SC96212

IN THE MISSOURI SUPREME COURT

BARBARA A. BARTLETT, et al., Appellants

v.

MISSOURI DEPARTMENT OF INSURANCE, et al., Respondents

Appeal from the Circuit Court of Cole County, Missouri
The Honorable
Case No. 13AC-CC00103

# SUBSTITUTE REPLY BRIEF OF APPELLANTS

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## INTRODUCTION

Appellant assumes that this Court took this case for reasons other than those underlying the facts of the case, and is instead focused on the unique procedural issues associated with Mandamus. In that regard, Point I, like that of Respondents, addresses those issues.

In response to Relators/Appellants' briefing arguing that sovereign immunity does not apply in mandamus, Respondents argue that dicta in several other cases provide a basis for denying mandamus relief. These cases are not controlling and can be harmonized with the cases cited by Appellant. With respect to the issue of the trial court's finding that there was no clear right, Respondents spend their prose trying to make a clear statutory right sound unclear, while overlooking the point that mandamus has consistently been used to obtain wages improperly denied to state employees. More importantly, they fail to address how the statute became unclear in 2002 when appropriated funds were available, but spent on other matters.

## CONDITIONAL MOTION TO STRIKE

At the outset Respondents submitted documents in their Supplemental Legal File that were never placed before the Cole County Circuit Court as part of its summary judgment motion. In its appeal before the Western District, Appellant sought to strike those documents. This because the appeal was from a motion for summary judgment. Only those documents then before the Court on summary judgment can be considered in determining the propriety of summary judgment. These documents in the Supplemental Legal File were not presented to or relied upon by the Circuit Court in ruling on the summary judgment motion.

Rule 74.04(C)(1) requires a specific enumerated statement of facts upon which summary judgment may be based. These facts and references were omitted from that statement. The facts in a motion for summary judgment must be stated with particularity:

> All facts must come into the summary judgment record in the manner required by Rule 74.04(c)(1) and (2), that is, in the form of a pleading containing separately numbered paragraphs and a response addressed to those numbered paragraphs.

*Cross v. Drury Inns, Inc.,* 32 S.W.3d 632 (Mo. App. S.D. 2000). To the extent that the documents are sought to be used to defend summary judgment, they are

outside the summary judgment record, were not referenced in the summary judgment pleadings, and were not attached as exhibits to the summary judgment motions. This Court should strike those documents and refuse to rely upon them. They are not dispositive of any issue raised in the summary judgment pleadings, and were not put before the Circuit Court. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31 (Mo. banc 1982). While Appellant recognizes that this Court has the right to affirm the judgment on any basis supported by the record, *Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112 (Mo. banc 2010), the record referred to is the summary judgment record, not parts of the record that were never put before the trial court. *Firestone v. VanHolt,* 186 S.W.3d 319 (Mo. App. W.D. 2005). Respondent moves to strike these documents if offered for that purpose.

Specifically, at page 34 of Respondent's brief, footnote 22, Respondent makes reference with boldfaced type to "Suggested Compensation." This is from the Supplemental Legal File. It was not in the Legal File because it was never placed before the Circuit Court and never referenced in the summary judgment factual section or the briefing. It cannot now be used to affirm summary judgment when the trial court never saw it and never relied upon it.

However, in this appeal it appears that Respondent is also using these documents to inform the court on the jurisdictional issue. To the extent that they are relevant on this issue, and are offered for that purpose, then there

would appear to be no basis to strike them as they apply to that issue. Appellant leaves to the Court the decision on the relevance and applicability of the documents.

## I. REPLY TO RESPONDENT'S POINT I.

### A. *BORESI* MANDATES JURISDICTIONAL DISMISSAL

Like Appellant, Respondent has moved to the first point its analysis on the jurisdictional issue. It does not, however, read *U.S. Dep't of Veterans Affairs v. Boresi*, 396 S.W.3d 356 (Mo. banc 2013) in the same way Appellant does.

Respondent recognizes that the sole rationale for extending judicial review in that case was that the parties were not at fault, and that the failure was that of the circuit court. (Respondent's brief at 14, hereafter RB__) However, in this case, the error was both that of the circuit court as well as that of the Appellants. Appellants conceded this in their opening brief before this Court. However, rather than having to "start again," as *Boresi* foreshadowed, here the Western District has pointed out that other procedural methods exist to get the answers to the questions at issue that do not require this Court to ignore the mandates of Rule 94. A Declaratory Judgment petition can establish the proper construction of the statute, while a count for an accounting could be used to settle the amounts at issue between the parties if, but only if, the Department of Insurance was found to have failed to properly apply the statute by underpaying its examiners as Appellants have alleged. The same discovery, factual statements, and likely the same arguments made to the Circuit Court below could be marshaled in that proceeding, without the need to try to make the square peg of a writ of mandamus fit the round hole of the facts of this case.

Respondents take the position that "some judicial evaluation of the claim" was made by the decision on the motions to dismiss filed in this case, (RB015) but cannot explain how, if those decisions were correct (inasmuchas they wholly failed to consider the dictates of Rule 94, and found that mandamus was the proper remedy) that the later decision of the same court on the same issue, to deny mandamus relief at summary judgment, could be correct. The pleadings had not changed, and neither had the basic facts.

B. WESTERN DISTRICT PRECEDENT FOLLOWS *BORESI*

It is readily apparent that the Western District read *Boresi* as an injunction to the Court of Appeals to refuse to consider appeals from writs where those writs were initiated without regard for Rule 94. In footnote one of the opinion, Judge Breckenridge specifically cautioned lower courts that "This Court is not required to exercise its discretion in like manner in the future." *Id.* at 359. And Judge Fisher was not shy in revealing how he would handle the matter. He noted that a summons does not serve the functions of a preliminary writ, does not lead to an immediate judicial determination of the merits of the action, and often prohibits additional action until the writ is made absolute or dissolved. *Id.* at 365. He concluded by noting that:

> Further, it leads to confusion as to the proper standard of review. In fact, the principal opinion in this case suggests the proper standard of review is abuse of discretion. Op. at 358–59.[7] In my

> view, this Court should follow the rules as written, and if the administration of justice requires a modification or amendment to the rules, this Court has the authority to do so.

*Id*. at 365. Although a dissent does not have precedential value, when combined with footnote one, the opinion strongly suggests that courts follow the rules. Indeed, following that opinion, the Western District has done just that in *WMAC 2013 LLC v. McBride* 493 S.W.3d 44 (Mo. App. W.D. 2016); *State ex rel. Tivol Plaza Inc. v. Mo. Hum. Rights. Comm'n,* 2016 WL 1435970; *R.M.A. v. Blue Springs R-IV School District*, 477 S.W.3d 185 (Mo. App. E.D. 2015); and *Powell v. Department of Corrections*, 463 S.W.3d 838 (2015). While the Eastern District has only cited *Boresi* in one case, *Professional Fire Fighters of Eastern Missouri v. City of University City*, 457 S.W.3d 23 (Mo. App. E.D. 2014), and still considered the appeal, it did not have the benefit of the Western District's more analytical holdings in the aforementioned cases.

### C. Rule 84.14 Permits This Court To Give The Judgment Required

Nor does, as Respondent suggests, dismissal here reward the guilty and punish the innocent. That is an unfair characterization. While Appellant fought to preserve the forum once discovery began, the trial court should have made the correct ruling at the outset and refused to issue a summons, and instead, considered whether to issue a writ.

Appellants as a group would suggest that it takes a pretty dim view of justice to suggest that state employees with a statutory right to be paid at a wage set in the Missouri Revised Statutes, who erred simply in the form of their petition, should be labeled as "guilty" when they have admitted their error and their confusion. At the end of the day, it is a state employee's right to be compensated pursuant to state law, and state law should not be subject to the caprice of an unelected and unaccountable director. This Court, should it retransfer this appeal to the Western District, will do no more than permit the resolution of the controversy in the correct forum under Rule 84.14.

Moreover, the suggestion that Respondent has some "right" to a judgment secured through flawed procedure is simply not sound. The judgment does not come in the form of an opinion that explains its rationale, contradicts a prior ruling in the case, and is itself testimony to the fundamental problem associated with handling this via writ. The court determined that it could not tell how much additional money the individuals should have been paid, and thus that the "right to relief" was somehow absent. (LF2120). It also found that sovereign immunity applied in the context of statutorily-mandated wages. Affirming such a holding is dangerous simply because many state employees in the executive and judicial branch have wage scales set by reference to certain standards, and if sovereign immunity bars an action on

those wages, then there might well be a 13th Amendment violation without a remedy.

If this Court decides to take up this matter on the merits, Appellants believe they have laid out a case for relief in their pleadings. But should this Court finally determine that Rule 94 means what it says, and requires that courts adhere to it, then Relators are not harmed in that the dismissal of the appeal acts to obviate the summary judgment, and its potentially preclusive effects on a refiled action.

## II. RELATORS HAD A RIGHT TO MANDAMUS RELIEF.

### A. THE RIGHT TO RELIEF IS NOT DOUBTFUL

After citing dozens of mandamus actions in Missouri, Respondents assert that the right to relief is not clear because discovery obtained during the lawsuit changed the amounts sought[1]. There is a difference between the "right to relief" and the "amount of relief." The right to relief has always been based on the statute, § 374.115 RSMo. (2014). That right, a statutory right, has always been crystal clear.

Respondents are attempting to make a clear statute sound murky, as the plain language of the statute confers a right, ties that right to a published schedule, and uses mandatory words: "shall be compensated…" § 374.115 RSMo. (2014). This is quite similar to the language used in Article XIII, § 3.1 Mo. Const. that reads in relevant part: "no … judge, … shall receive compensation for the performance of their duties other than in the amount established for each office by the Missouri citizens' commission on compensation for elected officials …." This is mandatory language that ensures that judicial officers are properly compensated for their judicial duties. The

[1] Relators sought only what was owed to them, and with each new disclosure in discovery, amended their calculations so as to provide the court the most accurate measure of what they were owed.

NAIC statute is no more complex than this constitutional provision, but you'd never know it to read the Respondent's briefing on this issue.

### B. MANDAMUS RELIEF IS AVAILABLE

Mandamus relief has traditionally been available as a means of obtaining wages wrongfully withheld in the context of unlawful dismissals. See, e.g., *State ex rel. Missey v. City of Cabool,* 441 S.W.2d 35, 43 (Mo.1969); *State ex rel. Ciaramitaro v. City of Charlack,* 679 S.W.2d 405, 406 (Mo.App. E.D.1984); *State ex rel. Pauli v. Geers,* 462 S.W.2d 166, 171 (Mo.App.1970). These cases hold that mandamus can be used to compel payment of wrongfully withheld wages. That this right should be preserved is important. Without it, no state worker could ever be assured that a bureaucrat could not unilaterally alter his wages.

In 2015, lawmakers, as they had done in 1998, refused to provide raises to Missouri judges. See, e.g., *Missouri Judges Get Pay Raise Despite Lack of Lawmaker Approval*, WASHINGTON TIMES, November 1, 2015. *Weinstock v. Holden*, 995 S.W.2d 411 (Mo banc. 1999) provides that the Legislature must approve or disapprove and must fund judicial salaries pro rata. *Id.*

Missouri judges received a pay raise in 2015 even though lawmakers did not approve one, and did not budget for one, by applying appropriated funds from other positions to judicial salaries.

But the remedy of mandamus should remain available because executive officers change, and sometimes, political power is misused. Were the Legislature[2] to reduce appropriations to the point that the salary schedule could not be funded, thereby violating the Constitution, the absence of an internal sanction in Article XIII should not prevent a mandamus remedy for any affected officers. Respondent's argument is really saying executive officials and judicial officers could not petition in mandamus to enforce a constitutional right to receive pay authorized by the Constitution because both the Constitution and the statute fail to provide a remedy for failure to comply with the "shall" language. As Respondent articulates the law, only a remedy built into the statute creates a mandatory right. Yet, even Respondents concede that whether a statute is mandatory or directory is context-specific. (Resp. Br. at 15).

In *Frager v. Director of Revenue*, 7 S.W.3d 555 (Mo. App. E.D. 1999), the failure to specify a consequence made "shall" inapplicable to time limitations, allowing the Director additional time under the DWI statutes. "Shall" was discretionary, as it was in *State v. Conz*, 756 S.W.2d 543 (Mo. App. W.D. 1988). Yet in these cases, Courts were dealing with technical rules regarding

[2] See, e.g., H. Woodall, *Former Governors Speak Out on Campaign Against Kansas Judges*, Government & Politics, KANSAS CITY STAR, September 6, 2016.

persistent offenders and drunk driving, and the constructional jujitsu effected public policy.

To make its point Respondents partially quote *Frye v. Levy*, 440 S.W.3d 405 (Mo. banc 2014) (RB025) on the distinction between mandatory and directory language. But, Respondents stop quoting too soon and omit the most relevant language in the case:

> But the Court also noted that "the presence or absence of a penalty provision is 'but one method' for determining whether a statute is directory or mandatory." *Id.* at 408. The Court's authority for this observation was *Sw. Bell Tel. Co., Inc. v. Mahn,* 766 S.W.2d 443, 446 (Mo. banc 1989), which stated that the "absence of a penalty provision does not automatically override other considerations."[4] **Ultimately, whether a statute is mandatory or directory is a "function of context and legislative intent."** *Bauer,* 111 S.W.3d at 408 (citing *Farmers,* 896 S.W.2d at 32).

*Id*. at 410-11 (emphasis supplied).

Using NAIC rates ensures that the insurance companies pay the same rates in Missouri for auditing that they pay in other states. This language is designed to provide fairness both to the state (ensuring it is reimbursed at national rates) as well as the insurance company (ensuring it is charged no

more and no less than other states). Moreover, it ensures fairness to specialized employees the state desires to retain to ensure accuracy and fairness in auditing. While the statute does not provide an explicit penalty for not paying the statutory rate, the context and legislative intent is clear.

This is because it is a cardinal rule of statutory interpretation that the Legislature is presumed to know the existing law when enacting legislation. *Greenbriar Hills Country Club v. Dir. of Revenue,* 47 S.W.3d 346, 352 (Mo. banc 2001). See also, *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 567 (Mo. banc 2012). Thus, the Legislature was aware specifically of *Barker v. Leggett*, 295 S.W.3d 836, 839 (Mo. Ct. App. 1956), where attorneys brought an action against the Superintendent of the Insurance Department for payment of legal services. The department refused to pay, and the attorneys sued. The Court held that Barker's only remedy was to be paid pursuant to the statutes. Given the cardinal rule and stated presumption, the legislative intent supports an application of mandatory language here. And a different holding would preclude anyone from enforcing the mandates of a statutory or constitutional salary schedule for elected and appointed officials such as Article XIII of Mo. Const.

Respondents next argue on appeal about appropriations without having specifically raised it below. Respondents did not place evidence in the trial court's summary judgment record on this issue. Respondents suggest the

director may only expend appropriated funds, but does not provide any citation to the record. (Resp. Br. at 16) An examination of the summary judgment record details no evidence of the amounts appropriated, nor does it contain any explanation that the appropriated amounts were insufficient to pay the examiners the statutory mandate. The circuit court's judgment made no reference to this issue because it was not separately raised. Respondents supplied no affidavits or other evidence. Without evidence in the summary judgment record supporting this line of argument (and having waived it by not advancing it specifically before the trial court in either its own motion or in response to Relators) Respondent has waived the argument.

### C. THE TERM "COMPENSATION" IS CLEAR AND UNEQUIVOCAL

Respondents next argue that the meaning of the word "compensated" is so unclear and unwieldy as to render it mere surplusage. Respondent offer a series of non-sequiturs to conclude that "what constitutes compensation[3]… is far from clear." (RB029). Appellants would point out that prior to 2002 it was pretty dog gone clear, and the State cannot dispute that it paid these rates. The confusion referenced is recently-manufactured-for-litigation, as the record indicated.

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[3] It is doubtful that anyone who receives a paycheck from the State fails to comprehend the term "compensation."

This is because the testimony of Joe Haverstick (LF961-963) in the summary judgment record shows that Appellants construction, that NAIC rates applied, was what the Director always paid its examiners until a new Director decided to make an end run around the Legislature. Many prior years' pay records support the Relators' analysis of the statute and compensation sought by mandamus. The state for years prior to the change announced in LF0960 paid NAIC wages and recruited based on NAIC standards and pay scales. (LF0852-883) Job advancements were based on NAIC rates (LF0884-7). Suddenly the term "compensation" became unclear? How?

Respondents seek to muddy the waters on compensation by arguing that the term salaries, as used in *Jones v. Carnahan*, 965 S.W.2d 209 (Mo. App. W.D. 1998) is somehow more specific but less enforceable than the term compensation. (RB031). It is an apples-to-oranges comparison. The statute there, § 228.220.4 RSMo., did not specify salary rates, it merely said parties "shall collaborate", a term so vague as to be meaningless. *Id.* This comparison does nothing to enhance Respondent's argument. It simply underscores the crafted-for-litigation approach taken by the State.

### D. RELATORS' EVIDENCE SUPPORTS MANDAMUS RELIEF

Respondents suggest reducing compensation below the rates set by the Legislature is permissible based on a document given to every Missouri employee (the MOSERS Personal Benefit Statements) that says "compensation

includes benefits." This ignores the fact that compensation in years prior was taken directly from NAIC schedules as shown in the summary judgment evidence submitted by Relators. (LF0852-887) Relators extensive documentation of compensation received during the period at issue in the complaint, (see, e.g., LF0958 [Relator Hernandez])(LF0959 [Relator Bartlett]) fully supports a remedy by mandamus. Relators also provided evidence of NAIC pay rates for the period referenced in the complaint (LF0915, 918, 922, 927, 933, 945, 950).

### E. THE APPROPRIATION ARGUMENT IS A RED HERRING

Respondents suggest that a specific appropriate for examiner compensation is required. All payments made through the general revenue fund require an appropriation. What Respondent hopes the Court missed, by virtue of this argument, is that the Legislature duly appropriated the money necessary to fully fund the NAIC wages, but that the Director of Insurance spent that money in other ways due to his refusal to follow the statute. The appropriation argument is a non-starter for that reason.

### F. EVIDENCE EXISTED FROM WHICH A RIGHT TO RELIEF COULD BE CRAFTED

In claiming that no evidence exists that supports the specific right to compensation pursuant to the statute, (RB037, 39) Respondents mistakenly direct the Court to the wrong exhibit ("Exhibit 2" - with reference to the

Supplemental Legal File that is the subject of Relators' motion to strike). That document makes reference to "suggested compensation levels." That document was never filed with the summary judgment documents, and fails to be persuasive now.

Respondent also says that only data from 2012 and later was presented to the Court. This is apparently an oversight on Respondents' part. Respondents wholly fail to examine what was designated as Exhibit 4 before the trial court (found at LF0888-981) that contains the Financial Examiner handbooks from 2000 through 2014. All of the things supposedly missing from Exhibit 2 (Resp. Br. 27-29) are found in Exhibit 4 at LF0888-981.

G. WHAT'S ALL THIS "UNCLEAR" AND "EQUIVOCAL" NONSENSE?

In its brief the State suggests that "materials incorporated by reference must also be clear, specific and unequivocal." (RB038) It then posits that the referenced materials are somehow unclear. Where did this lack of clarity arise? Here is how it arose:

Kirk Schmidt, the Chief Financial Examiner, in a memo dated July 12, 2002, told examiners they "will not be getting a pay increase in accordance with the NAIC rates" in the year of 2002. (LF0960) The memorandum went on to state:

This is official. I know many of you are worried about the

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

(LF0960)(emphasis added)

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

(LF0960)

To be precise, it did not arise because the statute was unclear. It did not arise because the referenced NAIC rates (into which the State had input) were unclear. The meaning of the word "shall" had not changed. The meaning of the word "compensated" had not changed. It did not arise from any lack of clarity or change at all. It arose because a government agent, an unelected and unaccountable appointed representative of the governor determined that the money that the Legislature appropriated to satisfy payment of the NAIC rates could be better spent on some other perceived greater need.

In the memorandum announcing what it called a "current year pay freeze" the author recognized the special nature of the examiners role and the impact such a permanent change would have, as indicated by the boldfaced items above. He also suggested that a long-term change was not intended. It is hard to know if this was artful deception, or simply compliant ignorance, but the effect was the same.

The idea that the State can rationalize its refusal to follow a mandatory statute by saying, long after it had followed it for years, that it is somehow "unclear" or "equivocal" is equivalent to the bank robber saying he stole the money because it was just sitting there in the bank!

Again, the examiners ask how the State, and indeed how this Court can ask state employees to follow state statutes on other controlling issues, and excuse the State's unexcused, rapacious decision to take money from its own employees? The Legislature appropriated money for that purpose, and the Legislature intended those funds to satisfy policies related to uniform examination and retention of personnel. It intended it to mitigate the very effects Schmidt's memorandum highlights. Does an executive director have the authority to overrule the Legislature after having followed its dictates for dozens of years?

### H. FACT ISSUES REMAIN AS TO DISCHARGE OF STATUTORY DUTY

Respondents contend that if there is a clear unequivocal right (and there is) then it has discharged its duties under that right. But it is asking this Court to make fact-finding that was not done by the trial court. If this Court reverses and finds that the right to mandamus relief exists under these facts, then remand is necessary to consider the argument that Respondents discharged the duty by applying a completely new and unprecedented approach to compensation and rejecting the payment of wages that was done previously. The "director's analysis" that is found at Resp. Br. 29 – 32 is an analysis developed as a result of this litigation – it was never asserted at the outset as is plain from the document at LF0960, which demonstrates that a significant change in payment is being made and that examiners will no longer be paid according to the statute.

If, in fact, the Director discharged his duties based on this recalculation of how the system ostensibly works, then perhaps it should have demanded back from its employees all the monies they were overpaid in the prior years. But it did not because this is a newly-minted-in-defense analysis that lacks even a colorable justification based on the facts on hand at the time bureaucrats decided it was necessary to ignore the statute and underpay their examiners.

## I. CONCLUSION

For the reasons expressed, this Court should reverse and remand for proceedings consistent with its opinion.

## III. REPLY TO RESPONDENTS POINT III.

### A. THE REMEDY SOUGHT HAS ALWAYS BEEN RESTITUTION

Respondent withheld compensation from MODOI examiners. That withholding was based on the Director's decision, and was not then, nor has it ever been approved by the Legislature. Instead of paying examiners the statutory amount, the Director paid them less. The difference between the amount due and the amount paid, whether that amount is referred to as withheld salary, unpaid wages, improperly withheld compensation, or by the shorthand use of the term "damages" has always been what was sought.

Similarly, Relators reject the assertion that they have asserted a new claim on appeal. A plain reading of the petition for the writ, as well as the summary judgment motion and evidence, all point toward a restitutionary remedy. Because Relators had an unequivocal right to that amount of money, and compensation was wrongfully withheld, that amount is properly delineated as restitution because the state kept something it had no right to keep.

Nearly every rhetorical flourish possible has been expended to refer to the sum sought as damages so that a tort analysis could apply. Where do Relators claim negligence? Where do Relators claim intentional tort? The answer is always: nowhere. This case is about a simple algebra problem: the Legislature promised the examiners X, the Director paid the examiners X minus

Y, and the Court had to solve for the difference. Instead, the Court declined to do the homework, primarily because one of its teachers didn't understand simple mathematics.

B. MANDAMUS LIES AGAINST AN EXECUTIVE OFFICER

Missouri law provides that mandamus lies against an executive officer when he refuses to perform a mandatory duty. *State ex rel. National Life Insurance of Montpelier v. Hyde*, 292 Mo. 342, 241 S.W. 396, 400 (1922) (Mandamus to compel acceptance of the tax and certify amount due).

The Director ignored a statutory duty. His actions fall within the power of mandamus because the people must have a way to hold the executive branch accountable for omissions. *Id.* The statute's language is clear and unequivocal, yet, the Director refused pay rates the Legislature ordered.

The authority relied upon by the Respondents aim at the wrong target. It precludes a tort action against a governmental entity. It does not preclude the remedy of mandamus because that is an extraordinary writ aimed at enforcing duties placed on the executive or judicial branches. Damages must be *adjudicated* and therefore are not available in mandamus because mandamus *executes*. *State ex rel. Lovell v. Tinsley*, 241 Mo.App. 690, 697, 236 S.W.2d 24, 27 (Mo. App. 1951).

Respondents rely on *Thomas v. Kansas City*, 92 S.W.3d 92 (Mo. App. W.D. 2002), a negligence lawsuit brought for damages from surface water. And

while it does include, in the context of tort, that a party must plead an exception to sovereign immunity, it does not stand for the proposition that relief by mandamus requires an exception to sovereign immunity because, in pursuing mandamus the only thing the court can do is order the executive official to comply with the statute. In so doing, the order can only address money withheld, it cannot award damages.

Respondent cites *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272 (Mo. App. W.D. 2010) for the proposition that sovereign immunity prevents mandamus relief, but fails to read the rest of the case. In *Kansas City Symphony*, the plaintiffs sought both a declaratory judgment and a mandamus against the Legislature, not against an executive agency. At issue was the statutory creation of an arts fund without any funding by the Legislature.

Sovereign immunity ***never*** was an issue in the decision on the mandamus, only on the Declaratory Judgment portion. This Court agreed that mandamus was the proper remedy to compel "public officials to perform specific 'ministerial' or mandatory duties," but held that funding was a discretionary, not ministerial duty of the Legislature. It concluded "[m]andamus will not lie to compel an agency to perform a discretionary duty. … Accordingly, the *Symphony* failed to state a claim for mandamus relief as a matter of law. The mandamus claim was properly denied on that basis, and the

defense of **sovereign immunity was never at issue**." *Id.* at 276 (citation omitted, emphasis added).

Thus, rather than standing for the proposition advanced by the Respondent here, it stands for exactly the opposite proposition. Mandamus did not require a sovereign immunity analysis.

Here, there is no evidence before the Circuit Court that there was not an appropriation. We know that there was an appropriation because the examiners were paid, just at a lower rate. The issue, then, was how that appropriation was used. Instead of cutting staff, supplies, travel, or other discretionary functions (LF0960) – *discretionary tasks*, *none of which the Director could have been compelled to do by mandamus* – the Director decided to reduce examiner compensation mandated in the statute. This was the one thing he could be compelled to do in mandamus. *Id.* That is what *Kansas City Symphony*[4] stands for.

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[4] Respondent cites *State ex rel. Redmond v. State*, 328 S.W.3d 818 (Mo. App. 2011) but fails to note that the case incorrectly interprets *Kansas City Symphony*. It held that the sovereign immunity issue was controlled by *Kansas City Symphony*, but claims that the case rejected the appellant's sovereign immunity claims. A plain reading of *Kansas City Symphony*, especially the bolded portion set out above, shows this is incorrect.

Mandamus cannot be used to create a right, only to enforce an existing right. *Maxwell v. Daviess County,* 190 S.W.3d 606, 610 (Mo.App. W.D.2006) Sovereign immunity is not so elastic a doctrine as to permit its use as a shield to mandatory duties imposed by statute. If it was, when would sovereign immunity not bar mandamus? A look at mandamus cases shows that the doctrine has not traditionally been used in that manner.

Indeed, even if this Court agrees that Mandamus is not the correct remedy, it must still reverse the trial court holding on sovereign immunity because sovereign immunity has never been and should never be a defense to an action to compel mandatory action by a state official.

C. MANDAMUS CAN COMPEL PAYMENT OF WAGES

*Liberty may be endangered by the abuse of liberty, but also by the abuse of power.* James Madison.

The theme that stretches throughout the law of mandamus in this state is that it is a discretionary writ, not a writ of right, and is issued only to execute, in aid of restraining the unlawful use of power, or commanding that powers lawfully required to be executed are so executed. It can compel only a ministerial act, and not a discretionary act. *State ex rel. Hanlon v. City of Maplewood,* 231 Mo.App. 739 (1936). It is often used to check usurpation of power, as it is in this case, to check the unauthorized change in compensation mandated by Missouri statutes.

In *State ex rel. Barricelli v. Noonan*, 59 Mo.App. 524 (1894), one of the first mandamus cases brought against an executive officer compelling a non-discretionary action, the Court of Appeals compelled the Mayor of St. Louis by mandamus to cancel permits issued in violation of a city ordinance. This because a writ of mandamus will lie both to compel a party to do that which it is obligated by law to do and to undo that which the party was by law prohibited from doing. *See State ex rel. Burns v. Gillis*, 102 S.W.3d 66 (Mo. App. W.D. 2003); see also *State ex rel. Leigh v. Dierker,* 974 S.W.2d 505, 506 (Mo. banc 1998).

*State ex rel. R. Newton McDowell, Inc.*, 334 Mo. 653, 67 S.W.2d 50 (1933) involved the State Purchasing Agent Act. That statute was offered as justification for the Auditor's inaction when the Auditor refused to draw a warrant on the treasury to pay for crushed stone obtained and used by the State Highway Commission. As to the issue of whether mandamus was available the Court said:

> It is contended for respondent that relator must show a clear legal right to the relief he asks for, else mandamus cannot issue. If by this is meant that such clear right must be shown in the application for the preliminary writ—in limine, as it were—we cannot accede to the contention. The rule in this respect applies

> "not to the right as made to appear upon the petition and return at the commencement of the proceedings, *but as such right is made to appear upon the full and final hearing of the case*."

334 Mo. at 667; 67 S.W.2d at 55 *quoting* 2 BAILEY ON HABEAS CORPUS AND SPECIAL REMEDIES, p. 804 (emphasis added). Mandamus issued to compel the auditor to draw the warrant and pay the company that supplied the rock. Were sovereign immunity properly asserted as a defense to a writ based on a statutory right, that would have been the perfect case in which to assert the defense. No mention is made of sovereign immunity because this fit within the traditional scope of mandamus and its role in compelling official behavior.

*State ex rel. Lovell v. Tinsley*, 241 Mo.App. 690, 236 S.W.2d 24 (1951) confronted the situation where a school board abrogated unto itself the power to re-write its history. Mandamus in that case issued to compel the school board to rewrite minutes of annual meetings where minutes did not accurately describe results of elections or actions taken. Mandamus was the proper remedy even though no statute provided that minutes were required to be truthful. No specific statute announced that right, or permitted the lawsuit against the Board. But this right was found and enforced through mandamus.

In *State ex rel. Martin-Erb v. Missouri Com'n on Human Rights*, 77 S.W.3d 600 (Mo. banc 2002). An employee sought to compel MCHR to make a

determination on a discrimination complaint. The issue was whether mandamus would lie where the Commissioners had failed to make a determination, § 536.150 RSMo., provided the means for review by mandamus to compel the making of the determination, but not the type of determination that should be made. The Supreme Court held it could compel a determination, but could not compel a particular kind of determination.

In *Burns,* a litigant sought a trial date in associate circuit court after service of process proper under Supreme Court rules. The trial court interpreted the *local* rules as being superior to the rules of the Supreme Court and refused to set a trial date until an extra jurisdictional party, previously properly served, was served a second time by alias summons. This Court, through Judge Breckenridge, made a writ of mandamus peremptory to compel the court to do that which the Supreme Court rules required.

All of these cases demonstrate that the writ may issue to compel statutorily or rule-based required acts. But perhaps the most relevant of the cases involving that which can be obtained through mandamus is this Court's decision in *Chadd v. City of Lake Ozark,* 326 S.W.3d 98 (Mo. App. W.D. 2010) and the cases relied upon therein. Although not specifically a mandamus case, it is noteworthy here because the holding confirms that relief in the form of unpaid wages is available in a mandamus action. In *Chadd,* a city manager was unlawfully discharged and brought a mandamus action for reinstatement.

Mandamus issued, and upon reinstatement the city immediately moved for termination using lawful procedure. Chadd filed suit for wages lost between the time of his original discharge and his later discharge. The circuit court dismissed on the basis of *res judicata*. This Court said:

> *Mr. Chadd contends that because the purpose of mandamus is to execute not adjudicate, he did not have the ability to seek damages in the first action.* A writ of mandamus will lie not only to compel public officials to do that which they are obligated by law to do but to undo that which they were prohibited by law from doing. *State ex rel. Thomas v. Neeley,* 128 S.W.3d 920, 924 (Mo.App. S.D.2004). Mandamus is the proper remedy to compel reinstatement of a public officer or employee illegally removed or discharged. *State ex rel. Missey v. City of Cabool,* 441 S.W.2d 35, 43 (Mo.1969); *State ex rel. Ciaramitaro v. City of Charlack,* 679 S.W.2d 405, 406 (Mo.App. E.D.1984); *State ex rel. Pauli v. Geers,* 462 S.W.2d 166, 171 (Mo.App.1970). "Consistent with this rule, if the removal of a public employee is illegal on any ground, he is entitled to reinstatement and restoration of lost earnings." *Missey,* 441 S.W.2d at 43–44. *See also State ex rel. Stomp v. Kansas City,* 313 Mo. 352, 281 S.W. 426 (1926)(if fireman's removal was illegal on any ground, he can in mandamus seek reinstatement and also

payment of the salary of which he has been thus deprived). ***Mr. Chadd's claim for lost wages could well have been included in the first action for writ of mandamus***.

*Id.* at 103 (emphasis added). Because the claim for unpaid wages could have been raised in a mandamus action, *res judicata* prevented the wrongful discharge action filed against the City.

It would be anomalous to hold that *Chadd*, *Missey*, *Ciaramitaro* and *Pauli* all provide for restitution of lost wages by mandamus in the absence of a specific statutory right to either reinstatement or restitution of wages, and to not provide the same rights to Department of Insurance employees here.

D. CONCLUSION

Relief by mandamus is proper and is not precluded under the doctrine of sovereign immunity. Even if this Court disagrees that a clear right exists, or that mandamus is a proper remedy, it must reverse on this point in order to preserve Appellants' right to pursue a remedy by Declaratory Judgment.

## CONCLUSION

Relief by way of mandamus in this case is consistent with *Chadd*, *Missey*, *Ciaramitaro* and *Pauli*. Neither sovereign immunity nor the Respondent's assertions of unclear rights are sound bases to allow the Director to escape the duty imposed on the Director of Insurance by statute. For this reason, the Appellants respectfully request that this Court reverse and remand for the entry of an order in mandamus.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c), in that the brief contains 7,473 words as directed by Rule 84.06(c). The word count was derived from Microsoft Word.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the Substitute Reply Brief of Appellants was served on Respondents via the Missouri Courts E-filing System on May 17, 2017, and the undersigned further certifies that he has signed the original and is maintaining the same pursuant to Rule 55.03 (a).

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