IN THE SUPREME COURT OF MISSOURI

SC97696

GARY GENTRY,

Plaintiff/Respondent,
v.
ORKIN, LLC and DANNY BIRON,

Defendants/Appellants

Appeal from a Judgment of the Circuit Court of Jackson County, Missouri (Independence, MO)
The Honorable Jennifer M. Phillips
Case No. 1416-CV16259

RESPONDENT'S SUBSTITUTE BRIEF

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ATTORNEYS FOR RESPONDENT GARY GENTRY

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FACTS

Orkin is a pest-control control company. (Ex.52[1]; TR383:10-13). In May 2007, Gentry became employed by Orkin as a pest technician[2] at its branch in Independence, Missouri. (TR739:10-22). Throughout Gentry's employment, he worked Route 8, which included Belton, Raymore, Grandview, Martin City, Harrisonville, Butler, and Rich Hill. (TR696:18 - 697:15). He also covered Hatfield, Tarkio, St. Joseph, Cameron, Savannah, Albany, Blue Springs, and Tightwad. (TR698:2-8). On June 1, 2012, Gentry was fired by the Branch Manager, Appellant Danny Biron. (TR705:10-11; TR542:14-21).

During 1999, Biron started working for Orkin in California. (TR491:25 - 492:6). He transferred to Independence in January 2011. (TR492:25 - 493:6, 15-18). As Branch Manager (TR493:19-22), Biron was the branch's highest-ranking employee. (TR494:22-24). When he transferred, he reviewed the pest technicians' files to became familiar with their performance (TR502:22 - 503:10; TR504:14-17), Gentry's included. (TR505:14-17).

In February 2012, Gentry started a medical leave of absence to have shoulder surgery for a workplace injury. (Ex.52, p.Orkin000740); (TR426:16-19). The previous

[1] Exhibit 52 is Appellants' March 13, 2014 Position Statement to the Missouri Commission on Human Rights in response to Gentry's Charge of Discrimination regarding Appellants' failure to rehire Gentry. (Ex.52; TR382:17-23). It was written by Orkin's trial counsel, John Gumbel (TR646:7-12) and admitted without objection. (TR383:10-20).

[2] Also "Pest Control" or "PC" Route Manager. (TR484:2-6; 492:3-4; 653:13-15).

June, he fell off a chair at a customer's house. (TR446:1-11). He had shoulder surgery February 3, 2012. (TR735:5; 777:15-18).

On June 1, 2012, approximately one week before Gentry was supposed to return from leave, he went to the branch to check-in and see how things were going. (TR704:7-18; TR719:11-25). While there, Biron fired him. (TR704:22-25; TR705:10-11; TR720:1-3; TR542:14-21).

On July 19, 2012, Gentry filed a Charge of Discrimination alleging his termination was discriminatory. (TR705:12-22); (TR710:5-24). Gentry contacted the Missouri Commission on Human Rights, told them about his termination from Orkin, his injury, and his age, and the Commission filled out a Charge of Discrimination form and asked him to sign. (TR710:5-19). The Charge alleged "age and disability discrimination" for being fired. (Ex.52, p.Orkin000740). The Commission told Gentry he needed to sign the Charge in order to complain about the circumstances of his termination. (TR710:20-24). He received a right-to-sue notice, but "elected not to file a lawsuit." (Ex.52, pp.740-41). The next time Gentry communicated with Biron was when seeking reemployment one year later. (TR723:19-22). Gentry was eligible for re-hire even though he was fired. (Ex.133; TR536:12-22; TR537:14-19).

On July 16, 2013, Gentry emailed Biron at d.biron@orkin.com with his resume attached, stating that he was "looking for work" and asking if he needed to "go and fill out an online application." (Ex.159; TR572:10-21). Initially, Appellants admitted Biron received Gentry's resume via email on July 16, 2013. (Ex.52, p.Orkin000741). Then Biron testified he did not receive the email until July 22, 2013 when Gentry forwarded it to

d.biron@orkin.com and dbiron@orkin.com. (TR573:3-20, 574:20-23; 576:4-7; Ex.159). It was undisputed that by July 22, 2013, Biron knew Gentry was seeking reemployment with Orkin. (TR574:20-23; 578:14-23).

Gentry also sent Biron another email on July 22, 2013 asking to return to Orkin. (Ex.160; TR580:1-11). When Biron fired Gentry, he gratuitously wrote Gentry a letter of recommendation. (TR720:4-18; TR804:6-12). In Gentry's second July 22, 2013 email, he mentioned Biron's "letter of recommendation" and suggested that, given Biron's "explanation for firing [him], that [Biron] might have a position available for [him]." (Ex.160). Biron's letter states:

> … Gary is a model employee. Within his first couple of months with the company he was selling beyond what our existing team was achieving. His spirited personality and positive attitude are great attributes that I would love to have on my team.
>
> Please give him the highest regard and any opportunity that may be available, your company would greatly benefit.

(Ex. 57; TR722:13-25; Ex.154).[3]

Gentry considered the letter a "glowing" review. (TR723:8-15). He thought it accurately described his character. (TR804:17 – 805:8). He agreed that he was a model employee. (TR809:2-13; TR810:2-15)

[3] Biron testified "several" of his statements in the letter (Ex.154; TR544:16-25) were "embellished" (TR545:8-9) or simply "[n]ot true." (TR546:2-5, 546:9-10, 546:11-13).

Gentry sent Biron a third email on July 22, 2013, saying he that wanted to return to Orkin, he "loved that job," and he was willing to fill-in or work on-call. (Ex.83; TR486:3-8). Biron emailed back: "Thank you for your interest in employment. I currently do not have any open positions at this time, but will keep your resume on file." (Ex.83; TR584:9-22; Ex.162). Gentry thought if a job became available, Biron would consider him. (TR725:1-5). Gentry had no contact with Biron during August, September, October, or November of 2013. (TR797:6-24).

On December 27, 2013 Gentry saw a classified ad in the Independence Examiner for pest technician openings at Orkin. (Ex.84,[4] TR726:12 – 727:7). The ad was for "Pest Technician" (Ex.84, TR728:25 – 729:3), said, "Experience Preferred" (Ex.84, TR729:4-6) and "Fax resume." (Ex.84, TR729:16-18). Gentry reapplied (TR727:8-11) by faxing his resume to the number provided. (TR730:11-20). He included the letter of recommendation from Biron. (TR804:13-16). Biron received Gentry's fax and resume on December 30, 2013. (Ex.52, p.Orkin000741; p.Orkin000766); (Ex.87; TR411:10-12). Biron never responded to Gentry. (TR730:21 – 731:5).[5]

[4] A legible copy of Exhibit 84 is in *Respondent's Appendix*, at A1-A2 (highlighted).

[5] When Biron's attorney asked him if he recalled receiving Gentry's December fax and resume, Biron testified he did not (TR586:23 - 587:17; Ex.178) and claimed he was on vacation. (TR587:22-23). But in Appellants' Position Statement, they admitted Biron received the fax when it was sent. (Ex.52, p.Orkin000741). They wrote the fax was sent

On January 6, 2014 Gentry filed a Charge of Discrimination with the Missouri Commission alleging he was retaliated against by not being interviewed or rehired. (TR800:16 – 801:9; 803:10-15). The Commission issued Gentry a right-to-sue notice on April 17, 2014. (D4, p.1). On July 14, 2014, Gentry filed this lawsuit, alleging Appellants refused to interview or rehire him as retaliation for filing the July 19, 2012 Charge of Discrimination. (D2, pp.2- 5). Trial started December 5, 2016. (D95, p.1).

In opening statement, Appellants told the jury Gentry was not rehired because there were "many problems with [his] performance." (TR375:13-20). The decision whether to rehire Gentry was "up to" Branch Manager Biron. (TR538:25 – 539:13). Despite giving conflicting testimony about whose decision it was,[6] Biron testified he refused to re-hire Gentry because he had a "history" and "a proven track record of bad performance." (TR591:21 – 592:4); (TR593:22 – 594:1).

"directly to Mr. Biron" on December 30, 2013 and attached the fax thereto. (Ex.52, p.Orkin000741, 764-66).

[6] When Biron's attorney asked, Biron testified it was his decision. (TR538:25 – 539:12). Biron agreed that as Branch Manager, he had the "primary call" on whether to re-hire an employee, unless the employee was ineligible for rehire. (TR539:4-13). Because Gentry was eligible for rehire (Ex.133; TR536:12-22; TR537:14-19) the decision was "up to the branch manager." (TR539:8). When Gentry's counsel followed-up, Biron changed his testimony, claiming that when hiring former employees, he "would have to go through the chain of command and get approvals." (TR646:23 – 647:3).

After arriving as Branch Manager in January 2011, the first time Biron documented Gentry's performance was September 1, 2011. (Ex.55; TR461:11-15); (Ex.213; TR514:6-515:2). Biron testified that through September, "G[entry] had been great." (TR462:12-16). In Gentry's September 1, 2011 performance review, Biron wrote, "You have a very positive attitude. You are courteous to both customers and coworkers. Thank you for being a team player." (Ex.55). He also wrote, "Even though your route covers a large area, you find time to help other technicians when you're needed. Your flexibility and seemingly endless positive attitude is one of your greatest strengths. Keep it up!" (Ex.55). Biron's "Summary" said Gentry's "attitude shows that [he was] proud to work for Orkin." (Ex.55)

On October 3, 2011 Biron emailed his Regional Manager with concerns about his staff's production statistics. (Ex.21, 10/3/11 Email; TR614:8-615:13). For the month of September, all eight of Biron's pest technicians failed to keep their cancellation rate under the allowed rate of two percent. (TR613:14-614:7). Among the eight technicians, however, Gentry's cancellation rate was second lowest (*i.e.*, second closest to the goal). (Ex.21, p.Orkin000960). Gentry was not a poor performer compared to his co-workers.

Gentry's termination was not based on "performance deficiencies." (Ex.52, p.Orkin000740).[7] On June 20, 2012 Biron completed a "Notice of Termination" form to record Gentry's termination. (Ex.53; TR438:7-12, 440:14-19, 441:18-21). The reason Biron recorded for Gentry's termination was, "Failed to return within 12 weeks of FMLA."

[7] Even if Gentry *had been* fired for poor performance, he would have been eligible for rehire. (Ex.53; 441:10-17).

(Ex.53; TR441:3-9). Orkin's non-FMLA leave policy afforded Gentry up to one year of leave, but Biron testified that the decision to fire Gentry earlier than that was a "risk management decision." (TR609:11-22; 610:6-15). Biron testified he wanted to allow Gentry return to work instead of firing him. (TR611:13-25).

According to Biron, he never wanted to fire Gentry and that decision was not his. Biron claimed that despite Gentry's alleged poor performance, he wanted to give Gentry a "second chance" by allowing him to return from his leave of absence instead of being fired. (TR603:18-23). Biron testified the reason Gentry was fired instead of getting a "second chance" was because he provided a doctor's note requiring extra time off before his leave expired. (TR606:16-21; TR646:13-18). The doctor's note requested Gentry's leave of absence be extended for "2-3 weeks" from May 25, 2012. (Ex.77; TR645:24 – 646:6; 646:19-22). The restriction in the doctor's note expired by the time Gentry reapplied in July 2013. (Ex.77; Ex.83). Nevertheless, Biron refused to interview or rehire Gentry even though there were open jobs for which Gentry was qualified.

Orkin's Independence branch had four Pest Technicians job openings when Gentry was seeking reemployment: (1) March 13, 2013; (2) October 1, 2013; (3) December 4, 2013; and (4) January 13, 2014. (Ex.52, p.Orkin000741). Controversy surrounds each one.

(1) March 13, 2013 Opening

In opening, Appellants said the March opening was filled by Michael Baldwin before Gentry's July 16, 2013 application. (TR371:21 – 372:18). Appellants made the same representation to the Missouri Commission. (Ex.52, p.Orkin000741). When Appellants submitted their Position Statement to the Commission, they included a "New Hire Form"

for the March opening. (Ex.52, p.Orkin000741). The "New Hire Form" was heavily redacted, but it purported to show an employee filling the March pest technician opening on July 1, 2013 (Ex.52, p.Orkin000768), which was more than two weeks before Gentry sent his first resume to Biron (Ex.52, p.Orkin000741, n.2); (TR384:16 – 385:8).

At trial, Biron admitted that Baldwin did not start on July 1, 2013. (TR399:13 – 401:15). Appellants swore (in interrogatory answers) that Baldwin was hired July 17, 2013. (TR395:5-9). At Biron's deposition as corporate representative for Orkin, he admitted that Baldwin's hire date was August 1, 2013. (TR394:14-24); (TR395:10-13); (TR396:2-10). At trial, Biron could not explain why Appellants provided three different hire dates for Baldwin saying, "I didn't know. I don't know." (TR395:19-22). Biron finally testified that "Mr. Baldwin was hired mid-July somewhere, I don't know…." (TR399:6-12).

When Appellants provided Gentry with a copy of their Exhibit notebook the morning of opening statements (the second day of trial) inside was Defense Exhibit 174 (*See* Ex.174).[8] Gentry offered Exhibit 174 and it was admitted without objection. (TR388:13-23). Exhibit 174 is the "unredacted" version of the "New Hire Form" Appellants gave the Missouri Commission, claiming it was for Michael Baldwin, but in fact, it was a new hire form for Jose Vargas. (TR388:11 – 391:15; 399:13 – 401:3). The New Hire Form for Jose Vargas, which Appellants provided to the State claiming it was

[8] Exhibit 174 was never produced by Appellants during discovery. The first time it was provided to Gentry was when the Exhibit Binder was produced the second day of trial.

for Baldwin, was for job code 4780. (Ex.52, p.Orkin000768). Notably, job code 4780 is not for Pest Control. (TR387:14 – 388:5; Ex.69).

(2) October 1, 2013 Opening

In opening, Appellants admitted a pest technician job opened October 1, 2013, which was never filled. (TR373:14-17). No one was hired for it. (TR423:19-21; TR478:14-16; TR585:24 – 586:3). There was also an opening as of October 1, 2013 for administrative specialist, but Biron did not consider Gentry for it. (TR484:25 – 485:11). Gentry was never contacted about either October job opening. (TR725:14-24).

(3) December 4, 2013 and (4) January 13, 2014 Openings

According to Exhibit 52, pest technician jobs opened on December 4, 2013 and January 13, 2014. (Ex.52, p.Orkin000741). Appellants claimed they "filled these positions with applicants who were more qualified than Complainant." *Id*. Those two people were Keith Shumate and Lenzel Boose. *Id*.

Biron testified he filled the December opening on December 4 or 5, 2013, when he hired or offered the job to Schumate. (TR411:15 – 412:11; TR415:12-18). In Exhibit 52, Appellants claimed Schumate applied on December 4, 2013. (Ex.52, Orkin000741). But at trial, Biron admitted Schumate did not apply until December 16, 2013. (TR416:4 – 417:22; TR418:14-15; TR590:6-9). Biron performed Schumate's telephone reference checks on January 20, 2014. (TR415:1-11).[9] After being confronted with this information, Biron

[9] Orkin policy requires telephone reference checks to be completed before an offer of employment is made. (Ex.90; TR623:1 – 624:10).

admitted he did not know when he offered a job or hired Schumate. (TR418:14-20). Then Biron claimed he never got Gentry's December 2013 faxed resume. (TR419:18-24). But the faxed resume was attached to Appellants' position statement along with an admission that they were received by Biron. (Ex.52, p.Orkin000741, 764-66).

Biron then claimed the December 4, 2013 opening was "taken off the market" before Gentry faxed his resume on December 30, 2013. (TR590:2-15). But on January 16, 2014, Boose applied (Ex.58, p.000614; TR467:6-10) for the December 4, 2013 opening. (Ex.58, first page). Biron admitted Boose's January 16, 2014 application was for the December 4, 2013 opening. (TR478:25 – 480:8). Regarding Boose's qualifications, when he applied, he was 19 years old and had two prior jobs. (Ex.58, pp.Orkin000610-11; TR468:2-5). Boose had no experience in pest control. (TR592:5-7). He was fired for violating Orkin's drug policy. (TR481:19-23, TR482:4-8, 18-19).

Appellants and Gumbel Lacked Credibility at Trial

In opening statement, Gumbel told the jury,

> What is important is that … Mr. Biron … whom you will hear from on the Defense side, none of them work for the company. None of them have to testify here today to keep their paycheck coming. That's an important part of this. And that's an important part of your assessment of the whole case.

(TR363:22 – 364:4). Biron admitted his lawyer suggested in opening that he did not have interest or bias in the case. (TR466:3-8). When asked, "You're not paying for your lawyer,

are you?" Biron answered "No." (TR466:9-10). Free legal counsel was not the only benefit Orkin had offered Biron since his termination.

When employed, Biron had executed Orkin's non-compete agreement (TR626:14-16) as did Gentry. (Ex.64; TR716:9-13). Orkin's non-compete prohibits employees from working for a competitor within a 10-mile radius of Orkin for two years after their employment ends. (Ex.64; TR717:3 – 718:24). Orkin fired Biron during April 2014, (TR378:4-8), "for improperly and personally posting service tickets for accounts to which he had not rendered services in violation of Orkin's policies and procedures." (TR381:14-20). Biron agreed that if he was "improperly posting services for which [he] had not rendered services, that would be stealing." (TR379:3-7). Despite being under a non-compete agreement, Biron started working at a competitor in downtown Kansas City within one month of being fired. (TR489:19-22; TR626:9-13). Orkin and their lawyers knowingly allowed Biron to work for a competitor. (TR628:24 – 629:6).

In opening, Appellants told the jury they were going to see "a fair amount of paperwork" that contained errors. (TR361:20-21). Appellants implored the jury to consider the errors as "clerical." (TR361:22-24). Regarding the alleged "clerical" errors, Appellants asked, "Did it make a difference?" (TR361:3). In closing, Appellants continued to advance their "clerical error" theory. (TR914:21 – 915:3). The asked the jury to consider "What difference would it make?" and proceeded to argue that Gentry's case was nothing but a "conspiracy theory coming out of a clerical error." (TR915:4-7). In addition to the "errors" regarding the hire dates discussed above, there were "errors" related to Gentry's termination and employees' attendance at workplace meetings.

The Notice of Termination form for Gentry shows a termination date of March 24, 2012. (Ex.53; TR441:18 – 442:1). Biron claimed the March 24, 2012 date was a mistake made by Human Resources when they completed the termination notice form. (TR442:2-21). Orkin's sworn interrogatory answers also listed Gentry's termination date as March 24, 2012. (TR444:23-2; TR445:14-17). March 24, 2012 was prior to the expiration of Gentry's FMLA leave, which started in early February 2012. (TR779:15-19).

There was evidence that company records maintained by Biron had been altered and contained forged signatures. Branch Manager Biron hosted weekly meetings that employees were required to attend; each employee signed a sheet confirming his attendance. (Ex.74; TR427:22 – 428:21; TR434:7-9). The sign-in sheets have four columns: (1) Employee Name (Please Print); (2) Employee Number; (3) Signature; and (4) Route No. (Ex.74). Biron testified that he made a template by printing the names in the first column and using a photocopy of the template each week. (TR430:7-22).

The sign-in sheet for February 7, 2012 has Gary Gentry's name printed in the first column and his signature in the third. (Ex.74, Orkin001904); (TR429:19 - 430:1). Both were in Gentry's handwriting. (TR733:12-22; 734:9-21). But Gentry was not at work on February 7, 2012; he had surgery four days prior and was "laid up." (TR734:22 – 735:11).

Biron also hosted the March 6, 2012 branch meeting. (TR737:19-21). That sign-in sheet has Gentry's name and signature next to his employee number, but someone wrote over Gentry's printed name, changing it to "Garritt Valandingham." (Ex.74, p.Orkin001645; TR431:3-23; TR432:6-12; TR736:22 - 737:18). But Gentry's signature remained intact and unaltered. (TR735:12-19; 736:1-10). Gentry never went to the branch

during March 2012. (TR736:11-12). Biron admitted the sign-in sheet for March 6, 2012 is not a photocopy of his original template. (TR431:9-14).

The sign-in sheet for April 3, 2012 also shows Gentry's name and signature, but his name was written over and changed to "Garritt Valindingham." (Ex.74, p.Orkin001643). Biron admitted, "It appears somebody has done something with it." (referring to Gentry's handwritten name) (TR434:14-25). Notably, Vallandingham did not work at Orkin's Independence branch until May 1, 2012 (Ex.76; TR639:14 - 640:14; 641:1-4) and naturally, his signatures become consistent from that date forward.

The sign-in sheet for July 12, 2012 has a signature for Garritt Vallandingham, and it is the first time his name was spelled correctly. (TR435:6-12). Vallandingham's signature on July 12, 2012 is noticeably different than all previous signatures attributed to him because it contains a very stylized crossing of the tees in his first name. (Ex.74, p.Orkin001642). Biron admitted this also. (TR435:18-24). Exhibit 89 contains several more examples of Vallandingham's signature, and every signature for 2013 (after he actually worked at the Independence branch) matches the one for July 12, 2012, (Ex.89, TR484:17-29). The signatures attributed to Vallandingham for April 3 and March 6, 2012 are Gentry's signature. (Ex.89, p.Orkin001643; 001645). The signature for March 20, 2012 does not contain Vallandingham's stylized tee-crossing and his printed name is spelled wrong. (Ex.89, pp.Orkin001644).

Exhibit 89 was admitted without objection (TR484:9-24) and the jury specifically requested to view it during deliberations. (TR935:7-25). The jury also specifically asked for Exhibit 52 (TR935:7-25), which was Appellants' Position Statement that had Gentry's

December faxed resume attached (Ex.52, p.Orkin000741, 764-66), which Biron testified he never received. (TR586:23 - 587:17; Ex.178)

The jury decided Orkin and Biron unlawfully retaliated against Gentry. (D95, p.1). It assessed Gentry's compensatory damages at $120,892.00 and found Orkin and Biron liable for punitive damages. (D95, p.2). The jury assessed punitive damages against Orkin at $10,000,000.00 and $5,000.00 against Biron. (D95, p.2).

I. Facts Most Relevant to Point I

Point I claims Instructions 6 and 8 (the verdict directors) were submitted in error because they omitted the "reasonable good faith" element of retaliation claims. *Appellants' Substitute Brief*, at 22; (TR854:15-18; TR589:25 – 860:8). Instruction 6 submitted Gentry's claim against Orkin. (D232, p.9)(A11). Instruction 8 was for Biron. (D232, p.11)(A13).

Gentry was fired on June 1, 2012. (TR705:10-11). Gentry filed a Charge with the Missouri Commission because he was suspicious about the reasons given for his termination. (TR705:12-22). Gentry contacted the Commission, told them about his age, getting hurt at work, and then being terminated. (TR710:5-15). The Commission filled out a Charge form and had Gentry sign it. (TR710:16-19). They told Gentry if he wanted to complain about his termination, he needed to sign and submit the Charge. (TR710:20-24).

During trial, Gentry was prohibited from offering evidence that would have provided a basis for the jury to find he filed the charge based on a reasonable, good faith belief. On the second day of trial, prior to opening statements, the court granted Appellants' request to clarify a few issues. (TR336:7-10). One issue was Appellants' request for a "standing objection related to all evidence of any discrimination based on age, leave of

absence, or disability occurring during Mr. Gentry's employment." (TR336:16-24). After hearing additional argument, the trial court explained, "it is the Court's intent that the circumstances of his first termination with Orkin is not what's on trial here … that's not the issues that are going to be decided." (TR339:1-5) The court said, "[t]he merits of an age discrimination claim or disability, FMLA, whatever it is as it relates to his first termination, is not what's on trial here." (TR339:13-16). It also said, "anything as it relates to the merits of the FMLA or age discrimination is nothing that this jury need to hear because it's not relevant and not probative of the issue of retaliation as this jury needs to decide." (TR340:17-22). Finally, the court instructed Gentry, "if you think that you're going down the road and you want further clarification, approach and the Court will certainly give it." (TR340:2-4).

During the re-direct examination of Biron by Gentry's counsel, in response to Appellants' objection, the court ruled, "We're not going to talk about age discrimination. We're not going to talk about whether or not it was wrongful termination…. That's the Court's ruling." (TR608:9-15).

When Gentry announced he would play the videotaped deposition of Larry Black, Orkin's former HR employee, Appellants requested to make a record. (TR679:4-680:3). Appellants made objections to the video (TR681:18 – 682:11) even though the court already heard objections and issued rulings during a pretrial conference. (TR683:18-25). After discussion about the trial court's prior rulings, the court clarified its prior rulings once again stating, "I have tried to be very clear in my rulings regarding the fact that whether it

be the claim of age discrimination … or the FMLA aspect of it … that those were going to be in front of the jury but for a very limited purpose." (TR688:16-25).

During Gentry's direct examination, Gentry asked to approach the bench and offered the July 19, 2012 Charge of Discrimination (A20) into evidence, arguing that its admission was necessary because it was evidence of the first element of Gentry's retaliation claim, *i.e.*, the protected activity element. (TR705:10 - 706:11). Appellants objected to the admission of the charge based on prejudice and hearsay and offered to "stipulate to the protected activity in that regard." (TR706:12-15). After what is recorded in the transcript as "an off-the-record discussion" (TR706:18-19), Gentry's counsel clarified the scope of Appellants' stipulation and their counsel agreed on the record that "**the charge, yes, creates the protected activity**." (TR706:20-25) (bold added).

Appellants did not further stipulate that Gentry had a reasonable goof faith belief that it was discrimination based on age and disability. (TR707:1-9). Gentry then argued the Charge should be admitted because *Appellants'* proposed jury instruction included filing the Charge based on a reasonable, good faith belief as an element of the claim. (TR707:17-23). The Court said, "I'm not going to allow evidence in based upon a proposed jury instruction," and then Gentry argued it was an element under *McCrainey*. (TR707:24 - 708:4). Ultimately, based on Appellants' objections, the Court excluded the Charge of Discrimination from evidence (TR708:5-18) and prohibited Gentry from testifying about why he thought his termination was based on age and/or disability. (TR708:18 - 709:9). Gentry never again argued that the reasonable, good faith element applied. (TR709:10 - 966:8).

Even though Appellants were successful in keeping the Charge of Discrimination out of evidence and preventing Gentry from testifying about why he thought his termination was age and/or disability discrimination, Appellants included these facts as elements of Gentry's claim in their proposed verdict director. (D155). Specifically, Appellants wanted the jury to be instructed that one of the elements of Plaintiff's claim was, "**Plaintiff Gentry filed a charge with the Missouri Human Rights Commission regarding what he in good faith reasonably believed was discrimination**." (D155, paragraph Second) (A21) (bold added). That was the exact evidence and testimony the Court prohibited based on Appellants' objection. (TR709:3-6).

II. Facts Most Relevant to Point II

Point II challenges the trial court's refusal of Appellants' proposed business judgment instruction. *Appellants' Substitute Brief*, at 37. Appellants' proposed business judgment instruction reads, "You may not return a verdict for Plaintiff just because you might disagree with Defendants' decision or believe it to be harsh or unreasonable." (Appellants' Appendix, A4). Although this instruction was refused, the Court submitted Lawful Justification defense instructions for both Orkin (D232, p.10,) (A12) and Biron (D232, p.12) (A14). Both Lawful Justification defense instructions were modeled after MAI 38.02 [2012 Revision] Missouri Human Rights Act – Lawful Justification. (D 231, p.10; p.12) (A31; A33). By these instructions, the jury was told its verdict must be for Defendants if it believed Plaintiff was not re-hired or interviewed because his previous job performance was unacceptable, and the Charge was not a contributing factor. (D232, p.10, p.12) (A12; A14).

Throughout Appellants' closing argument, they argued the decision to not interview or re-hire Gentry was a business decision based on Gentry's past performance during his employment with Orkin as opposed to being retaliation for the charge. (TR911:3-15, arguing about Gentry's "coachings and counselings and warnings and formal warnings and the failure to improve…."); (TR912:2-6, "17 coaching and counselings involving various performance problems."); (TR913:7-12, "three formal warnings"); (TR913:20-25, "sales quota"); (TR920:12-18, "17 coaching and counselings, three or four formal warnings, several warnings about termination…."); (TR922:1-6, "Do they show anything was a contributing factor, other than all of the coachings and counselings and performance problems that Mr. Gentry had?"); (TR923:2-5, "17 coachings and counselings and issues regarding his performance"); (TR924:5-8, "You did hear a lot of evidence about a legitimate, non-retaliatory reason for not rehiring him, and that was his performance.").

III. Facts Most Relevant to Point III

Point III claims the trial court erred in overruling Appellants' objection to Plaintiff's cross-examination during the punitive phase of trial. *Appellants' Substitute Brief*, at 44.

During the punitive damages phase, Gentry called Larry Black, former Human Resources Manager, who Orkin selected as their trial representative. (TR943:22; 944:9-22). Gentry asked Black if Orkin would admit it considered Gentry's charge of discrimination when it decided not to interview Gentry; there was no objection. (TR945:12-16). At Black's request, Gentry's counsel repeated the question; there was no objection. (TR945:16-21). The witness was again asked if he would admit Orkin considered Gentry's

Charge when it decided to hire other people to fill the jobs filled in 2013; again, there was no objection and Black answered in the negative. (TR945:22 – 946:3).

The first objection was made when Gentry asked, "So you're unwilling to accept this judgment; it that fair?" (TR946:4-7). Appellants' only objection was that the question was "highly prejudicial." (TR946:14-18). It was overruled. (TR947:2-5). Gentry's counsel then asked, *without objection*, "Do you accept responsibility? Do you accept responsibility for hiring [sic] Mr. Gentry?" (TR947:16-18). The answer was, "I don't believe we've harmed Mr. Gentry." (TR947:19). Appellants did not object based on logical relevance or the constitution at any time during Gentry's examination of Black. (TR944:9 – 947:20).

Gentry also called Biron. (TR953:3). He asked Biron three questions without objection. Biron denied he considered Gentry's Charge of Discrimination when he refused to offer Gentry an interview or job in 2013 (TR953:16-20) and refused to accept responsibility. (TR953:21-22). Appellants made no objection. (TR953:14-22). Biron's attorney asked him," Did you do anything wrong in this case?" and Biron answered, "No, I did not." (TR954:14-16).

IV. Facts Most Relevant to Point IV

Point IV claims "[t]he Trial Court erred in overruling Defendants' **objection to Plaintiff's closing argument** commenting on Defendants' failure to acknowledge responsibility for retaliation…." *Appellants' Substitute Brief*, at 47 (bold added). But Appellants concede they made no such objection during trial. *See id.* at 48 (suggesting "there was no need to further object during closing argument."). Appellants did not object

during Plaintiff's punitive-phase closing argument. (TR958:3 - 961:18). Nor did they object during the punitive-phase rebuttal. (TR964:16 - 966:8).

V. Facts Most Relevant to Points V

Point V claims it was error to allow Gentry to seek punitive damages because he did not plead a specific amount in his Petition. *Appellants' Substitute Brief*, at 50.

Gentry's petition set forth a single count of retaliation under the MHRA. (D2, pp.4-5, Count I). He included a prayer for punitive damages and for any "relief the Court deems just and proper" (D2, p.5) but did not allege a specific amount. (D2, pp.1-5).

Orkin's original Answer (filed 08/21/14) did not allege Gentry's claim for punitive damages failed as a matter of law for not pleading a specific amount. (D5, pp.9-10). It did not cite Rules 55.05, 55.19, or R.S.Mo. § 509.200. (D5, pp.1-11). Orkin's September 8, 2015 Amended Answer also contains no objection to Gentry's claim for punitive damages for not stating a specific amount or any citation to Rules 55.05, 55.19, or R.S.Mo. § 509.200. (D66, pp.1-12).

Biron's original Answer (filed 08/21/14) did not allege Gentry's claim for punitive damages failed as a matter of law for not pleading a specific amount. (D6, pp.9-10). It did not cite Rules 55.05, 55.19, or R.S.Mo. § 509.200. (D 5, pp.1-10). Biron's September 8, 2015 Amended Answer contains no objection to Gentry's claim for punitive damages for not stating a specific amount or any citation to Rules 55.05, 55.19, or R.S.Mo. § 509.200. (D65, pp.1-12).

On February 24, 2017 (after trial), Orkin and Biron sought leave to file a Second Amended Answer. (D102). The Court granted their motion. (D229). Appellants' Second

Amended Answer did not allege Gentry's claim for punitive damages failed for not pleading a specific amount. (D103, pp.10-13). Appellants did not cite Rules 55.05, 55.19, or R.S.Mo. § 509.200 in their Second Amended Answer. (D103, p.1-13).

Orkin and Biron did not file any pretrial motion challenging the pleading of Gentry's claim for punitive damages. *See generally* Legal File (containing no such motion). Orkin and Biron's written motion for directed verdict did not argue Gentry's claim for punitive damages failed for not pleading a specific amount. (D93, pp.1-5). Appellants made no oral argument beyond their written motion. (TR846:18 - 848:18). When responding to Gentry's oral argument, Appellants made no argument about Gentry's pleading of punitive damages. (TR850:6-24). Appellants' only argument was that the "punitive damages claim … continues to fail for lack of evidence." (TR850:22-24).

Jury Instruction 11 was used to submit Gentry's claim for punitive damages against Orkin. (D232, p.14). During the instruction conference, the only objections Appellants made to Instruction 11 was that there was not enough evidence to support it and it deviated from Appellants' submitted instruction. (TR863:2-21). Appellants made no objection to Instruction 11 based on Gentry's pleading. (TR863:2 – 864:10).

Jury Instruction 13 was used to submit Gentry's claim for punitive damages against Biron. (D232, p.16; TR865:15-17). Appellants' made the same objection to Instruction 13 as for Instruction 11. (TR865:22-25). They also objected to the substitution of the word "occurrence" with the word "conduct." (TR865:25 – 866:8). Appellants made no objection to Instruction 13 based on Gentry's pleading. (TR863:2 – 864:10; TR865:23 – 866:8).

The first time Appellants argued Gentry's claim for punitive damages failed based on his pleading was in a post-trial motion. *See Appellants' Substitute Brief*, at 50, *citing* their *Motion for Judgment Notwithstanding the Verdict, to Amend Judgment, for a New Trial, and for a Hearing on this Motion* (D152).

VI. Facts Most Relevant to Points VI

Point VI argues Gentry should not have been allowed to submit a retaliation claim based on "failure to interview" because refusal to interview is not actionable retaliation, in that it did not cause Gentry damage. *Appellants' Substitute Brief* at 55, 63-65.

Appellants did not make this objection at trial. At the instruction conference, Appellants' objections to Instruction 6 (retaliation verdict director against Orkin), was that including multiple causes of harm in one verdict director "is improper under 38.01" and that it lacked the "good faith reasonable belief language…." (TR854:1-18). There was no objection that Appellants' "failure to interview" did not cause damage to Gentry. *Id.* When Appellants objected to Instruction 8 (retaliation verdict director against Biron), they made the same objections as they made to Instruction 6 but did not make any specific objection claiming that the "failure to interview" did not cause harm to Gentry. (TR859:2 - 860:8).

The circumstances showed that not receiving an interview caused harm to Gentry. Gentry loved his job at Orkin. (TR693:15-16). He loved working for longtime customers because of the rapport he built with them. (TR693:17-25). Gentry was proud of the work he did for Orkin. (TR723:13-15). On July 22, 2013, after Gentry re-applied, Biron responded to Gentry's email application saying, "I currently do not have any open positions at this time, but will keep your resume on file." (TR724:15-25). Biron never told Gentry

there were job openings in October 2013. (TR725:14-24). Gentry testified that not hearing any response to his December fax made him feel "hurt and betrayed." (TR731:6-11). During Gentry's employment, Biron's father became ill, and Gentry offered to add his name to the prayer roll at his church, so members would pray for Biron. (TR759:6-9; 759:21 - 760:5). Gentry felt obliged to return to work at Orkin because of the work he did, the rapport he had with his customers, and because he identified with being "the Orkin man." (TR731:12-17). Helping people rid their homes of termites and other bugs had a positive impact on Gentry's life. (TR695:15-18).

VII. Facts Most Relevant to Point VII

Point VII argues that the Court erred by prohibiting Appellants from pursuing the affirmative defense of failure to mitigate damages. *Appellants' Substitute Brief*, at 66.

At trial, Orkin's operative answer was its September 8, 2015 Amended Answer. (D66). Therein, Orkin alleged, "Defendant states that Plaintiff has failed to mitigate his damages, if any, in failing to actively seek and gain subsequent employment sufficient to offset any damages." (D66, p.10, ¶1). Orkin made an identical allegation in its original Answer. (D5, p.9, ¶1). At trial, Biron's operative answer was his September 8, 2015 Amended Answer. (D65). Therein, Biron alleged the mitigation defense exactly the same as Orkin. (D65, p.10, ¶1). The same language was in his original Answer. (D6, p.10, ¶1).

On August 27, 2015 Gentry filed his motion in limine. (D34). Gentry sought to prevent Appellants from offering evidence or argument that Gentry failed to mitigate his damages because Appellants failed to adequately allege the affirmative defense. (D34, pp.6-8). Appellants' written response did not discuss their pleading. (D41, p.8-9).

On November 21, 2016, the Court sustained Gentry's motion in limine regarding the affirmative defense of failure to mitigate damages. (TR8:6-8; TR11:17-23). On December 5, 2018, after the jury was empaneled and before opening statements were made, (TR322:2-4) Appellants requested to make an offer of proof regarding their mitigation defense. (TR322:10-19). The Court allowed it. (TR322:19 - 329:4). Appellants' offer of proof included portions of Gentry's deposition testimony, statistics from the Bureau of Labor, a Kansas City job fair listing, and classified ads for open jobs. (TR322:20 - 325:16). These were marked as Exhibits 164, 165, 168, 223, and 224. (TR322:20 - 325:16).[10] The Court deferred its ruling until the next day. (TR332:9-17). On December 6, 2016 Gentry filed a trial brief further discussing how the affirmative defense of failure to mitigate damages the applies to the MHRA. (D92).

During lunch break the second day of trial, the Court ordered that it was "still sustaining the motion in limine" (TR470:2-14) because "the affirmative defense was not properly pled…." (TR470:15-17). The Court found that even if it was properly pled, Appellants' evidence could not satisfy the elements of the defense. (TR470:15-24). Appellants chose not to make a further record. (TR470:25 - 471:5). During trial, Appellants did not offer evidence regarding mitigation. (TR378-956). Appellants' proposed mitigation instruction contained ultimate facts that were not alleged in their pleadings. *See Appellants' Appendix*, A23.

[10] Exhibit 224 was Gentry's deposition, but 164, 165, 168, and 223 were not produced before trial, and are not included in the Legal File or elsewhere in the record.

ARGUMENT

I. RESPONSE TO POINT I

Point I should be denied because Instructions 6 and 8 (A11; A13) were correct statements of the law; whether Gentry filed a complaint was never disputed. In Point I, Appellants argue Instructions 6 and 8 improperly instructed the jury regarding Gentry's claims of retaliation. *Appellants' Substitute Brief*, at 22. Appellants argue that to prove the element of protected activity, Gentry was required to prove that he "filed a charge with the Missouri Human Rights Commission [sic] regarding what he in good faith reasonably believed was discrimination." *Id.* at 27. The issue is whether the jury was properly instructed regarding how to determine if Appellants violated the MHRA's prohibition of retaliation. Point I should be denied because Instructions 6 and 8 correctly stated the law.

a. Standard of Review

Whether the jury was properly instructed is a question of law subject to *de novo* review. *Ross-Paige v. St. Louis Metro. Police Dep't*, 492 S.W.3d 164, 172 (Mo. 2016). Reversal is only warranted if "there was error which resulted in prejudice *and* materially affected the merits of the action." *Minze v. Mo. Dep't of Pub. Safety*, 437 S.W.3d 271, 275 (Mo.App.WD 2014) (emphasis added). Appellants "must show that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice." *Hervey v. Mo. Dep't of Corrections*, 379 S.W.3d 156, 159 (Mo. 2012). A plaintiff may submit any cognizable theory to the jury.

"A plaintiff is the master of his or her lawsuit and can choose which causes of action to plead." *See Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 118 (Mo.

2015). "A party is entitled to any instruction that is supported by substantial evidence." *Foster v. Barnes-Jewish Hosp.*, 44 S.W.3d 432, 435 (Mo.App.ED 2001). A plaintiff has the right to choose what legal theory to submit if the evidence and the law support the plaintiff's theory. *Certa v. Associated Bldg. Ctr.*, 560 S.W.2d 593, 596 (Mo.App. 1977). A jury instruction must "follow the substantive law." *Alhalabi v. Mo. Dep't of Nat. Res.*, 300 S.W.3d 518, 527 (Mo. App.ED 2009).

b. Argument

Instructions 6 and 8 properly instructed the jury regarding how to determine whether Appellants violated R.S.Mo. § 213.070(2) (Aug. 28, 1998) (A41).[11] These instructions submitted each disputed fact that needed to be resolved to determine whether Appellants violated the statute. The statutory construction suggested by Appellants should not be adopted. There is no statutory basis for the Court to do so.

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." *Howard v. City of Kansas City*, 332 S.W.3d 772, 779 (Mo.2011). The MHRA is a remedial statute designed to eradicate discrimination, so Missouri Courts interpret it broadly further its purpose. *Subia v. Kansas City, Mo. Sch. Dist.*, 372 S.W.3d 43, 47-48 (Mo.App.WD 2012); *see also MCHR v. Red*

[11] The MHRA (R.S.Mo. chapter 213) was amended by SB43-2017, which became effective August 28, 2017. This case was tried under the pre-amendment MHRA; unless stated otherwise, all citations to Chapter 213 relate to the pre-amendment MHRA.

Dragon Rest., Inc., 991 S.W.2d 161, 166-67 (Mo.App.WD 1999) (same). The broad application of the MHRA is not a judicial creation, it is required by statute. *See* R.S.Mo. § 213.101.1 ("The provisions of this chapter shall be construed to accomplish the purposes thereof….") (A43). As such, the Court should interpret the MHRA in a manner that promotes the elimination of discrimination and retaliation. But in doing so, it may not require plaintiffs to prove elements not required by the MHRA.

Courts do not read requirements into a statute that are absent therein. *See Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579, 591 (Mo.2013). The Court will not apply an element to a statutory cause of action that is not required by the statute's "plain language." *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 382 (Mo.2014). Here, comparing Instructions 6 and 8 to the MHRA reveals that the jury was properly instructed. Appellants are asking the Court to apply an extra element not required by the statute.

i. Instructions 6 and 8 are Consistent with the MHRA

The MHRA makes it illegal to "retaliate or discriminate in any manner against any other person [1] because such person has opposed any practice prohibited by [the MHRA] or [2] because such person has **filed a complaint**, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to [the MHRA]." R.S.Mo. § 213.070(2) (bold/brackets added).[12] Gentry's theory of the case, as alleged in

[12] The clauses noted by bracketed numbers are referred to as "opposition" and "participation" clauses. *See infra*. at 31-37.

his Petition and Submitted in the jury instructions, was that he was retaliated against because he filed a Charge of Discrimination alleging his termination was discriminatory.

This Court has held for MHRA claims:

> [R]etaliation exists under section 213.070 when (1) a person files a complaint … pursuant to chapter 213 and (2), as a direct result[13] …suffers any damages due to an act of reprisal.

Keeney v. Hereford Concrete Prods, Inc., 911 S.W.2d 622, 625 (Mo.1995). In so holding, this Court reiterated that it "cannot judicially impose a requirement outside of the plain language in section 213.070." *Id.* Considering the MHRA's guidepost to statutory construction and the plain language of Section 213.070, the jury was properly instructed.

The MHRA prohibits retaliation against any person because that person has filed a "complaint" with the MCHR. The jury was instructed that in order to return a verdict for Gentry, it had to find that Gentry's July 2012 Charge of Discrimination was a contributing factor in Appellants' decision to not interview or re-hire Gentry, and that those decisions caused damage to Gentry. (D232, pp.9, 11) (A11; A13). This was an accurate statement of the law even though they did not require the jury to find that Gentry engaged in protected activity by filing the July 2012 Charge.

Whether Gentry filed the July 2012 Charge was undisputed. "There can be no prejudicial error when an instruction omits an element that is not in dispute." *Mignone v.*

[13] This Court later held the causation standard for retaliation claims is contributing factor. *See Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664-65 (Mo.2009).

Dep't of Corrections, 546 S.W.3d 23, 38 (Mo.App.WD 2018). "When a fact material to a plaintiff's case is conceded or undisputed, its inclusion under an approved jury instruction is not mandatory." *Id.* Such was the case here.

It was undisputed that Gentry filed a "complaint"[14] with the Missouri Commission. In opening statement, Appellants conceded that Gentry "filed a Charge of Discrimination with the Missouri Commission alleging that his discharge was due to – was unlawful" (TR370:9-13) and that he did so during "July of 2012, a month after his discharge." (TR370:17-18). Appellants' other opening remarks about the Charge did not dispute its filing. (TR373:11-12; TR375:13). During Gentry's direct examination, Appellants stipulated that Gentry filing the Charge "creates the protected activity." (TR706:3-25). Appellants' cross examination of Gentry referenced the Charge but did not dispute its existence or that Gentry filed it. (TR779:20 - 780:6); (TR787:25 - 788:3). Appellants also referenced the Charge in closing argument without disputing that Gentry filed it. (TR910:9-10, 20-24); (TR911:16-22); (TR914:15-18); (TR922:17-21). Under these circumstances, it was appropriate to submit Instructions 6 and 8 without requiring the jury to find that Gentry filed the July 2012 Charge of Discrimination.

[14] The MHRA does not define "complaint," but its use throughout the MHRA shows it refers to a Charge of Discrimination. *See, e.g.*, R.S.Mo. §213.010(4) (defining "complainant" as person who "filed a complaint with the commission"); § 213.030.1(7) (granting MCHR power to receive "complaints"); R.S.Mo. § 213.075 (allowing aggrieved person to file "complaint"); § 213.077.1 (referencing "filing of a complaint").

The remainder of Instructions 6 and 8 properly submitted the disputed elements to the jury. To return a verdict for Gentry, the jury was required to find that his July 2012 Charge was a "contributing factor" in the alleged acts of retaliation (D232, pp.9, 11, paragraph Second), satisfying the causation element as set forth in *Hill v. Ford Motor Co*. The jury was also required to find that Gentry suffered damage from Appellants' acts of reprisal, (D232, pp.9, 11, paragraphs First and Third) satisfying the requirements set forth by this Court in *Keeney v. Hereford Concrete Prods. Inc.*, 911S.W.2d at 625-26 (requiring proof of damages due to act of reprisal).

Instructions 6 and 8 are consistent with the MHRA's plain language, this Court's opinion in *Keeney v. Hereford Concrete Products*, and the MHRA's statement of legislative intent. As such, Point I should be denied. *Notwithstanding Gentry's arguments predating the events recorded on pages 705-709 of the transcript*, the "reasonable, good faith belief" element from *McCrainey* does not apply.

ii. *McCrainey* and Its Progeny Do Not Apply

In 2011, the Court of Appeals adopted the reasonable, good faith belief element that had been applied to Title VII "opposition clause" retaliation cases for decades. *See generally McCrainey v. Kansas City, Mo. Sch. Dist.*, 337 S.W.3d 746 (Mo.App.WD 2011). Doing so was appropriate and warranted under the facts of that case, but the doctrine does not apply to Gentry's retaliation claim, which arises under the "participation clause."

When interpreting the MHRA, Missouri courts may consider federal decisions interpreting federal employment statutes to the extent they are consistent with the MHRA. *Cox*, 473 S.W.3d at 115. This Court previously held that regarding what actions qualify as

actionable retaliation, the MHRA and Title VII have differences that are "sufficiently stark" to render federal case law inapplicable to the MHRA. *See Keeney*, 911 S.W.2d at 624-25. However, regarding the element of protected activity, the MHRA and Title VII are virtually identical. *Compare* 42 U.S.C. § 2000e-3(a) (Title VII's prohibition of retaliation) (A45) *with* R.S.Mo. § 213.070(2) (MHRA's prohibition of retaliation) (A41). Accordingly, for the element of protected activity, federal decisions may be considered.

The MHRA, like Title VII, contains two clauses setting forth what actions are protected from retaliation. One is referred to as the "opposition clause" and the other is the "participation clause." *See* EEOC Notice 915.004, EEOC Enforcement Guidance on Retaliation and Related Issues (Aug.25, 2016) (A46; A56-61).[15] According to the EEOC, the "participation clause" does not require a showing that the plaintiff had a reasonable, good faith belief (A57) but the "opposition clause" does. (A61). Its position is based on the statutory language, *id.*, and is long-standing law. *See Sias v. City Demonstration Agency*¸ 588 F.2d 692, 695 (9th Cir. 1978) ("It is well settled that the participation clause shields an employee from retaliation regardless of the merit of his EEOC charge."). The reasonable, good faith belief element is only applicable to the opposition clause, and no Missouri court has held otherwise.

In *McCrainey*, the Court of Appeals addressed a situation where an employee was fired for opposing what he thought was discrimination, even though he was incorrect as a

[15] EEOC Notice 915.004 *available at* https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#1._Participation (last visited July 10, 2019).

matter of law. Strict application of the MHRA would require judgment for defendant. But considering the MHRA's purpose and facts of the case, the Court of Appeals adopted the "reasonable, good faith belief" doctrine from federal case law, and found the plaintiff's internal complaint was protected even though what he complained about was technically not employment discrimination under the MHRA.

McCrainey alleged he was fired as retaliation for opposing a school employee using the term "bitch" in reference two female school board members. *McCrainey*, 337 S.W.3d at 750. On appeal, the parties agreed that because the board members were not employees, the remarks did not violate the MHRA's prohibition of employment discrimination. *Id.* at 752. Under the plain language of the statute, McCrainey's opposition was not protected because he did not oppose a practice actually "prohibited" by the MHRA. *Cf.* R.S.Mo. §213.070(2). The Court of Appeals, relying on federal law interpreting the "opposition" clause of Title VII, held a plaintiff alleging retaliation for opposing discrimination must prove they had a "reasonable, good faith belief" the conduct opposed was illegal. *McCrainey*, 337 S.W.3d at 753-54. This element applies to a plaintiff alleging retaliation in response to "his or her opposition" to a practice believed to be unlawful. *Id.*

Federal cases have applied the reasonable, good faith belief element to opposition cases dating back to the late 1970s and early 1980s. *See Sisco v. J.S. Alberici Const. Co., Inc.*, 655 F.2d 146, 150 (8th Cir. 1981) (adopting the doctrine; citing cases from Ninth and Seventh Circuits). The distinction between the "participation" and "opposition" clauses in Title VII's anti-retaliation provision has also been established for several decades, and predates the "reasonable, good faith belief" doctrine, which was noted by the Ninth Circuit

when it first adopted the reasonable, good faith belief doctrine. *See Sias*, 588 F.2d at 694-95. Unlike the "participation clause," the "opposition clause" could not be interpreted to give such broad protection because the statutory language limits its protection to "opposition to 'any practice made an unlawful employment practice.'" *Id.* Balancing the interests of strict statutory construction with legislative intent, the Court concluded that for "informal opposition," "[w]hen an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts." *Id.* at 695. This interpretation best guaranteed Title VII would be effective.

Refusing to recognize the reasonable, good faith belief doctrine for informal opposition would have unfair and unintended results for employees who oppose conduct they reasonably believe to be discriminatory. When the Seventh Circuit adopted the reasonable, good faith belief doctrine, it opined that non-lawyers should not be burdened with determining how the Supreme Court would ultimately rule on an issue when deciding whether to oppose workplace conduct reasonably appearing to be discriminatory. *See Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045-46 (7th Cir. 1980).

In *Berg*, the plaintiff opposed her employer's policy and practice of denying disability benefits to employees who could not work due to pregnancy because she believed it was discriminatory. *Id.* at 1041-42. The parties stipulated she was fired for doing so. *Id.* After her termination, and while her retaliation lawsuit was pending, the US Supreme Court held that disqualifying pregnant employees from disability benefits did not violate Title VII. *Id.* at 1043. Based on that opinion, the district court dismissed the plaintiff's retaliation

claim because what the plaintiff opposed was not prohibited. *Id.* When the Seventh Circuit reversed the dismissal and adopted the reasonable, good faith doctrine, it explained:

> Even though she proved wrong, her interpretation coincided with all of the courts of appeals that decided the question, with the EEOC guidelines, with three justices of the Supreme Court, and with Congress.

Id. at 1045-46. The Seventh Circuit noted that a "literal reading" of the opposition clause – like the School District's reading in *McCrainey* – "undermines Title VII's central purpose, the elimination of employment discrimination by informal means; destroys one of the chief means of achieving that purpose, the frank and nondisruptive exchange of ideas between employers and employees; and served no redeeming statutory or policy purposes of its own." *Id.* at 1045.

Thirty-one years later, after the reasonable, good faith belief doctrine was well-established federal law, the Missouri Court of Appeals faced a similar situation in *McCrainey*. The court was correct to interpret the MHRA in a manner that protects employees who reasonably believe they are opposing discrimination, even if they are wrong as a matter of law. To hold otherwise would require every-day employees to analyze how the Missouri Supreme Court – or a jury – could ultimately view certain conduct appearing to be discriminatory before voicing opposition to the same. Such an interpretation would not further the purpose of the MHRA. But the principles supporting the holding in *McCrainey* do not warrant adding an extra element to the "participation clause" that is not required by the statute.

Courts cannot impose requirements into a statute that are not present therein. *See Peters v. Wady Industries, Inc.*, 489 S.W.3d 784, 793 (Mo.2016) ("…courts cannot add statutory language where it does not exist"). There is no statutory basis to apply the "reasonable, good faith" belief element to a retaliation claim alleged under the participation clause. The MHRA's opposition clause says, "opposed any practice prohibited by this chapter." R.S.Mo. § 213.070(2). The phrase "any practice prohibited by this chapter" is the focus of the discussion in *McCrainey*. Interpreting the MHRA's opposition clause as protecting the articulation of a reasonable, good faith belief that there is discrimination afoot is reasonable. It is designed to encourage people to oppose practices believed to be discriminatory, to discourage frivolous opposition, and prohibit employers from retaliating against employees who bring issues to their attention in good faith. *See McCrainey*, 337 S.W.3d at 753-54. But the opposition clause does not apply to Gentry's claim, and the broad interpretation mandated by the legislature does not justify requiring Gentry to prove more than the statute requires.

Gentry alleged he was retaliated against for filing a charge of discrimination. To that end, the MHRA says a person cannot be retaliated against "**because such person has filed a complaint**." R.S.Mo. § 213.070(2) (bold added). Because the participation clause does not require that the conduct included in the complaint was "prohibited by this chapter," *see id.*, *McCrainey* does not apply. The distinction between the opposition and participation clauses is well-established federal precedent. *See* Table of Cases (A83-84). As explained by Judge Colloton, Circuit Judge for the 8th Circuit U.S. Court of Appeals,

> Title VII makes it an "unlawful employment practice" for an employer "to discriminate" against an employee "[1] because he has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." The two clauses of this section typically are described, respectively, as the "opposition clause" and the "participation clause." …
>
> The opposition clause protects an employee against discrimination because he has "opposed" any practice "made an unlawful employment practice" by Title VII. Our court, like other circuits, has interpreted this provision more broadly than its plain language might suggest. The clause encompasses actions that "oppose" employment practices that are unlawful, but also includes opposition to practices that are not unlawful, as long as the employee acted in a good faith, objectively reasonable belief that the practices were unlawful. …
>
> The text of the "participation clause," by contrast, does not connect the protected activity to the unlawfulness of any employment practice. In one respect, therefore, the plain language of the clause sweeps more broadly than the opposition clause, forbidding discrimination because of "participation in any manner" in an investigation under Title VII.

Gilooly v. Mo. Dept. of Health & Senior Servs., 421 F.3d 734, 741-42 (8th Cir. 2005) (COLLOTON, concurring in part, dissenting in part).

According to the Committee on Model Jury Instructions for the District Courts of the Eighth Circuit,

> In addition to prohibiting retaliation based on an employee's "opposition" to what he or she reasonably believes to be an unlawful employment practice, Title VII and other federal employment laws protect employees from retaliation based on their "participation" in proceedings under these statutes. Protected "participation" appears to include filing a charge with the EEOC (or a parallel state or local agency), filing a lawsuit under one of the federal employment statutes, or serving as a witness in an EEOC case or discrimination lawsuit. **Unlike "opposition" cases, employees who "participate" in these proceedings appear to have absolute protection from retaliation, irrespective of whether the underlying claim was made reasonably and in good faith**.

MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT, 10-2 (2018) [16] (bold added) (A85; A106). The Eighth Circuit verdict director for "participation clause" retaliation claims does not include the "reasonable, good faith" element. (A110). The statutory basis for this distinction in Title VII retaliation cases is also present in the MHRA. *See* R.S.Mo. § 213.070(2).

[16] http://www.juryinstructions.ca8.uscourts.gov/2018-REV_3.0_Jury_Instructions.pdf (last visited July 10, 2019).

Given Missouri Courts' unwavering adherence to interpreting statutes based on their plain language and the MHRA's statutory mandate to interpret the law in a way to further its purpose, this Court should conclude that the "participation" clause does not require the plaintiff to prove the charge was filed based on a reasonable, good faith belief. The statutory construction proposed by Appellants is inconsistent with the MHRA's language. Conversely, the construction suggested by Gentry is consistent with the MHRA and this Court's opinion in *Keeney*. It is also necessary to allow the Missouri Commission to receive and investigate complaints of discrimination.

The participation clause's protection is not limited to victims of discrimination, it also protects witnesses. *See* R.S.Mo. § 213.070(2). Witnesses who have no opinion whatsoever of the merits of an underlying claim could nevertheless testify in a way that helps the plaintiff and hurts the employer. If having a reasonable, good faith belief of discrimination was an element of a "participation" clause retaliation claim, then 'innocent bystander' witnesses could lawfully be fired for providing truthful testimony that hurts their employer's defense. A noted by the EEOC, the participation clause, as written, also protects witnesses who provide information that supports the *employer*. (A57, fn.16). The EEOC construes Title VII to protect the following persons: "those who participate in the EEO process in any way, including as a complainant, representative, or witness for any side, regardless of their job duties or managerial status." (A80). Holding that having a reasonable, good faith belief that there is discrimination in order to be protected under the participation clause would weaken the protection the MHRA affords to persons filing charges or providing testimony in legal proceeding and potentially thwart the MCHR's

investigative abilities. Moreover, the MCHR's procedures have built-in safeguards to discourage and prohibit false charges from being filed.

The Charge of Discrimination form utilized by the Missouri Commission requires the Charging Party to "declare under penalty of perjury that the foregoing is true and correct." (*See* D3). All charges filed with the Missouri Commission are dually filed with the EEOC, a federal agency. *See* R.S.Mo. § 213.075.2. As such, complainants who submit false charges are potentially subject to prosecution for perjury. There are more immediate consequences of filing a frivolous charge. The Commission is authorized to dismiss a charge for lack of probable cause, 8 CSR 60-2.025(7)(A) or "in any other circumstance where the executive director deems administrative closure to be appropriate." 8 CSR 60-2.025(7)(B)(7). Evidence that a charge was filed maliciously or in bad faith would likely warrant such dismissal. Moreover, both the pre- and post-amendment MHRA state that if a claim is brought "without foundation," the respondent may receive reasonable attorney fees. R.S.Mo. § 213.111.2. Such awards can be substantial. Accordingly, there are adequate deterrents from filing baseless complaints. Allowing employers to overtly retaliate against employees who file charges that end up lacking merit, even from a legal perspective, would be contrary to the MHRA.[17]

[17] In the event Appellants argue Gentry filed the July 2012 Charge in bad faith, the Court should note that this argument was never made to the trial court. Notably, Appellants' proposed Lawful Justification instructions (A12; A14; A115; A116) did not

Among all relevant factors, the plain language of the MHRA should be the most compelling. The participation clause does not require the element from *McCrainey*, which interprets a different part of the statute. Instructions 6 and 8 were not submitted in error because they were accurate statements of the law. There are additional reasons Point I should be denied.

iii. Appellants Successfully Excluded the July 2012 Charge from Evidence

This Court should also deny Point I because Appellants convinced the trial court to exclude the July 2012 Charge of Discrimination from evidence and prohibit Gentry from testifying to his belief supporting the Charge. Appellants' verdict director was properly rejected because it included these excluded facts as elements of Gentry's claim. (D155, paragraph Second) (requiring jury to find "Plaintiff Gentry filed a charge with the Missouri Human Rights Commission regarding what he in good faith reasonably believed was discrimination."). Appellants attempted to use the court's evidentiary rulings and a shield and a sword, and the trial court correctly prevented them from doing so.

If a party objects to exclude evidence, it may not argue that evidence's absence from trial is proof that it should prevail. In criminal trials, it is reversible error for a prosecutor to comment on the absence of evidence or testimony that the court has excluded upon the prosecutor's objection. *See State v. Hammonds*, 651 S.W.2d 537, 539 (Mo.App.WD 1994)

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contain any such allegation. Appellants never argued they refused to interview or rehire Gentry because he filed the Charge in bad faith. To the extent they advance such an argument in this appeal, it is a red herring that should be disregarded.

(plain error when prosecutor commented on absence of witness it requested not be allowed to testify at trial). This concept has application in civil cases as well.

This Court has held that if the trial court excludes a witness based on a party's motion, the moving party is not allowed to argue the witness's absence somehow supports a verdict in its favor. *See Bair v. Faust*¸ 408 S.W.3d 98 (Mo.2013). In *Bair*, the defendant moved the court to ban the plaintiff from the courtroom because she was not present at voir dire or the second morning of trial. *Id.* at 99. The court granted the motion and allowed the defendant to argue an adverse inference from the plaintiff's absence. *Id.* The jury returned a verdict for the plaintiff but assessed her fault at 85 percent. *Id.* at 101. On appeal, this Court found the trial court abused its discretion in allowing the defendant to argue an adverse inference. *Id.* at 104. In so holding, this Court relied on *Calvin v. Jewish Hospital of St. Louis*¸ which explains, "When a witness' [sic] testimony is excluded on an attorney's motion, it is misconduct constituting manifest injustice and thus reversible error if that attorney requests the jury to draw an adverse inference from his opponent's failure to produce that witness even though the error is not preserved for appeal." *Calvin v. Jewish Hosp. of St. Louis*¸ 746 S.W.2d 602, 605 (Mo.App.ED 1988). The *Calvin* court concluded that "[f]undamental fairness mandates remanding [a] case for a new trial" when this principle is violated. *Id.* at 605.

In *Calvin*¸ the plaintiff argued the absence of an expert was proof that the defendant did not have evidence to support its theory, but the expert was excluded on the plaintiff's motion. *Id.* This Court in *Bair* also approved of *Barnes v. Kissell*, 861 S.W.2d 614 (Mo.App.WD 1993). Like *Calvin*, *Barnes* involved a plaintiff commenting on the lack of

a defense expert where the expert was excluded on the plaintiff's motion. *Id.* at 619-20. Again, the Court of Appeals invoked the principle of "fundamental fairness" in finding an abuse of discretion. *Id.* at 620. This concept applies to *evidence* the same way it applies to *witnesses*. "The rule of law is that a party may not argue his opponent's failure to produce evidence when he has induced the court to exclude that evidence." *Titsworth v. Powell*, 776 S.W.2d 416, 421 (Mo.App.ED 1989). If the trial court used Appellants' verdict director, it would have led to a violation of this principle of fundamental fairness.

The trial court wholly excluded the July 2012 Charge of Discrimination based on Appellants' objection. (TR708:5-18). It also prohibited Gentry from telling the jury why he thought his termination was discriminatory. (TR708:18-709:9). To include those exact issues in the verdict director would have been a miscarriage of justice. At the instruction conference, Gentry argued that Appellants' proposed verdict director should not be used because Appellants were successful in excluding evidence that could have provided proof of Gentry's belief. (TR856:5-10). The trial court agreed. (TR856:14 - 857:9). If Appellants' proposal was accepted, Gentry would have had the impossible task of convincing the jury that the facts set forth in the Charge were based on his reasonable, good faith belief even though the jury was not allowed to see the Charge or hear Gentry's explanation. That was the situation the trial court prevented Appellants from creating.

It was proper to refuse Appellants' proposed verdict director under these circumstances. Appellants' argument is largely based on their assertion that Gentry had unfettered ability to offer evidence of age and disability discrimination in relation to his termination. The transcript shows this assertion is in accurate. The trial court was correct

to refuse to allow Appellants to obtain favorable rulings during trial and then try to change course in the instructions.

iv. The Law of the Case and Judicial Estoppel Do Not Warrant Reversal

Appellants' two final legal bases for error in Point I are the doctrines of law of the case and judicial estoppel; Appellants argue these doctrines required the reasonable, good faith element to be included in the verdict directors. *Appellants' Substitute Brief*, at 36.

a. Appellants' Objections Under these Doctrines were Not Preserved

"A party should make an objection to the trial process at the earliest opportunity to allow the other party to correct the problem without undue expense or prejudice." *Sanders v. Ahmed*, 364 S.W.3d 195, 207 (Mo.2012). "[I]f a party fails to make an objection when the concern can be corrected at the earliest and easiest opportunity, he or she will not be heard to complain later when the cost of correction may be far more onerous." *Id.*; *accord* Rule 78.09. "[A] party waives an objection if he does not make it timely." *Galovich v. Hertz Corp.*, 513 S.W.2d 325, 336 (Mo.1974). An objection not made "at the earliest possible opportunity after the objection becomes apparent … [is] waived." *Id.*

Objections to proposed instructions must be made at the instruction conference. *See Fowler v. Park Corp.*, 673 S.W.2d 749, 757-58 (Mo.1984). After making a timely and "specific" objection at the instruction conference, the objection must also be made in the motion for new trial. Rule 70.03. Even though Appellants objected to the verdict directors, they did not object based on law of the case or judicial estoppel. (TR854:1-18; TR859:2-860:8). "A party is not permitted to advance on appeal an objection different from that

stated at trial." *Nelson v. Waxman*, 9 S.W.3d 601, 605 (Mo.2000). Appellants failed to preserve these objections.

The first time Appellants *ever* made objections to Instructions 6 and 8 based on law of the case or judicial estoppel was in their *reply brief* filed with the Court of Appeals. The earliest opportunity to raise these objections was the instruction conference, but Appellants made no such objection to Instruction 6 (TR853:25 - 857:14) or 8 (TR859:2 – 860:20). Appellants did not raise these objections in their *Motion for Judgment Notwithstanding the Verdict, to Amend Judgment, For a New Trial, and For a Hearing on this Motion* (D152) or any other post-trial motion. These objections were not made in *Appellants' Brief* in the Court of Appeals. The reply brief on appeal was not the earliest opportunity to raise the objections, so they are not preserved.

In applying for transfer to this Court, Appellants argued that the Court of Appeals "overlooked" these arguments. The truth is they were not preserved, so the court was not required to address them. *See City of Greenwood v. Martin Marietta Materials, Inc.*¸ 299 S.W.3d 606, 617 (Mo.App.WD 2009) ("Plain error review is discretionary….). Moreover, because they were first raised in their Reply, Gentry did not have an opportunity to respond to them until oral argument and the legal file does not contain a record necessary to address them. This is likely why, despite Appellants' focus on these objections in seeking transfer, they are given short shrift in the brief. *Appellants' Substitute Brief*, at 36. Even if the Court entertains the objections, they should be reviewed for plain error and overruled.

"Plain error review is discretionary and rarely granted in civil cases." *City of Greenwood*, 299 S.W.3d at 617. Reversal is only warranted if there was "manifest injustice

or [a] miscarriage of justice." *Nelson*, 9 S.W.3d at 605*Id.* The Court is not required to entertain plain error review. *Howard*, 332 S.W.3d at 790-91.

b. The "Law of the Case" Does Not Warrant Reversal

Appellants claim the law of the case mandated that the reasonable, good faith belief element apply to Gentry's retaliation claim because it was held to be an element in a previous appeal. *Appellants' Substitute Brief*, at 36. This is inaccurate. The elements of the retaliation claim were not disputed until the instruction conference at trial.

"The doctrine of law of the case provides that a previous holding in a case constitutes the law of the case and precludes relitigation of the issue on remand and subsequent appeal." *Walton v. City of Berkeley*¸ 223 S.W.3d 126, 128-29 (Mo.2007). "The doctrine insures uniformity of decisions, protects the parties' expectations, and promotes judicial economy." *Id.* However, it does not apply when "the issues or evidence on remand are substantially different from those vital to the first adjudication and judgment." *Id.*at 130. Such is the case here.

Appellants argue that in *Gentry I*, the Court of Appeals "ruled" that an essential element of Gentry's claim was that he had a "good faith and reasonable belief" that his firing was discriminatory. *Appellants' Substitute Brief*, at 36. Notably, the following words are wholly absent from the Court's opinion in *Gentry I*: "reasonable;" "good;" "faith;" and "belief." *See Gentry v. Orkin, LLC*¸ 490 S.W.3d 784 (Mo.App.WD 2016). The elements of Gentry's claim were not at issue and there was no such ruling in the appeal.

The only issue on appeal in *Gentry I* was "the circuit court's denial of [Appellant's] motion to compel arbitration." *Gentry*¸ 490 S.W.3d at 788. Appellants moved to compel

arbitration on the eve of trial and appealed the denial of the motion. *Id.* at 787. One of several arguments made by Gentry was that Appellants waived their right to arbitrate. To show a waiver, there had to be evidence that (1) Appellants knew of their right to arbitrate, (2) acted inconsistently with that right; and (3) their actions prejudiced Gentry. *Id.* at 788.

In response to Gentry's argument that Appellants waived their right to compel arbitration, Appellants argued they did not know of their right to compel arbitration until after the trial court issued rulings on their motions in limine two weeks before trial. *Id.* at 787; 789. However, at oral argument, Appellants admitted they considered moving to compel arbitration at the onset of the case. *Id.* at 789. Based on this confession, the Court of Appeals found that the first element of waiver was satisfied. *Id.*

The Court discussed that in addition to Appellants' admission at oral argument, they should have known the July 2012 Charge was at issue in this case because it was the alleged protected activity. *Id.* at 789. Although in his briefing, Gentry argued the reasonable, good faith belief element applied (as he did throughout this case until the exchange on pages 705-709 of the transcript), the Court did not "rule" or "hold" that it was an element of the claim; it merely cited *McCrainey* for the proposition that Gentry had to prove he complained of discrimination. *Id.* at 789. The elements of a retaliation claim were not at issue in the appeal so there could be no "holding" or "law of the case" regarding the same. The law of the case established in *Gentry I* was that Appellants waived their right to arbitrate. *See id.* at 790. The law of the case doctrine does not warrant reversal.

c. Judicial Estoppel Does Not Warrant Reversal

If this objection was made timely to the court, it would be reviewed under an abuse of discretion standard. *Vacca v. Mo. Dep't of Labor & Indust. Relations*, SC96911, ---S.W.3d---, 2019 WL 1247074, at *6 (Mo. 03/09/2019). Since it was not timely raised, it may only be reviewed for plain error. *Nelson*, 9 S.W.3d at 605. However, the Court is not required to entertain plain error review. *Howard*, 332 S.W.3d at 790-91. Regardless, judicial estoppel does not warrant reversal.

"Judicial estoppel is an equitable doctrine." *Vacca*, 2019 WL 1247074, at *1. It may be invoked where a litigant unfairly takes two inconsistent positions, *id.* at *1, and invoking it is necessary to "preserve the integrity of the courts." *Id.* at *10. The relevant factors are: (1) whether a party's position is 'clearly' inconsistent with a prior position; (2) whether a court accepted the earlier position; and (3) whether the party changing position would gain an unfair advantage if not estopped. *Id.* at *8 (citing *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). Without explanation or discussion, Appellants summarily conclude judicial estoppel warrants a new trial because Gentry's position regarding the reasonable, good faith element changed at trial. *Appellants' Substitute Brief*, at 36. Gentry's position did change; however, Appellants fail to recognize the change was caused by their trial conduct and the trial court's reliance thereon. Considering all circumstances, judicial estoppel is unwarranted.

First, Appellants rely on Gentry's position in the first appeal. As discussed above, Appellants are correct that in his respondents' brief, Gentry argued the reasonable, good faith belief was an element. But the Court of Appeals did not rely on that being an element

of the claim in rendering its opinion. Moreover, Gentry's argument was a rebuttal to Appellants' written argument that they were unaware of their right to arbitrate until two weeks before trial, which, at oral argument, they conceded was untrue. Appellants' confession formed the basis for the court's opinion. *Gentry*, 490 S.W.3d at 789.

Appellants also refer to Gentry's position during pre-trial proceedings, but do not point to any specific instance. *See Appellants' Substitute Brief*, at *36. Gentry agrees that he argued this element applied in several instances in pre-trial proceedings and during trial, but maintains his change was reasonable due to changed circumstances and was not a display of bad faith. What is completely missing from Appellants' argument is any consideration as to the reason Gentry's position changed, and whether it resulted in an unfair advantage.

The change in Gentry's position was a response to events that transpired at trial; to wit: (1) the trial court prohibiting Gentry from talking about age discrimination or otherwise asserting his termination was wrongful (TR608:9-15); (2) the trial court excluding the July 2012 Charge from evidence based on Appellants' objection (TR708:5-18); (3) the trial court prohibiting Gentry from explaining the basis for his belief based on Appellants' objection (TR708:18-709:9); and (4) Appellants stipulating that Gentry filing the charge "creates the protected activity." (TR706:16-25). This issue was disputed throughout pretrial proceedings and trial but climaxed during Gentry's direct examination.

During the direct examination, and because of the court's instruction before opening (TR340:2-4), Gentry's counsel approached the bench to offer the July 2012 Charge. (TR705:23-706:11). It was excluded from evidence. (TR708:5-18). The court specifically

prohibited Gentry from testifying why he believed that his termination was discriminatory. (TR709:3-6). Having an argument rejected by the court based on your opponent's stipulation and objection is a good reason to change positions. After the bench conference, Gentry *never again* argued the reasonable, good faith element applied.

At the instruction conference, Gentry argued the same position *Appellants' counsel* took at the bench conference, *i.e.*, that filing the charge creates the protected activity. (TR856:2-13). Under these circumstances, judicial estoppel should not be invoked to order a new trial. Doing so would reward Appellants for changing their positions during trial, *i.e.*, successfully excluding evidence based on relevance objections and later claiming it was central to Gentry's claim. This result would be unjust and undermine the doctrine's very purpose.

Point I should be denied. Instructions 6 and 8 were proper statements of the law. They required the jury to find all disputed elements of the claim, as set forth in R.S.Mo. § 213.070(2) and in *Keeney v. Hereford Concrete Products*. Appellants stipulated that Gentry engaged in protected activity and successfully prevented Gentry from offering the Charge into evidence or explaining the basis for his belief. Appellants are not entitled to a new trial based on Point I.

II. RESPONSE TO POINT II

Point II argues the trial court erred by refusing to submit Appellants' non-MAI "business judgment" instruction. *Appellants' Substitute Brief*, at 37. Point II should be denied because this non-MAI instruction was not required and Appellants suffered no prejudice from the court's refusal to submit it.

a. Standard of Review

Claims of instructional error are reviewed *de novo*. *Ross-Paige*, 492 S.W.3d at 172. Reversal is only warranted if a prejudicial error materially affected the verdict. *Minze*, 437 S.W.3d at 275.

b. Argument

In 2006, the Missouri Court of Appeals held that refusing a business judgment instruction in MHRA cases is appropriate. *See McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162, 170-71 (Mo.App.ED 2006). In Point II, Appellants ask this Court to overrule *McBryde*, disregard Rule 70.02, and recognize an illusory claim of prejudice.

Appellants' argument for reversal of *McBryde* was not preserved. Arguments raised for the first time in a post-trial motion are waived. *Spalding v. Monat*, 650 S.W.2d 629, 631 (Mo.App.ED 1981). Prior to the verdict, Appellants never argued *McBryde* should be overruled. Appellants' argument in favor of their business judgment instruction was that it would be "fair to Defendant." (TR870:3-24). Appellants cited no legal authority. *Id.* Gentry's objection to the proposed instruction was twofold: (1) the jury had adequate instructions through which to decide the case; and (2) the Court of Appeals already approved of not submitting the instruction, citing "McCraineyBride [sic] versus Ritenour School District." (TR870:1-9). Appellants did not argue *McBryde* should be overruled until their post-trial motion. (D152, pp.7-8).

Even if this argument was preserved for appeal, Appellants' only support for overruling *McBryde* is an article published by a former Ogletree Deakins attorney. The Court should not be convinced by an editorial piece published by a lawyer from the firm

that represented Appellants at trial. In addition to *McBryde*, which holds no business judgment instruction is required in MHRA cases, giving a non-MAI business judgment instruction would have violated Missouri law.

"Whenever [the MAI] contains an instruction applicable in a particular case … such instruction shall be given to the exclusion of any other instructions on the same subject." *Mathes v. Sher Express, LLC*, 200 S.W.3d 97, 105 (Mo.App.WD 2006). Non-MAI instructions are only used if "there is no applicable MAI." Rule 70.02(b) (A112). Appellants' proposed business judgment instruction is duplicative of their Lawful Justification defense instructions (Instructions 7, 9; D232, p.10, 12) (A12; A14), because it would have told the jury to consider Appellants' non-retaliatory reason for not interviewing or rehiring Gentry, which it was instructed to do in Instructions 7 and 9. This not only shows Appellants' proposed instruction was duplicative, it undermines their claim of prejudice.

Even if a business judgment instruction was appropriate in an MHRA case, Appellants did not suffer prejudice from its rejection. Appellants argue, "had the [business judgment] instruction been given, reasonable jurors could have concluded the failure to rehire was the result of a business judgment decision and not because of retaliation." *Appellants' Substitute Brief*, at 43. But the jury was so instructed because these issues were succinctly stated in Instructions 7 and 9 (D232, pp.10, 12). The jury was specifically instructed that it was required to return a verdict for Appellants if it found their conduct

was based on Gentry's poor performance and not retaliation. *Id.*[18] "This Court presumes that the jury follows the instructions given by the trial court." *Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 435 (Mo.2016). As such, we must assume the jury considered exactly what Appellants claim they were precluded from considering. Appellants' purported explanation for their actions were submitted to the jury for consideration and nearly the entirety of Appellants' closing argument focused on the business-related justifications for its actions, *i.e.*, their contention that Gentry was a poor performer. (TR909-24). Therefore, Appellants' claim of prejudice is illusory.

Point II should be denied.

III. RESPONSE TO POINT III

Point III assigns error to the Circuit Court's decision to overrule their objection to Gentry's evidence during the punitive phase of trial. *Appellants' Substitute Brief*, at 44-46. Appellants' only legal basis for its argument in Point III is the constitutional right to a jury trial. *Id*. at 44. This objection was not made at trial.

[18] Gentry proposed the Lawful Justification Instructions that were submitted. (D231, pp.10, 12). Appellants' were rejected (D233, pp.2-3) because they did not include the "failure to interview" aspect of the claim. (TR857:14 – 858:23). But the alleged lawful justification was submitted as proposed by Appellants. (*compare* D232, pp.10, 12 (submitted) *with* D233, pp.2-3 (proposed by Appellants) (A115-16).

a. 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*, 473 S.W.3d at 114. Even if an abuse of discretion is found, reversal is only warranted if the error "materially affected the merits of the action." *Id.* The erroneous ruling must have caused substantial prejudice. *See Kansas City v. Keene Corp*., 855 S.W.2d 360, 372 (Mo.1993); *Letz v. Turbomeca Engine Corp*., 975 S.W.2d 155, 175 (Mo.App.WD 1997). Without a timely objection, plain error review applies. *Nelson*, 9 S.W.3d at 605.

b. Point III was not Preserved

If a party fails to object at the earliest opportunity, its objection is waived. *Sanders v. Ahmed*, 364 S.W.3d 195, 207 (Mo.2012). An objection must be made when it becomes "apparent." *Galovich v. Hertz Corp.*, 513 S.W.2d 325, 336 (Mo.1974). A party cannot make new objections in a post-trial motion. *See Freeman v. KCP&L Co.*, 502 S.W.2d 277, 283 (Mo.1973). "[A]n objection is not timely presented when it is raised for the first time in a motion for new trial." *Spalding*, 650 S.W.2d at 631.

During the punitive phase, Appellants did not object based on logical relevance or on the Constitution. (TR944:9-947:20; TR953:14-22). They only objected once, *i.e.*, that the question was "highly prejudicial." (TR946:14-18). The first time Appellants made the objections made on appeal was in their motion for new trial. (D152, pp.15-17). By then, the objections were already waived. Point III may only be reviewed for plain error.

c. Argument

Whether evidence is relevant "depends on many factors, including the plaintiff's circumstances and theory of the case." *Cox*, 473 S.W.3d at 111. Gentry's theory was that Appellants should be severely punished because they showed no remorse. (TR964:17 – 966:8). The questions asked of Appellants during the punitive phase furthered this theory.

It is the jury's duty to "determine … the amount of punitive damages." R.S.Mo. § 510.263.3 (A126). The jury is instructed that its assessment should be "in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct." MAI 10.01 [2008 Revision] (A129). Punitive damages are a form of punishment; in determining punishment, whether the defendant takes responsibility for its actions is relevant. *In re Belz*, 258 S.W.3d 38, 46 (Mo.2008) (remorse is mitigating factor when assessing punishment). For assessing punitive damages, the Court of Appeals has held that asking the defendant if it accepts responsibility for harming the plaintiff or if it would do anything different is acceptable. *See Boshears v. Saint-Gobain Calmar, Inc.*, 272 S.W.3d 215, 225-26 (Mo.App.WD 2008). In *Boshears*, the plaintiff asked the defense witnesses if they "learned their lesson." *Id.* at 226. Gentry expressly relied on *Boshears* at trial. (TR946:19-23). This Court has noted that the failure to show remorse is evidence to justify a large punitive damage assessment. *Lewellen v. Franklin*¸ 441 S.W.3d 136, 147-48 (Mo.2014).

Here, the challenged questions are akin to the questions in *Boshears*. It is not unfair to ask a defendant if he is remorseful during the punishment phase of trial. What *would be* unfair is to hold that a plaintiff cannot offer evidence of the lack of remorse to enhance

punishment, even though under *In re Belz*, a defendant can offer evidence of remorse to mitigate punishment. Evidence of remorse, or the lack thereof, is relevant to punishment.

Point III should be denied.

IV. RESPONSE TO POINT IV

Point IV claims "[t]he Trial Court erred in overruling Defendants' **objection to Plaintiff's closing argument** commenting on Defendants' failure to acknowledge responsibility for retaliation…." *Appellants' Substitute Brief*, at 47 (bold added). Notably, there were no objections during Gentry's closing argument or rebuttal during the punitive phase of trial. (TR958:3 - 961:18; 964:16 - 966:8).

a. Standard of Review; Point IV was Not Preserved for Appeal

To preserve an objection to a closing argument, a party must object, move to strike the improper remarks, and move for a mistrial. *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 15 (Mo.1994) ("…there was no objection of any type to this argument, no motion for a mistrial and no motion to strike, so nothing is preserved for appeal). Because there was no objection, Point IV may only be reviewed for plain error. *Nelson*, 9 S.W.3d at 605. The Court is not required to entertain plain error review. *Howard*, 332 S.W.3d at 790-91. Even if the Court reviews Point IV, the threshold for plain error in closing argument is very high.

"Plain error is rarely found in closing argument." *State v. McFadden*, 369 S.W.3d 727, 747 (Mo.2012). "Attorneys are allowed substantial latitude in closing argument." *Potter v. Kley*, 411 S.W.3d 388, 392 (Mo.App.ED 2013). "Counsel may draw conclusions from the evidence on his own system of reasoning even though such inferences at first

blush may appear both illogical and erroneous." *Titsworth v. Powell*, 776 S.W.2d 416, 420 (Mo.App.ED 1989). Here, allowing Gentry's closing argument was not plain error.

b. Argument

As discussed in the Response to Point IV, the punitive damages phase of a bifurcated trial is for the jury to assess the amount of punitive damages. If there is a punitive phase, the jury has already determined the defendant's liability for punitive damages, the only remaining issue is the monetary assessment of that liability. R.S.Mo. § 510.263.2-3. It is the jury's job to determine how much money a defendant should have to pay in order to be deterred from repeating its behavior. *See* MAI 10.01. This Court has acknowledged that a defendant's failure to show remorse is a factor to consider when determining the appropriateness of a punitive damages award. *Lewellen*, 441 S.W.3d at 148. If such a factor is relevant and appropriate to consider, then it is appropriate to argue to the jury.

Contrary to Appellants' characterization of Gentry's argument, Gentry did not argue Appellants should be punished for contesting their liability. Instead, Gentry argued that Appellants refused to accept responsibility during the punishment phase of trial (TR958) and that a large punitive verdict was the best way to prevent Appellants from repeating their misconduct in the future. (TR965-66). These are the only two portions of Gentry's argument that Appellants cite to in their appeal. *Appellants' Substitute Brief*, at 49. However, both arguments directly relate to the relevant jury instruction (MAI 10.01) and to the purpose of the second phase of trial, which is to assess an appropriate punishment. Whether a person to be punished is remorseful is always relevant in determining an appropriate punishment. Allowing Gentry's arguments was not plain error.

Point IV should be denied.

V. RESPONSE TO POINT V

Point V claims Gentry should not have been allowed to pursue punitive damages because he did not plead a specific amount in his petition. *Appellants' Substitute Brief*, at 50-54. However, such pleading in a tort case is prohibited by the Supreme Court Rules.

a. Point V was Not Preserved for Appeal

A party cannot make new objections in a post-trial motion. *See Freeman*, 502 S.W.2d at 283. Such objections are not timely. *Spalding*, 650 S.W.2d at 631. Appellants admit they first raised this objection post-trial. *Appellants' Substitute Brief*, at 50.

b. Standard of Review

Because Appellants did not timely raise this objection to Gentry's pleading, Point V may only be reviewed for plain error. "Plain error review is discretionary and rarely granted in civil cases." *City of Greenwood*, 299 S.W.3d at 617. Reversal is only warranted if there was "manifest injustice or [a] miscarriage of justice." *Nelson*, 9 S.W.3d at 605. The Court is not required to entertain plain error review. *Howard*, 332 S.W.3d at 790-91.

c. Argument

Appellants' argument regarding pleading punitive damages only considers half of the applicable Supreme Court Rule, which, in full, provides:

> When items of special damage are claimed, they shall be specifically stated.
>
> In actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered. **In actions for such damages based upon an alleged tort, no dollar amount**

or figure shall be included in the demand, but the prayer shall be for such damages as are fair and reasonable.

Rule 55.19 (A135) (emphasis added). The language in **bold** does not appear in R.S.Mo. § 509.200, but when the Supreme Court Rules and a statute regarding civil procedure are in conflict, the Rules prevail. *See* Rule 41.02; *see also Davis v. Chatter, Inc.*, 270 S.W.3d 741, 480-81 (Mo.App.WD 2008) (Rule 55.19 "supersedes any inconsistent statutes or rules"). As such, Rule 55.19 is controlling, not Section 509.200.

Gentry was not allowed, much less required, to plead a specific amount of punitive damages. MHRA claims are considered torts. *See Diehl v. O'Malley*¸ 95 S.W.3d 82, 87-89 (Mo.2003) (MHRA claims "analogous" to tort). When Rules or statutes segregate claims by tort and non-tort, MHRA claims are torts. *See Soto v. Costco*, 502 S.W.3d 38, 57 (Mo.App.WD 2016) (tort interest rate applies); *Bowolak v. Mercy East Communities*¸ 452 S.W.3d 688, 704 (Mo.App.ED 2014) (same). Because Gentry alleged a tort, Rule 55.19 prohibited Gentry from pleading a specific amount of punitive damages.

Gentry was only allowed to plead for punitive damages in an amount that is "fair and reasonable." Rule 55.19. Although Gentry did not use this exact phrase, his prayer for relief expressly seeks punitive damages and "other and further relief the Court deems just and proper." (D2, p.5). The phrase "just and proper" is not materially different than "fair and reasonable." Appellants make no argument to the contrary and do not argue the difference in language caused them prejudice; instead, they argue that Rule 55.19 is meaningless and cannot be complied with because punitive damages are not "fair and reasonable." *Appellants' Substitute Brief*, at 51-54. According to Appellants, Gentry's

punitive damages should be taken away because he did not disobey Rule 55.19 by pleading a specific amount. That is absurd. Litigants should not have judgments taken away for refusing to disobey mandatory Supreme Court Rules. In any event, there is no plain error.

Point V should be denied.

VI. RESPONSE TO POINT VI

Point VI argues "failure to interview" is not actionable retaliation, and thus Instructions 6 and 8 contained error. *Appellants' Substitute Brief*, at 55.

a. Point VI was Not Preserved for Appeal

Objections to jury instructions must be "specific." Rule 70.03 (A136). "A general objection that a particular instruction is unsupported by sufficient evidence does not preserve a claim that the plaintiff has failed to present sufficient evidence to support *a particular element* of the claim." *Mignone v. Mo. Dep't of Corrections*, 546 S.W.3d 23, 34 (Mo.App.WD 2018) (original italics). A general objection preserves nothing. *Id.*

Point VI's sole argument is that there was insufficient evidence showing the refusal to interview caused Gentry damage. At trial, Appellants' objection to Instruction 6 (Orkin verdict director) did not include a specific objection regarding damages. (TR854:1-18). The same is true for Instruction 8 (Biron verdict director). (TR859:2 - 860:20). Appellants concede that they did not make this specific objection until "their Motion for New Trial." *Appellants' Substitute Brief*, at 56. "[A]n objection is not timely presented when it is raised for the first time in a motion for new trial." *Spalding*, 650 S.W.2d at 631.

Point VI was not preserved.

b. Standard of Review

Preserved claims of instructional error are reviewed *de novo*. *Ross-Paige*, 492 S.W.3d at 172. Because Point VI was not preserved, it may only be reviewed for plain error. "Plain error review is discretionary and rarely granted in civil cases." *City of Greenwood*, 299 S.W.3d at 617. Reversal is only warranted if there was "manifest injustice or [a] miscarriage of justice." *Nelson*, 9 S.W.3d at 605. *Id.* The Court is not required to entertain plain error review. *Howard*, 332 S.W.3d at 790-91.

c. Argument

The failure to interview disjunctive of Gentry's retaliation claim was supported by the evidence and the law. "A plaintiff is the master of his or her lawsuit and can choose which causes of action to plead." *See Cox*, 473 S.W.3d at 118. Plaintiffs may submit any theory supported by the law and evidence. *Certa v. Assoc. Bldg. Ctr.*, 560 S.W.2d 593, 596 (Mo.App. 1977). A party may submit any instruction "supported by substantial evidence." *Foster v. Barnes-Jewish Hospital*, 44 S.W.3d 432 (Mo.App.ED 2001). When reviewing for substantial evidence, the Court believes all the plaintiff's evidence. *Ross-Paige*, 492 S.W.3d at 172.

Appellants argue that Plaintiff's testimony that he felt "hurt and betrayed" was not sufficient to support an award for damages." *Appellants' Substitute Brief*, at 64. This contention is contrary to well-established Missouri law regarding the MHRA. The MHRA allows the recovery of "actual damages." R.S.Mo. § 213.111.2. (A137-38). For retaliation claims, economic damage is not required. *Walsh*, 481 S.W.3d at 106. "Actual damages

[under the MHRA] include damages for emotional distress, humiliation, and deprivation of civil rights." *Sir v. Gateway Taxi Mgmt. Co.*, 400 S.W.3d 478, 491 (Mo.App.ED 2013).

"[T]he tort standard for actual damages for emotional distress does not apply to civil rights cases under the MHRA." *MCHR v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 171 (Mo.App.WD 1999). Instead, emotional distress damages can be "established by testimony or inferred from the circumstances." *Id.*; *accord Dean v. Cunningham*, 182 S.W.3d 561, 567 (Mo.2006). An act of reprisal that causes "any damages" is MHRA retaliation. *Keeney v. Hereford Concrete Prods.*, 911 S.W.2d 622, 625-26 (Mo.1995). The Court of Appeals recently recognized a plaintiff's testimony that the alleged retaliation was "stressful" sufficiently established damage. *Mignone*, 546 S.W.3d at 36.

Here, the evidence provided a sufficient basis for the jury to infer that Gentry not getting an interview caused him damage. Gentry testified that not hearing back caused him to feel hurt and betrayed. (TR731). He liked Biron, generally got along with him, and prayed for him during tough times. (TR759-60). From Biron's letter of recommendation, Gentry thought Biron would let him come back if there was a need. (Ex.160). Gentry loved his job, (TR693), identified with being the "Orkin Man," (TR731), was proud of his work (TR723), and felt a duty to return to his long-time customers. (TR731). There was ample evidence for the jury to find not getting an interview caused Gentry emotional distress under the standard applicable to intentional torts.

Point VI should be denied.

VII. RESPONSE TO POINT VII

Point VII claims the trial court erred by precluding Appellants from presenting the affirmative defense of failure to mitigate damages. *Appellants' Substitute Brief*, at 66. The trial court found "that the affirmative defense was not properly pled." (TR470:15-17).

a. Standard of Review

De novo review applies for whether pleadings "invoked principles of substantive law." *Phelps v. City of Kansas City*, 371 S.W.3d 909, 912 (Mo.App.WD 2012). Evidentiary rulings are only reversed for a "clear abuse of discretion." *Cox*¸ 473 S.W.3d at 114.

b. Argument

Point VII should be denied because Appellants waived the affirmative defense of failure to mitigate damages by not pleading it sufficiently. Failure to mitigate is an affirmative defense that must be pled and proven. *Hurst v. Kansas City, Mo. Sch. Dist.*, 437 S.W.3d 327, 337 (Mo.App.WD 2014). The defendant must prove the plaintiff unreasonably failed to take an "opportunity to mitigate." *Id.* at 338. Specifically, the employer must plead and prove that:

> (a) one or more discoverable opportunities for comparable employment were available in a location as, or more convenient than, the place of former employment, (b) the [ ] employee unreasonably made no attempt to apply for any such job, and (c) it was reasonably likely that the [ ] employee would obtain one of those comparable jobs.

Stewart v. Bd. of Educ. of Ritenour Consol. Sch. Dist., R–3, 630 S.W.2d 130, 134 (Mo.App. 1982). To invoke the defense, "ultimate facts" supporting each element must be plead. *See*

Dean v. Cunningham, 182 S.W.3d 561, 567 (Mo.2006). "A pleading that sets forth an affirmative defense … shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." Rule 55.08. If a defendant fails to satisfy this standard, its defenses are waived and fail as a matter of law.

"A defendant must plead his affirmative defenses in his answer to the suit or they will be deemed waived." *Echols v. City of Riverside*, 332 S.W.3d 207, 210 (Mo.App.WD 2010) (citations omitted). A defendant cannot pursue affirmative defenses at trial which they failed to adequately plead. *See Peterson v. Discover Property & Cas. Ins. Co.*, 460 S.W.3d 393, 411 (Mo.App.WD 2015). When reviewing the sufficiency of a pleading, courts only consider the facts alleged; they disregard conclusions. *Duvall v. Lawrence*, 86 S.W.3d 74, 80 (Mo.App.ED 2002) (dismissal proper where petition alleges conclusions and not ultimate facts).

> Legal conclusions cannot be pleaded as ultimate facts. Missouri rules of civil procedure demand more than mere conclusions that the pleader alleges without supporting facts. A conclusion must be supported by factual allegations that provide the basis for that conclusion, that is, facts that demonstrate how or why the conclusion is reached.

Jordan v. Peet, 409 S.W.3d 553, 561 (Mo.App.WD 2013) (citations omitted). "A pleading that makes a conclusory statement and does not plead the specific facts required to support the affirmative defense … **fails as a matter of law**." *Echols*, 332 S.W.3d at 211 (bold added). In *Echols*, the following was found to be insufficient: "Plaintiff's claims are barred

in whole or in part by Plaintiff's failure to mitigate damages." *Id.* Here, Appellants' pleading is similar to that in *Echols*. Appellants alleged:

> Defendant states that Plaintiff has failed to mitigate his damages, if any, in failing to actively seek and gain subsequent employment sufficient to offset any alleged damages.

(D66, p.10, ¶1); (D65, p.10, ¶1). Appellants' pleading does not include ultimate facts to support each element of the affirmative defense, so it fails as a matter of law. Ultimate facts are those included in jury instructions. *See Ostrander v. O'Banion*, 152 S.W.3d 333, 337 (Mo.App.WD 2004). Notably, Appellants' proposed jury instruction contains ultimate facts that were never plead. *See Appellants' Appendix*, A23. By including ultimate facts in the proposed instruction that they did not plead, Appellants implicitly admitted their pleading was insufficient.

Appellants also argue that MAI 32.29, not the defense as articulated in *Stewart*, is applicable to employment discrimination cases. Gentry is unaware of any Missouri opinions requiring MAI 32.29 to be applied to MHRA claims, and Appellants have cited none. Of course, if an applicable MAI exists, it must be used. Rule 70.02(b). But "if a particular MAI does not state the substantive law accurately, it should not be given." *Hervey v. Missouri Dep't of Corrections*, 379 S.W.3d 156, 159 (Mo.2012). The Court of Appeals has recognized that courts are not allowed to impute judicially-created affirmative defenses into the MHRA. *See Pollack v. Wetterau Food Distribution Grp.*, 11 S.W.3d 754, 767 (Mo.App.ED 1999). Neither the statutes contained in the MHRA, nor the regulations that describe the defenses available to an employer accused of illegal discrimination or

harassment, contain an affirmative defense of failure to mitigate damages. Assuming the defense applies, *Stewart*, and not MAI 32.29 sets forth the applicable elements.

The Committee Comments for MAI 32.29 do not indicate the instruction should be applied to MHRA cases. The only cases mentioned in the Comments are those alleged under the Federal Employers Liability Act ("FELA") and products liability cases. *See* MAI 32.29, Committee Comment (2002 New)(A-B). By statute, MAI 32.29 applies to "products liability claims." R.S.Mo. § 537.765.3(6) (referencing "The failure to mitigate damages."). However, the definition of "products liability claims" does not encompass claims under the MHRA. *See* R.S.Mo. § 537.760. By its own terms, the products liability statute only applies to "sections 537.760 to 537.765," *id.*, which does not include the MHRA.

Similarly, in FELA cases, the "injured employee…has a duty to mitigate his or her damages by returning to gainful employment as soon as reasonably possible," and this duty "is a substantive matter under federal law," which Missouri courts are required to enforce. *Kauzlarich v. Atchison, Topeka, & Santa Fe Ry.*, 910 S.W.2d 254, 256; 258 (Mo.1995). There are no statutes or regulations that require MAI 32.29 to be applied to the MHRA. Even if this Court decides MAI 32.29 does apply, Appellants' nevertheless waived the defense by not pleading ultimate facts to support each essential element.

Under MAI 32.29, a defendant must prove:

> First, plaintiff *(insert act sufficient to constitute failure to mitigate, such as "failed to return to work")*, and
>
> Second, plaintiff thereby failed to use ordinary care, and

Third, plaintiff thereby sustained damage that would not have occurred otherwise.

MAI 32.29 [2002 New] Failure to Mitigate Damages. Appellants alleged facts to support the first element, but not the second or third. (D66, p.10, ¶1); (D65, p.10, ¶1). Appellants did not allege Gentry failed to use ordinary care or that his failure caused him to suffer damage he could have otherwise avoided. *Id.* Therefore, even under MAI 32.29, Appellants waived the defense by not pleading ultimate facts showing it applies.

Appellants' argument regarding their "offer or proof" is misleading because the Court's decision was based on Appellants' pleading, not their evidence. (TR470:2-17). Moreover, Appellants' "offer of proof" preserved nothing for appeal because it was made before trial. Pre-trial motions in limine preserve nothing for appeal. *Hancock v. Shook*, 100 S.W.3d 786, 802 (Mo.2003). If a motion in limine is granted, to preserve the error, the aggrieved party must (1) offer the evidence at trial and (2) make an offer of proof after the evidence is excluded. *Id*. Otherwise, the argument is summarily denied. *See id.* When evidence is "simply not offered," then the trial court did not "exclude" anything, and the complaining party will not be heard on appeal. *See Smith v. Brown & Williamson Tobacco Corp.*, 410 S.W.3d 623, 636 (Mo.2013).

Appellants made an "offer of proof" before opening statements, and then asked the Court to reconsider its previous ruling on the motion in limine. (TR322-25). The Court's ruling remained. (TR470). Appellants did not offer mitigation evidence during trial. Regardless of the evidence, a party may not pursue claims or defenses it failed to adequately plead. Appellants did not seek leave to amend their pleading to cure the defect.

Even if the Court is inclined to grant a new trial based on mitigation, a new trial should be limited to the issue of mitigation. *See* Rule 78.01 (court may grant new trial "of any issue"). Ordering an entire new trial would be a waste of judicial time and resources and unnecessarily require the parties and jurors to try the entire case when the only issue is an affirmative defense that applies to damages only and not liability.

Point VII should be denied because Appellants failed to adequately plead the affirmative defense of failure to mitigate damages, which is a waiver of the same.

CONCLUSION

WHEREFORE, Gentry respectfully requests the Judgment of the Circuit Court be affirmed in all respects, for his reasonable attorneys' fees and costs incurred in this appeal, and for such other relief the Court deems to be fair and reasonable.

Respectfully submitted by,

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CERTIFICATION

Pursuant to Rule 84.06(c), I hereby certify that to the best of my knowledge:

(1) **Information Required by Rule 55.03:** *Respondent's Substitute Brief* includes all information required by Rule 55.03, including an attorney of record's signature, the attorney of record's name, Missouri bar number, address, telephone and facsimile numbers, and email address; moreover, I hereby certify that the original copy of *Respondent's Substitute Brief* was signed by Kenneth D. Kinney, MO #67435 and will be maintained for a period of not less than the maximum allowable time to complete the appellate process;

(2) **Service Information:** On July 12, 2019 *Respondent's Substitute Brief* was filed with the Court through CaseNet, which, pursuant to Rule 103.08, will transmit notice of said filing to Appellants' counsel of record. Moreover, on July 12, 2019, pursuant to Rule 43.01, a PDF copy of *Respondent's Substitute Brief* was emailed to Appellants' attorney of record, to wit: James R. Wyrsch at jimwyrsch@whmlaw.net.

(3) **Compliance with Rule 84.06(b):** *Respondent's Substitute Brief* complies with the limitations contained in Rule 84.06(b).

(4) **Word Count:** Not including the cover page, this certificate, the signature blocks or the appendix, and according to Microsoft Word's word count function, *Respondent's Substitute Brief* contains 19,059 words.

Respectfully submitted by,

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