IN THE SUPREME COURT OF MISSOURI

BISHOP & ASSOCIATES, LLC.,	)	
	)	
Appellant,	)	
	)	
v.	)	SC95658
	)	
AMEREN CORPORATION, et al.,	)	
	)	
Respondents.	)	

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant, Bishop & Associates, LLC, appeals from the final judgment entered on May 6, 2015, by the Circuit Court of the City of St. Louis, granting summary judgment in favor of Defendants on all counts of Plaintiffs' Amended Petition. Appendix ("Appx") A15, LF01672-1701. The action involves the claims of an independent contractor for wrongful termination in violation of public policy (Count I), breach of contract (Count II), tortious interference with contract (Count III), and defamation (Count IV). Amended Petition LF000127-149. Appellant also appeals the trial court's ruling on June 5, 2013, that punitive damages are not available in Appellant's claim of wrongful termination in violation of public policy. Appx A1, LF000113-126.

The issues on appeal involve errors committed by the Circuit Court. Appellant appealed to the Missouri Court of Appeals, Eastern District which affirmed the Circuit Court and denied Appellant's Motion for Rehearing and Application for Transfer. This Court granted Appellant's Application for Transfer. Accordingly, this appeal is within the jurisdiction of the Missouri Supreme Court pursuant to Article V, Section 10, of the Missouri Constitution.

STATEMENT OF FACTS

This action arises from the termination by Defendants Ameren Corporation, Union Electric Company d/b/a Ameren Missouri, and Ameren Services Company's (herein collectively "Ameren") of the long-standing business relationship between Ameren and Plaintiff Bishop &Associates, LLC (herein "B&A"), and from the conduct, in procuring that termination, of three individual Ameren building services managers and supervisors,

Defendants James Armistead, Michael Wright, and Richard George (herein collectively "Individuals" or "Individual Defendants"). Petition, LF000022-42; Amended Petition, LF01672-1701.

A. PROCEDURAL HISTORY

Plaintiff's lawsuit was filed in August 2012 and asserted four counts: two counts against Ameren, for wrongful termination in violation of public policy (Count I) and breach of contract in violation of public policy and the duty of good faith and fair dealing (Count II), and two counts against the Individuals, for tortious interference with business expectancy (Count III) and defamation (Count IV). Petition LF000022-42.

In September 2012, Defendants filed a Motion to Dismiss the Petition for Failure to State a Claim Upon Which Relief Can be Granted. LF000043-68. Judge Dierker issued an Order on June 5, 2013, granting Defendants' Motion in part and denying it in part. Memorandum and Order, Appx A1, LF000113-126. As relevant here, Judge Dierker found that Plaintiff B&A adequately pleaded claims for wrongful termination in violation of public policy (Count I), breach of contract in violation of public policy and the duty of good faith and fair dealing (Count II), and tortious interference with business relationship (Count III). *Id*. Judge Dierker also ruled that Plaintiff B&A could not assert a claim for punitive damages under Count I, for wrongful termination in violation of public policy, and dismissed that part of Count I with prejudice. Appx A10-11, A14; LF000122-123, 000126.

Challenging the trial court's denial of their Motions to Dismiss, Defendants filed Petitions for Writ of Prohibition in both the Court of Appeals and the Missouri Supreme

Court. Both Courts denied Defendants' Petition. *State ex rel. Ameren Corp. v. Dierker*, ED100462 (Mo. App. E.D. September 24, 2013); *State ex rel. Ameren Corp. v. Dierker*, SC93703 (Mo. November 26, 2013).

In January 2015, Defendants filed a Motion for Summary Judgment. LF000246-253. After briefing and argument, on May 6, 2015, Judge Joan Moriarty granted Defendants' motion and entered judgment for Defendants on all of Plaintiffs' claims. Memorandum, Order and Judgment, Appx A1, LF001672-1701.

Plaintiff timely filed its Notice of Appeal on June 12, 2015. LF01702-1704. The Court of Appeals affirmed the Circuit Court and denied Appellant's Motion for Rehearing and Application for Transfer. This Court granted Appellant's Application for Transfer.

Issues on Appeal

In this appeal Plaintiff challenges the trial court's rulings granting summary judgment on B&A's claim for wrongful termination in violation of public policy (Point 1), granting summary judgment on B&A's claim for breach of contract in violation of public policy and the implied covenant of good faith and fair dealing (Point 2), dismissing Plaintiff's claim for punitive damages for wrongful termination in violation of public policy (Point 3), and granting summary judgment on Plaintiff's claim against the individual defendants for tortious interference with business relations (Point 4).

B. FACTUAL BACKGROUND

1. The Business Relationship Between Ameren and B&A

Plaintiff Bishop &Associates, LLC ("B&A") is a small family-owned and operated commercial plumbing company which performed most of its work with two employees. Statement of Uncontroverted Facts in Support of Motion of Defendants for Summary Judgment ("Defs. Facts") ¶ 1, LF000254; Bishop Dep. (5/13) at 24-32, LF001043-45. Kara L. Bishop is the registered agent and sole owner of B&A. Bishop Dep. (5/13) at 24, LF001043. B&A employed Robert Bishop, Kara Bishop's husband. Defs. Facts, ¶ 2, LF000254; Bishop Dep. (5/13) at 10-11, LF001040. Mr. Bishop holds master-plumber and master drain-layer licenses in both St. Louis City and County, has over 30 years of experience in the plumbing industry, has numerous specialty certifications in various plumbing-related subfields, and has been retained by St. Louis County to provide expert testimony in a lawsuit involving plumbing practices and regulations. Bishop Dep. (5/13) at 16-18, 53, LF001041-42, LF001050.

Ameren is a Fortune 500 company with assets of approximately $23 billion. It is the parent company of Union Electric Company in St. Lous, which employs over 4,000 people, operates nine power plants and 3,100 miles of natural gas mains and serves approximately 1.2 million customers. Amended Petition and Amended Answer, ¶ 6, LF000129, LF000214-15.

In approximately 2002, B&A entered into a business relationship with Ameren to provide plumbing services and maintenance at several of its Missouri and Illinois facilities. Defs.' Facts ¶ 8, LF000255; Bishop Dep. (5/13) at 72-74, LF001055-56. The

relationship expanded in 2005 when several of Ameren's management-level personnel indicated that they wanted B&A to make itself more available to Ameren on an increased and more regular basis. Bishop Dep. (5/13) at 113-116, LF001065-66. Following those discussions, B&A began to devote nearly 100% of its time and resources to Ameren. Bishop Dep. (5/13) at 113-117, 161, LF001065, LF001078. Between 2007 and 2009, Ameren paid approximately $1.7 million to B&A for plumbing and related maintenance services. Ex. Bishop 2, LF000759.

2. The Parties' "Flex-Time" Arrangement

As a result of this 2005 expansion, B&A and Ameren entered into an arrangement known to the parties known as "flex-time." Bishop Dep. (5/13) at 119-121, LF001067. Under the flex-time arrangement, the parties understood that B&A would perform routine and recurring maintenance at several of Ameren's facilities on a flexible schedule and at B&A's discretion with respect to timing. Bishop Dep. (5/13) at 109-111, 123, 311, LF001064-65, LF001068, LF001117. Pursuant to this arrangement, Ameren received reductions in labor and equipment costs in exchange for allowing B&A to perform recurring work on its own schedule so as to fill in any gaps during slower periods. Bishop Dep. (5/13) at 109, 118, LF001064, LF001067; Ex.D-13 at LF000882. This arrangement, negotiated and ratified by members of Ameren management, appeared beneficial for both parties. Bishop Dep. (5/13) at 109-110, 122, LF001064-65, LF001068; Ex. D-13 at LF000882. The arrangement continued uninterrupted, and as initially agreed, until February 2009 when it was temporarily suspended, but soon

reinstated by Defendant Michael Wright. Bishop Dep. (5/13) at 148-153, LF001074-75; D-17, LF000884-88.

From approximately 2005 through 2009, Ameren consistently allocated 90% or more of its total budget for plumbing services at certain sites and facilities to B&A. Ex. Bishop 2, LF000759.

In 2010, however, Ameren began to drastically reduce the volume and scope of work that it would authorize B&A to perform. *Id.*; Defs.' Facts ¶ 17, LF000256. As described below, B&A had several meetings with and provided extensive documentation to numerous Ameren managers regarding the detrimental impact that this reduction was having on Ameren, creating risks to the lives, health and safety of the public and Ameren's employees, and on Ameren's compliance with environmental laws, Metropolitan Sewer District ("MSD") rules and regulations, state plumbing statutes, and local plumbing codes and ordinances. Defs.' Facts ¶¶ 18, 22, 23, 26-34, LF000257-259; Ameren Ex. F, G, H, I, J, LF000286-421; Ex. D-35, LF000931-943; Plaintiffs' Response to Defendants' Statement of Uncontroverted Facts in Support of Motion of Defendants for Summary Judgment ("Pls.' Res. to Defs.' Facts") ¶¶ 18-19, 22, LF000696-699. On July 29, 2010, and within just one month of B&A voicing its concerns and meeting with and providing documents to senior executives from Ameren's environmental protection group and to Ameren's CEO, Ameren terminated B&A's contract. Defs.' Facts ¶ 44, LF000261; Bishop Dep. (5/13) at 484, LF001161.

3. B&A's Reporting on and Preventing Threats to Life, Health and Safety, Violations of Law and Illegal Conditions between 2005 and 2008

Over the course of its eight year relationship with Ameren, B&A and Mr. Bishop would sometimes uncover problems or conditions that they considered a threat to life, health and safety, and either to be in actual violation or, if left unaddressed, certain to result in actual violation of state and federal environmental laws, Metropolitan Sewer District ("MSD") rules and regulations, state plumbing statutes, codes, and local plumbing codes and ordinances. *See, for example,* Appx A59-73; Ex. D-35, LF000462-474; Ex. D-19 LF000895-901; Ameren Ex. I, LF000374-403; Ameren Ex. J, LF000404-421. In such instances, B&A would document and report these problems and conditions in photographic reports ("photo reports") provided to Ameren managers and supervisory personnel. *Id*. With the cooperation of Ameren management, B&A was often able to prevent dangers to health and safety, and actual violations of the law, by providing advance warning of potential failures of environmental protection equipment and/or plumbing systems and engaging in preventative maintenance to forestall such failures. *See, e.g.*, Ameren Ex. J at LF000412. On some occasions, when the issues were discovered only after a violation had occurred, B&A would remediate the problem and then work to create a schedule of preventative maintenance designed to prevent future recurrences of these problems. Bishop Dep. (5/13) at 109, 169, LF001064, LF001080; Ex. D-13 at UE-011420; Ex. Ex. D-22 at LF000882. This goal of preventive maintenance as a means to minimize unnecessary threats to health and safety and noncompliance with laws, rules, and regulations, and to reduce the potential for risk and

liability, was a central part of the flex-time agreement as understood by both B&A and Ameren. Bishop Dep. (5/13) at 109, LF001064. Among the primary concerns identified by B&A during this period were potential dangers to life, health, safety and the environment by the introduction of oil, grease, other petroleum products, and other hazardous substances, into both the sanitary and storm sewers in violation of state and federal environmental laws as well as local MSD ordinances. *See, e.g.*, Ameren Ex. F at LF000311.

In 2007 and 2008, at the peak of the business relationship between the parties, Ameren building services managers praised and supported B&A for its efforts and diligence in correcting or preventing problems. Robert Johnson Dep. at 38-41, 106, LF001278, LF001296; Scott Held Dep. at 37, LF001243. Ameren increased its spending nearly three-fold for plumbing and preventative maintenance services between 2006 and 2009. Ex. Bishop 2 at LF000759. From B&A's perspective, Ameren was taking seriously its civic and legal responsibilities to protect life, health and safety, to protect the environment, and to comply with applicable laws, regulations, and ordinances. Bishop Dep. (5/13) at 135, LF001071.

4. Ameren's 2009-2010 Budget Reductions and Change in Corporate Compliance

Beginning in 2009, with the promotion of Defendant Wright as a building services manager, B&A began to perceive a change in Ameren's attitudes towards B&A's service and protective approach towards Ameren's people and property and its diligence with respect to legal compliance. *Id*. While other Ameren managers (including Scott Held

and Robert Johnson) seemed to share and appreciate B&A's diligent and protective approach to health, safety and the environment and striving for full compliance with applicable laws, Defendant Wright did not seem to share the same priorities. *See* Bishop Dep. (5/13) at 135-137, LF001071; Held Dep. at 59-60, LF001249. Instead, Wright placed more emphasis on budgets and personal career advancement than did others. *See* Bishop Dep. (5/13) at 184-187, LF001084-1085. Manager Scott Held fully authorized and supported the preventative flex-time program but Wright did not. Held Dep. at 54-55, 59-60, LF001248-1249.

On or about February 25, 2009, in one of his first interactions with B&A in his new management position, Defendant Wright questioned and suspended the flex-time arrangement for the Ameren facilities under his control. Ex. D-17 at LF000887. Wright directed that B&A's preventative maintenance work under the flex-time agreement was not to be performed without his approval due to "budget concerns" and "current economic conditions." *Id.* In light of the detrimental impact that Bishop believed Wright's decision could have for Ameren, its employees and the general public, and the environment, B&A approached Held and Johnson to discuss the importance of the flex-time program for Ameren. Held and Johnson appeared to appreciate and share B&A's concerns. Bishop Dep. (5/13) at 149, 154, LF001074-1075; Johnson Dep. at 83, 87, LF001289-1290; Held Dep. at 60, 61, LF001249-1250.

In the weeks that followed, Bishop, Held, and Johnson had joint and separate communications with Wright about the importance of resuming the flex-time program. *Id*. B&A also prepared a report for Held and Wright which referenced "Ameren UE's

Liability and Environmental Issues" and provided photographic documentation of locations where B&A had discovered safety and environmental issues at Ameren. Ex. D-19, LF000895-901.

As documented by B&A in this report, many of Ameren's facilities had experienced issues with motor oil and/or petroleum products exceeding the capacities of the on-site environmental protection and containment systems and either actually entered and/or threatened to enter storm and sanitary sewer systems in violation of state and federal environmental laws and/or sewer district regulations. *Id*. Further, B&A documented health and safety concerns from violations of plumbing codes at several of these same sites, including broken sewer pipes and illegally installed electrical wiring running through sewer systems. *Id*. Finally, B&A offered to provide Wright with "dozens more examples available upon request." *Id.* at LF000899.

Following receipt of this March 2009 report and a meeting with Bishop, Wright agreed to resume the flex-time program, albeit with three (3) sites removed from the flex-time service list. Bishop Dep. 165-170, LF001079-1081; D-18, LF000889-894. As understood by B&A and Bishop, they had complied with Wright's earlier directive to "not perform any of the yearly flex-time maintenance . . . without first getting the OK from me." Defs.' Facts, ¶ 41, LF000260. From Bishop's perspective, B&A stopped the flex-time work until B&A had a meeting with Wright to discuss the future of the program, where B&A was then given the approval to continue the program. (Bishop Dep. (5/13) at 152-53, LF001075; D-17, LF000884-888. Thus, B&A resumed the flex-time program pursuant to the previous terms and understanding, and resumed providing

its maintenance services at all but the three locations that Wright had specifically excluded.

While the flex-time matter appeared to be resolved, B&A continued to notice a change in Ameren's commitment, primarily by Defendant Wright, to protecting the lives, health and safety of its employees and the public, and to complying with environmental laws, MSD regulations, and plumbing statutes and codes. Bishop Dep. (5/13) at 135-137, LF001071. At that time, Ameren was reducing its staff of in-house maintenance personnel and reducing its budgets for repairs and preventative maintenance, while at the same time acquiring more facilities through acquisitions. Johnson Dep. at 25, 93, LF001274, LF001291. The reduction in budgetary expenditures was reflected in the approximately 25% decrease in spending from 2009 to 2010 on plumbing and maintenance services at the sites where B&A was providing such services. Ex. Bishop 2, LF000759. Thus, while Ameren was downsizing its existing maintenance staff and spending less on outside contractors, it was also adding to its list of sites and facilities that required repairs and preventative maintenance services. Johnson Dep. at 25, 93, LF001274, LF001291; Ex. Bishop 2, LF000759.

5. B&A's 2010 "New Approach" Proposal and Reporting of Additional Illegal and Unsafe Conditions

In approximately January 2010, B&A offered an exclusive contract to Ameren to provide plumbing and preventative maintenance services. Ex. D-25, LF000906-909. B&A offered this proposal, known as a "New Approach for Ameren," with support of Ameren managers Rob Johnson and Scott Held. Bishop Dep. (5/13) at 237, LF001097;

Johnson Dep. at 97-8, LF001293-1294; Held Dep. at 98, LF001259. In this proposal, B&A offered to provide exclusive and extensive plumbing and maintenance services to Ameren in exchange for an annual contract amount of $720,000, for both labor and equipment. Ex. D-25, LF000906-909. This $720,000 figure came at the suggestion of Scott Held and is indicative of the amount of maintenance expenditures that Held believed were required on Ameren's part to adequately repair and maintain their facilities. Ex. D-25, LF000906-909; (Bishop Dep. (5/13) at 237, LF001097.

As part of this proposal, B&A prepared a PowerPoint presentation for Ameren management, including its building services department manager, Defendant James Armistead. Ex. D-26, LF000910-925. In this presentation, B&A described several instances at Ameren locations where B&A had either uncovered and corrected illegal and unsafe conditions, or where it believed that illegal and unsafe conditions were being allowed to go uncorrected due to inadequate preventative maintenance and/or repairs. The conditions B&A reported at that time included illegal connection of piping which introduced human waste into vent piping systems. *Id*. at LF000914. B&A also documented instances where unlicensed in-house maintenance personnel had caused waste to drip onto the persons and desks of Ameren employees. *Id*. at LF000915. B&A also documented the introduction of sewer gases into a building. *Id.* at LF000916. Also in the New Approach presentation B&A documented the inadequacy of a chemical containment system at the Dorsett facility, causing oil leaking from tanks to be routed through illegally installed piping ejecting the oil to a modified creek bed contaminating the ground and water. *Id.* at LF000917-22.

In response to B&A's presentation, Scott Held contacted Bishop and indicated that he and Defendant Armistead had been discussing B&A's concerns and proposal and requested further information regarding the statement, "illegal/improper work has been performed by in-house personnel." Ex. D-27 at LF00926-930. In reply, Bishop provided further information, including an installation and/or attempted repair conducted by an unlicensed Ameren employee who created a direct unprotected cross connection between drinking water pipes and a sanitary waste stack (which contains human fecal waste). *Id.* As specifically indicated by Bishop in this response: "all of this work . . . requires a plumbing license by ordinance" and "by code it is illegal for anyone w/o a license to install/manipulate/modify plumbing systems." *Id.*

Bishop later learned from Scott Held that a break room installation that Bishop reported had been done illegally and improperly by in-house Ameren personnel, and included in both Bishop's "New Approach" proposal and his follow-up email to Held, was performed under the supervision of Defendant Armistead. Bishop Dep. (5/13) at 348-50, LF001126-1127. Held admitted in his deposition that Armistead "took offense that the third-floor break room job was [Armistead's] job and that was one of the ones that [Bishop] had included in the examples of illegal and improper work done at Ameren." Held Dep. at 110-11, LF001262. In fact, Held said "it was pretty clear Jim was pissed" about Bishop's criticism. Held Depo 111-112, LF001262; Bishop Dep. (5/13) at 348-50, LF001126-1127.

6. Confirmation of Ameren's Violations of MSD Regulations.

A few weeks after Ameren rejected B&A's "New Approach" proposal, on or about March 16, 2010, Ameren manager Rob Johnson forwarded an email to Bishop that Johnson had received from John Pozzo, a member of Ameren's environmental group, entitled "MSD Notification – Prohibition of Truck Washing Operations." Ex. P-2, LF001664-1667. In that email, Pozzo informed several members of Ameren management that "MSD has informed us by letter . . . that the practice of allowing truck wash water to enter a separate storm sewer (or run off site) is prohibited without a permit from the Missouri Department of Natural Resources (MDNR)." Ex. P-2 at LF001666. Pozzo further cautioned that "the same MSD inspector that evaluated Berkeley has requested a facility inspection at McKenzie." *Id.* In forwarding this email to Bishop, Johnson added his own commentary, stating, "BOB, Just look at this!!!!!!!!!!!!!!! What we have been saying all along!!!." Ex. P-2 at LF001665. Bishop responded to Johnson and other members of Ameren's management staff, including Defendants Wright and George, and noted: "Can you imagine the issues/fines/microscope had they not been serviced and once something like that is found they go to every property throughout . . . Nice to finally see the results pay off when so many times such programs were under direst/criticism [sic.]." *Id.* at LF001664.

In the following days, Johnson again contacted Bishop and requested information and reports created by Bishop in preparation for a "big pow-wow" that was to take place among senior Ameren management. Ex. P-5 at LF001670. B&A provided the

information as requested, which included further statements of concern regarding the illegal and/or unsafe conditions. Ex. P-5 at LF001668-1669.

7. B&A's Additional Whistleblowing from May to June 2010

On May 18, 2010, B&A expressed its concerns about the continuing problems it was observing at Ameren facilities, and its loss of business from Ameren, in a letter to Defendant Armistead, head of Ameren's building services department. Exhibit D-35, LF000931-943. B&A included with this letter approximately ten (10) pages of photographs of various problems that either needed immediate attention or posed potential future hazards if not properly addressed through preventative maintenance. Exhibit D-35, LF000931-943. Armistead and Bishop met to discuss B&A's concerns. Bishop Dep. (5/13) at 336, LF001123.

During this meeting Defendant Armistead told Bishop to "stop reporting" these concerns and, once he has raised an issue, to "drop it." Bishop Dep. (11/18) at 92, LF001189; Ex. D-86, at LF000516.

Following his meeting with Armistead, Bishop attempted to provide information to Warner Baxter, Ameren Corporation's CEO, through their mutual church pastor. Bishop Dep. (5/13) at 425-26, LF001146-1147. Bishop provided the pastor a sealed envelope with documents and reports relating to the illegal and dangerous conditions at Ameren facilities. *Id*. B&A was then able to communicate with three Ameren executives, Michael Menne, Ameren's Vice President of Environmental Safety and Health, and two other members of its environmental department, Warren Mueller and John Pozzo, to arrange a meeting to discuss its concerns. Ex. Bishop 4 at LF000763. In

the days following this meeting, B&A provided Mueller with several photo reports documenting examples of its concerns over the preceding years. Exs. Ameren F, G, H, I, and J, LF000286-421.

8. Ameren's Internal Discussions of B&A's May and June 2010 Reports

In response to receiving B&A's reports of health and safety concerns and violations of laws, rules, and regulations, environmental executives Menne and Mueller made inquiries of Defendant Armistead, and a limited internal review was conducted. Ex. Bishop 4 at LF000763. With respect to B&A's reports of violations of state plumbing statutes and local plumbing codes and ordinances, an Ameren manager instructed Defendant George to review B&A's complaints and Ameren's internal policies. Ex. Bishop 3 at LF000760-761. As part of this investigation, George contacted the owner of another plumbing company that did work for Ameren and confirmed to Defendant Armistead that B&A's assertion was correct: that the use of unlicensed in-house personnel to perform plumbing work was illegal within St. Louis City. *Id.* However, as Defendant George related back to Defendant Armistead: "What the City doesn't know, they don't know about." *Id.*

Ameren executives then discussed B&A's reports of health and safety and environmental violations at Ameren's facilities. Those internal discussions included Defendant Armistead (Director of the Building Services Department), Menne (VP of Environmental Safety and Health), Warner Baxter (Chairman, President and Chief Executive Officer of Ameren Corporation), and Daniel Cole (Chairman and President of Ameren Services). Ex. Bishop 5 at LF000766-767. In a June 23, 2010 email to Cole,

Menne indicated that he had met with Bishop and received "numerous emails . . . illustrating examples of problems which Bishop implies that either the company has not taken appropriate actions, or hires 'less thorough' contractors who do not adequately solve the problem." *Id*. Included with that email, Menne also forwarded a report from Armistead regarding the specific sites indicated by B&A as being particularly problematic. *Id*. In this report, Armistead validated B&A's reports, stating "[t]here are open issues at Belleville and Maryville, Illinois and at the Dorsett Complex in Missouri." *Id*. With respect to Belleville, Armistead indicated that the drainage system required redesign but that was not yet completed. *Id*. With respect to Maryville, Armistead reported that "there are some issues with the main drain line" that were being investigated. *Id*. With respect to Dorsett, Armistead admitted that "there are several issues around the oil tank farm." *Id*.

On June 23, 2010, Ameren CEO Baxter sent an email to Cole (Chairman and President of Ameren Services) and Environmental VP Menne, about B&A's reports, stating: "It does look like we still have some potential open issues that are being investigated at Dorsett . . . Also, what is our formal communication process back to Mr. Bishop on these matters." *Id*.

A few days later, in a June 28, 2010 email from Defendant Armistead to Pozzo (environmental manager), Defendant Wright, and several of Armistead's subordinate supervisors, Armistead referenced an environmental study and commented: "Regardless of the outcome of the study the tables raise some question that need to be reviewed such as: should an interior or exterior drain with oil water separator to a storm or sanitary

sewer? Several fleet locations have interior drains without oil separators? Gasoline trap use?" *Id.* at LF000768.

9. Ameren's Termination of B&A's Contract in July 2010.

Shortly after those June 2010 internal discussions of B&A's reports, on July 13, 2010, B&A arrived at Ameren's Alton, Illinois facility to perform the flex-time maintenance services. Ex. Bishop 9 at LF000779. An Ameren employee instructed B&A to stop work and leave the premises. Prior to leaving, Bishop spoke with a garage mechanic who asked why B&A was leaving without servicing the facility, since it needed service. *Id*. at LF000780.

After leaving the facility as instructed, B&A contacted VP Menne to report the incident. *Id*. at LF000779-780. In turn, Menne inquired of Defendant Armistead. *Id*. at LF000779. Armistead responded and indicated that B&A had been instructed in the past to call ahead prior to scheduling maintenance service and that it had overcharged and performed unnecessary work in the past when "left unsupervised." *Id*. Immediately following this exchange with Menne, Defendant Armistead contacted his second-line supervisors. *Id*.

On July 14, 2010, the three Individual Defendants, Armistead, Wright, and George, exchanged a series of emails looking for possible allegations of breach of contract or other misconduct to level against B&A and Bishop. Exs. Bishop 8 and Bishop 10, LF000774-778, LF000784-787. Wright offered two possibilities. *Id*. First, Wright asked his co-managers if any of them had received notification of B&A's rate increase. Ex. Bishop 8 at LF000774. Next, Wright circulated a copy of his February

2009 email in which he temporarily suspended the flex-time arrangement for Ameren's Missouri sites that were under his control. Ex. Bishop 10 at LF000784. In so doing, Wright mischaracterized the meaning of that email to insinuate that he had informed B&A to contact Wright prior to each flex-time service, even though Wright's 2009 email clearly did not apply to the Alton, Illinois location that B&A attempted to service in June 2010, and, as stated above, the flex-time program had been reinstated even for most of the Missouri facilities under Wright's management.[1] *Id.* Wright also noted that "I am not going to respond to him due to his practice of sending email to Ameren VP." *Id.* In response to Wright's discovery of this eighteen month old email, another Ameren manager responded: "You are a genius." *Id.*

Later that same day, Armistead again responded to Menne and Mueller regarding the incident at Alton, Illinois and included Wright's February 2009 email. (Ex. Bishop 11 at LF000788. In so responding, Armistead stated to Menne and Mueller that Bishop's response was "not true," referencing the February 2009 email. *Id.* Armistead then concluded by stating: "Based on the inaccuracies in this email and the excessive time that it is taking to manage this vendor I am no longer comfortable continuing to utilize Bishop Plumbing . . . I plan . . . to schedule a meeting at the end of the month and give Bob [Bishop] his 30 day notice of contract cancellation." *Id.*

[1] The flex-time arrangement and Wright's February 2009 email are discussed above in Sections 2 and 4.

On or about July 29, 2010, Defendants Armistead and Wright, and other Ameren managers, met with Bishop and informed him that Ameren would no longer be using B&A's services. Bishop Dep. (5/13) at 478-83, LF001160-1161. During the termination meeting, Armistead again repeated his allegations that Bishop was lying about the receipt and meaning of the eighteen month old February 2009 email. Bishop Dep. (5/13) at 482-83, LF001161. Following this termination, at least one Ameren manager, Held, expressed to Bishop that he disagreed with the decision and felt it was unfair. Held Dep. at 46-47, LF001246.

The Court of Appeals misstated the record when it said: "Bishop . . . admits . . . that Ameren was discontinuing its use of Bishop's services at least in part because Bishop had violated Ameren's directive to obtain its approval each time before performing particular maintenance services." Memorandum at 2-3. That statement suggests that the Court of Appeals concluded that Ameren had at least a partially legitimate reason for terminating B&A's services. Bishop did not agree with that. In fact, in its motion for summary judgment, Ameren did not even make that argument. Ameren argued only that (1) an employer/employee relationship is an essential element of a wrongful termination claim and (2) B&A reported no serious misconduct in violation of public policy. LF000248-250. Ameren did not dispute that B&A had sufficient evidence to prove its reports were a contributing factor in its discharge.

The Court of Appeal's conclusion that Ameren terminated B&A at least in part because it violated a directive to obtain approval before performing certain services is not supported by the record. The so-called "directive" was the February 2009 email from

Defendant Wright, in which Wright suspended the flex-time arrangement for certain of Ameren's sites in the State of Missouri. Ex. D-17 at LF000887; Ex. Bishop 10 at LF000784. In order to justify B&A's termination in 2010, Defendants Wright and Armistead both mischaracterized that email to mean that it required B&A to contact Wright on each occasion and for each Ameren facility prior to each flex-time service, even though Wright's 2009 email was only a temporary suspension of the flex-time service and it only applied to Missouri sites and not the Alton, Illinois location that B&A attempted to service in June 2010 without prior approval. *Id.*; Ex. Bishop 11 at UE 033811, LF000788; Bishop Dep. (5/13) at 482-83, LF000603. Bishop's testimony clearly shows that this was a contested issue of fact. Bishop Dep. (5/13) at 464-65, 467-69, LF001156-57 (For example, at p. 467: "I was going to these garages without prenotification . . . nobody saying you should call before. . . . [B]ut then Mike Wright makes an insinuation as if he told me that I'm supposed to call for several days in advance, which is absolutely ridiculous. . . . [T]here was no arrangement to tell them I was coming.").

Viewing the evidence and drawing all reasonable inferences in favor of B&A, this Court must presume that Ameren used the 2009 email as a pretext for retaliating against B&A because of its reports of illegal conditions and activities.

10. Defendants Armistead, Wright and George's Use of Improper Means to Interfere with B&A's Business Relationship with Ameren

The individual Defendants, Armistead, Wright and George, used improper means to interfere with B&A's business relationship with Ameren in that they made

misrepresentations of fact about B&A and violated public policy by retaliating against B&A because of its whistleblowing activities. *See* Plaintiffs' Response to Defendants' Statement of Uncontroverted Facts, Part I. Plaintiffs' Response to Defendants' Statement of Facts ¶¶ 78, 81, 83, 84, 87, and 88, and Part II. Plaintiffs' Statement of Additional Material Facts ¶¶ 89-103; LF000717-719, LF000734-735.

All three of the individual Defendants made numerous statements that B&A was dishonest by charging Ameren for equipment and services that were excessive and unnecessary. Bishop Dep. (11/18) at 235-36, 243-45, LF001226, LF001228.

Defendants Wright and George stated that Bishop falsely billed Ameren for equipment that was either not used or not necessary. They made those statements to others in Ameren's maintenance department, including to Defendant Armistead, who was the department head and who claims to have made the decision to terminate B&A. George also stated that Bishop turned every job into a large project for B&A's own benefit. Bishop Dep. (11/18) at 241-50, LF001227-1230.

As he was preparing to terminate B&A, Defendant Armistead told Ameren Vice President Michael Menne, that Bishop overcharged Ameren and performed unnecessary work. Ex. Bishop 9 at LF000779.

As described above, in the days leading to the termination of B&A, Defendants Armistead and Wright concocted a false reason for B&A's termination. Wright falsely claimed that Bishop violated a directive to obtain Wright's approval for each occasion that B&A performed repetitive maintenance services at an Ameren facility, under the "flex-time" program. Ex. Bishop 10 at 033843, LF000784. Armistead reiterated that false

statement to Vice President Menne and told Menne and others at Ameren that Bishop's contrary explanation was "not true." Ex. Bishop 11 at UE 033811, LF000788; *see also* Bishop Dep. (5/13) at 482-83, LF000603.

11. Defendants Armistead, Wright and George's Self-Interest and Personal Animus Toward B&A

The evidence shows that the three individual Defendants interfered with B&A's relationship with Ameren out of their own self-interest and they had personal animus toward Plaintiff. *See* Bishop Depo (5/13-14) at 139-42, 419, LF001072-73, LF001145; Plaintiffs' Response to Defendants' Statement of Uncontroverted Facts, Part I. Plaintiffs' Response to Defendants' Statement of Facts ¶ 19, Part II. Plaintiffs' Statement of Additional Material Facts ¶¶ 25-29, ¶¶ 105-108, LF000697-698, LF000723-724, LF000736.

According to Bob Bishop and Ameren manager Rob Johnson, Defendants George, Wright and Armistead were intentionally targeting Bishop because they did not want to hear his reports that illegal conditions needed to be remedied. Bishop Depo (5/13-14) at 419:6 to 25, LF001145.

George was one of the managers that Bishop complained was refusing to authorize necessary work and requesting illegal and improper work. With respect to one job, Bishop in essence accused George of bid-rigging, when George initially requested bids for a job based on a design that was illegal and improper under the plumbing code, but later awarded the job to another contractor with whom George had shared Bishop's corrected design. Bishop Depo (5/13-14) at 139:25-142:8, 233:12-22, LF001072-73.

Defendant George made condescending statements and used abusive language toward Mr. Bishop. Bishop Depo (5/13-14) at 139:5-20, LF001072.

As mentioned above, in at least one instance, Armistead had personally supervised a project that B&A included in a report to Ameren as containing illegal and improper plumbing. As a result of having his work so described in B&A's reports, Armistead was offended and became "pissed" at B&A and Mr. Bishop. *See* Ps' Response to Ds' Facts, ¶19; Bishop Dep. (5/13) at 348, LF001126; Held Dep. at 111-12, LF001262.

Prior to his termination, Held warned Bishop that Wright was antagonistic towards B&A and Bishop. Bishop Dep. (5/13) at 156, 184, 311, 312, 345, LF001076, LF001084, LF001117, LF001125; Held Dep. at 91, LF001257. As stated by Held, Wright had a "chip on his shoulder" for B&A and Bishop. Bishop Dep. (5/13) at 156, 184, 311, 312, 345, LF001076, LF001084, LF001117, LF001125. According to Held, the source of this hostility arose from a 2008 project in which Wright said B&A "fleeced" and "overcharged" him, when in fact Wright had asked B&A to include the billing for work on one building in the invoice for another building because Wright had no budget for repairs to the first building. Bishop Dep. (5/13) at 184-86, LF001084-86; Held Dep. at 91, LF001257. Bishop explained that he had done nothing but follow Wright's instructions and denied that he "fleeced" or "overcharged" Ameren, because B&A does not operate that way. Bishop Dep. (5/13) at 185-86, LF001085-86. Then, in November 2010, more than four months after B&A's termination, B&A was still on Wright's mind as he listed one of his accomplishments for the year as "[g]ot rid of Bishop . . . 'Ding Dong the witch is dead . . ." Depo Ex. P-21 at LF000902.

POINTS RELIED ON

POINT 1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANTS ON PLAINTIFF BISHOP & ASSOCIATES, LLC'S CLAIM OF WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY, BECAUSE, AS A MATTER OF LAW, PUBLIC POLICY REQUIRES THAT AN INDEPENDENT CONTRACTOR BE PROTECTED FROM RETALIATION FOR REPORTING SERIOUS MISCONDUCT, IN THAT THE TRIAL COURT'S RULING MISAPPLIED THE MISSOURI SUPREME COURT'S DECISIONS STRESSING THE IMPORTANCE OF PROTECTING WHISTLEBLOWERS IN ADVANCING PUBLIC POLICY, NO MISSOURI PRECEDENT (INCLUDING *FARROW*) PRECLUDES THIS RESULT, AND OTHER STATE AND FEDERAL COURT DECISIONS HAVE ALLOWED THIS EXPANSION OF THE LAW.

Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 92 (Mo. banc 2010)

Keveney v. Missouri Military Acad., 304 S.W.3d 98, 102-03 (Mo. banc 2010)

Farrow v. St. Francis Med. Ctr., 407 S.W.3d 579 (Mo. banc 2013)

POINT 2. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANTS ON PLAINTIFF BISHOP & ASSOCIATES, LLC'S CLAIM FOR BREACH OF CONTRACT IN VIOLATION OF PUBLIC POLICY AND THE DUTY OF GOOD FAITH AND FAIR DEALING, BECAUSE PUBLIC POLICY AND THE DUTY OF GOOD FAITH AND FAIR DEALING

PROHIBIT TERMINATION OF A CONTRACT FOR REASONS THAT CONTRAVENE PUBLIC POLICY, IN THAT THE TRIAL COURT'S RULING MISAPPLIED MISSOURI LAW REGARDING THE IMPORTANCE OF ADVANCING PUBLIC POLICY AND THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING.

Bishop v. Shelter Mut. Ins. Co., 129 S.W.3d 500, 502 (Mo.App. S.D. 2004)

Kmak v. Am. Century Cos., 754 F.3d 513, 517 (8th Cir. 2014)

Smith v. City of Byrnes Mill, 2015 U.S. Dist. LEXIS 103711 (E.D. Mo. Aug. 7, 2015).

Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 92 (Mo. banc 2010)

POINT 3. THE TRIAL COURT ERRED WHEN IT DISMISSED PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES UNDER COUNT I FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY, BECAUSE, ABSENT CERTAIN EXCEPTIONS THAT DO NOT EXIST IN THIS CASE, SUBSTANTIVE CHANGES IN COMMON LAW ARE TO BE APPLIED RETROACTIVELY, IN THAT THERE WERE NO PRIOR DECISIONS UPON WHICH DEFENDANTS COULD HAVE RELIED AND THE PURPOSE OF EXTENDING PUBLIC POLICY PROTECTION FOR INDEPENDENT CONTRACTORS IS TO PROMOTE PUBLIC POLICY.

Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 878 (Mo. App. W.D. 1985)

Keveney v. Mo. Military Acad., 304 S.W.3d 98, 105 n. 3 (Mo. banc 2010)

Sumners v. Sumners, 701 S.W.2d 720, 722-23 (Mo. banc 1985)

POINT 4. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT ON COUNT III FOR TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP AGAINST DEFENDANTS ARMISTEAD, GEORGE, AND WRIGHT BECAUSE MISSOURI LAW AUTHORIZES SUCH A CLAIM AGAINST INDIVIDUAL MANAGERS OF A PARTY TO THE RELATIONSHIP WHEN THEY EMPLOY IMPROPER MEANS TO ACHIEVE THE TERMINATION AND THEY ACT OUT OF SELF-INTEREST, IN THAT THE EVIDENCE DEMONSTRATES OR PERMITS AN INFERENCE THAT

(1) THE INDIVIDUAL DEFENDANTS USED IMPROPER MEANS OF

(a) MISREPRESENTATING FACTS ABOUT PLAINTIFFS' HONESTY, ALLEGED OVER-BILLING PRACTICES, AND PLAINTIFF SUPPOSEDLY VIOLATING A DIRECTIVE ABOUT WORK AUTHORIZATIONS AND THEN LYING ABOUT THAT DIRECTIVE, AND

(b) ACTING IN VIOLATION OF PUBLIC POLICY BY RETALIATING AGAINST PLAINTIFFS FOR REPORTING ILLEGAL CONDUCT, AND

(2) THE INDIVIDUAL DEFENDANTS ACTED OUT OF THEIR OWN SELF-INTEREST BY

(a) ARMISTEAD BEING OFFENDED AND "PISSED" ABOUT BISHOP REPORTING ON ARMISTEAD'S ILLEGAL AND IMPROPER INSTALLATION OF PLUMBING,

(b) WRIGHT'S EMPHASIS ON STAYING WITHIN BUDGET AND ON HIS PERSONAL CAREER, AND

(c) WRIGHT'S AND GEORGE'S PERSONAL ANIMOSITY TOWARD PLAINTIFFS.

Hibbs v. Berger, 430 S.W.3d 296, 318 (Mo. App. E.D. 2014)

Stehno v. Sprint Spectrum, L.P., 186 S.W.3d 247, 252-253 (Mo. banc 2006)

ARGUMENT

POINT 1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANTS ON PLAINTIFF BISHOP & ASSOCIATES, LLC'S CLAIM OF WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY, BECAUSE, AS A MATTER OF LAW, PUBLIC POLICY REQUIRES THAT AN INDEPENDENT CONTRACTOR BE PROTECTED FROM RETALIATION FOR REPORTING SERIOUS MISCONDUCT, IN THAT THE TRIAL COURT'S RULING MISAPPLIED THE MISSOURI SUPREME COURT'S DECISIONS STRESSING THE IMPORTANCE OF PROTECTING WHISTLEBLOWERS IN ADVANCING PUBLIC POLICY, NO MISSOURI PRECEDENT (INCLUDING *FARROW*) PRECLUDES THIS RESULT, AND OTHER STATE AND FEDERAL COURT DECISIONS HAVE ALLOWED THIS EXPANSION OF THE LAW.

A. Standard of Review

The standard of review of a summary judgment "is essentially de novo." *ITT Commercial Finance Corp. v Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). Summary judgment is only "appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007) (*citing ITT Commercial Fin. Corp.*). "The movant bears the burden of establishing a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment." *Id.*

Moreover, the Supreme Court has repeatedly held that "summary judgment should seldom be used in employment discrimination cases, because such cases are inherently fact-based and often depend on inference rather than on direct evidence." *See Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579, 588 (Mo. banc 2013) (citing *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664 (Mo. banc 2009); *Daugherty*, 231 S.W.3d at 818 (citations omitted)).

Likewise, the courts have repeatedly recognized that "[w]histeblower actions and other public policy wrongful discharge cases are also inherently fact-based and depend on inferences rather than direct evidence." *See e.g., Margiotta v. Christian Hosp. Northeast Northwest*, 2009 Mo. App. LEXIS 992, *13 (Mo. App. E.D. 2009), *aff'd on other grounds*, 315 S.W.3d 342 (Mo. banc 2010); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 94 (Mo. banc 2010) ("cases involving both the MHRA and the public policy exception turn on whether an illegal factor played a role in the decision to discharge the employee.").

B. Public Policy and the Reasoning and Holdings of Missouri Court Decisions Require the Extension of the Wrongful Discharge Cause of Action to Independent Contractors.

Thirty years ago the Missouri Court of Appeals recognized a common law cause of action for wrongful termination in violation of public policy. *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. W.D. 1985). When the Supreme Court formally recognized the cause of action in 2010, it did so based certain fundamental principles and compelling reasons. Without the restraint of the law, employers would be free "to

discharge employees, without consequence, for doing that which is beneficial to society." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010). Ultimately, denying workers the protections of law risks injury to both the private actor as well as the general public. As articulated by the Court, quoting the basic principle underlying public policy: "no one can lawfully do that which tends to be injurious to the public or against the public good." *Id.*, quoting *Boyle*, 700 S.W.2d at 871.

On the same day it decided *Fleshner*, the Court extended the wrongful discharge cause of action to contract employees. *Keveney v. Missouri Military Acad.*, 304 S.W.3d 98 (Mo. banc 2010). The Court recognized "three compelling reasons for allowing contract employees [as well as at-will employees] to pursue an action for wrongful discharge in violation of public policy." *Keveney*, 304 S.W.3d at 102. The first reason is based on "the distinct underlying purpose of the wrongful discharge cause of action." *Id.* The Court explained, "[a] discharge is not 'wrongful' because it violates the contractual terms of employment [but rather it] is 'wrongful' because it is based on the employer's attempt to condition employment on the violation of public policy expressed in applicable constitutional, statutory or regulatory provisions." *Id.* "Limiting wrongful discharge actions to at-will employees rests implicitly on the incorrect assumption that . . . constitutional, statutory, or regulatory interests . . . can be limited through private contracts." *Id.* Thus, "[a]n employer's obligation to refrain from discharging an employee who refuses to participate in or conceal actions inconsistent with public policy does not depend on the terms and conditions of the employment contract." *Id.*

Secondly, the Court explained that the wrongful discharge cause of action must be

available for a contract employee in order to provide the additional remedies available for a tort claim and to thereby vindicate and protect the public interest. *Id.* at 102-03. As the Court stated, "given the distinct interests at issue in a wrongful discharge action, it follows that the remedies are distinct." *Id*. at 102. As articulated by the Court:

> If an employee is discharged for refusing to violate a public policy requirement, a breach of contract action satisfies private contractual interests but fails to vindicate the violated public interest or to provide a deterrent against future violations.

Id. at 103.

The third "compelling reason" articulated by the Court for extending the wrongful discharge cause of action to contract employees is that it would be inconsistent to extend or withhold the protections of the law based on nothing more than a classification about the type of arrangement under which the worker labors. *Id*. To hold otherwise, "illogically grants at will employees greater protection from these tortious terminations due to the erroneous presumption that the contractual employee does not need such protections." *Id*. at 103 (citation omitted). Thus, under the law of this State, all workers should be on the "same footing" as all can be equally subject to coercive economic pressures and being forced into "a dilemma of choosing between their livelihoods and reporting serious conduct in the workplace." *Id*. (footnote omitted).

Based on these underlying principles and compelling reasons, the Supreme Court in *Keveney* expanded the wrongful discharge cause of action to employees with durational contracts. In so doing, the Court recognized a complete lack of justification

for basing access to the law's protections based on some arbitrary and overly-formalistic definition regarding the type of employment relationship that an employer and worker might have. The only reason that the Court could find for the persistence of such an arbitrary position was that "[previous] cases discussing the tort of wrongful discharge have all involved at-will employees." *Id*. at 102. However, once the Court analyzed the policy rationale underlying the wrongful discharge cause of action in light of a new type of employment relationship, it willingly expanded the scope of the law's protection to the new class of employees.

Applying the same rationale and compelling reasons, Circuit Judge Robert Dierker held that Missouri law allows a cause of action for an independent contractor for wrongful discharge in violation of public policy. LF000113-126. In a 2013 Order denying Defendants' Motion to Dismiss in this case, Judge Dierker determined that "[w]ith regard to the claim alleged by Bishop & Associates for wrongful termination, the Court concludes that the reasoning of *Margiotta*, *Keveney* and subsequent cases from the Court of Appeals, e.g., *Brand v. Kansas City Gastroenterology and Hepatology*, 3011 WL 135010 (Mo. App. W.D. 2011), counsel in favor of permitting Plaintiffs' action to proceed." *Bishop & Associates, LLC v. Ameren Corp.*, No. 1222-CC09459, Memorandum and Order at 9 (Cir. Ct. City of St. Louis June 5, 2013) (denying defendants' motion to dismiss Count I for failure to state a claim), Appx A9, LF000121. As reasoned by Judge Dierker, "when an independent contractor is retained to perform personal services on an indefinite basis, termination of the relationship for reasons that

are contrary to a clear mandate of public policy can be actionable in tort on the same basis as a wrongful discharge of a regular employee." *Id.* [2]

C. The *Farrow* Decision Does Not Preclude a Wrongful Termination Cause of Action for an Independent Contractor

Nearly two years after Judge Dierker's Order denying Defendants' Motion to Dismiss, Judge Joan Moriarty granted Defendants' Motion for Summary Judgment, concluding that the Supreme Court's decision in *Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579 (Mo. banc 2013), precluded a wrongful discharge in violation of public policy claim for an independent contractor. *Bishop & Associates, LLC v. Ameren Corp.*, No. 1222-CC09459, Memorandum, Order and Judgment (Cir. Ct. City of St. Louis May 6, 2015), Appx A15, LF001672-1701. Judge Moriarty believed she was required to follow the "plain language" of a statement in *Farrow*, even though that statement was not an essential part of the Court's holding. Appx A28-31, LF001685-1688.

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[2] The trial court's 2013 decision was issued prior to this Court's decision in *Farrow*. After *Farrow* was issued, and relying on it, Defendants sought a writ of prohibition to overturn the trial court's decision. *State ex rel. Ameren Corp. v. Dierker*, Petition for Writ of Prohibition and Suggestions in Support of Petition at 1-2, ED100462 (Mo. App. E.D. September 23, 2013); *State ex rel. Ameren Corp. v. Dierker*, Petition for Writ of Prohibition and Suggestions in Support of Petition at 1-2, SC93703 (Mo. October 2, 2013). Both Courts denied the Petition. Missouri Court of Appeals, ED100462 (Mo. App. E.D. September 24, 2013); Supreme Court, SC93793 (Mo. November 26, 2013).

Although Judge Moriarty recognized that the holding in *Farrow* was "that individual supervisors cannot be proper defendants in such a cause of action," the court nevertheless believed it was required to follow a statement made "*in the course of making that holding and explaining the reasoning for it*, . . . that a public policy/wrongful discharge action 'requires an employer/employee relationship.' *Farrow*, at 595." *Bishop v. Ameren*, Memorandum, Order and Judgment at 15 (May 6, 2015), Appx A29, LF001686. The trial court explained:

> That is very plain language, in no way ambiguous. Plain language should of course normally be interpreted to mean what it plainly says---and this rule of construction is no less true of our courts when they render authoritative decisions declaring what the common law is, than it is of our legislature when it uses wording in statutes.

Id. The trial court believed it was "duty-bound to follow *Farrow*," and mischaracterized the Supreme Court's statement about an employer/employee relationship as a holding: "our Supreme Court clearly held therein that a direct 'employer/employee relationship' was a necessary requirement for a public policy wrongful discharge cause of action." *Id.* at 16-17, Appx A30-31, LF001687-88.

The Court's statement in *Farrow* that a public policy wrongful termination claim "requires an employer/employee relationship" was *dicta*. "Statements . . . are *obiter dicta* [if] they [are] not essential to the court's decision of the issue before it." *Brooks v. City of Sugar Creek*, 340 S.W.3d 201, 212 (Mo. App. W.D. 2011).

> "There is no doctrine better settled than that the language of judicial decisions must be construed with reference to the facts and issues of the particular case, and that the authority of the decision as a precedent is limited to those points of law which are raised by the record, considered by the court, and necessary to a decision." *Parker v. Bruner*, 683 S.W.2d 265 (Mo. 1985) (per curiam; en banc), quoting from *State ex rel. Baker v. Goodman*, 364 Mo. 1202, 274 S.W.2d 293, 297 (1954) (en banc); *see also Coalition to Preserve Education on the Westside v. School District of Kansas City*, 649 S.W.2d 533, 536 (Mo.App. 1983).

Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 865 n. 6 (Mo. App. W.D. 1985).

The *Farrow* decision did not require rejection of Plaintiff's cause of action for wrongful termination of its contract with Defendants. The *Farrow* plaintiff, an at-will employee, brought a wrongful discharge claim against her former employer. Accordingly, the Court's discussion was focused on that type of relationship as it was the issue before it. As evidenced by *Keveney*, the fact that a relationship had not been previously discussed within the case law did not limit a discharged plaintiff's right to pursue such a cause of action. *See Keveney*, 304 S.W.3d at 102 (attributing that the absence of case law regarding a contract employee's right to pursue a wrongful discharge cause of action was due to the fact that "[prior] cases . . . all have involved at-will employees" rather than being based on any legal "justification"). Likewise, simply because the prior case law has all involved either an at-will employee or a contract employee does not give rise to the conclusion that independent contractors are excluded

from the protections of the wrongful discharge cause of action. As Judge Dierker explained in denying the motion to dismiss in this case, the reasoning underlying the previous at-will cases "counsel in favor of allowing this action to proceed." Memorandum and Order at 9 (June 5, 2013), Appx A9, LF000121. Thus, as established by the Court in *Keveney*, it is the application of the principles and rationale which motivate the wrongful discharge cause of action that are determinative and not an arbitrary and overly-formalistic distinction made on the basis of how the worker is classified.

Further, in its ruling that the plaintiff had a legitimate claim against her employer, the Court in *Farrow* relied upon much of the same precedent that Judge Dierker applied in reaching the decision to deny Defendants' Motion to Dismiss. *See Farrow*, 407 S.W.3d at 595-96 (citing *Keveney*, 304 S.W.3d at 101; *Fleshner*, 304 S.W.3d at 92; and *Margiotta*, 315 S.W.3d 346). In applying this case law, the Court in *Farrow* gave no indication that it disagreed with or was modifying the holdings or meanings of these cases. *Id*. at 594-98. There is no indication from the *Farrow* opinion that the issue of independent contractors was either raised or contemplated by the Court. *Id.* All that *Farrow* did was rule that individual supervisors cannot be proper defendants to a wrongful discharge cause of action. *Id.* at 595.

Judge Moriarty erred when she determined that the Court in *Farrow* "clearly held . . . that a direct 'employer/employee relationship' was a necessary requirement for a public policy wrongful discharge cause of action." The plaintiff in *Farrow* had a legitimate claim against her employer for wrongful discharge for violation of public

policy, *id.* at 595-98, so the interests of public policy could be vindicated by her lawsuit even if she could not pursue a claim against her supervisor. That is not the case here, where Plaintiff's only claim for wrongful termination of its contract could lie against Ameren.

D. Other Missouri Courts Support Application of a Wrongful Termination Cause of Action to Independent Contractors

Additional support can be found from within the Missouri courts for extending the wrongful discharge cause of action to independent contractors. In *Bishop v. Shelter Mut. Ins. Co.*, 129 S.W.3d 500 (Mo.App. S.D. 2004), an independent contractor brought a claim, *inter alia*, for wrongful discharge in violation of public policy. As noted by the court, "if the discharge violates a statutory provision or public policy, then a fired employee may maintain a suit for wrongful discharge." *Id*. at 503 (citation omitted). Ultimately, while the court found against the plaintiff, it did so because he had failed to show that the termination violated a statute or provision of public policy and not because his status as independent contractor precluded him from maintaining a wrongful discharge claim. *Id*. at 506. And, as explained by the court:

> We pause to acknowledge that the employment relationship here is not that typically found in the at-will cases. The agency contract provided that Plaintiff was an independent contractor, but the relationship could be terminated upon written notice . . . In such situations, whether labelled an independent contractor or employee, the relationship and termination of it

is governed by the general principles enunciated in the at-will doctrine cases.

Id. at 506.

Princess House, Inc. v Lindsey, 918 F.Supp. 1356, 1373 (W.D. Mo. 1994), *aff'd*, 77 F.3d 486 (8th Cir. 1996), cited by Ameren and relied on by Judge Moriarty below (LF001688), is of little import. It is unclear from the holding what public policy the defendant was citing, much less how it was alleging that the policy was violated. Furthermore, the case predates by fourteen years the Missouri Supreme Court's formal recognition of the wrongful discharge cause of action, in *Fleshner*, *Keveney*, and *Margiotta*. Additionally, to the extent that the holding may have been based on Missouri employment law, the federal court's understanding of that law at the time would have been governed by the older and abrogated *Luethens*-type understanding of at-will employment. *See Keveney*, 304 S.W.3d at 102-103 (abrogating, in part, *Luethans v. Washington Univ.*, 894 S.W.2d 169 (Mo. banc 1995)). Finally, the federal court sitting in a diversity matter was constrained not to effect any change in state common law even if it saw fit to do so. *See also Std. Ins. Co. v. Wandrey*, 395 F. Supp. 2d 830, 833-34 (E.D. Mo. 2005)(citation omitted)("In ruling on this matter sitting in diversity, the court is constrained to rule in accordance with established Missouri court precedent and stand in the proverbial 'shoes' of the Missouri court."); *Wisniewski v. Medical Indus*., 2000 U.S. Dist. Lexis 19321, * 10 (D. Colo. 2000)(citation omitted)(declining to extend the state common law tort of wrongful discharge on the grounds that "[i]t is simply not the role of a federal court to effect [such] a dramatic shift in forum state's common law").

E. Other Courts Have Allowed Independent Contractors to Sue for Wrongful Termination in Violation of Public Policy

Although many state courts that have considered the issue have refused to apply the public policy claim to independent contractors, "with few exceptions, the courts' decisions have turned on the employment status of the plaintiff, rather than the underlying public policy at issue." Lisa J. Bernt, *Wrongful Discharge of Independent Contractors: A Source-Derivative Approach to Deciding Who May Bring a Claim for Violation of Public Policy*, 19 Yale L. & Pol'y Rev. 39, 56 (2000). That article notes that "[w]hen courts deciding wrongful termination cases based on violation of public policy fixate on the plaintiff's employment status, they often lose sight of the public's interests." *Id.* at 56. Instead, the author proposes that "the court should first look at the source of public policy the plaintiff has identified." *Id.* She concludes that "[i]f the underlying source for the public policy was enacted to protect employees, as employees, then the independent contractor should not be able to use it as the sole basis for a wrongful discharge claim." *Id.* at 57. But in cases where the public policy "is one that transcends the employment relationship," the independent contractor should have a claim. *Id.* at 79. The article suggests that "independent contractors terminated for refusing to do something unlawful, or for reporting or objecting to unlawful activities present the strongest public policy." *Id.* at 64.

There are examples of state court cases that allow independent contractors or other non-employees the right to sue for wrongful termination in violation of public policy.

In *Harper v. Healthsource New Hampshire*, 674 A.2d 962 (N.H. 1996), the plaintiff was a doctor who had a contractual relationship with Healthsource, a health maintenance organization. Harper claimed Healthsource terminated his contract because he believed Healthsource was "manipulating and skewing . . . records of treatment" and "notified Healthsource of his concerns about the accuracy of his patients' records." *Id.* at 963. Although the contract between the parties allowed termination without cause on six months' notice or with cause at any time, and Harper's relationship with Healthsource was "not an employer-employee relationship" and not "an independent contractor . . . in the way that employment cases treat such a relationship," the court looked to the cases in which it had "carved out exceptions to the common law employment-at-will doctrine," and refused to "enforce a contract or contract term that contravenes public policy." *Id.* at 964-65. The court concluded "that the public interest and fundamental fairness demand that a health maintenance organization's decision to terminate its relationship with a particular physician provider must comport with the covenant of good faith and fair dealing and may not be made for a reason that is contrary to public policy." *Id.* at 966.

D'Annunzio v. Prudential Ins. Co. of America, 927 A.2d 113 (N.J. 2007), was a statutory case in which the New Jersey Supreme Court concluded that an independent contractor fit within definition of employee. *Id.* at 121-22. The state statute had been enacted to codify a common law claim. *Id.* at 118. The court was constrained by the legislation, but still found a way to include an independent contractor within the class that should be protected because of the purpose of the statute.

In an earlier case applying New Jersey's common law claim for wrongful termination in violation of public policy, a federal court concluded that members of the New Jersey Psychological Association should be allowed to pursue a claim that they were terminated by a managed care organization in violation of public policy. *New Jersey Psychological Ass'n v. MCC Behavioral Care*, 1997 U.S. Dist. LEXIS 16338 (D.N.J. Sept. 15, 1997). The court held: "Although an employer-employee relationship did not exist between [the parties], this tort is analogous to that identified by the New Jersey Supreme Court for wrongful discharge." *Id.* at *9.

In an unreported case, a California appellate court allowed an independent contractor to pursue a tort claim based on defendant's refusal to pay money owed under a contract because the payments were withheld because of plaintiff's public statements about defendant's illegal practices. *Caplan v. St. Joseph's Hospital*, 233 Cal. Rptr. 901 (Cal. App. 1st Dist. 1987). As to the fact that plaintiff was an independent contractor rather than an employee, the court said "the distinction seems trivial," and to deny plaintiff a right to sue for that reason "would be to exalt form over substance." *Id.* at 905.

The United States Supreme Court held that independent contractors can pursue claims under 42 U.S.C. §1983 for retaliation for free speech. *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996).

Independent contractors have also been allowed to pursue discrimination claims under statutes originally thought to protect only employees. Several Circuits of the U.S. Court of Appeals have held that an independent contractor can pursue a statutory claim of a racial discrimination under 42 U.S.C. §1981. *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181-

83 (3d Cir. 2009); *Taylor v. ADS, Inc*., 327 F.3d 579, 581-85 (7th Cir. 2003); *Webster v. Fulton County*, 283 F.3d 1254, 1257 (11th Cir. 2002); *Danco, Inc. v. Wal-Mart Stores, Inc*., 178 F.3d 8, 13-14 (1st Cir. 1999). The court in *Morrissett v. Honeywell Bldg. Solutions SES Corp.*, 2011 U.S. Dist. LEXIS 92728, *9 fn. 3 (D. R.I. 2011) concluded that an independent contractor could bring a claim for employment discrimination under a Rhode Island state civil rights statute, as "[g]iven the statute's broad language, its protections apply to [plaintiff] even though he is an independent contractor and not an employee."

The United States Supreme Court recently extended whistleblower protections to employees of contractors under the Sarbanes-Oxley Act. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (U.S. 2014). The Court relied on the purposes for the statute and "Congress' understanding that outside professionals bear significant responsibility for reporting fraud by the public companies with whom they contract, and that fear of retaliation was the primary deterrent to such reporting by the employees of Enron's contractors." *Id.* at 1170.

F. The Court of Appeals Rejected Plaintiff's Wrongful Termination Claim for Reasons that Ignore Important Public Policy Considerations

1. Lack of Disparity in Bargaining Power and Contractor's Right of Control Should not Preclude Claims of Independent Contractors Seeking to Protect the Public Interest

The Court below rejected Plaintiff's wrongful termination claim based in part on the propositions that "independent contractors typically do not face the same disparities

in bargaining power that employees do," and they "retain rights of control over their work that employees as a rule forfeit." Memorandum at 6-7. These general statements are not based on the facts of this case. See STATEMENT OF FACTS, § B.1., above. In addition, Ameren was exercising detailed control over B&A's work. For example, Ameren's managers were telling B&A not to follow its usual practice of using pipe inspection cameras to inspect for internal blockages and damage, and telling B&A to stop making photographic reports to document B&A's work. Bishop Dep. (5/13) at 222-24, 358, LF001094, LF001129.

Even if some independent contractors do not face the same dilemma as employees, to provide no protection for any independent contractors fails to recognize the important public policy behind protecting whistleblowers. The facts of this case regarding the relationship between B&A and Ameren demonstrate that some independent contractors do require protection in order to enable them to report illegal conduct without fear of devastating consequences.

To protect the public interest, this Court must recognize the need for protection for independent contractors, especially in situations like this one where there is a disparity of bargaining power, where the contractor has a continuing relationship with and is devoting a substantial portion of its work to one customer, and where the customer is exercising detailed control over the contractor. An independent contractor plaintiff will still need to meet the rest of the requirements for the cause of action. Courts will still examine the underlying policy and causation, and cases that do not meet those requirements will be dismissed. All Plaintiff is seeking is a chance to get past a threshold issue of relationship

status, which should not obscure the purpose of the public policy at issue – in this case to protect the life, health and safety of Ameren employees and the public, and to prevent environmental pollution.

2. Potential Abuse of a Cause of Action by a Hypothetical Unscrupulous Contractor Should not Prevent all Independent Contractors from Pursuing Public Policy Claims

The Court of Appeals also expressed the concern that "independent contractors may be tempted to abuse this proposed cause of action." Memorandum at 7. That concern is not based on the facts in this case and disregards the importance to the public of protecting whistleblowers from retaliation. Many of the conditions reported on by B&A put Ameren employees and the general public at risk for their life, health and safety, and related to matters that could only be identified by a licensed plumber. Ameren employed no licensed plumbers and was therefore dependent on outside contractors to identify these illegal and dangerous conditions.

If the Court of Appeals' hypothetical plumber is terminated for refusing to violate a law that the court recognizes as a worthy public policy (e.g., a statute prohibiting diversion of household sewage to a public water supply), then the plumber should not be foreclosed from bringing a wrongful termination claim.

Alternatively, the concern expressed by the Court below about an unscrupulous contractor who exploits an unsuspecting homeowner can be avoided by limiting whistleblower protection to situations more similar to an employment relationship, for contractors that perform services on an on-going and indefinite basis and who devote

substantially all of their efforts to one company. Like employees, those contractors are subject to the same coercive dilemma of "choosing between their livelihoods and reporting serious misconduct in the workplace." To find otherwise will allow companies who utilize independent contractors on an ongoing and indefinite basis to condition their contracts on turning a blind eye to violations of law and subject independent contractors to punishment for doing that which is beneficial to society.

As a matter of law and public policy, to deny whistleblower protection to an independent contractor such as B&A, is to deny protection for the life, health and safety of the public and protection of the environment. As Ameren had no employees who were qualified plumbing experts, only its contractors were able to identify the potential hazards. As the United States Supreme Court recognized when it extended whistleblower protection to employees of contractors under the Sarbanes-Oxley Act, "outside professionals bear significant responsibility for reporting fraud by the public companies with whom they contract." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1170 (2014).

G. Plaintiff Reported Serious Misconduct in Violation of Clearly Established Public Policy.

The trial court granted summary judgment as to Count I solely on the court's legal conclusion that because B&A was an independent contractor, rather than an employee of Ameren, it could not maintain a cause of action for wrongful termination in violation of public policy. The court noted, however, that it would have denied the motion for summary judgment on Ameren's alternative argument that "there is no evidence that Plaintiffs ever reported anything which could legitimately be deemed '*serious*'

misconduct, or that constituted a violation of '*well established and clearly mandated'* public policy, as is required by Margiotta, *supra.*" Memorandum, Order and Judgment (May 6, 2015) at 9, n. 1, Appx A23, LF001680. The court ruled that "the summary judgment record shows that there are at least some genuine issues of material fact as to whether some of the alleged misconduct Plaintiffs reported was indeed serious and in violation of clearly established, mandated public policy." *Id.*

As more fully addressed in the subsections below, the summary judgment record regarding Bishop's reports to Ameren is extensive and fully supports those determinations. *See* Plaintiffs' Response to Defendants' Statement of Uncontroverted Facts, Part I. Plaintiffs' Response to Defendants' Statement of Facts ¶¶ 13-35, 68-76, and Part II. Plaintiffs' Statement of Additional Material Facts ¶¶ 14-20, 32-33, 41-88 (LF000689-703, LF000712-716, LF000721-723, LF000725-734); *see also* Plaintiffs' Legal Memorandum in Opposition to Defendants' Motion for Summary Judgment at 7-17, 39-50 (LF001515-1525, 1547-1558).

1. Actual Violation of Law is Not Necessary

Ameren argued below that "[a] wrongful discharge plaintiff must demonstrate that he was terminated for reporting an ***actual*** violation of the law" and that "reasonable belief of wrongdoing is insufficient." Ameren Brief 32-33. None of the cases cited by Ameren support its arguments.

This Court made it clear that an actual violation of the law is not required. In *Fleshner*, the Court stated, "a plaintiff need not rely on an employer's *direct* violation of a statute or regulation. Instead, the public policy must be *reflected by* a constitutional

provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body." 304 S.W.3d at 96 (internal citations omitted). The Court includes similar language in the comments accompanying the MAI verdict director for the wrongful discharge claim. On July 13, 2015, the Court approved the comment that the public policy "need only be *reflected* by" the legal provision and that "there need not be a direct violation" of the law. MAI 38.03, Committee Comment C (2016 Revision) (Appx-A48-49). *Margiotta* dealt only with the specificity of the public policy sources relied on by a plaintiff and held "a vague or general statute, regulation, or rule cannot be successfully pled under the at-will termination theory." 315 S.W.3d at 346.

Kelly v. Bass Pro Outdoor World, LLC, 245 S.W.3d 841 (Mo. App. E.D. 2007), involving termination for reporting wrongful conduct, held that the plaintiff "made a submissible case for wrongful termination based upon his ***reasonable belief***" of unlawful activity. 245 S.W.3d at 848 (emphasis added). The Court relied on *Dunn v. Enterprise Rent-A-Car*, 170 S.W.3d 1 (Mo. App. E.D. 2005), where it held it was unnecessary to "allege or prove conclusively the law has been violated" to state a claim "when the employee held a reasonable belief" that illegal conduct occurred. "[A]n employee who has a reasonable belief that illegal activity is taking place should be able to report such belief to his or her supervisors without fear of termination." 245 S.W.3d at 847-48.

In addition, Ameren's reliance on the lack of findings against Ameren by governmental agencies is misplaced. Ameren Brief 33. Those investigations occurred after B&A was terminated, providing Ameren time to remediate the conditions that B&A reported. Moreover, there is no requirement that a plaintiff's reports be substantiated by

a governmental agency. As established by the Supreme Court, "the violation of the applicable authority need not result in criminal sanctions [and] [w]hether the violation results in civil fines, injunctions, or disciplinary action . . . is immaterial." *Margiotta*, 315 S.W.3d at 347.

2. B&A's Reported Plumbing Code Violations Constitute Serious Misconduct in Violation of Public Policy

Ameren acknowledges that B&A repeatedly reported improper plumbing installations illegally performed by unlicensed in-house personnel. Ameren Brief 6-8. Expert witnesses for both Ameren and B&A agreed that B&A's reports include numerous plumbing code violations. LF000693-695.

Plumbing codes are established pursuant to state statutes. §§341.090-341.220, RSMo ("Uniform Plumbing Code"); *Shepard Well Drilling Co. v. St. Louis County*, 912 S.W.2d 606, 608 (Mo.App. E.D. 1995). Their purpose is to promote "health, safety and the general welfare." §341.130 RSMo. Plumbing codes regulate "a subject vitally affecting the public health and welfare . . . to protect persons living in populous areas from the lurking threats of contagions, disease and epidemic by requiring those who do plumbing work to be properly qualified." *Stine v. Kansas City*, 458 S.W.2d 601, 609 (Mo. App. W.D. 1970); *see also State ex rel. Lipps v. Cape Girardeau*, 507 S.W.2d 376, 382 (Mo. 1974).

The codes specifically require that plumbing work be performed by licensed plumbers: "No person shall cause, authorize or permit the installation, construction, alteration or repair of any sewer or sewage treatment device, plumbing or drainlaying or

installation relating thereto, except minor repairs, . . . except by a licensed plumber or drainlayer." §341.140 RSMo (Appx A45). The term "minor repairs" excludes "any work involving connections to . . . pipes, . . . or the replacing or any setting of any fixture." §341.090.2 RSMo (Appx A45).

Ameren incorrectly cites *Bennartz v. City of Columbia*, 300 S.W.3d 251 (Mo. App. W.D. 2009) for the proposition that "violations of local ordinances cannot . . . support a wrongful discharge claim." Ameren Brief 36. *Bennartz* expressly left that question undecided, as it rejected plaintiff's claim on sovereign immunity grounds. *Id.* at 258-59. The following year, however, the Supreme Court included in the list of sources of public policy, "a rule created by a governmental body." *Fleshner,* 304 S.W.3d at 96. This Court need not decide the issue, however, as plumbing codes and sewer regulations (discussed below) are based on state constitutional and statutory provisions.

3. B&A's Reports Include Illegal Cross Connections Between Waste Systems and Drinking Water, Threatening Life, Health and Safety

Included in the illegal plumbing installations reported by B&A are cross connections between waste systems and drinking water. LF000914; LF000926 ("someone in-house took a copper tube with a valve and drilled a waste stack and tied it into the waste (yes, domestic drinking water tied into the sanitary waste stack)"); LF000940 ("improper/illegal waste connections and illegal water lines/discharge lines"); LF000337, LF000347 ("cross connections with a class 1 hazard item that I feel needs immediate addressing.").

Such cross connections are clearly prohibited by Regulations of the Missouri Department of Natural Resources (MDNR) enacted pursuant to the Missouri Clean Water Law, RSMo §§640.010 et seq., and the Federal Safe Water Drinking Act, 42 U.S.C. §§300f et seq. MDNR's Public Drinking Water Regulations provide: "No customer shall cause or allow the construction or maintenance of an unprotected cross-connection." 10 CSR 60-11.010(2) (Appx A46). "Cross-connection" is defined as: "Any actual or potential connection . . . between a public water system and any other source or system through which it is possible to introduce into any part of the public water system any used water, . . . or substance other than the intended potable water with which the system is supplied." 10 CSR 60-2.015.21 (Appx A45-46).

The United States Center for Disease Control and Prevention (CDC) reports that serious, life-threatening, illnesses such as Legionnaire's Disease (*Legionella*), can be caused by "cross-connections (i.e., direct connections between piped water systems containing potable and nonpotable water)."[3] CDC stated: "The piecemeal nature of some infrastructure development might contribute to the occurrence of these cross-connections, highlighting the importance of distribution system monitoring and

[3] Surveillance for Waterborne Disease Outbreaks Associated with Drinking Water and Other Nonrecreational Water — United States, 2009–2010, September 6, 2013, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a3.htm (Appx A50).

adherence to guidelines for the prevention of backflow of nonpotable water into the potable water supply."[4]

The United States Environmental Protection Agency also cautions that cross-connections "can result in public health risk . . . because piping systems are continually being installed, altered, or extended."[5]

4. B&A's Reports Include Evidence of Hazardous Substances Leaving Ameren's Property

Contrary to Ameren's assertions (*e.g.* Ameren Brief at 3), many of B&A's reports contain evidence of hazardous substances leaving Ameren's property. For example:

Belleville Storm Sewer and Creek: In June 2010 B&A provided to management a 2007 report showing oil that "transgresses to a retention basin at the primary street intersection then outfalls to the soil creek system through a residential area." LF000316 (Appx A59). B&A also provided a report describing the same conditions in 2009, "oil in the outfall/creek/retention basin," and noting that "this is something that occurs regularly." LF000351, LF000359 (Appx A60).

Emptying Oil Barrels into Berkeley Sewer: B&A's June 2010 reports also contained a 2007 report of oil barrels stored upside down, which "resulted in notable

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[4] *Id.*

[5] USEPA, Cross-Connection Control, http://water.epa.gov/infrastructure/drinkingwater/pws/crossconnectioncontrol/index.cfm (Appx A58).

amounts of oil . . . contaminating the storm sewer system," and "in the down stream storm catch basin(s)." LF000374, LF000376-379.

Oil in Dorsett Sewer System: In 2007 Bishop reported "contamination of the Sanitary Sewer system with an oil/sludge quality product existing throughout the sanitary piping system. Testing by Ameren . . . resulted in verification that the oil product . . . was in excess of acceptable limits as regulated by Metropolitan Sewer District," and causing "contamination of the MSD primary receiving Sanitary sewer system for the connected down stream MSD piping." LF000946.

In 2008 Bishop again reported oil in the sanitary sewer system at Dorsett, travelling "beyond the lower property perimeter fence." LF000992, LF001001.

In 2009 Bishop reported heavy sludge and by-products in a separator that "goes to the sanitary (against code)." LF000742.

Again in 2010 Bishop reported oil "by-products" throughout the sanitary sewers, "out to the MSD main" and "downstream of the sanitary main." LF001023, LF001027 (Appx A61).

Dorsett Oil Tanks Contaminating Ground Water and Creek: B&A reported in 2010 that oil leaking from tanks at the Dorsett facility was being routed through illegally installed piping ("by in-house mechanics"), "resulting in a complete breaching of the chemical containment area," and ejecting the oil to a modified creek bed contaminating the ground and ground water. LF001129-1132; LF000933-938 (Appx A68-73); Ex. P-35 and P-36 (videos LF001660-1661).

5. B&A's Reported Discharges of Oil Show Serious Violations of Law

Federal and state laws and regulations, as well as Metropolitan Sewer District (MSD) rules, clearly prohibit the discharge of any pollutant, such as oil. The Federal Clean Water Act prohibits "the discharge of any pollutant by any person." 33 U.S.C. §1311 (Appx A46). The Missouri Clean Water Law makes it "unlawful for any person . . . [t]o cause pollution of any waters of the state or to place or cause or permit to be placed any water contaminant in a location where it is reasonably certain to cause pollution of any waters of the state." §644.051 RSMo (Appx A46). The Illinois Environmental Protection Act makes it unlawful to "cause, threaten or allow the discharge of any contaminant into the waters of the State." 415 ILCS 5/12(f) (Appx A46). MSD ordinances limit the discharge of oil to its wastewater system to 200 milligrams per liter. MSD Ordinance 12559 (Appx A47). A witness from MSD testified that when you see an oily sheen on water, "they've exceeded 200 milligrams per liter." Opperman depo 13:1-13, LF001323. Further, regarding the oil storage tanks at the Dorsett facility, Federal EPA Spill Prevention Regulations require facilities to take steps "to ensure that no oil will be discharged." 40 CFR 112.8 (Appx A46-47).

According to the testimony of an MSD employee, regarding B&A's videos of Ameren's Dorsett facility: "Oil cannot go to the creek," and the videos "showed there was a problem, an issue." Opperman Depo 7:12-15:19, LF001322 -24 and 44:19-47:18, LF001331-32. Likewise, B&A's environmental expert testified that even if the oil did not leave Ameren's property its discharge was illegal: "You can't discharge

contamination. You have violated 40 CFR 112." Paschal depo, 67:9-68:12, LF001399 and 73:17-74:23, LF001400-01.

The discharge of oil to the sanitary sewer system is a significant problem. According to US EPA in a 2004 report to Congress, "FOG (fat, oil and grease) is the leading cause of blockages in the United States, and blockages account for nearly half of all SSO (sanitary sewer overflow) discharges. The best way to prevent blockages due to FOG is to keep FOG out of the sewer system." LF001568.

6. Ameren's Managers Acknowledged the Legitimacy of B&A's Reports

In June 2010, following B&A's reports to Ameren's environmental managers, Defendant Armistead, Director of Building Services, reported to Menne, Vice President of Environmental Safety and Health, that Armistead had reviewed B&A's reports and acknowledged: "There are open issues at Belleville and Maryville, Illinois and at the Dorsett Complex in Missouri." LF000767. Armistead indicated that in Belleville (where Bishop had been reporting oil in a creek since 2007), an engineering firm "was hired and [has] completed the redesign of the drainage system. . . . This construction work will be bid in July [2010]." *Id*. In Maryville, Armistead reported that "there are some issues with the main drain line" that were being investigated. *Id*. Regarding Dorsett, Armistead admitted that "there are several issues around the oil tank farm." *Id*. Menne forwarded Armistead's report to Daniel Cole, Chairman and President of Ameren Services, indicating that "we are taking corrective actions where necessary." LF000766. Cole then forwarded the information to Warner Baxter, Chairman, President and Chief Executive

Officer of Ameren Corporation, who responded: "It does look like we still have some potential open issues that are being investigated at Dorsett, true?" *Id.*

H. Conclusion

Denying independent contractors the right to pursue a cause of action for wrongful termination not only restricts the contractor's avenues for vindication of its private rights but, more importantly, fails to vindicate the violated public interests. Such a ruling abandons the important deterrence function of the public policy claim based on nothing more than a classification of the type of laborer that an employer chooses to utilize. Independent contractors who, like Plaintiff B&A, perform personal services on an indefinite basis and who devote substantially all of their efforts to one company, are subject to the same coercive dilemma of "choosing between their livelihoods and reporting serious misconduct in the workplace" as are at-will and contract employees. To find otherwise will allow companies who utilize independent contractors on an ongoing and indefinite basis to condition their contracts on turning a blind eye to violations of law and subject independent contractors to punishment for doing that which is beneficial to society. To deny the protections of the wrongful discharge action to independent contractors would run counter to the compelling and well-established rationales and principles underlying the cause of action, ignore the public interest in protecting life, health, safety and the environment, and allow unscrupulous companies an avenue to escape the consequences of their violations of law by clever definition of their workforce.

POINT 2. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANTS ON PLAINTIFF BISHOP & ASSOCIATES, LLC'S CLAIM FOR BREACH OF CONTRACT IN VIOLATION OF PUBLIC POLICY AND THE DUTY OF GOOD FAITH AND FAIR DEALING, BECAUSE PUBLIC POLICY AND THE DUTY OF GOOD FAITH AND FAIR DEALING PROHIBIT TERMINATION OF A CONTRACT FOR REASONS THAT CONTRAVENE PUBLIC POLICY, IN THAT THE TRIAL COURT'S RULING MISAPPLIED MISSOURI LAW REGARDING THE IMPORTANCE OF ADVANCING PUBLIC POLICY AND THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING.

A. Standard of Review

The standard of review of a summary judgment "is essentially de novo." *ITT Commercial Finance Corp. v Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). Summary judgment is only "appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007) (*citing ITT Commercial Fin. Corp.*). "The movant bears the burden of establishing a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment." *Id.*

B. Summary Judgment is Inappropriate as to Plaintiff's Count II for Breach of Contract in Violation of Public Policy and the Duty of Good Faith and Fair Dealing.

In Count II of the Amended Petition, Plaintiff Bishop & Associates, LLC brought a claim for breach of contract in violation of public policy and the duty of good faith and fair dealing. Count II is an alternative theory of recovery to Count I, and is fully supported by Missouri law. In ruling on Defendants' motion to dismiss, Judge Dierker upheld Plaintiff's claim under Count II. Memorandum and Order, June 5, 2013, LF000121-122. On Defendants' motion for Summary Judgment, however, Judge Moriarty ruled, purely as a matter of law, that Plaintiff had no such claim. Memorandum, Order and Judgment, May 5, 2015, LF001697-1700.

"Missouri law implies a covenant of good faith and fair dealing in every contract." *Farmers' Elec. Coop. Inc. v. Mo. Dep't of Corrs.*, 977 S.W.2d 266 (Mo. 1998); *Martin v. Prier Brass Manuf. Co.*, 710 S.W.3d 466, 473 (Mo.App. W.D. 1986) ("It is a fundamental principle and concomitant of agreement that: 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.'") (citing *Restatement (Second) of Contracts* § 205 (1981)). *Bishop v. Shelter Mut. Ins.*, *supra*, 129 S.W.3d at 505. "If such a term is not expressed in the contract, then it will be implied." *Id.* at 506.

While the Court of Appeals in this case recognized those general rules, it rejected B&A's claim based upon the erroneous premise that "there can be no breach of the implied promise or covenant of good faith and fair dealing were the contract expressly permits the actions being challenged." Memorandum at 8-9.

Bishop v. Shelter Mut. Ins., 129 S.W.3d 500 (Mo.App. S.D. 2004), is highly instructive because it involved the termination of an insurance agent pursuant to a written

agreement that characterized the agent as an "independent contractor" and that expressly allowed termination by either party upon written notice. 129 S.W.3d at 503. The Court recited the general rules regarding the duty of good faith and fair dealing, including the general rule that "the good faith and fair dealing covenant cannot be implied to supersede the express agreement that the employee can be fired without cause." *Id.* at 506. But the Court in *Bishop v. Shelter Mut. Ins.* did not stop there. Instead it examined the plaintiff's evidence of bad faith, and concluded, "Shelter's reason for terminating Plaintiff's terminable at-will agency contract, even if in bad faith or under false pretenses, is irrelevant since the termination did not violate a statute or public policy." *Id.* at 506. The Court held that summary judgment was proper on the claim of breach of the implied covenant of good faith and fair dealing because: "As a matter of Missouri law, such a cause of action did not lie here since Shelter's termination did not violate public policy or any statutory provision." *Id.* at 507. Therefore, it is absolutely clear that had Shelter's reason for terminating its agent violated public policy or a statute, the Court in *Bishop v. Shelter* would have recognized a wrongful termination cause of action in breach of contract.

Recent federal court decisions applying Missouri law have upheld claims similar to Plaintiff's Count II. "Under Missouri law, a plaintiff properly pleads a breach of the implied covenant of good faith and fair dealing when he alleges the defendant's action violated public policy or a statute." *Kmak v. Am. Century Cos.*, 754 F.3d 513, 517 (8th Cir. 2014) (citing *Bishop v. Shelter Mut. Ins.*). *See also*, *Smith v. City of Byrnes Mill*, 2015 U.S. Dist. LEXIS 103711 (E.D. Mo. Aug. 7, 2015).

Kmak involved a former employee who claimed he was injured when his former employer exercised its contractual right to repurchase Kmak's stock "at any time" after his employment ended. Kmak claimed that the former employer repurchased his stock in violation of public policy because it was done in retaliation for Kmak's testimony in an arbitration. Even though the contract expressly permitted the action taken by the defendant, the Eighth Circuit applied Missouri law regarding the implied covenant of good faith and fair dealing and Missouri public policy and held: "Because Missouri's public policy required American Century not to retaliate against Kmak for testifying in the arbitration proceeding, Kmak has alleged a breach of the implied covenant of good faith and fair dealing." *Kmak v. Am. Century Cos*., 754 F.3d at 517.

In *Smith v. City of Byrnes Mill*, the plaintiff was an at-will employee of a municipality, so any claim based the tort of wrongful discharge in violation of public policy was barred by Missouri's sovereign immunity statute. Instead, Smith brought a claim for breach of contract, to which sovereign immunity does not apply. Relying on *Kunzie v. City of Olivette*, 184 S.W.3d 570 (Mo. banc 2006), where "the Missouri Supreme Court noted the possibility that an at-will municipal employee who was terminated in violation of public policy 'might' be able to bring a contract-based action," and also relying on the Eighth Circuit's decision in *Kmak* and on the reasoning of *Fleshner*, the court in *Smith v. City of Byrnes Mill* held:

> Plaintiff has adequately pleaded a claim for breach of contract against the City based on breach of the implied covenant of good faith and fair dealing. He alleges that he had an employment contract with the City and that the

> City breached that contract's implied covenant of good faith and fair dealing by terminating his employment in violation of public policy based on his reporting wrongdoing or violations of law to superiors or public authorities.

Smith v. City of Byrnes Mill, 2015 U.S. Dist. LEXIS 103711, *16 (E.D. Mo. Aug. 7, 2015).

In *Harper v. Healthsource New Hampshire*, 674 A.2d 962 (N.H. 1996), discussed above as to Count I, the New Hampshire Supreme Court described the similarity between the requirements and constraints of public policy and the implied contractual duty of good faith and fair dealing. The court concluded that "the public interest and fundamental fairness demand that a health maintenance organization's decision to terminate its relationship with a particular physician provider must comport with the covenant of good faith and fair dealing and may not be made for a reason that is contrary to public policy." *Id.* at 966.

As described by the Missouri Supreme Court, "Public policy is the principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good." *Fleshner*, 304 S.W.3d at 91 (citation omitted). That principle should permit a breach of contract action just as it permits a tort action for a termination in violation of public policy.

POINT 3. THE TRIAL COURT ERRED WHEN IT DISMISSED PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES UNDER COUNT I FOR WRONGFUL

TERMINATION IN VIOLATION OF PUBLIC POLICY, BECAUSE, ABSENT CERTAIN EXCEPTIONS THAT DO NOT EXIST IN THIS CASE, SUBSTANTIVE CHANGES IN COMMON LAW ARE TO BE APPLIED RETROACTIVELY, IN THAT THERE WERE NO PRIOR DECISIONS UPON WHICH DEFENDANTS COULD HAVE RELIED AND THE PURPOSE OF EXTENDING PUBLIC POLICY PROTECTION FOR INDEPENDENT CONTRACTORS IS TO PROMOTE PUBLIC POLICY.

A. Standard of Review.

On Defendants' motion to dismiss, the trial court ruled that Plaintiff Bishop & Associates, LLP "failed to state a cognizable claim for punitive damages" under Count I, for wrongful termination in violation of public policy. Memorandum and Order, June 5, 2013, LF000122-23. "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom." The appellate court reviews such a dismissal *de novo*. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 768 (Mo. 2007).

B. A Change or Clarification of the Common Law Should be Applied Retroactively Unless Certain Exceptions Apply.

In 1985, when the Court of Appeals acknowledged for the first time an exception to the employment at will doctrine for an employee who was terminated for reasons that violated public policy, the Court held "the employee has a cause of action in tort for damages for wrongful discharge," and remanded the case for further proceedings so the

plaintiff could pursue her claim. *Boyle v. Vista Eyewear, Inc*., 700 S.W.2d 859, 878 (Mo. App. W.D. 1985). Twenty-five years later, when the Supreme Court recognized for the first time that the wrongful termination public policy tort was available to a contract employee, the Court clearly indicated that the plaintiff could seek punitive damages on remand. *Keveney v. Mo. Military Acad*., 304 S.W.3d 98, 105 n. 3 (Mo. banc 2010). In *Keveney*, the plaintiff had prevailed at trial on his breach of contract claim, but was apparently denied his right to seek punitive damages. The Supreme Court noted: "Employee also asserts that punitive damages should be available in his breach of contract action. There is no need to resolve this issue in light of the availability of a tort claim for wrongful discharge in violation of public policy." *Id.*

Although the Courts in *Boyle* and *Keveney* did not discuss the retroactivity issues relevant to the holdings recognizing and then expanding the public policy claims, the results in those cases are clearly in line with Missouri law on retroactive application of changes in the common law.

As a general rule, changes in law by court decision are retroactive. *Sumners v. Sumners*, 701 S.W.2d 720, 722-23 (Mo. banc 1985):

> "At common law there was no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" *Linkletter v. Walker*, 381 U.S. 618, 622-23, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965) (footnote and citation omitted). Thus, a

> change in the law by judicial decision related back to past transactions and occurrences within its ambit as well as to future events. *Id*.

Sumners, 701 S.W.2d at 722. As the United States Supreme Court explained, in the case cited by our Supreme Court in *Sumners*: "The judge rather than being the creator of the law was but its discoverer." *Linkletter v. Walker*, 381 U.S. 618, 623 (1965).

The Missouri Supreme Court recognizes "two exceptions to the general rule of retroactivity. The first exception is found when the change pertains to procedural as opposed to substantive law." *Sumners*, 701 S.W.2d at 723. That exception would not apply here as the recognition of a wrongful termination in violation of public policy claim for an independent contractor would be a substantive development. Under *Sumners*:

> The second exception turns on the issue of fundamental fairness and is often expressed as a question of reliance. If the parties have relied on the state of the decisional law as it existed prior to the change, courts may apply the law prospectively-only in order to avoid injustice and unfairness.
>
> > One of the most important factors considered by the courts "in deciding whether and to what extent a judicially changed rule of law should be given retroactive effect" is "the degree to which the prior rule may have been justifiably relied on."

Id. at 723 (citations omitted).

Applying those principles, *Sumners* adopted "a three-factor test to determine whether an overruling decision . . . should be given prospective-only effect. First, the

decision in question 'must establish a new principle of law . . . by overruling clear past precedent." *Id.* at 724. As the trial court recognized, allowing an independent contractor a cause of action for wrongful termination in violation of public policy would not overrule any past precedent, as the question has never been decided by the Missouri courts. Thus, there are no prior court decisions that Ameren could have relied on in believing it would not be subject to tort liability in this case.

The second part of the test to determine whether a decision should be given prospective-only effect is "whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective operation." *Sumners* at 724. The "purpose and effect" of a rule allowing contractors to sue for wrongful termination in violation of public policy is to promote public policy. Retroactive application of that rule, as in *Boyle* and *Keveney*, would do just that. As the Court explained in *Keveney*, "[a] discharge is not 'wrongful' because it violates the contractual terms of employment [but rather it] is 'wrongful' because it is based on the employer's attempt to condition employment on the violation of public policy expressed in applicable constitutional, statutory or regulatory provisions." *Keveney*, 304 S.W.3d at 102.

The third factor announced in *Sumners* requires the Court to:

> balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule.

Id. at 724. Again, there was no "old rule" upon which Ameren could have relied. Moreover, to deny Plaintiff and the public the full measure of tort remedies would be a hardship that the Missouri Supreme Court did not impose in *Keveney* when it allowed the plaintiff to seek punitive damages under the ruling expanding the public policy claim to contract employees. The Court's discussion in *Boyle*, when it recognized the public policy exception to the well-established employment at will doctrine, demonstrates the limited hardship to employers from applying the newly announced rule:

> Although employers generally are free to discharge at-will employees with or without cause at any time, they are not free to require employees, on pain of losing their jobs, to commit unlawful acts or acts in violation of a clear mandate of public policy expressed in the constitution, statutes and regulations promulgated pursuant to statute. The at-will employment doctrine does not depend upon the employer having such a right. The employer is bound to know the public policies of the state and nation as expressed in their constitutions, statutes, judicial decisions and administrative regulations, particularly, as here, those bearing directly upon the employer's business.

Boyle, 700 S.W.2d at 877. The Court in *Boyle* also recognized limits of its decision on law-abiding companies:

> The public policy exception is narrow enough in its scope and application to be no threat to employers who operate within the mandates of the law and clearly established public policy as set out in the duly adopted laws.

> Such employers will never be troubled by the public policy exception because their operations and practices will not violate public policy.

Id. at 878.

The trial court erred when it dismissed Plaintiff's claim for punitive damages under its claim for wrongful termination in violation of public policy. The court did not address the rules discussed above regarding retroactive application of changes in common law, but instead relied on *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758 (Mo. 2007). *Hess* involved the question whether a punitive damages remedy would be applied retroactively following a statutory amendment to the Missouri Merchandising Practices Act. Thus, the Court in *Hess* was constrained by the Missouri Constitution, which "prohibits laws that are retrospective in operation. Mo. Const. art. I, sec. 13." *Id.* at 769. The principles applicable to changes in the law by court decision are quite different and compel the conclusion that extension of the wrongful termination claim for an independent contractor should include all of the traditional tort remedies, including punitive damages, as the Court ruled in *Keveney*.

POINT 4. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT ON COUNT III FOR TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP AGAINST DEFENDANTS ARMISTEAD, GEORGE, AND WRIGHT BECAUSE MISSOURI LAW AUTHORIZES SUCH A CLAIM AGAINST INDIVIDUAL MANAGERS OF A PARTY TO THE RELATIONSHIP WHEN THEY EMPLOY IMPROPER MEANS TO ACHIEVE

THE TERMINATION AND THEY ACT OUT OF SELF-INTEREST; IN THAT THE EVIDENCE DEMONSTRATES OR PERMITS AN INFERENCE THAT

(1) THE INDIVIDUAL DEFENDANTS USED IMPROPER MEANS OF

(a) MISREPRESENTATING FACTS ABOUT PLAINTIFFS' HONESTY, ALLEGED OVER-BILLING PRACTICES, AND PLAINTIFF SUPPOSEDLY VIOLATING A DIRECTIVE ABOUT WORK AUTHORIZATIONS AND THEN LYING ABOUT THAT DIRECTIVE, AND

(b) ACTING IN VIOLATION OF PUBLIC POLICY BY RETALIATING AGAINST PLAINTIFFS FOR REPORTING ILLEGAL CONDUCT, AND

(2) THE INDIVIDUAL DEFENDANTS ACTED OUT OF THEIR OWN SELF-INTEREST BY

(a) ARMISTEAD BEING OFFENDED AND "PISSED" ABOUT BISHOP REPORTING ON ARMISTEAD'S ILLEGAL AND IMPROPER INSTALLATION OF PLUMBING,

(b) WRIGHT'S EMPHASIS ON STAYING WITHIN BUDGET AND ON HIS PERSONAL CAREER, AND

(c) WRIGHT'S AND GEORGE'S PERSONAL ANIMOSITY TOWARD PLAINTIFFS.

A. Standard of Review

The standard of review of a summary judgment "is essentially de novo." *ITT Commercial Finance Corp. v Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). Summary judgment is only "appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007) (*citing ITT Commercial Fin. Corp.*). "The movant bears the burden of establishing a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment." *Id.*

"A 'genuine issue' that will prevent summary judgment exists where the record shows two plausible, but contradictory, accounts of the essential facts and the 'genuine issue' is real, not merely argumentative, imaginary, or frivolous." *Daugherty*, 231 S.W.3d at 818 (*citing ITT Commercial Fin. Corp.*). The appellate court "reviews the record in the light most favorable to the party against whom judgment was entered." *Id.* "Summary judgment should not be granted unless evidence could not support any reasonable inference for the non-movant." *Id.*

B. A Claim for Tortious Interference with a Business Relationship Can be Maintained Against Individual Managers When They Use Improper Means and Act in Their Own Self Interest.

To prevail on a claim for tortious interference with a business relationship, a plaintiff must establish: (1) the existence of a contract or valid business expectancy; (2) knowledge on the part of the defendant of this contract or relationship; (3) intentional

interference by defendant inducing or causing a breach of the contract or relationship; (4) an absence of justification; and (5) damages resulting from defendant's conduct. *Farrow*, 407 S.W.3d at 602.

While generally "[a]n action for tortious interference with a business expectancy will lie against a third party only" and "[w]here an individual being sued is an officer or agent of the defendant corporation, the officer or agent acting for the corporation is the corporation for purposes of tortious interference," *id*., Missouri courts have allowed for exceptions to this general rule. "[T]he privilege of a manager to induce a breach of a corporate contract is not absolute: the manager shall not employ improper means, the manager must act in good faith to protect the corporate interest, and the manager must not act out of self-interest." *Hibbs v. Berger*, 430 S.W.3d 296, 318 (Mo. App. E.D. 2014); *see also, Preferred Physicians Mut. Mgmt. Group v. Preferred Physicians Mut. Risk Retention*, 918 S.W.2d 805 (Mo. App. W.D. 1996).

C. Genuine Issues of Material Fact Precluded Summary Judgment for Defendants in this Case.

While the trial court in this case recognized the exceptions to the general rule discussed above, the court erred when it held that Plaintiff B&A failed to adduce evidence sufficient to establish a genuine issue of fact on the issues whether the individual Defendants used improper means and acted only in their self-interest. Memorandum, Order and Judgment, May 6, 2015, at 6-7, Appx A20-21, LF001677-78. B&A respectfully submits that the Court of Appeals turned the summary judgment standard upside down by suggesting that B&A "must prove" that Ameren employees

used improper means and acted only out of self-interest. Memorandum at 10. The appellate court must review the record "in the light most favorable to the party against whom judgment was entered," and "[s]ummary judgment should not be granted unless evidence could not support any reasonable inference for the non-movant." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007).

The evidence clearly is sufficient to allow a jury to conclude that Ameren employees are liable for tortiously interfering with B&A's business relationship because they lied about B&A and they were motivated by their own personal animosity toward B&A and their personal interest in covering up their own misdeeds. Evidence showing that the defendants displayed "personal animus" toward the plaintiff would be proof that the individual defendants were acting out of "'personal, as opposed to corporate' interests." *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 252-253 (Mo. banc 2006). When the evidence is considered in the light most favorable to Plaintiff, Defendants failed to demonstrate that the evidence could not support the inferences that the individual Defendants were misrepresenting facts about Bishop & Associates and were doing so to protect themselves because Bishop was reporting that those managers were violating laws designed to protect the environment and to promote public health and safety.

1. Individual Defendants' Improper Means

On the issue of improper means, misrepresentations of fact need not be defamatory. Under Missouri law, as examples of improper means, the courts list separately statements that are defamatory and those that are misrepresentations of fact.

"For purposes of this tort, 'improper means' are defined as 'those that are independently wrongful' such as . . . defamation, misrepresentation of fact, . . . or any other wrongful act recognized by statute or the common law." *Hibbs v. Berger*, 430 S.W.3d at 318; *see also*, *Farrow*, 407 S.W.3d at 602. The evidence and its reasonable inferences allow a finding that the individual Defendants were engaged in improper means by misrepresenting facts and violating public policy by retaliating against Bishop & Associates because of its whistleblowing.

As described in more detail in the Statement of Facts, above, the summary judgment record includes evidence that the individual Defendants misrepresented the facts to their colleagues and superiors about B&A and violated public policy by retaliating against B&A because of its whistleblowing activities.

- All three individual Defendants, Armistead, Wright and George, made numerous statements that B&A was dishonest by charging Ameren for equipment and services that were excessive and unnecessary. Those statements were contradicted by Bob Bishop.
- Defendants Wright and George stated that B&A falsely billed Ameren for equipment that was either not used or not necessary. Bishop testified it did not.
- Defendant George stated that Bishop turned every job into a large project for B&A's own benefit. That statement was contradicted by Bishop.
- In the days leading up to the termination of B&A's business relationship with Ameren, Defendants Armistead and Wright concocted a false reason for B&A's termination. Wright falsely claimed that Bishop violated a directive to obtain

Wright's approval for each occasion that B&A performed repetitive maintenance services at an Ameren facility, under the "flex-time" program. As detailed in the Statement of Facts, that claim is demonstrably false.

- Armistead reiterated that false statement to Vice President Menne and told Menne and others at Ameren that Bishop's contrary explanation was "not true."

2. Individual Defendants' Self-Interest

A proper evaluation of the record, in the light most favorable to Plaintiffs and giving Plaintiffs the benefit of all reasonable inferences, demonstrates that Defendants failed to meet their burden to demonstrate there is no genuine issue on the question of self-interest. To the contrary, the evidence supports the conclusion that the individual defendants were operating for their own benefit, rather than Ameren's, when they made misrepresentations about B&A's performance and honesty. Evidence showing that the defendant displayed "personal animus" toward the plaintiff is evidence that the individual defendant was acting out of "'personal, as opposed to corporate' interests." *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 252-253 (Mo. banc 2006).

Record evidence of the individual Defendants' self-interest and personal animus toward Plaintiffs includes the following, described in more detail in the Statement of Facts, above:

- Defendants George, Wright and Armistead were intentionally targeting Bishop because they did not want to hear his reports that illegal conditions needed to be remedied.

- Defendant Armistead told Bishop to "stop reporting" his concerns about risks to life, health and safety, and about environmental violations, and, once he's raised an issue, to "drop it."
- Defendant George made condescending statements and used abusive language toward Mr. Bishop.
- Bishop complained that George was refusing to authorize necessary work, requesting illegal and improper work, and awarding work to a competitor based on a design corrected by Bishop.
- Wright did not share previous Ameren managers' appreciation of B&A's diligence and protective approach to Ameren, but was more concerned about meeting his budgets and his personal career advancement.
- Armistead was offended and became "pissed" at B&A and Bishop because B&A reported to Ameren management that one of the "illegal and improper" jobs had been authorized by Armistead.
- Wright was antagonist towards B&A and Mr. Bishop and Wright had a "chip on his shoulder" for Plaintiffs.
- After Ameren terminated its relationship with Plaintiffs, Wright listed one of his accomplishments for the year as "[g]ot rid of Bishop . . . 'Ding Dong the witch is dead . . . ."

CONCLUSION

For the reasons stated above, this Court should reverse the summary judgment granted by the trial court on Counts I, II, and III of the Amended Petition, reinstate Plaintiffs' claim for punitive damages under Count I, and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of July, 2016, the foregoing Substitute Brief of Appellant was filed electronically with the Clerk of the Court therefore to be served on the following attorneys for Respondents by operation of the Court's electronic filing system:

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing Substitute Brief of Appellant complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 19,746 words as determined by MS Word 2010. The foregoing Brief includes all the information required by Supreme Court Rule 55.03.

Dated: July 22, 2016 */s/ Kenneth M. Chackes*