

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC97712**

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**J.L. WILSON,**

**Respondent,**

**v.**

**THE CITY OF KANSAS CITY, MISSOURI,**

**Appellant.**

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**On Appeal from the Circuit Court of Jackson County, Missouri  
Sixteenth Judicial District, Division 15  
Honorable Charles H. McKenzie, Circuit Judge  
Case No. 1416-cv23151**

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**APPELLANT'S SUBSTITUTE BRIEF**

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### **JURISDICTIONAL STATEMENT**

This is an appeal from an August 23, 2017, amended final judgment entered in the Circuit Court of Jackson County, Missouri following a jury verdict and the awards of attorney fees, litigation expenses, and other equitable relief. The City of Kansas City, Missouri (the City) filed its Notice of Appeal on August 28, 2017. (LF D87). The Missouri Court of Appeals, Western District, affirmed the circuit court's judgment through an unpublished, per curiam order pursuant to Supreme Court Rule 84.16(b) on December 18, 2018. This Court has jurisdiction as it sustained the City's application for transfer pursuant to Supreme Court Rule 83.04. Mo. Const. art. V, § 10.

## **STATEMENT OF FACTS**

In 2011, the City of Kansas City, Missouri (the City) employed J.L. Wilson as an equipment operator, assigning him to drive a recycling truck for the City's Solid Waste Division in the Public Works Department. (Transcript 340:3-5; 354:13-25). The position of equipment operator within the City varies widely depending on the department in which the employee works. (Transcript 354:13-358:2; Ex. 1-1—Ex. 1-2). Equipment operators may operate road work machinery, operate snow plows, drive trucks for tree crews, haul and operate construction equipment, and operate many other types of machinery. (Transcript 354:13-358:2; Ex. 1-1—Ex. 1-2). In the Solid Waste Division, equipment operators drive various trash trucks, which include trucks which collect the City's recycling. (Transcript 148:18-186:2; 357:21-358:2).

During his employment with the City, Wilson injured his elbow while driving a recycling trash truck. (Transcript 267:13-268:2). At the end of 2011, Wilson's injury began as soreness, but eventually it swelled to the point that he realized he needed to seek medical treatment. (Transcript 267:10-24). After engaging in conservative treatment methods which had limited effect, Wilson was diagnosed with right lateral epicondylitis, or tennis elbow, and underwent surgery on his elbow in July 2012. (Transcript 267:10-270:14; Ex. 23-3—Ex. 23-8). Dr. Brian Divelbiss performed Wilson's surgery and monitored his post-operation recovery. (Transcript 272:17-277:15; Ex. 23-1—Ex. 23-29).

Following physical therapy and transitional duty assignments, Wilson returned to his equipment operator position with the City's Solid Waste Division in October 2012. (Transcript 275:5-24). Soon after his return to work, he complained again of pain in his

right elbow. (Transcript 275:13-24). Wilson returned to Dr. Divelbiss for further treatment. Eventually, Dr. Divelbiss concluded Wilson had reached maximum medical improvement and, in a disability rating report, assigned him a permanent partial disability rating of 15 percent at the level of his elbow. (Transcript 276:15-277:15; Deposition of Dr. Divelbiss<sup>1</sup> at 33:00-39:45).

During his videotaped deposition that was played at trial, Dr. Divelbiss testified in detail regarding the disability rating he assigned Wilson. (Deposition of Dr. Divelbiss at 33:00-39:45). He explained his rating report, in the “work comp. setting,” was designed to try to quantify the amount of disability that a person has after sustaining an injury in the course of employment. (Deposition of Dr. Divelbiss at 34:10-34:50). To arrive at a disability rating, Dr. Divelbiss testified that he does not rely upon any hard and fast rules, but utilizes his experience of seeing patients with similar diagnoses and difficulties, a number of objective measurements (grip strength and range of motion), the underlying medical diagnosis, and the patient’s functioning at the end of a course of treatment. (Deposition of Dr. Divelbiss at 34:50-35:50). In Wilson’s case, Dr. Divelbiss reviewed Wilson’s treatment documents, Wilson’s symptoms that remained following his treatment, and Wilson’s grip strength. (Deposition of Dr. Divelbiss at 36:10-37:00). Measuring Wilson’s grip strength, Dr. Divelbiss determined Wilson had 50 pounds of grip strength on his right as compared to 80 pounds of grip strength on the left. (Deposition of Dr. Divelbiss

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<sup>1</sup> Only the video deposition of Dr. Divelbiss was admitted into evidence at trial; no deposition transcript is an exhibit in evidence. Therefore, the City refers to Dr. Divelbiss’s deposition by citing to the time on the video where the referenced testimony appears.



at 37:00-37:40). By assigning Wilson a 15-percent permanent partial disability rating for his right elbow, Dr. Divelbiss concluded Wilson's elbow was 15-percent less usable than it used to be. (Deposition of Dr. Divelbiss 38:10-39:25). Dr. Divelbiss testified that he made this disability rating determination with a reasonable degree of medical certainty. (Deposition of Dr. Divelbiss at 39:25-39:45).

On further questioning from the City, Dr. Divelbiss clarified the disability rating he assigned to Wilson. (Deposition of Dr. Divelbiss at 51:45-55:05). The disability rating report was not part of Wilson's treatment and was not needed to either diagnose or treat Wilson. In fact, the information contained in the disability rating report was pulled from other medical records that contained descriptions of Wilson's treatment. (Deposition of Dr. Divelbiss at 51:45-52:35). In addition, Dr. Divelbiss specified that Wilson's tennis elbow would not make him unable to communicate, unable to walk or ambulate, unable to care for himself, unable to socialize with others, unable to educate himself, unable to transport himself, or unable to do additional vocational training, so long as the training was not something very heavy. (Deposition of Dr. Divelbiss at 53:25-55:05).

When he released Wilson from his care and permitted him to return to work, Dr. Divelbiss gave Wilson a permanent restriction of "no trash truck driving." (Transcript 277:13-20; Ex. 120-2; Deposition of Dr. Divelbiss at 29:30-32:40). Upon returning to work, Wilson presented this "no trash truck driving" restriction to his supervisor. (Transcript 278:4-9). The parties disputed at trial what occurred after Wilson's return to work with the trash truck driving restriction.

Wilson testified that he had a conversation with Michael Shaw, an Assistant to the Director in the City's Public Works Department, about an accommodation for his work restriction. (Transcript 278:4-279:3). As Assistant to the Director, Shaw had oversight responsibility for the Solid Waste Division, including application of the City's reasonable accommodation policy for employees working in the Solid Waste Division. (Transcript 115:14-118:18). During their conversation, Wilson suggested his work assignment be changed from driving the recycling truck to the clam truck or another truck that had been equipped with power steering. (Transcript 279:11-282:25). Wilson testified that he could have performed the essential functions of his job if he had been assigned to drive a truck with power steering. (Transcript 261:21-262:2; 279:11-23; 280:21-23). He also stated that he did not find anything glamorous about the clam truck and pointed to his evaluation where he stated his workplace goals were to become a supervisor. (Transcript 132:3-134:2; 279:11-280:1; Ex. 39-10). At trial, Wilson read into evidence the City's admission that the "trash truck [he] drove had no power steering." (Transcript 79:8-13).

Shaw testified that when Wilson returned to work with the trash truck driving restriction, Wilson only presented him with a single piece of paper containing the restriction. (Transcript 122:1-23; Ex. 120-2). Because the Solid Waste Division is essentially the City's trash company, Shaw testified the restriction puzzled him since all trucks within the division were considered "trash trucks." (Transcript 123:3-17; 184:22-185:22). At trial, Shaw described in detail the different trash trucks the City utilizes and the employee job class normally assigned to each truck. (Transcript 148:18-186:2; Ex. 141-144; Ex. 147; Ex. 149). According to Shaw, Wilson told him that he could drive a

conventional cab truck rather than a cabover truck. (Transcript 186:3-187:22). Wilson also told Shaw on various occasions, including prior to his elbow injury, that he wanted to drive the clam truck on the bulky collection route. (Transcript 131:11-132:2; 205:8-22; Ex. 147-1—Ex. 147-4). In response, Shaw told Wilson that he did not have seniority within the department to drive the clam truck because that truck was assigned to more senior equipment operators. (Transcript 131:11-132:2; 205:8-22; Ex. 147-1—Ex. 147-4). He also told Wilson that he needed to get further clarification from Dr. Divelbiss about the trash truck driving restriction. (Transcript 187:6-22). Dr. Divelbiss's no trash truck driving restriction was never modified. Faced with responding to Wilson's restriction, Shaw told Wilson that he needed to submit a request for accommodation under the City's policy. (Transcript 189:22-190:7). Shaw did not personally contact Wilson's doctors to clarify the restriction because he believed that might violate medical privacy law. (Transcript 126:24-25; 190:8-18).

While Shaw did not understand how to accommodate Wilson's trash truck driving restriction, he attempted to find another solution to allow Wilson to remain employed with the City. Shaw offered Wilson a position as a maintenance worker where he would have performed other tasks. (Transcript 187:23-189:21). Evidence at trial established that maintenance workers in the Public Works Department performed job duties which included riding on the back of trash trucks picking up trash and recycling and driving other City trash trucks, including the dead animal trucks and scatter trucks, which tended to be smaller in size. (Transcript 188:6-189:14). Shaw further testified Wilson would have received the same pay as a maintenance worker or as an equipment operator. (Transcript 189:15-18).

Using profanity, Wilson declined Shaw's offer to become a maintenance worker. (Transcript 137:10-20; 189:19-21). Wilson testified that he did not want to move to the maintenance worker position because he would have lost the seniority he had established as an equipment operator. (Transcript 278:18-279:10).

At trial, Wilson questioned Marvin Davis, an Assistant to the Director and the HR Liaison for the City's Public Works Department, about an email he had sent to Michael Kitchen and Michael Shaw on October 24, 2012. (Transcript 652:14-653:22; Ex. 4-1). In that email, which predated Wilson's request for accommodation, Davis first told Michael Kitchen that Wilson was an equipment operator who had a permanent restriction of no trash truck driving. (Transcript 128:24-129:8; Ex. 4-1; Ex. 5-1). Approximately an hour after Davis sent his first email, he sent another email to Kitchen with additional information he had received from the City's Risk Management personnel. (Transcript 130:15-25; Ex. 4-1). Davis explained Wilson had returned to work without any medical restrictions and then went back to the doctor because he had experienced pain. When he came back from the doctor, Wilson had a permanent restriction of "no trash truck driving." (Transcript 130:15-25; Ex. 4-1; Ex. 120-2). Davis informed Kitchen and Shaw that Risk Management believed Wilson had told his doctor that he did not want to drive trash trucks and instead wanted to drive other City vehicles. (Transcript 130:15-25; Ex. 4-1). Davis was surprised this email made it into the file the City kept regarding Wilson's request for an accommodation. (Transcript 657:2-658:8).

On October 30, 2012, Wilson applied for an accommodation pursuant to the City's process defined in its Administrative Regulation 1-18. (Transcript 301:22-302:10; Ex. 5-

1—Ex. 5-2). In support of his request for accommodation, Wilson submitted documents from Dr. Divelbiss, which included the trash truck driving restriction. (Transcript 371:7-16; Ex. 115). The City's Reasonable Accommodation Committee reviewed Wilson's application for an accommodation during a meeting. (Transcript 423:22-424:25). At the time, the City's Reasonable Accommodation Committee consisted of four individuals: Michael Kitchen, Meg Conger, Teri Casey, and an attorney from the Law Department. (Transcript 422:20-423:11). Although Casey testified during her deposition that she participated during the Committee's meeting to review Wilson's request for accommodation, she later corrected her testimony upon realizing she had been on maternity leave at the time of the meeting. (Transcript 635:1-637:9).

The function of the City's Reasonable Accommodation Committee is to review requests from City employees, determine what additional information is needed, and decide whether an employee meets the definition of a qualified individual with a disability which substantially limits one of his or her major life activities. (Ex. 3-1—Ex. 3-3; Transcript 423:12-24). When considering an employee's request for accommodation, the City's committee reviews the appropriate medical information, usually the most recent medical records, to determine whether the individual qualifies for an accommodation because of a disability. (Transcript 425:1-23; 582:5-583:18; 618:1-23). After reviewing Wilson's request for an accommodation, the members of the City's Reasonable Accommodation Committee determined Wilson's case was clear-cut because his medical restriction was limited only to trash truck driving and did not require further clarification. (Transcript 457:1-463:5; 497:7-498:4; 616:5-618:23). Through the Reasonable Accommodation

Committee, the City denied Wilson's request for an accommodation and informed him of the opportunity to appeal to the City Manager's Office within 60 days. (Transcript 325:7-15; 375:1-377:12; 482:10-483:10; Ex. 7-1—Ex. 7-2).

Wilson appealed the denial of his accommodation request to the City Manager's Office. (Transcript 306:1-308:4; 375:1-377:12; Ex. 6-1—Ex.6-3; Ex. 153-1—Ex. 153-2). When an appeal from the Reasonable Accommodation Committee is filed with the City's Manager's Office, the City holds a hearing where each side presents evidence regarding the requested accommodation. (Transcript 482:4-484:24). The City presents its side first and provides the reasons that the request for accommodation cannot be granted. Michael Kitchen presented the City's position regarding Wilson's accommodation request. (Transcript 504:20-505:18; 507:7-13; Ex. 115). Then, the employee and his or her representative may present evidence to support the requested accommodation, including new evidence that had not been previously presented to the Reasonable Accommodation Committee. (Transcript 482:10-484:24). Wilson was represented at the appeal hearing by an attorney who had represented him in workers' compensation matters. (Transcript 505:22-506:14; Ex. 115; Ex. 153-1—Ex. 153-2). During the appeal hearing, while the City was presenting its position in support of the denial of Wilson's accommodation request, it also encouraged Wilson for a second time to apply for other vacant positions within the City. (Transcript 499:1-500:18; 507:14-509:12). Wilson and his attorney stated their position that the City could simply place Wilson in another open job; they maintained that he would not be applying for any other position on his own. (Transcript 508:1-509:12). Wilson's appeal was denied. (Transcript 190:23-191:4).

Following the denial of Wilson's accommodation appeal, Shaw contacted Wilson and again encouraged him to consider becoming a maintenance worker. (Transcript 190:19-191:25). Shaw told Wilson that driving a trash truck was a minimum qualification for his job as an equipment operator and he could not meet that qualification with the "no trash truck driving" restriction Dr. Divelbiss had given him. (Transcript 191:5-16). Shaw allowed and encouraged Wilson to apply for other positions within the City so he would be able to continue working. (Transcript 190:19-191:25). Wilson rejected Shaw's recommendation and Shaw learned that Wilson never applied for another City job. (Transcript 192:1-21). Eventually, Shaw requested Wilson's termination because the City had to require other employees to work overtime in order to complete Wilson's work. (Transcript 192:22-193:24; Ex. 10-1). A predetermination hearing regarding Wilson's termination was held on May 17, 2013. (Transcript 100:22-101:4; Ex. 12-1—Ex. 12-3).

Marvin Davis acted as the City's hearing officer at Wilson's predetermination hearing. (Transcript 100:22-101:17; Ex. 12-1—Ex. 12-3). Although he did not know Wilson personally, Davis was aware that Wilson had received transitional duty assignments through the Solid Waste Division. (Transcript 653:1-23; 659:25-660:8). While Davis was not aware of the temporary duty assignments Wilson completed, testimony at trial reflected that Wilson scanned documents, taught a CDL class, and took pictures of abandoned buildings. (Transcript 274:8-16). Yet, these assignments were only temporary. (Transcript 389:15-390:15). Davis further testified that Wilson likely would not have been recommended for termination if he had been granted an accommodation for his elbow condition; however, his accommodation request was denied. (Transcript 670:11-671:14).

Without an accommodation, and based on the evidence of Wilson's case, Davis determined Wilson should be terminated from his position because he was unable to perform his regular job duties and he was unwilling to accept the maintenance worker position that had been offered to him. (Transcript 666:3-23; Ex. 12-1—Ex.12-3). Wilson was terminated on May 29, 2013. (Transcript 100:19-104:8; Ex. 12-1—Ex. 12-3).

Following his termination from employment with the City, Wilson filed suit pursuant to the Missouri Human Rights Act (MHRA), R.S.Mo. § 213.010 to § 213.137 (LF D47). In addition to the facts summarized above, there was evidence at trial establishing the City had re-hired Wilson in 2016 as an equipment operator in the Storm Water Division. (Transcript 259:15-260:10; 344:18-20). In his position as an equipment operator in the Storm Water Division, Wilson drove a truck and trailer and worked at different sites performing tasks such as mowing grass and cleaning out sewers. (Transcript 260:2-10). There was no evidence the City ever assigned Wilson to drive a trash truck in this new position. While Wilson regained employment with the City, he no longer had the seniority from his earlier employment in the Public Works Department. (Transcript 348:10-23).

The case proceeded to jury trial and Wilson submitted a single claim of disability discrimination to the jury. (LF D56 pp. 14). In addition to the testimony described above, during trial Wilson made a number of references to the workers' compensation disability rating Dr. Divelbiss assigned to his right elbow. During Wilson's testimony, his attorney asked whether he had regained full range of elbow motion. Wilson responded that he did not have full range of motion, but had "enough to, you know, maneuver." (Transcript 305:18-22). Upon receiving that response, Wilson's attorney further questioned Wilson



whether he had “ended up with a partial permanent disability rating,” to which Wilson responded, “correct.” (Transcript 305:23-25). Later during the trial, Wilson’s attorney pointedly questioned Meg Conger, a member of the City’s Reasonable Accommodation Committee, regarding Wilson’s disability rating. Wilson’s attorney asked whether Conger was aware Wilson “had been rated as permanently partially disabled by Dr. Divelbiss.” (Transcript 594:4-5). Conger responded that she was aware Wilson had a “permanent restriction of not driving a trash truck.” (Transcript 594:6-7). Dissatisfied with that response, Wilson’s attorney pressed on. He asked again whether Conger had been aware that Wilson “had a permanent partial disability determination by Dr. Divelbiss.” (Transcript 594:8-10). Conger responded again that from the records she reviewed “there was no disability except that he could not drive a trash truck. That is a restriction.” (Transcript 594:11-14).

Wilson’s closing argument further highlighted the workers’ compensation disability rating Dr. Divelbiss assigned to Wilson’s right elbow. During his closing argument, Wilson’s attorney argued to the jury that this workers’ compensation disability rating established that Wilson was disabled for purposes of his claim under the MHRA. (Transcript 722:15-22; 738:8-15). Specifically, Wilson’s attorney stated in closing:

Let’s talk about Dr. Divelbiss. He talked about having surgery on Wilson. James Wilson’s elbow has a permanent partial disability at 15 percent for his workers’ comp. rating. That’s a payment rate out of work comp. *But he has a permanent partial disability. Permanent, that’s pretty easy. Disability, that’s pretty easy.*

(Transcript 722:15-22) (emphasis added). Then, when alerted by the Court that he had three minutes of allotted argument time remaining, Wilson’s attorney returned to the disability rating determination stating “[p]ermanent partial disability. Permanent means permanent.” (Transcript 738:8-15).

The jury ultimately returned a verdict in Wilson’s favor, awarding him \$44,871.16 in actual damages and assessing \$87,583.00 in punitive damages. (LF D57; D58). Following the jury’s verdict, the court entered judgment. (LF D59). Wilson moved to amend the judgment to add equitable relief in the forms of attorney fees, injunctive relief, costs, expenses, front pay, and/or increased seniority. (LF D60). Following a hearing, the circuit court entered an amended judgment which included a provision amending Wilson’s seniority with the City to reflect an uninterrupted time of employment. (LF D86). The circuit court also awarded Wilson \$308,308.75 in attorney fees and \$9,644.56 in litigation expenses. (LF D86; Appendix A1-A6).

The City timely appealed from the circuit court’s amended judgment to the Court of Appeals, Western District. (LF D87). The City raised four points on appeal. Briefly stated, these points were:

1. Wilson failed to make a submissible case for disability discrimination under the MHRA because the evidence did not establish Wilson is disabled under the MHRA.
2. The circuit court erred in admitting evidence of the permanent partial disability rating Dr. Divelbiss assigned to Wilson because that

evidence from a workers' compensation framework is not relevant to a disability discrimination claim under the MHRA.

3. Wilson failed to make a submissible case for punitive damages.
4. The circuit court erred in awarding Wilson litigation expenses because there is no specific statutory provision allowing such an award; the MHRA only allows an award of "court costs."

In an unpublished, per curiam order pursuant to Supreme Court Rule 84.16(b), the Western District addressed and denied each of the City's points.

The City sought transfer to this Court. On June 25, 2019, this Court sustained the City's application for transfer.

### **POINTS RELIED ON**

I. The circuit court erred when it allowed the jury to hear evidence and argument related to the permanent partial disability rating Dr. Divelbiss assigned to Wilson because that evidence unduly prejudiced the City, in that a disability rating in the workers' compensation context is not relevant to a disability claim under the MHRA.

R.S.Mo. § 287.190

R.S.Mo. § 213.010(4)

II. The circuit court erred in awarding Wilson litigation expenses, because there is no statutory provision allowing such an award, in that the MHRA only permits a prevailing party to recover its court costs and reasonable attorney fees.

R.S.Mo. § 213.111.2 (2016)

R.S.Mo. § 514.060

*State v. Richey*, 569 S.W.3d 420 (Mo. banc 2019)

*Hesse v. Missouri Dep't of Corrections*, 530 S.W.3d 1 (Mo. App. W.D. 2017)

*Williams v. Trans State Airlines, Inc.*, 281 S.W.3d 854 (Mo. App. E.D. 2009)

## ARGUMENT

**I. The circuit court erred when it allowed the jury to hear evidence and argument related to the workers' compensation permanent partial disability rating Dr. Divelbiss assigned to Wilson because that evidence unduly prejudiced the City, in that a disability rating in the workers' compensation context is not relevant to a disability claim under the MHRA.**

### *A. Preservation of Error*

The City preserved this error for appeal in advance of trial by filing a motion *in limine* seeking a ruling that Dr. Divelbiss's disability report and rating for Wilson not be received in evidence. (LF D52 pp. 1-4). At trial, the City objected to the admission of the disability report and rating, along with any testimony regarding the report and rating, and requested a continuing objection. The circuit court overruled the City's objection to the report and rating, but afforded the City "a continuing objection during the course of the testimony related to that rating and the report containing that rating and the doctor's testimony relating to that rating." (Transcript 77:14-18). The Court further specified that it would "show a continuing objection whenever that rating is discussed." (Transcript 77:20-21). Following trial, the City filed a motion for new trial in which it raised the issue of the court's admission of the disability report and permanent partial disability rating into evidence. (LF D68 pp. 8-11). The Court denied the City's motion. (LF D85).

On appeal to the Court of Appeals, Western District, the City maintained this argument in Point II. As noted by the Western District, the City argued Wilson's "references to the workers' compensation disability rating prejudiced the City's defense"

of the case. (Per Curiam Order at p. 16). The City argued the jury should not have been allowed to see and hear Dr. Divelbiss's discussion of the rating report at trial or see the disability rating in the treating documents that were received in evidence at trial. (Per Curiam Order at p. 16). The disability rating report was solely for workers' compensation purposes. Pointing out the differences between the two statutory schemes, workers' compensation and the MHRA, the City argued a workers' compensation disability rating determination was irrelevant in an MHRA case. (Per Curiam Order at p. 16). The City contended the admission of this evidence was an abuse of discretion and was outcome-determinative in the case.

The Western District rejected the City's argument related to the admissibility of the permanent partial disability rating and the rating report. (Per Curiam Order at p. 18). The Western District stated Wilson "had the burden of proving he ha[d] a physical impairment that substantially limit[ed] one or more of his major life activities." To meet this burden, the Western District concluded the circuit court did not abuse its discretion in allowing Wilson to use the permanent partial disability as evidence. (Per Curiam Order at p. 18).

### ***B. Standard of Review***

"A trial court enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its action will not be grounds for reversal." *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 (Mo. banc 2015) (other citations omitted). A ruling constitutes an abuse of discretion when it is "clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate

consideration.” *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. banc 2014). “By both statute and rule, an appellate court is not to reverse a judgment unless it believes the error committed by the trial court against the appellant materially affected the merits of the action.” *Id.* at 451-52. “An erroneous evidentiary ruling warrants reversal, therefore, only when it affects the result or outcome of the case.” *Id.* at 452.

### *C. Analysis*

There are various definitions of disability found within Missouri’s workers’ compensation law. These definitions of disability are distinct from the definition of disability under the MHRA. As explained below, the differences between workers’ compensation and the MHRA make the workers’ compensation disability determinations legally irrelevant in a claim for disability discrimination under the MHRA. The circuit court erred when it allowed evidence of Wilson’s permanent partial disability rating into evidence at trial and this error materially affected the outcome of the case.

Under the workers’ compensation statutes, the term “permanent partial disability” has a specific legal meaning that is irrelevant to the question of disability under the MHRA. The term “permanent partial disability” signifies a “disability that is permanent in nature and partial in degree.” R.S.Mo. § 287.190.6(1). A permanent partial disability includes injuries caused by severance, total loss of use, or proportionate loss of use of various body parts, including arms, hands, fingers, legs, feet, and toes, and loss of vision or sight. R.S.Mo. § 287.190.1. A physician’s certification that someone has a “permanent partial disability” to a specific body part is utilized in the workers’ compensation context to determine the amount of a payment from the employer to the employee. R.S.Mo.

§ 287.190.1; R.S.Mo. § 287.190.6(2). The determination of a permanent partial disability is distinct from another type of workers' compensation disability determination, "total disability." Under Missouri's workers' compensation law, total disability signifies an "inability to return to any employment and [does] not merely mean inability to return to employment in which the employee was engaged at the time of the accident." R.S.Mo. § 287.020.6.

Contrasted with the above workers' compensation disability definitions is the definition of "disability" under the MHRA. R.S.Mo. § 213.010(4) defines "disability," in pertinent part, as "a physical or mental impairment which substantially limits one or more of a person's major life activities, being regarded as having such an impairment, or a record of having such an impairment, which with or without reasonable accommodation does not interfere with performing the job." With this definition, the MHRA makes the question of whether a plaintiff can perform his or her job with or without a reasonable accommodation part of the test to determine if the plaintiff is disabled. *Medley v. Valentine Radford Comms., Inc.*, 173 S.W.3d 315, 321 (Mo. App. W.D. 2005). A claim of disability discrimination under § 213.111 of the MHRA requires a plaintiff to show that: (1) the plaintiff is legally disabled; (2) the plaintiff was discharged; and (3) the disability was a factor in the plaintiff's discharge. *Hervey v. Missouri Dep't of Corrections*, 379 S.W.3d 156, 159 (Mo. banc 2012).

The workers' compensation permanent partial disability rating determination and the disability determination under the MHRA utilize different standards and have no relation to each other. In fact, Dr. Divelbiss's testimony establishes that he did not consider



Wilson's ability to perform his position as an equipment operator, with or without accommodation, when he reached his determination that Wilson had a fifteen-percent permanent partial disability to his right elbow. (Deposition of Dr. Divelbiss at 33:00-39:45; 51:45-55:05). Dr. Divelbiss testified that when he is figuring a disability determination for workers' compensation cases he does not follow any hard and fast rules. Instead, he uses his experience of having seen "lots of patients" with similar diagnoses and difficulties and putting those patients into a scale he had developed over a number of years. (Deposition of Dr. Divelbiss at 34:50-35:50). He also uses a number of objective tests, including grip strength and range of motion. (Deposition of Dr. Divelbiss at 34:50-35:50). Finally, he utilizes the information he has on the patient's underlying diagnosis and how the patient is functioning at the end of treatment. (Deposition of Dr. Divelbiss at 34:50-35:50). For Wilson's particular case, Dr. Divelbiss reviewed the treating documents and also tested Wilson's grip strength. (Deposition of Dr. Divelbiss at 36:10-37:00).

Based on the record in this case, the workers' compensation disability determination Dr. Divelbiss reached was irrelevant to Wilson's claim of disability discrimination. Relevancy is the key criterion for admission of evidence, and the court must find evidence both logically and legally relevant in order to admit it. *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992). Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principle issue of the case. *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 116 (Mo. banc 2015). The legal relevance analysis requires

the trial court to balance the probative value of the proffered evidence against its prejudicial effect on the jury. *Id.* Evidence acquires legal relevance only when the probative value of its logical relevance outweighs the danger of unfair prejudice. *State v. Bernard*, 849 S.W.2d 10, 22 (Mo. banc 1993), abrogation on other grounds recognized by *State v. Williams*, 548 S.W.3d 275, 283 (Mo. banc 2018). Legal relevance requires the trial court to weigh the probative value of the evidence against its costs, such as unfair prejudice, confusion of the issues, undue delay, misleading the jury, waste of time, or needless presentation of cumulative evidence. *Reed v. Kansas City Missouri School District*, 504 S.W.3d 235, 246 (Mo. App. W.D. 2016).

The circuit court's decision to allow into evidence the unrelated workers' compensation permanent partial disability rating was an abuse of discretion. Even assuming there is some logical relevance to the disability rating in Wilson's claim of disability discrimination, the principle there are separate and distinct definitions of "disability" would have confused the jury in this case. The jury heard from Dr. Divelbiss, an expert witness, who used the term "disability" in a way that was unrelated to the ultimate issue in the case and the jury was not provided any meaningful explanation of the distinction between the two types of disability. See *Switzer v. Switzer*, 373 S.W.2d 930, 939 (Mo. banc 1964) ("evidence that throws no light on the controversy should be excluded as it tends to confuse the issues and operates to prejudice a party before the jury"); *Barr v. Plastic Surgery Consultants, Ltd.*, 760 S.W.2d 585, 588 (Mo. App. E.D. 1988) ("Irrelevant and immaterial evidence is excluded because its admission has a tendency to draw the jury's attention away from the issues it has been called to resolve"). The jury heard

testimony from Wilson and statements from his attorneys at multiple points during the trial that a medical doctor had already determined Wilson's right elbow condition was a disability, a required element in his claim of disability discrimination. *See Hervey*, 379 S.W.3d at 159 (judgment reversed because verdict director failed to require jury to determine whether employee was in fact disabled as an essential element of disability discrimination claim). Then, Wilson made a closing argument that this disability rating conclusively proved his disability under the MHRA. Therefore, because the workers' compensation permanent partial disability rating's cost (particularly the likelihood Dr. Divelbiss's rating would confuse the issues and mislead the jury) outweighed its probative value, the rating was not legally relevant. The circuit court abused its discretion in admitting the workers' compensation disability rating into evidence.

The circuit court's admission of this permanent partial disability rating was prejudicial error because it was outcome-determinative and materially affected the merits of the case. "A determination of prejudice by the erroneous admission of evidence depends largely upon the facts and circumstances of the particular case." *Kearbey v. Wichita Se. Kan.*, 240 S.W.3d 175, 184 (Mo. App. W.D. 2007). In determining whether a party was prejudiced, the question is whether the "erroneously admitted evidence had any reasonable tendency to influence the verdict of the jury." *Id.* "Evidence is prejudicial if it tends to lead the jury to decide the case on some basis other than the established propositions in the case." *Urbach v. Okonite Company*, 514 S.W.3d 653, 660 (Mo. App. E.D. 2017). Put another way, the question is whether the evidence had an effect on the jury's deliberations

to the point that it contributed to the result reached. *State v. Barriner*, 34 S.W.3d 139, 151 (Mo. banc 2000).

After the circuit court denied the City's motion *in limine* to exclude any reference to the workers' compensation permanent partial disability rating and granted a continuing objection, there was little that occurred during the trial to lessen its prejudicial effect. Even though the jury heard from both Dr. Divelbiss and Wilson's attorney that the disability rating was for workers' compensation purposes, the admission of this disability rating allowed the jury to use this evidence when deliberating on the issue of whether Wilson was disabled for purposes of the MHRA. Additionally, Wilson's attorney focused on this rating at crucial points of the closing argument. As described above, Wilson's attorney discussed Dr. Divelbiss's permanent partial disability rating and said "But he has a permanent partial disability. ***Permanent, that's pretty easy. Disability, that's pretty easy.***" (Transcript 722:19-21) (emphasis added). Then, Wilson's attorney returned to the disability rating when told by the circuit court that his time for argument was drawing to a close. (Transcript 738:8-15).

There should be little question Wilson's use of the permanent partial disability rating out of workers' compensation had a reasonable tendency to influence the jury's verdict against the City in this case. This improperly admitted evidence allowed Wilson to unfairly discredit the City's defense that he was not a qualified individual with a disability for purposes of the MHRA. The City's defense of the case and its closing argument to the jury focused on this issue: "Is there a physical impairment here? Absolutely. The question is, is it a physical impairment that substantially limits a major life activity?" (Transcript

743:17-20). There is a reasonable probability the jury used this permanent partial disability rating from the workers' compensation context to influence its determination that Wilson proved all elements of his claim of disability discrimination. This evidence was prejudicial.

This Court should find the circuit abused its discretion in admitting the workers' compensation permanent partial disability rating and that such admission was prejudicial to the City. The City's point should be granted on appeal and the amended judgment should be reversed and the case remanded for further proceedings.

**II. The circuit court erred in awarding Wilson litigation expenses, because there is no statutory provision allowing such an award, in that the MHRA only permits a prevailing party to recover its court costs and reasonable attorney fees.**

**A. *Preservation of Error***

Following trial, Wilson's attorneys filed a motion styled as "Plaintiff's Motion to Amend Judgment to Add Equitable Relief: Attorney Fees, Costs, Expenses, Front Pay and/or Increased Seniority." (LF D 60 p.1). Within that motion, Wilson's attorneys averred their current *expenses* expended on the case were \$9,644.56. (LF D60 p.2) (emphasis added). Attached to that Motion to Amend Judgment at Exhibits E and F were only spreadsheets which purported to itemize expenses incurred in the prosecution of the case. (LF D65 p.1 and LF D66 pp. 1-2; Appendix A19-A22). No itemized receipts were included. (LF D65 p.1 and LF D66 pp. 1-2; Appendix A19-A22). Included among these expenses were line entries for Jimmy John's (lunch during trial), Harry's Country Club (dinner during trial), soda and water during trial, Dickson Diveley (expert witness retainer

fees for deposition), postage expenses, copy expenses, parking expenses, and “reimbursement[s] for trial.” (LF D65 p.1 and LF D66 pp. 1-2; Appendix A19-A22).

The City objected to Wilson’s request to recover these expenses in its filed Opposition to Plaintiff’s Motion for Fees and Costs. (LF D69 p.1). Within that filing, the City contended the circuit court should deny a majority of Wilson’s requested “costs” because “the costs [went] far beyond the scope of recoverable ‘court costs’” under the MHRA. (LF D69 p.12). Additionally, the City argued Wilson could not recover video deposition costs in the face of Missouri Supreme Court Rule 57.03, which expressly states that such videotaping “shall not be taxed as costs.” (LF D69 p.14). Finally, the City challenged Wilson’s other claims for reimbursement of costs because he submitted insufficient documentation to allow for recovery of those costs. (LF D69 p. 16; Appendix A19-A22).

At the hearing on Wilson’s Motion to Amend Judgment to Add Equitable Relief: Attorney Fees, Costs, Expenses, Front Pay and/or Increased Seniority, the circuit court explicitly questioned the parties on their respective positions regarding an award of “litigation expenses” under R.S.Mo. § 213.111.2. (Transcript (Post-Trial Motions) 15:10-11). The City’s response emphasized the MHRA only allowed a Court discretion to award a prevailing party its court costs and reasonable attorney fees, not its litigation expenses. (Transcript (Post-Trial Motions) 15:12-15). An extended discussion regarding the recoverability of litigation expenses under the MHRA ensued. The City cited *Williams v. Trans State Airlines, Inc.*, 281 S.W.3d 854, 880-81 (Mo. App. E.D. 2009), to emphasize that litigation expenses could not be awarded under the MHRA. Wilson’s attorneys argued

that *Trans State Airlines* left this question to the circuit court's ultimate discretion. (Transcript (Post-Trial Motions) 14:25-18:19). In its amended final judgment, the circuit court awarded Wilson and his attorneys "Litigation Expenses in the amount of \$9,644.56." (LF D86 p.3).

In Point IV of its appeal to the Court of Appeals, Western District, the City maintained the circuit court erred when it granted Wilson all of his requested litigation expenses in the amended judgment. The City acknowledged the Western District had decided in *Hesse v. Missouri Dep't of Corrections*, 530 S.W.3d 1 (Mo. App. W.D. 2017)<sup>2</sup>, the decision to award litigation expenses in an MHRA case "is within the sound discretion of the trial court and should not be reversed absent a showing that the trial court abused its discretion." (Per Curiam Order at pp. 22-24). However, the City argued the Western District's decision in *Hesse* should be reexamined and disavowed because it was wrongly decided pursuant to the plain language of the MHRA and the *Hesse* court's reliance on the Eastern District's decision in *Williams v. Trans States Airlines Inc.*, 281 S.W.3d 854 (Mo. App. E.D. 2009), was misplaced. The Western District disagreed, stating the issue of awards of litigation expenses under the MHRA had been decided and the court was bound by the doctrine of stare decisis. (Per Curiam Order at p. 24). The Court of Appeals denied the City's Point IV and affirmed the entire award of litigation expenses.

### ***B. Standard of Review***

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<sup>2</sup> Neither party referenced the Western District's decision in *Hesse* at the hearing on Wilson's motion to amend the judgment in the circuit court because it had not yet been decided.

The decision to award court costs and reasonable attorney fees to the prevailing party is within the sound discretion of the trial court and should not be reversed absent a showing that the trial court abused its discretion. *Hesse v. Missouri Dep't of Corrections*, 530 S.W.3d 1 (Mo. App. W.D. 2017). However, whether § 213.111.2<sup>3</sup> of the MHRA permits a circuit court to award litigation expenses as “court costs” is an issue of statutory interpretation. Statutory interpretation is an issue of law that this Court reviews *de novo*. *Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683, 686 (Mo. banc 2010). The Court’s task in statutory interpretation is to discern the intent of the legislature from the language used. *Id.* In doing so, this Court considers the language’s plain meaning. *Id.*

### **C. Analysis**

In the MHRA, the Missouri legislature included the term “court costs” as a category of authorized recovery for a prevailing plaintiff. It did not utilize the term “litigation expenses.” Additionally, because the term “court costs” has a specific definition in Missouri law, a court has discretion only to allow those court costs permitted by explicit statutory authority. “Court costs” in the MHRA means what it says, and that term does not include other litigation expenses. The Western District’s determination to the contrary in *Hesse* should be overruled and reversed.

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<sup>3</sup> In the time since the trial court awarded Wilson his litigation expenses in this case, the legislature has amended R.S.Mo. § 213.111. These amendments to § 213.111 do not affect the City’s particular argument in this case. In all pertinent versions of the statute, a prevailing plaintiff could be awarded “court costs and reasonable attorney fees.” A copy of both versions of § 213.111 are included in the appendix to this brief. (Appendix A15-A17).



In Missouri, “‘costs’ are a creature of statute, and courts have no inherent power to award costs, which can only be granted by virtue of express statutory authority.” *State v. Richey*, 569 S.W.3d 420, 423 (Mo. banc 2019); *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 800 (Mo. banc 2017). “Statutes allowing the taxation of costs are strictly construed.” *Id.* “[N]o right to or liability for costs exists in the absence of statutory authorization.” *Cramer v. Smith*, 350 Mo. 736, 168 S.W.2d 1039, 1040 (Mo. banc 1943). Express statutory authority must be clear, definite, and unambiguous. There is no power to tax costs “unless a finger can be put upon a statute permitting it.” *Jacoby v. Mo. Valley Drainage Dist.*, 349 Mo. 818, 163 S.W.2d 930, 931 (Mo. banc 1942). In other words, “[a]n item is not taxable as costs in a case unless it is specifically authorized by statute, or by agreement of the parties.” *Carter*, 518 S.W.3d at 800; *Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39, 44 (Mo. banc 1976).

Despite the longstanding, unambiguous directive from this Court that an item is not taxable as a court cost unless it is specifically authorized by statute, the Court of Appeals has held the MHRA is an exception. The divergence from this Court’s precedent seems to have initiated with the Eastern District’s decision in *Williams v. Trans States Airlines Inc.*, 281 S.W.3d 854 (Mo. App. E.D. 2009). In *Trans State Airlines*, the prevailing plaintiff included in her Bill of Costs fees for filing her petition and service of summons, costs for electronic equipment and electronic exhibits used at trial, costs for postage and fax, copy and duplication costs, and parking fees. 281 S.W.3d at 881. She argued she was entitled to recover these expenses because she believed R.S.Mo. § 213.111.2 allowed a prevailing plaintiff to recover a “broader array of expenses and costs than are taxable in other civil

actions.” *Id.* at 880. The Eastern District declined to extend § 213.111.2 beyond the plain meaning of the statute’s language and found the trial court had not abused its discretion in its cost award. *Id.*

In reaching that conclusion, the Eastern District explained that a trial court is limited to awarding only those costs granted by virtue of express statutory authority. *Id.* Then, the Court stated § 213.111.2 grants the trial court authority to award costs “at its discretion, and does not mandate the taxing of any particular costs.” *Id.* at 881. In continuing, however, the Eastern District drifted from precedent and wrote that any award of costs beyond those for which R.S.Mo. § 514.060 provides “must emanate from Section 213.111.2 of the MHRA, which gives the trial court discretion in awarding costs.” *Id.* Finally, in dicta, the Eastern District concluded its opinion on this issue by remarking:

While it may be within the discretion of the trial court under Section 213.111.2 to follow the federal approach of awarding costs outside the parameters of Section 514.060, we find nothing in the MHRA that requires a trial court to make such a cost award, or that a trial court abuses its discretion in declining to follow the federal approach.

*Id.*

The Eastern District’s concluding statements regarding costs in *Trans State Airlines* were later adopted by the Western District in *Hesse v. Missouri Dep’t of Corrections*, 530 S.W.3d 1 (Mo. App. W.D. 2017), as authority to award costs outside the parameters of R.S.Mo. § 514.060 and any other statutory authority. In *Hesse*, the Western District upheld an award of \$1,389.15 in litigation expenses. *Id.* In affirming that award, the Court announced:

The trial court's discretion to determine court costs is broad. In *Trans State Airlines Inc.*, 281 S.W.3d at 881, our Eastern District recognized that Section 213.111.2 even gives trial courts discretion "to follow the federal approach of awarding costs outside the parameters of Section 514.060," though they are not required to do so. Here, the trial court either interpreted "court costs" as inclusive of litigation fees or used its considerable discretion to award costs "outside the parameters of Section 514.060." The [appellant] has not shown how either approach would constitute an abuse of discretion.

*Id.* at 6. The rule regarding litigation expenses in *Hesse* continues to be applied in MHRA cases. *See, e.g., Jones v. City of Kansas City*, 569 S.W.3d 42 (Mo. App. W.D. 2019) (upholding award of \$44,913.49 in costs, which included videotaped depositions, under theory that trial court could award costs by following the federal approach and exceeding the boundaries of § 514.060).

The term "court costs," at dispute in this case, is not defined in the MHRA. Yet, the tools of statutory interpretation demonstrate the legislature did not intend to allow a prevailing party to recover its litigation expenses in an action under the MRHA. "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018). "The legislature is presumed to have intended *every word, provision, sentence, and clause* in a statute to be given effect." *Id.* "The plain and ordinary meaning of the words in a statute is determined from the words' usage in the context of the entire statute." *Id.* A court does not make the law, but is obligated to enforce the law as duly enacted by the legislature. *Goerlitz v. City of Maryville*, 333 S.W.3d 450,

456 (Mo. banc 2011). In doing so, the Court defers to the plain language of the statute, the time-honored principle of separation of powers, and the recognition that policy decisions are within the province of the legislature. *Id.*

A proper reading of § 213.111.2 demonstrates the Court of Appeals has made two errors when holding a trial court has discretion to award “costs” under the MHRA in such an expansive fashion. First, § 213.111.2 does not grant a circuit court the discretion to award any “costs” it deems justified to a prevailing party. The circuit court only has discretion to award “court costs” to the prevailing party. The term “court costs” is far less expansive than “costs.” Next, there is little in the MHRA’s plain language of “court costs” to demonstrate that term can be interpreted to signify that other miscellaneous litigation expenses are also recoverable by a prevailing party. Section 488.010 provides the definition of court costs that should be applied in this case. Court costs are defined as “the total of fees, miscellaneous charges and surcharges imposed in a particular case.” § 488.010(1). “Fees” are defined as “the amount charged for services to be performed by the court.” § 488.010(2). “Miscellaneous charges” are defined as “the amounts allowed by law for services provided by individuals or entities other than the court.” § 488.010(3). Finally, “surcharges” are defined as “additional charges allowed by law which are allowed for specific purposes designated by law.” § 488.010(4). When interpreting what may be considered a “service” and recoverable as a miscellaneous charge, this Court has stated that cost taxation statutes must be construed strictly. *State v. Richey*, 569 S.W.3d 420, 423 (Mo. banc 2019) (“section 488.010 cannot be found to provide *express* statutory authorization to allow jail debt to be taxed as court costs”) (emphasis in original).

If the Missouri legislature had intended litigation expenses to be included within a prevailing party's recovery under the MHRA, it would have used different, and more expansive, language in § 213.111.2. In fact, within the Missouri Revised Statutes, there are at least four instances where the legislature has expressly used the more expansive term "litigation expenses." Within R.S.Mo. § 136.315, the legislature has permitted the recovery of litigation expenses in tax collection proceedings. Specifically, in a tax collection proceeding, a court or administrative hearing commission is permitted to "award the party reasonable litigation expenses if it finds that the position of the state was vexatious or was not substantially justified." R.S.Mo. § 136.315.2. For purposes of the section, litigation expenses are to include "*court costs, attorneys' fees and fees for expert and other witnesses.*" § 136.315.1(4) (emphasis added). Section 448.3-111 of the Uniform Condominium Act permits a condominium association to recover "*all litigation expenses, including reasonable attorney's fees.*" (emphasis added). Section 547.370 allows any attorney appointed in the postconviction phase of a death penalty case to be provided "*reasonable and necessary litigation expenses.*" (emphasis added). Finally, in R.S.Mo. § 600.064 the legislature has prohibited a circuit court judge from requiring private attorneys appointed to represent an indigent defendant to advance the attorney's "*personal funds in any amount for the payment of litigation expenses to prepare defense for an indigent defendant.*" R.S.Mo. § 600.064.2 (emphasis added).

Other statutory sections similarly indicate the legislature is aware of how to include more expansive terms than court costs to allow for greater recovery for a party which prevails in litigation. Through the Missouri Merchandising Practice Act (MMPA), R.S.Mo.

§ 407.010 to § 407.130, the state’s attorney general has been empowered to conduct investigations into potential violations of the Act. When the attorney general brings an action under the MMPA, the legislature has permitted the attorney general to recover “*as costs, in addition to normal court costs, the costs of the investigation and prosecution of any action.*” R.S.Mo. § 407.130 (emphasis added). In the Motor Vehicle Franchise Practice Act (MVFP Act), R.S.Mo. § 407.810 to § 407.835, the legislature has declared a franchisee who proves a violation of the MVFP Act is able to recover actual damages sustained by reason of the violation, “*plus actual and reasonable expenses of litigation, including, but not limited to, depositions, transcripts, expert witnesses, and attorney fees.*” R.S.Mo. § 407.835.1 (emphasis added). In Missouri’s Surface Coal Mining Law, R.S.Mo. § 444.800 to 444.940, the legislature has granted a circuit court or the Missouri mining commission authority to award “*all costs and expenses (including attorney fees)* as determined to have been reasonably incurred by such person for or in connection with his participation in commission proceedings.” R.S.Mo. § 444.895.5 (emphasis added). In § 514.303, the legislature has provided that in the enforcement of judgments, “*all costs* involved in the execution and sale of property pursuant to judgment, except attorney’s fees, may be awarded as judgment in favor of the party incurring such costs, including moving expenses, insurance, storage charges, and any other expenses” that are “reasonably incurred as a result of such execution and sale.” R.S.Mo. § 514.303 (emphasis added). These are but a few examples demonstrating the legislature is capable of drafting varied cost provisions into statutes as it deems appropriate.

Despite its demonstrated ability to include more expansive language, in the MHRA the legislature settled on allowing the recovery of “court costs.” In light of the plain language of “court costs” in the MHRA and this Court’s precedent requiring express statutory authority for an item to be awarded as a court cost, the circuit court has erred in awarding Wilson litigation expenses in this case. Wilson has been awarded litigation expenses which included lunches during trial, dinner following a day of trial, soda and water during trial, parking expenses, postage expenses, filing and service fees, retainers for expert witness depositions, video deposition expenses,<sup>4</sup> and non-itemized entries of “reimbursement for trial” and “blow ups.”<sup>5</sup> (LF D65 and D66). The City cannot find any authority to support a conclusion that the majority of the awarded litigation expenses come within the characterization of “court costs” under the MHRA or any other Missouri statute. At no stage of this case has the Court of Appeals, the circuit court, or Wilson pointed to any statute which provides express statutory authorization to allow a deli sandwich at Jimmy John’s, dinner at Harry’s Country Club in the City Market, unsupported claims seeking “reimbursement for trial,” or any of the other awarded litigation expenses to be

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<sup>4</sup> Wilson sought and was awarded litigation expenses for a video deposition despite a Missouri Supreme Court Rule explicitly exempting such expenses as being included as costs. Rule 57.03(c)(6) provides that “[u]nless otherwise stipulated to by the parties, the expense of videotaping is to be borne by the party utilizing it and shall not be taxed as costs.”

<sup>5</sup> Wilson has been awarded these litigation expenses despite astonishingly little documentation to substantiate what they are or that they were incurred as part of the case. For example, Wilson has been awarded a total of \$609.25 for entries which state nothing more than “reimbursement for trial.” (LF D66 p.1). This Court must require parties and their attorneys to produce much more detailed documentation when seeking reimbursement for any type of court costs.

recoverable as court costs. Simply put, such authority cannot be found because these are not court costs.

The Western District's interpretation of "court costs" in *Hesse* to include litigation expenses, and duly followed in this case, has effectively expanded the relief available to a prevailing plaintiff under the MHRA to bounds the legislature never envisioned. If Wilson's award of litigation expenses is permitted, then it is not difficult to see this holding expanded even further. Many other litigation expenses may be routinely requested as court costs by prevailing parties: mock trial expenses, jury consultant expenses, technology consultant expenses, gas for attorneys' vehicles to get to the courthouse for trial, dry cleaning for trial clothing, among many others. Trial courts could soon unnecessarily face decisions of how closely tethered must a requested "litigation expense" be to a court proceeding before it can be recovered as a court cost. None of this should be necessary.

Section 213.111.2 of the MHRA authorizes courts to award a prevailing plaintiff the "court costs" he or she incurred in the litigation. That term means the court costs as specified in Missouri law; it does not include litigation expenses. This Court should reverse the amended final judgment of the circuit court and remand the case for further proceedings so the judgment may be modified to include an award of court costs which is permitted by law.

### **CONCLUSION**

For the foregoing reasons, the City respectfully requests this Court reverse the circuit court's amended final judgment and remand this cause for a new trial. In the event this Court does not reverse the amended final judgment and remand for a new trial, the



judgment should be reversed and remanded for further proceedings so that it may be modified to only include an award of court costs which is permitted by law.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

The undersigned counsel hereby certifies that pursuant to Missouri Supreme Court Rule 84.06(c), this brief contains the information required by Missouri Supreme Court Rule 55.03; (2) complies with the limitations in Missouri Supreme Court Rule 84.06(b); and (3) contains 9,855 words, exclusive of the sections exempted by Missouri Supreme Court Rule 84.06(b), which was determined using the word count feature in Microsoft Word.

/s/ Timothy R. Ertz  
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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of Appellant's Substitute Brief has been filed today, August 5, 2019, with the Court's efilings system. That system will serve a copy to all counsel of record in this case by electronic mail.

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