IN THE SUPREME COURT OF MISSOURI

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

SUBSTITUTE REPLY BRIEF OF APPELLANT KANSAS CITY, MISSOURI SCHOOL DISTRICT

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

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The plaintiff's claim is refuted by the clear holdings of this Court setting forth that a whistleblower case requires a showing of an actual violation of law and public policy, not a mere "reasonable belief." The undisputed facts show that the only superior to whom the plaintiff reported his beliefs was Dr. Lee-Gwin, who is alleged to be a wrongdoer. These facts doom the plaintiff's whistleblower claim and render his verdict directing instruction a prejudicial misstatement of the law.

As to the sovereign immunity statute, the plaintiff explicitly requests the Court to ignore the plain statutory language. The judgment in this case is contrary to the statute in that the plaintiff's claim is barred entirely, or at least far in excess of the statutory limits.

The Court should reverse the denial of JNOV. In the alternative, the Court should remand for a new trial under proper instructions or reduce the judgment in conformity with the law.

I. The plaintiff failed to make a submissible case.

Submission of the plaintiff's claim to the jury was improper because the claim was unsupported by substantial evidence. As this Court has explained, an employee at will generally may be terminated for any reason or for no reason. *Fleshner v. Pepose Vision Institute, P.C.,* 304 S.W.3d 81, 91 (Mo. banc 2010). The plaintiff attempts to fit himself into a very narrow public-policy exception to this rule: "An at-will employee may not be terminated (1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant

to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities." *Id.* at 92.

A wrongful discharge action must be based on a constitutional provision, a statute, a regulation based on a statute, or a rule promulgated by a governmental body. *Margiotta v. Christian Hosp.,* 315 S.W.3d 342, 345 (Mo. banc 2010). Absent such explicit authority, the wrongful discharge action fails as a matter of law. *Id.*

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

A. This Court's cases set forth the applicable law.

Remarkably, the plaintiff claims that he was not required to meet the standards set forth in this Court's recent decisions. Instead, he says the Court should follow two cases from the Eastern District of the Missouri Court of Appeals that pre-dated *Fleshner, Margiotta,* and *Farrow.*

In reliance on *Dunn v. Enterprise Rent-A-Car,* 170 S.W.3d 1 (Mo. App. 2005), and *Kelly v. Bass Pro Outdoor World, LLC,* 245 S.W.3d 841 (Mo. App. 2007), the plaintiff declares that he "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." Respondent's Substitute Brief at 24 (italics in original).

The plaintiff attempts to miscast the School District's argument by asserting: "Without acknowledging either *Dunn* or *Kelly*, KCMSD essentially argues that *Margiotta* somehow abrogated the 'reasonable belief' standard." Respondent's Substitute Brief at 27. The School District argues nothing of the kind. The School District merely relies on authoritative and more recent decisions of this Court rather than prior and contrary decisions of the Eastern District.

The plaintiff's argument ignores that this Court recognized a whistleblower cause of action for the very first time in *Fleshner,* in which the Court stated: "This Court has never explicitly recognized the public-policy exception." *Fleshner,* 304 S.W.3d at 91. Thus, the only relevant cases are those that follow the recognition of the cause of action in *Fleshner,* including *Margiotta* and *Farrow.*

Margiotta explicitly resolves this "reasonable belief" argument against the plaintiff. *Margiotta* holds that a plaintiff must demonstrate that the employer's conduct actually violated the public policy in question -- complaints about conduct the plaintiff "merely believes to be violations of the law or public policy" will not support a wrongful discharge claim. *Margiotta,* 315 S.W.3d at 348. "Belief" is not enough.

Even the Eastern District does not follow *Dunn* or *Kelly* anymore. In its substitute brief in this Court, the School District cited a recent opinion of the Eastern District

explaining the law in this area. *See Jones v. Galaxy 1 Marketing, Inc.,* 478 S.W.3d 556, 564 (Mo. App. 2015). The employee in *Jones* claimed that he had been discharged in violation of public policy for refusing to connect potential cable customers in an allegedly misleading way.

In *Jones*, the Eastern District relied on *Fleshner* and *Margiotta* (and not *Dunn* or *Kelly*) in stating that an an actual violation of law or public policy is required to maintain a whistleblower action: "When reviewing an employee's termination under the lens of the public-policy exception to the employer's right to terminate an at-will employee, we must determine if there exists a clear and focused public policy in a constitutional provision, a statute, regulation promulgated pursuant to statute, or a rule created by a governmental body." *Id.* at 565 (citing *Fleshner*).

The *Jones* court relied on *Margiotta* in setting forth that the law or public policy at issue must be clear: "To prevail in his claim, Margiotta was required to show that the conduct about which he was whistleblowing violated the law or a clear mandate of public policy. Similarly, Jones must demonstrate that the conduct in which he refused to participate would have violated either the law or a clear mandate of public policy. Regardless of the category argued by Jones, the public-policy exception to at-will employment does not apply if the statute or regulation that serves as the source of the public policy is too general or vague." *Id.* at 566 (discussing *Margiotta*).

Oddly, though *Jones* was cited in the School District's substitute brief, the plaintiff does not mention *Jones* in his brief before this Court.

Other cases of the Court of Appeals are to the same effect as *Jones*. For example, in *Hedrick v. Jay Wolfe Imports I, LLC,* 404 S.W.3d 454, 459 (Mo. App. 2013), the Western District relied on *Fleshner* and *Margiotta* (and not *Dunn* or *Kelly*) in stating that an employee claiming to be a whistleblower needs to identify a clear mandate of public policy in the law in order for his petition to state a claim upon which relief may be granted. The public policy "must be found in a constitutional provision, a statute, regulation promulgated pursuant to statute, or a rule created by a governmental body." *Id.* (quoting *Fleshner*). "Until the legislature or other governmental body enacts a clear statement of public policy in a statute, regulation or a code of professional ethics, there is not a 'clear mandate of public policy' in existence that Hedrick can be said to have been following which resulted in his termination. A vague or general statute is insufficient and absent explicit authority, the cause of action must fail as a matter of law." *Id.* (quoting *Margiotta*).

The plaintiff requests the Court to adopt a standard that is no standard at all. If a plaintiff is not required to point to a law or public policy that has been violated, but instead may make a submissible case by declaring that his or her suspicions were "reasonable," the very narrow public-policy exception intended by the Court would be subject to the "varying personal opinions and whims" of judges and juries. *See Margiotta,* 315 S.W.3d at 346. *Dunn* and *Kelly* do not express the public policy of Missouri as set forth in this Court's cases and recognized by more recent cases of the Court of Appeals, and this Court should not follow them.

B. There was no evidence of a violation of public policy.

Since he disclaims any need to show violations of law or public policy, it is no surprise that the plaintiff fails to point to evidence of any such violations.

The plaintiff does not argue that any public money was ever spent by the School District in violation of any law or public policy. Rather, the plaintiff advances the novel argument that it was somehow a violation of law or public policy for anyone to ***request*** payments to be made. According to this theory, his reporting a ***request***, or his refusal to comply with a ***request***, somehow makes him a whistleblower.

Here is the plaintiff's own summary of his purported whistleblowing: "Newsome testified that he refused to approve a payment to independent consultant Ron Epps, which was requested to be pushed through by Dr. Covington." Respondent's Substitute Brief at 16. "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." *Id.* at 17. Thus, according to the plaintiff, he complained only that certain payments had been requested, not that any payments were ever made.

As to the contract with Mr. Epps, the plaintiff does not dispute that he had a concern about issuing purchase orders requesting payment for additional work, so he brought the matter to the attention of Dr. Lee-Gwin: "I brought to her attention the terms of the agreement, and we talked about it. ***She agreed with me, and she took the agreement, and that's the last that I really heard about it.***" Tr. at 611 (emphasis added). The plaintiff testified that he did not know whether Mr. Epps was ever paid in violation of any law or public policy. Tr. at 697.

Even now, in his brief before this Court, the plaintiff does not identify any law or public policy he claimed was violated by a ***request*** for payment that was never honored. The plaintiff does not deny his testimony that Dr. Lee-Gwin never asked him to do anything he felt was against any policy (other than the purchase of the Ford Escapes): "Dr. Gwin I can't recall asked me to do anything that was against board policy with the exception of the vehicles." Tr. at 673. The evidence as to Mr. Epps was inadequate to make a submissible claim.

The same is true as to the transaction with the Ford Escapes. In his brief, the plaintiff makes no response to the fact that his own evidence, Plaintiff's Exhibit 35, shows that the purchase request for the Ford Escapes was approved by the school board to substitute for the purchase of the Ford Explorers. L.F. at 913-915. Dr. Lee-Gwin testified that amended purchase orders were routinely taken back to the school board for approval. The plaintiff does not point to any law or public policy that could be violated by a ***request*** for the purchase of Ford Escapes that is properly approved before any payment. This transaction shows no illegality or violation of public policy.

According to the plaintiff's evidence, in these two instances, the purchasing office received requests for payment. The plaintiff does not point to any provision of law or any public policy that would forbid the making of a request. According to the plaintiff's evidence, Mr. Epps was never paid, and the Ford Escapes were purchased after board approval. None of these facts hint at any illegality or violation of public policy.

Merely thinking a practice is improper is no basis for a whistleblower cause of action. In *Hedrick v. Jay Wolfe Imports I, LLC,* 404 S.W.3d 454 (Mo. App. 2013), an

employee at a car dealership was discharged after a member of his household bought a car from a competitor without giving the employer a chance to match the competitor's price. The employee claimed that he was terminated "for following what he asserts to be Missouri's public policy of encouraging its citizens to freely conduct business." *Id.* at 458. The employee stated that various statutes, though they did not explicitly prohibit the termination at issue, "form a statutory scheme that evidences a clear public policy to encourage citizens to freely conduct business and, alternatively, to discourage those that would inhibit a citizen's right to freely conduct business." *Id.* at 459.

The *Hedrick* court rejected the employee's claim: "None of the statutory authority cited by Hedrick represents a clear mandate of public policy that clearly encourages the act of buying a vehicle at the best price one could find, regardless of the consequences that decision brings. Hedrick can point to no clear statement of a public policy for which he was terminated for following. Public policy is not to be determined by the varying personal opinions and whims of judges or courts . . . as to what they themselves believe to be the demands or interests of the public." *Id.* at 459-460 (quoting *Fleshner*) (internal quotation marks omitted).

Similarly, in this case, the plaintiff has pointed to no statute or other source of public policy that would forbid a ***request*** for an expenditure of public funds. A wrongful discharge action must be based on a constitutional provision, a statute, a regulation based on a statute, or a rule promulgated by a governmental body. *Margiotta,* 315 S.W.3d at 345 (Mo. banc 2010). Absent such explicit authority, the wrongful discharge action fails as a matter of law. *Id; see Farrow,* 407 S.W.3d at 595-596. There is no such authority

barring a request for payment that is either refused (as with the Epps request) or granted after board approval (as with the Ford Escapes request).

Put another way, in the plaintiff's preferred terms, how could there be a "reasonable belief" of a violation in the absence of any provision forbidding the requests?

The plaintiff failed to make a submissible case because there was no evidence of a violation of public policy in connection with the requests at issue.

C. The plaintiff was not a whistleblower.

In addition, the plaintiff never blew the whistle on any alleged violations relating to purchasing requests. The plaintiff failed to make a submissible case for wrongful discharge under a whistleblower theory because, according to his own testimony, he never reported any alleged wrongdoing to anyone other than the alleged wrongdoer. The evidence does not support the plaintiff's claim for relief. *See Fleshner,* 304 S.W.3d at 97 n. 13, *Jones,* 478 S.W.3d at 564.

Even now, the plaintiff points to no evidence that he "blew the whistle" to public authorities or superiors (other than those involved) regarding the request to purchase the Ford Escapes. According to the plaintiff, he spoke to Dr. Lee-Gwin, Mr. Rounds, and Mr. Mobley about his objections and then followed Dr. Lee-Gwin's instructions to prepare the revised purchase order for the Escapes, attaching his note about his reservations about the purchase request. Exhibit 35.

The plaintiff testified that he never made any complaint about these requests to the superintendent, or the school board, or any other authority. Tr. at 654-659, 697. Dr. Covington (the superintendent) did not see the memorandum (Exhibit 35) setting forth

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

The plaintiff claims that one can be a whistleblower merely by complaining to an alleged wrongdoer. This is completely wrong. Internal reporting to superiors of illegal actions by other employees ***can*** constitute protected activity. *See Fleshner,* 304 S.W.3d at 97 n. 13. "However, a report of wrongdoing to the wrongdoer is insufficient to invoke the whistleblowing public policy exception." *Drummond v. Land Learning Foundation,* 358 S.W.3d 167, 171 (Mo. App. 2011); *see Fleshner,* 304 S.W.3d at 97 n. 13. Reporting to the alleged wrongdoer does not expose the wrongdoer or the alleged wrongdoing and, thus, does not further public policy. *Drummond,* 358 S.W.3d at 171.

Recently, the Western District reaffirmed this settled issue of Missouri law: "Missouri common law wrongful discharge whistleblower cases do require disclosures to persons other than the wrongdoers." *See Hudson v. O'Brien,* 449 S.W.3d 87, 91 (Mo. App. 2014).

Oddly, the plaintiff attempts to rely on *Faust v. Ryder Commercial Leasing & Services,* 954 S.W.2d 383 (Mo. App. 1997), abrogated on other grounds by *Fleshner,* 304 S.W.3d at 93. *Faust* makes it clear that the plaintiff's claims must fail. *Faust* squarely rejected the plaintiff's contention that a successful whistleblower can be one who complains to a wrongdoer: "Here, for purposes of the public policy exception, we find that the appellant's reporting to King his suspicions as to King's and Farris' criminal wrongdoing did not constitute reporting or whistleblowing. We base this on the fact that

appellant's reporting to King appellant's suspicions did not 'expose' King and Farris or their criminal activity. . . . Or in other words, by definition, by reporting to the wrongdoer, there is no blowing of the proverbial whistle and the public policy mandate goes wanting." *Faust,* 954 S.W.2d at 391. *Faust* is death to the plaintiff's claim.

Jones v. Galaxy 1 Marketing, Inc., 478 S.W.3d 556 (Mo. App. 2015), is squarely on point. Relying on *Fleshner, Drumond,* and *Faust,* the court in *Jones* held that one is not a whistleblower for complaining to an alleged participant in alleged wrongdoing. The employee in *Jones* claimed he he was fired after complaining to his supervisors about allegedly fraudulent practices. *Id.* at 564. However, the court noted that the employee "did not express his concerns about the fraudulent nature of the conduct required of him to any one at Galaxy other than the immediate supervisors." *Id.* The court noted that these facts would not support a whistleblowing claim: "Complaining of wrongdoing only to the wrongdoers does not fall within the public-policy exception because such complaint does not expose the wrongdoers." *Id.* The whistleblower public-policy exception protects only employees who appropriately report to supervisors or other third parties. *Id.* (citing *Fleshner*).

The employee in *Jones* "blew the whistle" on the alleged fraudulent activity only to the two supervisors who instructed him to engage in it, and the court held this did not make him a whistleblower: "Jones's complaints to these two individuals did not expose Galaxy in a way that could remedy the wrong because Jones complained only to the wrongdoers. Because Jones complained to only the wrongdoers, Missouri law precludes

him from invoking the whistleblower protection of the public-policy exception to at-will employment." *Id.* at 565 (citing *Drummond* and *Faust*).

In his substitute brief before this Court, the plaintiff does not address *Jones*, which is fully consistent with this Court's cases and directly contrary to the plaintiff's argument.

There was no wrongdoing in connection with the purchasing matters raised by the plaintiff. If there were any wrongdoing, the only wrongdoer was was Dr. Lee-Gwin. She was the chief finance officer of the School District. Tr. at 512-513. Dr. Lee-Gwin made the plaintiff the purchasing manager. Tr. at 513. Dr. Lee-Gwin set forth procurement procedures. Tr. at 520-521; Exhibit 20. According to the plaintiff, Dr. Lee-Gwin was the person who approved or disapproved the purchasing requests at issue and the person to whom he raised his concerns. If there were any violations of "state purchasing law" or School District policy, as the plaintiff suggests, then Dr. Lee-Gwin was the only one who committed the alleged violations.

The plaintiff's entire claim is 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 that he "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." Respondent's Substitute Brief at 6. Under the settled law, a report to Dr. Lee-Gwin -- the only alleged wrongdoer -- is not whistleblowing. *See Fleshner; Jones; Drummond*; *Hudson; Faust.*

II. Instruction 15 misstated the law.

The plaintiff's response to the School District's Point II is very odd. The law requires that, in order to prevail on a claim of whistleblowing, a plaintiff must show that he or she reported serious misconduct that constitutes a violation of the law or well established and clearly mandated public policy. *Margiotta v. Christian Hosp.,* 315 S.W.3d 342, 347 (Mo. banc 2010).

Under Instruction No. 15, as requested by the plaintiff, the jury was required to return a verdict in favor of the plaintiff if it found either of these facts: "Plaintiff refused to approve a payment to Ron Epps that he ***reasonably believed*** would violate School District contracting law, or . . . Plaintiff reported to a superior that he ***reasonably believed*** the purchase of Ford Escapes would violate School District contracting law." L.F. at 744 (emphasis added). This instruction was error because it clearly misstated the law requiring actual wrongdoing or an actual violation. *See Fleshner,* 304 S.W.3d at 92; *Margiotta,* 315 S.W.3d at 347.

Relying on the *Dunn* and *Kelly* cases mentioned above with respect to Point I, the plaintiff claims that he was not required to show any actual violation of law or public policy. As noted, the law is set forth by this Court's opinions in *Fleshner, Margiotta,* and *Farrow* as well as the recent decisions of the Court of Appeals in *Jones* and *Hedrick.*

Submission of Instruction No. 15 in violation of the law certainly prejudiced the School District in that the plaintiff never presented evidence of any violation, and the jury was not required to find one. Where there is deviation from an applicable MAI instruction that does not need modification, "***prejudicial error will be presumed unless it***

is made perfectly clear by the proponent of the instruction that no prejudice could have resulted from such deviation." *Thomas v. McKeever's Enterprises Inc.,* 388 S.W.3d 206, 215-216 (Mo. App. 2012) (emphasis added). The plaintiff's argument to the contrary should be rejected.

III. Instruction 15 was a roving commission.

The plaintiff is mistaken in claiming waiver as to the vagueness of Instruction 15. The School District's counsel specifically objected that she was "concerned about the fact that the evidence has not come in with any specific evidence showing violations of law or constitution, you know, any statute, and that I believe it could be a roving commission to the jury." Tr. at 962. Counsel continued: "I think the case law shows that it is required that the plaintiff identify specific statutes or laws that he claims that he reported were violated or that he refused to violate, and that that led to his discharge. And in this case it's just been very vague, just that he has claimed only that just law in general, and we haven't had any evidence showing exactly what was violated." Tr. at 962-963.

The deficiency of the instruction is shown by the plaintiff's own brief in this Court. The plaintiff still has never specified what was meant by the phrase "School District contracting law." The jury never received evidence as to what "law" the plaintiff claimed was violated as to Mr. Epps or the purchase of the Ford Escapes. Instruction 15 provided the jury with no guidance as to any law or established public policy that was allegedly violated. The jury was free to decide for itself what public policy might be violated by the alleged conduct of the School District.

IV. The plaintiff's claim is barred by sovereign immunity.

It is undisputed that the School District's insurer "has denied coverage under [the insurance policy] for the claims arising from this lawsuit based on sovereign immunity and the language of [the insurance policy]." L.F. at 261. The plaintiff's argument on sovereign immunity, which depends entirely on the theory that his claim is covered by insurance, must be rejected. Point IV should be granted because the plaintiff's claim is barred by sovereign immunity.

As shown by the plaintiff's own cited case, the standard of review is de novo. *See Ogden v. Iowa Tribe,* 250 S.W.3d 822, 824 (Mo. App. 2008) ("Whether there is sovereign immunity is a question of law, which we review *de novo*.").

The trial court's ruling on sovereign immunity was based on stipulated and undisputed facts. L.F. at 651; Tr. at 51-52. The plaintiff does not point to any disputed issue of fact resolved by the trial court in ruling on sovereign immunity. Thus, review is de novo. *See Kohrs v. Family Support Div.,* 407 S.W.3d 85, 87 (Mo. App. 2013).

Similarly, the interpretation of an insurance policy is a question of law entitled to de novo review. *Seeck v. Geico Gen. Ins. Co.,* 212 S.W.3d 129, 132 (Mo. banc 2007).

These are the undisputed facts on the issue of sovereign immunity:

The School District was covered by one Hiscox policy from July 1, 2010, through July 1, 2011. L.F. at 148. The School District was covered by another Hiscox policy from July 1, 2011, through July 1, 2012. L.F. at 204.

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

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

November 9, 2011 (morning): The School District and Hiscox agree to the language of Endorsement 13. L.F. at 452. Endorsement 13 provides that the insurer "shall not be liable to make any payment for Loss in connection with any Claim made against any Insured . . . that is barred by the defense of sovereign immunity as provided for in Section 537.600, et seq., of the Revised Statutes of Missouri." Endorsement 13 also states "nothing contained in this Policy shall constitute a waiver of the defense of sovereign immunity." Endorsement 13 states it is effective **July 1, 2011**. L.F. at 262.

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

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

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

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

A. The 2010-2011 policy does not apply to this case.

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

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

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

L.F. at 195, 229.

The plaintiff mistakenly argues that his signing the release "was a written demand for monetary relief within the ordinary meaning of that phrase" so that the School District knew on June 27, 2011, that the plaintiff had claims under the 2010-11 policy. Respondent's Substitute Brief at 40.

This argument ignores the plain language of the release, ***which the School District presented to the plaintiff***. *See* Respondent's Substitute Brief at 1-2, 40. The release did

not state that the plaintiff had any claims against the District. Rather, the release merely stated that the plaintiff "hereby executes this General Release and Waiver of Claims, resolving any and all ***claims which may exist*** as they relate to Mr. Newsome's employment with the Kansas City, Missouri School District." L.F. at 289 (emphasis added). The document provided that the plaintiff would release the District "from any and all liability, actions, claims, grievances, demands, or lawsuits ***which Mr. Newsome may have had, or presently has, foreseen or unforeseen, known or unknown,*** including but not limited to, those in connection with or arising out of his employment with the School District and the termination of such employment." L.F. at 289 (emphasis added).

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

B. The plaintiff's claim is barred by the 2011-2012 policy.

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

The undisputed date of the School District's "receipt" of the notice of charges was November 22, 1011. L.F. at 438, 440. The undisputed date of the EEOC's "filing" of the notice was November 18, 2011. L.F. at 438, 440. Both dates are after November 9, 2011

(when the insurer and the insured agreed to Endorsement 13). L.F. at 452. Both dates are after November 11, 2011 (when the insurer processed Endorsement 13). L.F. at 262. Both dates are after July 1, 2011 (the effective date of Endorsement 13). L.F. at 262. The plaintiff's claim that the notice predated Endorsement 13 is contrary to the facts.

In arguing otherwise, the plaintiff attempts to convert his ***charge*** of discrimination into a ***notice*** of charge of discrimination, arguing: "Newsome's filing of a Charge clearly qualified as filing a 'notice of charges' with the EEOC, and therefore Newsome made a 'claim' as of November 9, 2011, as that term is defined and understood in the 2011-12 Policy, and the trial court agreed." Respondent's Substitute Brief at 42.

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

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

Thus, the record refutes the plaintiff's claim that any "receipt or filing of a notice of charges" occurred before November 9, 2011 (when the insurer and the insured agreed to Endorsement 13), or November 11, 2011 (when the insurer processed Endorsement 13), or July 1, 2011 (the effective date of Endorsement 13).

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

C. Endorsement 13 applies to the plaintiff's claim.

Contrary to the plaintiff's assumption, the parties to an insurance policy -- the insurer and the insured -- are entitled to determine when an endorsement becomes effective. *See Frost v. Liberty Mut. Ins. Co.,* 828 S.W.2d 915, 918-19 (Mo. App. 1992); *Crown Ctr. Redevelopment Corp. v. Occidental Fire & Cas. Co.,* 716 S.W.2d 348, 359-60 (Mo. App. 1986). The parties agreed on November 9, 2011, that Endorsement 13 would be effective as of July 1, 2011. The Court should reject the plaintiff's claim that this endorsement was ineffective.

The plaintiff is mistaken in declaring that Endorsement 13 is ineffective because it required a signature or approval by the school board. According to this "logic," neither

Hiscox policy would be enforceable, since neither is signed by any representative of the School District, but rather only by the insurer. L.F. at 149, 205. Since the plaintiff's entire action is (inaccurately) premised on the idea of insurance coverage, one cannot imagine that the plaintiff truly intends to stand on this argument.

The plaintiff refers to section 432.070, RSMo, which is the statute of frauds applicable to school district contracts. Section 432.070 was enacted to preclude parties who have performed services for a governmental entity without a contract from recovering the value of those services based upon an implied contract. *Investors Title Co., Inc. v. Hammonds,* 217 S.W.3d 288, 294 (Mo. banc 2007). The purpose of section 432.070 is to protect governmental entities, rather than parties who might seek to impose obligations upon governmental entities. *Gill Const., Inc. v. 18th & Vine Authority,* 157 S.W.3d 699, 709 (Mo. App. 2004); *Public Water Supply Dist. No.16 v. City of Buckner,* 44 S.W.3d 860 (Mo. App. 2001). No one asserts that the 2011-2012 policy or Endorsement 13 constitute an implied contract, and no one seeks to impose a financial obligation on the School District based on the policy or the endorsement.

The plaintiff repeatedly declares that Endorsement 13 was not approved by a vote of the school board, citing "L.F. 1103-04." *See* Respondent's Substitute Brief at 2, 47. The cited portion of the record, however, is merely deposition testimony reinforcing that there was ***no additional premium charged for Endorsement 13***. The plaintiff bears the burden of proof in claiming a waiver of sovereign immunity. *Randel v. City of Kansas City,* 467 S.W.3d 383 (Mo. App. 2015). The plaintiff has not carried his burden of showing Endorsement 13 to be invalid.

The plaintiff seeks to rely on *Behr v. Blue Cross Hosp. Service, Inc.,* 715 S.W.2d 251 (Mo. banc 1986), involving the termination of group health coverage. *Behr* did not involve a claims-made liability policy, but rather a health policy in the particular context of maternity coverage. *Id.* at 255. *Behr* has nothing to say about the issues in this appeal.

O'Hare v. Pursell, 329 S.W.2d 614 (Mo. 1959), is similarly irrelevant. *O'Hare* involved no issue as to the applicability of an endorsement or the rights of a claimant; the case was between insureds and their reinsurer, and the issue was whether the reinsurer could cancel a policy after the insured had obtained a vested right to coverage. *Id.* at 622.

In two footnotes, the plaintiff asserts that the School District somehow admitted waiver of sovereign immunity as to this plaintiff in two other actions. *See* Respondent's Substitute Brief at 41 n. 22, 43 n. 23. This is nonsense. As the plaintiff's own cited case makes clear, an admission in one case "concedes ***for the purposes of that particular trial*** the truth of some alleged fact." *Mitchell Engineering Co. v. Summit Realty Co., Inc.,* 647 S.W.2d 130, 140 (Mo. App. 1982) (emphasis added). The District never admitted coverage of the plaintiff's claims in this action or in any action involving other claimants.

V & VI. Alternatively, the trial court should have ordered a remittitur.

As noted, the Court should reverse the judgment outright or order a new trial. In the alternative, the amount of the judgment is contrary to the law and should be reduced.

The issue raised in Points V and VI is whether the trial court properly interpreted and applied section 537.610, RSMo, which provides the limit of liability of public entities on claims as to which sovereign immunity has been waived. This issue is reviewed de novo. *Hudson v. O'Brien,* 449 S.W.3d 87, 91 (Mo. App. 2014).

The plaintiff's absurd waiver argument is that a defendant must somehow preserve the issue of remittitur in a motion for directed verdict, before a case is submitted, before there is a verdict, and before the amount of a verdict can be known. The plaintiff's two cited cases say nothing of the kind. *See Howard v. City of Kansas City,* 332 S.W.3d 772 (Mo. banc 2011); *Bailey v. Hawthorn Bank,* 382 S.W.3d 84 (Mo. App. 2012). Remittitur does not address the submissibility of the case, but rather the amount of the verdict.

The plaintiff has cited no cases directly addressing the issues in Point V, and in fairness it does not appear that there any reported decisions explicitly ruling on whether a court can properly enter a judgment against a governmental entity in excess of the statutory cap. It is clear, however, that section 537.610, RSMo, provides the limit of liability of public entities on claims as to which sovereign immunity has been waived. Section 537.610.1 is clear in stating that "no amount in excess of the [statutory] limits shall be awarded or settled upon." The plaintiff does not dispute that the current statutory limit is $403,139. *See* http://insurance.mo.gov/industry/sovimmunity.php.

The plaintiff does not dispute that statutory provisions that waive sovereign immunity are to be strictly construed. *Ohio v. Mo. State Treasure,* 130 S.W.3d 742, 744 (Mo. App. 2004). This Court has recently held that it "cannot read into the statute an exception to sovereign immunity or imply waivers not explicitly created in the statute." *Metropolitan St. Louis Sewer Dist. v. City of Bellefontaine Neighbors,* 476 S.W.3d 913, 921 (Mo. banc 2016). Construed in any manner, the statute is clear, providing that "no amount in excess of" $403,139 could legally be "awarded or settled upon."

But then there is Point VI. Even the statutory limit of $403,139 is restricted by section 537.610.1, which makes it clear that sovereign immunity "is waived ***only to the maximum amount*** of and only for the purposes ***covered by such policy of insurance purchased pursuant to the provisions of this section*** . . . ." § 537.610.1 (emphasis added). The plaintiff's cited cases agree. *See Kunzie v. City of Olivette,* 184 S.W.3d 570, 574 (Mo. banc 2006) ("Section 537.610.1 . . . waives sovereign immunity 'only to the maximum amount of and only for the purposes covered by such policy of insurance' or self-insurance plan."); *Farm Bureau Town & Country Ins. Co. v. American Alternative Ins. Corp.,* 347 S.W.3d 525 (Mo. App. 2011) (holding a fire district "waived sovereign immunity to the limits of the AAIC policy.").

According to the plaintiff's cited case, a governmental entity's sovereign immunity is only waived under section 537.610 "for the specific purpose of and ***to the extent of its insurance coverage***." *Kunzie,* 184 S.W.3d 574 (emphasis added).

The School District did not waive the protection of sovereign immunity, but even under the plaintiff's mistaken theory, the School District's coverage extends only to

amounts over $250,000. It is undisputed that the School District's retention under the relevant insurance policy was $250,000. L.F. at 204. The plaintiff does not dispute that, by the terms of the insurance policy, the School District has no insurance for this amount, which is "to be borne by the insureds ***and shall remain uninsured***." L.F. at 225, 234 (emphasis added).

The plaintiff misapprehends the plain meaning of the statute in arguing that sovereign immunity is not "retained" up to the amount of the retention or deductible. Rather, as the statute and the plaintiff's own cases say, any waiver is only up to the amount covered by insurance. The plaintiff's argument that a governmental entity must pay from public funds in excess of the amount covered by insurance is directly contrary to his own cited authority and the clear intent of section 537.610.

The maximum amount that could be awarded against the School District would be the statutory limit ($403,139), less the amount that is not covered by insurance ($250,000) for a total limit of $153,139. If not set aside, the judgment should be reduced to $153,139.

CONCLUSION

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

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on July 15, 2016.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the total number of words contained in this brief is 7,501, excluding the cover, signature block and this certificate.

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