IN THE SUPREME COURT OF MISSOURI

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

SUBSTITUTE REPLY BRIEF OF APPELLANT

/s/ Kenneth M. Chackes
Kenneth M. Chackes, MOBAR #27534
CHACKES, CARLSON, & GOROVSKY, LLP
906 Olive Street, Suite 200
St. Louis, Missouri 63101
Phone: (314) 872-8420
Fax: (314) 872-7017
kchackes@cch-law.com

/s/ Bruce A. Morrison
Bruce A. Morrison, MOBAR #38359
The Morrison Law Firm
319 North Fourth Street, Suite 800
Saint Louis, Missouri 63102
Phone: (314) 397-2474
Fax: (314) 231-4184
bamorrison@bamorrisonlaw.com

ATTORNEYS FOR APPELLANT

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I. AMEREN PROVIDES A DISTORTED VIEW OF THE FACTS

A. Ameren Presents Facts in the Light Most Favorable to Ameren

Throughout their Brief, Respondents' discussion of facts is conclusory and argumentative and provides a distorted view of selected facts. Ameren draws inferences and presents facts in the light most favorable to Respondents. Under Missouri law, however: "When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered," and the Court must "accord the non-movant the benefit of all reasonable inferences from the record." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

B. Facts Viewed Objectively or in the Light Most Favorable to Bishop & Associates

When the evidence in this case is viewed in the proper light, a very different picture emerges.[1] Over their eight-year relationship B&A provided quality plumbing and maintenance services at numerous Ameren facilities. Throughout that time, B&A reported conditions or practices to Ameren's building service managers that created a risk to the life, health and safety of Ameren's employees and/or to the environment. At first, Ameren's managers seemed to appreciate B&A's reports and followed his advice on how to avoid such issues in the future. As time went on, however, managers with different

[1] For specific citations to the evidence, *see* Substitute Brief of Appellant ("B&A Brief") 4-24.

priorities became responsible for Ameren's facilities, and they reacted quite differently, putting their own reputations and budget targets ahead of health, safety and environmental concerns. While B&A did fix many of the problems it identified in earlier years, during the final year of their relationship, Ameren building managers – particularly the three individual defendants – continued to create conditions and engage in practices that created additional risks to life, health, safety and the environment, and, as a consequence, more risk to Ameren itself. To address Bishop's concerns regarding current conditions and practices, B&A compiled documentation of the previous and continuing problems that it had identified over the years, and presented it to the managers who were preferring to cut corners and ignore risks. When those efforts proved futile, B&A reached out to Ameren's CEO and provided documentation to managers and officers in other parts of Ameren -- to a Vice President and two other managers in Ameren's environmental health and safety department. Those reports, which contained within both historical and current conditions and practices, led to internal discussions of Bishop's concerns among Defendant Armistead (the Director of the Building Services Department with whom B&A had been dealing directly); Michael Menne, the Vice President of Environmental Safety and Health; Warner Baxter, the Chairman, President and CEO of Ameren Corporation; and Daniel Cole, the Chairman and President of Ameren Services. In late June 2010, Defendant Armistead admitted to the others that several of the current conditions reported by B&A revealed open issues that needed to be addressed. In late July Defendant Armistead informed B&A that Ameren would no longer use its services.

Although Ameren suggests that it had a legitimate reason for terminating B&A, in its motion for summary judgment Ameren did not even challenge B&A's claim that it was terminated because of its reports of health, safety and environmental concerns.

C. Misstatements Regarding Findings of Government Agencies

In the opening paragraph of their Brief, Respondents mislead the Court by implying that all of the violations that B&A reported to Ameren were reviewed and rejected by government agencies. Substitute Brief of Respondents ("Ameren Brief"), at 1 ("B&A reported these alleged violations to . . . .") (emphasis added). *See also* Ameren Brief 15-16. That is not true.

After B&A's termination it shared with government agencies only a small portion of the information it reported to Ameren, and that information was related primarily to Ameren's Dorsett facility. Plaintiff's Responses to Uncontroverted Facts ("Facts") ¶¶50, 52, 60, 61 (LF000708, 710). As Respondents note, inspections were performed only by MDNR and MSD, and only at Dorsett. Ameren Brief 16.

Those inspections were performed in September and November of 2010, long enough after B&A's July 29, 2010 termination to allow Ameren to remediate the Dorsett site. Facts ¶¶53, 64 (LF000708, 711). In fact, by August 31, 2010, Ameren was having the soil and rock removed from the area at Dorsett where B&A reported oil in a modified creek bed. Robert Johnson Dep. 185-189 (LF001315-1316). "Q. But by August 31, 2010, there was an effort underway to remove oil from that drain at Dorsett? A. Yes." *Id.* at 185:25-186:3. Before Ameren's remediation, Bishop had shown to an MSD official videos he had taken of the oil on the ground at Dorsett. She testified that the videos

caused her concern because they showed "there was oil coming to the ground, potentially going into the creeks." Opperman Dep. 45-46 (LF001331-1332). Because of Ameren's removal of the oil-impacted rocks and soil in August, Ameren prevented the inspectors from determining the extent of the oil pollution inspected in September and November.

Moreover, Ameren's assertion that the government agencies found nothing that supported B&A's reports is incorrect. *See* Facts ¶56 (MDNR found "small amount (blue/red colored) of oil residue where the June 2010 spill occurred was noticeable on the concrete surface at the time of inspection"), ¶¶57-59 (barrels containing hazardous waste), ¶66 (MSD inspector reported finding evidence to support at least some of B&A's past complaints: "didn't find anything to support Mr. Bishop's complaints (at least nothing recent)" (LF000709-711).

For those reasons, and because there is no requirement that a plaintiff's reports be substantiated by a governmental agency, the post-termination inspections and findings are of no consequence. *Margiotta v. Christian Hosp. Northeast Northwest*, 315 S.W.3d 342, 347 (Mo. banc 2010).

D. Misstatement Regarding Circuit Court Findings of Serious Misconduct

Ameren states "the circuit court and the court of appeals did not reach the question whether B&A presented competent evidence that it reported 'serious misconduct that constitutes a violation of the law and of . . . well-established and clearly mandated public policy.'" Ameren Brief 3. That too is incorrect as the circuit court carefully analyzed that issue and stated:

> [T]he motion for summary judgment as to Count I would be denied if it were determined solely on the basis of this alternative argument. Careful review of 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.

Memorandum, Order and Judgment (May 6, 2015) 9, n. 1, Appx A23, LF001680.

E. Misstatements Regarding Reports of Serious Misconduct

Ameren ends its Introduction with several misleading conclusions regarding the evidence that B&A reported serious misconduct in violation of clearly established public policy. Ameren Brief 3-4.

Ameren asserts that "B&A's 'reports' involved routine plumbing and maintenance issues" and that there is no "evidence that any hazardous substance ever left Ameren's property." *Id.* Those are argumentative characterizations of disputed facts, which can only be reached by viewing the evidence and drawing inferences in Ameren's favor. As the trial court determined, Ameren failed to meet its burden on these issues as "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." Memorandum, Order and Judgment (May 6, 2015) 9, n. 1, Appx A23, LF001680.

Ameren also states that "[n]one of B&A's reports identified any specific law, code or ordinance provision that was violated." *Id.* 3-4 (*see also* Ameren Brief 10, 12, 48-49 n.

23). That is misleading and irrelevant, as courts do not require identification of the laws violated in the reports of whistleblowers, but only in the legal pleadings filed in court, such as the Petition or in response to a Motion for Summary Judgment. That was the holding in the two cases cited by Respondents on this point, *Adolphsen v. Hallmark Cards*, 907 S.W.2d 333, 338-39 (Mo. App. WD 1995); *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 940 (Mo. App. WD 1998).

B&A did identify the specific laws that were violated by Ameren's conduct. Missouri statutes specifically require that plumbing work be performed only by licensed plumbers. *See* B&A Brief 49-50. MDNR regulations, enacted pursuant to the Missouri Clean Water Law and the Federal Safe Water Drinking Act, specifically prohibit construction or maintenance of cross connections. *Id.* at 51. Federal and state laws and regulations, and MSD rules, clearly prohibit the discharge of any pollutant, such as oil. *Id.* at 54.

Ameren wrongly asserts that B&A's reports were old job reports that did not address current conditions. Ameren Brief 46-61. In making this argument Ameren distorts or chooses to ignore important facts.

B&A did include in its 2010 reports examples of previous misconduct, but it also provided evidence of current problems that required immediate attention. For example, in its June 2010 submissions to Ameren's environmental managers, B&A included reports from March 2010 about oil in the storm sewer system in Belleville (LF000286, LF000307-315), described current issues with oil leaking from the Dorsett oil tanks being ejected to a creek and included "a document about cross connections with a class 1

hazard item that I feel needs immediate addressing" (LF000337), and provided an earlier report showing "oil in the outfall/creek/retention basin at Belleville" from October 2009, and stating "this is something that occurs regularly." (LF000351). Those reports were discussed internally among the managers and officers of Ameren who concluded that B&A's reports demonstrated "open issues at Belleville and Maryville, Illinois and at the Dorsett Complex" that were still being addressed in the month before B&A was terminated. LF000766-67; s*ee* B&A Brief 55-56.

Ameren notes that B&A reported improper plumbing installations performed by unlicensed in-house personnel, but complains that B&A failed to identify those employees. Ameren Brief 8-9, 56-59. Bishop did identify in his deposition Ameren employees who performed plumbing work and expressed to Ameren his concern that it was continuing to follow that practice. Bishop Dep. 208-214 (LF001090-92); Ex. D-27 (LF000926-30). [2]

F. Bishop's Testimony and Opinions are Competent and Admissible

Ameren argues that this Court should disregard Mr. Bishop's testimony and opinions because many of his statements are "self-serving and speculative." Ameren Brief 4. That is not a legitimate argument on a motion for summary judgment, especially

[2] Ameren also points out that Bishop did some plumbing work in Illinois although he did not have an Illinois plumbing license. Since Bishop was well-trained and fully qualified to do all of the work he did for Ameren, the issue of his not having an Illinois license is far different from Ameren's practice of using untrained and unqualified personnel.

in this case. "A 'party's own testimony is often self-serving,' but the mere fact that [plaintiff's] factual testimony is favorable to his legal claim does not render it incompetent." *Argenyi v. Creighton Univ.*, 703 F.3d 441, 446 (8th Cir. 2013). Even if "self-serving," courts are not "authorized to determine the weight or credibility" of testimony in deciding a motion for summary judgment. *Wills v. Whitlock*, 139 S.W.3d 643, 649 n.8 (Mo. App. W.D. 2004); *see also Pub. Sch. Ret. Sys. of Mo. v. Taveau*, 316 S.W.3d 338, 345 n.4 (Mo. App. W.D. 2010). Moreover, Bishop's opinions are admissible as he holds master plumber and master drain-layer licenses, has over 30 years of experience, has numerous specialty certifications, and has testified as an expert witness. B&A Brief 4.

II. PUBLIC POLICY REQUIRES THAT AN INDEPENDENT CONTRACTOR BE PROTECTED FROM TERMINATION FOR REPORTING SERIOUS MISCONDUCT

A. Public Policy Limits the Making and Enforcement of Contracts

"'Public policy' is that 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." *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 871 (Mo. App. W.D. 1985); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010).

The arguments of Ameren and its amici curiae that providing whistleblower protection to independent contractors will improperly alter the contractual relationship between the parties are misguided. *See* Amici Brief 5; Ameren Brief 30, 35, 38. Public policy has been relied on by courts for centuries to limit the rights of parties to make and

enforce contracts. Contracts do not override public policy -- public policy overrides contracts. That is why provisions in a contract that violate the law or public policy are void and unenforceable in Missouri. *MIF Realty v. Pickett*, 963 S.W.2d 308, 311 (Mo. App. 1997) (waiver of jury trial); *citing First Nat. Ins. Co. of America v. Clark*, 899 S.W.2d 520, 521 (Mo. banc 1995) (provisions of auto insurance policy). The public policy doctrine was used by the U.S. Supreme Court to allow the government to challenge an agreement between railroad companies to jointly establish rates, rules, and regulations as a restraint on trade or commerce. *United States v. Trans-Mo. Freight Assoc*., 166 U.S. 290 (1897).

Employment law is merely one area in which Missouri courts have made it clear that provisions in contracts that allow termination at will must yield to public policy as expressed in statutes, regulations and the like. *See*, *e.g.*, *Fleshner*, 304 S.W.2d at 96; *Keveney v. Mo. Military Acad*., 304 S.W.3d 98, 103 (Mo. banc 2010). Such provisions cannot, and do not, stand in the way of claims of retaliatory termination in violation of public policy. *Id*. It must be the same for at-will provisions in contracts between independent contractors and hiring businesses. Public policy trumps those contracts as well.

Ameren claims that this Court in *Margiotta* noted "that the ability to terminate a commercial relationship is '[r]ooted in freedom of contract and private propery principles." Ameren Brief 30. Yet the Court said nothing in *Margiotta* about "commercial relationships." What it did say was that the at-will doctrine is rooted in freedom of contract. In the next breath, however, it explained that the at-will doctrine is limited by

the public policy exception to it. *Margiotta*, 315 S.W.3d at 346. In short, freedom of contract is not absolute; it is qualified by public policy.

B. Decisions in Other Jurisdictions Support Recognition of the Public Policy Tort for Independent Contractors

Ameren argues that this Court should disregard all of the cases cited by B&A and the NELA amici curiae providing whistleblower protection for independent contractors and other non-employees. Those cases are significant because they recognize that public policy is more important than the nature of the relationship between the parties. That is what this Court recognized in *Keveney* and what the Missouri Court of Appeals acknowledged in *Bishop v. Shelter Mut. Ins. Co.*, 129 S.W.3d 500 (Mo.App. S.D. 2004).

An article published by the ABA noted: "Recent court decisions indicate a trend to extend whistleblower protection to individuals whom one might generally consider to be independent contractors, and not limit such protections to traditional 'employees.'" Peyzner, Independent Contractor Whistleblowers, ABA Section of Litigation (2014),[3] citing two cased relied on by B&A, *Lawson v. FMR LLC*, 134 S. Ct. 1158 (U.S. 2014) (extending whistleblower protections to employees of contractors under the Sarbanes-Oxley Act); *D'Annunzio v. Prudential Ins. Co. of America*, 927 A.2d 113 (N.J. 2007) (interpreting state whistleblower law to protect independent contractors).

[3] Available at http://apps.americanbar.org/litigation/committees/commercial/articles/fall2014-1214-independent-contractor-whistleblowers.html.

In their brief the NELA amici curiae state that at least 43 states have recognized the public policy tort, yet only a small fraction of them (about nine) have decided whether independent contractors have a remedy under it. Brief of the St. Louis and Kansas City Chapters of the National Employment Lawyers Association ("NELA Brief") 18. Ameren counters that "State and federal courts throughout the country have affirmatively rejected common law claims by independent contractors for wrongful discharge in violation of public policy." Ameren Brief 23, n. 10. Even a cursory examination of the cases cited by Ameren, however, shows that the NELA amici curiae got it right. Only a small fraction of the state appellate courts have determined whether to apply the public policy tort to an independent contractor.

Of the 16 cases Ameren cites, the first seven are federal decisions. Almost without exception, these federal decisions point to the same "small fraction" of State Appellate Courts which actually have examined the issue. *See, e.g., McNeill v. Sec. Ben. Life Ins. Co*., 28 F.3d 891, 893 (8th Cir. 1994) ("We have found a few cases from other jurisdictions discussing the issue," looking to California, Idaho, and Indiana appellate courts to predict Arkansas law); *Birchem v. Knights of Columbus*, 116 F.3d 310, 315 (8th Cir. 1997) (relying on that Court's decision in *McNeill v. Sec. Ben. Life Ins. Co*., and thus again looking to California, Idaho, and Indiana appellate courts to predict North Dakota law); *Cogan v. Harford Mem'l Hosp*., 843 F. Supp. 1013, 1022 (D. Md. 1994) ("there are no cases in Maryland that address the issue of extending to independent contractors the right to sue for abusive or wrongful termination of an employment relationship," looking to California and Pennsylvania appellate courts to predict Maryland law); and *Wisniewski*

v. Med. Action Ind., Inc., No. 99-D-409, 2000 WL 1679612, at *3 (D. Colo. Sept. 27, 2000) ("Colorado courts have not addressed the issue," looking to California and New Jersey appellate courts to predict Colorado law).

Further, not all of the remaining nine state court decisions support Ameren's argument. For example, in *Prof'l Network, Inc. v. Washington Dep't of Soc. & Health Servs*., 2011 Wash. App. LEXIS 309 (Ct. App. Jan. 31, 2011), the Washington State Court declined to extend the tort of wrongful termination in violation of public policy to the particular contractual relationship at issue. The Court made clear that it would "leave open the question of whether the doctrine might extend to another context . . . ." *Id.* at *14. There was no flat out rejection of applying the doctrine to an independent contractor relationship. Also, for example, in *Perron v. Hood Industries, Inc*., 2007 WL 2458472, *8 (Ohio App. Aug. 31, 2007), a state statute limited application of the doctrine to an "employee."

Ameren argues that this Court must disregard the statement of the Oklahoma Supreme Court in *Rosenfeld v. Thirteenth Street Corp.*, 1989 Okla. LEXIS 105 at *13 n.2 (Okla. June 13, 1989) that it would recognize a public policy tort for independent contractors because the decision was withdrawn four years after it was issued. Ameren Brief 27, n. 11 (citing Westlaw). LEXIS says nothing about the opinion in *Rosenfeld* being withdrawn. In fact, it says "no subsequent appellate history." Given the confusion, it's not surprising to find one case and four law review articles (including the Bernt article) citing the *Rosenfeld* opinion even after it had been withdrawn.

Ameren claims that "courts have expressly rejected" the argument that "cases arising under federal civil rights laws support expansion of a common law wrongful discharge cause of action to independent contractors." Ameren Brief 29-30. Ameren points to two cases that rejected the application of *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996) (independent contractors can pursue claims under 42 U.S.C. §1983 for retaliation for free speech), to the public policy tort. *Sistare-Meyer v. Young Men's Christian Ass'n*, 67 Cal. Rptr. 2d 840 (Cal. App. 1997); *Vesom v. Atchison Hospital Ass'n*, 279 Fed. Appx. 624 (10th Cir. 2008). But these cases do not have the significance that Ameren suggests.

All the Court said in *Sistare-Meyer* was that *Umbehr* did not deal with common law whistleblower claims. It failed to explain why the reasoning in *Umbehr*, which dealt with whistleblowing in the analogous context of free speech claims, is not equally applicable to such common law claims. 67 Cal. Rptr. 2d at 845. Even less relevant is *Vesom*, where the Court in that case did not follow the reasoning in *Umbehr* because it could not. It was dealing with a state whistleblower statute which, by its terms, only allowed suit by employees. 279 Fed. Appx. 624, 639. The Court in *Vesom* was in no position to follow *Umbehr* by holding, contrary to the language of the statute, that independent contractors are protected from retaliation.

According to Ameren, "MO-NELA is simply wrong" in asserting that Section 1983 claims sound in tort. Ameren Brief 29, n. 12. In reality, it is Ameren who is "simply wrong" about the essential tort nature of claims brought under Section 1983.

Section 1983 is quite different from other statutes which, by their express terms or by necessary implication, cover both employees and independent contractors. It consists of essentially one sentence without any clarifying details. *See* 42 U.S.C. § 1983. Given its exceedingly general nature, courts have been compelled to look beyond the text of Section 1983 for guidance in interpreting it. Significantly, they have looked to the common law of torts to put flesh on its bones.

This reality emerges clearly from countless federal cases. The U.S. Supreme Court, for example, said: "We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution. Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986). Along the same lines, the Eighth Circuit observed, echoing the views of the other federal appellate courts, that "a § 1983 action is a type of tort claim." *Irving v. Dormire*, 519 F.3d 441, 448 (8th Cir. 2008); *see also Benson v. Cady*, 761 F.2d 335, 339 (7th Cir. 1985) ("a Section 1983 action is a tort damage action even though the duty the defendant is alleged to have breached is created by the Constitution or federal law").

It is noteworthy that the U.S. Supreme Court in *Umbehr* did not mention the text of Section 1983 when it held that independent contractors, as well as employees, are protected from retaliation for their whistleblowing. This is not surprising because there was no guidance to be found in it. Instead, the Court proceeded to undertake the kind of

policy analysis that courts typically use in deciding whether to recognize or expand a common law cause of action. *See* Boudin, Judge Henry Friendly and the Craft of Judging, 159 U. Penn. L. Rev. 1, 4 (2010) ("Some statutes . . . are nearly blank canvas and invite nothing very different than common law elaboration"). The reasoning in *Umbehr* is keenly relevant in this case and leads to the conclusion that B&A, along with other independent contractors, have a remedy under the public policy tort.

Ameren suggests that a difference in the burden of proof in Section 1983 cases makes them inapplicable to the issue before this Court. Ameren Brief 29, n. 7. There is no difference, however, other than a semantic one, between a "motivating factor" and a "contributing factor." Under both the public policy tort and Section 1983, the plaintiff is not required to prove that the defendant's reliance on a prohibited criterion was the sole or exclusive reason for the challenged employment decision; it is enough that it was a "contributing" or "motivating" reason for it. *Fleshner*, 304 S.W.3d at 93-95 (public policy tort); *Mays v. Springhorn*, 719 F.3d 631, 634-635 (7th Cir. 2013) (Section 1983). In addition, it is not true that employers lack a "same decision" defense under the public policy tort. To say that the employer would have made the same employment decision anyway, for some legitimate non-retaliatory reason, is to say that there was no causal connection between its reliance on the prohibited criterion and the alleged harm flowing from the employment decision, such as the loss of back pay. Such causality is, of course, required by Missouri jury instructions. *See* MAI 38.03.

C. Differences Between Employees and Independent Contractors do not Justify Withholding Whistleblower Protection for Contractors

In light of the increased use of independent contractors in our society, it is becoming increasingly important that courts recognize for them a cause of action for wrongful termination in violation of public policy. As the U.S. Supreme Court acknowledged when it extended whistleblower protection under the Sarbanes-Oxley Act, outside professionals bear significant responsibility for reporting violations of the law. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (U.S. 2014). That same rationale is apparent in this case, as one of B&A's oft-reported concerns dealt with Ameren's use of unqualified in-house personnel who improperly installed and repaired plumbing, creating risks to life, health, safety and the environment. If the only trained and qualified plumbers utilized by a company like Ameren are independent contractors, they will be the only ones capable of discovering and reporting on dangerous conditions and practices in Ameren's facilities. Public policy demands that such companies not be allowed to freely terminate such contractors.

Ameren states that no court has expressly adopted the reasoning of the law review article cited by B&A and NELA, Bernt, Wrongful Discharge of Independent Contractors, 19 Yale L. & Policy Rev. 39 (2000). Ameren Brief 31, n. 14. But Ameren overlooks the fact that at least one court has given it serious consideration. It cited the article with apparent approval and stated that "perhaps a case can be made for application [of the public policy tort] outside the traditional employment context [to independent contractors]." *Awana v. Port of Seattle*, 89 P.3d 291, 293-295 (Wash. App. 2004). The

court had no occasion to reach the issue, however, because the plaintiffs were employees of the independent contractor who fired them at the encouragement of the hiring business. They had an adequate tort remedy against both their employer (under the public policy tort) and against the hiring business (under a theory of tortious interference with contractual relations). *Awana*, 89 P.3d at 296. As a result, there was no need for the court to recognize a cause of action on behalf of independent contractors. However, it seemed receptive to the idea.

Ameren characterizes NELA's concern about the misclassification of employees as independent contractors as irrelevant. Ameren Brief 35, n. 18. But the U.S. Supreme Court did not think it was irrelevant when it decided *Umbehr*. To the contrary, it pointed out that allowing the government to terminate independent contractors in retaliation for their whistleblowing would give it an incentive to misclassify its employees as independent contractors. *Umbehr*, 518 U.S. at 679. As NELA pointed out, such misclassification is a widespread social ill. It is destructive of the public policies embodied in important state and federal laws that protect employees but not independent contractors. These include laws that require the payment of a minimum wage and overtime pay as well as those that forbid discrimination.

Ameren leaves the false impression that the Navigant Economics and Columbia University studies cited by NELA somehow support its position. Ameren Brief 36. They do not. Nobody disputes the fact, asserted by the authors of the two studies, that independent contracting has economic benefits that should not be destroyed by misguided regulation. But that is a long way from saying that hiring businesses should be allowed to

terminate independent contractors as a way to get even with them for reporting their unlawful conduct. There is not one word containing the slightest hint in the two studies that their authors would tolerate or condone such misconduct. It is inconceivable that they would, not only because it would contravene public policy, but also because it would discourage independent contracting. People would think twice about becoming independent contractors, as opposed to employees, if they know they can be terminated without any legal remedy for calling attention to the wrongdoing of those who hire them.

There is a further consideration. The Navigant Economics and Columbia University studies were concerned about unreasonable regulation that biases the marketplace away from independent contractors to employment relationships. *See* Navigant Economics study at 9, 30-31, 42; Columbia University study at 90-94. But that is not a problem here. If independent contractors are allowed to sue for retaliatory termination, businesses will not react by hiring employees instead of independent contractors for the obvious reason that they will not gain anything by such a move -- they will be subject to the same lawsuits for retaliatory termination by the employees.

There is no reason for this Court to defer to the legislature on the question whether the public policy tort extends to independent contractors, as suggested by Ameren. The courts did not defer when the question was whether a cause of action should be recognized for employees, an issue with much wider implications. Nor did Missouri courts defer to the state legislature when, over the course of the last thirty years, they answered a whole host of questions concerning the scope and meaning of the public policy tort. These include (1) whether it suffices for the plaintiff to have a good faith

belief that a violation of law had occurred; (2) whether the source of public policy can be federal law as well as state law; (3) whether the plaintiff can sue individual supervisors under the tort; (4) whether the protected activity must be the sole or exclusive cause of the challenged employment decision; (5) whether contract employees, in addition to at-will employees, have a remedy under the tort; and (6) whether the remedy extends to constructive discharges as well as actual discharges from employment. Ameren does not explain why Missouri courts should suddenly reverse course and, when the question is whether independent contractors are protected from retaliation, dump the issue in the lap of the legislature.

Such an approach is singularly inappropriate for the tort of retaliatory termination because it is grounded in the common law. It is the proper domain of the courts, not the state legislature, to expound upon the common law. *Carver v. Schafer*, 647 S.W.2d 570, 575 (Mo. App. 1983). There may be rare exceptions, as in the case cited by Ameren, where a common law issue carries with it a "vast array of ancillary issues" that are better left to comprehensive determination by the state legislature. *Powell v. American Motors*, 834 S.W.2d 184, 189 (Mo. banc 1992). But that is not the situation here.

D. Fear of Extortion and Other Abuse by Unscrupulous Independent Contractors

Ameren argues that an unscrupulous contractor could make a company like Ameren retain its services forever and use threats of lawsuits to create more work for itself. Ameren Brief 39-40. It may be true that independent contractors can get more work, and therefore more money, if they point out violations of the law by their

principals. But this is as it should be; financial incentives *should* align with conduct that furthers Missouri public policy.

Ameren contends that some independent contractors may falsely tell their principals that they are violating the law in an effort to get more work. But if the principals refuse to authorize the work or stop using the contractors altogether, they cannot be successfully sued under the public policy tort. This is because the contractors will be unable to prove, as they must, that a violation of the law existed or that they had a good faith belief that it did.

It is also not true that only independent contractors, and not employees, would have an incentive to misuse the public policy tort for their own personal benefit. Employees who are concerned that they may soon be discharged, may threaten to report, or actually report, the real or purported wrongdoing of the business in an effort to preserve their jobs. Some employers may be reluctant to fire such employees for fear of inviting a lawsuit charging them with retaliation. Yet this possibility of abusive conduct by *some* employees or contractors is not sufficient to bar retaliatory termination claims by *all* employees or contractors. Such claims are necessary to protect the public, not just to protect whistleblowers.

The "unscrupulous contractor" argument sounds plausible on the surface. It is in fact empty and meaningless because it is disconnected from reality. It does not come close to justifying a complete ban on all retaliation lawsuits brought by all independent contractors – the vast majority of whom are honest rather than dishonest.

Ameren's amici curiae suggest that "at least several courts have refused to extend the common law wrongful discharge in violation of public policy cause of action to independent contractors to avoid this very type of mischief," citing as the only example the case of *Harris v. Atl. Richfield Co.*, 14 Cal. App. 4th 70 (Cal. Ct. App. 1993). The court in *Harris* never said that extending whistleblower protection to independent contractors would encourage them to manipulate their hiring entities into authorizing more work. In fact, no court has ever expressed this concern, except the Court of Appeals in the present case. The crux of the court's analysis in *Harris* was that contract remedies are sufficient to protect independent contractors from retaliatory terminations. 17 Cal. Rptr. 2d at 656. Yet this is the very idea that was rejected by this Court in *Keveney*. 304 S.W.3d at 103.

The court's suggestion in *Harris* that extending legal protection to independent contractors would risk "turning every breach of contract dispute in a punitive damage claim" is farfetched. 17 Cal. Rptr. 2d at 656. Most terminations of employees or independent contractors will not involve a breach of contract at all, since most of them involve at-will relationships. Moreover, most breaches of contract, whether involving employees or independent contractors, will not run afoul of statutes, regulations or other sources of public policy. For those that do, however, there must be a remedy in tort including, in appropriate cases, punitive damages.

Ameren cites the Missouri Attorney General's compilation of consumer complaints to argue that consumers have much to fear from allowing independent contractors whistleblower protection. Ameren Brief 41. So far as appears, however, the

complaints about home repair contractors do not include anything about them deceiving homeowners into making unnecessary repairs. To the contrary, they include complaints about such matters as storm chasers who go door-to-door asking for money up front but then doing little or no work.

Ameren's argument runs into trouble on another ground. The vast majority of independent contractors work for businesses -- not homeowners. These businesses are not staffed by hapless or naïve people; the idea that they will turn over substantial sums of money to unscrupulous independent contractors without verifying the need for the claimed repairs is unrealistic. This may help to explain why there is no empirical evidence that independent contractors have engaged in the kind of widespread abusive conduct hypothesized by Ameren and its amici.

E. B&A was a Whistleblower

Ameren's arguments that B&A is not entitled to protection because it was not a whistleblower must be rejected. Ameren Brief 42-46. Ameren did not assert either of those arguments as grounds for summary judgment, but even if it did, they have no merit.

Words seize priority over substance with Ameren's argument that B&A was not a whistleblower because it did not report wrongdoing to its superiors. If there are good reasons for allowing independent contractors to bring retaliatory termination claims, as there are, then the mere fact that they cannot report the wrongdoing to a "superior" is hardly a good reason for banning such claims. The purpose of requiring a whistleblowing employee to report the unlawful conduct to a superior is to ensure that corrective action is taken to stop it. *Faust v. Ryder Commercial Leasing,* 954 S.W.2d 383, 390-391 (Mo.

App. 1997). But that purpose is equally well-served by requiring a whistleblowing independent contractor to bring the wrongdoing to the attention of somebody at the hiring business who, although not a "superior" in a technical sense, nevertheless has the authority to correct it. That is exactly what Plaintiff B&A did in this case. B&A reported the unlawful conditions and conduct to the facility managers who had the authority to correct the issues, including the Director of Building Services, and it then reported its concerns to the Vice President of Environmental Safety and Health, and to the CEO of Ameren.

Ameren also contends, for the first time in this Court, that B&A's claim of retaliatory termination in violation of public policy fails because it was part of its job duties to blow the whistle on Ameren's wrongdoing. Significantly, no court in Missouri or in any other jurisdiction has ever imposed such a restriction on the public policy tort. The one case cited by Ameren did not involve a common law claim of retaliatory termination and, in any event, is distinguishable because the plaintiff was terminated because of the way she performed her job not because of her whistleblowing. *Maro v. Sizemore Security,* 678 So.2d 1127, 1128 (Ala. 1996).

Ameren's argument fails to take into account not only relevant case law but also relevant policy considerations. It would not be reasonable to adopt a rule which would allow businesses to retaliate against employees and independent contractors with impunity for reporting unlawful conduct merely because it was part of their job duties to make the report. To the contrary, such a rule would impose heavy costs to society without any offsetting benefits.

The source of Ameren's argument, though not acknowledged by it, is the U.S. Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). There, the Court drew a distinction in free speech cases between a government employee's statements made outside the scope of his official duties (and therefore as a private citizen) and statements made pursuant to his official duties (as an agent of the government). The former were deemed protected from adverse employment action while the latter were not. *Garcetti*, 547 U.S. at 701.

The rule set forth in *Garcetti* has no place in the common law tort of retaliatory termination because its rationale does not fit. The Supreme Court pointed out that public employees often occupy trusted positions in society and, when they speak, they can express views that may contravene government policies or may impair the proper performance of government functions. *Garcetti*, 547 U.S. at 418-419, 422-423. That is not a concern when the government employee is speaking as a private citizen or, as in the present case, is not a governmental employee at all. *Id*. To import the *Garcetti* rule into the public policy tort would be senseless. It would mean that a whole class of employees and independent contractors who suffer retaliation for calling attention to unlawful conduct would be left without any remedy. And this harm to Missouri public policy would not be justified by any of the benefits identified by the Supreme Court in *Garcetti*. The law is not so absurd as to endorse such a result.

III. B&A'S CLAIM FOR BREACH OF CONTRACT IN VIOLATION OF PUBLIC POLICY AND THE DUTY OF GOOD FAITH AND FAIR DEALING IS COGNIZABLE IN MISSOURI

B&A and Ameren had a contractual relationship that outlined the types of services B&A would provide and how Ameren would pay for those services. It contained no stated duration. The two cases on which Judge Moriarty and Ameren primarily rely are distinguishable.

Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822 (Mo. App. W.D. 1985), involved an employee trying to avoid the at will doctrine. It was decided before any Missouri court recognized the public policy exception to the employment at will doctrine. It rejected, without discussion, plaintiff's claim based on an implied covenant of good faith and fair dealing.

Newco Atlas, Inc. v. Park Range Construction, Inc., 272 S.W.3d 886 (Mo. App. W.D. 2008) involved the termination of an at will distributorship contract. The court held there was no need to consider the covenant of good faith and fair dealing because Missouri applies the recoupment doctrine to such contracts, imputing "a duration equal to the length of time reasonably necessary for a dealer to recoup its investment, plus a reasonable notice period before termination." 272 S.W.3d at 893. Thus, there was no need for the additional remedy based on the covenant of good faith and fair dealing. *Newco* supports the theory that when an at will contract is terminated for a wrongful reason Missouri courts provide a remedy.

IV. PUNITIVE DAMAGES SHOULD BE AVAILABLE FOR VIOLATION OF PUBLIC POLICY

There is nothing novel about the public policy doctrine. A jury can determine whether Ameren's agents in the building services department acted with evil motive or reckless indifference when they terminated B&A's services, based upon a trumped up reason, when their true motive was to retaliate against B&A because it was exposing to the highest levels of Ameren their serious misconduct that created risks to life, health, safety and the environment.

V. B&A PROVIDED SUFFICIENT FACTS TO SUPPORT ITS CLAIM FOR TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

The bullet points in the argument section of B&A's Brief contain a summary of facts, in the light most favorable to B&A, that support the improper means used by the individual defendants and their self-interest. The citations to the record appear in the fact section of the brief. B&A Brief 21-24.

"Personal animus" is not "beside the point." Ameren Brief 82. It is proof of acting for "personal, as opposed to corporate" interests. *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 252-253 (Mo. banc 2006).

CONCLUSION

For the reasons stated above, this Court should reverse the order granting summary judgment, reinstate Plaintiff's claim for punitive damages, and remand this case for further proceedings.

Respectfully submitted,

/s/ Kenneth M. Chackes
Kenneth M. Chackes, MO Bar #27534
CHACKES, CARLSON, & GOROVSKY, LLP
906 Olive Street, Suite 200
St. Louis, Missouri 63101
Phone: (314) 872-8420
Fax: (314) 872-7017
kchackes@cch-law.com

/s/ Bruce A. Morrison
Bruce A. Morrison, MOBAR #38359
The Morrison Law Firm
319 North Fourth Street, Suite 800
Saint Louis, Missouri 63102
Phone: (314) 397-2474
Fax: (314) 231-4184
bamorrison@bamorrisonlaw.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of October, 2016 the foregoing Substitute Reply 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:

Robert T. Haar
Lias A. Pake
Jozef J. Kopchick
1010 Market St., Suite 1620
St. Louis, MO 63101
(314) 241-2224
(314) 241-2227 (facsimile)
rhaar@haar-woods.com
lpake@haar-woods.com
jkopchick@haar-woods.com

/s/ Kenneth M. Chackes

CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing Substitute Reply Brief of Appellant complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 7721 words as determined by MS Word 2010. The foregoing Brief includes all the information required by Supreme Court Rule 55.03.

Dated: October 11, 2016 */s/ Kenneth M. Chackes*