SC96212

IN THE SUPREME COURT OF MISSOURI

BARBARA A. BARTLETT, et al.,

Appellants,

v.

MISSOURI DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION
and
DIRECTOR CHLORA LINDLEY-MYERS, in her official capacity,

Respondents.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

RESPONDENTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the Judgment of the Cole County Circuit Court granting Respondents summary judgment and denying Relators' requested writ of mandamus. After filing their original Petition for Writ of Mandamus—Class Action in the Jackson County Circuit Court, that court issued summonses as a consequence of Relators' direction to treat this matter as a normal case – not a writ. Neither before nor after the Jackson County Circuit Clerk transferred this action to the Cole County Circuit Court on a change of venue, did a circuit court issue a preliminary order in mandamus. The Circuit Court of Cole County did, however, deny Respondents' Motion to Dismiss (one type of responsive pleading satisfying the summonses' requirement for the same) – finding that "the statute at issue clearly sets forth the right to be enforced, thus making mandamus an appropriate remedy." L.F. 40. Furthermore, the Circuit Court "directed [Respondents] to file an answer within twenty (20) days of this order." *Id.* Thereafter, the Circuit Court of Cole County entered a judgment sustaining Respondents' Motion for Summary Judgment and denying Relators' request for a Writ of Mandamus.

Relators appealed. The Court of Appeals, Western District, dismissed Relators' appeal of the Circuit Court's judgment either finding that it lacked jurisdiction or declining to exercise the jurisdiction it had. *Bartlett v. Missouri Dep't of Ins. Fin. Insts. & Prof'l Regis.*, WD79411, slip op. at 2, 10, 12, and 15 (Mo.App. Nov. 29, 2016). Because a Circuit Court in this action issued summonses, "the functional equivalent of a preliminary order, and then denie[d] a permanent writ, appellate review is available." *U.S. Dep't of Veterans*

Affairs v. Boresi, 396 S.W.3d 356, 359 (Mo.banc 2013) (citation omitted). On March 31, 2017, this Court granted Respondents' Application for Transfer. Rule 83.04. Jurisdiction is proper in this Court pursuant to Art. V, §10, Mo.Const. Because appellate jurisdiction was an issue in the Court of Appeals, Respondents will address appellate jurisdiction in Point I below.

STATEMENT OF FACTS

A. Procedural History

1.Jackson County Circuit Court.

On November 9, 2012, Relators filed their Petition for Writ of Mandamus—Class Action in Jackson County Circuit Court with neither exhibits nor suggestions in support attached. L.F. 19-23; S.L.F. 124. The Jackson County Circuit Clerk sent correspondence to Relators' counsel asking, "[S]hould this case be handled as a Writ or a regular Jackson County case? If handled as a Writ of Mandamus, please refer to the Missouri Court Rules." S.L.F. 37. Relators' counsel responded to "file…as a regular…Case and not as a Writ." S.L.F. 38. Summonses were issued and served upon Respondents requiring a responsive pleading. S.L.F. 39-42, 124-25. After Respondents moved to dismiss, S.L.F. 43-65, Relators filed their First Amended Petition for Writ of Mandamus ("First Amended Petition") with suggestions, containing two exhibits on January 16, 2013. S.L.F. 66-93. Respondents again moved to dismiss. S.L.F 94-121, 127-38. Identifying it as an unremedied flaw, Respondents specifically said, "Relators have not sought a preliminary order under [ ] 94.04 and 94.05…to have the Court determine if an answer is warranted to the amended petition for writ or direct the Respondents to answer within a set time." S.L.F. 128, n. 1. Thereafter, the Jackson County Circuit Court granted Respondents' Amended Motion to Transfer Venue to the proper court of venue, the Cole County Circuit Court. S.L.F. 122, 124-26.

2.Cole County Circuit Court.

On April 2, 2014, the Cole County Circuit Court denied the motion to dismiss, in part, but did not issue an order denominated as a preliminary order in mandamus. L.F. 40. The court granted the motion to dismiss "to the extent any relief prior to five years from the filing date is barred by the statute of limitations." *Id.* The court further found "that the statute [§374.115] clearly set forth the right to be enforced, thus making mandamus an appropriate remedy. Relators/Plaintiffs bear the burden of proving facts which entitle them to relief under the statute." *Id.* The Order further directed "Respondents/Defendants" to file an answer. *Id.* Respondents filed their General Objection and Answer ("Answer") where they repeated their objections to Relators' First Amended Petition, the Circuit Courts' failure to comply with Rule 94,[1] and raised the same infirmities to the action as a whole as set forth in their motions to dismiss. S.L.F. 139-50, S.L.F. 43-65, S.L.F. 94-121, S.L.F. 127-38.

On November 26, 2014, Relators filed their Motion for Leave to File Relator's [sic] Second Amended Writ and, almost two months later, their Amended Motion for Leave to File Relators' Second Amended Writ. L.F. 41-289, S.L.F. 20-21, 24. Both proposed

[1] Respondents specifically observed, "in response to the proper showing accompanying a petition for writ of mandamus, the circuit court is empowered to issue but one type of order; a preliminary order in mandamus. Rule 94.04, Mo.R.Civ.P. Pursuant to that Rule, the circuit court may issue the preliminary order upon a determination that a writ should issue." S.L.F. 140.

second amended petitions for writ included a new relator, Gary Kimball.[2] L.F. 44-51, 84-119. Respondents opposed both motions. S.L.F. 152-89. The Circuit Court did not specifically rule on these motions for leave to file a second amended petition, *see generally* S.L.F. 16-34, thus Kimball was never added as a party relator. Additionally, the Judgment states: "All other claims for relief, not expressly granted herein, are denied." L.F. 2120.

On March 30, 2015, Respondents filed their Motion for Summary Judgment and Statement of Uncontested Facts and their Suggestions in Support, raising, *inter alia*, the same objections and procedural and legal infirmities as their motions to dismiss and their Answer. L.F. 290-810.[3] On that same day, Relators filed Relators' Motion for Summary Judgment and Attorney's Fees and their Suggestions in Support (L.F. 811-992), ostensibly based on one of their un-filed second amended petitions for writ. In the Motion Kimball's name appears in the caption as a relator and Relators included substantive allegations and evidence regarding Kimball, who was a market conduct examiner – not a financial examiner – in support of Relators' Motion for Summary Judgment. *See, e.g.*, L.F. 811,

[2] Relators Bartlett and Hernandez were employed as financial examiners (S.L.F. 67), while Kimball was a market conduct examiner (L.F. 46, ¶7) according to one of the second amended petitions that Relators never received leave to file.

[3] Due to an electronic filing error, Respondents resubmitted Exhibits B-8 through B-10 by motion. L.F. 1918-43. The court granted Respondents leave to supplement. S.L.F. 32 (June 12, 2015 docket entry).

814, 818, 825, 834, 839-41, 895-97.[4] Respondents moved to strike Relators' Motion for Summary Judgment. L.F. 1323-1337. The Circuit Court did not expressly rule on this motion nor on Respondents' other pending motions[5] challenging Relators' Motion for Summary Judgment. *See generally* S.L.F. 16-34. Both parties filed suggestions in opposition to the cross motions for summary judgment; Relators, L.F. 994-1322; Respondents, L.F. 1396-1917. Only Respondents filed a reply in support of their Motion for Summary Judgment. S.L.F. 244-335**.** This Reply sets forth each of Respondents' asserted uncontested facts, Relators' response to each asserted fact, and Respondents' reply thereto. S.L.F. 251-313.

In its Judgment, the Circuit Court took "up the pending cause for ruling the cross motions for summary judgment." L.F. 2120. The Judgment continues:

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

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[4] In their Brief, Relators rely extensively on evidence they presented in their Motion for Summary Judgment seeking judgment on an un-filed second amended petition and quote from the prayer for relief in that un-filed petition. Substitute Brief of Appellant[s], hereafter Rel.S.Brf. 13-17, 55-57.

[5] Respondents' Rule 74.04(f) Motion to Refuse Relators' Motion for Summary Judgment, L.F. 1338-58 and Respondents' Motion to Strike Affidavit of Joe Haverstick, Relators' Exhibit 9 in Relators' Motion for Summary Judgment and Suggestions in Support, L.F. 1359-95.

except to the extent that it should have been more. Mandamus requires a showing of a clearly established right.

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.

The Court sustains the Respondents' Motion for Summary Judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Relators' request for a Writ of Mandamus is denied and judgment is entered in favor of Respondents. All other claims of relief, not expressly granted herein, are denied. Costs taxed to the Relators.

L.F. 2120.

Relators appealed to the Western District Court of Appeals "from a grant of summary judgment in a Circuit Court action for relief in the form of mandamus." Jurisdictional Statement, Appellants' Brief, p. 8, in WD79411 (in Part 18 of record transferred to this Court on March 31, 2017; hereafter, "transferred record"); see also Rel.S.Brf. 10. The Court of Appeals issued its Opinion dismissing Relators' appeal of the Circuit Court's judgment either finding that it lacked jurisdiction or declining to exercise the jurisdiction. *Bartlett v. Missouri Dep't of Ins., Fin. Insts. & Prof'l Regis.,* WD79411 (in Part 19 of the transferred record). The appellate court's only mandate was to transfer the record to this Court (in Part 19 of the transferred record).

B. Substantive Facts

Relators Barbara Bartlett and Shawn Hernandez left employment of Respondent Department of Insurance, Financial Institutions and Professional Registration ("Department") in March 2012. L.F. 671, 690. While their claim for mandamus relief, originally filed on November 9, 2012, is predicated on §374.115 regarding their compensation during employment since 2001 (L.F. 19-23, S.L.F. 66-80), the Circuit Court found that "any relief prior to five years from the filing date is barred by the statute of limitations." L.F. 40. The following charts prepared by Respondents and contained in their summary judgment motion summarize and, as calculated, demonstrate Relators' compensation for the five years at issue exceeded that set forth in any guideline "established and published" by the National Association of Insurance Commissioners ("NAIC"):

Shawn Hernandez

→ State Actual				$ Variance	NAIC Handbook Guidelines ←		
Year	Salary $	Benefit $	Total $	← Favor →	Total $	Daily Rate $	Exam Days
2012	12,412.52*	4,683.36	17,095.88	← 7,834.88	9,261.00	343.00	27
2011	74,475.12	28,100.16	102,575.28	←42,664.28	59,911.00	331.00	181
2010	74,475.12	25,998.00	100,473.12	←43,729.12	56,744.00	328.00	173
2009	74,475.12	25,761.84	100,236.96	←43,492.96	56,744.00	328.00	173
2008	72,556.26	24,769.68	97,325.94	←45,533.94	51,792.00	312.00	166
2007	12,051.00	4,021.30	16,072.30	← 8,428.30	7,644.00	294.00	26

*Excludes $11,529.31 annual leave payout

Barbara Bartlett

→ State Actual				$ Variance	NAIC Handbook Guidelines ←		
Year	Salary $	Benefit $	Total $	← Favor →	Total $	Daily Rate $	Exam Days
2012	18,054.57*	7,261.29	25,315.86	←10,566.86	14,749.00	343.00	43
2011	74,475.12	31,438.44	105,913.56	←46,995.56	58,918.00	331.00	178
2010	74,475.12	25,950.12	100,425.24	←41,057.24	59,368.00	328.00	181
2009	74,475.12	25,520.04	99,995.16	←45,219.16	54,776.00	328.00	167
2008	73,390.56	19,971.60	93,362.16	←40,010.16	53,352.00	312.00	171
2007	12,051.00	3,227.84	15,278.84	← 9,398.84	5,880.00	294.00	20

*Excludes $2,025.39 annual leave payout

To calculate the compensation for the five years claimed by Relators (November 9, 2007 to the end of their employment), Respondents reviewed the NAIC Guidelines' rates (where available) and analyzed Relators' days worked, time keeping records, salaries, and benefits. *See generally* L.F. 290-313.

1.NAIC Handbook.

Relators' Exhibit 2, attached to their First Amended Petition, relies upon a section of the NAIC Financial Examiners Handbook ("NAIC Handbook") entitled "Classifications, Minimum Qualifications and Suggested Compensation for Zone Examiners[ ]" to support their claim for relief. S.L.F. 69, n. 2; S.L.F. 75-80. This section of the NAIC Handbook is available for 2009 through 2012 (L.F. 376, 380-81, 387, 393)[6]

[6] The NAIC Handbook for 2007 and 2008 did not contain a section entitled "Classifications, Minimum Qualifications and Suggested Compensation for Zone Examiners." L.F. 353-54.

and sets forth "Salary and Per Diem Guidelines." For example, such "Guidelines" from the 2012 NAIC Handbook state:

> **D. Salary and Per Diem Guidelines**
>
> Salary and per diem charges are to be computed beginning at the time of reporting for duty at the office of the company to be examined and terminating upon completion of the examination or the examiner's active participation therein and to include actual days for travel as certified by his or her commissioner.
>
> 1.Suggested Compensation:
>
> The proposed competitive salary schedule for all examiners is as follows:
>
> | Classification | Daily Rate |
> | --- | --- |
> | * * * | * * * |
> | Senior Insurance Examiner, CFE | $343.00 |

L.F. 393 (bold and underline in original).

2.Calculations establishing Relators' compensation exceeded the suggested NAIC rates.

Although Relators did not plead they met all of the qualifications for Senior Insurance Examiners, CFE, (S.L.F. 70), Relators alleged this classification as the applicable "daily rate." S.L.F. 70-71, ¶¶29, 36. Hence, Respondents used this classification for their calculation. (Hernandez: L.F. 696, ¶20, L.F. 697, ¶27, L.F. 698, ¶35, 699, ¶43, L.F. 700, ¶50, L.F. 701, ¶58; Bartlett: L.F. 702, ¶66, 703-04, ¶74, L.F. 705, ¶82, L.F. 706, ¶90, L.F. 707, ¶97, L.F. 708, ¶105.)

The Guidelines' "daily rates" relied upon by Relators are the rates to be paid for work performed on the premises of the insurance company to be examined. L.F. 352-94, L.F. 694, ¶¶12, 15. However, the "daily rate" as stated by the NAIC does not specify whether it applies to full or partial days worked on the premises of the insurance company to be examined. L.F. 352-94, L.F. 694, ¶14.

When Respondent Director evaluated the sufficiency of Relators' compensation, he[7] counted both partial and full days billed to the examination of an insurance company as being subject to the full "daily rate." L.F. 694, ¶14. While the First Amended Petition does not specify which exam days involved work on the premises of the insurance company being examined, the Director's analysis of Relators' compensation levels expanded upon the NAIC Guidelines and assumed that all examination days were for work done on the premises of the insurance company being examined. L.F. 695, ¶15.

In addition, because the NAIC was unable to produce the relevant portion of the Handbook for 2007-2008 equivalent to that produced for 2009-2012 as it had only been posted on the NAIC website and not maintained (L.F. 353-54, ¶¶9, 10), the Director, without admitting the documents comply with the requirements of §374.115, relied on the

[7] Despite the substitution of the Respondent Director, Respondents continue to use the male pronoun in this brief where appropriate because the previous director of the Department is male and it is his affidavit that, in part, supports Respondents' Motion for Summary Judgment.

NAIC's incomplete documents containing the rates for 2007-2008. (Hernandez: L.F. 700, ¶¶49-50, L.F. 701, ¶¶57-58; Bartlett: L.F. 706-707, ¶¶96-97, L.F. 708, ¶¶104-105.)

In the next step of Respondent Director's analysis, the exam days (full and partial) for each of the time periods at issue were multiplied by the allegedly applicable NAIC daily rate to produce an amount of compensation for each year that would be due under the NAIC's alleged guidelines. *See generally* L.F. 693-709. These yearly calculations became the right hand side of the charts set forth above, the calculations moving from the right hand side of each chart to the center. *Id.*

To generate the left side of the charts, in the next step of the Respondent Director's analysis, he added the salaries paid to Relators for the time periods in dispute to the cost of the benefits Relators received as a result of their employment with the Department. *Id.* The Director considered it appropriate to add salary and the costs of benefits together to determine the equivalency of compensation levels because the NAIC rates appear to constitute the entire economic benefit examiners are to receive for their labors and, thus, must be compared to the entire economic benefit Relators received as a result of their employment with the Department. L.F. 694-95, ¶13. Respondent Director also understood the term "compensation" as used in §374.115 to include benefits. *Id.* Furthermore, this inclusion appeared appropriate to the Director because Relators were repeatedly told that their compensation included more than just their paychecks, it also included the costs of their benefits. L.F. 694-95, ¶13 (*see also* Hernandez: L.F. 674, 677, 680, 683, 686; Bartlett: L.F. 652, 655, 658, 661, 664, 667). The left hand side of the foregoing charts, moving from the left to the center, reflects this analysis.

The charts for each Relator so computed (pp. 8-9, above), demonstrate the basis for Respondents' conclusion that Relators' compensation exceeded that suggested by the NAIC, as reflected in the variance column. L.F. 695, ¶¶16, 17, L.F. ¶ 111.

3.Relators' differing calculations of their compensation.

Relators (and their counsel separately) put forth numerous different levels of compensation to which they assert an entitlement and utilized differing methods to arrive at these various amounts. L.F. 313-18, 330-35. A detailed discussion of the nine versions of the compensation Relators alleged they were entitled to is lengthy and, while not repeated here, is included in Respondents' Motion for Summary Judgment and Suggestions. *Id.*

ARGUMENT

Point I.

This Court has jurisdiction to review the Circuit Court's judgment granting Respondents' Motion for Summary Judgment and denying Relators' request for issuance of a Writ of Mandamus. (Responding to Relators' Supplemental Briefing regarding jurisdiction.)

Just four years ago in *U.S. Dep't of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 359 (Mo.banc 2013), this Court determined "when the lower court issues a summons, the functional equivalent of a preliminary order, and then denies a permanent writ, appellate review is available." This Court has not overruled *Boresi*. While the *Boresi* Court explained that a summons "requires a response from the respondent without regard to the merits of the petition," it nonetheless explained that it would consider the appeal "because the parties, who already have litigated the matter fully, were not at fault and should not be required to initiate a new writ proceeding due to the circuit court's failure to follow the procedure proscribed by the rules." *Id*. at 359 n.1.

The situation before the Court is much clearer than it was in *Boresi*. As in *Boresi*, the Circuit Clerk's office in this case issued summonses and the Circuit Court failed to enter an order denominated a preliminary writ of mandamus. *Id.* at 358. While the similarities between *Boresi* and the pending case end there, the dissimilarities accentuate the rationale for exercising appellate jurisdiction over this matter based on *Boresi's* guidance.

In *Boresi*, in response to the summons, the respondent "filed a response and suggestions in opposition to the VA's writ petition." *Id*. at 358. Respondents here did not follow that path. Rather, Respondents filed motions to dismiss both the original and the first amended petitions for writ of mandamus, and thereby compelled the Circuit Court to engage in a review of the writ petition. S.L.F. 43-47, 94-99. These motions both argued that Relators had failed to follow the procedural requirements for a writ of mandamus. S.L.F. 45, ¶6, S.L.F 96-97, ¶8, S.L.F. 128, n. 1. While the summonses' requirement for a responsive pleading was satisfied by the filing of motions to dismiss, these motions also had the effect, "at the outset of [the] writ proceeding … to require *some* judicial evaluation of the claim to determine if the respondent should even be required to answer the allegations." *Boresi*, 396 S.W.3d at 365 (Fischer, J., concurring) (emphasis added).[8] Here

[8] The procedural variance created here by the Circuit Court's ruling on Respondents' motion to dismiss also serves to distinguish *Powell v. Dep't of Corrections*, 463 S.W.3d 838 (Mo.App. 2015), cited by Relators. *See* Rel.S.Brf. at 24-25. In *Powell*, in response to the issuance of summons in a writ of mandamus case, the respondent "filed suggestions in opposition to [the] writ petition." 463 S.W.3d at 840. Furthermore, we know that motions to dismiss actually serve the function of providing *some* judicial evaluation prior to allowing a writ application to proceed. For example, such a motion was utilized by respondents in *State ex rel. Tivol Plaza, Inc. v. Mo. Comm'n on Human Rights*, 2016WL1435970 at *1 (Mo.App., April 12, 2016) (transfer granted August 23, 2016), and the circuit court there, finding the petition to be without merit, dismissed it.

the Circuit Court in part granted and in part denied the motion to dismiss and "directed [Respondents] to file an answer within twenty (20) days…." L.F. 40. In short, the Circuit Court here engaged in at least *some* judicial evaluation of the writ petition and, following that, entered an order requiring Respondents to file an answer. *Id*. This is certainly the "functional equivalent of a preliminary order" and is all either opinion in *Boresi* would require.[9] 396 S.W.3d at 359.

But some judicial evaluation of the writ petition and a subsequent order directing Respondents to answer are not the only distinctions between *Boresi* and this matter that support appellate court review. For the purpose of deciding whether to conduct appellate review, the *Boresi* Court found it significant that the parties there had "litigated the matter fully [and] were not at fault…" for the procedural mistakes before the Court. *Id.* at 359, n. 1. By contrast, Relators – as they have acknowledged – were not faultless in the procedural deficiencies in this matter. Here Relators "take responsibility for the manner in which counsel initiated this matter," "concede[ ] that the State did raise the procedural objection numerous times," and acknowledge that "[t]he error belongs to the Appellant[s'] here." Rel.S.Brf. 24 and 24, n.1, *see also* Rel.S.Brf. 25, n.3 ("the Division of Insurance raised the issue of writ procedure several times in the court below.").

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[9] This functional equivalency is significant because a legal document "is not judged by its title but by its substance and content." *See State v. Abeln*, 136 S.W.3d 803, 813 n. 8 (Mo.App. 2004) (quoting *Farmers State Bank v. Place–Wiederholt Chevrolet–Oldsmobile, Inc.*, 747 S.W.2d 170, 172 (Mo.App. 1988)).

In fact, dismissal here rewards the guilty and punishes the innocent. Dismissal of this appeal is a benefit to Relators and deprives Respondents of their hard-fought victory overcoming procedural defects that were not of their making and ones they repeatedly raised. As the Appellate Court noted, Respondents objected, early and often, to procedural deficiencies present in this case, but those cries went unheeded. In fact, as the Western District notes, Respondents asserted Relators' failure "to satisfy the procedural requirements for mandamus under Missouri Supreme Court Rule 94.03" in their Motion to Dismiss the petition (*Bartlett* slip. op. at 3), in their motion to dismiss the First Amended Petition (*id*.), in their General Objection and Answer – filed after the partial denial of their motion to dismiss (*id.* at 4), in their objections to Relators' motion for leave to file a second amended petition (*id.*), and again in their objections to Relators' amended motion for leave to file a second amended petition (*id.* at 4-5).

Surely, after years of litigation, Respondents were entitled to file a motion for summary judgment in an attempt to bring resolution to this matter and, when they successfully did so, they were entitled to the benefits of the judgment they had secured. Any other conclusion would be an abuse of the discretion acknowledged by the *Boresi* Court. 396 S.W.3d at 359, n. 1.

A "trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Doe by and through Doe v. Hughes*, No. WD79064, 2016WL7364704 at *8 (Mo.App. WD December 20, 2016) (quoting *Dodson v. Ferrara*, 491 S.W.3d 542, 552 (Mo.banc 2016)).

This case meets *Doe's* standard for abuse of discretion. Respondents expended more than four years' worth of scarce public resources to secure a judgment below and in the attempt to defend it; if this Court declines to exercise jurisdiction, the entire expenditure has been a waste.[10] A Court decision to dismissing this appeal would impose this waste on Respondents, the innocent party who repeatedly raised the procedural defects in this matter.[11] That discretionary decision is "so unreasonable and arbitrary that [it] shocks the

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[10] As suggested by the Western District, Relators disclose an intention to file a declaratory judgment action based on the facts of this case. Rel.S.Brf. 26. Because the Western District's discussion of the merits of Relators' action or other avenues of relief were unnecessary to its dismissal of Relators' appeal, the same was dicta. *Swisher v. Swisher*, 124 S.W.3d 477, 482 (Mo. App. W.D. 2003) ("Obiter dicta, by definition, is a gratuitous opinion. Statements are obiter dicta if they are not essential to the court's decision of the issue before it." (internal quotations omitted)). Relators' repeated reliance and advocacy in their supplemental brief before this Court on the Western District's opinion is misplaced. *Philmon v. Baum*, 865 S.W.2d 771, 774 (Mo.App. 1993) ("The decision of the court of appeals in a case subsequently transferred is of no precedential effect.").

[11] Relators, at least partially, agree that dismissal produces considerable waste. "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." Rel.S.Brf. 24, n.4.

sense of justice and indicates a lack of careful deliberate consideration." 491 S.W.3d at 552.

The "lack of careful deliberation" component for analyzing abuse of discretion is established by considering the logical consequences that would flow if the Circuit Court had reached a different conclusion in this matter. Imagine for a moment if Respondents had not objected to the procedural irregularities in this matter or, without regard to any objections, that the Circuit Court had entered judgment for Relators. Theoretically, Respondents either would have been obligated to file a futile appeal that no appellate court had jurisdiction to review or they could have ignored the judgment entered against them, waited for the filing of an enforcement action, and then asserted the Circuit Court's error in failing to enter a preliminary order in mandamus as a basis to avoid the judgment that had been entered against them. An absence of appellate jurisdiction under these hypothetical circumstances would produce chaos, and it is the very kind of chaos courts of law are obligated to avoid. "The law must be so construed as to avoid clashes and conflicts between courts and their jurisdiction; otherwise confusion and chaos will come out of what is intended as order." *State ex rel. Knisely v. Holtcamp*, 266 Mo. 347, 181 S.W. 1007, 1010 (1915).

Dismissal of this appeal for want of jurisdiction or as an exercise of appellate discretion works a miscarriage of justice. It rewards Relators, who instigated this procedural quagmire, and punishes Respondents, who diligently raised the procedural deficiencies, by vacating the judgment Respondents secured after years of litigation. It does so in the name of procedural purity when the function it would have produced – some

review of the writ petition prior to a compulsory answer – was achieved by the Circuit Court's ruling on Respondents' Motion to Dismiss. This Court has appellate jurisdiction and it should exercise that jurisdiction and review this matter.

Point II.

The Circuit Court properly denied Relators' request for mandamus relief and properly granted Respondents' Motion for Summary Judgment because Relators failed to demonstrate that they had a clear, unequivocal, and specific right to relief and Respondents demonstrated that Relators were paid in excess of NAIC Guidelines, if applicable. (Responding to Relators' Point II.[12])

A. The nature of mandamus.

Mandamus is an extraordinary remedy, *Jones v. Carnahan*, 965 S.W.2d 209, 212 (Mo.App. 1998), reserved for those who seek enforcement of a "clear, unequivocal, and specific right[,]" *State ex rel. Mo. Growth Ass'n v. State Tax Comm'n*, 998 S.W.2d 786, 788 (Mo.banc 1999), and who have no other adequate legal remedy. *State ex rel. J.C. Nichols Co. v. Boley*, 853 S.W.2d 923, 924 (Mo.banc 1993). Pending before this Court is

[12] Though Relators now argue in Points I and II of their Supplemental Brief that "the trial court erred in denying summary judgment to relator …[,]" they did not assert error in the denial of their motion for summary judgment in their Points Relied On before the Western District. Relators have strayed impermissibly from their original contentions in the Court of Appeals. "On transfer to this Court, an appellant may not 'alter the basis of any claim that was raised in the brief filed in the court of appeals.'" *Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo.banc 1997) (quoting Rule 83.08(b)). Relators never asserted in the Western District that the Circuit Court erred in denying their motion for summary judgment. This Court should not countenance Relators' attempt to move the target.

a stale case demonstrating, for a myriad of reasons, that mandamus relief is wholly inappropriate.

"The extraordinary relief of mandamus has limited application." *Jones*, 965 S.W.2d at 212. The use of the writ is appropriate "to prevent great injury or injustice." *State ex rel. Red Cross Pharmacy, Inc. v. Harman*, 423 S.W.3d 258, 262 (Mo.App. 2013) (quoting *State ex rel. Farley v. Jamison*, 346 S.W.3d 397, 399 (Mo.App. 2011)). Mandamus is an "unreasoning writ [that] is reserved for extraordinary emergencies." *State ex rel. Meyer v. Ravenhill*, 20 S.W.3d 543, 545 (Mo.App. 2000) (quoting *State ex. rel. McGarry v. Kirkwood*, 423 S.W.2d 205, 208 (Mo.App. 1967)). Accordingly, "[m]andamus is a discretionary writ, and no right exists to have the writ issue." *State ex rel. Mason v. County Legislature*, 75 S.W.3d 884, 887 (Mo.App. 2002). "Mandamus is a legal, not an equitable remedy." *State ex rel. Walton v. Miller*, 297 S.W.2d 611, 615 (Mo.App. 1956).[13] The judgment in a mandamus proceeding "will be upheld on any reasonable theory supported by the evidence." *Chastain v. Kansas City Missouri City Clerk*, 337 S.W.3d 149, 155

[13] Curiously, Relators assert that they will pursue a "remedy at law" through a declaratory judgment action. Rel.S.Brf. 26. However, as this Court explained in *State ex rel. SLAH, L.L.C. v. City of Woodson Terrace*, 378 S.W.3d 357, 361 (Mo.banc 2012), declaratory judgment "actions are sui generis in nature – neither legal nor equitable – but because their historical affinity is equitable, equitable principles govern such actions. Consequently, to maintain a declaratory judgment action, there must be no adequate remedy at law." (Citations omitted.)

(Mo.App. 2011) (quoting *State ex rel. Thomas v. Neeley*, 128 S.W.3d 920, 924 (Mo.App. 2004)); *see also State ex rel. Lee v. City of Grain Valley*, 293 S.W.3d 104, 107 (Mo.banc 2009) ("The judgment in a mandamus action will be affirmed unless the trial court commits an abuse of discretion so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." (quotations omitted)). "A party seeking the writ must **allege and prove** that it had an unequivocal, clear, specific right to the thing claimed." *Red Cross Pharmacy*, 423 S.W.3d at 262 (quoting *State ex rel. Farley*, 346 S.W.3d at 399 (Mo.App. 2011)) (emphasis added).[14] "Mandamus will issue only when there is an unequivocal showing that the public official failed to perform a ministerial duty imposed by law." *Jones*, 965 S.W.2d at 213. Put another way, "[m]andamus does not issue except in cases where the ministerial duty sought to be coerced is definite, arising under conditions admitted or proved and imposed by law." *State ex rel. George v. Verkamp*, 365 S.W.3d 598, 600 (Mo.banc 2012) (quoting *State ex rel. Collector of Winchester v. Jamison*, 346

[14] Rule 94.03 mandates that relevant evidence be included in or attached to the Petition for Writ of Mandamus. The Rule provides, in relevant part:

> A copy of any order, opinion, record or part thereof, document, or other item that may be essential to an understanding of the matters set forth in the petition in mandamus **shall** be attached as exhibits if not set forth therein.

(Emphasis added.) Exhibit 2, attached to Relators' First Amended Petition (S.L.F. 75-80), fails to meet the requirements of this Rule as discussed more fully below.

S.W.3d 589, 592 (Mo.banc 2012)). Mandamus "will not lie if the right is doubtful." *Jones*, 965 S.W.2d at 213.

> To determine whether the right to mandamus is clearly established and presently existing, the court examines the statute under which the relator claims the right….If the statute involves a determination of facts or a combination of facts and law, a discretionary act rather than a ministerial act is involved and this discretion cannot be coerced by the courts.

Id. (internal citation omitted). Thus, "[t]he purpose of mandamus is to execute and not to adjudicate." *Mason*, 75 S.W.3d at 887.

B. Section 374.115 does not create a clear, unequivocal, and specific right.

Relators claim an entitlement to mandamus to compel Respondents to compensate them under §374.115, which provides, in its entirety:

> 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.

This statute, with its numerous undefined terms and unspecified referents, requires a determination of facts or facts and law, is not clear, unequivocal and specific, and therefore cannot be enforced by writ of mandamus. "It is well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed." *Felker v. Carpenter*, 340 S.W.2d 696, 701 (Mo. 1960) (quoting *Ward v. Christian Co.*, 341 Mo.

1115, 111 S.W.2d 182, 183 (Mo. 1937)). At least three words or phrases in this statute fail to meet the mandamus test in that they are unclear, equivocal, or unspecific: those words or phrases are "shall," "compensation," and "established and published." Each will be discussed in turn.

1. "Shall." While language indicating that a person or entity "shall" do something in a statute is often mandatory in nature, it can also be directory. Whether "shall" is mandatory or directory is a function of context. *Farmers & Merchants Bank and Trust Co. v. Dir. of Revenue*, 896 S.W.2d 30, 32 (Mo.banc 1995). "Where the legislature fails to include a sanction for failure to do that which 'shall' be done, courts have said that 'shall' is directory, not mandatory." *Id*. at 33.

Section 374.115's ostensible command that the Director "shall" compensate examiners pursuant to NAIC levels does not have a remedy or consequence for failure to comply, meaning that "shall" as used in this statute is merely directory, and not mandatory. This Court explained the trouble with "shall" in this way:

> The rationale for the "mandatory" vs. "directory" dichotomy, and the purpose served by that analysis, is to ensure that decisions regarding what sanctions (if any) are appropriate when a party fails to comply with a statutory deadline or other obligation are **legislative** decisions – no more or less than the decision whether to impose such an obligation at all.

Frye v. Levy, 440 S.W.3d 405, 414 (Mo.banc 2014) (emphasis in original).

It is entirely logical that the Legislature by utilizing "shall" in §374.115 intended that the word be directory as any examiner compensation was limited each year to the

amount appropriated for that purpose. "No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law…." MO.CONST. art. IV, §28. And, in the context of this matter, that appropriation cannot come from the State's general revenue. Rather, "[t]he director shall pay from the insurance examiners fund the compensation of insurance examiners…, including standard benefits afforded to state employees, for performance of any such examination and other expenses covered in the assessment." Section 374.160.4.[15] And what Respondent Director may expend from the Insurance Examiners Fund to compensate insurance examiners is limited to the amounts appropriated from that fund for that purpose. "Within [a] fiscal year, an [office holder] may expend funds appropriated to his or her office as he or she sees fit, provided the expenditures are within the limits and for the purposes set out in the appropriation order." *Kuyper v. Stone Co. Comm'n,* 838 S.W.2d 436, 440 (Mo.banc 1992).

[15] Note that the compensation of insurance examiners from the Insurance Examiners Fund and the assessment imposed on the insurance companies being examined pursuant to §374.160.4 are, by statute, to create a closed loop for funding the costs of insurance examinations. "The director shall assess the expenses of any examination against the company examined and shall order that the examination expenses be paid into the insurance examiners fund." Section 374.160.4. "The expenses of examinations…are to be paid by the company, or as provided by law. The state shall not be responsible in any manner for the payment of any such expenses, or any charges connected therewith." Section 374.160.1.

A statutory allocation of funds, like the Insurance Examiner's Fund, is still "subject to appropriation, compliance with the statute was discretionary and not mandatory." *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272, 276 (Mo.App. 2010). "The policy underlying the constitutional appropriations requirement is that each legislature must have discretion to respond to the financial needs of the times….one general assembly cannot tie the hands of its successor." *Id.* at 278, (citations omitted).

While the "legislature is permitted to establish a special fund and allocate revenue to that fund, the actual disbursement of such funds is nonetheless subject to appropriation by future legislators." *Id.* Relators' Substitute Brief, and its Amended Petition, entirely ignore the necessity for an appropriation of examiner compensation.[16] Further, Relators'

[16] They do so even though the only evidence they offered below that a purported change to the way they were compensated would occur was in the form of a 2002 memorandum from their supervisor indicating that a change would occur as a result of an appropriation issue. The memorandum said: "At one point during the legislative session the Departments' appropriation authority had been significantly reduced and we were fearful that we would actually have to lay off examiners and cut office staff. We were able to convince the legislators that this was not appropriate for our Department and part of this negotiation was the pay freeze for examination staff." L.F. 960. Relators selectively quote from this memorandum in their Statement of Facts, but by using two block quotes studiously avoid the memorandum's acknowledgement of the reduced appropriation. Rel.S.Brf. 15.

make no attempt to link the level of compensation to which they claim an entitlement with the language of the NAIC Handbook (Rel.S.Brf. 54) and make no attempt to demonstrate that the Legislature appropriated sufficient funds from the examiners fund to compensate all of the Respondent Department's examiners at the level Relators contend is required by §374.115 – whatever level that might be.

2. "Compensation." Relators assert, relying on §374.115, that they should be "compensated" per the NAIC levels. But Relators make no attempt to discern the meaning of the term "compensated."[17] The Legislature did not define "compensated" as used in §374.115 and the NAIC's creation of a "daily rate" for work done "at the office of the company to be examined" (L.F. 79), demonstrates that the NAIC has not done what

[17] In fact, while Relators assert that the statute "creates [a] clear and unequivocal right" (Rel.S.Brf. 47), that being a right to be "compensated according to the levels established and published by the National Association of Insurance Commissioners" (*id.*), Relators proceed to argue throughout their Supplemental Brief that they are entitled to "wages," a "wage," or a "salary" 37 times, eschewing the words "compensated" or "compensation" to describe what they were allegedly due. If the statute was as clear as Relators contend, Relators would surely utilize the statute's language to present their argument instead of relying on non-statutory terms. Relators' failure to utilize that statutory language is a tacit admission that the statutory language is unclear, or unhelpful to Relators' argument.

§374.115 contemplated it would do; establish a compensation level for insurance examiners who were state employees.[18]

What constitutes "compensation" or what things are included when one is "compensated" is far from clear. The Supreme Court of Missouri has found, at least in certain circumstances, that "compensation" includes more than just wages or salary. In *Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System v. Barton Co.*, 311 S.W.3d 737 (Mo.banc 2010), the Missouri Supreme Court grappled with the meaning of "compensation" as it appears in Article VI, §11 of the Missouri Constitution. Barton County had stopped making statutorily required pension contributions to the Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System, which filed a writ of mandamus to force the county's contributions. *Id.* at 739. "The dispositive pension issue

[18] Respondent Director believed that the NAIC had not done what the Legislature intended in §374.115 because full-time employees are not customarily paid a daily rate dependent on the location where their work is performed. L.F. 694, ¶¶ 7-9. Relators never even allege how many days per year they worked, whether that work was "at the office of the company to be examined" (S.L.F. 79), or acknowledge that work location is instrumental in determining how examiners should be compensation. Despite his belief that the NAIC had not set compensation as §374.115 envisioned, Respondent Director utilized the NAIC adopted criteria to determine that Relators were compensated in excess of the NAIC's guideline.

on appeal" was "whether pension contributions are encompassed within the phrase 'compensation of county officers' as used in article VI, section 11." *Id*. at 741.

The Missouri Supreme Court found that "the word 'compensation' is a generic term that can be used in different senses in different contexts." *Id*. at 743. Examining Article VI, §11 and various cases, the Court concluded that "compensation" as used in the Missouri Constitution included pension contributions, and that Barton County could be required to make such contributions by statute without running afoul of the Hancock Amendment. *Id*. at 743-47.[19]

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[19] Other Missouri courts seeking to discern the meaning of "compensation" have reached a variety of results. In *Bell v. Bell*, the court stated, "compensation does not include . . . pension[s]" when determining the definition of compensation for the purpose of funding an individual retirement account. *Bell v. Bell*, 360 S.W.3d 270, 283 (Mo.App. 2011). Similarly, in *Bauer v. City of Grandview*, the court held based on the applicable statute that "[e]mployer's deferred compensation accounts are not 'compensation'" and therefore, did not need to be reported to the Local Government Employee's Retirement System. *Bauer v. City of Grandview*, 138 S.W.3d 810, 815 (Mo.App. 2004). *But see Emmons v. Farmer*, 271 Mo. 306, 196 S.W. 1106, 1108 (Mo.banc 1917) ("the word 'compensation' is the generic term, and includes, as used in the above provision of the Constitution [Art. 14, §8], salary, fees, pay, remuneration for official services performed, in whatever form or manner or at whatsoever periods the same may be paid."); *see also Lynch v. Lynch*, 665 S.W.2d 20, 24 (Mo.App. 1983) ("A pension is a form of deferred *compensation* attributable to the

Given the amorphous, context-driven definition of "compensation," Relators would be hard-pressed to articulate whether, under what circumstances, and the extent to which the NAIC's suggested "daily rates" for work done on the premises of the insurance company being examined are co-extensive the Legislature's use of the word "compensated." They do not even try. And regardless of what "compensated" means in the statute, the word cannot be said to be clear, unequivocal, and specific. Rather, the statute, and the material incorporated by reference, require Respondent Director to determine facts or facts and law. The Director had to determine the following: (a) the NAIC's applicable rate, assuming there is one, for the sake of argument here – the daily rate, (b) the days worked on site at an insurance company being examined to which the daily rate applies, (c) applicable travel days (*see* S.L.F. 79) and (d) the legally required components of compensation, all precluding issuance of a writ of mandamus. "If the statute involves a determination of facts or a combination of facts and law, a discretionary act rather than a ministerial act is involved and this discretion cannot be coerced by the courts." *Jones*, 965 S.W.2d at 213.

In *Jones*, the Court found that appellants, hearing officers for the Department of Social Services, failed to meet their burden that the statute imposed a "clear, unequivocal, specific and positive right" even though the statute spoke of "salaries," a term more narrow than "compensation." *Id.* The statute at issue, §288.220.4, provided:

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entire period in which it was accumulated.") (citing *Kuchta v. Kuchta*, 636 S.W.2d 663, 665 (Mo.banc 1982) (emphasis added)).

> The director shall collaborate with the personnel director and the personnel advisory board in establishing for employees of the division salaries comparable to the salaries paid by other states of a similar size and volume of operations to employees engaged in the administration of the employment security programs of those states.

The Court determined that mandamus could not issue because under this statute "the establishment of hearing officers' salaries…involves a discretionary act…." *Id.* "Discretion is contemplated in determining what salaries are 'comparable' and which states are of 'similar size and volume of operations.'" *Id.*[20]

The statute here at issue requires Respondent Director to make similar discretionary decisions. Respondents must apply §374.115 necessitating a definition of "compensated," which they understand to include the cost of benefits Relators receive by virtue of their status as employees of Respondent Department. L.F. 694-95, ¶13. This is consistent with §374.160, which includes in the assessments Respondents impose on insurance companies they examine, "the costs of *compensation, including benefits,* for the examiners…directly contributing to the examination…." (Emphasis added.) And Respondents' view is consistent with what Relators were told every year – that their "compensation" "is more than just the dollars you receive in your paycheck." (MOSERS Personal Benefit

[20] *Cf. George*, 365 S.W.3d at 602 (where the Court found clear, unequivocal and specific a statute's easily-applied mandate that a full-time prosecuting attorney's compensation be equal to the compensation of an associate circuit judge).

Statements - Bartlett: L.F. 652, 655, 658, 661, 664, 777; Hernandez: L.F. 674, 677, 680, 683, 686.)[21] Under these circumstances, §374.115's use of "compensated" either clearly includes the benefits provided to Relators (in which case the summary judgment facts demonstrate that Respondents are entitled to summary judgment and denial of the writ) or is unclear and requires Respondents to determine facts or a combination of facts and law as to whether the cost of benefits is to be included (in which case Relators are not entitled to a writ of mandamus). Again, "[i]f the statute involves a determination of facts or a combination of facts and law, a discretionary act rather than a ministerial act is involved and this discretion cannot be coerced by the courts." *Jones*, 965 S.W.2d at 213; *Mo. Growth Ass'n,* 998 S.W.2d at 788 (mandamus "cannot be used to control the judgment or discretion of a public official…."). Regardless of whether the Circuit Court determined that Respondents' understanding of "compensated" as used in §374.115 involves a determination of fact or a combination of facts and law, the Circuit Court appropriately granted Respondents summary judgment and denied the requested writ.

3. "Established and published." Relators claim that they are entitled to compensation per the levels "established and published" by the NAIC. And, presumably, Relators' Exhibit 2 (S.L.F. 75-80), attached to the First Amended Petition, is an attempt to show such levels. This "proof" fails because that exhibit specifically says it was "Updated

[21] Significantly, Relators use the same Personal Benefit Statements to oppose Respondents' Motion for Summary Judgment. L.F. 1091-1134.

June 2012[.]" Both Relators had left the Department in March 2012. S.L.F. 70, ¶¶ 27, 33; L.F. 671, 690.

The First Amended Petition and its exhibits also fail to demonstrate that compensation rates have been "established" by the NAIC because in identifying its rates the NAIC uses language inconsistent with the "establishment" of a rate. The NAIC levels stated in Exhibit 2 are merely "suggested" and "proposed" "guidelines."[22] When operative words are undefined, courts generally adopt the plain and ordinary meaning of the words as found in the dictionary. *See generally Balloons Over the Rainbow v. Dir. of Revenue*, 427 S.W.3d 815, 825 (Mo.banc 2014) ("Absent a statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary." *Id.*). Looking to the dictionary for plain meaning, to "suggest" means "to mention (something) as a possibility…to propose (something) as desirable or fitting…to offer (as an idea or theory) for consideration…." WEBSTER'S THIRD NEW INTERNATIONAL

[22] First Amended Petition Exhibit 2, by its title, pertains to "**Suggested** Compensation" (emphasis supplied). And after the document details examiner titles and responsibilities, Exhibit 2 then sets forth "Salary and Per Diem **Guidelines,**" "**Suggested** Compensation," and a "**proposed** competitive salary schedule." (Emphasis added.) Thus, the levels on which Relators apparently rely are only "suggested" and "proposed" "guidelines" for a "daily rate" for classifications of insurance examiners. S.L.F. 79. Even in one of Relators' un-filed second amended petitions, Relators admit that "[t]he NAIC published *suggested* compensation…." L.F. 100, emphasis added.

DICTIONARY OF THE ENGLISH LANGUAGE, 2286 (3d ed. 1993). Similarly, to "propose" means, "to form or declare a plan or intention." *Id*. at 1819. In addition, a "guideline" is "an indication or outline of future policy or conduct." *Id*. at 1009. The NAIC's use of the words, "suggested," "proposed," and "guidelines," is inconsistent with the §374.115's requirement that the NAIC "establish"[23] compensation levels. And §374.115, crafted as it is with reference to ambiguous non-legislative pronouncements, should not be interpreted by a court on mandamus. *See Mason*, 75 S.W.3d at 887 ("purpose of mandamus is to execute, not to adjudicate….").

C. Relators have not established a clear, unequivocal, and specific right to a particular level of compensation.

Relators do not have a clear, unequivocal, and specific right to be compensated at any particular level because: (1) §374.115 does not define compensation (i.e., does it include employee benefits or not); (2) the NAIC has not established compensation rates for examiners (it has, for some years, set a daily guideline rate to be charged insurance companies for examination activities performed on the premises of an insurance company applicable to both contract examiners and employee examiners); and (3) Relators have put

[23] "Establish" is defined thusly: "to make firm or stable: fix to prevent or check unsteadiness, wavering, turmoil, or agitation…." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 778 (3d ed. 1993).

forth several different salary or wage levels (not compensation levels)[24] to which they assert an entitlement, and Respondents have set forth a different compensation level determined in a manner consistent with the statute and that actually utilized the NAIC Guidelines (if applicable under the statute's terms).[25] This is not merely a problem of

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[24] For a detailed discussion and comparison of Relators' numerous and widely divergent calculations, *see* L.F. 330-35.

[25] Relators' Substitute Brief asserts that Relators presented to the trial court the amounts required by the "NAIC Mandate" (Rel.S.Brf. 54), claiming that the amount there reflected was shown by Relator Bartlett. This is inaccurate. In one of Relators' many assertions of the amount supposedly required by the NAIC Guidelines, Relator Bartlett asserted a lower amount (L.F. 762-63) than set forth in Relators' Supplemental Brief and described the method she used to calculate it ("Daily rate…divided by 8 hours and then multiplied by 2080 hours"). L.F. 763. This calculation methodology does not reference the NAIC Guidelines as discussed above. The figures found in Relators' newly created chart for the purposes of appeal are found in Relators' counsel's unattested response (not one of the Relators' responses) to the same interrogatory for which Relator Bartlett had given different, lower amounts. L.F. 762-64. Relators' remark that "they asked for the Director…to be ordered to calculate the underpayments and make restitution…" (Rel.S.Brf. 54) is disingenuous for two reasons: (1) the First Amended Petition – the operative petition in this matter – does not ask for restitution (S.L.F. 71); and (2) Respondent Director has, in fact, made a detailed calculation confirming that Relators

remedy as Relators contend; it goes directly to the fact that there is no clearly established right to be compensated at any specific level under the statute.

> [T]he vehicle of a petition in mandamus does not ordinarily serve to resolve issues centered on an ambiguous statute because by definition the right to be enforced in mandamus must be clear and unequivocal. The writ in mandamus does not issue except where the ministerial duty to be coerced is simple and definite arising under conditions admitted or proved and imposed by law.

State ex rel. Igoe v. Bradford, 611 S.W.2d 343, 347 (Mo.App. 1980) (citation omitted). Relators refer to §374.115 and declare it to create a clear, unequivocal, and specific right (despite its use of undefined and unspecific terms) and proceed to completely ignore that when the statute that incorporates outside materials by reference in order to be operative,

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received compensation in excess of the NAIC Guidelines. LF 693-710. Continuing in the same manner, Relators claim that their remedy "can be determined by a simple calculation." Rel.S.Brf. 45. This case presents more than a remedy problem. The parties disagree over what methodology is to be utilized to determine if Relators were undercompensated, with Respondents utilizing the NAIC Guidelines and Relators creating an alternative one *sub silentio*. Rel.S.Brf. 54. The record reflects that Respondents painstakingly performed the calculation and the circuit court granted judgment to Respondents. The "purpose of mandamus is to execute, not to adjudicate." *Mason*, 75 S.W.3d at 887.

those materials incorporated by reference must also be clear, specific, and unequivocal.[26] Relators concede as much. While at one point Relators assert that "the right to relief flows solely from the statute" (Rel.S.Brf. 48), elsewhere Relators concede that "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.'" Rel.S.Brf. 47, n. 10. Even apart from §374.115's unclear language, the situation before the Court constitutes the very antithesis of the required clear, unequivocal, and specific right to any particular level of compensation because the statutorily incorporated applicable NAIC levels are themselves unclear.[27] And, in the absence of a

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[26] In fact, the NAIC Guidelines specifically grant the Respondent Director discretion in calculating the examiner per diem. Those "charges" "are to be computed beginning at the time of the reporting for duty at the office of the company to be examined and terminating upon the completion of the examination ***or*** the examiner's active participation therein…." L.F.393, emphasis added. A writ of mandamus could not properly direct Respondent Director which of these two options contained in the NAIC Guidelines he or she was required to select. Hence, Relators' claim that "the right of relief flows directly from the statute," Rel.S.Brf. 48, is belied by the fact that the statute requires Respondents to look elsewhere.

[27] Relators readily concede that the statute requires construction, Rel.S.Brf. 32, n.5 and 50-52, and suggest the rationale for the law is to prevent examiner flight to other states. As convenient as that suggestion is for Relators, it is at least as likely that the Legislature

clear, unequivocal, and specific right, Respondents are entitled to summary judgment and the denial of Relators' requested writ.

The First Amended Petition asserts that Relators have a "specific right" to compensation pursuant to §374.115, at the level reflected in "pay scales for different classifications of insurance examiners on a yearly basis," and that "there is no discretionary analysis in determining pay." S.L.F. 69, ¶¶19-21. The only exhibit attached that could factually support Relators' claims is Exhibit 2, an unauthenticated document dated June 2012[28] purportedly authored by the NAIC, that provides in relevant part that:

> Salary and per diem charges are to be computed *beginning at the time of reporting for duty at the office of the company to be examined* and *terminating upon* completion of the examination *or* the examiner's active participation therein and *to include actual days for travel* as certified by his or her commissioner.

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sought to cap examiner compensation (Rel.S.Brf. 48, examiner compensation cannot be "more than" NAIC Guidelines), so that the labor costs of examination for Missouri insurance companies were not above the labor costs of examinations for insurance companies domiciled elsewhere. *See* §374.160.4, RSMo.

[28] Exhibit 2 was apparently a June 2012 update, covering a period well after the time when Relators complain about their compensation. S.L.F. 140-41, n. 1. Relator Bartlett left employment with the Department on March 29, 2012 (L.F. 671), while Relator Hernandez retired from the Department on March 1, 2012. L.F. 690.

1. *Suggested* Compensation:

The *proposed* competitive salary schedule for all examiners is as follows:

Classification	Daily Rate
* * *	* * *
Senior Insurance Examiner, CFE	$343.00

S.L.F. 79 (underline in original; italic emphasis added).

No specific right to compensation levels is identified (Exhibit 2 – using the word "or" – provides two alternatives as to when the "proposed competitive salary" can be terminated and states a "proposed competitive salary"). No definition of "compensation" is included. No allegations are made concerning the "time[s] [when Relators] report[ed] for duty at the office[s] of the compan[ies] to be examined." No allegations are made concerning what "actual days for travel" were "certified." And, while Relators alleged that they were entitled to the $343.00 daily rate (S.L.F. 70-71, ¶¶29, 36), they made no allegation nor offered any evidence concerning how many days Relators would be entitled to this rate.

D. If the Court determines that Respondents had a clear, unequivocal, and specific duty, Respondents have discharged that duty.

Assuming for the sake of argument the applicability of the "daily rate," the undisputed facts demonstrate that Respondents are entitled to summary judgment and the denial of Relators' request for Mandamus. The facts demonstrate that Relators were compensated in excess of the daily rates set forth in the NAIC Guidelines – if those rates are applicable at all. L.F. 694, ¶11. The evidence indicates that those rates are "daily rates"

to be paid for work performed on the premises of the insurance company to be examined. L.F. 694, ¶12; *see generally* L.F. 378, 380-81, 387, and 393. The "daily rate" as expressed by the NAIC does not specify whether it applies to full or partial days worked on the premises of the insurance company to be examined. L.F. 695, ¶14; *see generally* L.F. 378, 380-81, 387, and 393. For this reason, when the Director evaluated the sufficiency of Relators' compensation he counted both partial and full days billed to the examination of an insurance company as being subject to the full "daily rate," obviously benefitting Relators. L.F. 695, ¶14. While the First Amended Petition does not specify which exam days involved work on the premises of the insurance company being examined, the Director's analysis of Relators' compensation levels assumed that all examination work days as reflected on Relators' time sheets were for work done on the premises of the insurance company being examined – again benefitting Relators in a way not contemplated by the NAIC Guidelines. L.F. 695, ¶15.

In the next step of the Respondent Director's analysis, the exam days (full and partial, all presumably done on the premises of the insurance company being examined) for each of the time periods in issue were multiplied by the allegedly applicable NAIC daily rates to produce and amount of compensation for each year that would be due under the NAIC's Guidelines. L.F. 693-709. These yearly calculations became the right hand side of the charts below, the calculations moving from the right hand side of each chart to the center.

In the next step of the Respondent Director's analysis, the salaries paid to Relators for the time periods in dispute were added to the cost of the benefits Relators received as a

result of their employment with the Department. *Id.* The Director considered it appropriate to add salary and the costs of benefits together to determine the equivalency of compensation levels because the NAIC rates appear to constitute the entire economic benefit examiners are to receive for their labors and, thus, must be compared to the entire economic benefit Relators received as a result of their employment with the Department. L.F. 694-95, ¶13. Furthermore, the Director felt this appropriate because this was his understanding of §374.115 and because Relators were repeatedly told that their compensation included "more than just…[their] paycheck[s]," it also included the costs of their benefits. *Id.* The inclusion of benefit costs is also consistent with §374.160.4. This analysis is reflected on the left hand side of the charts below, moving from the left to the center.

Utilizing the following charts produced according to this analysis, the Director determined that Relators' compensation exceeded that suggested by the NAIC Guidelines, as reflected in the variance column. L.F. 695, 708-09, ¶¶16, 17, 111.

Shawn Hernandez

→ State Actual				$ Variance	NAIC Handbook Guidelines ←		
Year	Salary $	Benefit $	Total $	← Favor →	Total $	Daily Rate $	Exam Days
2012	12,412.52*	4,683.36	17,095.88	← 7,834.88	9,261.00	343.00	27
2011	74,475.12	28,100.16	102,575.28	←42,664.28	59,911.00	331.00	181
2010	74,475.12	25,998.00	100,473.12	←43,729.12	56,744.00	328.00	173
2009	74,475.12	25,761.84	100,236.96	←43,492.96	56,744.00	328.00	173
2008	72,556.26	24,769.68	97,325.94	←45,533.94	51,792.00	312.00	166
2007	12,051.00	4,021.30	16,072.30	← 8,428.30	7,644.00	294.00	26

*Excludes $11,529.31 annual leave payout

Barbara Bartlett

→ State Actual				$ Variance	NAIC Handbook Guidelines ←		
Year	Salary $	Benefit $	Total $	← Favor →	Total $	Daily Rate $	Exam Days
2012	18,054.57*	7,261.29	25,315.86	←10,566.86	14,749.00	343.00	43
2011	74,475.12	31,438.44	105,913.56	←46,995.56	58,918.00	331.00	178
2010	74,475.12	25,950.12	100,425.24	←41,057.24	59,368.00	328.00	181
2009	74,475.12	25,520.04	99,995.16	←45,219.16	54,776.00	328.00	167
2008	73,390.56	19,971.60	93,362.16	←40,010.16	53,352.00	312.00	171
2007	12,051.00	3,227.84	15,278.84	← 9,398.84	5,880.00	294.00	20

*Excludes $2,025.39 annual leave payout

As these charts demonstrate, Relators were compensated at a level in excess of that suggested by the allegedly applicable NAIC daily rates and exclude Relators' annual leave payouts that they received upon their cessation of employment with the Department. Note as well that Relator Hernandez, now retired, was scheduled to receive an initial retirement benefit in the amount of $3,755.90 per month and that Relator Bartlett is scheduled to receive a retirement benefit in the amount of $1,107.82 per month if she waits to collect retirement benefits until her normal retirement in December 2017. L.F. 709, ¶¶113, 114.

The evidence demonstrates that Relators were compensated well in excess of whatever levels were allegedly suggested by the NAIC. The only way Relators will suggest otherwise is to ask this Court to define "compensation" to exclude Relators' employment benefits,[29] and to either ignore the limitations contained within the NAIC's Guidelines, or to add examination days to the calculation in excess of those days that Relators' time sheets

[29] The foregoing charts demonstrate that the salaries Relators received (shown in column two) exceed the daily rate as set forth in the NAIC Guidelines (column six).

demonstrate that they worked on insurance company examinations. The Court should do none of these things, as they are unsupported by the summary judgment evidence or the law. Rather, based on the undisputed evidence, the Court should affirm the Circuit Court's Judgment granting Respondents' Motion for Summary Judgment and denying Relators' request for a Writ of Mandamus.

Point III.

The Circuit Court properly granted Respondents' Motion for Summary Judgment and denied Relators' request for a writ of mandamus on the independent basis of sovereign immunity because Relators sought damages in the absence of a waiver of sovereign immunity, and because Relators cannot assert a contract or quasi-contract claim for the first time on appeal, such a claim is unsupported by the law and, if it were permitted, is barred by laches. (Responding to Relators' Point I.)

A. Respondents are entitled to immunity from Relators' claims and that immunity has not been waived.

Relators contend before this Court that they are not seeking damages, but either restitution or a remedy for a contractual debt. Rel.S.Brf. 37, 39-40 n.9.[30] But in the Circuit

[30] Relators repeat this claim at the end of their brief, suggesting here that they seek an order requiring Respondents to calculate the underpayment of wages to Relator and the preparation of a "damages spreadsheet" for the court's approval, supported by a long quotation of their purported prayer for relief. Rel.S.Brf. 55-57. Inexplicably, the quoted prayer for relief is from Relators' **un-filed** second amended petition and their summary judgment motion based on that same pleading. *Compare,* Rel.S.Brf. pp. 55-57, *with* L.F. 117-119 ((second) second amended petition) *and* L.F. 840-41 (motion for summary judgment based on (second) second amended petition). This is significant because Kimball remains as a putative relator in the relief Relators request from this Court. Therefore, as the Relators' predicated their Motion for Summary Judgment on the wrong pleading,

Court Relators sought damages. Relators' Suggestions in Support of Motion for Summary Judgment plainly states that "Relators now seek to recover damages…." L.F. 818; *see also* L.F. 812, 841. Relators' Suggestions in Opposition to Respondents' Motion for Summary Judgment asserts an entitlement to "damages." L.F. 999; *see also* L.F. 1057. Moreover, at oral argument on the motions for summary judgment Relators requested "damages." Tr. 4, 8, 9.[31] Because Relators never gave the Circuit Court the opportunity to consider quasi-

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including a new relator, Relators are not entitled to summary judgment. "The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." *ITT Comm. Fin. Corp. v. Mid-America Marine Supply Corp.* 854 S.W.2d 371, 380 (Mo. banc 1993), citing *cf. E.O. Dorsch Electric Co. v. Plaza Constr. Co.* 413 S.W.2d 167, 173 (Mo. banc 1967) (judgment improper, despite non-movant's failure to file counter-affidavits and create a material issue of fact, because movant had not established a right to judgment as a matter of law). The prayer for relief that was before the Circuit Court can be found at S.L.F. 71.

[31] Even after the trial court entered its judgment, Relators continued with their assertion that they were seeking damages. In their Civil Case Information Form Supplement (Form 1), Relators state: "Relators/Appellants now seek to recover damages…" (S.L.F. 238) and in their statement of the Issues Presented, attached thereto, present as an issue on appeal: "3. Whether the Circuit Court erred in finding Relators' claim for damages were not specific enough in calculation to show a clearly established right." S.L.F. 239. An appellate argument that suggests that Relators were not seeking

contract or restitution theories, those theories are not preserved, *Dieser v. St. Anthony's Medical Ctr.*, 498 S.W.3d 419, 432 (Mo.banc 2016) (quoting *State v. Davis*, 348 S.W.3d 768, 770 (Mo.banc 2011) ("An issue that was never presented to or decided by the trial court is not preserved for appellate review")) and are reviewable, if at all, for plain error only. Rule 84.13. While the Circuit Court did not err in considering Relators' writ as one requesting "damages," if it had erred it was surely invited error.[32]

The doctrine of sovereign immunity protects the State of Missouri from liability, in that "the sovereign may not be sued without its consent." *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 923 (Mo.banc 1995). *See also Kleban v. Morris*, 363 Mo. 7, 247 S.W.2d 832, 836 (Mo. 1952) ("The courts of this State have consistently held that the State may not be sued without its consent....[t]he principle that the sovereign cannot be sued without its consent or permission rests upon grounds of public policy, and the law making authority

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damages below is an argument "created solely for litigation, and not a good faith argument…." Rel.S.Brf. 49, n. 11.

[32] "Under the invited error rule, 'a party is estopped from complaining of an error of his own creation, and committed at his request.'" *Brizendine v. Bartlett Grain Co.*, 477 S.W.3d 710, 717 & n.2 (Mo.App. 2015) (quoting *Rouse v. Cuvelier*, 363 S.W.3d 406, 416 & n.6 (Mo.App. 2012)); *see also Calarosa v. Stowell*, 32 S.W.3d 138, 146 (Mo.App. 2000) (quoting *Reed v. Rope*, 817 S.W.2d 503, 509 (Mo.App. 1991) ("'[A] party cannot complain on appeal of alleged error which his own conduct creates,' and more to the point, '[a] party cannot lead the court into error and then employ that error as a source of complaint.'")).

is the proper body to change the public policy and authorize a suit against this state." (citations omitted)). Instrumentalities of the state, including its agencies, are protected and immunized to the same extent as the state itself. *Pitts v. Malcolm Bliss Mental Health Ctr.*, 521 S.W.2d 501, 504 (Mo.App. 1975); *St. Louis Police Officers' Ass'n v. Bd. of Police Comm'rs*, 846 S.W.2d 732, 735 (Mo.App. 1992). There is no dispute that Respondent Department is a state agency (S.L.F. 66-67, esp. ¶6); therefore, it enjoys the same immunity from liability as the State of Missouri. Respondent Director is also entitled to sovereign immunity because the Director was sued in his official capacity. "When a cause of action is stated against a state official in his official capacity, the action is one against the state....Therefore, the immunities available to the defendant in an official capacity action seeking damages are those the governmental entity enjoys." *Edwards v. McNeill*, 894 S.W.2d 678, 682 (Mo.App. 1995). Again, it is undisputed that Relators' suit against Respondent Director is for his actions in his official capacity as the Director of the Department (S.L.F. 66-67, esp. Caption, ¶7), affording him the benefits of sovereign immunity.

While the Missouri Supreme Court abrogated sovereign immunity for torts in *Jones v. State Highway Commission*, 557 S.W.2d 225, 229 (Mo.banc 1977), in *Fort Zumwalt*, the Court explained that the broad prohibition against state defendant suits extends beyond tort liability and includes instances when the state is sued for monetary damages. *Fort Zumwalt Sch. Dist.*, 896 S.W.2d at 923 ("in *Jones* [*v. State Highway Comm'n,* 557 S.W.2d 225 (Mo.banc 1977)], this Court acknowledged the existence of a more general theory of

sovereign immunity from suit….The more general rule is that the sovereign may not be sued without its consent. That rule was not abolished in *Jones*.").[33]

Relators have not pled any facts demonstrating the inapplicability of sovereign immunity to this case. "[T]o state a cause of action sufficient to survive a motion to dismiss on the pleadings, the petition, when viewed in its most favorable light, must plead facts, which if taken as true, establish an exception to the rule of sovereign immunity." *Thomas v. City of Kansas City*, 92 S.W.3d 92, 101 (Mo.App. 2002). Furthermore, Relators' claims regarding their entitlement to additional compensation do not fit into any of the limited exceptions to sovereign immunity and Relators have not alleged consent to suit or waiver of sovereign immunity. "If the claimant can show no waiver of [sovereign immunity], he is barred from suing the sovereign in its courts." *State ex rel. Mo. Div. of Family Servs. v. Moore*, 657 S.W.2d 32, 34-35 (Mo.App. 1983).

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[33] The state of Missouri restored its sovereign immunity from tort actions by statute "except to the extent waived, abrogated or modified by statutes…." Section 537.600.1. Section 537.600.1 waives immunity only for "torts [involving negligence] arising from (1) the governmental operation of motor vehicles, and (2) dangerous conditions on government property." *Martin v. City of Washington*, 848 S.W.2d 487, 490 (Mo.banc 1993). Additionally, the Court has determined that "when the State enters into a validly authorized contract, it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance, just as any private citizen would do by so contracting." *V.S. DiCarlo Const. Co. v. State of Missouri*, 485 S.W.2d 52, 54 (Mo. 1972).

Relators' Substitute Brief does not assert that the State has waived sovereign immunity from Relators' damages claims. Missouri courts strictly construe statutory waivers of sovereign immunity. "The general rule is that '[w]aivers of sovereign immunity' – at least as they appear in statutes – 'are … strictly construed.'" *Hendricks v. Curators of University of Missouri*, 308 S.W.3d 740, 746 (Mo.App. 2010) (quoting *Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876, 882 (Mo.banc 1993). In fact, "[a]ll waivers of sovereign immunity are to be strictly construed." *State ex rel. Kansas City Symphony*, 311 S.W.3d at 276.

The only waiver Relators assert is based on the existence of Chapter 529, authorizing writs of mandamus against the state.[34] The courts of this state have routinely

[34] While Relators assert that "sovereign immunity does not apply to equitable actions," this assertion does not advance Relators' cause. Rel.S.Brf. 29. This Court has held that "[m]andamus is an action at law…." *State ex rel. Horton v. Bourke*, 344 Mo. 826, 832, 129 S.W.2d 866, 868 (Mo. 1939). And the Court of Appeals, Western District, agrees: "Mandamus is a legal, not an equitable remedy." *State ex rel. Walton*, 297 S.W.2d at 615; *see also State ex rel. Onion v. Supreme Temple Pythian Sisters*, 54 S.W.2d 468, 469-70 (Mo.App. 1932) ("Mandamus is a legal, and not an equitable, remedy of necessity, it is a stern harsh writ, and, when issued, is an unreasoning, inflexible, peremptory command to do a particular thing therein specified without condition, limitation or terms of any kind."). Hence, Relators' suggestion that Respondents are not entitled to sovereign immunity because Relators seek equitable relief (Rel.S.Brf. pp. 29, 37) is misleading because

required a waiver of sovereign immunity in mandamus cases, rejecting the notion that the existence of mandamus relief itself constitutes a waiver of sovereign immunity. In *Kansas City Symphony*, the relator brought a mandamus action to compel the Legislature to fund a particular trust fund as directed by the relevant statute. *Id.* at 274. The Court did not consider the possibility that the existence of mandamus relief constituted a waiver of sovereign immunity. *Id.* at 276. Rather, the court examined the statute for a waiver of immunity and found none. *Id.* The *Kansas City Symphony* Court further determined, as the statutory funding scheme required an appropriation and legislative appropriations are inherently discretionary, "[t]he mandamus claim was properly denied on that basis…." *Id.*

Kansas City Symphony was quickly followed by *State ex rel. Redmond v. State*, 328 S.W.3d 818 (Mo.App. 2011). There, again, the Legislature established a fund, which provided that certain monies were to be deposited to that fund, and limited appropriations from the fund to certain purposes. *Id.* at 820. In a mandamus action the Redmonds contended that required amounts were not being deposited to or properly withdrawn from the fund. *Id.* In response to the mandamus claim, the Court did not consider sovereign

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mandamus relief is a legal, not equitable, form of relief and because Relators – ***former*** employees of Respondents who by virtue of that status cannot secure prospective relief – by their own admission "seek to recover damages." L.F. 818; *see also* L.F. 812, 841 (where Relators requested Court approval of a "*damages* spreadsheet" and the "payment of all back wages due to the individuals identified on the approved *damages* spreadsheet…."). (Emphasis added.)

immunity waived because the cause was one for mandamus. *Id.* at 823. Rather, the Court looked to the funding statute on which the relators based their claim and determined that it did not contain a waiver of sovereign immunity. *Id.* The *Redmond* Court found that the "resolution of the Redmonds' sovereign immunity arguments is controlled by *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272 (Mo.App W.D. 2010)….*Kansas City Symphony* rejected the plaintiff-appellant's sovereign immunity claims….The Court noted that there was no express waiver of sovereign immunity in [the relevant statute]." *Id.* at 822-23.

The situation before this Court is analogous to *Kansas City Symphony* and *Redmond*. In §374.162, the Legislature created the "Insurance Examiners Fund." "The director shall assess the expenses of any examination against the company examined and shall order that the examination expenses be paid into the insurance examiners fund created by section 374.162." Section 374.160.4. "The director shall pay from the insurance examiners fund the compensation of insurance examiners…." *Id.* And "compensation…include[es] benefits…." *Id.* Relators here claim, just as relators did in *Kansas City Symphony* and *Redmond*, an entitlement to greater distributions from a fund, here for the purpose of providing them increased compensation. And, just as in *Kansas City Symphony* and *Redmond*, mandamus will not lie to compel additional distributions from the insurance examiners fund because Respondents are entitled to sovereign immunity.

Relators admonish Respondents to more carefully read *State ex rel. Cravens v. Nixon*, 234 S.W.3d 442 (Mo.App. 2007). Rel.S.Brf. 38. As with most such admonitions,

this one would be best more universally applied. Relators direct the Court to *Cravens* for the notion that the "Legal Expense Fund created by statute permitted the mandamus action" (Rel.S.Brf. 39) against the state to compel the payment of money. Relators misread *Cravens*. First, the underlying federal action in that case resulted in a judgment obtained by the inmate "against a former state employee" (234 S.W.3d at 444), not, as Relators contend, "a money judgment against the State of Missouri." Rel.S.Brf. 38. In *Cravens*, the state asserted that the state employee's conduct, sexual assault committed on an inmate,[35] "was not conduct arising out of and performed in connection with his [the employee's] official duties." 234 S.W.3d at 446. The *Cravens* Court, affirming the trial court, determined to the contrary. The Court then held: "[S]overeign immunity [is] not available as a defense by the State to actions seeking recovery from the [Legal Expense] Fund, given that the underlying litigation is against *state employees*, rather than the state itself." *Id*. at 449 (citation omitted, emphasis added). Unlike *Cravens*, this is not a suit against state employees, nor is it a suit to seeking to recover moneys from the Legal Expense Fund. Rather, it is a suit against a state agency and an official capacity suit against a Department Director, meaning it is a suit against the State itself. *Cravens* does not bear on whether the State is subject to monetary damages for its own actions in a mandamus proceeding. Because of Relators' insufficient pleadings regarding immunity and the actual absence of any grounds for waiver of sovereign immunity, Respondents are entitled to

[35] The State of Missouri makes sexual contact with an offender a felony. Section 217.405.1.

summary judgment on the ground of sovereign immunity and to the denial of Relators' requested writ of mandamus.

B. Relators' new claim sounding in contract or quasi-contract cannot be asserted for the first time on appeal, is legally unsound, and, if permitted, is barred by laches and does not meet the standard for mandamus relief.

On appeal, Relators' for the first time claim that their suit sounds in contract or quasi-contract and that they seek restitution as a remedy. This recharacterization of Relators' claims finds no voice below.

> Absent some constitutional imperative…, it simply is not the role of the court of appeals or [the Supreme] Court to grant relief on arguments that were not presented to or decided by the trial court. This rule abides regardless of the merits of the new argument. "Appellate courts are merely courts of review for trial errors, and there can be no review of a matter which has not been presented to or expressly decided by the trial court."

Barley v. McKeever Enterprises, Inc., 456 S.W.3d 829, 839 (Mo.banc 2015) (footnote and citation omitted).

Even if this Court were to consider Relators' new theory, such consideration would prove futile. "It is well established law that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute." *Maxwell v. Andrew Co.*, 347 Mo. 156, 164, 146 S.W.2d 621, 625 (Mo. 1940). And, on the merits, Respondents have demonstrated that Relators were compensated in excess of the NAIC

Guidelines, assuming their applicability. As such, no money is due Relators, regardless of the theory employed.

Furthermore, Relators new equitable theory of recovery would be barred by the equitable doctrine of laches.[36] "'Laches' is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." *Hagely v. Bd. of Educ. of Webster Groves Sch. Dist.*, 841 S.W.2d 663, 669 (Mo.banc 1992) (citations omitted) ("*Hagely I*"). "[T]he delay involved must work to the disadvantage and prejudice of the defendant," wherein legal harm has occurred and the situation has materially changed. *Id.* at 669-70 (citations omitted). Prejudice can be established for the purposes of laches when there is "a change of position by one seeking to invoke laches in a way that would not have occurred, but for the delay." *Perez v. Missouri State Bd. of Registration for Healing Arts*, 803 S.W.2d 160, 166 (Mo.App. 1991) (citations omitted). In *Hagely v. Bd. of Educ. of Webster Groves Sch. Dist.*, 930 S.W.2d 47, 50 (Mo.App. 1996) ("*Hagely II*"), the Court barred teachers' claims for salaries in past budget years because their claims prejudiced the school board's "ability to maintain [its]

[36] As they did below, Respondents continue to assert that the entirety of Relators' claim for additional compensation arising from an alleged failure to comply with §374.115 beginning in 2002 (regardless of how characterized) is brought after an unreasonable and impermissible delay, barred by laches and the applicable statute of limitations, and inconsistent with the emergency standard and other standards required for mandamus relief.

fiscal health and fulfill its statutory duties." Laches operates "where enforcement of the right asserted would work an injustice." *Lake Dev. Enterprises, Inc. v. Kojetinsky*, 410 S.W.2d 361, 368 (Mo.App. 1966) (citations omitted). This is the case here where evidence has been lost (records regarding the NAIC Guidelines for 2007 and 2008), Respondents cannot delinquently assess insurance companies for the costs of examinations that were performed and paid for years ago, and funds appropriated to pay examiners – if any remained at the end of any applicable fiscal year – have lapsed.

Allowing claims for past budget years and concluded examinations prejudices Respondents' ability to maintain Respondent Department's fiscal health (because the Department's funds for examiner compensation are limited to yearly appropriations to the Insurance Examiners Fund) and interferes with Respondents' ability to fulfill their statutory duties under §374.160.4 (those duties being to assess the expenses of examinations against the company examined). *See Hagely II*, 930 S.W.2d at 50 (the school district was required by statute to submit an annual budget for the upcoming school year). The teachers in *Hagely II* filed their petition in 1991 for back pay claims for the school years 1987-1990. *Id.* at 49. The Court, relying on the direction provided by the Missouri Supreme Court in *Hagely I*, held that laches barred the claims for back pay for 1987-1990. *Id.* at 50-51. In this case, Relators waited over ten years to file their petition in the Circuit Court. Applying the reasoning in *Hagely I and Hagely II*, and considering the prejudice to Respondents balanced against the fact that any harm to Relators "is obviated by their own delay[,]" (*Hagely II*, 930 S.W.2d at 51), Relators' action is barred by laches.

Surprisingly, Relators offer no real excuse for their delay in bringing this action.[37] In their Brief, Relators focus on an alleged 2002 decision to not pay Relators in accordance with §374.115. Rel.S.Brf. 15. If Relators are now attempting to enforce a contractual debt or secure restitution based on an alleged decision by Respondents, similar to the teachers' salary claims in *Hagely I* and *Hagely II*, their action would be a noncontested case under §536.150.1. *Hagely I*, 841 S.W.2d at 669 ("An administrative decision that is not a contested case under MAPA is a noncontested case subject to judicial review pursuant to §536.150.") That statute provides, in relevant part:

> When any administrative officer or body existing under the constitution or by statute…shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person,…and there is no other provision for judicial inquiry into or

[37] Below Relators asserted that they "are insurance examiners, rather than attorneys, and cannot be expected to immediately realize that [the former Director] violated the law in abandoning the statutory [compensation] scheme." L.F. 1057. Yet, Relators provided the trial court with a 2002 memorandum purportedly from their supervisor, the first sentence of which reads: "As most of you may have heard the examiners will not be getting a pay increase in accordance with the NAIC rates this year." L.F. 960. The rationale for the alleged action is also recounted in the memorandum, and it reflects a change in appropriation authority, not an otherwise motivated decision by the then Department Director. *Id.*

> review of such decision, such decision may be reviewed by suit for…mandamus[.]

Section 536.150.1. In *Hagely I*, the Missouri Supreme Court engaged in a separate discussion from laches, this time focused on the time between when the teachers received notice of the school board's decision and the date they filed suit, and declared: "This interval is subject to the reasonable time standard of §536.150." *Hagely I*, 841 S.W.2d at 669. In *Hagely I*, the Court determined that for purposes of §536.150, "a delay of slightly over six months after [the teachers] received notice of the Board's adverse decision [and the filing of their petition]…was not unreasonable." *Id.* at 670. If Relators' mandamus action is based upon an alleged 2002 decision regarding their compensation, the more than ten years between that decision and their filing of their Original Petition is unreasonable under §536.150.[38]

Finally, awarding mandamus relief on their newly articulated contract or quasi-contract theory does not meet the "emergency" standard for issuance of a writ of mandamus. Relators have not pled nor proven an entitlement to this extraordinary writ,

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[38] Respondents located no cases under §536.150 regarding the exact standard of "reasonableness" for filing such an action. However, in the context of prosecution of a city condemner's exception, five years was an unreasonable delay, absent valid excuse. *City of Jefferson v. Capital City Oil Co.*, 286 S.W.2d 65, 68 (Mo.App. 1956); *see also State ex rel. State Hwy. Comm'n v. Manley*, 549 S.W.2d 533, 534 (Mo.App. 1977) (ten-year delay unreasonable). Relators here offer no excuse for their ten-year delay.

Jones, 965 S.W.2d at 212, because Relators have neither pled nor proven a great injury, injustice, or emergency. "A writ of mandamus is a hard and fast unreasoning writ, and is reserved for extraordinary emergencies." *State ex. rel. McGarry v. Kirkwood*, 423 S.W.2d 205, 208 (Mo.App. 1967). See also *State ex rel. Horton v. Bourke*, 344 Mo. 826, 832, 129 S.W.2d 866, 868-69 (Mo. 1939) (the writ of mandamus has been "denominated a hard and fast writ, and an unreasoning writ, a castiron writ, the right arm of the court. It is essentially the exponent of judicial power, and hence is reserved for extraordinary emergencies. It does not issue except in cases where the ministerial duty sought to be coerced is simple and definite, arising under conditions admitted or proved and imposed by law. It does not issue where the right is doubtful or where there is another adequate remedy."). Relators waited more than ten years between when they alleged Respondents stopped compensating them as statutorily required and the bringing of this suit. They offer no excuse for this lengthy delay. It is abundantly clear that there was no emergency requiring the original Petition's filing in 2012. Relators have not seasonably brought this suit and prejudiced Respondents by this delinquency. Under these circumstances, Respondents were entitled to summary judgment and denial of the requested writ, and this Court should affirm the Circuit Court's judgment to that effect.

CONCLUSION

This Court should affirm the Circuit Court's decision properly granting Respondents' Motion for Summary Judgment and denying the First Amended Petition for Writ of Mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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I further certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 15,955 words.

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