IN THE SUPREME COURT OF MISSOURI

CARY NEWSOME,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	No. SC95538
	)	
THE KANSAS CITY, MISSOURI SCHOOL DISTRICT,	)	
	)	
	)	
Defendant/Appellant.	)	

SUBSTITUTE BRIEF OF APPELLANT KANSAS CITY, MISSOURI SCHOOL DISTRICT

Appeal from the Circuit Court of Jackson County
The Honorable S. Margene Burnett, Circuit Judge

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JURISDICTIONAL STATEMENT

The plaintiff filed an action in the Circuit Court of Jackson County alleging employment discrimination against the Kansas City, Missouri School District. The jury returned a verdict in favor of the School District on two of the three claims submitted and in favor of the plaintiff on one claim.

On June 9, 2014, the trial court entered a judgment in favor of the plaintiff. On June 10, 2014, the trial court entered a corrected judgment. L.F. at 1194. On July 9, 2014, the School District filed post-judgment motions for JNOV, new trial, or remittitur. L.F. at 810, 918. On October 6, 2014, the trial court denied all post-judgment motions. L.F. at 1215, 1217.

On October 15, 2014, the School District filed a notice of appeal to the Missouri Court of Appeals, Western District. L.F. at 1219. This action does not involve any matters over which this Court has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution. The Circuit Court of Jackson County is within the territorial jurisdiction of the Western District. § 477.070, RSMo.

On December 29, 2015, a panel of the Western District issued an affirmance under Rule 84.16(b). On January 13, 2016, the School District filed a motion for rehearing and application for transfer. On February 2, 2016, the Western District denied rehearing and transfer. On February 17, 2016, the School District filed an application for transfer in this Court. On April 5, 2016, this Court granted transfer.

This Court has jurisdiction to entertain appeals after transfer from the Court of Appeals pursuant to Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

A jury found in favor of Plaintiff Cary Newsome on a claim against the Kansas City, Missouri School District for retaliatory termination in violation of public policy. L.F. at 748. The jury found in favor of the School District on the plaintiff's claims for discriminatory termination and retaliatory termination in violation of the Missouri Human Rights Act. L.F. at 747-748. The trial court denied the School District's motions for JNOV, new trial, and remittitur. L.F. at 1215, 1217. This appeal followed.

Pre-trial proceedings

The plaintiff alleged in his petition that from 1992 to 2011 he was employed by the School District and that his final position was as procurement manager. L.F. at 16. The plaintiff alleged that the School District was "a School District organized and existing under the laws of the State of Missouri." L.F. at 14. The plaintiff alleged that the School District was organized and exists "for the purpose of educating elementary, middle school, and high school age children residing within the boundaries of the School District." L.F. at 15. Count I of the plaintiff's petition alleged wrongful termination in violation of the Missouri Human Rights Act. L.F. at 19. Count II alleged "RETALIATION IN VIOLATION OF MISSOURI PUBLIC POLICY ('WHISTLE BLOWING')." L.F. at 21.

Prior to trial, both parties briefed the issue of sovereign immunity. L.F. at 132, 339, 453, 533. The parties stipulated to the admissibility of the exhibits attached to their respective trial briefs regarding sovereign immunity for the trial court to consider in connection with a motion for directed verdict. L.F. at 651; Tr. at 51-52.

In his petition, the plaintiff alleged: "Defendant has purchased an insurance policy or policies that provide coverage for Plaintiff's claims against Defendant including employment-related and tort actions, and including Plaintiff's claims herein of discrimination, retaliation, and wrongful termination in violation of public policy. Therefore, Defendant has waived any potential defenses of sovereign immunity or other immunity against the aforementioned claims." L.F. at 18.

The plaintiff presented the court with a document dated June 27, 2011, in which he stated, "I hereby voluntarily resign my employment with the Kansas City, Missouri School District, effective 30 June 2011." L.F. at 288. He also presented the court with a General Release and Waiver of Claims that he signed on June 27, 2011. L.F. at 289. On July 11, 2011, the School District received a letter from the plaintiff dated June 30, 2011, stating that the plaintiff was revoking his signature on the General Release and Waiver of Claims and rescinding his resignation. L.F. at 294.

The plaintiff provided the court with a copy of his charge of discrimination submitted to the EEOC and the Missouri Commission on Human Rights. L.F. at 147. The charge showed that it was received by the government agency on November 9, 2011, at 2:58 p.m. L.F. at 147. The EEOC issued a Notice of Charge of Discrimination dated November 18, 2011. L.F. at 438, 440. The School District received this notice on November 22, 2011. L.F. at 438, 440.

The plaintiff presented the court with a policy of insurance from Hiscox Insurance Company, policy number UDA1151454.10. L.F. at 148. The policy period was from July 1, 2010, through July 1, 2011. L.F. at 148. The plaintiff also presented the court

with Hiscox policy number UDA1151454.11, with a policy period from July 1, 2011, through July 1, 2012. L.F. at 204. The 2011-2012 policy was a renewal of the 2010-2011 policy. L.F. at 204, 379.

The plaintiff presented the trial court with Endorsement 13 to the 2011-2012 policy, titled "Sovereign Immunity Exclusion." L.F. at 262. Endorsement 13 provided that the insurer "shall not be liable to make any payment for Loss in connection with any Claim made against any Insured . . . that is barred by the defense of sovereign immunity as provided for in Section 537.600, et seq., of the Revised Statutes of Missouri." L.F. at 262. Endorsement 13 also stated that "nothing contained in this Policy shall constitute a waiver of the defense of sovereign immunity." L.F. at 262.

Endorsement 13 stated that it was effective July 1, 2011. L.F. at 262. Endorsement 13 stated that it was processed November 11, 2011. L.F. at 262. The School District and the insurer agreed to the language of Endorsement 13 on the morning of November 9, 2011. L.F. at 452.

The plaintiff presented the affidavit of a School District official stating that the insurer "has denied coverage under [the policy] for the claims arising from this lawsuit based on sovereign immunity and the language of [the policy]." L.F. at 261.

The 2011-2012 policy states: "This is a Claims-Made Policy, coverage is limited to those Claims made during the Policy Period or any applicable Discovery Period." L.F. at 204. The policy defines a "Claim" as follows:

(i) a written demand for monetary, non-monetary or injunctive relief (including any request to toll or waive any statute of limitations);

(ii) a civil, criminal, administrative or regulatory proceeding for monetary, non-monetary or injunctive relief which is commenced by:

(1) service of a complaint or similar pleading;

(2) return of an indictment, information or similar document (in the case of a criminal proceeding); or

(3) receipt or filing of a notice of charges;

Including, but not limited to, an Equal Employment Opportunity Commission ("EEOC") or Office of Federal Contract Compliance Program ("OFCCP") (or similar federal, state or local agency) proceeding or investigation; or

(iii) an arbitration proceeding pursuant to an employment contract, policy or practice of an Organization commenced by receipt of a demand for arbitration or similar document.

However, in no event shall the term "Claim" include any labor or grievance proceeding which is subject to a collective bargaining agreement.

L.F. at 229.

The School District notified the insurer of the plaintiff's charge of discrimination on December 13, 2011. L.F. at 438-439, 448-449. The notice to the insurer stated: "We have reviewed the District's files and confirmed that the District has not received any written demands for monetary, non-monetary or injunctive relief against the District from Mr. Newsome prior to the receipt of his administrative charge." L.F. at 448.

Evidence at trial

Bonnie McElvey testified that she was a former employee of the School District, and chief finance officer until 2008. Tr. at 343-344. She testified that there are specific purchasing rules, policies, and guidelines to follow. Tr. at 344-345. She testified that there were policies and procedures related to bidding. Tr. at 345. Ms. McKelvy testified that the plaintiff performed his job very well, that he was very well-liked, and that he was a very conscientious worker. Tr. at 347. She testified that she was not an employee of the School District during the time that the plaintiff was the purchasing manager and could not speak to his performance in that role. Tr. at 355.

Angela McIntosh testified that she was a current employee of the School District as the operations, budget, and financial manager. Tr. at 359-360. She found the plaintiff to be responsive and helpful. Tr. at 365, 378. She testified that she was familiar with the fact that there were purchasing policies that were required when working for the School District. Tr. at 369. Ms. McIntosh testified that her understanding was that any purchase over $25,000 required formal bids and that any purchase over $2,000 required informal quotes. Tr. at 373.

Ms. McIntosh testified that Michael Rounds became the School District's Chief Operating Officer in 2010 and that at a different time Larry Englebrick became the new Facilities director. Tr. at 379, 462. Mr. Rounds came to the role of Chief Operating Officer during the time that the School District closed thirty schools. Tr. at 464. The plaintiff testified that, in his judgment, Mr. Rounds and Mr. Englebrick did not understand the purchasing process for the School District. Tr. at 548.

The plaintiff testified that he was employed by the School District from 1992 to 2011. Tr. at 505. He was the accounts payable manager from 1995 to 2009. Tr. at 508. He always got positive reviews. Tr. at 509. In 2009, Dr. Jon Covington became the superintendent and Dr. Rebecca Lee-Gwin became the chief finance officer. Tr. at 512-513. Dr. Lee-Gwin made the plaintiff the purchasing manager. Tr. at 513.

The plaintiff testified that, when he got the purchasing position in September of 2009, the first nine or ten months on the job were "pretty rough. I mean, learning the, getting really familiarized with the procedures and policies, making sure you stayed on top of that, making sure that you get all the items of how to be bid out, making sure that you kept track of the contracts that would be expiring and needed to go back out. So it took a little time to get adjusted." Tr. at 535.

When the plaintiff took over the role, there was a procedure manual in place, and the plaintiff continued to use it. Tr. at 519; Exhibit 19. The manual sets out a variety of policies, laws, and regulations that the district has to follow. Tr. at 519. Dr. Lee-Gwin set forth procurement procedures. Tr. at 520-521; Exhibit 20. There were also other policies relating to purchasing. Tr. at 529; Exhibit 21.

The plaintiff testified that School District policy provided that the superintendent had authority to declare an emergency. Tr. at 529. The plaintiff testified that, if immediate action is required, the superintendent needed to consult the executive committee, and then the President of the Board needed to call a special session to declare an emergency. Tr. at 529. The plaintiff testified that, if that happened, then there could be circumstances when the bidding process might be bypassed. Tr. at 529.

The plaintiff testified that it is also possible to "piggyback" a purchase without going through a formal bidding process by joining with another public body that has already made purchase arrangements. Tr. at 532.

The plaintiff testified that Ron Epps was a consultant who had a contract with the School District. Tr. at 609-610; Exhibit 32. The plaintiff testified, "I was requested to make some adjustments to his purchase order so that the payments could be made to him. . . . Well, basically the contract stated that he had four visits and that he was supposed to receive a certain amount of money for those visits. And the request I was having was to increase his purchase order, which would have been more than the four visits that was in the contract." Tr. at 610-611.

The plaintiff testified that he determined that Mr. Epps had exceeded the number of visits, and the plaintiff had a concern about issuing purchase orders for more work, so he brought the matter to Dr. Lee-Gwin: "I brought to her attention the terms of the agreement, and we talked about it. She agreed with me, and she took the agreement, and that's the last that I really heard about it." Tr. at 611. The plaintiff testified that he did not know whether Mr. Epps was ever paid for the additional work. Tr. at 697.

The plaintiff testified that, the same week as the issue about Mr. Epps, there was another issue about the possible purchase of vehicles. Tr. at 612; Exhibit 33. The plaintiff testified:

> Well, in March of that year the Facilities Department came to PFC to request the purchase of vehicles, and it was a two-part purchase: One was trucks to replace older vehicles in their organization that needed to be replaced; there was also three vehicles they was asking for for the management team of that division.
>
> When they brought the request my first question to them was, Do we really want to spend $70,000 to purchase vehicles for management to drive around in considering that we were laying off district employees? They said that they needed them.
>
> I brought my concerns to Dr. Gwin. She mentioned to me that they had the money. Let them purchase the vehicles.
>
> So what I did was went out to the state of Missouri, got the contract, and we started working on the board item to get those vehicles purchased.

Tr. at 612-613.

The plaintiff testified that he identified a contract of the state of Missouri that could be used to piggyback the purchase of the vehicles. Tr. at 614-615. The state contract ran through the end of June of 2011 and had pricing for both Ford Escapes and

Ford Explorers. Tr. at 615. The board of the School District approved the purchase of Ford Explorers under the state contract. Tr. at 616-617.

The plaintiff testified: "Well, what we found out after it was board approved, that after the purchase order was issued that there was a change in the state contract that no one was aware of. And we only found that out after we sent the purchase order to the vendor to order the vehicles. And what we found out was on -- sometime in April that the State issued an amendment to their agreement, and it put in dates that we had to have the vehicles ordered by." Tr. at 617.

The plaintiff testified that he reached out to the dealer to ask if the School District could continue to order off the contract even though the cut-off dates had already passed. Tr. at 619. The facilities group wanted the vehicles before June 30, but the dealer said there was no way they could provide those vehicles, since they were being made by Ford, to have them available by June 30. Tr. at 620. "They wanted vehicles to arrive before the end of the fiscal year so they could pay for them out of the current year budget. In order to do that they had to be in the district's possession by June 30." Tr. at 621.

The dealer had three Ford Escapes already in stock that could be delivered before June 30, and the amount was essentially the same as what the board had approved for the Ford Explorers. Tr. at 621-622. The plaintiff testified that Dr. Lee-Gwin did not approve: "Dr. Gwin actually came out to visit while we were having that discussion. She wanted to know what was going on. We explained to her what we were discussing. She basically said that's not going to happen; you need to cancel this order. And she walked off." Tr. at 623. The order was cancelled. Tr. at 623-624; Exhibit 34.

The plaintiff testified that, shortly afterward, "Dr. Gwin came back down, she asked us about the Ford -- the purchase of the vehicles. . . . She basically told us that we needed to order the vehicles. . . . She said she didn't want to hear anything else about it; we needed to take care of it." Tr. at 624-625. The plaintiff prepared the paperwork and attached a memorandum listing his concerns. Tr. at 625-626; Exhibit 35.

Plaintiff's Exhibit 35 shows that the purchase of the Ford Escapes was approved by the school board to substitute for the purchase of the Ford Explorers. L.F. at 913-915. Plaintiff's Exhibit 35 explained the factual background of the purchase: "In April 2011, the Board approved the purchase of two Chevy Silverado trucks and three Ford Explorers. Once Administration attempted to complete the purchase, we were notified and advised that the Ford Explorers were no longer available through the State Contract. As a result, Administration has modified the purchase from three Ford Explorers to three Ford Escapes." L.F. at 914.

The plaintiff testified that the following Monday, his employment was terminated by the director of human resources. Tr. at 627. "I was an at-will employee and that was the reason why they were letting me go." Tr. at 628. The plaintiff was told by the director of human resources that he hadn't done anything wrong. Tr. at 727. The plaintiff testified that he was told "that the district was offering incentives for those employees that were retiring, that he would offer me the same incentive, which was $20,000, that if I would resign and, of course, sign the waiver." Tr. at 629; Exhibit 8.

After the plaintiff revoked his acceptance, a notice of termination was sent along with his final paycheck, but the director of human resources noted, "Do not code him as ineligible for rehire." Tr. at 731. The former director of human resources testified:

> Q. And would you agree with me as the head of HR at that time that if an employee had been terminated for any cause like insubordination, that that employee would be coded as ineligible for rehire?
>
> A. That is correct.
>
> Q. And so the fact that Mr. Newsome was not being coded that way, didn't that further confirm for you that there was not any reason, not any performance issue, not any insubordination or violation of policy that Mr. Newsome had engaged in?
>
> A. That is correct.

Tr. at 731.

The former director of human resources testified that the plaintiff's termination was memorable: "Very, very, very uncommon that the superintendent would call me to his office. Most terminations are, I would say 90-100 percent of the terminations are conducted by the immediate supervisor. It would not be uncommon for Dr. Gwin to recommend the termination of one of her employees. But I can't think of another time the whole time I was in HR that Dr. Covington called me to his office to terminate an employee." Tr. at 735.

Dr. Lee-Gwin testified that she gave the plaintiff an outstanding review in May of 2011. Tr. at 777-778; Exhibit 5. Dr. Lee-Gwin testified that in June of 2011 the plaintiff expressed concern and disagreement about the process of certain purchases. Tr. at 785-786. Dr. Lee-Gwin testified as to why she authorized the purchase of the Ford Escapes: "Because it appeared that the purchase of the Escapes was within the process, that the Escapes were on the bid list, that it was an acceptable purchase." Tr. at 838-839.

> Q. So you, after researching the Escapes and the purchase of those further, determined that it was okay to do, right?
>
> A. Yes.

Tr. at 839.

The plaintiff's termination was not Dr. Lee-Gwin's decision, and she was not involved in it. Tr. at 793. The superintendent, Dr. Covington, made the decision and reported it to Dr. Lee-Gwin: "I don't recall the word insubordination, but I do recall him saying to me that he felt that he had talked to Cary previously about an issue with the procurement, and that the same type of issue was occurring, and that he was going to talk to him again [and terminate him]." Tr. at 793. "I don't recall the word insubordination in the conversation. We could have had. I just don't recall it." Tr. at 794.

The plaintiff testified that he made complaints about various transactions to Dr. Lee-Gwin and Mr. Rounds. Tr. at 654. He never made any complaint about transactions to the superintendent, or the school board, or any other authority. Tr. at 654-659, 697. Dr. Lee-Gwin testified that Dr. Covington did not see the plaintiff's memorandum

(Exhibit 35) setting forth his objection to the purchase of the Ford Escapes that he had saved on the purchasing computer system: "No. Dr. Covington never looked at the [purchasing computer] system. He didn't go into that." Tr. at 840.

The plaintiff testified: "Dr. Gwin I can't recall asked me to do anything that was against board policy with the exception of the vehicles." Tr. at 673.

The verdict director

The verdict director that the trial court used for the claim of retaliatory discharge for whistleblowing was Instruction 15:

INSTRUCTION NO. 15

> Your verdict must be for plaintiff if you believe:
>
> First, either:
>
> Plaintiff refused to approve a payment to Ron Epps that he reasonably believed would violate School District contracting law, or
>
> Plaintiff reported to a superior that he reasonably believed the purchase of Ford Escapes would violate School District contracting law;
>
> and
>
> Second, defendant discharged Plaintiff, and

> Third, any one or more instances of the conduct of Plaintiff as submitted in paragraph First was a contributing factor in his discharge; and
>
> Fourth, as a direct result of his discharge, plaintiff sustained damage.

L.F. at 744.

The School District objected that this verdict director was improper because it did not require the jury to find that the plaintiff had complained about any violation of law, or that there had even been a violation of law, and that it was improper to base recovery on what someone might have "reasonable believed" to be a violation of law. Tr. at 931-949, 967-968. The School District also objected that the verdict director was not specific as to what law was allegedly violated, that the instruction was vague and a roving commission, and that it was unsupported by evidence. Tr. at 949-950, 962-964, 967-969.

Before trial, the School District proposed that, if the court were to deny a directed verdict, overrule the School District's objections, and submit the whistleblower claim, the verdict director should be as follows:

INSTRUCTION NO. ___

> Your verdict must be for plaintiff Cary Newsome if you believe:
>
> First, either

> plaintiff reported to his superiors violations of law regarding purchasing, or
>
> plaintiff refused to approve a payment that would be in violation of law,
>
> and
>
> Second, defendant discharged plaintiff, and
>
> Third, any one or more instances of the conduct of plaintiff as submitted in paragraph First was a contributing factor in his discharge, and
>
> Fourth, as a direct result of his discharge, plaintiff sustained damage.

L.F. at 592, 615.

In light of the evidence at trial, the School District withdrew this proposed instruction. Tr. at 964.

Post-trial proceedings

The jury returned verdicts in favor of the School District on two claims submitted for discriminatory termination and retaliatory termination in violation of the MHRA. L.F. at 746-747. The jury returned a verdict of $500,000 in favor of the plaintiff on his claim for retaliatory termination in violation of public policy. L.F. at 748.

On June 9, 2014, the trial court entered a judgment in accordance with the verdicts in favor of the plaintiff. On June 10, 2014, the trial court entered a corrected judgment. L.F. at 1194.

On July 9, 2014, the School District filed post-judgment motions for JNOV, new trial, or remittitur. L.F. at 810, 918.

On October 6, 2014, the trial court denied all post-judgment motions. L.F. at 1215, 1217.

On October 15, 2015, the School District filed a notice of appeal. L.F. at 1219.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF AND IN DENYING JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE PLAINTIFF FAILED TO PRESENT SUBSTANTIAL EVIDENCE IN SUPPORT OF EVERY ELEMENT OF HIS CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY IN THAT THE PLAINTIFF FAILED TO PRESENT EVIDENCE THAT HE REFUSED TO VIOLATE THE LAW OR A WELL-ESTABLISHED AND CLEAR MANDATE OF PUBLIC POLICY OR THAT HE REPORTED WRONGDOING OR VIOLATIONS OF LAW TO SUPERIORS OR PUBLIC AUTHORITIES.

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

Margiotta v. Christian Hosp., 315 S.W.3d 342 (Mo. banc 2010).

Jones v. Galaxy 1 Marketing, Inc., 478 S.W.3d 556 (Mo. App. 2015).

Drummond v. Land Learning Foundation, 358 S.W.3d 167 (Mo. App. 2011).

II. THE TRIAL COURT ERRED IN OVERRULING THE SCHOOL DISTRICT'S OBJECTION TO INSTRUCTION 15, IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF, AND IN DENYING A NEW TRIAL BECAUSE THE TRIAL COURT COMMITTED REVERSIBLE INSTRUCTIONAL ERROR IN THAT INSTRUCTION 15 DEVIATED FROM MAI 38.03 AND MISSTATED THE LAW IN REQUIRING THE JURY TO FIND ONLY THAT THE PLAINTIFF "REASONABLY BELIEVED" THAT THE TRANSACTIONS VIOLATED "SCHOOL DISTRICT CONTRACTING LAW," WHILE THE LAW REQUIRES A PLAINTIFF TO SHOW THAT HE OR SHE REPORTED SERIOUS MISCONDUCT CONSTITUTING AN ACTUAL VIOLATION OF THE LAW OR WELL ESTABLISHED AND CLEARLY MANDATED PUBLIC POLICY, NOT A MERE BELIEF.

Margiotta v. Christian Hosp., 315 S.W.3d 342 (Mo. banc 2010).

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

MAI 38.03.

III. THE TRIAL COURT ERRED IN OVERRULING THE SCHOOL DISTRICT'S OBJECTION TO INSTRUCTION 15, IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF, AND IN DENYING A NEW TRIAL BECAUSE THE TRIAL COURT COMMITTED REVERSIBLE INSTRUCTIONAL ERROR IN THAT INSTRUCTION 15 CONSTITUTED A ROVING COMMISSION BECAUSE IT FAILED TO ADEQUATELY SPECIFY THE BASIS ON WHICH THE JURY COULD BASE A FINDING OF LIABILITY AND FAILED TO SET FORTH THE LAW OR PUBLIC POLICY THAT WOULD RENDER THE SCHOOL DISTRICT LIABLE, BUT RATHER MADE VAGUE REFERENCES TO WHETHER CONDUCT "WOULD VIOLATE SCHOOL DISTRICT CONTRACTING LAW."

Chavez v. Cedar Fair, LP, 450 S.W.3d 291 (Mo. banc 2014).

McNeill v. City of Kansas City, 372 S.W.3d 906 (Mo. App. 2012).

Margiotta v. Christian Hosp., 315 S.W.3d 342 (Mo. banc 2010).

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

IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF AND IN DENYING JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE PLAINTIFF'S CLAIM WAS BARRED BY SOVEREIGN IMMUNITY (§ 537.600, RSMO) IN THAT THE SCHOOL DISTRICT'S INSURANCE POLICY INCLUDED AN ENDORSEMENT PROVIDING THAT THE INSURER WOULD NOT BE LIABLE FOR LOSS IN CONNECTION WITH ANY CLAIM THAT WAS BARRED BY SOVEREIGN IMMUNITY AND STATED THAT "NOTHING CONTAINED IN THIS POLICY SHALL CONSTITUTE A WAIVER OF THE DEFENSE OF SOVEREIGN IMMUNITY," AND A PUBLIC ENTITY DOES NOT WAIVE ITS SOVEREIGN IMMUNITY BY MAINTAINING AN INSURANCE POLICY THAT INCLUDES A PROVISION STATING THAT THE POLICY IS NOT MEANT TO CONSTITUTE A WAIVER OF SOVEREIGN IMMUNITY.

§ 537.600, RSMo.

Metro. St. Louis Sewer Dist. v. City of Bellefontaine, 476 S.W.3d 913 (Mo. banc 2016).

State ex rel. City of Grandview v. Grate, No. SC95283 (Mo. banc 2016).

State ex rel. Board of Trustees v. Russell, 843 S.W.2d 353 (Mo. banc 1992).

V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF FOR $500,000 AND IN DENYING THE SCHOOL DISTRICT'S MOTION TO REMIT THE JUDGMENT IN THAT THE JUDGMENT AND THE DENIAL OF THE SCHOOL DISTRICT'S MOTION TO REMIT THE JUDGMENT ARE CONTRARY TO LAW BECAUSE THE JUDGMENT EXCEEDS $403,139 AND THAT THE STATUTORY MAXIMUM THAT MAY BE AWARDED AGAINST THE SCHOOL DISTRICT FOR A TORT CLAIM UNDER MISSOURI LAW (§ 537.610) IS $403,139.

§ 537.610, RSMo.

Richardson v. State Highway & Transp. Comm'n, 863 S.W.2d 876 (Mo. banc 1993).

Metro. St. Louis Sewer Dist. v. City of Bellefontaine, 476 S.W.3d 913 (Mo. banc 2016).

Ohio v. Mo. State Treasure, 130 S.W.3d 742 (Mo. App. 2004).

VI. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF FOR $500,000 AND IN DENYING THE SCHOOL DISTRICT'S MOTION TO REMIT THE JUDGMENT BECAUSE THE JUDGMENT AND THE DENIAL OF THE SCHOOL DISTRICT'S MOTION TO REMIT THE JUDGMENT ARE CONTRARY TO LAW IN THAT THE STATUTORY MAXIMUM THAT MAY BE AWARDED AGAINST THE SCHOOL DISTRICT FOR A TORT CLAIM UNDER MISSOURI LAW (§ 537.610, RSMO) IS THE MAXIMUM AMOUNT COVERED BY THE INSURANCE PURCHASED BY THE SCHOOL DISTRICT, THE MOST THAT MAY BE AWARDED AGAINST THE SCHOOL DISTRICT UNDER SECTION 537.610 IS $403,139, AND IT IS UNDISPUTED THAT THE SCHOOL DISTRICT'S RETENTION UNDER THE INSURANCE POLICY IS $250,000, SO THAT THE JUDGMENT CANNOT PROPERLY EXCEED $153,139 (THE STATUTORY LIMIT OF LIABILITY OF $403,139 LESS THE SCHOOL DISTRICT'S RETENTION OF $250,000).

§ 537.610, RSMo.

Metro. St. Louis Sewer Dist. v. City of Bellefontaine, 476 S.W.3d 913 (Mo. banc 2016).

Ohio v. Mo. State Treasure, 130 S.W.3d 742 (Mo. App. 2004).

ARGUMENT

The School District was entitled to JNOV because the judgment for alleged wrongful termination in violation of public policy was unsupported by substantial evidence. The plaintiff failed to make a submissible case for wrongful discharge under a whistleblower theory because, according to his own testimony, he never reported any alleged wrongdoing to anyone other than the alleged wrongdoer. The evidence does not support the plaintiff's claim for relief. *See Fleshner v. Pepose Vision Institute, P.C.,* 304 S.W.3d 81, 97 n. 13 (Mo. banc 2010); *Jones v. Galaxy 1 Marketing, Inc.,* 478 S.W.3d 556, 564 (Mo. App. 2015).

In the alternative, the Court should reverse for a new trial due to instructional error. The verdict director, Instruction 15, required a verdict in favor of the plaintiff if he "reasonably believed" that actions "would violate School District contracting law." This "reasonably believed" language is contrary to MAI 38.03 and the settled law, which require a plaintiff to show a ***violation***, not a ***belief*** of a violation. Further, Instruction 15 was vague and a roving commission in that it failed to specify any law or mandate of public policy that the plaintiff allegedly refused to violate, or that someone else allegedly violated and the plaintiff allegedly reported.

The School District was also entitled to JNOV because the plaintiff's claim was barred by sovereign immunity. It is undisputed that the School District's insurance policy included an endorsement providing that there was no coverage for any claim "that is barred by the defense of sovereign immunity as provided for in Section 537.600, et seq., of the Revised Statutes of Missouri." L.F. at 262. The endorsement explicitly

provided that "nothing contained in this Policy shall constitute a waiver of the defense of sovereign immunity." L.F. at 262. As a matter of law, a public entity does not waive its sovereign immunity by maintaining an insurance policy that includes a provision stating that the policy is not meant to constitute a waiver of sovereign immunity. *State ex rel. City of Grandview v. Grate,* No. SC95283, 2016 WL 1357140 (Mo. banc April 5, 2016); *State ex rel. Bd. of Trustees v. Russell,* 843 S.W.2d 353, 360 (Mo. banc 1992).

If the Court denies JNOV or a new trial, the judgment should be reduced for two reasons. First, the judgment for $500,000 is contrary to the sovereign immunity statute, which explicitly provides that liability of a public entity "shall not exceed [$403,139 as adjusted for inflation] for any one person in a single accident or occurrence." § 537.610.2, RSMo; *see* http://insurance.mo.gov/industry/sovimmunity.php. Under the law, the highest possible judgment that could be entered against the School District was $403,139.

Further, it is undisputed that the School District's retention under the insurance policy at issue was $250,000, which was "to be borne by the Insureds and shall remain uninsured." Section 537.610, RSMo, provides that sovereign immunity is waived only to the maximum amount of insurance coverage. Because the School District is uninsured for the first $250,000 of any judgment, sovereign immunity is not waived for this amount. If the judgment is not reversed, it should be reduced to $153,139 (the statutory limit of liability of $403,139 less the School District's retention of $250,000).

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF AND IN DENYING JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE PLAINTIFF FAILED TO PRESENT SUBSTANTIAL EVIDENCE IN SUPPORT OF EVERY ELEMENT OF HIS CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY IN THAT THE PLAINTIFF FAILED TO PRESENT EVIDENCE THAT HE REFUSED TO VIOLATE THE LAW OR A WELL-ESTABLISHED AND CLEAR MANDATE OF PUBLIC POLICY OR THAT HE REPORTED WRONGDOING OR VIOLATIONS OF LAW TO SUPERIORS OR PUBLIC AUTHORITIES.

Submission of the plaintiff's claim to the jury was improper because the plaintiff was not a whistleblower. The plaintiff never claims to have reported any violation of law or public policy to anyone other than the alleged wrongdoer. A report to the alleged wrongdoer is insufficient to invoke the whistleblowing public-policy exception. *See Fleshner v. Pepose Vision Institute, P.C.,* 304 S.W.3d 81, 97 n. 13 (Mo. banc 2010); *Jones v. Galaxy 1 Marketing, Inc.,* 478 S.W.3d 556, 564 (Mo. App. 2015).

Whether the plaintiff made a submissible case is a question of law that this Court reviews de novo. *Ellison v. Fry,* 437 S.W.3d 762, 768 (Mo. banc 2014). A case may not be submitted unless each and every fact essential to liability is predicated on legal and substantial evidence. *Id.* To determine whether the evidence was sufficient to support the jury's verdict, an appellate court views the evidence in the light most favorable to the verdict. *Id.* A motion for directed verdict or JNOV should be granted if the defendant shows that at least one element of the plaintiff's case is not supported by the evidence. *Id.*

A. The public-policy exception is very narrow.

Generally, an employee at will may be terminated for any reason or for no reason. *Fleshner v. Pepose Vision Institute, P.C.,* 304 S.W.3d 81, 91 (Mo. banc 2010). As a matter of law, the discharged at-will employee has no cause of action for wrongful discharge. *Id.; Margiotta v. Christian Hosp.,* 315 S.W.3d 342, 345 (Mo. banc 2010).

There is a slim public-policy exception to this rule: "An at-will employee may not be terminated (1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities." *Fleshner,* 304 S.W.3d at 92. This exception "is very narrowly drawn." *Margiotta,* 315 S.W.3d at 346.

B. The plaintiff was not a whistleblower.

To prevail on a claim of whistleblowing, the plaintiff was required to demonstrate that he "reported to superiors or public authorities serious misconduct that constitutes a violation of the law and of . . . well-established and clearly mandated public policy." *Margiotta,* 315 S.W.3d at 346-347. A plaintiff "who merely disagrees personally with an employer's legally-allowed policy" is not a whistleblower. *Id.* at 347. Further, the plaintiff must demonstrate that the employer's conduct actually violated the public policy in question -- complaints about conduct the plaintiff "merely believes to be violations of the law or public policy" will not support a wrongful discharge claim. *Id.* at 348.

The plaintiff offered no proof of a violation of law or public policy, or even a violation of procurement procedures. Exhibit 35 shows that the vehicle purchase was presented to the school board for approval. There was no evidence that anyone paid Mr. Epps after the plaintiff objected.

Even more fundamentally, it is clear that the plaintiff did not "blow the whistle" to public authorities or superiors (other than those implicated in the alleged wrongdoing) regarding Mr. Epps or the purchase of Ford Escapes. As this Court has explained, "The public-policy exception explicitly recognizes that an employee's superiors can constitute the proper authority to whom to blow the whistle and that an employee who is fired for informing his superiors of wrongdoing by ***other*** employees is entitled to bring suit." *Fleshner,* 304 S.W.3d at 97 n. 13 (emphasis added). According to the plaintiff, he never reported anything to any ***other*** employee beyond the alleged wrongdoer.

The plaintiff testified that he objected to the purchase of the Ford Escapes after the initial purchase of Ford Explorers could not be completed due to the amendment of the state piggyback contract. According to the plaintiff, he spoke to Dr. Lee-Gwin, Mr. Rounds, and Mr. Mobley about his objections and then followed Dr. Lee-Gwin's instructions to prepare the revised purchase order for the Escapes, attaching his note about his reservations about the purchase.

The plaintiff testified that he never made any complaint about these transactions to the superintendent, or the school board, or any other authority. Tr. at 654-659, 697. Dr. Lee-Gwin testified that Dr. Covington (the decision maker in connection with the plaintiff's termination) did not see the plaintiff's memorandum (Exhibit 35) setting forth

his objection to the purchase of the Ford Escapes that he had saved on the purchasing computer system: "No. Dr. Covington never looked at the [purchasing computer] system. He didn't go into that." Tr. at 840.

The plaintiff cannot properly claim to be a whistleblower merely by complaining to the persons he claimed were committing a violation. Internal reporting to superiors of illegal actions by other employees ***can*** constitute protected activity. *See Fleshner,* 304 S.W.3d at 97 n. 13. "However, a report of wrongdoing to the wrongdoer is insufficient to invoke the whistleblowing public policy exception." *Drummond v. Land Learning Foundation,* 358 S.W.3d 167, 171 (Mo. App. 2011); *see Fleshner,* 304 S.W.3d at 97 n. 13; *Jones,* 478 S.W.3d at 564; *Scott v. Missouri Valley Physicians, P.C.,* 460 F.3d 968, 970 (8th Cir. 2006). Reporting to the alleged wrongdoer does not expose the wrongdoer or the alleged wrongdoing and, thus, does not further the accepted clear mandate of public policy. *Drummond,* 358 S.W.3d at 171.

This plaintiff is seeking "whistleblower" protection for reporting claimed violations in connection with Mr. Epps and the purchase of Ford Escapes to Dr. Lee-Gwin, ***the person who instructed him not to pay Mr. Epps and to proceed with the vehicle transaction after he raised his concerns.*** The plaintiff cannot properly claim to be a whistleblower for reporting alleged purchasing violations by Dr. Lee-Gwin to Dr. Lee-Gwin.

The per curiam memorandum of the Court of Appeals declares that a complaint to Dr. Lee-Gwin about Dr. Lee-Gwin's alleged violations was adequate to make the plaintiff a whistleblower on the theory that Dr. Lee-Gwin had ***not yet*** committed the alleged

violations at the time of the complaints: "Lee-Gwin was not a wrongdoer when Newsome first reported to her that the facilities' department's request to purchase the Ford Escapes would violate the District's purchasing policies and state law. . . . That she later directed him to process the request is immaterial. Because Newsome presented sufficient evidence that he reported the wrongdoing to his superior, he made a submissible case of wrongful discharge in violation of public policy." Memorandum, No. WD78047, at 16.

Respectfully, this statement overlooks the undisputed fact that the ***only*** alleged wrongdoer in connection with the purchasing issues was Dr. Lee-Gwin, and the plaintiff allegedly made his complaints to Dr. Lee-Gwin. As the Western District has explained, in a published decision after *Fleshner* and *Margiotta*, "Missouri common law wrongful discharge whistleblower cases do require disclosures to persons other than the wrongdoers." *Hudson v. O'Brien,* 449 S.W.3d 87, 91 (Mo. App. 2014) (citing *Drummond* and *Fleshner*). As a matter of law, these undisputed facts refute the plaintiff's claim to be a whistle blower. *See Drummond; Fleshner; Jones.*

The judgment in favor of the plaintiff on this claim should be reversed.

C. The plaintiff presented no evidence of a violation of public policy.

At trial, the plaintiff presented evidence concerning numerous transactions, but submitted his verdict director based only on two transactions -- a purchase order submitted for a payment to Ron Epps and a purchase order for Ford Escapes. L.F. at 744. The plaintiff presented no evidence that either transaction implicated violations of law or well-established mandates of public policy as expressed in the constitution, statutes,

regulations promulgated pursuant to statute, or rules created by a governmental body. Therefore, the claims were not submissible, and the trial court erred in denying JNOV.

Public policy is not found "in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public." *Margiotta,* 315 S.W.3d at 346 (quoting *In re Rahn's Estate,* 291 S.W. 120, 123 (Mo. 1926)). A wrongful discharge action must be based on a constitutional provision, a statute, a regulation based on a statute, or a rule promulgated by a governmental body. *Id.* Absent such explicit authority, the wrongful discharge action fails as a matter of law. *Id.*

Not every statute or regulation gives rise to an at-will wrongful termination action. *Id.* A vague or general statute, regulation, or rule cannot be the basis of such a claim, because it would force the court to decide on its own what public policy requires. *Id.* Such vagueness would also cause the duties imposed upon employers to become more vague and create difficulties for employers to plan around liability based on the vagaries of judges. *Id.; see Farrow v. Saint Francis Medical Center,* 407 S.W.3d 579, 595-596 (Mo. banc. 2013).

The plaintiff testified that Ron Epps was a consultant who had a contract with the School District. Tr. at 609-610; Exhibit 32. The plaintiff testified, "I was requested to make some adjustments to his purchase order so that the payments could be made to him. . . . Well, basically the contract stated that he had four visits and that he was supposed to receive a certain amount of money for those visits. And the request I was having was to

increase his purchase order, which would have been more than the four visits that was in the contract." Tr. at 610-611.

The plaintiff testified that he determined that Mr. Epps had exceeded the number of visits, and the plaintiff was concerned about issuing purchase orders for more work, so he brought the matter to the attention of Dr. Lee-Gwin: "I brought to her attention the terms of the agreement, and we talked about it. She agreed with me, and she took the agreement, and that's the last that I really heard about it." Tr. at 611. The plaintiff testified that he did not know whether Mr. Epps was ever paid for additional work. Tr. at 697. There is no evidence in the record that the purchase order was ever processed.

The plaintiff did not identify any law or public policy that he claimed was violated by this purchase order ***request*** as to Mr. Epps. There is no evidence that this purchase order was ever actually ***processed***, and the plaintiff has failed to identify any law or public policy that he claimed would have been violated if the purchase order had been processed.

As to Mr. Epps, the plaintiff is claiming that he was a "whistleblower" as to a purchasing request, without proof that the purchase was ever made. The plaintiff did not identify any law or public policy he claimed was violated by the purchase order request or that would have been violated by processing the purchase order. Indeed, the plaintiff testified that Dr. Lee-Gwin never asked him to do anything he felt was against any policy (other than the purchase of the Ford Escapes): "Dr. Gwin I can't recall asked me to do anything that was against board policy with the exception of the vehicles." Tr. at 673.

The plaintiff made no showing of any violation of public policy in connection with the School District's dealings with Mr. Epps.

The plaintiff also testified regarding the request for the purchase of Ford Escapes, which originally had been approved for a purchase of Ford Explorers. Plaintiff's Exhibit 35 shows that the purchase of the Ford Escapes was approved by the school board to substitute for the purchase of the Ford Explorers. L.F. at 913-915. Plaintiff's Exhibit 35 explained the factual background of the purchase: "In April 2011, the Board approved the purchase of two Chevy Silverado trucks and three Ford Explorers. Once Administration attempted to complete the purchase, we were notified and advised that the Ford Explorers were no longer available through the State Contract. As a result, Administration has modified the purchase from three Ford Explorers to three Ford Escapes." L.F. at 914. Dr. Lee-Gwin testified that amended purchase orders were routinely taken back to the school board for approval.

The plaintiff testified that he placed a memorandum in the purchasing computer about the acquisition of the Ford Escapes: "This request is being process [sic] without the documentation necessary to support purchase. . . . Procurement has recommed [sic] not to purchase this vechicles [sic] in this manner. Management has decided that we will." Exhibit 35; L.F. at 909. This memorandum did not assert that the purchase would violate state law or public policy, and it did not identify any School District policy that might be violated by the purchase. At trial, the plaintiff did not testify regarding any state law or public policy that could be violated by the purchase of the Ford Escapes.

The evidence at trial did not include the required showing of any violation of the law or a well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body. *See Fleshner,* 304 S.W.3d at 92; *Margiotta,* 315 S.W.3d at 346. Therefore, the plaintiff failed to make a submissible case, and the judgment should be reversed.

II. THE TRIAL COURT ERRED IN OVERRULING THE SCHOOL DISTRICT'S OBJECTION TO INSTRUCTION 15, IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF, AND IN DENYING A NEW TRIAL BECAUSE THE TRIAL COURT COMMITTED REVERSIBLE INSTRUCTIONAL ERROR IN THAT INSTRUCTION 15 DEVIATED FROM MAI 38.03 AND MISSTATED THE LAW IN REQUIRING THE JURY TO FIND ONLY THAT THE PLAINTIFF "REASONABLY BELIEVED" THAT THE TRANSACTIONS VIOLATED "SCHOOL DISTRICT CONTRACTING LAW," WHILE THE LAW REQUIRES A PLAINTIFF TO SHOW THAT HE OR SHE REPORTED SERIOUS MISCONDUCT CONSTITUTING AN ACTUAL VIOLATION OF THE LAW OR WELL ESTABLISHED AND CLEARLY MANDATED PUBLIC POLICY, NOT A MERE BELIEF.

If the Court finds that the judgment should not be reversed outright, the judgment should be reversed and the cause remanded for retrial due to instructional error. The law demands that, in order to prevail on a claim of whistleblowing, a plaintiff must show that he or she reported serious misconduct that constitutes a violation of the law or well established and clearly mandated public policy. *Margiotta v. Christian Hosp.,* 315 S.W.3d 342, 347 (Mo. banc 2010). The jury in this case was not required to find that any law or public policy had been violated, but merely that the plaintiff ***believed*** so. This is reversible error.

Whether the jury was properly instructed is a question of law that is reviewed de novo. *Chavez v. Cedar Fair, LP,* 450 S.W.3d 291, 294 (Mo. banc 2014). The Court will

vacate a judgment on the basis of an instructional error if that error materially affected the merits of the action. *Id.*

Instruction No. 15 only required that the plaintiff must have "reasonably believed" that the payment to Ron Epps "would violate School District contracting law" or that the plaintiff reported to a superior that he "reasonably believed" the purchase of Ford Escapes "would violate School District contracting law." This "reasonably believed" language is not supported by MAI 38.03, the required instruction to submit a claim for wrongful discharge in violation of public policy.

The "reasonably believed" language is also squarely contrary to the cases of this Court setting forth the requirements of a whistleblower action. *Fleshner* was the case in which the Court recognized this cause of action for the first time and set forth "the public-policy exception to the at-will employment doctrine: An at-will employee may not be terminated (1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities." *Fleshner,* 304 S.W.3d at 92. The Court made it clear that a plaintiff must report "wrongdoing." *Id.* at 97 n.13.

Fleshner does not permit a cause of action when a plaintiff merely ***believes*** that there was wrongdoing or a violation -- there must be wrongdoing or violations to report.

Similarly, in *Margiotta,* the Court stated that this cause of action required a plaintiff to report serious misconduct -- not conduct that a plaintiff believed to be serious,

or conduct that a plaintiff believed to be misconduct. *Margiotta,* 315 S.W.3d at 347. The Court went on to explain that "the plaintiff must demonstrate that the public policy mandated by the cited provision is violated by the discharge." *Id.* (quoting 82 Am.Jur.2d § 61). "Generally, there is no whistleblowing protection for an employee who merely disagrees personally with an employer's legally-allowed policy." *Id.* "The pertinent inquiry here is whether the authority clearly prohibits the conduct at issue in the action." *Id.*

The verdict director that the trial court used for the claim of retaliatory discharge for whistleblowing was Instruction 15, which directed the jury that their verdict ***must*** be for the plaintiff if either: "Plaintiff refused to approve a payment to Ron Epps that he reasonably believed would violate School District contracting law, or . . . Plaintiff reported to a superior that he reasonably believed the purchase of Ford Escapes would violate School District contracting law." L.F. at 744.

This instruction did not require any actual or even threatened wrongdoing or violation of law or public policy. Rather, the jury was ordered to return a verdict in favor of the plaintiff based solely on the plaintiff's belief. This instruction was error because it omitted the requirement of actual wrongdoing or an actual violation. *See Fleshner,* 304 S.W.3d at 92; *Margiotta,* 315 S.W.3d at 347.

If the judgment is not reversed outright, the case should be remanded for a new trial.

III. THE TRIAL COURT ERRED IN OVERRULING THE SCHOOL DISTRICT'S OBJECTION TO INSTRUCTION 15, IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF, AND IN DENYING A NEW TRIAL BECAUSE THE TRIAL COURT COMMITTED REVERSIBLE INSTRUCTIONAL ERROR IN THAT INSTRUCTION 15 CONSTITUTED A ROVING COMMISSION BECAUSE IT FAILED TO ADEQUATELY SPECIFY THE BASIS ON WHICH THE JURY COULD BASE A FINDING OF LIABILITY AND FAILED TO SET FORTH THE LAW OR PUBLIC POLICY THAT WOULD RENDER THE SCHOOL DISTRICT LIABLE, BUT RATHER MADE VAGUE REFERENCES TO WHETHER CONDUCT "WOULD VIOLATE SCHOOL DISTRICT CONTRACTING LAW."

In addition to misstating the law, Instruction 15 was vague and a roving commission in that it failed to specify any law or mandate of public policy that the plaintiff allegedly refused to violate, or that someone else allegedly violated and the plaintiff allegedly reported. Allowing the vague language "violate School District contracting law" without any evidence presented to the jury as to what "law" the plaintiff claimed the payment to Ron Epps allegedly violated, or what "law" the plaintiff claimed the purchase of the Ford Escapes allegedly violated, presented the jury with a roving commission. "School District contracting law" was never defined or limited at trial, through the evidence or the trial court's instructions. The submission of Instruction 15 was reversible error.

Whether the jury was properly instructed is a question of law that is reviewed de novo. *Chavez v. Cedar Fair, LP,* 450 S.W.3d 291, 294 (Mo. banc 2014). The Court will

vacate a judgment on the basis of an instructional error if that error materially affected the merits of the action. *Id.*

Prejudicial and reversible error occurs when an instruction gives the jury a roving commission. *McNeill v. City of Kansas City,* 372 S.W.3d 906, 909 (Mo. App. 2012). "To avoid a roving commission, the trial court must instruct the jurors regarding the specific conduct that renders the defendant liable." *Id.* at 910; *Mast v. Surgical Servs. of Sedalia, L.L.C.,* 107 S.W.3d 360, 366 (Mo. App. 2003) (overruled on other grounds by *Marion v. Marcus,* 199 S.W.3d 887 (Mo. App. 2006)); *Gomez v. Constr. Design, Inc.,* 126 S.W.3d 366, 371 (Mo. banc 2004) (overruled on other grounds by *Badahman v. Catering St. Louis,* 395 S.W.3d 29 (Mo. banc 2013)); *Centerre Bank of Kansas City v. Angle,* 976 S.W.2d 608, 617 (Mo. App. 1998).

An instruction may also be considered a roving commission when it is too general or it is submitted in a broad, abstract way without any limitation to the facts and the law developed in the case. *Centerre,* 976 S.W.2d at 617. The instruction must not leave the jury to "roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose liability." *Klotz v. St. Anthony's Medical Ctr.,* 311 S.W.3d 752, 766 (Mo. banc 2010).

As noted, the law requires a plaintiff claiming wrongful discharge in violation of public policy to show that he or she reported serious misconduct that constitutes a violation of the law or well established and clearly mandated public policy. *Margiotta,* 315 S.W.3d at 347; *Fleshner,* 304 S.W.3d at 92.

Instruction 15 provided the jury with no guidance as to any law or established public policy that was allegedly violated. The jury was free to decide for itself what public policy might be violated by the alleged conduct of the School District. The Court has noted that public policy cannot be founded on the "varying personal opinions and whims of judges or courts." *Margiotta,* 315 S.W.3d at 346. By the same token, public policy cannot be founded on the unguided whims of jurors who have not been properly instructed.

Instruction 15 was a vague roving commission that provided the jury no guidance. The resulting judgment should be set aside. If the judgment is not reversed outright, the cause should be remanded for a new trial.

IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF AND IN DENYING JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE PLAINTIFF'S CLAIM WAS BARRED BY SOVEREIGN IMMUNITY (§ 537.600, RSMO) IN THAT THE SCHOOL DISTRICT'S INSURANCE POLICY INCLUDED AN ENDORSEMENT PROVIDING THAT THE INSURER WOULD NOT BE LIABLE FOR LOSS IN CONNECTION WITH ANY CLAIM THAT WAS BARRED BY SOVEREIGN IMMUNITY AND STATED THAT "NOTHING CONTAINED IN THIS POLICY SHALL CONSTITUTE A WAIVER OF THE DEFENSE OF SOVEREIGN IMMUNITY," AND A PUBLIC ENTITY DOES NOT WAIVE ITS SOVEREIGN IMMUNITY BY MAINTAINING AN INSURANCE POLICY THAT INCLUDES A PROVISION STATING THAT THE POLICY IS NOT MEANT TO CONSTITUTE A WAIVER OF SOVEREIGN IMMUNITY.

The plaintiff's claim was barred by sovereign immunity. *See* § 537.600, RSMo. The trial court's judgment to the contrary should be reversed. The existence of sovereign immunity, and questions of statutory interpretation, are issues of law that the Court reviews de novo. *Wyman v. Missouri Dept. of Mental Health,* 376 S.W.3d 16, 18 (Mo. App. 2012).

Under section 537.600, Missouri school districts and other governmental entities have sovereign immunity from suit in tort (including suits for wrongful discharge for "whistleblowing" about alleged "illegal activity") unless some exception applies, such as a public employee's negligent operation of a motor vehicle or injuries caused by the dangerous condition of public property. *See Brooks v. City of Sugar Creek,* 340 S.W.3d

201, 205-206 (Mo. App. 2011); *Bennartz v. City of Columbia,* 300 S.W.3d 251, 260 (Mo. App. 2009); *Topps v. City of Country Club Hills,* 272 S.W.3d 409, 414 (Mo. App. 2009).

As this Court very recently explained, statutory provisions that waive sovereign immunity must be strictly construed. *Metropolitan St. Louis Sewer Dist. v. City of Bellefontaine Neighbors,* 476 S.W.3d 913, 921 (Mo. banc 2016). This Court has held that it "cannot read into the statute an exception to sovereign immunity or imply waivers not explicitly created in the statute." *Id.*

"A public entity does not waive its sovereign immunity by maintaining an insurance policy where that policy includes a provision stating that the policy is not meant to constitute a waiver of sovereign immunity." *Langley v. Curators of University of Missouri,* 73 S.W.3d 808, 811-812 (Mo. App. 2002); *see State ex rel. City of Grandview v. Grate,* No. SC95283, 2016 WL 1357140 (Mo. banc April 5, 2016); *State ex rel. Board of Trustees v. Russell,* 843 S.W.2d 353, 360 (Mo. banc 1992).

Liability of a political subdivision for torts is the exception to the general rule of sovereign immunity, and a party seeking to establish such liability must demonstrate that an exception exists. *Langley,* 73 S.W.3d at 811. "Sovereign immunity is not an affirmative defense but is part of the plaintiff's prima facie case." *Shifflette v. Missouri Dept. of Nat. Resources,* 308 S.W.3d 331, 334 (Mo. App. 2010).

A. The 2011-2012 policy barred coverage.

The School District's 2011-2012 insurance policy specifically excluded claims "barred by the defense of sovereign immunity as provided for in Section 537.600" and stated that nothing contained in the policy "shall constitute a waiver of the defense of

sovereign immunity." L.F. at 262. The policy, therefore, unambiguously did not provide coverage for the plaintiff's whistleblower claims, and sovereign immunity was not waived by the existence of the policy, as shown by a host of cases addressing very similar policy language. *See, e.g., White v. City of Ladue,* 422 S.W.3d 439, 449-450 (Mo. App. 2013); *Brooks,* 340 S.W.3d at 208-209; *Hendricks v. Curators of Univ. of Mo.,* 308 S.W.3d 740, 744-746 (Mo. App. 2010); *Topps,* 272 S.W.3d at 417-418.

The School District's insurance was explicitly a claims-made policy: "This is a Claims-Made Policy, coverage is limited to those Claims made during the Policy Period or any applicable Discovery Period." L.F. at 204. In this context, a claim is made when an insured receives notice of a complaint of discrimination. *Grissom v. First Nat'l Ins. Agency,* 371 S.W.3d 869, 878 (Mo. App. 2012).

The sovereign immunity endorsement was in effect before the School District received notice of the plaintiff's claim of discrimination. After a period of negotiation, the School District and the insurance company agreed to the language of the endorsement, Endorsement 13, on the morning of November 9, 2011. L.F. at 452. Endorsement 13 stated that it was effective July 1, 2011. L.F. at 262. Endorsement 13 stated that it was processed November 11, 2011. L.F. at 262.

The plaintiff provided the trial court with a copy of his initial charge of discrimination submitted to the EEOC and the Missouri Commission on Human Rights, which showed that it was received by the government agency on November 9, 2011, at 2:58 p.m. L.F. at 147. The EEOC issued a Notice of Charge of Discrimination dated

November 18, 2011. L.F. at 438, 440. According to the plaintiff's evidence, the School District received this notice on November 22, 2011. L.F. at 438, 440.

The School District received notice of the plaintiff's initial claim of discrimination on November 22, 2011, after the effective date of Endorsement 13 (July 1, 2011), and after the parties agreed to the inclusion of Endorsement 13 in the insurance policy (November 9, 2011). L.F. at 438, 440, 262, 147.

Thus, the plaintiff's claim is barred by sovereign immunity. Indeed, the plaintiff's own evidence showed that the insurer "has denied coverage under [the policy] for the claims arising from this lawsuit based on sovereign immunity and the language of [the policy]." L.F. at 261. The judgment of the circuit court should be reversed.

B. The 2010-2011 policy did not apply to this case.

Seeking to avoid the effect of Endorsement 13 to the 2011-2012 policy, the plaintiff has argued that his claim was within the coverage of the 2010-2011 policy. This argument ignores the terms of these claims-made policies. The plaintiff's claim was made during the 2011-2012 policy period, and the 2010-2011 policy does not apply.

The plaintiff has carefully avoided discussing the terms of the relevant policies, which both include the same definition of "claim" for purposes of the insurance coverage. Both policies state: "This is a Claims-Made Policy, coverage is limited to those Claims made during the Policy Period or any applicable Discovery Period." L.F. at 148, 204. As to employment cases, the policies both define a "Claim" as follows:

> (i) a written demand for monetary, non-monetary or injunctive relief (including any request to toll or waive any statute of limitations);
>
> (ii) a civil, criminal, administrative or regulatory proceeding for monetary, non-monetary or injunctive relief which is commenced by:
>
> (1) service of a complaint or similar pleading;
>
> (2) return of an indictment, information or similar document (in the case of a criminal proceeding); or
>
> (3) receipt or filing of a notice of charges; . . . .

L.F. at 195, 229.

The plaintiff has mistakenly argued that his signing the release "was a written demand for monetary relief within the ordinary meaning of that phrase" so that the School District knew on June 27, 2011, that the plaintiff had claims under the 2010-11 policy. Respondent's Brief, No. WD78047, at 11.

This argument ignores the plain language of the release, ***which the School District presented to the plaintiff***. The release did not state that the plaintiff had any claims against the District. Rather, the release merely stated that the plaintiff "hereby executes this General Release and Waiver of Claims, resolving ***any and all claims which may exist*** as they relate to Mr. Newsome's employment with the Kansas City, Missouri School District." L.F. at 289 (emphasis added). The document provided that the plaintiff would release the District "from any and all liability, actions, claims, grievances,

demands, or lawsuits ***which Mr. Newsome may have had, or presently has, foreseen or unforeseen, known or unknown,*** including but not limited to, those in connection with or arising out of his employment with the School District and the termination of such employment." L.F. at 289 (emphasis added).

This release -- ***the School District's own document*** -- was not "a written demand for monetary, non-monetary or injunctive relief," as required to constitute a "claim" under the 2010-2011 policy. On its face, it is a waiver of the ability to assert any demand in the future. A document acknowledging that a former employee could possibly attempt to assert a claim that he may or may not have is not a written demand for relief.

C. The School District received notice of the claim on November 22, 2011.

The plaintiff has argued that the key date for determining coverage based on his EEOC claim is the date of "receipt or filing of a notice of charges" as set forth in the definition of "claim" under the 2011-2012 policy. Under the undisputed facts, this date dooms the plaintiff's claim. Here is the sequence that the plaintiff does not dispute:

June 27, 2011: The plaintiff resigns his employment and signs the General Release and Waiver of Claims. L.F. at 289.

July 11, 2011: The School District receives a letter from the plaintiff dated June 30, 2011, stating that the plaintiff was revoking his signature on the release and rescinding his resignation. L.F. at 294.

November 9, 2011 (morning): The School District and the insurer agree to the language of Endorsement 13. L.F. at 452. Endorsement 13 provides that the insurer "shall not be liable to make any payment for Loss in connection with any Claim made

against any Insured . . . that is barred by the defense of sovereign immunity as provided for in Section 537.600, et seq., of the Revised Statutes of Missouri." Endorsement 13 also states "nothing contained in this Policy shall constitute a waiver of the defense of sovereign immunity." Endorsement 13 states it is effective **July 1, 2011**. L.F. at 262.

November 9, 2011, at 2:58 p.m.: The plaintiff submits a charge of discrimination to the EEOC. L.F. at 147.

November 11, 2011: Endorsement 13 is processed by the insurer. L.F. at 262.

November 18, 2011: The EEOC issues a Notice of Charge of Discrimination as to the plaintiff's charge. L.F. at 438, 440.

November 22, 2011: The School District receives the EEOC notice. L.F. at 438.

The undisputed date of the School District's "receipt" of the notice of charges was November 22, 1011. L.F. at 438, 440. The undisputed date of the EEOC's "filing" of the notice was November 18, 2011. L.F. at 438, 440. Both dates are after July 1, 2011 (the effective date of Endorsement 13). L.F. at 262. Both dates are after November 9, 2011 (when the insurer and the insured agreed to Endorsement 13). L.F. at 452. Both dates are after November 11, 2011 (when the insurer processed Endorsement 13). L.F. at 262. The plaintiff's claim that the notice predated Endorsement 13 is contrary to the facts.

In arguing otherwise, the plaintiff has attempted to convert his ***charge*** of discrimination into a ***notice*** of charge, arguing: "Newsome's filing of a Charge clearly qualified as filing a 'notice of charges' with the EEOC, and therefore Newsome made a 'claim' as of November 9, 2011, as that term is defined and understood in the 2011-12 Policy, and the trial court agreed." Respondent's Brief, No. WD78047, at 13.

This assertion has no basis in fact. What the plaintiff submitted to the EEOC was not a ***notice*** of charge of discrimination -- it was a ***charge*** of discrimination. The document is titled "CHARGE OF DISCRIMINATION." L.F. at 147. Above the plaintiff's initials, the document says: "I want this ***charge*** filed with both the EEOC and the State or local Agency, if any." L.F. at 147 (emphasis added). The plaintiff's filing with the EEOC was a charge, not a notice.

The EEOC issued a ***notice*** of the charge on November 18, 2011. L.F. at 438, 440. The document is titled "***NOTICE*** OF CHARGE OF DISCRIMINATION." L.F. at 440 (emphasis added). The document states: "This is ***notice*** that a charge of employment discrimination has been filed against your organization." L.F. at 440 (emphasis added). The charge was attached to the notice. L.F. at 442. The School District received the notice on November 22, 2011. L.F. at 438, 440.

Thus, the record refutes the plaintiff's claim that any "receipt or filing of a notice of charges" occurred before November 9, 2011 (when the insurer and the insured agreed to Endorsement 13) or November 11, 2011 (when the insurer processed Endorsement 13).

In a claims-made policy, the coverage is effective when the negligent or omitted act is discovered and brought to the attention of the insurer regardless of when the act of omission occurred. *Continental Cas. Co. v. Maxwell,* 799 S.W.2d 882, 886 (Mo. App. 1990); *Grissom v. First Nat'l Ins. Agency,* 371 S.W.3d 869, 874 (Mo. App. 2012). An insured cannot report a charge of discrimination to the insurer before receiving notice of the charge. In this case, the charge was filed two weeks before the School District received notice of it. The later date controls.

V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF FOR $500,000 AND IN DENYING THE SCHOOL DISTRICT'S MOTION TO REMIT THE JUDGMENT IN THAT THE JUDGMENT AND THE DENIAL OF THE SCHOOL DISTRICT'S MOTION TO REMIT THE JUDGMENT ARE CONTRARY TO LAW BECAUSE THE JUDGMENT EXCEEDS $403,139 AND THAT THE STATUTORY MAXIMUM THAT MAY BE AWARDED AGAINST THE SCHOOL DISTRICT FOR A TORT CLAIM UNDER MISSOURI LAW (§ 537.610) IS $403,139.

As noted, the plaintiff's claim in this action is entirely barred by sovereign immunity under section 537.600, RSMo. However, if the Court disagrees, the trial court erred in entering judgment in excess of the statutory limit. Section 537.610, RSMo, provides the limit of liability of the state and its public entities on claims as to which sovereign immunity has been waived. *See Richardson v. State Highway & Transp. Comm'n,* 863 S.W.2d 876, 880 (Mo. banc 1993). Section 537.610.1 provides a statutory limit of liability, explicitly providing that "no amount in excess of the above limits shall be awarded or settled upon." If not set aside entirely, the judgment of the trial court should be reduced to no more than $403,139.

As noted in Point VI below, this sum should be further reduced to account for the extent of the School District's retention under its insurance policy ($250,000), so that the total judgment should be reduced to $153,139 if not set aside.

A trial court's interpretation and application of a statute is reviewed de novo. *Hudson v. O'Brien,* 449 S.W.3d 87, 91 (Mo. App. 2014).

In relevant part, section 537.610.1 explicitly sets a limit on the amount that may be awarded against a Missouri public entity on a tort claim:

> 1. The commissioner of administration, through the purchasing division, and the governing body of each political subdivision of this state, notwithstanding any other provision of law, may purchase liability insurance for tort claims, made against the state or the political subdivision, but the maximum amount of such coverage shall not exceed two million dollars for all claims arising out of a single occurrence and shall not exceed three hundred thousand dollars for any one person in a single accident or occurrence, . . . and no amount in excess of the above limits shall be awarded or settled upon. Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state.

Thus, an entity like the School District "may purchase liability insurance for tort claims, . . . but the maximum amount of such coverage shall not exceed . . . three hundred thousand dollars for any one person in a single accident or occurrence, . . . and no amount in excess of the above limits shall be awarded or settled upon. ***Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance***

purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state." *See* § 537.610.1 (emphasis added).

These sums are subject to annual adjustment for inflation. The limitation applicable to the plaintiff's claim is $403,139. Under the law, the highest possible judgment that could be entered against the School District was $403,139. *See* http://insurance.mo.gov/industry/sovimmunity.php.

The School District raised this statutory limitation, L.F. at 918, but the trial court refused to amend the judgment. Statutory provisions that waive sovereign immunity are to be strictly construed. *Metropolitan St. Louis Sewer Dist. v. City of Bellefontaine Neighbors,* 476 S.W.3d 913, 921 (Mo. banc 2016); *Ohio v. Mo. State Treasure,* 130 S.W.3d 742, 744 (Mo. App. 2004). This Court is empowered to enter the judgment that the trial court should have entered. Rule 84.14. Subject to an additional reduction as set forth in the following point relied on, the Court should enforce the statutory limit of liability in section 537.610.

VI. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFF FOR $500,000 AND IN DENYING THE SCHOOL DISTRICT'S MOTION TO REMIT THE JUDGMENT BECAUSE THE JUDGMENT AND THE DENIAL OF THE SCHOOL DISTRICT'S MOTION TO REMIT THE JUDGMENT ARE CONTRARY TO LAW IN THAT THE STATUTORY MAXIMUM THAT MAY BE AWARDED AGAINST THE SCHOOL DISTRICT FOR A TORT CLAIM UNDER MISSOURI LAW (§ 537.610, RSMO) IS THE MAXIMUM AMOUNT COVERED BY THE INSURANCE PURCHASED BY THE SCHOOL DISTRICT, THE MOST THAT MAY BE AWARDED AGAINST THE SCHOOL DISTRICT UNDER SECTION 537.610 IS $403,139, AND IT IS UNDISPUTED THAT THE SCHOOL DISTRICT'S RETENTION UNDER THE INSURANCE POLICY IS $250,000, SO THAT THE JUDGMENT CANNOT PROPERLY EXCEED $153,139 (THE STATUTORY LIMIT OF LIABILITY OF $403,139 LESS THE SCHOOL DISTRICT'S RETENTION OF $250,000).

As noted in the previous point, the maximum amount of the judgment that could be awarded against the School District was $403,139. *See* § 537.610.1, RSMo; http://insurance.mo.gov/industry/sovimmunity.php. A further limitation is that sovereign immunity "is waived ***only to the maximum amount*** of and only for the purposes ***covered by such policy of insurance purchased pursuant to the provisions of this section*** . . . ." § 537.610.1 (emphasis added). It is undisputed that the School District's retention under the relevant insurance policy was $250,000. L.F. at 204. Thus, the maximum amount that could be awarded against the School District would be the statutory limit ($403,139),

less the amount that is not covered by insurance ($250,000) for a total limit of $153,139. If not set aside, the judgment should be reduced to $153,139.

A trial court's interpretation and application of a statute is reviewed de novo. *Hudson v. O'Brien,* 449 S.W.3d 87, 91 (Mo. App. 2014).

As noted, the judgment of the trial court should be reversed outright. In the alternative, a new trial should be granted. If not, the Court should order the judgment reduced to $153,139 under Rule 84.14.

By its plain terms, section 537.610.1 provides that the maximum amount that may be awarded against a Missouri public body under the waiver of sovereign immunity for insurance coverage is the maximum amount of insurance coverage.

The coverage obtained by the School District contains an endorsement making it clear that the coverage does not waive sovereign immunity. L.F. at 262.

If the Court disagrees, the coverage has a retention of $250,000. L.F. at 204. By the terms of the insurance policy, this retention is "to be borne by the insureds ***and shall remain uninsured***." L.F. at 225, 234 (emphasis added). Thus, the School District has no insurance coverage for $250,000 of any amount awarded to the plaintiff.

The maximum amount of the judgment that could be awarded against the School District, if it had waived sovereign immunity, would be $403,139. *See* § 537.610.1; http://insurance.mo.gov/industry/sovimmunity.php. The statute makes it clear that "no amount in excess of the above limits shall be awarded or settled upon." *See* § 537.610.1.

Sovereign immunity "is waived only to the maximum amount of and only for the purposes ***covered by such policy of insurance***." *See* § 537.610.1 (emphasis added).

By the terms of section 537.610 and the insurance policy, sovereign immunity (if waived at all) could only be waived to the statutory limit ($403,139), minus the retention of $250,000 that by the terms of the insurance policy is "to be borne by the insureds and shall remain uninsured." L.F. at 204, 225, 234. This would total $153,139.

Statutory provisions that waive sovereign immunity are to be strictly construed. *Metropolitan St. Louis Sewer Dist. v. City of Bellefontaine Neighbors,* 476 S.W.3d 913, 921 (Mo. banc 2016); *Ohio v. Mo. State Treasure,* 130 S.W.3d 742, 744 (Mo. App. 2004). Under any construction, the School District's liability cannot exceed the statutory maximum, and then only to the extent of insurance coverage. If the judgment is not reversed, it should be reduced to $153,139.

CONCLUSION

For the foregoing reasons, the Court should reverse the circuit court's judgment and remand this action for entry of a judgment in favor of the School District. In the alternative, the Court should reverse and remand for a new trial free of instructional error. If the Court does not reverse the judgment, it should order the amount of the judgment to be reduced in accordance with the law.

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ATTORNEYS FOR APPELLANT KANSAS CITY, MISSOURI SCHOOL DISTRICT

CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on May 9, 2016.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the total number of words contained in this brief is 13,117, excluding the cover, signature block, appendix, and this certificate.

The electronic copies of this brief were scanned for viruses and found virus-free through the Symantec anti-virus program.

/s/ Jeffery T. McPherson

APPENDIX

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CARY NEWSOME,

Plaintiff,

vs. **Case No: 1316-CV00683**

KANSAS CITY, MISSOURI SCHOOL DISTRICT,

Defendant.

CORRECTED
JURY TRIAL MINUTES AND JUDGMENT ON CLAIMS OF PLAINTIFF CARY NEWSOME

MONDAY, JUNE 2, 2014

This cause comes on for jury trial on the claim of Cary Newsome in Division 7, with Judge S. Margene Burnett presiding. Plaintiff Cary Newsome appears in person and by counsel, Rik N. Siro, Eric W. Smith and Athena M. Dickson. Defendant appears by counsel, Ivan L. Nugent, Stephen R. Williams and Shana J. Long.

The Court notes that pre-trial motions and Motions in Limine were taken up and ruled on the record on Wednesday, May 28, 2014 and Friday, May 30, 2014. At the second pre-trial conference, Plaintiff invokes rule for exclusion of witnesses from the courtroom. Exclusion shall begin at opening statements, by agreement of counsel. Counsel stipulates to jury note-taking. On Monday, June 2, 2014, the case is called for trial and a panel of sixty-five (65) venire persons is summoned and sworn. Voir dire is conducted by counsel and the Court. Venire persons 1, 2, 24, 25, 32, 34, 40, 44, 46, 52, 54, 59, 62 and 64 are excused for hardship. Voir dire examination is completed. Out of the hearing of the jury, challenges for cause are made and ruled. Peremptory strikes are made by both sides. A jury of twelve (12) persons and two (2) alternates is selected, seated and sworn. Court adjourns for the day and recess

instruction is given.

TUESDAY, JUNE 3, 2014

Trial resumes with the same parties and jurors. Plaintiff's counsel Eric W. Smith and Athena M. Dickson appear. Defendant appears by counsel and by corporate representative Camille Allen. Outside of the hearing of the jury, Defense counsel raises objections to Plaintiff's demonstrative evidence exhibits 71 and 68. The Court rules that the evidence will be permitted. Instruction No.1, MAI 2.01 is given. Plaintiff's counsel gives opening statement. Defendant's counsel gives opening statement. Plaintiff present evidence: Testimony of Bonnie McElvey, Angela McIntosh, and Cary Newsome.

Recess instruction is given, and proceedings are adjourned for the day.

WEDNESDAY, JUNE 4, 2014

Trial resumes with the same parties, attorneys and jurors. Plaintiff's evidence continues: Testimony of Cary Newsome, Allan Tunis, and Anthony Moore.

Recess instruction is given, and proceedings are adjourned for the day.

THURSDAY, JUNE 5, 2014

Trial resumes with the same parties, attorneys and jurors. Plaintiff's evidence continues: Testimony of Rebecca Lee-Gwin and April Allen. Defendant makes oral motions for directed verdict at the close of Plaintiff's evidence. The motions are argued, considered and OVERRULED on all issues.

Jury is brought in and Defendant rests. Plaintiff offers no rebuttal evidence. Recess instruction is given and jury is adjourned for the day. The Court reconsiders the oral motions for directed verdict at the close of all evidence. Rulings are the same as stated above. Plaintiff moves for Directed Verdict on Defendant's migration of damage affirmative defense and

Defendant's Sovereign Immunity claims. Defendant withdraws its affirmative defense of mitigation of damages. The motion regarding sovereign immunity is DENIED as moot per the Court's ruling on Defendant's Motion for Directed Verdict.

Out of the hearing of the jury, instruction conference is held.

FRIDAY, JUNE 6, 2014

Trial resumes with same parties, attorneys and jury. Additional jury instruction conference is held and parties' arguments are made on the record. Instructions 2-16 are read to the jury. Closing arguments are given by both sides. Two alternates are discharged. Bailiff is sworn. Jury retires to deliberate at 12:05 p.m.

Jury sends notes, attached hereto as Court Exhibits A, B, and C and the Court responds.

At 2:55 p.m. the jury returns with the following verdicts:

VERDICT A

"On the claim of plaintiff for discriminatory termination against defendant as submitted in Instruction Number 7, we, the undersigned jurors, find in favor of Defendant Kansas City, Missouri School District."

"We, the undersigned jurors, find that defendant is not liable for punitive damages."
Signed by 10 Jurors.

/s/ Andrea Kiem, Daphne Scruggs, Donald Amos, Jr., Glendia Calvin, Megan Collette, Morgan Leeker, Roderick Tolliver, James Burrow, Emily Lecuyer and Michael Ighoyivwi.

VERDICT B

"On the claim of plaintiff for retaliatory termination (in violation of the MHRA) against defendant as submitted in Instruction Number 11, we, the undersigned jurors, find

"We, the undersigned jurors, find that defendant is not liable for punitive damages."
Signed by 12 Jurors.

/s/ Andrea Keim, Daphne Scruggs, Donald Amos, Jr., Diann Sanders, Glendia Calvin, Megan Collette, Morgan Leeker, Elizabeth Trapp, Roderick Tolliver, James Burrow, Emily Lecuyer, and Michael Ighoyivwi.

VERDICT C

"On the claim of plaintiff for retaliatory termination (in violation of public policy) against defendant as submitted in Instruction Number 15, we, the undersigned jurors, find in favor of Plaintiff Cary Newsome:"

"We, the undersigned jurors, assess the damages of plaintiff at $500,000."

Signed by 9 Jurors.
/s/ Andrea Keim Donald Amos, Jr., Diann Sanders, Glendia Calvin, Megan Collette, Morgan Leeker, Elizabeth Trapp, Roderick Tolliver and James Burrow.

Without objection, the Court accepts the verdicts of the jury, and the jury is discharged. Proceedings are adjourned.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiff Cary Newsome against Defendant Kansas City, Missouri School District for retaliatory termination (in violation of public policy) in the amount of $500,000.

IT IS SO ORDERED.

S. Morgan Britt

June 10, 2014
Date

S. MARGENE BURNETT, Circuit Judge

38.03 [2012 Revision] Verdict Directing—Wrongful Discharge in Violation of Public Policy

Your verdict must be for plaintiff if you believe:

First, plaintiff *(here describe plaintiff's act or refusal to act such as "refused to submit duplicate billing to Medicare," or "reported suspected child abuse to the Division of Family Services")*[1], and

Second, defendant discharged plaintiff, and

Third, such conduct of plaintiff as submitted in paragraph First was a contributing factor in his/her discharge, and

Fourth, as a direct result of his/her discharge, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number _____ *(here insert number of affirmative defense instruction)*].

Notes on Use (2011 New)

1. The act(s) inserted must be in accordance with *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010), which adopted the public policy exception for discharge of an at-will employee stating:

> An at-will employee may not be terminated (1) for refusing to violate the law or any well established and clear mandate of public policy as expressed in the Constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities.

See also *Keveney v. Missouri Military Academy*, 304 S.W.3d 98 (Mo. banc 2010) (adopting the public policy exception for an employee under contract).

For submitting multiple acts in the disjunctive, refer to the form in MAI 17.02. As is the case with all disjunctive submissions, there must be sufficient evidence to support each submission or the instruction will be erroneous.

* Add if affirmative defense is submitted.

38.03 EMPLOYMENT DISCRIMINATION

Committee Comment (2011 New)

A. If the case involves constructive discharge, demotion, or adverse job consequences, this instruction can be easily modified. The Committee takes no position as to whether the public policy exception applies to cases in which the employee's action has resulted in constructive discharge, demotion, or adverse job consequences.

B. In *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010), the employee was discharged for talking to federal investigators about the employer's violation of Fair Labor Standards Act requirements to pay overtime compensation. The Court expressly adopted a public policy exception to the "at will" doctrine where the employee is discharged for reporting violations of law to authorities or for refusing to perform illegal acts. *Id.*

C. The public policy must be found in a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body. However, the public policy need only be *reflected* by a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body, and there need not be a direct violation by the employer of that same statute or regulation. Additionally, "there is no requirement that the violation that the employee reports affect the employee personally, nor that the law violated prohibit or penalize retaliation against those reporting its violation." *Fleshner*, 304 S.W.3d at 97. Moreover, the public policy is applicable to communications made to federal or state officials as well as to the employee's supervisors. *Fleshner*, 304 S.W.3d at 97. See also, *Margiotta v. Christian Hospital Northeast-Northwest*, 315 S.W.3d 342 (Mo. banc 2010).

D. In *Fleshner* the Court also cited the "contributing factor" standard expressed in MAI 31.24 with approval as the standard for causation in this type of wrongful discharge case. *Fleshner*, 304 S.W.3d at 94-95.

E. In *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 103 (Mo. banc 2010), the Court extended the public policy exception to the at-will doctrine to "contract employees" in addition to "at-will" employees.

F. The Court, under the facts in *Keveney*, also determined that in order to survive a motion to dismiss, an employee must plead the following in order to state a cause of action for wrongful discharge under the public policy exception:

(1) That the employee refused to perform an illegal act or act in a manner contrary to public policy;

(2) That the employee was discharged; and

(3) That there is a causal connection between the employee's discharge and the employee's refusal to engage in the actions at issue.

Id. at 103.

G. The *Margiotta* case limited the public policy exception by excluding situations in which the claimed "public policy" is vague or general and not a specific statute, rule, regulation, or constitutional requirement. The Court found that the two regulations cited in *Margiotta* were vague statements and did not specifically proscribe conduct in the alleged incidents. One regulation was extremely broad as to patient safety, and the other regulation clearly dealt with building safety and not patient treatment. For these reasons the Court found that summary judgment was appropriately granted. *Margiotta*, 315 S.W.3d at 347-48.

H. In *Bennartz v. City of Columbia, Missouri*, 300 S.W.3d 251, 261-62 (Mo. App. 2009), the court held that a municipal employee may not maintain a wrongful discharge cause of action against the municipality or another municipal employee under the public policy exception because the defendants are protected by sovereign immunity.

Historical Note

(MAI 38.03 replaces the prior MAI 31.27 (2011 New)).

INSTRUCTION NO. 15

Your verdict must be for plaintiff if you believe:

First, either:

Plaintiff refused to approve a payment to Ron Epps that he reasonably believed would violate School District contracting law, or

Plaintiff reported to a superior that he reasonably believed the purchase of Ford Escapes would violate School District contracting law; and

Second, defendant discharged Plaintiff, and

Third, any one or more instances of the conduct of Plaintiff as submitted in paragraph First was a contributing factor in his discharge; and

Fourth, as a direct result of his discharge, plaintiff sustained damage.

Missouri Revised Statutes

Chapter 537
Torts and Actions for Damages

←537.595 **Section 537.600.1** 537.602→

August 28, 2015

Sovereign immunity in effect--exceptions.

537.600. 1. Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances:

(1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment;

(2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition. In any action under this subdivision wherein a plaintiff alleges that he was damaged by the negligent, defective or dangerous design of a highway or road, which was designed and constructed prior to September 12, 1977, the public entity shall be entitled to a defense which shall be a complete bar to recovery whenever the public entity can prove by a preponderance of the evidence that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed.

2. The express waiver of sovereign immunity in the instances specified in subdivisions (1) and (2) of subsection 1 of this section are absolute waivers of sovereign immunity in all cases within such situations whether or not the public entity was functioning in a governmental or proprietary capacity and whether or not the public entity is covered by a liability insurance for tort.

3. The term "public entity" as used in this section shall include any multistate compact agency created by a compact formed between this state and any other state which has been approved by the Congress of the United States.

Missouri Revised Statutes

Chapter 537
Torts and Actions for Damages

←537.602

Section 537.610.1

537.615→

August 28, 2015

Liability insurance for tort claims may be purchased by whom--limitation on waiver of *immunity*--maximum amount payable for claims out of single occurrence--exception--apportionment of settlements--inflation--penalties.

537.610. 1. The commissioner of administration, through the purchasing division, and the governing body of each political subdivision of this state, notwithstanding any other provision of law, may purchase liability insurance for tort claims, made against the state or the political subdivision, but the maximum amount of such coverage shall not exceed two million dollars for all claims arising out of a single occurrence and shall not exceed three hundred thousand dollars for any one person in a single accident or occurrence, except for those claims governed by the provisions of the Missouri workers' compensation law, chapter 287, and no amount in excess of the above limits shall be awarded or settled upon. Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state.

2. The liability of the state and its public entities on claims within the scope of sections 537.600 to 537.650, shall not exceed two million dollars for all claims arising out of a single accident or occurrence and shall not exceed three hundred thousand dollars for any one person in a single accident or occurrence, except for those claims governed by the provisions of the Missouri workers' compensation law, chapter 287.

3. No award for damages on any claim against a public entity within the scope of sections 537.600 to 537.650, shall include punitive or exemplary damages.

4. If the amount awarded to or settled upon multiple claimants exceeds two million dollars, any party may apply to any circuit court to apportion to each claimant his proper share of the total amount limited by subsection 1 of this section. The share apportioned each claimant shall be in the proportion that the ratio of the award or settlement made to him bears to the aggregate awards and settlements for all claims arising out of the accident or occurrence, but the share shall not exceed three hundred thousand dollars.

5. The limitation on awards for liability provided for in this section shall be increased or decreased on an annual basis effective January first of each year in accordance with the Implicit Price Deflator for Personal Consumption Expenditures as published by the Bureau of Economic

Analysis of the United States Department of Commerce. The current value of the limitation shall be calculated by the director of the department of insurance, financial institutions and professional registration, who shall furnish that value to the secretary of state, who shall publish such value in the Missouri Register as soon after each January first as practicable, but it shall otherwise be exempt from the provisions of section 536.021.

6. Any claim filed against any public entity under this section shall be subject to the penalties provided by supreme court rule 55.03, or any successor rule.

(L. 1978 H.B. 1650 § 2, A.L. 1989 H.B. 161, A.L. 1999 S.B. 295 & 46, A.L. 2009 H.B. 481)

CROSS REFERENCE:

Liability of state and public entities, increases to be effective on certain causes of actions, when, 537.615

(2000) Statutory cap does not apply to postjudgment interest on damage awards against the State. Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663 (Mo.App.S.D.).

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