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IN THE SUPREME COURT OF MISSOURI

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

SUBSTITUTE BRIEF OF RESPONDENT CARY NEWSOME

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

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STATEMENT OF FACTS

After a five day jury trial, the jury reached a verdict in favor of Respondent Cary Newsome on his claim of wrongful discharge in violation of public policy against Appellant, Kansas City, Missouri School District ("KCMSD"), and awarded him $500,000. (Legal File "L.F." 48.) On June 10, 2014, the trial court entered a corrected judgment in accordance with the verdict in favor of Newsome. (L.F. 1194.) The trial court denied KCMSD's post-trial motions for judgment notwithstanding the verdict ("JNOV"), new trial, and remittitur. (L.F. 1217-18.) This appeal followed.

The factual allegations and evidence presented at trial must be taken in the light most favorable to the jury's verdict, giving Newsome all reasonable inferences and disregarding all conflicting evidence and inferences. While Newsome does not take issue with many of the background facts as outlined by KCMSD, additional facts and clarification are necessary to conform to this standard and are outlined herein and in Newsome's argument, which Newsome incorporates here by reference.

Newsome presented the trial court with two insurance policies (the 2010-11 and 2011-12 Hiscox Policies) that provided KCMSD insurance coverage for claims for wrongful termination of employment in violation of public policy. (L.F. 148, 204.) The 2011-12 Policy was a renewal of the 2010-11 Policy. (L.F. 379.) Neither policy references the term "sovereign immunity," nor contains any exclusion or statement of limitation or prohibition of claims that are barred by sovereign immunity or section 537.610 RSMo. (L.F. 1038-93.) KCMSD presented Newsome with a proposed "General Release and Waiver of Claims," (hereinafter "Release"), on June 27, 2011, and offered

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him $20,000 to release and waive all of his employment related termination claims against KCMSD. (L.F. 1094-98.) Newsome signed the Release on June 27th and later revoked on June 30, 2011. (*Id.*) Newsome filed his Charge of Discrimination with the EEOC, alleging his public policy claim, on November 9, 2011. (L.F. 1101.) Endorsement 13, entitled "Sovereign Immunity Exclusion," was also presented to the trial court. (L.F. 1102.) The Endorsement states it has an "effective" date of July 1, 2011 and "processed date" of November 11, 2011. (L.F. 1102.) In an email from Lockton to KCMSD on November 11, 2011, the Lockton representative stated that "[he] ha[s] confirmed that Hiscox will add the attached to their EPL policy and Starr [excess carrier] has agreed to … follow form." (L.F. 1141.)[1] Endorsement 13 was not approved by a vote of the KCMSD School Board or signed by any representative of KCMSD. (L.F. 1103-04.) The trial court explained that sovereign immunity was waived and Endorsement 13 did not apply to Newsome's claim:

> Probably one of the things that first caught my attention was the agreement that Mr. Newsome was handed and told to sign that just listed every single thing he is wanting to argue about and says was wrong in this matter, and he was told to sign that away.

[1] KCMSD's statement that KCMSD and Hiscox agreed to the language of Endorsement 13 on the morning of November 9, 2011, is not accurate or supported by the evidence.

> I think it's a reasonable inference that a fact finder can make from that that the [defendant] (sic) knew, had actual knowledge that a claim was forthcoming. If they didn't know it then, they knew when – I agree when he revoked it. And, by golly, they sure as heck knew it when he filed his complaint on November 9th.
>
> . . . .
>
> So I know you have the endorsement that relates back to the date of the 2011 policy. I think there is strong evidence that shows this [claim] came under the 2010 policy, but even if it doesn't, your 2011 policy, that endorsement is not applicable.

(Transcript "Tr." 905-06.) Further, the trial court found KCMSD "waived sovereign immunity by purchasing liability insurance with a limit of $2,000,000 and that the purported Endorsement 13 did not relate back to cover the period of [Newsome]'s claims." (L.F. 1218.)

During trial, Newsome testified at length regarding his duties as Purchasing Manager for the District. (Tr. 515-35.) Consistent with his job description (Plaintiff's Exhibit 17), Newsome testified that one of his main duties was to administer KCMSD's purchasing and contracting functions "in compliance with applicable laws and policies." (L.F. 992-93.) This included: "[a]dminister[ing] a system of competitive bidding as appropriate under State law, Board policies and administrative procedures"; "[a]dvis[ing] and assist[ing] all District administrators in obtaining goods and services in the most cost-effective manner consistent with board policies and procedures"; and "[e]xecut[ing]

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basic procurement principles in accordance with adopted board policies and procedures in the purchasing of goods and services for the District." (*Id.*)

Newsome discussed the major purchasing and contracting policies that applied to KCSMD in 2009 to 2011 and explained the legal requirements underpinning such policies. (L.F. 994-1005.) This included testimony about the law and policies related to contract formation by KCMSD and Newsome's explanation that such laws required contracts to be approved by the Board and that he understood once a contract was approved by the Board it could not legally be altered or amended without some future Board action.[2] (Tr. 531-33.) Newsome also described the legal and public policy basis for KCMSD's purchasing policies found in Plaintiff's Exhibit 21 (citing section 432.070 RSMo.). (Tr. 529-33; L.F. 994-1005.) He testified that the requirement of formal bids for purchases over $25,000 was based on "state law" and the "district's policies and procedures." (Tr. 528.) He also explained that the public policy behind the laws and purchasing policies was to "make sure that you purchase goods and services in a cost effective manner within the confines of state law, federal law and the district's policies and procedures." (Tr. 517.) The purchasing policies also ensured the broadest possible competition to secure goods and services in the most cost-effective manner, which protects against the waste or abuse of taxpayer money and ensures taxpayer money is spent wisely. (Tr. 527-29, 669.)

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[2] Ms. McElvey confirmed that modifications to Board approved contracts could only be made with subsequent Board approval. (Tr. 345.)

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Testimony from other witnesses, including Ms. Bonnie McElvey, Ms. Angela McIntosh, and Dr. Rebecca Lee Gwin (Chief Financial Officer) confirmed that there were specific laws, rules, policies and guidelines that had to be followed in KCMSD's purchasing department, including in regard to bidding and contracts. (Tr. 344-45, 364-65, 369, 765.) Dr. Gwin explained that there was no discretion in how purchases for good and services were to be made as "there is state law and district policy that is mandatory." (Tr. 768-69.) Ms. McIntosh testified that KCMSD must spend money received in accordance with the rules, the regulations, [and] the statutes that governed use of that money." (Tr. 364.) Ms. McElvey also confirmed that these policies were in place because all of KCMSD's revenue comes from "taxpayer funds, and so [they were] required to guard taxpayer dollars to make sure they are spent properly." (Tr. 345.)

Newsome, Ms. McIntosh, and Dr. Gwin all testified that beginning in 2011 there were several projects where each had difficulty getting Michael Rounds (Chief Operating Officer) and Larry Englebrick (Director of Facilities) to follow purchasing laws and policies applicable to KCMSD. (Tr. 381-86, 393, 582-87, 765, 768-69.) Newsome informed Dr. Gwin that certain requested or proposed actions of Rounds and Englebrick would violate state purchasing law and policy applicable to KCMSD and either refused to complete the actions or raised objections to the purchases. (Tr. 582-87, 785, 856.)

Newsome testified that he refused to approve a payment to Ron Epps, an independent consultant contracted with KCMSD, which the Superintendent Dr. Covington was requesting to be pushed through in excess of the board-approved number of payments in his consulting contract. (Tr. 609-10, 654) Newsome understood

approving the additional Epps payment would violate state law regarding contracting requirements that public entities such as the school district must follow: the law prevented the amendment or modification of a contract and in particular that "it was illegal in the state of Missouri to alter contracts after the fact." (Tr. 612.) Newsome further testified that he reported his concern to Dr. Gwin that the Epps payment requested by Superintendent Covington would be a violation of contracting law applicable to KCMSD and advised Dr. Gwin that he was refusing to approve the requested payment to Epps on that basis. (Tr. 611-12.)

Newsome also testified that he objected to a request to purchase Ford Escapes by Rounds, Englebrick, and Art Mobley, from the Facilities Department, as he understood the Escapes purchase would violate state contracting law because KCMSD was changing a contract once it was approved by the Board, without official action first by the Board to amend it or to approve a new contract. (L.F. 994-1005; Tr. 531-33, 624-26.) Ms. McIntosh testified that she and Newsome had discussed concerns about whether appropriate "laws and policies were being followed" regarding the Escapes purchase and that she determined the purchase was not in compliance with district policies because there was "not a formal bid." (Tr. 389-92, 427-28, 461, 471-72.) Newsome reported his concerns to Dr. Gwin that purchasing the Escapes in the manner requested by Facilities (Rounds, Englebrick and Mobley) would violate state contracting law applicable to KCMSD. (Tr. 623-24, 785-87, 856.) While Dr. Gwin initially supported Newsome, she later changed her mind and told him to process the request anyway. (Tr. 624-25, 787-90, 837-39.) Newsome again objected to the purchase as a violation of state laws applicable

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to KCMSD and placed a memorandum in the JD Edwards system documenting his concerns. (L.F. 1006; Tr. 625-26, 699-701, 789.) The evidence presented at trial showed several of Newsome's superiors had electronic access to JD Edwards and the memorandum and that a hard copy was attached by Newsome to the documents accompanying the Escapes purchase order. (Tr. 699-701.) Newsome was terminated three days after raising his objections to the Escapes purchase and writing the memo. (L.F. 1094-98.)

KCMSD's position regarding who terminated Newsome shifted throughout the case. (L.F. 1014, 1024.) The evidence at trial showed that Dr. Gwin, who knew of his refusal to approve the Epps payment and his reports of contracting law violations, was the one who decided to terminate him, with the approval of Dr. Covington. (L.F. 1014.) KCMSD had previously taken the position in its supplemental interrogatories that Dr. Covington solely made the decision to terminate Newsome. (L.F. 1024.) The jury also heard that Dr. Covington advised Dr. Gwin that Newsome was being terminated because "he felt that he had talked to [Newsome] 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." The jury was told that Covington made these statements after Newsome objected to the Epps payment, and after he objected to approving the purchase of the Escapes and entered his memo into JD Edwards and attached it to the documents. (Tr. 793.) The jury was presented with evidence for both scenarios. (*Id.*; Tr. 703-11.)

During the instruction conference, KCMSD presented the trial court with its own proposed version of Instruction No.15. (L.F. 592.) Newsome eventually accepted

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KCMSD's proposed version of Instruction No. 15. (Tr. 952.) However, KCMSD subsequently withdrew its proposed instruction. (Tr. 964.) In light of KCMSD's withdrawal of the instruction, Newsome submitted a newly proposed Instruction No. 15 to the trial court, which was ultimately given to the jury. (L.F. 723; Tr. 966-68.) While KCMSD did object to the giving of the newly proposed Instruction No. 15, it objected specifically to the "reasonably believed" language, that the "School District contracting law" language in the instruction did not cite to a specific "state statute," and that there was not sufficient evidence to support giving the instruction at all. (Tr. 967-68.) Contrary to KCMSD's contention in its facts, KCMSD never asserted that the phrase "violate School District contracting law" created a "roving commission" after its own proposed instruction was withdrawn. (Tr. 966-68.)

The jury returned a verdict of $500,000 in favor of Newsome on his claim for wrongful termination in violation of public policy. (L.F. 748.)

ARGUMENT

I. Point I must be denied as Newsome submitted substantial evidence for each element of his wrongful discharge in violation of public policy claim.

A. Standard of Review

The standards of review for a denial of a JNOV and the denial of a motion for directed verdict are essentially the same. *Clevenger v. Oliver Ins. Agency, Inc.*, 237 S.W.3d 588, 590 (Mo. banc 2007). This Court must determine whether the plaintiff presented a submissible case by offering evidence to support every element necessary for

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liability. *Id.* "Evidence is viewed in the *light most favorable to the jury's verdic*t, *giving the plaintiff all reasonable inferences and disregarding all conflicting evidence and inferences*." *Id.* (emphasis added). This Court will reverse a jury verdict *only* where it finds a *complete absence* of probative facts to support the jury's conclusion. *Id.*

B. Newsome presented substantial evidence supporting each element of his claim and the trial court did not err in submitting the claim to the jury.

KCMSD challenges the submissibility of Newsome's claim of wrongful discharge in violation of public policy, contending Newsome failed to present substantial evidence supporting each element of his claim. "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 v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010). If either reason outlined in *Fleshner* is a *contributing factor* in the termination of an employee, "then the employee has a cause of action in tort for wrongful discharge based on the public-policy exception." *Id.* at 92, 95. Viewing the evidence in the light most favorable to the jury's verdict, giving Newsome all reasonable inferences and disregarding all conflicting evidence and inferences, Newsome met his burden of presenting a submissible case for retaliatory discharge in violation of Missouri public policy and Point I must be denied.

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i. Under Missouri law, Plaintiff did not need to prove an actual violation of law or public policy occurred, so long as he reasonably believed such actions would violate law or public policy.

KCMSD contends that Newsome failed to present evidence at trial that conclusively proved that the transactions at issue here, the Epps payment and Escapes purchase, actually "implicated violations of law or well-established mandates of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules create d by a governmental body." (Appellant's Substitute Brief at pp. 34-35.) Under Missouri Law, a Plaintiff need only show he was discharged for reporting to his superiors his *reasonable belief* that the defendant was violating the law or public policy or that he refused to act in a way that he *reasonably believed* would violate the law or public policy; he need *not* show that the conduct he refused to participate in or reported to the proper authorities did, in fact, violate the law. *See, e.g.*, *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 847-49 (Mo. App. 2007) (finding "it was unnecessary for an employee to 'allege or prove conclusively the law has been violated in order to state a cause of action' when the employee held a *reasonable belief* illegal conduct or conduct against a clear mandate of public policy has occurred" (emphasis added)); *Dunn v. Enter. Rent-A-Car Co.*, 170 S.W.3d 1, 6, 8, 10-11 (Mo. App. 2005) (same).

This view is further confirmed in the Committee Comment C (2011 New) of MAI

38.03.[3] Comment C reads, in part, that "[t]he public policy must be found in a . . . statute . . . or rule created by a governmental body"; "[h]owever, the public policy need only be *reflected* by a . . . 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." (Appendix A-009 (MISSOURI APPROVED JURY INSTRUCTIONS ("MAI"), 7th Ed., MAI 38.03)). Therefore, Plaintiff did *not* need to show an *actual* violation of a statutory law or public policy rooted in such laws, so long as he reasonably believed it was a violation of the law or public policy.[4] However, as the trial court found in denying the KCMSD's Motion for New Trial and JNOV, (L.F. 1217-18),[5] and as set forth below, Newsome did in fact

[3] MAI 38.03 applied to Newsome's wrongful discharge in violation of public policy claim, and was the basis for Instruction No. 15, the verdict director.

[4] The "reasonable belief" standard and *Kelly* and *Dunn* are addressed in more detail in Point II, and Newsome incorporates by reference those arguments herein to his response to Point I. *See infra* II.B.

[5] The Court of Appeals also found that Newsome presented substantial evidence that both the Ron Epps payment and the Ford Escapes purchases were actual violations of Missouri law and public policy, including that the "District's policies [based on Section 432.070] required Board approval to change previously-approved contracts and formal bidding for purchases over $25,000 . . . . [and] that the public policy reflected in these policies is to guard taxpayer dollars to ensure that they are spent properly, because all of the District's

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present sufficient evidence that he was reporting actual violations of law and public policy.

ii. Newsome presented substantial evidence that the Epps payment and the Escapes purchase violated Missouri law or well-established mandates of public policy expressed in statutes or rules created by a governmental body.

Newsome testified at length regarding his duties as the Purchasing Manager for the District. (Tr. 515-35.) Consistent with his job description (Plaintiff's Exhibit 17), Newsome testified that one of his main duties was to administer KCMSD's purchasing and contracting functions "in compliance with applicable laws and policies," including administering competitive bidding under State law and Board policies; obtaining goods and services in the most cost-effective manner consistent with board policies and procedures; and executing basic procurement principles in accordance with adopted board policies and procedures in the purchasing of goods and services. (L.F. 992-93; Tr. 515-35.)

Newsome also described the legal and public policy basis underlying KCMSD's purchasing policies, including that the requirement of formal bids for purchases over $25,000 was based on "state law" and the "district's policies and procedures." (Tr. 528.) Newsome explained that such laws required contracts to be approved by the Board and

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revenue comes from taxpayer funds." Memorandum Supplementing Order, WD78047, Dec. 29, 2015, at p.14 (App. at A-025.)

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that he understood once a contract was approved by the Board it could not legally be altered or amended without some future Board action to do so, which was confirmed in Plaintiff's Exhibit 21 (citing section 432.070).[6] (L.F. 994-1005; Tr. 531-33.) He explained that the public policy behind the laws and purchasing policies was to "make sure that you purchase goods and services in a cost effective manner within the confines of state law, federal law and the district's policies and procedures." (Tr. 517.) The evidence also showed that the purchasing policies ensure the broadest possible competition to secure goods and services in the most cost-effective manner, which protects against the waste or abuse of taxpayer money and ensures taxpayer money is spent wisely. (Tr. 527-29, 669.)

Testimony from Ms. McElvey, Ms. McIntosh, and Dr. Gwin supported Newsome's testimony that there were specific laws, rules, policies and guidelines that had to be followed in KCMSD's purchasing department, including in regard to bidding and contracts. (Tr. 344-45, 364-65, 369, 765.) Dr. Gwin explained that there was no discretion in how purchases were to be made as "there is state law and district policy that is mandatory." (Tr. 768-69.) Ms. McIntosh testified that KCMSD must spend money received in accordance with the rules, the regulations, [and] the statutes that governed use of that money." (Tr. 364.) Ms. McElvey also confirmed that these policies were in place because all of KCMSD's revenue comes from "taxpayer funds, and so [they were]

[6] Ms. McElvey confirmed that modifications to Board approved contracts could only be made with subsequent Board approval. (Tr. 345.)

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required to guard taxpayer dollars to make sure they are spent properly." (Tr. 345.)

Contrary to KCMSD's contentions, Newsome presented substantial evidence that the Epps payment and the Escapes purchase were violations of Missouri public policy and applicable contracting law and purchasing regulations (adopted with reference to section 432.070). Newsome explained to the jury that the public policy established in KCMSD's contracting laws was to protect against waste or abuse of taxpayer money by school district employees. (Tr. 517, 527-29.) KCMSD contracting and purchasing policies presented at trial as Plaintiff's Exhibit 21, and violated by the Epps and Escapes transactions, cite section 432.070 for authority, which also supports the public policy construction outlined by Newsome. (L.F. 994-1005.)

Furthermore, School District contracting law as outlined in section 432.070, and testified to by Newsome, supported the jury's verdict in favor of Newsome on his public policy claim. In *Investors Title Co., Inc. v. Hammonds*, 217 S.W.3d 288, 294 (Mo. banc 2007), the court explained that:

> The manifest purpose of [section 432.070] … is that the terms of the contract shall, in no essential particular, be left in doubt, or to be determined at some future time, but shall be fixed when the contract is entered into. This was one of the precautions taken to prevent extravagant demands, *and to restrain officials from heedless and ill-considered engagements*.

(Emphasis added). Section 432.070, therefore, protects public funds by preventing corruption, graft, waste or other "ill-considered engagements" at the hands of school

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district officials. *See id.* at 295 ("The . . . legislature sought to address by section 432.070 . . . a need to restrain individual officials from obligating the county to pay for or perform unauthorized actions . . . .").

Consistent with section 432.070, KCMSD's purchasing policies and the law applicable to contracting for a public school district require that approval of any contract or a change in an approved contract "shall require a favorable action by at least five (5) members of the Board," and some consideration to be executed *subsequent* to the making of such a contract or change to an existing contract. (L.F. 999-1001.) The public policy outlined in *Investors Title Co.*, reflected in section 432.070, and reflected in the Board purchasing regulations violated here (which specifically cite to section 432.070), was clearly violated by the Epps payment and Escapes purchase order, which Newsome refused and objected to. *See also Ballman v. O'Fallon Fire Prot. Dist.*, 459 S.W.3d 465, 468 (Mo. App. 2015) ("Public officials discharging duties with respect [to section 432.070] are 'act[ing] in regard to public funds in a trust capacity as servants of the public.'" And without "'such provisions the public corporation has no earthly protection against either greed or graft.'") (Internal citations omitted).

iii. Newsome presented substantial evidence that he reported violations of Missouri law and public policy to a superior who was not a wrong-doer.

Appellant misleadingly argues that Newsome's complaints were not protected because he only complained to a "wrong-doer," Dr. Rebecca Lee-Gwin. Appellant's argument is simply incorrect and ignores the facts in this case. Rather, the evidence at

trial showed that both the Epps payment and the Escapes purchase were requested by other managers, outside the purchasing and finance departments. Newsome properly reported his concerns about these transactions to his superior, Dr. Gwin, the CFO. Dr. Gwin had no involvement in illegally requesting or obtaining the goods and services until Newsome reported to her his concerns that the transactions would violate state purchasing law and policy applicable to KCMSD and he either refused to complete the actions or raised objections. (Tr. 582-87, 785, 856.) The facts here present a textbook example of an employee blowing the whistle to his internal superior who was not involved in the illegal transactions. Each transaction is discussed in detail below.

a. Ron Epps contract

Newsome testified that he refused to approve a payment to independent consultant Ron Epps, which was requested to be pushed through by Dr. Covington. (Tr. 609-10, 654.) Newsome testified he was concerned because Mr. Epps had a contract that provided for a maximum number of consulting visits and Epps had already been paid for the maximum number of visits permitted under the contract. Therefore, Newsome believed it would violate state law and KCMSD purchasing policy to pay Epps for any more visits, as Dr. Covington had requested. (Tr. 609-12, 654.) Newsome understood approving the Epps payment would violate state law regarding contracting requirements that public entities such as the school district must follow: the law prevented the amendment or modification of a contract and in particular that "it was illegal in the state of Missouri to alter contracts after the fact." (Tr. 612.) This was consistent with Newsome's testimony that once a contract was approved by the Board, without some new

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Board action first to approve a new contract or to amend the existing contract, it could not be legally altered or amended. (L.F. 994-1005 (citing section 432.070); Tr. 531-33, 856.) Less than one week before he was fired, Newsome reported his concern to his superior, Dr. Gwin, that the Epps payment requested by Dr. Covington would be a violation of contracting law applicable to KCMSD, and he refused to approve the requested payment to Epps on that basis. (Tr. 611-12, 654.)

b. Ford Escapes purchase

Newsome also testified that he objected to Dr. Gwin regarding a request to purchase Ford Escapes by Michael Rounds, the COO, and Larry Englebrick the Facilities Department Director. Newsome testified that he understood the purchase would violate state contracting law because KCMSD would have to change a contract after it had been approved by the Board, without official steps first by the Board to amend or to approve a new contract. (L.F. 994-1005; Tr. 531-33, 624-26.) Specifically, Newsome explained that the Board had approved the purchase of three Ford Explorers under a State of Missouri "piggy-back" contract, which delineated the specific prices and equipment for the Explorers. (Tr. 613-17) After the Board's approval of the contract, an unanticipated amendment to the State contract prevented the Explorers from being purchased, because the District had not made its purchase request prior to the amended deadline under the State contract. (Tr. 617-20, 856.)

Rounds and Englebrick therefore requested that Newsome switch out the Explorers and purchase Ford Escapes instead, because a local Ford dealer had stated it would sell the District three Escapes for essentially the same price as the Board had authorized for

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the purchase of the Explorers under the state contract. (Tr. 620-24.) Newsome testified he understood it would violate state contracting law applicable to KCMSD to substitute Escapes for the approved Explorers without Board approval, and to pay a higher price than was set out in the State piggy-back contract. (Tr. 617-27.)[7]

Newsome testified that he reported his concerns to Dr. Gwin that purchasing the Escapes in the manner requested by Rounds and Englebrick would violate state contracting law applicable to KCMSD. (Tr. 623-24, 785-87, 856.) While Dr. Gwin initially supported Newsome, she later changed her mind and told him to process the requested purchase anyway. (Tr. 624-25, 787-90, 837-39.) Newsome again objected to the purchase as a violation of state laws applicable to KCMSD and placed a memorandum in the JD Edwards computer system documenting his concerns and he attached his complaint memo to the Escapes documentation. (L.F. 1006; Tr. 625-26, 699-701, 789.) Newsome was fired the next business day for his alleged "insubordination." (L.F. 1014, 1024.)

Public policy encourages employees to report suspected wrongdoing in order to expose the wrongdoing and to prevent further wrongdoing. *Faust v. Ryder Comm. Leasing & Servs.*, 954 S.W.2d 383, 390-91 (Mo. App. W.D. 1997). Internal reporting to

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[7] Ms. McIntosh testified that she and Newsome discussed concerns about whether appropriate "laws and policies were being followed" regarding the Escapes purchase and that she determined the purchase was not in compliance with district policies because there was "not a formal bid." (Tr. 389-92, 427-28, 461, 471-72.)

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superiors of illegal actions by other employees constitutes protected activity: "[A]n 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). At the point when Newsome reported the wrong-doing by Covington, Rounds, and Englebrick to Dr. Gwin, he had blown the whistle on violations of school district contracting law. Dr. Gwin was not the wrong-doer at that time. The whistle cannot be "un-blown" here. KCMSD's argument would essentially thwart any possible internal whistle-blower retaliation claim by converting anyone who later retaliates against a whistleblower or refuses to correct the issues raised into one of the alleged wrongdoers. This is circular reasoning. Instead, the evidence presented showed that Dr. Gwin was not the wrongdoer when Newsome initially refused to process the Epps payment and reported his concerns with the Escapes purchase, and the Court should disregard any argument to the contrary. The fact that Dr. Gwin ultimately did not support Newsome and was involved in terminating him merely serves as further support for Newsome's wrongful termination claim. (L.F. 1014.)

iv. Newsome's refusal to approve the Epps payment and reporting violations of School District contracting law and public policy regarding the Escapes purchase were contributing factors in his wrongful termination.

Newsome was terminated on June 27, 2011, shortly after refusing to make the Epps payment and the following business day after complaining that the Escapes purchase violated state contracting laws. Newsome testified that he believed his refusal

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to process the Epps payment because it would violate applicable contract law and his complaints about contract law violations related to the Escapes purchase contributed to the decision to fire him. (Tr. 641.) The evidence at trial showed that Dr. Gwin, who knew of his refusal to approve the payment and his reports of contracting law violations, was the one who decided to terminate him, with the approval of Dr. Covington.[8] (L.F. 1014.) Moreover, the evidence of pretext concerning KCMSD's articulated reasons for terminating Newsome was overwhelming.

"Pretext can . . . be shown through weaknesses, implausibilities, inconsistencies, incoherencies or contractions in the employer's proffered legitimate reasons, such that a reasonable factfinder could rationally find them unworthy of credence." *Smith v. Aquila, Inc.*, 229 S.W.3d 106, 123 (Mo. App. 2007). Evidence that an employer's explanation for its decision is "unworthy of credence" is one factor that "may well suffice to support liability." *Hazen Paper Co. v. Biggens*, 507 U.S. 604, 613 (1993). Indeed, "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). And "upon such rejection, [n]o additional proof of discrimination is required." *Id.* (internal quotations omitted).

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[8] KCMSD's position regarding who terminated Newsome shifted throughout litigation. While KCMSD originally claimed Dr. Gwin made the decision with approval of Dr. Covington, that was later changed to solely Dr. Covington. (L.F. 1014, 1024.) The jury was presented with evidence for both scenarios. (*Id.*; Tr. 703-11.)

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For example, the jury heard testimony that Newsome had previously met with Dr. Covington and he told Newsome that "it has been communicated to him that [Newsome] was questioning his authority" in regard to certain purchases. (Tr. 649.) Also, the jury heard that Dr. Covington advised Dr. Gwin that Newsome was being terminated because "he felt that he had talked to [Newsome] 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," the next business day after Newsome objected to approving the purchase of the Escapes and entered his memo into JD Edwards.[9] (Tr. 793.) Further, KCMSD took the position in its supplemental interrogatories that Dr. Covington made the decision to terminate Newsome and did so "because Dr. Covington previously met with Plaintiff to discuss his expectations and directives that Plaintiff not impede the purchasing process . . . and Plaintiff failed to follow those expectations and directives."

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[9] KCMSD briefly alludes to the fact that Newsome somehow cannot rely on the memorandum he attached in the JD Edwards system for his public policy claim because he did not present direct evidence the memo was seen. However, the evidence presented at trial showed that any number of superiors with access to JD Edwards may have seen the memorandum and that a hard copy was attached by Newsome to the documents accompanying the Escapes purchase order. (Tr. 699-701.) The jury could easily infer from the circumstantial evidence that others, including Dr. Covington, saw the memo about the Escapes purchase placed in the JD Edwards system by Newsome or received word of it, and evidence to the contrary must be disregarded.

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(L.F. 1024.) Taking the evidence in the light most favorable to the jury's verdict, there was ample evidence for the jury to conclude that either or both of Newsome's protected actions were contributing factors in his termination and that KCMSD's proffered reasons for his termination were mere pretext. Therefore, Newsome made a submissible case and Point I must be denied.

II. KCMSD is not entitled to a New Trial on Points II & III because there was no instructional error as Instruction No. 15 complied with the MAI and correctly stated the law.

A. Standard of Review

"Whether a jury was instructed properly is a question of law … review[ed] de novo." *Doe 1631 v. Quest Diagnostics, Inc.*, 395 S.W.3d 8, 13 (Mo. banc 2013). "Review is conducted in the light most favorable to the submission of the instruction, and if the instruction is supportable by any theory, then its submission is proper." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 766-67 (Mo. banc 2010). "[T]o be reversible, [an instructional] error must materially affect the merits of the case," and "a new trial is required only if the offending instruction misdirected, misled, or confused the jury, resulting in prejudicial error." *Doe 1631*, 395 S.W.3d at 13 (internal quotation omitted). The "burden of proof rests with the party alleging error." *Holder v. Schenherr*, 55 S.W.3d 505, 507 (Mo. App. W.D. 2001).

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B. Point II must be denied because the "reasonably believed" language in Instruction No. 15 was proper under the MAI and Missouri law as outlined in *Dunn* and *Kelly*.

KCMSD contends that the trial court erred in giving Instruction No. 15, the verdict director proffered by Newsome and accepted by the Court, because of the inclusion of the "reasonably believed" language. KCMSD states in cursory fashion that the "reasonably believed" language contained in Instruction No. 15 is not supported by MAI 38.03, but cites *no* authority for this proposition. In fact, both the MAI and Missouri law support the instruction as submitted. Instruction No. 15 was given consistent with MAI 38.03 for a case involving multiple protected acts,[10] and read as follows:

> 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

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[10] "For Submitting multiple acts in the disjunctive, refer to the form in MAI 17.02." (App. A-008)

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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. 723). Committee Comment C (2011 New) of MAI 38.03 instructs further that the public policy must be found in a statute or rule created by a governmental body, but the public policy need only be "*reflected*" by the statute or rule, and "***there need not be a direct violation by the employer*** of that same statute or regulation." (App. A-009 (emphasis added).) Therefore, Newsome did *not* need to show that his refusal to make the Epps payment or his reporting that he believed the Escapes purchase was a violation of the District's contracting policies and law, was an *actual* violation of a statutory law or public policy rooted in such laws, if he reasonably believed it was a violation of the law or public policy. Here, Instruction No. 15 was within the parameters of MAI 38.03 and was consistent with Missouri law.

Under Missouri law, as outlined in both *Kelly* and *Dunn*, a plaintiff need only show he was discharged for reporting to his superiors his *reasonable belief* that the defendant was violating the law or public policy or that he refused to act in a way that he *reasonably believed* would violate the law or public policy; he need *not* show that the conduct he refused to participate in or reported to the proper authorities did, in fact, violate the law or that an actual violation of the law occurred. *See, e.g.*, *Kelly*, 245 S.W.3d at 847-49; *Dunn*, 170 S.W.3d at 6, 8, 10-11.

Both *Kelly* and *Dunn* remain good law and governed Newsome's claim and Instruction No. 15. In fact, Newsome's situation, and the evidence as presented at trial, is

almost identical to that of the plaintiff in *Dunn*. In *Dunn*, the plaintiff's job included evaluating whether his employer complied with acceptable accounting standards for SEC filings. *Dunn*, 170 S.W.3d at 7-10. He warned his superiors that the company would not be in compliance unless his proposed changes were adopted, and the defendant allegedly fired him for these actions. *Id.* The SEC filing was later delayed after the plaintiff's termination, at least partly due to plaintiff's concerns, and no violation actually occurred. *Id.* The *Dunn* court cited this delay as evidence that plaintiff's belief that his employer's actions would be illegal was objectively reasonable. *Id.* at 10. The court found that reporting illegal activities which had not yet occurred, where plaintiff was acting on *reasonable good faith belief*, warranted protection under the public policy exception.[11]

[11] Like the holding in *Dunn*, numerous cases from other jurisdictions that recognize the public policy exception to the at-will employment doctrine have concluded a good faith, reasonable belief of a violation of public policy or law satisfies the whistle-blower cause of action. *See, e.g.*, *Fox v. Bowling Green*, 668 N.E.2d 898, 902 (Ohio 1996) ("From a public policy perspective, the 'reasonable belief' standard is the only acceptable interpretation of the [whistleblower] statute. . . . . The 'actual violation' standard could delay a whistleblower's reporting of a violation which endangers the public safety, or at worst, prevent him from reporting the violation at all. The statute expects a whistleblower to be vigilant, attuned to the public's safety, loyal to his employer, and sometimes even brave – it does not require him to be infallible."); *see also e.g.*, *TFS of Gurdon, Inc. v. Kay Hook*, 474 S.W.3d 897 (Ark. App. 2015) ("Plaintiff making a

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Id. Undoubtedly, the jury here appropriately found that Newsome's good faith belief[12] that there would be a violation of school district contracting law was objectively reasonable.

KCMSD incorrectly states that *Fleshner* stands for the proposition that there must be *actual* "wrongdoing or violations" of law or public policy reported for a wrongful discharge in violation of public policy claim. However, *Fleshner* never states this and cannot be read so narrowly. In fact, the *Fleshner* Court specifically states that "a plaintiff need not rely on an employer's *direct* violation of a statute or regulation" and instead "the public policy must be *reflected* by a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body." *Fleshner*,

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wrongful-discharge claim must show only a good-faith, objectively reasonable belief that his former employer was violating public policy, not prove an actual violation."). Moreover, the use of a reasonable, good faith belief standard is supported in other Missouri employment law, including under the MHRA. *See, e.g., McCrainey v. Kansas City, Mo, Sch. Dist.*, 337 S.W.3d 746, 754 (Mo. App. 2011) ("If an employee were required to be certain that the conduct was unlawful before making a report, an unsure employee will be less likely to oppose conduct that may in fact be prohibited under the MHRA. Therefore, we conclude that a plaintiff need only have a good faith, reasonable that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim.").

[12] Newsome specifically testified he made his objections in "good faith." (Tr. 702.)

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304 S.W.3d at 96. Therefore, contrary to KCMSD's contention, *Fleshner*[13] did not limit the "reasonable belief" standard or require Newsome to demonstrate his protected acts violated the law.

Further, KCMSD's reading and reliance on a few select lines from *Margiotta v. Christian Hosp. Northeast Northwest*, 315 S.W.3d 342 (Mo. banc 2010), is also misplaced. Without acknowledging either *Dunn* or *Kelly*, KCMSD essentially argues that *Margiotta* somehow abrogated the "reasonable belief" standard. However, the *Margiotta* Court did not even cite to nor mention *Kelly* or *Dunn* in its opinion addressing a motion for summary judgment, let alone state the "reasonable belief" standard was no longer good law. This Court has subsequently made clear in *Farrow v. Saint Francis Medical Center*, 407 S.W.3d 579, 596 (Mo. banc 2013), that the basis for the decision in *Margiotta* was that "this Court found the statute and regulation cited by the [plaintiff] were so vague and generalized that they *were inapplicable to the conduct he reported* . . . ." *Farrow*, 407 S.W.3d at 596 (emphasis added). The *Farrow* Court found that the Nursing Practices Act ("NPA") constituted a "clear mandate of public policy" that may support a wrongful discharge public policy claim and that *Margiotta* therefore

[13] The *Fleshner* Court also cited *Kelly* in relation to availability of punitive damages for wrongful discharge in violation of public policy cases and was obviously aware of the *Kelly* case, but did not qualify or limit the *Kelly* opinion in anyway. *Id.* at 96.

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did not govern the allegations in Farrow's petition.[14] *Farrow*, 407 S.W.3d at 597. Moreover, *Dunn* and *Kelly* continue to be followed post-*Margiotta*,[15] and *Margiotta*, therefore, did not abrogate the "reasonable belief" standard, which remains good law in

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[14] *Farrow* relied heavily on *Hughes v. Freeman Health Systems*, 283 S.W.3d 797 (Mo. App. 2009), a decision that relied heavily on the *Dunn* decision. *Hughes*, 283 S.W.3d at 799-800 (quoting multiple passages from *Dunn*). Yet, the *Farrow* Court never qualified *Hughes* or *Dunn* in light of *Margiotta*.

[15] Case law post-*Margiotta* confirms that a plaintiff need *not* prove an actual violation of law or public policy; a good faith belief of a violation of law or public policy is enough. *See, e.g.*, *Johnson v. Stokes Contr. Servs. L.L.C.*, 2014 U.S. Dist. LEXIS 126714, at *8 (E.D. Mo. Sept. 10, 2014) (relying on *Kelly* and *Dunn* post-*Margiotta* and finding that under Missouri law "the actual violation of the cited federal regulation is not essential to the state law claim [of public policy wrongful termination"); *Fruits v. LS Constr. Servs. of Kan., Inc.*, 2013 U.S. Dist. LEXIS 97466 (W.D. Mo. July 12, 2013) (relying on *Dunn* post-*Margiotta* and to find a plaintiff must only show an objectively reasonable good-faith belief that his or her employer was violating a statute, regulation, or public policy); *Wingate v. Russell Stover Candies, Inc.*, No. 4:12-cv-00553-BP, Doc. 26 at 3 (W.D. Mo. Sept. 25, 2012) (L.F. 1211-14) (relying on *Dunn* and *Kelly* in finding post-*Margiotta* that Missouri law holds plaintiff need only show a "good faith belief that [defendant] was violating the law or public policy" and not an actual violation).

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Missouri and governed Newsome's claim.

i. KCMSD was not prejudiced in any way by the "reasonably believed" language of Instruction No. 15.

Furthermore, even if the "reasonably believed" language contained in Instruction No. 15 was found not applicable here, KCMSD has failed to establish how it was prejudiced by the instruction. KCMSD contends only that "[t]he 'reasonably believed' language is not supported by MAI 38.03," but makes absolutely no other argument of any prejudice. Such a conclusory statement, without further explanation, falls short of establishing the requisite prejudice for instructional error. *See Hurst v. Kan. City, Mo. Sch. Dist.*, 437 S.W.3d 327, 335-36 (Mo. App. W.D. 2014). Therefore, KCMSD's contention must be denied as any arguments regarding prejudice created by Instruction No. 15 and the "reasonably believed" language have been waived as KCMSD has the burden of demonstrating that the instructional error materially affected the merits of the case and that the offending instruction misdirected, misled, or confused the jury, resulting in prejudicial error and has completely failed to do so. *See Doe 1631*, 395 S.W.3d at 13; *Holder*, 55 S.W.3d at 507.

Moreover, even if this Court were to entertain the notion the *Kelly* and *Dunn* are no longer good law and the "reasonably believed" standard was not applicable, KCMSD was not prejudiced by its inclusion in Instruction No. 15. As the Court of Appeals aptly noted, "[a]t the close of Newsome's case and at the close of the evidence, the [trial] court determined that Newsome had made a submissible case for wrongful discharge in violation of public policy[,]" including finding substantial evidence that actual violations

of law occurred because "the Epps additional payment and the Ford Escapes purchase violated the District's policies, which were based on Section 432.070, and they violated the well-established and clearly mandated public policy reflected in Section 432.070." Memorandum Supplementing Order, WD78047, Dec. 29, 2015, at p.22 (App. at A-033.) "The language requiring the jury to find, *additionally*, that Newsome 'reasonably believed' the acts were violations of school district contracting law was superfluous. [However], *it was not prejudicial to the District, as it merely required the jury to find a fact that it did not need to find*." Memorandum Supplementing Order, WD78047, Dec. 29, 2015, at p.23 (App. at A-034.) (Emphasis Added.) Therefore, KCMSD was not prejudiced by the inclusion of the "reasonably believed" language, even if its inclusion was incorrect.

Instruction No. 15 was consistent with Missouri law regarding wrongful discharge in violation of public policy, and did not materially affect the merits of the case or result in any prejudicial error and Point II must be denied.

C. Point III must be denied as the phrase "School District contracting law" contained in Instruction No. 15 was not vague and was properly supported by the evidence adduced at trial.

In Point III, KCMSD contends that giving Instruction No. 15 was reversible error because the instruction was "vague" and a "roving commission" because it failed to specify what law or mandate of public policy Newsome either refused to violate or reported that KCMSD had violated and instead included the language "violate School District contracting law." It should be noted initially that KCMSD *never* specifically

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objected to the "School District contracting law" language contained in Instruction No. 15 as being vague or a roving commission, nor did it offer alternative language, and therefore it waived any argument of instructional error in regard to that portion of the instruction. *See* Rule 70.03; *Hensley v. Jackson County*, 227 S.W.3d 491, 497 (Mo. banc 2007) (finding failure to object to a jury instruction at trial waives right to review); *Edwards v. Gerstein*, 363 S.W.3d 155, 166-71 (Mo. App. 2012) (finding objections to other similar prior versions of verdict directors without an objection of "roving commission" to the specific language in the verdict director given to the jury was not enough to preserve the argument for judicial review).

Rule 70.03 provides: "No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." "[O]bjections must be specific; general objections are not sufficient to preserve error." *Edwards*, 363 S.W.3d at 167. "Further, a point of appeal must be based on a theory voiced in the objection at trial and a defendant cannot expand or change on appeal the objection as made." *Id.* (internal citations and quotations omitted).

During the instruction conference the evening prior to closing arguments, KCMSD presented the trial court with its own proposed version of Instruction No.15 that Newsome eventually accepted. (L.F. 592; Tr. 952.) However, KCMSD subsequently withdrew its proposed instruction shortly before closing argument the following morning. (Tr. 964.) In light of KCMSD's withdrawal, Newsome prepared and submitted a newly proposed Instruction No. 15 to the trial court, which was ultimately given to the jury.

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(Tr. 966-68.) While KCMSD objected to the giving of the newly proposed Instruction No. 15, it objected specifically to the "reasonably believed" language, that the "School District contracting law" language in the instruction did not *cite* to a specific "state statute," and that there was not sufficient evidence to support giving the instruction at all.[16] (Tr. 967-68.) However, KCMSD *never* claimed that the phrase "violate School District contracting law" created a "roving commission" *after* its own proposed instruction was withdrawn, and therefore failed to preserve this argument for review.[17] *See Giddens v. Kansas City S. Ry. Co.*, 29 S.W.3d 813, 823 (Mo. banc 2000) (finding that where an alleged error relating to an instruction differs from the objections made to the trial court, the error may not be reviewed on appeal); *Edwards*, 363 S.W.3d at 167.

Even if this Court entertains KCMSD's claim of instructional error, Newsome presented substantial evidence to support Instruction No. 15 and such language was neither vague nor prejudicial. As outlined above in section I.B.i-iii, Newsome testified at

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[16] Specifically, KCMSD stated "I just wanted to finalize that it's defendant's position that there is no proper instruction under the evidence that can be submitted." (Tr. 968.)

[17] Here, the situation is just like that of *Edwards*, where the defendants had objected to various versions of the verdict director previously and at various other points during the instruction conference, but failed to specifically carry those objections, including the objections of "roving commissions" and "misstated the legal duty … owed[,]" to the final verdict director by stating "distinctly the matter objected to and the grounds of the objection" as required by Rule 70.03. *Edwards*, 363 S.W.3d at 167.

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length regarding his understanding of the legal requirements underpinning KCMSD's purchasing policy as it related to making contracts or altering approved contracts. (Tr. 515-35.) That policy expressly cited section 432.070 as part of the statutory basis for the policy requirements, and was presented to the jury. (L.F. 1000-01.) Newsome further testified about his understanding that KCMSD contracts legally were required to be in writing, signed and approved by the School Board, and that it would be illegal to either make payments without following such steps or to alter a written contract once it was approved without some type of Board action first. (Tr. 529-33, 612.) As Newsome testified, his understanding of these legal requirements was the reason why he refused to approve the payment to Epps as he believed it would violate School District contracting law, and why he reported to his superior that he believed the Escapes purchase would violate School District contracting law. (Tr. 609-12, 623-24, 785-87, 856.) Clearly, the evidence presented at trial supported the submission of Instruction No. 15 and the use of the "School District contracting law" language in paragraph First.

"A roving commission occurs when an instruction assumes a disputed fact or submits an abstract legal question that allows 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*, 311 S.W.3d at 766 (internal quotations omitted). The issue then is whether the phrase, as used in the verdict director, was misleading in the context of the evidence presented at trial. *Id.* at 767. Where the testimony in a case explains a phrase used in the verdict director, there is no "roving commission." *Id.* Here, KCMSD fails to explain what is vague about the phrase "School District contracting law" or how the jury might

have misinterpreted the phrase based upon the record. *See id.* At trial, Newsome thoroughly explained the legal requirements for School District contracting as he understood them. (Tr. 515-35.) This was also thoroughly explained by other witnesses in their testimony, including Ms. McElvey, Ms. McIntosh, and Dr. Gwin. (Tr. 344-45, 364-65, 369, 765-69.) With Newsome and the other witnesses' thorough explanation, and in particular in relation to the Epps payment and Escapes purchase, there was clearly no "roving commission" and no prejudice to KCMSD.[18]

In *Reed v. Sale Memorial Hospital & Clinic*, 698 S.W.2d 931, 937-38 (Mo. App. 1985), the court found a very similar verdict director to Instruction No. 15 was *not* a roving commission. The verdict director in *Reed* stated in pertinent part:

> Your verdict must be for the plaintiff if you believe:
>
> First, that plaintiff, while employed by the defendants, exercised certain of her rights under the Worker's Compensation Law by filing a Claim for Compensation and failing to attend the Conference scheduled on September 28, 1976, and

[18] KCMSD fails to explain how Instruction No. 15 prejudiced it, and such an argument is waived as KCMSD has the burden of demonstrating that the instructional error materially affected the merits of the case and that the offending instruction misdirected, misled, or confused the jury, resulting in prejudicial error and has completely failed to do so. *See Klotz*, 311 S.W.3d at 767; *Doe 1631*, 395 S.W.3d at 13.

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Second, as a direct result of plaintiff exercising said rights, or either of them, under the Worker's Compensation Law, defendants discharged plaintiff, ...

Id. at 937. The instruction "hypothesizes ultimate facts, not abstract statements of law" and "no prejudice resulted from [plaintiff] submitting her acts as such." *Id.* at 938.

The instruction in *Reed* identified the law being violated as "Worker's Compensation Law," and identified the specific acts that violated it: filing a claim or failing to attend a conference. A jury instruction must "submit ultimate facts, not abstract statements of law." *Furlow v. Laclede Cab Co.*, 502 S.W.2d 373, 379 (Mo. App. 1973). Instruction No. 15 identified the law being violated as "School District contracting law," and identified the specific acts that violated it: the payment to Epps and the Escapes purchase. (L.F. at 723.)[19] Therefore, such language in Instruction No. 15 did not constitute a roving commission, especially in light of the overwhelming evidence that the Epps payment and the Escapes purchase violated School District contracting law. Therefore, Point III must be denied.

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[19] While it is unclear, it appears KCMSD would have Instruction No. 15 identify abstract statements of law from section 432.070 or Board policies and have the jury interpret them. Such statutory language calls for judicial construction and has no place in jury instructions. *Gaffner v. Alexander*, 331 S.W.2d 622, 628 (Mo. 1960).

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III. Point IV should be denied as KCMSD waived any sovereign immunity defense against Newsome's public policy claim, pursuant to section 537.610.1 RSMo., through its purchase of liability insurance.

KCMSD erroneously argues that Newsome's public policy wrongful termination claim was barred by sovereign immunity based solely on the faulty contention that KCSMD's EPLI insurance policy, which undisputedly covered Newsome's claim for wrongful termination of employment, included a later-added Endorsement 13 that preserved KCMSD's defense of sovereign immunity.

While the existence of sovereign immunity is a question of law, which is reviewed *de novo*, *Ogden v. Iowa Tribe of Kan. & Neb.*, 250 S.W.3d 822, 824 (Mo. App. 2008), the trial court made specific findings of fact regarding the timing of the waiver of sovereign immunity and entered judgment to that effect, and the trial court's judgment should be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). To the extent the trial court's application of the law in determining that sovereign immunity did not exist was based upon the evidence presented, this Court should defer to the trial court's factual findings and credibility determinations. *See State v. Severance*, 453 S.W.3d 278, 280 (Mo. App. 2014). Because KCMSD contends waiver of sovereign immunity was an element of Newsome's prima

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facie case which determines submissibility,[20] the Court must review the evidence in the light most favorable to finding waiver, provide Newsome all reasonable inferences, and disregard all conflicting evidence and inferences. *Clevenger v. Oliver Ins. Agency, Inc.*, 237 S.W.3d 588, 590 (Mo. banc 2007). KCMSD's characterization of evidence is improper under the standard which requires deference to the trial court's factual rulings on this element.

A. The EPLI Part of the 2010-11 and 2011-12 Hiscox Policies covered Newsome's public policy wrongful discharge claim and did not preserve sovereign immunity.

Public entities may be protected from suit in tort by sovereign immunity, with some limited exceptions. *See Howard v. City of Kansas City*, 332 S.W.3d 772, 776-78 (Mo. banc 2011). One of these exceptions is set forth in section 537.610.1 of the Revised Statutes of Missouri, which states:

> [T]he governing body of each political subdivision of this state . . . may purchase liability insurance for tort claims. . . . 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 and in such amount and for such purposes provided in any self-

[20] KCMSD cites to *Shifflette v. Missouri Department of Natural Resources*, 308 S.W.3d 331, 334 (Mo. App. 2010) for the proposition that "[s]overeign immunity is not an affirmative defense but is part of the plaintiff's prima facie case."

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insurance plan duly adopted by the governing body of any political subdivision of the state.

This Court has previously held a public entity's purchase of liability insurance to cover employment-related tort claims may waive that entity's sovereign immunity defense under section 537.610. *Amick v. Pattonville-Bridgeton Terrace Etc.*, 91 S.W.3d 603 (Mo. banc 2002). The trial court here specifically found that KCMSD "waived sovereign immunity by purchasing liability insurance with a limit of $2,000,000 and that the purported Endorsement 13 did not relate back to cover the period of [Newsome]'s claims" under both the 2010-11 and 2011-12 Policies. (L.F. 1218; Tr. 905-06.)

The 2010-11 and 2011-12 Hiscox Policies include an EPLI Part that provides KCMSD insurance coverage for claims for wrongful termination of employment. (L.F. 1063-71.) Each policy states that "This EPLI Coverage Part shall pay the loss of an Insured arising from a Claim first made against such Insured during the Policy Period . . . for any actual or alleged Wrongful Act of such Insured." (L.F. 1063.) "Wrongful Act" includes any actual or alleged Employment Practices Violation. (L.F. 1067.) The EPLI Part defines "Employment Practices Violation" as "any actual or alleged . . . *wrongful termination of employment* (actual or constructive), dismissal or discharge; or . . . *Retaliation* . . . ." (L.F. 1064-65 (emphasis added).) "Retaliation" is defined as any adverse employment act in response to the disclosure by an Employee to a superior "of any act by an Insured that is alleged to be a violation of any federal, state, local or foreign law, common or statutory, or any rule or regulation promulgated thereunder." (L.F. 1066.) KCMSD does not and did not deny coverage existed under *either* policy as

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written and initially adopted and approved by the KCMSD Board of Directors.

The EPLI Part of the Hiscox Policies does *not* reference in any way the term "sovereign immunity," *nor* does it contain an exclusion, definition or endorsement referencing sovereign immunity. (L.F. 1063-71.) Furthermore, no other part of either of the Hiscox Policies contains any statement of limitation or prohibition of "claims" that are barred by "sovereign immunity" or section 537.610 RSMo. (L.F. 1038-93.) Therefore, KCMSD through its Board-approved purchase of EPLI that specifically covered wrongful termination public policy claims, such as Newsome's, waived its defense of sovereign immunity for any such filed *claims* under both the 2010-11 and 2011-12 Hiscox Policies up to the limits of each policy, here $3,000,000 (2010-2011 policy) and $2,000,000.00 (2011-2012 policy) respectively. (L.F. 148-49; 1038-39.)

i. The 2010-11 Policy, which never included Endorsement 13, governs Newsome's public policy wrongful discharge claims.

Instead, KCMSD focuses on a later proposed sovereign immunity endorsement, Endorsement 13, and argues this preserved KCMSD's defense of sovereign immunity. However, KCMSD's arguments regarding Endorsement 13 are irrelevant, as the 2010-11 Hiscox Policy applied to Newsome's claims. Substantial evidence on this policy and Newsome's claims during the effective dates of the 2010-11 Hiscox Policy was presented, and the trial court, in making factual determinations, found that Newsome's claims were covered under both the 2010-11 Policy and the 2011-12 Policy. (Tr. 905-06.) Therefore, the evidence must be reviewed in the light most favorable to sovereign

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immunity being waived under the 2010-11 Hiscox Policy.[21]

Newsome's claim herein was known by KCMSD and qualified under the 2010-11 Hiscox Policy at least by the time KCMSD presented Newsome with a proposed "General Release and Waiver of Claims," (hereinafter "Release"), on June 27, 2011, which Newsome signed and later revoked on June 30, 2011. (L.F. 1094-98.) In consideration for signing the Release, Newsome was offered $20,000 to release and waive all of his employment related termination claims against the District including any and all claims under "common (including civil tort) law." (L.F. 1095.) The EPLI Part of the Hiscox policies defines "Claim" to mean, "a written demand for monetary, non-monetary or Injunctive relief . . . ." (L.F. 1063.) Newsome's signing a Release of his employment tort claims against KCMSD in exchange for an agreed payment of $20,000, was a written demand for monetary relief within the ordinary meaning of that phrase. KCMSD knew at least as early as June 27, 2011, that Newsome had employment claims against KCMSD that qualified as claims under the 2010-11 Hiscox Policy. On June 30, 2011, Newsome subsequently revoked his signature on the Release and rescinded his resignation. (L.F. 1100.) Undoubtedly, this also qualified as a non-monetary written

[21] The Court of Appeals properly gave deference to the trial court's factual findings with respect to the determination that Newsome made a claim under the 2010-2011 policy, noting that "[t]he circuit court found 'strong evidence' that Newsome first made his claim under the 2010-2011 policy. Memorandum Supplementing Order, WD78047, Dec. 29, 2015, at p.11 (App. at A-022.)

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demand for relief and re-affirmed the existence of his wrongful termination claim. KCMSD, therefore, alternatively knew by June 30, 2011, that Newsome had employment claims against it that qualified under the 2010-11 Policy and that he was unwilling to waive such claims in exchange for a mere payment of $20,000.

Because the 2010-11 Policy was in effect up and until July 1, 2011, it covered both of these "claims." It is undisputed that the 2010-11 Policy waived KCMSD's defense of sovereign immunity for employment claims,[22] and that Endorsement 13 was never added and did not apply to the 2010-11 Policy. Therefore, KCSMD waived any

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[22] KCMSD previously admitted in *Eunice K. Johnson v. Kansas City, Missouri School District*, Case No. 1016-CV33104, Circuit Court of Jackson County, Missouri, that when it purchased the 2010-11 Hiscox Policy it waived its sovereign immunity defense as to employment-related tort claims as set forth in section 537.610.1. (L.F. 1181.) In *Johnson*, KCMSD stated, "[h]ere, it is undisputed . . . that Defendant maintains liability insurance covering the types of tort claims alleged by Plaintiff. . . . . Accordingly, Plaintiff's tort claims fall within the liability insurance exception to sovereign immunity set forth in § 537.610.1." (*Id.*) Because the insurance policy in force for the *Johnson* claims was renewed with identical material terms as the 2011-12 Policy, KCMSD's previous admissions of waiver of sovereign immunity under section 537.610.1 in *Johnson*, are also controlling here. *Mitchell Engineering Co., A Div. of CECO Corp. v. Summit Realty Co., Inc.*, 647 S.W.2d 130, 140-42 (Mo. App. 1982); *see also Burrus v. Norfolk & W. Ry.*, 977 S.W.2d 39, 43 (Mo. App. 1998).

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and all claims of sovereign immunity to Newsome's public policy claims, which fell under the 2010-11 Policy, and KCMSD's arguments in Point IV are irrelevant.

ii. The Hiscox 2011-12 EPLI Policy in effect at the time Newsome filed a "claim," *did not* contain any provision retaining a defense of sovereign immunity, and therefore any such defense was waived.

Newsome also presented substantial evidence that KCMSD's 2011-12 Policy, which was a renewal of the 2010-11 Policy, was the insurance policy in force at the time Newsome filed his notice of charges with the EEOC, and therefore Newsome filed a "claim" covered by KCMSD's 2011-12 Policy *prior* to the attempted addition of Endorsement 13 (regardless of whether it was ever added to the policy). The EPLI Part defines a "Claim" to include "*filing of a notice of charges* . . . including, but not limited to, an . . . EEOC (or similar federal, state or local agency) proceeding or Investigation . . . ." (L.F. 1063.) Newsome *filed* his Charge with the EEOC on November 9, 2011, which included specific allegations of retaliatory termination in violation of public policy against the District. (L.F. 1101.) Newsome's filing of an EEOC 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. (L.F. 132-294, 453-532, 670-75; Tr. 905-06.) Because KCMSD waived any claims of sovereign immunity for public policy claims under the 2011-12

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Policy,[23] it therefore waived any defense of sovereign immunity to Newsome's claim.

KCMSD, however, contends that the 2011-12 Hiscox Policy Endorsement 13 preserved its sovereign immunity defense. The Endorsement 13 states it has an "effective" date of July 1, 2011; however, the "processed date" was *not* until November 11, 2011. (L.F. 1102.) A review of e-mail correspondence demonstrates that the

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[23] In the *Machicao & Tan v. Kansas City, Missouri School District*, Case No. 1116-CV28200, Circuit Court of Jackson County, Missouri, the plaintiffs brought public policy whistle-blowing claims against KCMSD. KCMSD's Risk Manager – Business & Finance submitted an affidavit dated January 2013 indicating that the 2011-12 Policy, *without Endorsement 13*, was the insurance policy "in force in October 2011 when [the Machicao] lawsuit was filed." (L.F. 1189.) KCMSD did not contend that Endorsement 13 should be retroactively applied to the 2011-12 Policy during the October 2011 time period. (L.F. 1191.) Newsome's November 9, 2011 claim was governed by the same 2011-12 Policy that KCMSD admitted applied to the October 2011 claims in *Machicao*. KCMSD's admission that Endorsement 13 did not apply retroactively to cover October 2011 claims may be considered as an admission against interest in evidence, and is entitled to *considerable weight*. *See Mitchell Engineering Co.*, 647 S.W.2d at 140-42. Because the *Machicao* Court already found KCMSD waived any claims of sovereign immunity for whistle-blowing claims under the 2011-12 Policy, the same analysis and result should be applied with regard to Newsome's claim and was by the trial court. (L.F. 1191, 1217-18.)

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sovereign immunity endorsement had *not* been contemplated and that no agreement had been reached between KCMSD and Hiscox to add Endorsement 13 to the policy until November 11, 2011, at the earliest. (L.F. 1144-66.) In an email from Lockton to KCMSD on November 11, 2011, the Lockton representative stated that "[he] ha[s] confirmed that Hiscox will add the attached to their EPL policy and Starr [excess carrier] has agreed to . . . follow form." (L.F. 1141.) Whether KCMSD stated it wanted the proposed Endorsement 13 on November 9th or otherwise, Hiscox and the excess carrier did not indicate acceptance of the Endorsement until November 11, 2011. Therefore Endorsement 13, if valid at all, was added after Newsome filed his EEOC Charge and therefore after he made a claim under the policy.

Sovereign immunity was therefore waived for Newsome's claim regardless of Endorsement 13, since it became effective, if at all, *after* November 11, 2011. Missouri law prohibits reading Endorsement 13 to apply retroactively to allow KCMSD to retroactively deny coverage for a claim that had already accrued. *Behr v. Blue Cross Hosp. Serv., Inc., of Mo.*, 715 S.W.2d 251, 253 (Mo. banc 1986). Parties to an insurance policy cannot avoid their obligations to the policy's third-party beneficiaries (in this case Mr. Newsome) once liability has attached. *O'Hare v. Pursell*, 329 S.W.2d 614, 622 (Mo. 1959). Therefore, KCMSD waived any defense of sovereign immunity to Newsome's claim, and it cannot retroactively deny coverage based on Endorsement 13.

KCMSD further argues (assuming Endorsement 13 was in effect) it still did not waive sovereign immunity against Newsome's public policy claim filed on November 9, 2011, because it was the date KCMSD received notice of Newsome's EEOC Charge or

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"Claim" on November 22, 2011, that triggered coverage under the 2011-12 Policy, not the date when Newsome filed his EEOC Charge. While arguably the November 22, 2011 "receipt" of Newsome's Charge also qualifies as a "claim" under the 2011-12 Policy, which states a "Claim" means "receipt *or* filing of a notice of charges," this does *not* alter the fact that Newsome had already triggered coverage under the 2011-12 Policy by "filing" his notice of charges with the EEOC on November 9, 2011, well before Endorsement 13 could have possibly become a part of the 2011-12 Policy. (L.F. 1063.)

The scope of the purchased EPLI coverage by KCMSD covers losses "arising from a Claim first made against such insured during the Policy Period or Discovery Period (if applicable)." (L.F. 1063.) Therefore, even assuming KCMSD effectively modified its policy on November 11, 2011, the pre-amended policy would provide coverage here. The most logical interpretation of the policy language, providing Newsome all reasonable inferences, is that Newsome's claim was made against KCMSD with the filing of his EEOC charge, thereby commencing a claim no later than November 9, 2011.

iii. Endorsement 13 did not become a part of KCMSD's 2011-12 Policy, because state contracting law was not followed in attempting to adopt the Endorsement.

Regardless, Endorsement 13 never became a part of the 2011-12 Policy. KCMSD's own purchasing policies and Missouri law applicable to public school district

contracting (section 432.070 RSMo.[24]), require that approval of any contract (for insurance or otherwise) or modification of that contract have School Board approval[25] and some consideration to be performed *subsequent* to the making of such a contract or change to an existing contract. (L.F. 1000-01.) Section 432.070 states in pertinent part:

> No . . . *school district* . . . *shall make any contract*, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made *upon a consideration wholly to be performed or executed subsequent to the making of the contract*; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.

(Emphasis added.) The plain language of section 432.070 requires any school district contract to be in writing, dated when made, signed, and made upon some consideration to be performed or executed thereafter. *See State v. Moore*, 303 S.W.3d 515, 520 (Mo. banc

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[24] KCMSD has often argued in other matters that the "*statutory requirement (of RSMo. 432.070) that any purportedly enforceable contract with a public entity be in writing is mandatory and strict compliance is required in order to bind the public entity*[,]" and it cannot feign to ignore such a requirement here in attempting to retroactively apply Endorsement 13 to cover Newsome's claims. (L.F. 1111.)

[25] An approval of any contract or a change in an approved contract "shall require a favorable action by at least five (5) members of the Board[.]" (L.F. 1000.)

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2010) (noting the primary rule of statutory construction is to ascertain the intent of the legislature from the plain language used in the statute). Endorsement 13 was *never* authorized or approved by a vote of the KCMSD School Board, there was no consideration supporting its addition to the existing contract, and it was not signed by KCMSD. (L.F. 1103-04.) Therefore, Endorsement 13 had *no* effect on the terms of the 2011-12 Policy because it was not properly adopted as a modification to the existing Policy. *See Ballman v. O'Fallon Fire Prot. Dist.*, 459 S.W.3d 465, 468 (Mo. App. 2015) (holding that modifications to public contracts were invalid under section 432.070 even though the parties had considered them binding and "the record leaves no doubt that the District intended to be bound . . ., [because] the fatal fact remains that the board neglected to duly appoint and authorize the chairman in writing as required by § 432.070 and long-standing precedent").

Moreover, noticeably absent from Endorsement 13 or KCMSD's email communications with its insurance brokers was *any* evidence of *consideration* for adding Endorsement 13 to the 2011-12 Hiscox Policy. Subsequent consideration is required for a valid contract, and is a necessary element for KCMSD to comply with section 432.070. Without additional consideration "subsequent to the making of the contract," there could never be any modification of the original policy. § 432.070 RSMo. The evidence demonstrates that KCMSD failed to follow the statutory requirements of section 432.070 in order to modify its insurance contract and therefore Endorsement 13 never took effect and Point IV must be denied.

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IV. Points V & VI must be denied because the trial court did not abuse its discretion or act contrary to law in denying KCMSD's Motion for Remittitur.

A. Standard of Review

Trial courts have broad discretion in awarding or declining to award remittitur. *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 448 (Mo. banc 1998). We presume that the trial court acted within its discretion and will only find otherwise after a showing that the ruling in question is so arbitrary and unreasonable as to shock the conscience. *Anglim v. Mo. P. R. Co.*, 832 S.W.2d 298, 303 (Mo. banc 1992).

B. KCMSD failed to preserve in its Motion for Directed Verdict the new arguments it raised regarding the Hiscox Policy Retention or the limit on damages under section 537.610.1.

In Points V & VI, KCMSD raises new arguments that were raised in its motion for JNOV, but were *never* included or even alluded to in KCMSD's briefs or oral argument in support of its Motion for Directed Verdict, including the Hiscox Policy Retention maintaining sovereign immunity and the limit on damages under section 537.610.1, and are therefore waived for appeal. *Howard*, 332 S.W.3d at 790; *see also Bailey v. Hawthorn Bank*, 382 S.W.3d 84, 99-100 (Mo. App. W.D. 2012) (finding a defendant "rais[ing] [] arguments for the first time in its motion for [JNOV]," and not in its motion for directed verdict "failed to preserve these issues for appeal"). "A motion for directed verdict at the close of all evidence becomes the meaningful motion to preserve the issue as it presented itself to the trial court at that time, prior to submission to the jury."

Sanders v. Ahmed, 364 S.W.3d 195, 207 (Mo. banc 2012). Rule 72.01(a) requires a motion for a directed verdict to "state the specific grounds therefore." "A sufficient motion for directed verdict at the close of all the evidence is required to preserve an issue for a motion for JNOV." *Marquis Fin. Servs. of Ind. v. Peet*, 365 S.W.3d 256, 259 (Mo. App. 2012). If the motion for directed verdict is insufficient, a "subsequent post-verdict motion is without basis and preserves nothing for review." *Howard*, 332 S.W.3d at 790.

In *Bailey*, the defendant made a variety of arguments regarding the plaintiff's claims that were never raised in its motion for directed verdict orally or in writing. *Bailey*, 382 S.W.3d at 99-100. The defendant asked for a motion for directed verdict at the close of all evidence on the plaintiff's claims for negligent misrepresentation. *Id.* at 99. However, in its JNOV motion, defendant asserted several new theories as to why plaintiff did not make a submissible case for negligent misrepresentation. *Id.* Even though defendant challenged the sufficiency of plaintiff's claim of negligent misrepresentation in its directed verdict motion, it did not assert the *specific arguments* raised later, and the *Bailey* Court found that raising arguments its JNOV for the first time failed to preserve these issues for appeal. *Id.* at 100 (citing *Howard*, 332 S.W.3d at 790-91).

Bailey controls here. The parties submitted extensive pre-trial briefing to the trial court on the issue of KCMSD's waiver of sovereign immunity, pursuant to Section 537.610 and KCMSD incorporated, by reference, its Trial Brief and Supplemental Trial Brief on the Doctrine of Sovereign Immunity in its Suggestions in Support of Defendant Kansas City Public Schools' Motion for Directed Verdict at the Close of All Evidence.

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(L.F. 132-294, 339-452, 453-532, 533-36, 652-69; Tr. 876-79, 915.) However, several new specific arguments raised in KCMSD's motion for JNOV were *never* included or even alluded to in its briefs, Motion for Direct Verdict or Suggestions in Support, or in its oral argument in support of its motion. As this stated in *Sanders*, the requirement that an issue be preserved is "based on ideas of efficiency and fair play," and a party should make an objection during the litigation or trial at the earliest opportunity. 364 S.W.3d at 208. KCMSD had ample opportunity to make these arguments throughout the litigation process or in its motion for directed verdict, but chose not to. Therefore, KCMSD has waived its arguments in Points V & VI and this Court should not entertain them here. [26]

C. Point V must be denied because KCMSD is not entitled to a statutory reduction under section 537.610.1 because its purchase of liability insurance constituted an absolute and complete waiver of all immunities.

In Point V, KCMSD argues that even where sovereign immunity is waived through the purchase of insurance, "the highest possible judgment that could be entered against [KCMSD] was $403,139" under section 537.610.1. Section 537.610.1 allows

[26] This Court also refused to review such allegations under plain error review, consistent with this Court's refusal in *Howard* to exercise this right, and this case is no different as KCMSD waived its right to review. *See Bailey*, 382 S.W.3d at 100 (citing *Howard*, 332 S.W.3d at 790-91).

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political subdivisions of the state to purchase liability insurance for tort claims and section 537.610 waives sovereign immunity "to *the maximum amount of* and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of [537.610] *and in such amount* and for such purposes provided in any self-insurance plan." (Emphasis added.); *see Kunzie v. City of Olivette*, 184 S.W.3d 570, 574 (Mo. banc 2006). If a governmental entity maintains insurance that covers the claim at issue, then "it will have waived its immunity under section 537.610 for the specific purpose of and to the extent of its insurance coverage." *Kunzie*, 184 S.W.3d at 574. "This waiver through the purchase of insurance effects '*an absolute and complete waiver of all immunities.*'" *Farm Bureau Town & Country Ins. Co. v. Am. Alternative Ins. Corp.* ("*Farm Bureau*"), 347 S.W.3d 525, 533 (Mo. App. 2011) (emphasis added).

In *Farm Bureau*, the court found that a Fire District waived sovereign immunity up to the maximum liability coverage of $1,000,000 for *each* of its insurance policies that covered the claims at issue. 347 S.W.3d at 532-33. Specifically, the *Farm Bureau* Court found that while the Fire District was a public entity "protected by sovereign immunity from suit for damages above $300,000 per person (plus the statutory adjustment)," the Fire District's purchase of liability coverage of up to $1,000,000 waived any limits of liability imposed by section 537.610 up to the coverage limit and effected "an absolute and complete waiver on all immunities" up to the $1,000,000 liability limit. *Id.* at 533.

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The present case is no different.[27] There is no question Newsome's wrongful termination claim fell within the purview of the Hiscox Policies, and that the Hiscox Policies constituted "*an absolute and complete waiver of all immunities*" up to the liability coverage of $3,000,000 under the 2010-2011 policy and $2,000,000 under the 2011-2012 policy. Therefore, consistent with *Farm Bureau*, KCMSD waived all claims of immunity up to $3,000,000 or $2,000,000 in the respective policy years, and any other reading of the Hiscox Policies or interpretation of section 537.610 would be contrary to Missouri law and the purpose of section 537.610. Further, the trial court confirmed this, finding that KCMSD waived sovereign immunity for the entire amount of the verdict by "purchasing liability insurance with a limit of $2,000,000." (L.F. 1218.)[28]

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[27] While KCMSD cites to *Richardson v. State Highway & Transportation Commission*, 863 S.W.2d 876 (Mo. banc. 1993), its reliance on *Richardson* is misplaced, as that case addressed a statutory reduction under section 537.610.2, and *not* a sovereign immunity waiver through *the purchase of liability insurance* under section 537.610.1 as here. Therefore, *Richardson* is distinguishable and *Farm Bureau*'s interpretation of section 537.610.1 is instructive.

[28] Moreover, public policy also supports a reading of section 537.610 that is consistent with *Farm Bureau*. In Illinois, like Missouri, the purchase of liability insurance by a governmental entity waives immunity "insofar as they are covered by liability insurance." *Wilhelm v. Baxter*, 436 F. Supp. 1322, 1327 (S.D. Ill. 1977). The *Wilhelm* Court noted that "public policy dictates that where premiums are paid for protection out of public

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The trial court did not abuse its discretion or misapply the law in denying KCMSD's motion to remit the judgment and Point V must be denied.

D. Point VI must be denied as the Retention included in the Hiscox Policy does not preserve the District's defense of Sovereign Immunity.

In Point VI, KCMSD contends that the $250,000 Retention contained in the 2011-12 Hiscox Policy[29] preserved its defense of sovereign immunity up to that amount and the trial court erred in failing to remit the verdict. KCMSD points to language in the Policy stating that the Retention amount is "to be borne by the insureds and shall remain uninsured," and argues that it effectively had no insurance for the first $250,000 of the judgment, and therefore did not waive sovereign immunity for that amount. (L.F. 1068.)

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funds . . . , the insurance company should be foreclosed, estopped or prevented from asserting a defense [of sovereign immunity]." *Id.* at 1328. "If a public body is immune for [torts] and it sees fit to purchase liability insurance using public funds and an insurance carrier sees fit to accept such public funds . . . , it would then appear that *the insurance carrier should not be able to hide behind the curtain of immunity*." *Id.* (emphasis added); *see also, e.g.*, *Jackson v. Kansas City*, 235 Kan. 278, 320 (Kan. 1984) ("The $500,000.00 limit of liability . . . is, of course, inapplicable where insurance has been purchased providing greater coverage K.S.A. 1983 Supp. 75-6111.").

[29] Under the 2010-11 Hiscox Policy, which the trial court found applied, the Retention amount is $175,000.

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However, KCMSD has not cited to any law that supports its position in Point VI that the $250,000 Retention preserves its defense of sovereign immunity, and has offered no explanation as to why relevant authority is not available. "Where an appellant neither cites relevant authority in support of its position, nor offers an explanation for why none is available, an appellate court is justified in considering the point abandoned." *Schubert v. Trailmobile Trailer, L.L.C.*, 111 S.W.3d 897, 906 (Mo. App. 2003). Therefore, this Court should consider Point VI abandoned by KCMSD.[30]

While Newsome contends KCMSD has waived Point VI altogether, even if considered, KCMSD's argument is tenuous at best and inconsistent with the purpose and language of section 537.610.1 and *Farm Bureau*. 347 S.W.3d at 533. Deductibles and retentions are exceedingly common place and are present in essentially every insurance policy that is written; however, Newsome has found no Missouri case law stating that a governmental entity retains sovereign immunity up to the amount of the deductible or retention. If sovereign immunity was retained under section 537.610 up to the amount of the retention or deductible, this issue presumably would have been addressed previously. However, no Missouri cases so hold.

The law regarding waiver of sovereign immunity due to the purchase of liability insurance is consistent in Missouri: the extent of an insurance waiver under section 537.610.1 is "expressly dictated, and limited, by the terms of the insurance policy."

[30] Moreover as discussed above, this argument was waived as KCMSD raised it for the first time on its motion for JNOV, but failed to make in its Motion for Directed Verdict.

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Topps v. City of Country Club Hills, 272 S.W.3d 409, 415 (Mo. App. 2008). The terms of the Hiscox Policies contained absolutely *no* preservation of sovereign immunity for any part of the policy, including the self-insured retention. (L.F. 1038-93.) Had Hiscox or KCMSD intended to preserve sovereign immunity for the amount of the self-insured retention, such language could have and should have been added to the Policies. Because sovereign immunity was not preserved under either policy for any portion of the self-insured retention or coverage amount, this effected "*an absolute and complete waiver of all immunities*" and KCMSD therefore waived any contention of sovereign immunity for the self-insured retention. *Farm Bureau*, 347 S.W.3d at 533. The Hiscox Policies had liability coverage of up to $3,000,000 and $2,000,000 respectively. (L.F. 1038.) Therefore, regardless of any limits or Retention, KCMSD has waived all claims of immunity up to $3,000,000 or $2,000,000 depending on the policy year, consistent with *Farm Bureau*; any other reading of the Hiscox Policies or interpretation of "Retention" would be contrary to Missouri law and the purpose of section 537.610.

i. Public policy dictates that a governmental entity waives sovereign immunity for the entire amount of liability insurance, regardless of any retention or deductible.

Furthermore, reading an insurance policy with a self-insured retention of $175,000 or $250,000 and a $3,000,000 or $2,000,000 limit of liability to maintain sovereign immunity for the amount of the retention is in contradiction with the plain language of section 537.610, which states sovereign immunity is waived to the *maximum* amount of such insurance or self-insurance, and the policy surrounding section 537.610. Allowing

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KCMSD to carve out a partial sovereign immunity waiver only for amounts greater than the $175,000 or $250,000 retention would essentially create a black hole of uncertainty for all claims. To determine whether the waiver would ultimately apply, a plaintiff might be required to pursue a claim through trial, and defendant to defend it, in order to determine if sovereign immunity was preserved or waived. This is a tenuous and illogical reading of section 537.610.1, unsupported by statute, public policy, or Missouri case law.

Moreover, this reading requires a leap in logic and analysis that cannot be made—if sovereign immunity were not waived for the first dollar of a claim, how could it theoretically be waived for claim amounts greater than $175,000? If there were no liability by a party and sovereign immunity were preserved for dollars one through 175,000, then how could there ever be any liability to pay dollars of loss for anything beyond those amounts? While it makes logical sense to cap or limit the liability waiver at the maximum amount of insurance coverage, there is no logical interpretation of a sovereign immunity waiver that would permit leaping over the first $175,000 in damages in order to get to a waiver of liability and damages beyond that amount.

ii. KCMSD waived any argument of sovereign immunity for the retention by failing to submit evidence of "defenses costs."

Assuming this Court entertains KCMSD's arguments regarding retention, the retention found in the Hiscox Policy covers all of KCMSD's costs and fees in defending this case, which would have been charged against KCMSD to determine the amount of

the retention that remained unused. Undoubtedly, KCMSD's costs and attorney's fees to defend this action were extremely high given the volume of discovery, the length of time leading up to trial, and the trial itself and this appeal. The amount of these costs would work to reduce or possibly eliminate the self-insured retention amount altogether. *See Schubert*, 111 S.W.3d at 906. The record, however, is devoid of any indication of what that amount is, since KCMSD never raised the retention argument prior to the jury's verdict, nor did it present any evidence of the amount of costs and fees it had spent against the retention, and therefore it has waived any claim that the retention preserves sovereign immunity. A party must present evidence in the record concerning the self-insured retention and how much has been spent on defense costs and fees, prior to a judgment being entered. *Id.* at 905-06 (finding that no evidence of costs and fees were presented regarding the self-insured retention, and therefore, no determination could be made as to the amount of the retention that had been used, which meant such an argument was waived). If KCMSD wanted to claim the self-insured retention impacted sovereign immunity, this defense presented a set of fact questions that needed discovery and development at trial to support its position, and it was simply too late to do so after the jury's verdict. KCMSD therefore waived or abandoned arguments about the self-insured retention by failing to present any evidence of defense costs or fees prior to the judgment.

iii. The Self-Insured Retention in the Hiscox Policy constitutes a "self-insurance plan" that did not preserve sovereign immunity.

The $175,000 (or $250,000) self-insured retention amount under the Hiscox

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Policy, which was approved by the Board, was an adoption of a "self-insurance plan" for that amount for the types of claims covered under the Policy. Under section 537.610, sovereign immunity is waived to the maximum amount covered as provided in any *self-insurance plan*. *See also, e.g.*, *Farm Bureau*, 347 S.W.3d at 532-33. At the time of adopting the Hiscox Policies, the School Board approved the $175,000 and $250,000 retention amounts and agreed to adopt a policy wherein the retention was "self-insured," as outlined in the Policy. Here, like with the Policies themselves, the adopted self-insurance plan did *not* contain the language needed to preserve sovereign immunity and therefore waived it. *Langley v. Curators of the Univ. of Mo.*, 73 S.W.3d 808, 811-12 (Mo. App. 2002). To the extent KCMSD claims to maintain a defense of sovereign immunity for the amount of the retention, such a defense was waived by the Board approved purchase of policies that did not expressly preserve the defense of sovereign immunity.

Moreover, if the retention is found to be a self-insured plan, any potential statutory cap would not apply to reduce the jury verdict as the self-insured plan of the District would be treated as a primary policy and the Hiscox Policy after the retention would be excess insurance, and both would apply to cover Newsome's claims. Where a claim against a governmental entity is covered by multiple insurance policies, *each policy may provide coverage*. *See* § 537.610. Because each policy provides coverage for Newsome's claims, the $403,139 claimed statutory cap amount would apply separately to each policy, and up to the maximum amount of coverage. The District's self-insured plan would cover the first $175,000 (or $250,000), and the Hiscox Policy, assuming *arguendo*

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the statutory cap even applies, would cover anything over $175,000 (or $250,000) up to $403,139. Therefore, the entire $500,000 would be covered even if the statutory cap applies.

CONCLUSION

For the foregoing reasons, the Court should affirm the jury's $500,000 verdict in favor of Newsome on his claim of wrongful discharge in violation of public policy and the trial court's judgement upholding the verdict, finding KCMSD waived sovereign immunity, and denying KCMSD's Motion for JNOV as to Count II or, in the Alternative, Motion for New Trial and Alternative Motion for Remittitur.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief was prepared in compliance with Mo. S. Ct. Rule 84.06, and that total number of words, excluding the caption, signature line, this certificate, and appendix, is 16,814 words.

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CERTIFICATE OF SERVICE

I hereby certify that the original of the above was signed by the undersigned and that on June 14, 2016, I electronically filed the foregoing with the clerk of the court by using the Missouri eFiling system which will send a notice of electronic filing to the following:

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