IN THE SUPREME COURT OF MISSOURI

SC95538

CARY NEWSOME,
Plaintiff/Respondent

v.

THE KANSAS CITY, MISSOURI SCHOOL DISTRICT,
Defendant/Appellant

BRIEF OF KANSAS CITY AND ST. LOUIS CHAPTERS OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF/RESPONDENT

ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
THE HONORABLE S. MARGENE BURNETT, CIRCUIT JUDGE

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STATEMENT OF INTEREST

Amicus Curiae, the Kansas City and St. Louis Chapters of the National Employment Lawyers' Association, are voluntary membership organizations of approximately 175 lawyers who represent employees in labor, employment and civil rights disputes in the state of Missouri. The Chapters are affiliates of the National Employment Lawyers' Association (NELA) which consists of more than 3,000 attorneys who represent individuals in controversies arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs in state and federal courts across the country regarding the proper interpretation and application of laws protecting the rights of workers to ensure that such laws are fully enforced and that the rights of workers are fully protected. Members of the Kansas City and St. Louis Chapters of NELA regularly represent plaintiffs in wrongful discharge in violation of public policy claims and other discrimination and retaliation cases brought under the Missouri Human Rights Act.

STATEMENT OF FACTS

Plaintiff Cary Newsome (Newsome) brought this lawsuit against his former employer, Defendant Kansas City, Missouri School District (KCMSD), alleging a tort claim for wrongful discharge in violation of public policy. Following a trial, the jury agreed with Newsome's claim that he was wrongfully discharged as a result of his reports to his immediate supervisor, the Chief Financial Officer, of violations of the provisions of Mo. Rev. Stat. § 432.070 applicable to all Missouri governmental entities including KCMSD. Amicus Curiae adopts the Statement of Facts of Newsome in this brief.

POINTS RELIED UPON[1]

I. POINT I SHOULD BE DENIED AS THE TRIAL COURT CORRECTLY DENIED KCMSD'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE NEWSOME PRESENTED SUBSTANTIAL EVIDENCE IN SUPPORT OF EACH ELEMENT OF HIS CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY, INCLUDING EVIDENCE ESTABLISHING NEWSOME AS A "WHISTLE BLOWER" WHO REPORTED HIS REASONABLE BELIEF OF VIOLATIONS OF CLEAR LAW TO HIS SUPERIORS.

Dunn v. Enterprise Rent-A-Car Co., 170 S.W.3d 1 (Mo. App. 2005)

Kelly v. Bass Pro Outdoor World, LLC, 245 S.W.3d 841 (Mo. App. 2007)

McCrainey v. Kansas City, Missouri School District, 337 S.W.3d 746 (Mo. App. 2011)

Barekman v. City of Republic, Missouri, 232 S.W.3d 675 (Mo. App. 2007)

II. POINT II SHOULD BE DENIED AS THE TRIAL COURT PROPERLY DENIED KCMSD'S MOTION FOR NEW TRIAL AS THE VERDICT DIRECTOR (INSTRUCTION 15) PROPERLY SUBMITTED THE LAW FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

[1] No other position is taken on any point not addressed in this brief.

INCLUDING THE PLAINTIFF'S REASONABLE BELIEF OF VIOLATION OF CONTRACTING LAW.

Dunn v. Enterprise Rent-A-Car Co., 170 S.W.3d 1 (Mo. App. 2005)

Kelly v. Bass Pro Outdoor World, LLC, 245 S.W.3d 841 (Mo. App. 2007)

III. POINT III SHOULD BE DENIED AS THE TRIAL COURT PROPERLY DENIED KCMSD'S MOTION FOR NEW TRIAL AS THE VERDICT DIRECTOR (INSTRUCTION 15) PROPERLY SUBMITTED THE LAW FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY AND DID NOT AMOUNT TO A ROVING COMMISSION.

Klotz v. St. Anthony's Med. Ctr., 311 S.W.3d 752 (Mo. banc 2010)

Dunn v. Enterprise Rent-A-Car Co., 170 S.W.3d 1 (Mo. App. 2005)

Reed v. Sale Memorial Hospital & Clinic, 698 S.W.2d 931 (Mo. App. 1985)

ARGUMENT

I. POINT I SHOULD BE DENIED AS THE TRIAL COURT CORRECTLY DENIED KCMSD'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE NEWSOME PRESENTED SUBSTANTIAL EVIDENCE IN SUPPORT OF EACH ELEMENT OF HIS CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY, INCLUDING EVIDENCE ESTABLISHING NEWSOME AS A "WHISTLE BLOWER" WHO REPORTED HIS REASONABLE BELIEF OF VIOLATIONS OF CLEAR LAW TO HIS SUPERIORS.

Newsome acquired the status of a "whistle blower" entitled to protection under Missouri law when he reported to his undisputed supervisor – Dr. Lee-Gwin, the Chief Financial Officer of KCMSD – his reasonable belief of his employer's violation of a clear mandate of law governing public governmental entities: that public funds may be spent only with the required prior written and signed agreement of the elected officials comprising the governing body of the KCMSD, as set forth by statute, Mo. Rev. Stat. § 432.070.

A. Newsome acquired the status of a "whistleblower" at the time of his report to his undisputed supervisor.

KCMSD hopes that Missouri law will betray Newsome by reversing the whistle-blowing protection to which he was entitled at the time of reporting to his undisputed supervisor violations of Section 432.070, simply because the agent of KCMSD

to whom Newsome directed his report later is characterized by KCMSD as complicit in the wrongdoing. Such a narrow and transitory interpretation of the status of a whistleblower is without precedent and would defeat the underlying purposes of the wrongful discharge cause of action of encouraging employees to come forward with reports of clear violations of law or public policy. *See Fleshner v. Pepose Vision Inst.*, 304 S.W.3d 81, 96 (Mo. banc 2010) (recognizing encouragement of communications to appropriate government officials about violations of overtime laws as an underlying purpose of cause of action); *Dunn v. Enterprise Rent-A-Car Co.*, 170 S.W.3d 1, 10 (Mo. App. 2005) (recognizing the encouragement of reporting of suspected wrongdoing as an underlying purpose of whistle blower cause of action).

This Court expressly recognized the existence of a cause of action for wrongful discharge in violation of public policy when an employee is 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 statutes, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities." *Fleshner*, 304 S.W.3d at 92; *see also Margiotta v. Christian Hosp. Northeast Northwest*, 315 S.W.3d 342 (Mo. banc 2010) (acknowledging the existence of claim for wrongful discharge in violation of public policy but affirming summary judgment where the violation was not a clear mandate of law or public policy); *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98 (Mo. banc 2010) (extending the wrongful discharge cause of action beyond employees at-will to employees with contractual employment

agreements).[2]

[2] Appellate courts following *Fleshner*, *Margiotta*, and *Keveney* have pointed out that previous appellate cases referred to four, rather than only two, categories of "public policy" exceptions to the at-will employment doctrine and have concluded the 2010 holdings of the Missouri Supreme Court simply addressed only the first two exceptions, rather than intending to exclude the last two of the four previously recognized public policy exceptions. *See, e.g.*, *Delaney v. Signature Health Care Found.*, 376 S.W.3d 55, 57 n.2 (Mo. App. 2012) (holding employee fired for decision to become an organ donor stated a cause of action for wrongful discharge in violation of the public policy favoring and encouraging organ donations under third public policy exception); *Hamid v. Kansas City Club*, 293 S.W.3d 123, 125-128 (Mo. App. 2005) (holding employee discharged after becoming subject of income withholding order stated cause of action under third exception encouraging financial support of children); *Hughes v. Bodine Aluminum, Inc.*, 328 S.W.3d 353, 356 (Mo. App. 2010) (referring to four recognized public policy exceptions to the employment at-will doctrine); *Weng v. Wash. Univ.*, 480 S.W.3d 332, 342 (Mo. App. 2015) (same). The four categories of "public policy" exceptions to the at-will employment doctrine have recently been referred to as: 1) the "Illegal Acts Exception"; 2) the "Whistleblowing Exception"; 3) the "Encouraged Acts Exception"; and 4) the "Exercise of Statutory Rights Exception." Ken Kinney, Comment, *Wrongful Termination in Violation of Public Policy: The Viability of the "Encouraged Acts" Exception in*

The 2010 trilogy of Missouri Supreme Court public policy wrongful discharge cases -- *Fleshner*, *Margiotta*, and *Keveney* -- each recognized internal reporting as a basis for the cause of action, in identifying either "superiors or public authorities" as the parties to whom an employee may report a violation of law or public policy to satisfy the first element of the "whistle blower" cause of action. *Fleshner*, 304 S.W.3d at 92, 96-97; *Margiotta*, 315 S.W.3d at 346; *Keveney*, 304 S.W.3d at 103-104.[3] *Margiotta* squarely involved an employee's reports of incidents of safety violations pertaining to patient care directed only to his supervisors, as opposed to any governmental or other outside authority. *Margiotta*, 315 S.W.3d at 345.

Missouri, 81 UMKC L. REV. 967, 974-79 (2013) (collecting Missouri cases and discussing the four public policy exceptions to the at-will employment doctrine). While Newsome's case here does not deal directly with the third and fourth public policy exceptions to the at-will employment doctrine, given lower court support for such important exceptions, it is necessary to note that these exceptions exist and may be directly affected by the result of this appeal.

[3] The 2010 Missouri Supreme Court trilogy also adopted the "contributing factor" causation standard, thereby aligning the cause of action for wrongful discharge in violation of public policy with prior holdings interpreting the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.010, *et seq.*, *Daugherty v. City of Md. Heights*, 231 S.W.3d 814 (Mo. banc 2007), and *Hill v. Ford Motor Co.*, 277 S.W.3d 659 (Mo. banc 2009).

Fleshner involved disclosures by the plaintiff to a federal Department of Labor (DOL) investigator about violations of overtime laws. *Fleshner*, 304 S.W.3d at 96. This Court rejected as "too narrow" the argument that the plaintiff was not entitled to claim whistleblower protection when violation of state (as opposed to federal) overtime laws was the public policy relied upon but the plaintiff had spoken only with a federal DOL investigator. *Id.* The Court in *Fleshner* reasoned that the plaintiff need not rely upon a direct violation of a statute or regulation as proof of a public policy claim, citing with approval to *Kirk v. Mercy Hospital Tri-County*, 851 S.W.2d 617, 621 (Mo. App. 1993). Instead, the wrongful discharge claim may rely upon public policy "as reflected by" a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body. *Fleshner*, 304 S.W.3d at 96. The Court concluded that the public policy reflected by the minimum wage laws should encourage communication by employees with government labor investigators about their employers' overtime compensation payment practices without fear of retaliation, making the reporting of the state overtime violations to a federal agency worthy of protection under the public policy exception despite any potential technical differences between state and federal investigators of such laws. "While a prosecution for violation of the law requires communication with *state* government labor investigators, a suit for wrongful termination is not so constrained." *Fleshner*, 304 S.W.3d at 97.

The facts in *Keveney* involved both reporting internally and to an outside authority, as the plaintiff, a teacher, reported to school administrators evidence of a student's physical

abuse and then insisted that the information be reported to the Missouri Division of Family Services (DFS). *Keveney*, 304 S.W.3d at 101. Because a statutory duty exists to report suspected child abuse to DFS, the facts demonstrated plaintiff refused to perform an illegal act (failure to report suspected child abuse) and that plaintiff reported to three supervisors suspected child abuse. Significantly, none of the three supervisors to whom the reports were made were compliant with their respective statutory reporting obligations, a fact that did not disqualify the plaintiff's "whistle blowing" from protection because the supervisors were violating the law. Although the plaintiff in *Keveney* insisted the employer report to DFS, the decision never discusses, much less turns upon, whether or not the reporting to DFS actually took place. 304 S.W.3d at 103-104.

Before the 2010 Missouri Supreme Court trilogy of public policy cases, Missouri appellate decisions also clearly recognized internal reporting may satisfy the "whistle blower" claim for wrongful discharge. In *Brenneke v. Department of Missouri, Veterans of Foreign Wars*, 984 S.W.2d 134 (Mo. App. 1998), the plaintiff's internal report to three officers at the VFW about allegations of internal stealing by a co-worker satisfied the reporting element and the court expressly held as unnecessary any requirement that outside authorities be contacted. 984 S.W.2d at 138; *see also Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 878 (Mo. App. 1985) (identifying report to "superiors or to public authorities" of serious misconduct that constitutes violations of the law and of such well-established and clearly mandated public policy as the basis of tort for damages for wrongful discharge).

In *Lynch v. Blanke Baer Bowie Krimko, Inc.*, 901 S.W.2d 147, 150-51 (Mo. App. 1995), cited with approval in *Margiotta*, 304 S.W.3d at 347, the plaintiff reported to his superiors violations of Food and Drug Administration (FDA) regulations regarding testing of water activity in food products. Lynch raised the issue of water activity level at executive committee meetings and distributed memoranda regarding the subject, but his repeated urging of compliance with the law to his superiors was always ignored. Lynch only suggested to his employer that the FDA be contacted to initiate more frequent testing, but never made a formal report to any outside authority. In reversing the granting of a directed verdict against Lynch, the Eastern District found Lynch's internal reports were sufficient to entitle him to whistle blower protection. 901 S.W.2d at 150-51. The fact that Lynch's supervisors never once heeded his repeated complaints did not serve to forfeit his rights to protections against retaliation as a whistleblower.

In *Dunn v. Enterprise Rent-A-Car Co.*, 170 S.W.3d 1 (Mo. App. 2005), plaintiff's internal complaints of violations of federal securities laws were also found to satisfy the reporting element of a whistleblower public policy cause of action. As the company's controller, Dunn was responsible for certifying that the company's financial records were prepared in accordance with generally accepted accounting principles (GAAP), among other reasons, for the purpose of satisfying the legal requirements of an initial public offering (IPO). Plaintiff was discharged after having raised to the Chief Financial Officer (CFO), Dunn's supervisor, issues concerning depreciation rates and related accounting issues reported in the company's financial statements. Hearing Dunn's complaints, the

CFO responded that senior management did not want to follow plaintiff's advice. Dunn persisted in urging the CFO that Defendant alter its accounting methods for depreciation in making the IPO, which plaintiff believed was necessary to comply with federal securities laws, and as a result, the IPO was postponed.

The Court of Appeals held plaintiff Dunn made a submissible case for wrongful discharge when he was terminated for reporting in good faith that his employer was about to engage in conduct that Dunn reasonably believed to be violations of the law. *Dunn*, 170 S.W.3d at 10-11. *Dunn* rejected the Defendant's argument that because the IPO had been postponed by the employer, there had been no violation of any securities laws and thus, no claim for wrongful discharge, finding that the reporting of suspected wrongdoing satisfied the element of whistle blowing and citing to *Brenneke* and *Faust v. Ryder Commercial Leasing & Services*, 954 S.W.2d 383 (Mo App. 1997). "Public policy does . . . encourage employees to report suspected wrongdoing by co-workers. . . . . Public policy would certainly not be served by requiring an employee to wait until his or her employer completes the unlawful act before reporting it and before being protected by the whistleblower exception to the employment at-will doctrine." *Dunn*, 170 S.W.3d at 10 (internal citations omitted); *see also Beasley v. Affiliated Hosp. Prods.*, 713 S.W.2d 557, 560-61 (Mo. App. 1986) (petition stated cause of action for wrongful discharge in violation of public policy where plaintiff refused to predetermine winner of raffle in violation of state laws).

In *Faust v. Ryder Commercial Leasing*, 954 S.W.2d 383, the plaintiff's report of stealing from the company solely to the known wrongdoer was held as insufficient to provide whistleblower protection. Faust resigned his employment after having only confronted his direct supervisor, a district manager, with his belief that the supervisor, along with another manager, were stealing from the company, threatening to report the supervisor to higher authorities as a "courtesy warning." Faust resigned before ever actually following through on his threat to his supervisor of reporting to other superiors. In solely confronting the wrongdoer of the theft, *Faust* held that the plaintiff had not served the purpose of exposing wrongdoing to persons in a position to correct the wrongdoing and therefore, did not fall within the protection of a whistle blower. *Faust*, 954 S.W.2d at 389-91.

In *Brenneke*, the Court of Appeals explained that *Faust* did not hold that the plaintiff's claim was fatal because of the failure to report the wrongdoing to any outside authority, but rather, because the Plaintiff had failed to report the wrongdoing "to any authority whatsoever." *Brenneke*, 984 S.W.2d at 139. Merely confronting the wrongdoer with knowledge of the wrongdoing as a "courtesy warning" does not amount to blowing any whistle and fails to advance the purposes of the public policy exception to the employment at-will doctrine. *Id.*

Neither *Margiotta* nor *Keveney* cite to *Faust.* Although this Court cited the *Faust* decision twice in *Fleshner*, its stated purposes in doing so was to point out the previous recognition and examples of internal whistle blowing, rather than to express any agreement

with the ultimate holding in *Faust* rejecting the plaintiff's claim. *Fleshner*, 304 S.W.3d at 97. *Fleshner* also cited *Faust* as one of several cases no longer to be followed with respect to the previously required standard of exclusive causation. *Fleshner*, 304 S.W.3d at 93. Nothing in *Fleshner* supports any argument that the Missouri Supreme Court approved the actual holding in *Faust* disqualifying whistleblowing protection to the plaintiff.

This case does not fall within the narrow factual circumstances present in *Faust*, where the plaintiff unmistakably knew in advance that by confronting a wrongdoer known to be stealing from the corporation, he was not "exposing" any wrongdoing by any stretch of the imagination. In sharp contrast, in this case, Newsome reported to his undisputed superior, the Chief Financial Officer, having no prior knowledge of any wrongdoing by the supervisor (and where no wrongdoing by her existed), and then suffered the consequences of a retaliatory discharge. No evidence existed that Newsome knew in advance the position his supervisor would take in response to Newsome's reports of violations of the law, any more than the plaintiffs in *Lynch*, *Dunn*, *Boyle* or *Brenneke* could predict the responses of their respective supervisors.

The holding in *Faust* should be narrowly confined to the peculiar facts where the plaintiff confronts only the known wrongdoer solely as a "courtesy warning" that he would be reported, and nothing further happens other than a resignation. Whistle blowers should not be required to be clairvoyant or otherwise gamble with their jobs whether or not their supervisors are at the time, or may in the future become, complicit in the wrongdoing.

The holding of *Faust,* and later extensions of such holding, fail to fulfill the purpose

of the public policy cause of action of encouraging employees to communicate with their superiors about wrongdoing in an effort to expose and eradicate it. *Fleshner*, 304 S.W.3d at 96. Two cases cited by KCMSD apply the holding of *Faust*, involving theft by individuals, to the broader situations of company-wide wrongdoing, and further exemplify why *Faust* should be overruled or confined to its specific facts. *Drummond v. Land Learning Foundation*, 358 S.W.3d 167, 171 (Mo. App. 2011), involved internal reporting by the CEO of suspected tax fraud engaged in by a not-for-profit company, with the participation of its owners. *Scott v. Missouri Valley Physicians, P.C.*, 460 F.3d 968, 970 (8th Cir. 2006), involved a practice by a physician's group of alleged violations of federal laws prohibiting kickbacks for referrals of patients accepting Medicare. Both plaintiffs reported the respective wrongdoing to the highest level superiors of the company and were left without recourse because such superiors were participants in company-wide wrongdoing, based upon the reasoning of *Faust*. In effect, despite company-wide illegal practices being reported, the participation by the highest superiors in the wrongdoing led to the absurd result that the employer was free to retaliate against any employee internally objecting to the wrongdoing in an effort to expose such wrongdoing, even against employees required by their job duties to participate in or carry out the wrongdoing. Allowing the presence of malfeasance at the highest levels of corporations and other businesses to effectively free the employer to retaliate at will with anyone who expresses opposition to wrongdoing hardly serves the underlying purposes of public policy of encouraging reporting of clear violations of law or public policy. Therefore, the holding

of *Faust* should be narrowly drawn, if not overruled.

In this case, KCMSD would greatly expand the holding of *Faust* even further by allowing a supervisor's later complicity in wrongdoing to defeat his employer's liability for retaliation against a whistle blower reporting wrongdoing to his undisputed supervisor. Laying in the path of a whistle blower the unfair landmine that his or her superior may later become complicit in the reported wrongdoing amounts to definite discouragement, not encouragement, of communication of wrongdoing by employees with their employers.

B. Plaintiff's evidence included violations of a clear mandate of public policy under Mo. Rev. Stat. § 432.070.

In *Margiotta,* this Court discussed the parameters of the underlying public policy that may be used as the basis of a cause of action for wrongful discharge in violation of public policy. The Court explained that a wrongful discharge claim must be based upon a constitutional provision, a statute, a regulation based on a statute or a rule promulgated by a governmental body that clearly prohibits the conduct at issue in the statute. *Margiotta,* 315 S.W.3d at 346-47. *Margiotta* rejected the health care regulations relied upon by the plaintiff because of the lack of clarity and notice to employers that the conduct complained of would be illegal – "Most importantly, it does not specifically proscribe the three incidents Margiotta reported." *Margiotta,* 315 S.W.3d at 348. The Court also expressed concern over the lack of fair notice to employers when a vague or general statute, regulation or rule allows for courts to decide on its own what public policy would require. *Margiotta*, 315 S.W.3d at 347; *see also Farrow v. Saint Francis Medical Center*, 407

S.W.3d 579, 595 (Mo. banc 2013) (nurse sufficiently pled public policy wrongful discharge claim when she alleged that she was fired for complaining about the delegation of nursing procedures to non-nurses in violation of provisions of the Nursing Practice Act); *Van Kirk v. Burns & McDonnell Engineering Company, Inc.*, 480 S.W.3d 334 (Mo. App. 2016) (plaintiff fired for reporting the unauthorized practice of engineering under the "whistle blower" theory of wrongful discharge and regulations at issue - 20 C.S.R. 2030-2.010(5) and (7) - were not vague and did not impermissibly force the court to decide on its own what public policy requires).

In contrast to the concerns of a lack of a clear public policy expressed in *Margiotta*, the public policy at issue in this case addresses a clear and specific statute, Mo. Rev. Stat. § 432.070, in effect since 1929, that is expressed in "plain language" and has "voluminous established precedent." *Ballman v. O'Fallon Fire Protection District*, 459 S.W.3d 465, 467 (Mo. App. 2015). Mo. Rev. Stat. § 432.070 provides:

> No county, city, town village, school township, school district or other municipal corporation shall make any contact, 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.

The statutory requirements expressed in Section 432.070 are so well-established that all

persons dealing with public entities are charged with notice of the law's requirement. *Gill Construction, Inc. v. 18th & Vine Authority*, 157 S.W.3d 699, 708-09 (Mo. App. 2004). Given that the general public is charged with notice of the requirements of Section 432.070, KCMSD can hardly claim as an employer a lack of notice of its mandatory requirements amounting to any unfair surprise when an employer internally reports violations of the statute.

Section 432.070 is aimed at public bodies to serve the laudable and important purpose of the protection of taxpayer funds and its requirements are mandatory, not merely directory. *Muncy v. City of O'Fallon*, 145 S.W.3d 870, 873 (Mo. App. 2004). The statute is so strictly enforced that contracts entered into or performed without the formalities of its statutory requirements are void, not merely voidable, and the contractual deficiencies cannot be overcome through equitable remedies such as estoppel, ratification or implied contract. *Ballman*, 459 S.W.3d at 467.

The purpose of Section 432.070 includes that "that the terms of the contract shall, in no essential particular, be left in doubt, or be determined at any future time, but shall be fixed when the contract is entered into. This is one of the precautions taken to prevent extravagant demands, and to restrain officials from heedless and ill-considered engagements. * * * The statute also safeguards against fraud and peculation. It specifically regulates the mode by which the business of a municipality is to be transacted. No contractual obligation is incurred by a Missouri city in the absence of the writing prescribed." *Burger v. City of Springfield*, 323 S.W.2d 777, 781 (Mo. 1959) (internal

citations omitted).

In *State ex rel. State Highway Commission v. City of Washington*, 533 S.W.2d 555 (Mo. banc 1976), the court discussed the purposes of strict and mandatory enforcement of the statutory requirement that municipal contracts be in writing and executed in compliance with the statutory formalities of Section 432.070, as "one of the precautions taken to prevent extravagant demands, and to restrain officials from heedless and ill-considered engagements. . . . . A court should unhesitatingly enforce compliance with all mandatory legal provisions designed to protect a municipal corporation and its inhabitants. Inasmuch as municipal corporations represent the public, they, themselves, are to be protected against the unauthorized acts of their officers and agents." *Id.* at 558.

As further evidence of the clarity of the statutory directives of Section 432.070, KCMSD has in place long-standing employee policies that expressly cite to the statute as the foundation for specific and clear directives to employees such as Newsome governing the handling of expenditures of public funds. The employee policies demonstrate KCMSD's own recognition that employees such as Newsome, as stewards of public funds, carry the responsibilities to insure that the intended oversight of elected bodies for expenditure of public funds inherent in Section 432.070 are not ignored. As stewards of public funds, employees such as Newsome guard against the removal of the transparency of expenditures by public bodies intended by the statutory requirements of Section 432.070 and must act consistently with the laws applicable to such public bodies including laws designed to require accountability to the public, public access to information and

avoidance of conflicts of interest.

KCMSD has no basis to claim that Plaintiff failed to show a violation of a clear mandate of public policy, in any manner comparable to the rejected public policy at issue in *Margiotta*.

C. Plaintiff's evidence showed a reasonable belief of violation of Section 432.070 which is sufficient under the public policy wrongful discharge cause of action to support the jury's verdict.

Missouri law has both implicitly and explicitly recognized that the report of a reasonable belief of violation of a clear mandate of public policy qualifies for whistleblowing protection under the cause of action. Newsome's evidence showed *both* a violation and reasonable belief of violations of the mandatory requirements of Section 432.070. Implicitly, the applicable MAI approved for wrongful discharge in violation of public policy claims, MAI 38.03 [2012 Rev.], requires no separate jury finding that the reported conduct, in fact, amounts to an actual violation of the law. Instead, the first paragraph of MAI 38.03 requires only the insertion of the description of the plaintiff's report or other actions that are protected under the law, without any further paragraph requiring the jury to find whatever necessary elements to determine the actual illegality of the wrongdoing reported to the employer.

Even before the adoption of MAI 38.03, no Missouri case required proof of an actual violation of the law but to the contrary, explicitly allowed the report of a reasonable belief of violation of the law to qualify. *Dunn*, 170 S.W.3d at 10-11; *Kelly v. Bass Pro*

Outdoor World, LLC, 245 S.W.3d 841 (Mo. App. 2007); *Clark v. Beverly Enterprises-Missouri, Inc.*, 872 S.W.2d 522 (Mo. App. 1994). KCMSD's reliance upon *Margiotta* as support for its contention that an actual violation of the law is required by Missouri law is misplaced. As explained in Section I.B, *supra*, *Margiotta* held that the source of public policy must be clear and definite, not that the **violation** of the public policy must meet such a standard. Even after *Margiotta*, Missouri courts have continued to hold that a report of suspected unlawful conduct is entitled to whistleblower protection. *See Drummond*, 358 S.W.3d at 171.

In *Dunn*, the plaintiff made a submissible case for wrongful discharge when he was terminated for internally reporting in good faith that his employer was about to engage in conduct that Dunn reasonably believed to be violations of the law. *Dunn*, 170 S.W.3d at 10-11. The court rejected the Defendant's argument that because the IPO had been postponed by the employer, there had been no violation of any securities laws and thus, no claim for wrongful discharge, finding that the reporting of suspected wrongdoing satisfied the element of whistle blowing. "Public policy does . . . encourage employees to report suspected wrongdoing by co-workers. . . . . Public policy would certainly not be served by requiring an employee to wait until his or her employer completes the unlawful act before reporting it and before being protected by the whistleblower exception to the employment at-will doctrine." *Dunn*, 170 S.W.3d at 10 (internal citations omitted); *see also Bazzi v. Tyco Healthcare Group, L.P.*, 652 F.3d 943, 948 (8th Cir. 2011) (citing to *Dunn* to support sufficiency of good faith and objectively reasonable belief of violation of

law).

In *Kelly v. Bass Pro Outdoor World, supra,* the Court of Appeals likewise found it unnecessary to prove an actual violation of the law to support a wrongful discharge claim. Instead, the plaintiff must cite legal authority for the belief that the employer or coworker's conduct was unlawful or contrary to a clear mandate of public policy and the employee's belief must be reasonable. Nor was the Plaintiff required to prove beyond a reasonable doubt each element of the crime reasonably believed by the plaintiff to have been committed. 245 S.W.3d at 847-48.

In *Clark v. Beverly Enterprises-Missouri*, *supra*, the court held that the reporting of a good faith belief that the nursing home has engaged in patient abuse provided the basis for a wrongful discharge violation, without the necessity of showing an actual violation of the law. *Clark*, 872 S.W.2d at 525-26.

MAI 38.03 [2012 Rev.] and the holdings of *Dunn*, *Kelly*, and *Clark* are analogous to the MHRA's statutory prohibitions against retaliation under the MHRA, Mo. Rev. Stat. § 213.070. The MHRA prohibits retaliation by finding it an unlawful discriminatory practice, "(2) [t]o retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter . . . ." Nowhere does the statutory language impose liability for retaliatory actions by an employer only when an actual violation of the MHRA can be shown, and accordingly, Missouri courts do not

impose this requirement upon plaintiffs in MHRA cases. *See McCrainey v. Kansas City, Mo, Sch. Dist.*, 337 S.W.3d 746 (Mo. App. 2011); *Barekman v. City of Republic, Mo.*, 232 S.W.3d 675 (Mo. App. 2007).[4]

In *McCrainey*, the Court discussed that the requirement of a good faith, reasonable belief in an MHRA retaliation case advanced two interests: preventing plaintiffs from prevailing on retaliation claims that are entirely frivolous, and second, encouraging employees to report and oppose potentially discriminatory conduct. "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

[4] Federal cases interpreting the anti-retaliation provisions of federal employment discrimination laws have also concluded that actual violations of the law are not required and that an employee who acts in good faith with an objectively reasonable belief that the practices are unlawful, is entitled to protection. *See Benson v. Little Rock Hilton Inn*, 742 F.2d 414 (8th Cir. 1984) ("[T]o establish a claim of retaliation, an employee must establish that the employer retaliated against him for opposing conduct which the employee reasonably believed constituted unlawful discrimination"); *Foster v. Time-Warner Entertainment Co.*, 250 F.3d 1189, 1194 (8th Cir. 2001); *Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 89, 100 (8th Cir. 1995); *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997).

that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim." *McCrainey*, 337 S.W.3d at 754. The same interests identified in *McCrainey* support the recognition of a "reasonable belief" of a violation of a clear mandate of law or public policy in common law cases for wrongful discharge in violation of public policy. As reasoned in *Dunn*, "The social harm from reporting in good faith a complaint that may turn out, after investigation, to be unfounded is potentially far less than the harm of not reporting a well—founded complaint for fear of the consequences." *Dunn*, 170 S.W.3d at 10.

Like the public policy exceptions recognized in *Fleshner*, the prohibitions against discrimination and retaliation expressed by statute under the MHRA, Mo. Rev. Stat. § 213.055, essentially modify the common law employee at-will doctrine by restricting the otherwise free reign of employers to discharge employees at will without incurring liability. *Fleshner*, 304 S.W.3d at 94; *see also Farrow*, 407 S.W.3d at 595 (pointing out the Court's comparison in *Fleshner* between the MHRA and the public policy wrongful discharge claim as both representing exceptions to the employment at-will doctrine). The underlying reasons for the protections against retaliation afforded employees under the MHRA and those recognized by the cause of action for wrongful discharge in violation of public policy support the similar treatment in the recognition of a reasonable belief of violation of the law as satisfying the reporting element of the cause of action of wrongful discharge in violation of public policy.

Like the holdings in *Dunn*, *Kelly*, and *Clark*, numerous cases from other

jurisdictions have recognized a good faith, reasonable belief of a violation of public policy as satisfying the element of a whistle blower cause of action. As reasoned by the Court in *Fox v. Bowling Green*, 668 N.E.2d 898 (Ohio 1996), "[f]rom a public policy perspective, the 'reasonable belief' standard is the only acceptable interpretation of the [whistleblower] statute. R.C. 4113.52 was designed to give whistleblowers some protection in Ohio's employment-at-will environment. * * * The public, in turn, relies on whistleblowers for protection. 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." 668 N.E.2d at 902.

Allowing the reporting of a reasonable belief of a violation of law or public policy to satisfy the first element of a whistle blower claim is supported by cases in the majority of other jurisdictions recognizing the common law cause of action. *See Reed v. Anchorage*, 782 P.2d 1155 (Alaska 1989) (employee retaliated against for reporting safety violations had a cause of action for retaliatory discharge); *TFS of Gurdon, Inc. v. Kay Hook*, 474 S.W.3d 897 (Ark. App. 2015) ("Plaintiff making a 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."); *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992) (recognizing employer's awareness of the reasonable belief of unlawful conduct as satisfying whistleblower cause of action); *Fenner v. Hartford Courant*

Co., 822 A.2d 982 (Conn. App. 2003) (plaintiff wrongfully terminated for refusing to complete employer's accident and insurance forms because plaintiff reasonably believed that employer's policy violated insurance laws, plaintiff need not prove employer directly violated statute); *Stebbings v. Univ. of Chicago*, 726 N.E.2d 1136 (Ill. App. 2000) (recognizing retaliatory discharge claims under the citizen crime-fighter test when plaintiff has a reasonable belief that a law or federal statute is being violated and plaintiff stated a cause of action for retaliatory discharge when plaintiff believed in good faith that the University was violating the law by not complying with federal filing requirements); *Johnson v. World Color Press, Inc.*, 498 N.E.2d 575 (Ill. App.1986) (same); *Palmer v. Brown*, 752 P.2d 685, 690 (Kan. 1988) (whistle blower must have been in good faith to provide protection of cause of action); *Karch v. Baybank FSB*, 794 A.2d 763, 775 (N.H. 2002) (recognizing a public policy exception to the at-will doctrine for an employee's "good faith reporting of reasonably perceived illegal activity" by her employer even where it is ultimately determined that the employer engaged in no illegal activity); *House v. Carter-Wallace, Inc.*, 556 A.2d 353 (N.J. Super. Ct. App. Div. 1989), *cert. denied*, 564 A.2d 874 (N.J. 1989) (employee who claimed retaliatory discharge for his complaint within company regarding contamination of products can recover only if he had reasonable belief that products were contaminated); *Gabler v. Holder and Smith, Inc.*, 11 P.3d 1269, 1277-78 (Okla. Civ. App. 2000) (holding the discharge was actionable when the employee refused to produce university parking passes without the university's permission, which the employee believed (falsely) to be illegal); *McManus v. Auchincloss*, 353 P.3d 17 (Or. App.

2015) (reasonable belief in violation of law sufficient for common law whistleblower claim); *Ellis v. City of Seattle*, 13 P.3d 1065 (Wash. 2000) (en banc) (upholding employee's claim of wrongful discharge against employer who fired him after refusing to disable fire alarm system that interfered with quality of arena's sound system); *Washington, Gardner v. Loomis Armored Inc.*, 913 P.2d 377 (Wash. 1996) (holding in the context of concerns regarding public safety where imminent harm is present, an employee's objectively reasonable belief the law may be violated in the absence of his or her action may satisfy element of claim).

For all of these reasons, Point I must be denied.

II. POINT II SHOULD BE DENIED AS THE TRIAL COURT PROPERLY DENIED KCMSD'S MOTION FOR NEW TRIAL AS THE VERDICT DIRECTOR (INSTRUCTION 15) PROPERLY SUBMITTED THE LAW FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY INCLUDING THE PLAINTIFF'S REASONABLE BELIEF OF VIOLATION OF CONTRACTING LAW.

As argued in detail under Point I, Missouri law both implicitly and explicitly recognizes that a common law claim for wrongful discharge in violation of public policy may be based upon the report of a plaintiff's reasonable belief of violation of the law. *Dunn*, *supra*; *Kelly*, *supra*; *Clark*, *supra*; MAI 38.03 [2012 Rev.].

Mo. R. Civ. Pro. 70.02(b) provides that "Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts." Newsome's verdict director (Instruction 15) is brief, free from argument and did not require detailed evidentiary facts.

For all of the reasons set forth in Point I, KCMSD's Point II must also be denied.

III. POINT III SHOULD BE DENIED AS THE TRIAL COURT PROPERLY DENIED KCMSD'S MOTION FOR NEW TRIAL AS THE VERDICT DIRECTOR (INSTRUCTION 15) PROPERLY SUBMITTED THE LAW FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY AND DID NOT AMOUNT TO A ROVING COMMISSION.

KCMSD contends on appeal that the language "violate School District contracting law" in Instruction No. 15 was "vague" and a "roving commission."[5] Although appellate review of jury instructions is de novo, the "[r]eview 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. Instructional errors are reversed only if the error

[5] Amicus does not address whether this issue was preserved for appeal.

resulted in prejudice that materially affects the merits of the action." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 766 (Mo. banc 2010).

As set forth under Point I, under well-established Missouri law, a plaintiff has a submissible case for wrongful discharge through a showing of termination for internally reporting in good faith that his employer was about to engage in conduct that he reasonably believed to be a violation of the law. *Dunn*, 170 S.W.3d at 10-11; *Clark*, 872 S.W.2d at 525-26; *Kelly*, 245 S.W.3d at 847-48.

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). "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). Where the evidence at trial explains the phrase used in the verdict director, there is no "roving commission." *Id.*

Here, the phrase used in the verdict director, "School District contracting law," was not misleading in the context of the evidence presented at trial. *Klotz*, 311 S.W.3d at 767. The phrase identified the law alleged to have been violated in simple, brief and impartial language. The issue presented in the instruction was well supported by Missouri law and based on the facts presented at trial. *McNeill v. City of Kansas City*, 372 SW 3d 906 (Mo. App. 2012). Instruction 15 was not a roving commission because it did not assume any disputed facts, it was not too general, and it did not submit abstract legal questions to the

jury. *See, e.g., Cmty. Bank of Raymore v. Patterson Oil*, 463 S.W.3d 381 (Mo. App. 2015); *Edwards v. Gerstein*, 363 SW 3d 155 (Mo. App. 2012).

In *Reed v. Sale Memorial Hospital & Clinic*, 698 S.W.2d 931, 937-38 (Mo. App. 1985), the court found a verdict director similar to Instruction No. 15 was *not* a roving commission. The instruction in *Reed* identified the law violated as "Worker's Compensation Law." Here, Instruction 15 identified the law being violated as "School District contracting law." As in *Reed*, Instruction 15 "hypothesizes ultimate facts, not abstract statements of law." 698 S.W.2d at 938. Accordingly, the language in Instruction 15 did not constitute a roving commission, especially in light of the evidence adduced at trial. Point III must be denied.

CONCLUSION

The jury's finding of liability in favor of Newsome under his claim for wrongful discharge in violation of public policy was supported by substantial evidence. Instruction 15, the verdict director submitting Newsome's claim, was supported by law and properly submitted the ultimate facts to the jury in accordance with Rule 70.02(b). KCMSD's appeal is without merit and this Court should affirm the trial court's judgment in favor of Newsome.

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CERTIFICATION OF COMPLIANCE

I hereby certify the following:

1. This Brief complies with the type and volume requirements of Rule 84.06 and the format is Times New Roman 13 point type. The word and line counts used to prepare the Brief also comply with 84.06 applicable to *amicus curiae* briefs. The Brief contains 7,783 words, inclusive of all material contained in the brief except the cover, certificate of service, certificate required by Rule 84.06(c), and signature block, as set forth in Rule 84.06(b).

2. The Brief has been prepared using Microsoft Word 2016 format.

/s/Marie L. Gockel
Marie L. Gockel

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2016, the Brief of Amicus Curiae was scanned for viruses and is virus-free, and was electronically filed with the Clerk of the Supreme Court of Missouri via the Missouri Courts eFiling System, which also automatically transmits an Electronic Notice of Entry to:

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