SC96212

IN THE MISSOURI SUPREME COURT

BARBARA A. BARTLETT, et al., Appellants

v.

MISSOURI DEPARTMENT OF INSURANCE, et al., Respondents

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon Beetem

Case No. 13AC-CC00103

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a grant of summary judgment in a Circuit Court action for relief in the form of mandamus. The judgment and order granting summary judgment was issued by the Circuit Court of Cole County. Cole County is in the Western Appellate Division. This appeal was originally pursued at the Western District; it dismissed the appeal by opinion and on application of Respondent, this matter was transferred pursuant to Rule 83. As such, this Court has jurisdiction to hear the appeal of this matter pursuant to Article V, MO. CONST.

STATEMENT OF FACTS

This was a mandamus action. (Legal File at page 19, hereafter abbreviated as "LF00__"; LF0796) The right sought to be enforced was statutory. (LF0019) Petitioners sought relief predicated upon Chapter 374, Revised Statutes of Missouri (Hereafter "R.S.Mo.") Chapter 374, R.S.Mo., establishes and controls the operation of the Department of Insurance. While the entire chapter is relevant to the issues in this case, two statutes stand out in particular. The first is § 374.110 R.S.Mo. (2001) (A-9). It provides:

> 374.110. 1. The director of the department of insurance, financial institutions and professional registration, through the chief examiner, may examine into the affairs and good faith of any person who is engaged in, or is claiming or advertising that he is engaged in, organizing or receiving subscriptions for or disposing of stock of, or in any manner aiding or taking part in the formation of or business of an insurance corporation, association or organization and the chief examiner shall conduct or assist in conducting the examination of insurance companies, associations and organizations and reciprocal or interinsurance exchanges as required by law, and do such other things pertaining to the department as the director may direct.
>
> 2. The director may also employ one or more expert actuaries or

examiners to assist the chief examiner in making such examinations.

3. The fees and expenses in all cases to be reasonable and to be paid by the company, association, organization or reciprocal or interinsurance exchange being examined upon accounts approved by the director.

§ 374.110 R.S.Mo. The statute protects insurance companies by requiring the Director to impose only reasonable fees and expenses on the companies being examined. One way to insure that only reasonable expenses and fees are charged is to standardize the costs associated with salaries for auditors and examiners to a national scale. This is accomplished in § 374.115 R.S.Mo. (2001) (A-10). It states:

Insurance examiners appointed or employed by the director of the department of insurance, financial institutions and professional registration shall be compensated according to the applicable levels established and published by the National Association of Insurance Commissioners.

§ 374.115 R.S.Mo.

The term "examiner" is defined by statute. § 374.202.2(4) R.S.Mo., defines "Examiner" as "any individual or firm having been authorized by the director to conduct an examination under sections 374.202 to 374.207." All of the individuals who were relators in this case were examiners that fit within their relevant National

Association of Insurance Commissioners (Hereafter, "NAIC") categories. (LF0857-883; 956)

Relators sought relief by way of Mandamus (LF0040). Early on Defendants filed a motion to dismiss asserting that relief by way of mandamus was not available. The Circuit Court held otherwise saying "the statute at issue clearly sets forth the right to be enforced, thus making mandamus an appropriate remedy." (LF0040). Neither the statutes nor the requested remedy changed during the course of the litigation.

Relators set out in their evidence before the Circuit Court, facts that established that the compensation requirements set forth in § 374.115 R.S.Mo. (2001) applied to Missouri Financial Examiners and Market Conduct Examiners employed by the Missouri Department of Insurance. (LF0961-963) Relators also included various job postings from the Department of Insurance over the relevant time frame. (LF0852-883) The records of the National Association of Insurance Commissioners were placed into evidence through affidavit of their custodian. (LF0805-810; 974-979) The records demonstrated the rates published by the NAIC. (LF0974-76)

The Department's job postings for the job title "Insurance Financial Examiner I/II/III" were in evidence. Those records state that "[t]his position participates in all phases of the financial analysis and financial examination of Missouri domestic and foreign insurers to determine solvency and statutory

compliance. Work includes evaluating insurers' financial operations, management practices, and recorded assets, liabilities, surplus and capital for compliance with statutes, rules, and regulations…" (LF0852-883).

In order to perform examinations and be paid according to NAIC standards, Insurance Financial Examiners are required to attain an AFE designation within the first two years of employment and a CFE designation within the first three years of employment. (LF0856 "Necessary Special Requirements").

Prior to 2001, Missouri's Department of Insurance paid its examiners according to the pay schedules set out by NAIC. The department's own pre-2001 pay records show that the pay rate for insurance financial examiners (specifically the Relators in this case) is set by the NAIC pay rate per statute. "Due to Receipt of CFE designation effective 10-26-95[,] Employee is being given the salary advancement per NAIC statutes" (LF0884); "Pay rate as set by statute 374.115" (LF0885); "Received NAIC pay rate, per Statute." (LF0886); "Employee received salary advancement recommended by NAIC in compliance with 374.115 RSMO." (LF0887). Prior to 2001 the Director of the Department of Insurance had strictly followed the statutory mandate.

Relators, Barbara Bartlett and Shawn Hernandez were issued NAIC Financial Conditions Examiners Handbooks and were required to follow the guidelines and procedure in the books when conducting examinations. (LF0982-84); (LF0988-90). Up until 2002 relators were paid as mandated by the statute at

the NAIC salary level for their position. That changed suddenly in 2002. There was no corresponding change in the statute (See, § 374.115).

The memorandum of Kirk Schmidt, the Chief Financial Examiner, dated July 12, 2002, sent to all examiners and audit managers, states that "the examiners will not be getting a pay increase in accordance with the NAIC rates" in the year of 2002. (LF0960) The memorandum went on to state:

> This is official. I know many of you are worried about the possibility of some day losing this NAIC pay scale altogether. I think this would be devastating to our examination staff as I know many of you would not be willing to travel and sacrifice your family and personal lives if your pay were indefinitely frozen or decreased drastically. I wanted you to know that this is not the intention of this current year pay freeze.

(LF0960).

The memorandum to the examiners and audit managers ended with this statement:

> My advice to all of you is to just keep performing at the high level you always have and things will get better in the future. We are currently in an environment where just hanging on to what you have is the best we can hope for.

(LF0960).

In spite of the Chief Financial Examiner's statements about the Department's expressed intentions, the Department never returned to the NAIC standards while relators remained employed. At no time has the Legislature seen fit to mandate the Department to use a lower pay scale by statute. (See, § 374.115 R.S.Mo.)

One logical inference from the memorandum, as well as the history of payroll changes referenced earlier, is that market conduct examiners and financial examiners were to be treated as Insurance Examiners as defined by the State as they were paid the established statutory rate as required by law prior to the year 2002. (LF0960).

Throughout the litigation the Department took the position that it was not obligated to pay the NAIC rates. But the evidence was (as shown at LF0884-87) that the Department had been paying these rates all along. Perhaps more importantly, the Department sent representatives to NAIC meetings and those representatives participated in the discussions regarding the pay scales, and voted on and ratified the rates of pay. Joe Haverstick was the Respondents' Deputy Chief Financial Examiner from the years 2001 through 2008 and represented Missouri as a member of the NAIC's Financial Examiners' Qualification and Compensation Technical Group of the Examination Oversight Task Force ("FEQC"). (LF0888-951).

The FEQC, with Joe Haverstick representing Missouri, met in Dallas, Texas on September 11, 2000, and voted to increase the salary for all Financial Examiners with AFE and CFE designations. (LF0900; 0961-63). The FEQC met again in New Orleans, LA, on September 11, 2002, Joe Haverstick was present representing Missouri. (LF0961-63) (LF0907). At this meeting the Group members voted to raise the Financial Examiners' pay rates. (LF0907).

The FEQC held a conference call on August 9, 2006, with Joe Haverstick representing Missouri. During this meeting Mr. Skiera, representing Illinois, motioned to adopt a 2.5% pay increase for Financial Examiners. Joe Haverstick seconded the motion and the motion passed. (LF0915).

The Department has been inconsistent in applying the pay scales in the NAIC manuals and ceased to use these requirements during certain periods. (LF0961-63). The Department would deny pay increases even though the employee would be entitled to such pay increase according to the NAIC manuals. (LF0961)

Relators provided extensive documentation of the amounts of money they had received in salary during the period at issue in the complaint. (See, e.g., LF0958 [Relator Hernandez])(LF0959 [Relator Bartlett]) Relators also provided evidence of what the pay rates approved by the NAIC were for the period referenced in the complaint (LF0915, 918, 922, 927, 933, 945, 950).

Respondents opposed Relator's motion for summary judgment and sought summary judgment in defense citing a variety of reasons. See generally, LF0320-

0618. The Circuit Court, however, only ruled on two of those defenses. It said the following:

> The Court finds that Relators have failed to establish a basis for mandamus in that they cannot establish what they should have been paid, except to the extent that it should be more. Mandamus requires a showing of a clearly established right. (LF2120).

This ruling conflicted with the Court's prior ruling (LF0040) in that neither the remedy sought nor the statute changed during the course of the litigation. The Circuit Court also opined:

> Independently, while as this Court has previously found that mandamus is the proper cause of action to compel a payment, the doctrine of sovereign immunity bars this action under the facts established.

LF2120. The Court's order provides no additional explanatory text and does not indicate the reason the Court apparently vacated its prior holding.

This appeal followed to the Western District. That Court, on November 29, 2016, dismissed the appeal. That opinion concluded that Appellants had a right to bring a Declaratory Judgment action to establish their right to be paid according to the NAIC rates. It effectively vacated the trial court's erroneous rulings on sovereign immunity, while asserting that the availability of a right under the

Declaratory Judgment statute effectively nullified the right to bring a mandamus action.

Respondent sought transfer from this Court which was granted on March 31, 2017.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO RELATOR AND GRANTING SUMMARY JUDGMENT TO RESPONDENT FINDING THAT RELATORS' CLAIMS WERE BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY BECAUSE SOVEREIGN IMMUNITY DOES NOT BAR LAWSUITS OTHER THAN THOSE SEEKING TORT STYLE DAMAGES AND THE MANDAMUS CAUSE OF ACTION HERE WAS BASED ON ENFORCEMENT OF A CLEAR STATUTORY MANDATE, IN THAT THE OBLIGATION SOUGHT TO BE ENFORCED WAS IN THE NATURE OF A CONTRACT DEBT, NOT IN THE NATURE OF A TORT AND MANDAMUS HAS TRADITIONALLY BEEN USED IN THIS MANNER.

Kubley v. Brooks, 141 S.W.3d 21 (Mo. banc 2004)

Bush v. State Highway Comm'n of Mo., 329 Mo. 843, 46 S.W.2d 854 (1932)

V.S. DiCarlo Construction Co., Inc. v. State, 485 S.W.2d 52, 54 (Mo.1972)

State ex rel National Life Insurance of Montpelier v. Hyde, 292 Mo. 342, 241 S.W. 396 (1922)

§ 374.115 R.S.Mo. (2001)

II. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO PLAINTIFF AND GRANTING SUMMARY JUDGMENT TO RESPONDENT FINDING THAT RELATORS HAD NOT ESTABLISHED A BASIS FOR RELIEF IN MANDAMUS BECAUSE THE RIGHT TO RELIEF IS FOUND IN § 374.115 R.S.Mo. (2000), IN THAT (A) THE TRIAL COURT'S CONCLUSION THAT RELATORS COULD NOT ESTABLISH HOW MUCH THEY SHOULD HAVE BEEN PAID CONFLATED THE RIGHT TO RELIEF WITH THE AMOUNT OF RESTITUTION OWED AND (B) THE RIGHT TO RELIEF IN MANDAMUS IS ESTABLISHED BY DEMONSTRATING A VIOLATION OF THE RIGHTS SET OUT IN THE STATUTE.

.*Jones v. Carnahan,* 965 S.W.2d 209, 213 (Mo.App.1998)

Maxwell v. Daviess County, 190 S.W.3d 606, 610 (Mo.App. W.D.2006)

United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy, 208 S.W.3d 907, 909 (Mo. banc 2006)

Williams v. Nat'l Cas. Co., 132 S.W.3d 244, 249 (Mo. banc 2004)

§ 374.115 R.S.Mo. (2001)

ARGUMENT

SUPPLEMENTAL BRIEFING ON TRIAL COURT AND APPELLATE JURISDICTION

A. Introduction

Appellant believes that the Court of Appeals reached the wrong result on the underlying facts, but the right result on the procedural law. Rule 84.04 gives no guidance on what to do when a procedural/jurisdictional question arises that is outside the confines of the rules dictated for Points Relied On. This case was apparently transferred because of matters outside those presented to the Court of Appeals, just as the Court of Appeals decision is predicated on matters not put before the Court of Appeals directly in briefing. For this reason Appellant is adding this portion of the brief as "Supplemental Briefing" precisely because it does not relate to the trial court's orders or actions appealed from.

In spite of this, Appellant would, borrowing from the standards enunciated in Rule 84.04, phrase this briefing in this manner, should this Court require a Point Relied On in order to consider the briefing:

THE WESTERN DISTRICT PROPERLY INTERPRETED THE IMPACT OF A CHANGE IN THE PROCEDURAL LAW OF MANDAMUS ON THE CASE PENDING IN COLE COUNTY CIRCUIT COURT BECAUSE THE PROCEDURAL REQUIREMENTS OF RULE 96 WERE NOT FOLLOWED, IN

THAT (A) A SUMMONS WAS ISSUED INSTEAD OF A PRELIMINARY WRIT AND (B) A REMEDY AT LAW EXISTS BY DECLARATORY JUDGMENT.

B. Standard of Review

The Western District, just as this Court, has a duty, *sua sponte*, to determine its jurisdiction. *City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Ruecking Const. Co.*, 212 S.W. 887 (1919); *Committee for Educational Equality v. State*, 878 S.W.2d 446 (Mo. banc 1994). It is thus right and proper that this court undertake a similar jurisdictional analysis. A question as to the subject-matter jurisdiction of a court is "purely a question of law, which is reviewed *de novo*." *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n,* 102 S.W.3d 10, 22 (Mo. banc 2003); *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 476 (Mo. 2009)

C. Appellants Did Not Have the Benefit of *Boresi* When They Pleaded Their Action.

As noted in *U.S. Dept. of Veterans Affairs v. Boresi*, 396 S.W.3d 356 (Mo. banc 2013), appellate courts in Missouri had frequently held that Mandamus cases arising by summons could be treated as cases where a preliminary writ had been issued, and thus, could be appealed to the Court of Appeals. *Id*., fn. 1. See also, concurrence of Fisher, J., at 396 S.W.3d 364. Only Judge Fisher's concurrence, and footnote one, devote substantive time in the opinion to the procedure through which

the writ in that case arose, although the Court concluded that the merits of the matter warranted review[1]. *Boresi* did not appear to announce a hard and fast rule that writs initiated by summons would be refused appellate review. The Court of Appeals opinion was based primarily on the *Boresi* footnote.

Still, trial counsel for Appellant must take responsibility for the manner in which counsel initiated this matter. Had counsel insisted on a writ issuing at the outset a different result might have obtained. Counsel should not have avoided, even unintentionally, the procedural requirements of the rule. The error belongs to the Appellant here.

D. The Failure to Apply *Boresi*, *Powell*, and *Tivol* by the Trial Court Divested it of Jurisdiction.

It is difficult to quarrel with the jurisdictional analysis applied by the Western District in this case. After this Court's *Boresi* decision, the Western District had a chance to review a similar procedural issue in *Powell v. Department of Corrections*,

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[1] A similar point should be made here. While the parties did not have the benefit of *Boresi* to guide them at the outset, it must be conceded that the State did raise the procedural objection numerous times. Still, having worked on this matter through litigation to this point, requiring a new round of litigation in a different procedural and legal context might well argue for the result taken in *Boresi* of reaching the merits.

463 S.W.3d 838 (Mo. App. W.D. 2015). As here, the trial court issued a summons and applying *Boresi* the Western District held that it lacked jurisdiction and dismissed the appeal[2]. The Western District next took up this issue in its opinion in *State ex rel. Tivol Plaza, Inc. v. Missouri Commission on Human Rights*, 2016 WL 1435970. This case has been accepted for transfer by this Court and has not, at this writing, been decided.

Tivol involved a mandamus petition filed against the Missouri Human Rights Commission. It was initiated by summons and following *Boresi* and the Western District's prior holding in *Powell* the Western District applied the same standard and dismissed the appeal. Judge Ahuja, in a dissent, suggested that the appellate court could exercise jurisdiction and could reach the appeal because nothing in *Boresi* specifically prohibited it. He also made the point – one that would not apply here – that the opponent there had not raised the procedural issue below[3].

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[2] *Powell* involved a prisoner in the Department of Corrections who wanted the Court to modify his prison sentence. Powell was pro se before the Western District, indicating that perhaps his briefing on procedural issues may have suffered from a lack of zealous advocacy by counsel.

[3] As noted in the Western District opinion, the Division of Insurance raised the issue of writ procedure several times in the court below.

It is important to note that the procedural requirements of Rule 94 protect both the trial court's processes as well as the rights of the defendant by requiring that the Court make an initial determination as to the availability and wisdom of relief before issuing a writ. Rule 94.04. This promotes judicial efficiency in that should the court apply the traditional standards for extraordinary writs (for example, that the right sought to be compelled is not clear and definite) it can at that point deny the writ. If it denies the preliminary writ the remedy for the applicant is to immediately file the writ in the next higher court.

E. A Remedy At Law Exists That Appellants Will Pursue

As the Western District notes in its opinion, a remedy at law in the form of a declaratory judgment action pursuant to § 527.020 R.S.Mo. (2016) (A-11), allows Appellants here to seek relief that can be used to determine their right to compensation under the statute. If those rights are adjudicated in their favor, the resulting declaratory judgment could then be used to compel a remedy under mandamus, the right to such payment having been duly adjudicated. The summary judgment issued in this case would be a nullity due to lack of jurisdiction of the circuit court.

F. Should The Court Decide the Jurisdictional Question in Favor of Jurisdiction, Plaintiff's Original Briefing Establishes that Summary Judgment Was Improvidently Granted.

As noted in the introduction to this briefing, Appellant believes that it has a clear, present and existing right to be paid in accordance with the statute. The Circuit Court's factual findings and legal conclusions are erroneous as presented in the briefing that follows.

I. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO RELATOR AND GRANTING SUMMARY JUDGMENT TO RESPONDENT FINDING THAT RELATORS' CLAIMS WERE BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY BECAUSE SOVEREIGN IMMUNITY DOES NOT BAR LAWSUITS OTHER THAN THOSE SEEKING TORT STYLE DAMAGES AND THE MANDAMUS CAUSE OF ACTION HERE WAS BASED ON ENFORCEMENT OF A CLEAR STATUTORY MANDATE, IN THAT THE OBLIGATION SOUGHT TO BE ENFORCED WAS IN THE NATURE OF A CONTRACT DEBT, NOT IN THE NATURE OF A TORT AND MANDAMUS HAS TRADITIONALLY BEEN USED IN THIS MANNER.

A. STANDARD OF REVIEW

In this court-tried case the Circuit Court's judgment will be affirmed unless no substantial evidence exists to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *Kubley v. Brooks*, 141 S.W.3d 21 (Mo. banc 2004). Appellants/Relators assert it both erroneously declares the law with regard to mandamus, and to sovereign immunity, and assert that the court has erroneously applied the law. Under the facts as pleaded, sovereign immunity works a profound

injustice and effectively allows no remedy for a violation of a statutorily-created right.

B. SOVEREIGN IMMUNITY DOES NOT APPLY TO EQUITABLE ACTIONS

In the trial court, the Department of Insurance argued this matter as though it was a tort action. It made reference to damages and positioned this action as though it was based on a tort theory of damages emanating from a breach of duty. The trial court provided no rationale for why it found that sovereign immunity applied:

> Independently, while as this Court has previously found that mandamus is the proper cause of action to compel a payment, the doctrine of sovereign immunity bars this action under the facts established.

(LF2120). This lone sentence provides no illumination for what facts established sovereign immunity, or whether this immunity was provided by statute or common law. Irrespective of whether the immunity asserted is based on statute or common law, it fails here because the statutes empower the Courts to grant petitions for mandamus relief, and because the Director of the Department of Insurance is subject to mandamus relief as an officer of the state.

1. SOVEREIGN IMMUNITY UNDER § 537.600.1 ONLY PERTAINS TO TORT ACTIONS

In *Kubley v. Brooks*, 141 S.W.3d 21 (Mo. banc 2004) the Supreme Court made clear that sovereign immunity under § 537.600 applied only to tort actions, and not to actions for quasi-contractual debts:

> As is evident, section 537.600 expressly states it applies *only* to suits in tort. The purpose of section 537.600 was to reinstate sovereign immunity in tort in Missouri as it had existed prior to its abrogation by judicial decision on September 12, 1977, in *Jones v. State Highway Commission*, 557 S.W.2d 225 (Mo. banc 1977). Section 537.600.2 does not address or govern the liability of the State under non-tort theories of recovery.

Id. at 29 (emphasis in original).

Kubley involved a woman who asserted that the Division of Child Support Enforcement had erroneously collected child support pursuant to an invalid order. The state asserted the defense of sovereign immunity and the Court found that the enabling statute authorized the "money had and received" action against it. The Court reasoned that suits for money had and received are not based on express contract, but rather on equitable principles permitting recovery of money from a

defendant that, in all justice and fairness, the evidence shows the defendant should not keep. *Id., citing Palo v. Stangler,* 943 S.W.2d 683, 685 (Mo.App. E.D.1997).

2. MANDAMUS PRESERVES GOVERNMENT ACCOUNTABILITY

Indeed, accountability of state agencies seems to undergird this analysis given that *Bush v. State Highway Comm'n of Mo.*, 329 Mo. 843, 46 S.W.2d 854 (1932) held that finding a state entity "not liable to the discipline of the courts in proper cases" – like this one trying to enforce a statutory duty – "would be like the monster of whom we read in Mrs. Shelley's Frankenstein (1817).... The state of Missouri has not created such a monster." *Id.* at 856, and *cited with approval* in *Kubley*, 141 S.W.3d at 30.

The underlying principle in this action is the Legislature's use of the word "shall" in a statute directing payment of compensation. When it uses mandatory statutory language directing the Department of Insurance to pay its examiners in accord with the statute (§ 374.115 R.S.Mo. dictates that examiners are to be compensated in accord with NAIC pay scales), it effectively creates a statutory contract for the payment of specific wages at nationally-published rates[4].

[4] As noted in the statement of facts, the State of Missouri sent representatives to the NAIC meetings, had an opportunity for input into and advocacy (either in favor of or opposed to) the NAIC rates. (LF0900; 0961-63).

State employees should be able to rely upon the duly-enacted promise of the Legislature as it relates to their compensation[5]. As Missouri courts have always held, when the State contracts for services it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance, just as any private citizen would do by contracting. *V.S. DiCarlo Construction Co., Inc. v. State*, 485 S.W.2d 52, 54 (Mo.1972). The Legislature, by dictating to the state Department of Insurance the compensation its examiners will be paid (by reference to nationally-published standards), has created an obligation (and a clearly-expressed right) that may be enforced through mandamus. As the Court said in

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5 This Court has often spoken of the primacy of the Legislature's language when interpreting statutes. Statutory construction is a matter of law. *Theerman v. Frontenac Bank*, 308 S.W.3d 756, 764 (Mo.App. E.D.2010). When engaging in statutory construction, the primary purpose is to ascertain the legislature's intent from the language used to give effect to that intent if possible. *Morse v. Director of Revenue*, 353 S.W.3d 643, 645 (Mo. banc 2011). "Presumably, the legislature does not insert superfluous language in a statute." *Cook v. Newman*, 142 S.W.3d 880, 889 (Mo.App. W.D.2004). See also, *Beard v. Missouri State Employees' Ret. Sys.*, 379 S.W.3d 167, 169 (Mo. banc 2012)(holding that where language required survivors, trial court properly denied benefits).

State ex rel. Kansas City Symphony v. State, 311 S.W.3d 272 (Mo. Ct. App. W.D. 2010):

> We agree with the Symphony that mandamus is an appropriate remedy to compel public officials to perform specific "ministerial" or mandatory duties, such as those referenced in *State ex rel. Zoological of Control v. City of St. Louis*, 318 Mo. 910, 1 S.W.2d 1021, 1028 (1928) (City had mandatory duty to levy and collect tax that was authorized by state law and approved by City voters).

Id. at 276. While the *Kansas City Symphony* court found the duties were discretionary and not mandatory, the statute here is clear and unambiguous and supports a mandamus remedy[6]. Here, the statute set a specific standard (the NAIC standard) for payment of examiners. The state lived up to that standard for many years, then, arbitrarily and without resort to the Legislature, simply refused to comply with the statutes. The difference between what the examiners were to be paid statutorily, versus what they were actually paid, created a debt owed by the state. Missouri law requires any employee of the Department of Insurance must be paid "in the same manner as provided by law for the payment of other expenses of

[6] Indeed, the trial court so held in denying the Defendant's motion to dismiss. See LF0040.

the insurance department." *Barker v. Leggett*, 295 S.W.3d 836, 839 (Mo. Ct. App. 1956).

In *Barker*, attorneys brought an action against the Superintendent of the Department of Insurance for payment of legal services provided to the department. The department refused to pay, and the attorneys sued. The Court held that attorney Barker must be paid, if at all, pursuant to the statutes. That is precisely what the Appellants seek here: payment as dictated by the statutes.

3. MISSOURI STATUTES PERMIT ACTIONS IN MANDAMUS TO COMPEL STATE OFFICERS TO PERFORM NON-DISCRETIONARY DUTIES

Missouri law is clear that a mandamus action lies against an executive officer of the Department of Insurance when he refuses to perform a mandatory duty. In *State ex rel National Life Insurance of Montpelier v. Hyde*, 292 Mo. 342, 241 S.W. 396 (1922) the state treasurer refused to receive the amount claimed by an insurance company to be due as a tax on premiums. The company sought mandamus to require the treasurer to receive the money. The treasurer sought to refuse and certify the company as delinquent, which would have triggered suspension.

The issue was one of statutory interpretation. The statute imposed a tax on premiums received. The petitioner, a mutual insurer, allowed rebated premiums to be used to offset premiums due from its insureds. It thus collected less money in premiums from insureds because insureds were allowed to offset premiums with rebates. The state sought to impose tax on the entirety of the premiums, not simply

those collected from insureds. The court interpreted the statute favorably to the insurer. Mandamus – to compel acceptance of the tax and compel the superintendent of insurance to certify that the amount offered was the amount due – was held to be the proper remedy in that case. *Id*. at 241 S.W. 400.

Just as in *Montpelier Insurance*, the Director here has a duty imposed by statute. The statute's language is clear and unequivocal. The statute does not provide the Director any discretion with respect to the wages to be paid to insurance examiners. The language is not ambiguous. Unlike *Montpelier Insurance*, this is not a question of a difference in statutory interpretation. As the memorandum of Kirk Schmidt shows, the state understands that it must pay the NAIC rates. (LF0960) Yet, instead, the Director refused to do what the Legislature mandated to be done[7].

Put another way, it is always stated that Mandamus cannot be used to create a right, only to enforce an existing right. *Maxwell v. Daviess County*, 190 S.W.3d 606, 610 (Mo.App. W.D.2006) In *Montpelier Insurance*, the court had to interpret the statute (i.e., find the right) before it could enforce it. Here no interpretation of the statute is called for. It uses mandatory language. The right is clear.

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[7] A holding that sovereign immunity applied in this context could give executive agencies the power to nullify, in whole or in part, any perceived inconvenient legislative enactments, secure in the knowledge that their actions would be unreviewable and go unchallenged by litigants.

Even if this Court determines it is a matter of statutory interpretation, the same principles apply: the Circuit Court can and must order the Director of Insurance to comply with the state statutes and pay its employees according to the NAIC pay scales. *Id.*

It is noteworthy that all of the historical and modern rationales for the doctrine of sovereign immunity arise within the context of tort lawsuits. In *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. banc 1977), this Court examined each of these rationales for the rule. The early rationales placed the public welfare above that of the "injured individual,[8]" and held that the doctrine was necessary to prevent the waste of government funds and preserve the purposes for which appropriations are made. *Id.* at 228-229. The idea that the "king could do no wrong" and that the stability of the government was threatened by tort judgments were all rejected in *Jones*, but the tenor of the language is clear. The doctrine as it existed in common law sought to protect the governmental purse so as to preserve to the Legislature the right and obligation to spend money. *Id.* And it sought to protect the state not from restitution claims arising from refusals to perform mandatory duties imposed by the Legislature, but rather, to prevent the state from incurring tort liabilities based on the negligence of its agents.

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8 "...early English cases held that it was better for the ***injured individual*** to bear a loss than the public which would then be forced to suffer an inconvenience." *Jones,* 557 S.W.2d 228. (emphasis added)

Stretching sovereign immunity into a barrier that prevents a court from ordering a government official to perform a mandatory duty imposed by statute serves none of the public policy ends of sovereign immunity, and encourages dereliction of duty by executive officers who would see this Court's opinion as a grant of freedom to ignore legislative mandates.

4. THE EQUITABLE RELIEF SOUGHT HERE IS IN THE NATURE OF ENFORCEMENT OF A CONTRACTUAL DEBT

Petitioners made no claim that the state breached a duty in tort. Rather, Relators brought a mandamus action to compel an executive officer's performance of a non-discretionary, mandatory statutory duty. An application of the statutory sovereign immunity principles to this case was wrong because it failed to recognize the character of the obligation. Given that Missouri case law has always provided for enforcement of mandatory statutory duties through Mandamus, the common law doctrine of sovereign immunity simply cannot justify the trial court's erroneous ruling.

Rather, this case may be analogized to a contractual debt created by statute. The state promised to pay, and indeed directed its officers to pay to insurance examiners the amount of money published by the NAIC in its nationally-published pay scales. As Petitioner pointed out to the trial court, Missouri sent representatives to the NAIC and had a voice in the creation of those pay scales. (LF0961-63). Petitioners were hired and promised a specific wage by statute, but the executive

officer in charge of the department concluded that he could ignore the statute's clear terms with impunity. Rather than paying examiners what the Missouri Legislature had dictated they be paid, the Director paid them less. Even though the statute provides for no discretion in the payment of wages to examiners (and even though case law holds that employees of the department ***must*** be paid in the manner dictated by statute, *Barker*, 295 S.W.3d at 839), the Director abrogated the discretion to himself to avoid responsibilities imposed by the Legislature by statute.

In asserting its sovereign immunity defense, the state suggested only that a suit against officers in their official capacities is the same as suing the state itself, and that the state was shielded by sovereign immunity. (LF1433) The state cited *State ex rel. Cravens v. Nixon*, 234 S.W.3d 442 (Mo. App. 2007). The state cited it, but may have failed to read it carefully.

Cravens involved an inmate that was sexually assaulted by an employee of the Department of Corrections at Algoa. *Id*. at 445. The inmate sued in federal court and won a money judgment against the State of Missouri for $250,000 plus costs and expenses. Although the district court found that the assault was committed under color of state law and that it arose out of the defendant's official duties on behalf of the state, the state refused payment saying that the conduct did not arise out of or in connection with the defendant's official duties. *Id*. Cravens responded by filing a petition for writ of mandamus in the Circuit Court of Cole County alleging that the Attorney General had a ministerial duty to pay the judgment based on § 105.711, R.S.Mo. (2005) (A-3). The Circuit Court granted Cravens' motion

and issued its writ of mandamus and also entered an award of attorney's fees. The state appealed, in part, on the basis of sovereign immunity. While the court did say – as the state suggests – that "Sovereign immunity, if not waived, bars suits against employees in their official capacity, as such, suits are essentially direct claims against the state," *Id*. at 449. But the state ended the quote a bit too soon. Indeed, this Court went on to hold "Sovereign immunity is simply not applicable to this case." *Id.* It found that the Legal Defense Fund created by statute permitted the mandamus action. *Id.*

The same rationale applies here. The state Legislature mandated a pay scale. It provided no discretion in this regard. It created a clear statutory right. Sovereign immunity simply does not apply in this context.

Similarly, the state asserted that sovereign immunity extended to "suits for money damages, such as Relator's petition, other than in tort," [sic] citing *Fort Zumwalt Sch. Dist. vs. State*, 896 S.W.2d 918 (Mo. banc 1995). This was misdirection. The lawsuit here is in mandamus and it sought not "damages" but restitution for amounts wrongfully withheld. The measure of relief sought was for the difference between what should have been paid and what was paid. The lawsuit sought a restitutionary remedy[9], not a "damages" remedy as that term is used in tort

[9] Although the petition does improvidently characterize the restitution of back wages sought in the petition as "damages" at various points, Relators seek

law. In effect, Relator sought a "benefit of the bargain" remedy of the type sought in a contract action. Thus, the characterization of this as a damages action barred by sovereign immunity does not stand up to inspection when the nature of the remedy is thoughtfully examined.

And as even the Respondents admitted in their filings before the Circuit Court, a debt owed by the state is not subject to sovereign immunity. *V.S. DiCarlo Construction Co., Inc. v. State*, 485 S.W.2d 52, 54 (Mo.1972).

Equally important, failure to allow relief by mandamus in this matter will effectively strip the Legislature of its power and violate the separation of powers doctrine. "The legislative power shall be vested in a senate and house of representatives to be styled 'The General Assembly of the State of Missouri.' " MO. CONST. art. III, § 1 (A-14). A thorough reading of the article shows that the constitution assigns the General Assembly the single power and sole responsibility to make, amend and repeal laws for Missouri and to have the necessary power to accomplish its law-making responsibility. *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 230 (Mo. banc 1997) "[A]ll the power to make laws in the name and with the authority of its constituent elements—its citizens en masse—is lodged in the temporary Legislature, subject only to the restraining clauses of the Constitutions of the state and nation." *Ludlow–Saylor Wire*

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only restitution based on compensation owed but not paid. They do not seek damages for a breach of duty in tort.

Co. v. Wollbrinck, 275 Mo. 339, 205 S.W. 196, 197 (1918). The power of the Legislature to make laws is plenary within its sphere of responsibility. *Joint Committee*, 956 S.W.2d at 231.

In *Joint Committee,* the Legislature sought to commission a "management audit" of the state Auditor's office. In prohibiting this the Supreme Court noted:

> There are two broad categories of acts that violate the constitutional mandate of separation of powers. "One branch may interfere impermissibly with the other's performance of its constitutionally assigned [power] ... [citations omitted]. Alternatively, the doctrine [of separation of powers] may be violated when one branch assumes a [power] ... that more properly is entrusted to another. [citations omitted]." *I.N.S. v. Chadha*, 462 U.S. 919, 963, 103 S.Ct. 2764, 2790–91, 77 L.Ed.2d 317 (1983). (Powell, J., concurring).

Id. at 231. The Court explained that:

> The constitutional demand that the powers of the departments of government remain separate rests on history's bitter assurance that persons or groups of persons are not to be trusted with unbridled power. For this reason, the separation of the powers of government into three distinct departments is, as oft stated, "vital to our form of government." *State on Information of Danforth v. Banks*, 454 S.W.2d 498, 500 (Mo. banc), *cert. denied*, 400 U.S. 991, 91 S.Ct. 452, 27 L.Ed.2d 439 (1971), because it prevents the abuses of power that

> would surely flow if power accumulated in one department. *See State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 73–74 (Mo. banc 1982) (separation of powers "prevent[s] the abuses that can flow from centralization of power"). Thus, "[t]he doctrine of the separation of powers [is not meant to] promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293, 47 S.Ct. 21, 85, 71 L.Ed. 160 (1926) (Brandeis, J., dissenting).

Id.

Here, if the executive is allowed to ignore the plain language of the statute to effect a more parsimonious redistribution of wages it will upset the Legislature's determination that examiners are to be paid in accord with a national wage scale. Irrespective of whether the Legislature's policy determination is based on a desire to make it harder for neighboring states to steal away examiners, or some other unstated rationale, the Legislature has spoken and the Circuit Court had a duty to apply the statute as written. Absent relief by mandamus, the Legislature has created a right, and those who stand to benefit from that right have no remedy. This violates MO. CONST. art I, § 14 (A-12).

5. MANDAMUS IS THE METHOD USED TO ENFORCE PAYMENT

Mandamus has traditionally been used to compel payment of salary:

> If ... the amount of a salary is fixed by law, and for that reason no discretion is left as to the amount, then mandamus is an appropriate remedy to enforce the payment of a salary to a public official against the officer or officers whose duty it is to pay such official."

State ex rel. Koehler v. Bulger, 289 Mo. 441, 233 S.W. 486, 487 (1921). "In such cases the salary is a fixed amount, if it exists at all, and the sole question is the legal one as to whether or not there is a liability." *Id.* That is what Relators sought to determine here. Moreover, Mandamus relief has traditionally been available as a means of obtaining wages wrongfully withheld. See, e.g., *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 43 (Mo.1969); *State ex rel. Ciaramitaro v. City of Charlack*, 679 S.W.2d 405, 406 (Mo.App. E.D.1984); *State ex rel. Pauli v. Geers*, 462 S.W.2d 166, 171 (Mo.App.1970). These cases hold that mandamus can be used to compel payment of wrongfully withheld wages. That this right should be preserved is important.

C. CONCLUSION

For all these reasons, the Respondent cannot rely on sovereign immunity to escape its responsibility to discharge mandatory duties to pay employees according to pay scales set by the Legislature. This Court should reverse the holding of the Circuit Court and remand for appropriate mandamus relief.

II. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO PLAINTIFF AND GRANTING SUMMARY JUDGMENT TO RESPONDENT FINDING THAT RELATORS HAD NOT ESTABLISHED A BASIS FOR RELIEF IN MANDAMUS BECAUSE THE RIGHT TO RELIEF IS FOUND IN § 374.115 R.S.Mo. (2000), IN THAT (A) THE TRIAL COURT'S CONCLUSION THAT RELATORS COULD NOT ESTABLISH HOW MUCH THEY SHOULD HAVE BEEN PAID CONFLATED THE RIGHT TO RELIEF WITH THE AMOUNT OF RESTITUTION OWED AND (B) THE RIGHT TO RELIEF IN MANDAMUS IS ESTABLISHED BY DEMONSTRATING A VIOLATION OF THE RIGHTS SET OUT IN THE STATUTE.

A. STANDARD OF REVIEW

Appellant adopts the standard of review from point I.

B. THE TRIAL COURT'S ERRONEOUS RULING

After voluminous summary judgment briefing on the issue of the relators' right to relief, the Circuit Court entered an order that found in part:

> The Court finds that Relators have failed to establish a basis for mandamus in that they cannot establish what they should have been

paid, except to the extent that it should be more. Mandamus requires a showing of a clearly established right.

(LF2120). This ruling conflicted unmistakably with the court's prior ruling on the motion to dismiss. There the court's order declared that relief was available in the form of mandamus. The court said "the statute at issue clearly sets forth the right to be enforced, thus making mandamus an appropriate remedy." (LF0040). As the Circuit Court's own words betray, mandamus requires only the showing of a clearly established right, not a showing of the amount of the restitutionary remedy flowing from that right, which can be determined by simple calculation.

C. STANDARDS FOR RELIEF UNDER MANDAMUS

Mandamus is the appropriate action when seeking to require the performance by an official of a ministerial act. *Hunter v. County of Morgan*, 12 S.W.3d 749, 764 (Mo.App.2000). A writ of mandamus will lie to compel a public official to do that which he or she is obligated by law to do and undo that which he or she was prohibited by law from doing. *See State ex rel. Burns v. Gillis*, 102 S.W.3d 66, 68 (Mo.App.2003).

A ministerial act is one that law directs the public official to perform upon a given set of facts, independent of how the official may regard the propriety or impropriety of performing the act in any particular case. *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo.App.1998). A writ of mandamus will only issue when there

is an unequivocal showing that the public office failed to perform a ministerial duty imposed by law. *Id.*

The relator seeking a writ of mandamus must show a clear and specific right to the relief sought. *State ex rel. Selsor v. Grimshaw*, 762 S.W.2d 868, 869 (Mo.App.1989).

"[M]andamus only lies when there is an unequivocal showing that a public official failed to perform a ministerial duty imposed by law." *Modern Day Veterans Chapter No. 251 v. City of Miller*, 128 S.W.3d 176, 178 (Mo.App. S.D.2004). "The purpose of mandamus is to require the performance of a duty already defined by the law." *Maxwell v. Daviess County*, 190 S.W.3d 606, 610 (Mo.App. W.D.2006) (citation omitted). "Thus, mandamus enforces existing rights, but may not be used to establish new rights." *Id.* "Whether a petitioner's right to mandamus is clearly established and presently existing is determined by examining the statute or ordinance under which petitioner claims the right." *State ex inf. Riederer ex rel. Pershing Square Redevelopment Corp. v. Collins*, 799 S.W.2d 644, 649 (Mo.App. W.D.1990).

The relator must prove that he has a clear, unequivocal, specific, and positive right to have the official perform the act demanded, and the remedy will not lie if the right is doubtful. *Jones*, 965 S.W.2d at 213. As noted in *Maxwell*, and reaffirmed through numerous Missouri cases, in determining whether the right to mandamus is clearly established and exists currently, the court examines the statute under which the relator claims the right. *Id.*

Here the statute that creates the clear and unequivocal right is § 374.115 R.S.Mo. (2000).

The statute provides: "Insurance examiners appointed or employed by the director of the department of insurance, financial institutions and professional registration **shall be compensated** according to the applicable levels established and published by the National Association of Insurance Commissioners." *Id.* (emphasis added). Every year these standards were published, and prior to the change in 2002, every year employees were paid according to the dictates of the statute and the NAIC standards.

1. THE STATUTE IS CLEAR AND SHOULD BE ENFORCED AS WRITTEN

The statute sets forth in clear terms that it applies to the Director of Insurance. It sets the pay scales for insurance examiners employed or appointed by the director. It speaks in mandatory terms ("shall be compensated[10]") and sets the standard at the "applicable levels established and published by the National Association of

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10 The Court of Appeals substituted the plain language of the statute for the word "compensation" and suggested, as Respondents had alleged, that the term compensation was vague. However, one cannot separate the term "compensated" from the remainder of the sentence: "according to the applicable levels established and published by the National Association of Insurance Commissioners."

Insurance Commissioners." *Id.* The statute is clear and unambiguous. It does not say "pay compensation" it says that examiners should be compensated in accord with the published NAIC standards.

Because the statute provides the director with no discretion to pay less than (or more than) these set wages, the director had a ministerial duty to pay these wages. This because the statute "directs the public official to perform upon a given set of facts, independent of how the official may regard the propriety or impropriety of performing the act in any particular case." *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo.App.1998). The Director of Insurance is given no discretion under this statute. The language is mandatory.

Because the right to relief flows solely from the statute, this Court's inquiry could end here. Mandamus is appropriate. But it is worth noting that the justification for paying less than the required wages was created out of whole cloth only **after** the department had for years strictly complied with the statute's requirements. In other words, discretion was found to exist by virtue of a budgetary problem, and was not conveyed by the words of the statute.

2. THE STATE RECOGNIZED ITS DUTY TO PAY NAIC WAGES

The Department of Insurance's own pre-2001 pay records show that the pay rate for insurance financial examiners (specifically the Relators in this case) is set by the NAIC pay rate per statute. "Due to Receipt of CFE designation effective 10-26-95[,] Employee is being given the salary advancement per NAIC statutes"; "Pay

rate as set by statute 374.115"; "Received NAIC pay rate, per Statute."; "Employee received salary advancement recommended by NAIC in compliance with 374.115 RSMO." (LF0884-887)

Obviously the payment of the NAIC wages in 2000 and earlier, in compliance with the statute, demonstrates that the Department believed it had a statutory duty to award pay increases and increase pay for job-related certifications as mandated by the NAIC standards[11]. The record demonstrates that for years it complied with the law, and deviated without notice to or approval from the Legislature. There was no change in the text of the statute in 2001 that required a change in the Department's adherence to the statute, and thus the deviation from the accepted standard is yet more evidence that there is a breach of a ministerial duty.

3. THE STATE HAD A HAND IN SETTING THE NAIC WAGES

Joe Haverstick was the Department of Insurance's Deputy Chief Financial Examiner from the years 2001 through 2008, and represented Missouri as a member of the NAIC's Financial Examiners' Qualification and Compensation Technical

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[11] Before the Circuit Court and Court of Appeals the State claimed the statute was "unclear" and "ambiguous." Yet, the state, as noted, followed the plain language prior to 2002. Any lack of clarity is created solely for litigation, and not a good-faith argument based on the statutory language or history of prior performance.

Group of the Examination Oversight Task Force ("FEQC"). (LF0888-0951; 961-963)

That year the FEQC, with Joe Haverstick in attendance and representing Missouri, met in Dallas, Texas on September 11, 2000, and voted to increase the salary for all Financial Examiners with AFE and CFE designations. (LF0900; 0961-63).

NAIC meetings with the Financial Examiners Qualification and Compensation group occurred regularly. The FEQC met in New Orleans, LA, on September 11, 2002, again with Joe Haverstick representing Missouri. (LF0961-63) (LF0907). The Group members voted to raise the Financial Examiners' pay rates. (LF0961-63) (LF0907).

The FEQC held a conference call on August 9, 2006, with Joe Haverstick again representing Missouri. During this meeting Mr. Skiera, representing Illinois, moved to adopt a 2.5% pay increase for Financial Examiners. Joe Haverstick seconded the motion and the motion passed. (LF0915). The state's active participation in the setting of the NAIC rates, and their representative's efforts to help secure passage of pay raises is further evidence, if any is needed, that the state was violating a known duty, and one that was ministerial and not discretionary.

D. THIS IS A QUESTION OF LEGISLATIVE INTENT

At its heart, this is a case that requires this Court to discern the intent of the Legislature in passing § 374.115, R.S.Mo. (2000).

"Construction of a statute is a question of law," which an appellate court reviews *de novo. Delta Air Lines, Inc. v. Dir. of Revenue*, 908 S.W.2d 353, 355 (Mo. banc 1995). The primary object of statutory interpretation is to ascertain the intent of the Legislature. Appellate courts do so from the language used. *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 909 (Mo. banc 2006); *Appleby v. Director of Revenue*, 851 S.W.2d 540, 541 (Mo.App.W.D.1993).

In determining the Legislature's intent, a court must examine the words used in the statute, the context in which the words are used and the problem the Legislature sought to address with the statute's enactment. *Id.* A court must construe the statute in light of the purposes the Legislature intended to accomplish and the evils it intended to cure. *Id.* A statute must not be interpreted narrowly if such an interpretation would defeat the purpose of the statute. *Id.*

"All canons of statutory construction are subordinate to the requirement that the court ascertain and apply a statute in a manner consistent with the legislative intent." *Williams v. Nat'l Cas. Co.*, 132 S.W.3d 244, 249 (Mo. banc 2004) (quoting *Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678, 682 (Mo. banc 2000)). "Construction of statutes should avoid unreasonable or absurd results." *Reichert v. Bd. of Educ. of St. Louis*, 217 S.W.3d 301, 305 (Mo. banc 2007).

Moreover, the General Assembly is presumed to have intended what a statute says. *Missouri Osteopathic Found. v. Ott*, 702 S.W.2d 495, 497 (Mo.App.W.D.1985). A court cannot give a different meaning and effect to a statute

when its meaning is clear and unambiguous. *Missouri Div. of Employment Sec. v. Labor & Indus. Relations Comm'n*, 699 S.W.2d 788, 791 (Mo.App.E.D.1985).

The statute here is short and to the point. It requires that examiners be paid in the manner set by the Legislature. The words used are not ambiguous. They are plain and straightforward. The Legislature is presumed to have intended what it said in the statute, and this Court cannot give it a different meaning no matter how much the Director of Insurance wants to avoid the plain meaning of the statute.

Public policy is declared in the statutes of this state. *See American Family Mut. Ins. Co. v. Flaharty*, 710 S.W.2d 5, 7 (Mo.App.W.D.1986). This statute sets forth a non-discretionary ministerial duty to pay examiners what the NAIC says they should be paid.

The rationale behind such a public policy is easy to intuit. If Missouri's examiners are paid less than the examiners in sister states, some may abandon their employment in Missouri and seek employment in other states paying higher NAIC wages. Moreover, employees in the department are likely to carry out their work with diligence if they are treated properly and paid according to their counterparts in other states and the mandate set out in the state statutes.

But even beyond that, how can the State ask its employees to perform their jobs according to the statutes and the standards set forth therein when the state refuses to be bound by the same statutes — not because it *cannot* comply – but because it *will not*. Justice Holmes said that "[m]en must turn square corners when

they deal with the government." *Rock Island A & L.R. Co.*, 254 US 141, 143 (1920). Shouldn't government return the favor? *See, e.g., FMC Stores v. Borough of Morris Plains*, 100 N.J. 418 (1985), (in dealing with the public, government agencies must "turn square corners," "comport itself with compunction and integrity," and not "conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage" over a member of the public).

E. COMPETENT AND SUFFICIENT EVIDENCE EXISTED TO DETERMINE A REMEDY WAS DUE

Respondents took the position before the Circuit Court that because the ***amount of the relief*** required some calculation, that ***the right to relief*** was unclear and mandamus would not lie. This was artful misdirection because it conflates the right to the remedy (which arises solely from the statute) with the amount of the restitution due. The right to a remedy has always been crystal clear because it is laid out clearly in the statutes.

In Relators' summary judgment pleadings, Relators set out the amounts that NAIC mandated they be paid, as well as their payments during the time frames at issue. In doing so, Relators made a prima facie case of their right to restitution in the amount of the difference between what they were paid and what they were entitled to be paid by statute. Relators Barbara Bartlett and Shawn Hernandez were both Insurance Examiners with CFE designations before 2007 and maintained the designations through their retirements in 2012. In their summary judgment

pleadings, they provided evidence of these statuses and set out the relevant NAIC amounts as well as the summaries of their income from the relevant time frame.

For example, Relator Bartlett showed:

Year	**A** **Salary Received** (LF0959)	**B** **NAIC Mandate** (LF0763)	**Difference** **(B-A)**
2007	71,165	86,240	15,075
2008	73,300	91,630	18,330
2009	74,475	96,285	21,810
2010	74,475	96,285	21,810
2011	74,475	97,265	22,790

(LF0763, 0959) Relators' summary judgment paperwork showed these amounts. The state disputed these amounts. Relators did not ask for restitution in a specific amount. Rather, they asked for the Director of Insurance to be ordered to calculate the underpayments and make restitution accordingly. (LF0840-41).

F. REVERSAL AND REMAND IS REQUIRED

Relators established the language of the statute and the court had previously recognized that they were entitled to a remedy under Mandamus as admitted in the judgment. Relators did not seek to establish their right to be paid – that was established by the statute. That right was set out in black and white inside the state

statutes. Relators gave the court an index to the amount they should have been paid, asking the Court for the following relief:

> 1. Enter an order compelling the Respondents to comply with MO. REV. STAT. § 374.115.
>
> 2. Calculate the underpayment of wages to the Relators, Barbra Bartlett and Shawn Hernandez, and all similarly situated employees with the AFE designations, CFE designations and Insurance Examiner-In-Charge job titles from November 9, 2007, to the present. Calculate the underpayment wages to the Realtor, Gary Kimball, and all similarly situated employees with AIE and CIE designations and Examiner-In-Charge titles from November 9, 2007, to the present. Back wages should be calculated by taking the deference between the annual wages published by the NAIC and reproduced in the attached Statement of Facts at paragraph 38 and 41, and what is recorded on the Missouri Accountability Portal for that employee for the same corresponding year.3 All Examiners with only an AFE designation should have their wages calculated at the Insurance Company Examiner (AFE) pay level. All Examiners with (CFE) Designations should have their wages calculated at the Senior Insurance (CFE) pay level. All Examiner-In-Charge employees should have their rates calculated at the corresponding Examiner-In-Charge pay level. All

Market Conduct Examiners with a Senior Examiner AIE designation should have their wages calculated at the Senior Examiner (AIE) pay level. All Market Conduct Examiners with a Senior Examiner CIE designation should have their wages calculated at the Senior Examiner (CIE) pay level. And all Market Conduct Examiner-In-Charge employees with (CIE) Designations should have their wages calculated at the Examiner-in-Charge (CIE) pay level.

3. Provide to the Court for approval and Relators' counsel for objections, with a spreadsheet that includes the following information: identity of all employees who fall within the class of employee's identified above by name, address, telephone number, job position by date, the date the employee received their AFE, CFE, AIE, and/or CIE designations, the year to date gross pay of each employee as identified on the Missouri accountability portal each year from 2007 to the present, the difference each year between what the employee was paid according to the accountability portal and what their wages should have been based on the NAIC rates per year according to if they had a AFE, CFE, AIE, and/or CIE designation at the time, and the total amount of back wages due to each individual based on the entire class period. Respondents will provide this spreadsheet within thirty days of the Court entering an order granting this Motion.

4. Once the damages [12] spreadsheet is approved by the Court, Respondents will have an additional thirty days to make payment of all back wages due to the individuals identified on the approved damages spreadsheet minus thirty-three percent (33%) of the back wages due to each individual, which will be paid by Respondents to Relators' counsel as their pro-rata share of attorney's fees.

5. Grant such other and further relief as is just and proper.

(LF0840-41).

Relators established their right to relief by establishing the statute, explaining its plain language, and showing to the satisfaction of the court that Relators had not been paid what NAIC mandated their wages to be. It is difficult to see how Relators could have articulated their right in any clearer fashion than this.

In holding that Relators did not establish their right to relief, the court conflated the *amount* of restitution with the *right* to receive restitution. The rule in Mandamus bears repeating.

"Mandamus cannot be used to control the judgment or discretion of a public official, nor can the writ be used to control a legislative act." *Brannum v. City of*

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[12] Again, while the characterization of the spreadsheet as a "damages" spreadsheet is inaccurate, the remedy sought, as shown by the clear terms of the request, is for restitution of wages wrongly withheld. (LF0840-41)

Poplar Bluff, 439 S.W.3d 825, 830–31 (Mo.App.S.D.2014). Matters involving the exercise of discretion are not subject to attack by mandamus. *State ex rel. Cabool v. Tex. Cty. Bd. of Equalization*, 850 S.W.2d 102, 105 (Mo. banc 1993). "Mandamus will not lie to compel an act when its performance is discretionary." *McDonald v. City of Brentwood*, 66 S.W.3d 46, 51 (Mo.App.E.D.2001). Rather, "[m]andamus will only issue when there is an unequivocal showing that the public official failed to perform a ministerial duty imposed by law." *State ex rel. Westside Dev. Co. v. Weatherby Lake*, 935 S.W.2d 634, 639 (Mo.App.W.D.1996).

While the amount of relief may require calculation, that is a ministerial duty, that can be calculated. The application of mathematics does not require discretion, just a calculator. Relators sought an equitable remedy similar to an accounting to allow them to receive the wages that the Legislature said they should receive. This was not an attempt to adjudicate and establish a new right, but to collect on an old one. Relators meet each of the tests outlined above. The trial court erred in its application of the law, and this Court should reverse and remand with instructions to enter appropriate relief.

G. CONCLUSION

This Court should reverse and remand to the Circuit Court with instructions to provide relief for the Relators.

CONCLUSION

This Court should reverse and remand with instructions to the Circuit Court to order that Relators' back wages be calculated and paid out to the Appellants.

Respectfully submitted,

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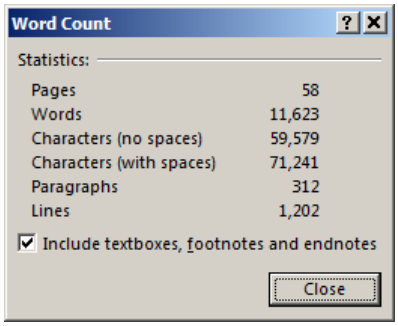
CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c), in that the brief contains 11,623 words as directed by Rule 84.06(c). The word count was derived from Microsoft Word.



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/s/ Anthony L. DeWitt
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Substitute Brief of Appellant and Appendix was served on Respondents via the Missouri Courts E-filing System on April 19, 2017, and the undersigned further certifies that he has signed the original and is maintaining the same pursuant to Rule 55.03 (a).

Respectfully submitted,

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