unmodified M.A.I. No. 23.13, it was prejudicial error for the trial court not to instruct the jury on the significance of pretext under Missouri law.

WHEREFORE, Appellant John Templemire prays that the judgment entered by the trial court below be reversed, and that the cause be remanded for new trial.

Respectfully submitted,

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CERTIFICATION

Pursuant to Mo.R.Civ.P. 84.06(c), I hereby certify that Appellant's Substitute Reply Brief includes the information required by Rule 55.03, complies with the limitations in Rule 84.06(b) and contains 5,595 words excluding the parts of the brief exempted by Rule 84.06(b), according to the Microsoft Word system used to prepare the brief.

_____/s/ Bryan T. White_____
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on May 17, 2013, a true and correct copy of the foregoing Substitute Reply Brief was filed electronically using the Missouri Courts e-Filing System, which provided notice and service of the filing to counsel of record for Respondent:

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