SUPREME COURT OF MISSOURI
en banc

GARY GENTRY,	)	
	)	
Respondent,	)	
	)	
v.	)	Case No. SC97696
	)	
ORKIN, LLC and DANNY BIRON,	)	
	)	
	)	
Appellants.	)	

APPELLANTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

After trial of this case the jury rendered a verdict of $120,892 actual damages and $10,000,000 punitive damages against Defendant Orkin for Plaintiff on his claim of retaliation under the Missouri Human Rights Act §213.010 et seq. (relevant sections, pp. 44-53). Defendant Daniel Biron was jointly and severally held liable for the compensatory damage of $120,892 awarded by the jury and was assessed $5,000 in punitive damages by the jury verdict. The jury rendered its verdict in the Circuit Court of Jackson County, Missouri. Jackson County is within the territorial jurisdiction prescribed for the Western District of the Missouri Court of Appeals in RSMo § 477.070 (West), as authorized by Mo. Const. art. V, § 3. This case is not within the exclusive jurisdiction of the Missouri Supreme Court and is, therefore, within this Court's general jurisdiction pursuant to Mo. Const. art. V, § 3. Appellants filed a timely Notice of Appeal from the total judgment awarding Gentry $3,731,242.88. LF Doc #213. (Judgments attached to the Notice of Appeal and Order awarding Plaintiff attorney's fees, costs and expenses in the amount of $488,117 in attorney's fees, $12,804.83 in costs and litigation expenses, plus interest; Order and Final Judgment awarding Plaintiff $3,109,369.15 in punitive damages, compensatory damages of $120,890, $5,000 punitive damages against Biron, plus interest on this Judgment). LF Doc #213

The Western District Court of Appeals denied Orkin's appeal and affirmed the Judgment on December 26, 2018. (A51) Thereafter, Orkin timely filed its Motion for Rehearing and/or Transfer, which Motion was denied by the Western District Court of Appeals on January 29, 2019. Thereafter, Orkin timely filed its Motion in this Court

seeking transfer of the cause. This Court granted Orkin's Motion transferring the matter for consideration by this Honorable Court on April 2, 2019.

STATEMENT OF FACTS[1]

I. INTRODUCTION

Plaintiff sued Orkin and Biron in a one-count Petition alleging "retaliation" in violation of the Missouri Human Rights Act ("MHRA"), RSMo § 213.010 (West)). Plaintiff alleged in his one-count Petition that, when Plaintiff, who had been fired by Orkin in June 2012 applied for re-employment 13 months later in July 2013, Orkin and Biron retaliated against him in violation of MHRA by failing to interview or re-employ Plaintiff because Plaintiff had filed and pursued a Charge of Discrimination against Orkin in the Human Rights Commission in July 2012 claiming that Plaintiff had been fired because of his age and disability. The Petition did not allege whether Defendants' claimed retaliation was due to Gentry's opposition to age and disability discrimination asserted in the Charge of Discrimination or was due to Gentry's participation in a Charge of Discrimination against Orkin. LF Doc #2. Relevant sections of the MHRA are included in the Appendix at A41-A50.

[1] The Transcript in this case includes pretrial, trial and post-trial proceedings and will be referred to as "TR __." References to the Appendix will be referred to as "A __." The Legal File will be referred to as "LF Doc #__, p. __." Exhibits will be referred to as P. Ex. __ for Plaintiff's exhibits and D. Ex. __ for Defendants' exhibits.

Gary Gentry was employed as a pest technician by Defendant Orkin, LLC for approximately five years beginning in May 2007. TR 701, 705.[2] A pest technician's job was to spray pesticides and in part to collect bad debts. TR 654-654. Pest technicians' job performance standards included the "cancellation rate," i.e., no more than two percent of the employee's customers were supposed to terminate their service during a month, TR 497-498, 512-513, 654, 656-657, and the "allowance rate" which is the number of customers that are not serviced in a particular month. TR 497-499, 512-513, 660-661. If a pest technician could not meet company standards he could be terminated. TR 663-664. "Coaching and counseling" forms were utilized to improve a pest technician's performance. TR 503-505.

Gentry was terminated from Orkin in or around June 1, 2012, and thereafter filed a complaint with the Missouri Human Rights Commission ("MHRC") alleging that he was terminated because of age and disability discrimination. TR 704-705, 710. This claim was never pursued by Gentry because his lawyer failed to file a suit on his behalf. LF Doc #41, #45. In July and December 2013 Gentry sent his resume to Orkin requesting that he be reemployed. P. Ex. 83, TR 486; P. Ex. 97, TR 411. Orkin did not reemploy or interview him. Shortly after his last request to be employed and more than a year and a half after his termination from Orkin, Gentry filed a complaint with the MHRC alleging that Orkin's failure to rehire him was in retaliation for his filing the original discrimination case against

[2] When he was first employed by Orkin he signed an employment agreement that he would not compete with Orkin for a period of two years. TR 715-719; P. Ex 64, TR 716.

Orkin. LF Doc #2, Exhibit A to the Petition. Subsequently, after the MHRC provided him with a right to sue letter, Gentry sued Orkin and Biron in 2014 for retaliation by failing to interview and rehire him because he had filed a discrimination claim. Gentry asserted that Defendants' acts violated the Missouri Human Rights Act, RSMo § 213.010 (West). LF Doc #2, Exhibit A to the Petition.

II. PRIOR PROCEEDINGS

Before this case was tried in the Circuit Court, Orkin and Biron pursued an appeal in the Western District Court of Appeals on the ground that, because of the trial court's ruling that certain alleged evidence of discrimination by Orkin would be admitted at trial, Gentry's claim of retaliation was subject to arbitration. That appeal was denied. *Gentry v. Orkin, LLC*, 490 S.W.3d 784 (Mo.App. W.D. 2016).

III. PLAINTIFF'S EVIDENCE AT TRIAL

A. Gentry's Termination by Orkin

Gentry's employment was terminated by Orkin in June 2012. TR 534-536; D. Ex. 132, 133; TR 704-705; P. Ex. 53; TR 440. Although, according to Orkin, when Gentry was terminated he was not meeting performance standards (TR 534), the form utilized by Orkin to reflect his termination stated that he was being terminated because he failed to return from a leave of absence, which had been granted because he was injured on the job. P. Ex. 47, 53; TR 438, 440, 445-446, 536-538. Gentry was eligible for rehire by Orkin.

TR 438, 440-441.[3] Even though Biron signed the form on June 20, 2012, the form showed his date of termination as March 24, 2012. TR 438, 442; P. Ex. 53. Interrogatory Answers also indicated that Gentry's termination date was March 24, 2012. TR 444-446; P. Ex. 47.

Defendant Danny Biron was a manager in the Lee's Summit branch office (known as the Independence branch) of Orkin and was the manager for Gentry. TR 493, 505. Gentry was provided a letter of reference by Biron which said good things about Gentry. TR 722-723; P. Ex. 57; TR 720-723; D. Ex. 218. Gentry also presented evidence of a favorable employment review by Orkin. TR 461-462, 465; P. Ex. 55. As of June 2012, when Gentry was terminated, Orkin was willing to give him a second chance. TR 603. However, in October, November and December 2013, whether Gentry would be reemployed depended upon what Orkin's Risk Management Department wanted to do. TR 603-612. But Biron also testified that he would not consider Gentry for open positions. TR 485-486; P. Ex. 83.

B. Gentry's Reapplication for Employment in July 2013

Gentry reapplied for employment at Orkin on or about July 22, 2013. TR 724; P. Ex. 83. P. Ex. 83 is the response of Biron to Gentry indicating that Orkin didn't have any open positions at that time but he would keep his resume on file. TR 724-725.

[3] Biron was terminated from Orkin in 2014 for posting service tickets for accounts for which he had not rendered services in violation of Orkin's policies and procedures. TR 379-382; D. Ex. 46, TR 486. Even though Mr. Biron was terminated and had a non-compete, he went to work for a competitor shortly after his termination. TR 626-629.

As to Gentry applying for a position with Orkin in July 2013, Orkin's position was that the spot had been filled by the time Gentry submitted his resume on July 22, 2013, by Michael Baldwin after completion of background checks on or about July 15, 2013. A conditional offer was made to Baldwin on July 1, 2013. TR 562-571. Baldwin's start date was August 1, 2013, because Baldwin wanted to give his employer two weeks' notice. TR 567-571. Plaintiff, however, presented evidence that Orkin's own documents showed that the position Gentry applied for in July 2013 was still open. Thus, Gentry's evidence was that Orkin provided a statement to the Missouri Human Rights Commission (MHRC) in response to Gentry's complaint of retaliation. TR 382-383; D. Ex. 52; TR 383. In the response, Orkin stated that the position Gentry applied for in July 2013 was filled on March 13, 201,3 and that the applicant's first day of work was July 1, 2013. TR 384-385. Attached to P. Ex. 52 was a new hire form which was redacted and did not contain Michael Baldwin's name. TR 384-389, 391. According to this form, Jose Vargas was selected to fill the position. P. Ex. 69; D. Ex. 174; TR 384-389. While Orkin contended that a conditional offer was made to Baldwin on or before July 11, 2013, (TR 392; P. Ex. 48; TR 597), according to the deposition testimony of Biron, the hiring date for Baldwin was August 1, 2013. TR 384-385. See also P. Ex. 47; TR 846. Orkin's response to an interrogatory also indicated that a person was hired for the position on July 17, 2013, to fill the position of March 13, 2013. TR 395; see also P. Ex. 47; TR 846 (Baldwin's hire date was July 17, 2013). Biron agreed that there were a number of inconsistencies in terms of Orkin's documents when people were hired for which Biron had no explanation. TR 397-398. Also, documents submitted to the EEOC indicated that Baldwin's actual start date

was July 1 even though he didn't start on that date. TR 399-400. Another Orkin form (D. Ex. 199) for Baldwin did not show his start date or when he was offered a job. TR 405, 409, 421. Moreover, the new hire form provided to the MHRC had a different job code and pay plan than that for Baldwin. TR 410.

C. Gentry's Reapplication for Employment in December 2013[4]

On December 27, 2013, Gentry reviewed an advertisement in a local newspaper for an opening at Orkin. TR 728-729; P. Ex. 84. He then reapplied for a position with Orkin on December 30, 2013. TR 727-728; P. Ex. 87. In P. Ex. 84, the newspaper ad, Orkin indicated "experience preferred" and that he/she must pass a motor vehicle and background check. Gentry said he could pass those checks. TR 728-729. The ad also indicated that a high school diploma was required and Gentry had a high school diploma. TR 729. Gentry never heard back from Orkin with respect to his application on December 30, 2013. TR 730-731. Gentry stated that, because he didn't have any response to his application for employment, he "felt hurt and betrayed." TR 731.

P. Ex. 87 was a fax from Gentry to Orkin applying for another position on December 30, 2013. TR 411-412, 419-420; P. Ex. 87. According to P. Ex. 52 (TR 383), Shumate was hired on December 4 but Shumate hadn't even applied for that position until December 16. TR 412-416; P. Ex. 65. The background and other checks were not completed on Shumate until January 20, 2014. TR 415, 622-627; P. Ex. 90. In fact,

[4] Gentry was not considered for a job as an administrative specialist on October 1, 2013. TR 484-485.

Shumate was not hired until January 20, 2014. P. Ex. 47; TR 436-437. Also, a Lenzel Boose was hired by Orkin for the same position as Shumate. TR 481-484; P. Ex. 75. Neither Shumate nor Boose had any pest technician experience. TR 592. Another Orkin document stated that Boose was employed by Orkin as of July 16, 2013. TR 592-593; P. Ex. 75; TR 483. If Shumate in fact was hired on December 4, 2013, it was in violation of Orkin's policy not to hire anyone before background checks had been completed. P. Ex. 90; TR 623, 626; P. Ex. 52; TR 383; P. Ex. 72; TR 845. Orkin's position statement to the MHRC on Gentry's Complaint of Retaliation did not state that Gentry was not hired because Boose and Shumate had been hired and the jobs had been removed from the marketplace. TR 642-643.

D. Orkin Records Regarding When Gentry Was Present For Work

Plaintiff presented evidence that Orkin's records reflected Gentry being at work when he was in fact on leave. TR 426-428, 431-432; P. Ex. 72, 74; TR 733-736. Someone signed another technician's name over Gentry's. TR 431-436.

E. Coaching and Counseling Forms

Plaintiff and Defendants presented evidence that Gentry had been terminated after receiving numerous "coaching and counseling" forms indicating that he did not meet Orkin's performance standards for the allowance and cancellation rates. P. Ex. 25; TR 633; P. Ex. 52; TR 383; D. Ex. 102, 115, 116, 117, 119, 120; TR 770; TR 509, 514, 525, 527, 530; P. Ex. 43, 76, 89; TR 699-700; 702-703. Gentry did make efforts to improve his performance but his efforts "seldom worked out." TR 700-701.

Plaintiff's evidence indicated that Orkin's use of coaching and counseling sessions were inconsistent and not always enforced. TR 446-461; P. Ex. 55; TR 613-617; P. Ex. 75, 76, 79; TR 456, 483, 484; P. Ex. 89; TR 484, 636-642, 652, 654-660, 662-663, 665-666; P. Ex. 15; TR 669-672, 674-676; P. Ex. 11.

F. Plaintiff's Evidence of Orkin's of Age and Disability Discrimination and Violation of its Leave of Absence Policy.

Plaintiff also presented evidence designed to show age and disability discrimination of its employees as well as violation of its leave of absence policies as follows, through the video deposition of Black, a supervisor for Orkin. P. Ex. 99; TR 690, 845. [5]

1. *Age:*

Ex. 2 to P. Ex. 99; P. Ex. 99, Video at 10:29-10:34, p. 22, l. 12 to p. 25, l. 5; Exhibit 3 to P. Ex. 99; P. Ex. 99, Video at 10:54-10:56, p. 40 l. 1 to p. 41 l. 5; Ex. 7 to P. Ex. 99.

2. *Disability:*

Exhibit 2 to P. Ex. 99; P. Ex. 99, Video at 10:24-10:26, p. 19, ll. 3-25; P. Ex. 99, Video at 10:41-10:42, p. 29, l. 17 to p. 30, l. 13; P. Ex. 99, Video at 10:47-10:50, p. 35, l. 2 to p. 36, l. 23; P. Ex. 99, Video at 10:52-10:53, p. 38, ll. 2-24; P. Ex. 99, Video at 10:53-10:54, p. 39, ll. 7-14; see also P. Ex. 22; TR 629-633.

[5] P. Ex. 99 is the transcript of the video. The references to the video itself were prepared by Appellants' counsel from the unredacted video.

3. *Leave of Absence:*

Ex. 14 to P. Ex. 99; P. Ex. 99, Video at 12:03-12:04, p. 81, l. 9 to p. 82, l 2; Exhibit 17 to P. Ex. 99; P. Ex. 99, Video at 12:37-12:40, p. 89, ll. 18-19, 23-25 to p. 91, l. 17; see also P. Ex. 72; TR 646, 601-602.

G. Plaintiff's Damages

Plaintiff and his expert presented evidence that his back pay damages were $120,892. TR 732; P. Ex. 93; TR 816-825. His damages on the claim of failure to interview was that he suffered emotional distress, i.e., he "felt hurt and betrayed." TR 731.

IV. DEFENDANTS' EVIDENCE AT TRIAL

A. Gentry Did Not Meet Orkin's Performance Standards

For a substantial period of time prior to his termination, Gentry did not meet Orkin's performance standards, was repeatedly coached and counseled about his performance, including being repeatedly warned he could be terminated. TR 505, 534; D. Ex. 102 (18 coaching and counseling forms), 215, 117, 119, 120. If Gentry's cancellation rate continued, he would have lost 60% of his customers by the end of the year. TR 594-595; D. Ex. 102.

B. Gentry's Termination

There was a clerical error on Gentry's termination form showing his termination was as of March 24, 2012. D. Ex. 133, P. Ex. 13; TR 441-444, 539-542; D. Ex. 135. Gentry was provided a reference letter at his request which was in part untrue. TR 543-550; D. Ex. 154-155.

C. Gentry's July 22, 2013 "Application"

Gentry did not apply for a March 2013, pest technician job opening until July 22, 2013. TR 572; D. Ex. 159. By then the position was filled. TR 555-558, 562-583; P. Ex. 99; D. Ex. 157, 158, 159, 160, 161. Biron informed Gentry that he did not have any open positions at this time but would keep his resume on file. TR 583-585; D. Ex. 162. Biron would not have rehired Gentry because he had a proven track record of bad performance. TR 586.

D. Gentry's December 30, 2013 "Application"

Gentry faxed his resume to Orkin on December 30, 2013, which did not specifically indicate he was looking to be hired. TR 587-588; D. Ex. 178. His July 2013 "application" was no longer effective. TR 551-553; D. Ex. 100. The opening for a new hire was December 4, 2013, and the opening had been filled by the time Gentry applied. TR 586-587; D. Ex. 178; TR 590-593. A hire date for the new employee on a form was incorrect. TR 590-593. Another pest technician was subsequently hired until other Orkin branches had an opening for him. TR 591. Gentry filed his complaint with the MHRC on January 6, 2014. TR 800-801.

V. PLAINTIFF'S EVIDENCE DURING THE PUNITIVE DAMAGE PHASE OF THE TRIAL

The jury returned a verdict for Plaintiff in the amount of $120,892. LF Doc #95, p. 2; TR 937. During the subsequent punitive damage phase of the trial, Larry Black testified that he saw no evidence or information that indicated to him that the charge filed by Gentry in July 2012 was taken into account when the decision not to rehire was made in 2013. TR

949. Biron testified that he did not agree that he took into account Gentry's charge of discrimination filed in July 2012 when he did not offer Gentry a position in 2013. TR 953.

VI. DEFENDANTS' EVIDENCE DURING THE PUNITIVE DAMAGES PHASE OF THE TRIAL

Black also testified about the number of benefits that Orkin provided for its employees, about Orkin's charitable contributions, and about a program for hiring veterans. TR 950-952. Defendant Biron's background was presented. In 2011, Orkin transferred Biron to the Independence branch to fix an underperforming branch. TR 954.

VII. VERDICTS

A verdict for actual damages of $120,892 against Orkin and Biron was rendered by 11 of 12 jurors. TR 937; LF Doc #95; A25-A28. The punitive damage verdict against Orkin for $10,000,000 was rendered by 10 of 12 jurors and against Biron for $5,000 by nine of 12 jurors. TR 966-970; LF Doc #95; A26, A28.

VIII. POST-VERDICT HEARING

The Court held a post-verdict hearing on Defendants' Motion to reduce the verdict. LF Doc #109, 110, 111, 112, 113, 126. The Court also held a hearing on Plaintiff's amended suggestions in support of Motion for attorney's fees, expenses, equitable relief and post-judgment interest. TR 974. LF Doc #97, 127; Supp LF Doc #217-228; D. Ex. 106; TR 992. No judgment had been entered on the jury verdict because there remained issues to resolve, including a hearing for front pay and attorney's fees and other relief. TR 971. At the beginning of the hearing on Plaintiff's request for attorney's fees and equitable and other relief, Plaintiff formally withdrew his request for front pay on the basis that the

verdict directors that were submitted were disjunctive and as a result, with respect to Verdict A, the actual damage verdict against Orkin and Biron, Plaintiff conceded that "there is no way for the Court or anyone to discern whether or not the jury awarded backpay or emotional damages." TR 975. In addition, Plaintiff withdrew his request for an award for taxes to be paid on any front pay award. TR 1147.

Plaintiff presented expert and other testimony concerning the reasonableness of his request for attorney's fees. TR 973-1044; P. Ex. 1 (TR 1010); P. Ex. 2 (TR 1020); P. Ex. 3 (TR 1096); P. Ex. 4 (TR 1104); Supp LF Doc #217. While Defendants opposed the request for attorney's fees and costs at the hearing (TR 977-1009, 1013-1016, 1017-1018, 1029-1044, 1120-1172, 1179-1185), Defendants are not contesting the award of attorney's fees and costs on this appeal.

Defendants presented evidence to support their Motion to reduce the verdict but are not pursuing this issue on appeal in light of Plaintiff's concession that it was impossible to determine what the verdict was for.

IX. JUDGMENT OF THE COURT

The Court awarded judgment to the Plaintiff for attorney's fees in the amount of $278,924. The Court then applied a multiplier of 1.75, resulting in a total attorney's fee award of $488,117. LF Doc #150, p. 3. The Court awarded Court costs and litigation expenses in the amount of $12,804.83. LF Doc #150, p. 4. The court also awarded post-judgment interest at the rate of 5.66%. A30-A33. The Court then entered an Order and Final Judgment, reduced the jury verdict of $10 million against Defendant Orkin under RSMo § 510.265 (West) to five times the net amount of the Judgment. The Court also

entered judgment for the Plaintiff in the amount of $120,892 in compensatory damages. LF Doc #150, p. 4. The net Judgment was therefore $621,873.83. The Court also affirmed the $5,000 punitive damages against Defendant Biron. The Court entered a judgment of $3,109,369.15 for punitive damages against Orkin. LF Doc #151, pp. 1-4. The total judgment was $3,731,242.98. A34-A37.

X. POST-JUDGMENT PLEADINGS AND ORDERS

On August 29, 2017, the Court entered orders denying Defendants' timely Motions for judgment notwithstanding the verdict, to amend judgment, for new trial and for a hearing on the Motion, LF Doc #52, #153-181, #210; A38, timely Motion for Remittitur and for a hearing, LF Doc #182, #211; A39 and timely Motion for relief from the judgment pursuant to Mo. Sup. Ct. R. 74.06(b) and for a hearing. LF Doc #183-187, #212; A40. The Defendants timely filed a Notice of Appeal on September 8, 2017. LF Doc #213.

The Western District Court of Appeals denied Orkin's appeal and affirmed the Judgment on December 26, 2018. Thereafter, Orkin timely filed its Motion for Rehearing and/or Transfer, which Motion was denied by the Western District Court of Appeals on January 29, 2019. Thereafter, Orkin timely filed its Motion in this Court seeking transfer of the cause. This Court granted Orkin's Motion transferring the matter for consideration by this Honorable Court on April 2, 2019.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS' OBJECTIONS TO VERDICT DIRECTING INSTRUCTIONS NO.6 AND NO. 8 AND BY REJECTING DEFENDANTS' PROFFERED VERDICT-DIRECTING INSTRUCTION BECAUSE THE VERDICT DIRECTING INSTRUCTIONS NO. 6 AND NO. 8 ERRONEOUSLY FAILED TO REQUIRE THE JURY TO FIND THAT PLAINTIFF FILED A CHARGE WITH THE MISSOURI HUMAN RIGHTS COMMISSION BASED UPON WHAT HE IN GOOD FAITH REASONABLY BELIEVED WAS PROHIBITED DISCRIMINATORY CONDUCT IN THAT FILING A CHARGE WITH THE MISSOURI HUMAN RIGHTS COMMISSION BASED UPON A GOOD FAITH AND REASONABLE BELIEF THAT PROHIBITED DISCRMIINATORY CONDUCT HAS OCCURRED IS AN ESSENTIAL ELEMENT OF A RETALIATION CLAIM UNDER THE MISSOURI HUMAN RIGHTS ACT ("MHRA").

McCrainey v. Kansas City Missouri Sch. Dist., 337 S.W.3d 746 (Mo.App. W.D. 2011)

Mignone v. Missouri Dep't of Corr., 546 S.W.3d 23 (Mo.App. W.D. 2018), *reh'g and/or transfer denied* (Mar. 22, 2018), *transfer denied* (May 22, 2018)

Gilooly v. Missouri Dept. of Health & Senior Services, 421 F.3d 734 (8th Cir. 2005)

Vacca v. Missouri Department of Transportation, et al., 2019 WL1247074 (Supreme Court of Missouri, March 19, 2019)

II. THE TRIAL COURT ERRED IN REFUSING DEFENDANTS' PROFFERED INSTRUCTION REGARDING DEFENDANTS' EXERCISE OF THEIR

BUSINESS JUDGMENT BECAUSE DEFENDANTS' PROFFERED INSTRUCTION MET THE REQUIREMENTS OF MO. SUP. CT. R. 70.02(b), WAS A PROPER VERDICT DIRECTING INSTRUCTION BASED UPON DEFENDANTS' THEORY OF THE CASE, WAS SUPPORTED BY THE EVIDENCE THAT THE POSITIONS PLAINTIFF APPLIED FOR WERE ALREADY FILLED AND THAT PLAINTIFF HAD PREVIOUS UNSATISFACTORY JOB PERFORMANCE IN THAT HAD THE JURORS BEEN ALLOWED TO CONSIDER DEFENDANTS' PROFFERED INSTRUCTION REASONABLE JURORS COULD HAVE CONCLUDED THE FAILURE TO INTERVIEW OR REHIRE WAS THE RESULT OF A BUSINESS JUDGMENT DECISION AND NOT RETALIATION.

Hervey v. Missouri Dept. of Corr., 379 S.W.3d 156 (Mo. 2012)

Stemmons v. Missouri Dept. of Corr., 82 F.3d 817 (8th Cir. 1996)

Scamardo v. Scott County, 189 F.3d 707 (8th Cir. 1999)

III. THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS' OBJECTIONS TO PLAINTIFF'S LINE OF QUESTIONING DURING CROSS EXAMINATION IN THE PUNITIVE DAMAGE PHASE OF THE TRIAL AS TO WHETHER DEFENDANTS WOULD ADMIT TO THE RETALIATORY CONDUCT AND TAKE RESPONSIBILITY FOR THEIR ACTIONS BECAUSE SUCH EVIDENCE WAS IN VIOLATION OF DEFENDANTS' RIGHTS TO A JURY TRIAL UNDER MO. CONST. ART. I, § 22(a) AND UNDER MO. SUP. CT. R. 69.01(a) IN THAT DEFENDANTS

HAVE A CONSTITUTIONAL RIGHT TO JURY TRIAL UNDER THE MISSOURI HUMAN RIGHTS ACT, WHICH INCLUDES THE RIGHT TO CONTEST LIABILITY THROUGHOUT ALL PHASES OF TRIAL

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

Allstate Ins. Co. v. Marotta, 125 So. 3d 956 (Fla. Dist. Ct. App. 2013)

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. 2003)

IV. THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS' OBJECTION TO PLAINTIFF'S CLOSING ARGUMENT COMMENTING ON DEFENDANTS' FAILURE TO ACKNOWLEDGE RESPONSIBILITY FOR RETALIATION DURING CROSS EXAMINATION OF DEFENDANTS IN THE PUNITIVE DAMAGES PHASE OF THE TRIAL BECAUSE THE CLOSING ARGUMENT VIOLATED DEFENDANTS' RIGHT TO A JURY TRIAL UNDER MO. CONST. ART. I, § 22(a) IN THAT DEFENDANTS HAVE A CONSTITUTIONAL RIGHT TO JURY TRIAL UNDER THE MISSOURI HUMAN RIGHTS ACT WHICH INCLUDES THE RIGHT TO CONTEST LIABILITY AT ALL PHASES OF TRIAL AND THE ARGUMENT THAT DEFENDANTS HAD FAILED TO ACKNOWLEDGE RESPONSIBILITY FOR RETALIATION AGAINST PLAINTIFF DURING THE PUNITIVE DAMAGES PHASE OF THE TRIAL WAS AN IMPROPER BASIS FOR THE JURY TO RENDER A VERDICT FOR PUNITIVE DAMAGES.

Giddens v. Kansas City Southern Railway, 937 S.W.3d 300 (Mo.App. W.D. 1996)

Critcher v. Rudy Fick, Inc., 315 S.W.2d 421 (Mo. 1958)

St. Francis Med. Ctr. v. Hargrove, 956 S.W.2d 949 (Mo.App. S.D. 1997)

V. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL, JUDGMENT NOTWITHSTANDING THE VERDICT, AND MOTION TO AMEND THE JUDGMENT BECAUSE DEFENDANTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES IN THAT PLAINTIFF DID NOT, IN HIS PETITION, SEPARATELY STATE THE AMOUNT OF PUNITIVE DAMAGES SOUGHT TO BE RECOVERED AS REQUIRED BY RSMo § 509.200 (West) AND MO. SUP. CT. R. 55.05 And 55.19.

Brown v. Payne, 264 S.W.2d 341 (Mo. 1954)

Green v. Study, 286 S.W.3d 236 (Mo.App. S.D. 2009)

Boyer v. Grandview Manor Care Ctr., Inc., 805 S.W.2d 187 (Mo.App. W.D. 1991)

David v. Chatter, Inc., 270 S.W.3d 471 (Mo.App. W.D. 2008)

VI. THE TRIAL COURT ERRED BY INSTRUCTING THE JURORS IN INSTRUCTIONS NO. 6 AND NO. 8 THAT THE JURY COULD FIND IN FAVOR OF PLAINTIFF IF DEFENDANT ORKIN EITHER FAILED TO INTERVIEW OR HIRE PLAINTIFF BECAUSE INSTRUCTING THE JURY IN THE DISJUNCTIVE TO INCLUDE "FAILURE TO INTERVIEW" AS A GROUNDS FOR LIABILITY WAS NOT SUPPORTED BY THE LEGALLY SUFFICIENT EVIDENCE IN THIS CASE IN THAT PLAINTIFF'S TESTIMONY THAT HE FELT HURT AND BETRAYED AS

A RESULT OF DEFENDANTS' FAILURE TO INTERVIEW HIM IS NOT A SUFFICIENT BASIS TO SUPPORT A JURY VERDICT IN FAVOR OF PLAINTIFF ON THE FAILURE TO INTERVIEW CLAIM.

Griffin v. Kansas City S. Ry. Co., 965 S.W.2d 458 (Mo.App. W.D. 1998), *as modified* (Apr. 28, 1998)

Tisch v. DST Sys., Inc., 368 S.W.3d 245 (Mo.App. W.D. 2012)

Mitchell v. Residential Funding Corp., 334 S.W.3d 477 (Mo.App. W.D. 2010), *as modified* (Feb. 1, 2011)

VII. TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT PLAINTIFF FAILED TO MITIGATE HIS DAMAGES AND IN REFUSING DEFENDANTS' PROFFERED INSTRUCTION SUBMITTING PLAINTIFF'S FAILURE TO MITIGATE HIS DAMAGES BECAUSE THE RULING IS CLEARLY AGAINST THE LOGIC OF THE CIRCUMSTANCES THEN BEFORE THE TRIAL COURT AND/OR IS SO ARBITRARY AND UNREASONABLE AS TO SHOCK THE SENSE OF JUSTICE AND INDICATE LACK OF CAREFUL CONSIDERATION IN THAT THE EXCLUDED EVIDENCE AND PROFFERED INSTRUCTION WERE PROPER BOTH AS A MATTER OF LAW AND FACT AND FAILURE TO ALLOW THE JURY TO CONSIDER THE PROFFERED EVIDENCE AND INSTRUCTION WAS PREJUDICIAL TO DEFENDANTS AND MATERIALLY IMPACTED THE VERDICT AS THE JURY AWARDED MORE IN DAMAGES THAN WOULD HAVE BEEN

AWARDED IF THE EVIDENCE HAD BEEN ALLOWED AND THE INSTRUCTION HAD BEEN SUBMITTED.

Lozano v. BNSF Ry. Co., 421 S.W.3d 448 (Mo. 2014)

Spencer v. Millstone Marina, Inc., 890 S.W.2d 673 (Mo.App. W.D. 1994)

Shutt v. Chris Kaye Plastics Corp., 962 S.W.2d 887 (Mo. 1998)

State v. Bisher, 255 S.W.3d 29 (Mo.App. S.D. 2008)

ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS' OBJECTIONS TO VERDICT DIRECTING INSTRUCTIONS NO.6 AND NO. 8 AND BY REJECTING DEFENDANTS' PROFFERED VERDICT-DIRECTING INSTRUCTION BECAUSE THE VERDICT DIRECTING INSTRUCTIONS NO. 6 AND NO.8 ERRONEOUSLY FAILED TO REQUIRE THE JURY TO FIND THAT PLAINTIFF FILED A CHARGE WITH THE MISSOURI HUMAN RIGHTS COMMISSION BASED UPON WHAT HE IN GOOD FAITH REASONABLY BELIEVED WAS PROHIBITED DISCRIMINATORY CONDUCT IN THAT FILING A CHARGE WITH THE MISSOURI HUMAN RIGHTS COMMISSION BASED UPON A GOOD FAITH AND REASONABLE BELIEF THAT PROHIBITED DISCRMIINATORY CONDUCT HAS OCCURRED IS AN ESSENTIAL ELEMENT OF A RETALIATION CLAIM UNDER THE MISSOURI HUMAN RIGHTS ACT ("MHRA").

A. Standard of Review and Preservation of Error

Whether the trial court properly gave a jury instruction is a question of law subject to *de novo* review. *Hemphill v. Pollina*, 400 S.W.3d 409, 415–16 (Mo.App. W.D. 2013). Appellate review is conducted in the light most favorable to the record and, if the instruction is supported by any theory, its submission is proper. *Hervey v. Missouri Dept. of Corr.*, 379 S.W.3d 156, 159 (Mo. 2012) (citing *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 608 (Mo. 2008)). Reversal is granted only where instructional error

results in prejudice that materially affects the merits of a case. *Id.* "The party challenging the instruction must show that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice to the party challenging the instruction." *Id.* (citing *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 90–91 (Mo. 2010)).

The standard of review concerning the trial court's ruling overruling a motion for new trial is whether the court abused its discretion in doing so. *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 250 (Mo. 2006).

Defendants preserved this issue by objecting to the Verdict Directing Instructions as required by Mo. Sup. Ct. R. 70.03. Defendants stated distinctly their objection and grounds for their objection to verdict directing Instructions 6 (Orkin) and 8 (Biron), A1-A2; LF Doc. #152; TR 854, 859-860, 883-885, 886. Moreover, Defendants submitted their own instruction regarding this issue which was refused by the Court. TR 856-857, 860; A3; LF Doc #155.

B. Verdict directing instructions 6 and 8 and Defendants' Proffered Instruction

Verdict Directing Instruction No. 6 reads as follows:

> Your verdict must be for Plaintiff and against Defendant Orkin, L.L.C. on Plaintiff's claim of unlawful retaliation if you believe:
>
> First, either
>
> Defendant Orkin, L.L.C. did not interview Plaintiff, or
>
> Defendant Orkin, L.L.C. did not hire Plaintiff, and

Second, Plaintiff's July 2013 Charge of Discrimination was a contributing factor in any such conduct in Paragraph First, and

Third, as a direct result of any such conduct, Plaintiff sustained damage.

TR 883-885; A1.

Verdict Directing Instruction No. 8 reads as follows:

Your verdict must be for Plaintiff and against Defendant Danny Biron on Plaintiff's claim of unlawful retaliation if you believe:

First, either

Defendant Biron did not interview Plaintiff, or

Defendant Biron did not hire Plaintiff, and

Second, Plaintiff's July 2013 Charge of Discrimination was a contribution factor in any such conduct in Paragraph First, and

Third, as a direct result of any such conduct, Plaintiff sustained damage.

TR 886; A2.

Defendants' Proffered Instruction reads as follows:

Your verdict must be or Plaintiff Gentry and against any Defendant you find responsible, if you believe:

First, Plaintiff Gentry was employed by Orkin, LLC, and

Second, Plaintiff Gentry filed a charge with the Missouri Human Rights Commission regarding what he in good faith reasonably believed was discrimination, and

Third, Defendants failed to rehire Plaintiff Gentry, and

Fourth, Plaintiff's charge of discrimination was a contributing factor in such Defendants' decision not to rehire Plaintiff Gentry, and

Fifth, as a direct result of such failure to rehire, Plaintiff Gentry sustained damage.

A3; LF Doc #155.

C. Factual background

1. *Prior Proceedings in the Appellate Court*

Before this case was tried in the Circuit Court, Orkin and Biron had pursued an appeal in the Missouri Court of Appeals, Western District, on the ground that, because of the trial court's ruling that certain alleged evidence of discrimination by Orkin would be admitted at trial, Gentry's claim of retaliation was subject to arbitration. That appeal was denied by that Court. *Gentry v. Orkin, LLC*, 490 S.W.3d 784 (Mo.App. W.D. 2016).

The Appellate Court in the first appeal had already held in the context of this case that Gentry had to establish for his retaliation claim that he had complained of discrimination in good faith. *Gentry*, 490 S.W.3d at 789 (first Appellate Opinion) citing *McCrainey v. Kansas City Missouri Sch. Dist.*, 337 S.W.3d 746, 753 (Mo.App. W.D. 2011) which expressly held that an essential element of asserting a retaliation claim under the Missouri Human Rights Act is that a plaintiff must have filed a Claim of Discrimination in "good faith."

The holding in the first Orkin Appellate decision was based, at least in part, upon the position relied upon by Respondent in the 2016 case wherein Respondent's counsel

argued that under *McCrainey*: "Gentry was required to prove he engaged in protected activity, i.e., that he reasonably believed his prior employment was terminated due to his age or disability" (emphasis added, citing *McCrainey*, 337 S.W.3d 746) (Respondent's Brief filed in the Court of Appeals are attached to the Appendix to Appellants' Reply Brief in the Record on Appeal at 1.

2. *Plaintiff's Evidence at Trial*

After obtaining the first Orkin Appellate decision, Gentry again relied upon the Appellate Court's Opinion in *McCrainey* and the Appellate Court's holding in the first appeal to successfully obtain the trial court's critical ruling over Orkin's objection that evidence of discrimination was admissible because an essential element of his claim of retaliation was that he had filed a charge of discrimination with the MHRC reasonably and in good faith. LF Doc #88, pp. 3-4; TR 29-31; 338-342; 629-633; 650-652; 668, 681-690; 705-713; 845.

3. *Defendants' Evidence at Trial*

Defendants presented substantial evidence that Gentry had been terminated after receiving numerous "coaching and counseling forms" indicating he did not meet Orkin's performance standards for the allowance and cancellation rates (P. Ex. 25; TR 633; P. #x. 52; TR 383 and, if Gentry's cancellation rate continued he would have lost 60% of his customers by the end of the year. (TR 594-595; D. Ex. 102) See also testimony of Biron on cross-examination. TR 488-550; D. Exs. 102, 115, 117, 119, 120, 132, 133, 135, 154 and 155.

D. An essential element of a retaliation claim under the Missouri Human Rights Act is that Plaintiff filed a charge with the Missouri Human Rights Commission regarding what he in good faith reasonably believed was discrimination.

1. *Missouri cases*

Missouri cases uniformly hold that with respect to a retaliation claim under the opposition clause of the MHRA, an essential element of the claim is that the plaintiff must have filed a charge with the MHRC regarding what he in good faith reasonably believed was discrimination. In this case, of course, as is manifest by Plaintiff's one-count Petition that the factual basis for the claim of retaliation was Defendants' failure to re-employ or even interview Plaintiff because, after Orkin had fired Plaintiff in 2012, Plaintiff had alleged age and disability discrimination in the Charge of Discrimination he filed with the Missouri Human Rights Commission. Plaintiff did not allege in his Petition that his claim of retaliation was brought under the "oppositional clause" as opposed to the "participation clause" or both. Certainly, however, one who pursues a Charge of Discrimination alleging age and disability discrimination is not only participating in a Charge of Discrimination but is also opposing the alleged discriminatory conduct by the Defendants.

After initially arguing to the Court in pre-trial briefing and argument that proof that Gentry had a reasonable, good faith belief that Orkin's conduct was wrongfully discriminatory was required as an element, Gentry's counsel argued the direct opposite in support of Gentry's tendered verdict director instructions 6 and 8 and in opposing the verdict director tendered by Orkin. Counsel for Gentry argued at the instructional

conference and persuaded the Court to give the verdict directing instructions 6 and 8 tendered by Plaintiff and that inclusion in the verdict directors of the requirement that Plaintiff prove he had a reasonable good faith belief that Orkin's conduct was discriminatory was a legally erroneous argument which should have been rejected by the trial court for at least the following reasons: (1) there was no applicable MAI instruction presenting a retaliation claim under MHRA and, therefore, the trial court was obligated to present verdict directing instructions that were consistent with then applicable Missouri law; and (2) under applicable law at the time of trial, if there had been an MAI instruction, such instruction would have included the "reasonable, good faith belief" element; and (3) MAI 38.01(A) explicitly requires Plaintiff to set out the "protected class" element in note 2 to the instruction but the verdict directing instructions 6 and 9 that were given by the trial court did not do so.

In *Hervey v. Missouri Dept. of Corr.*, 379 S.W.3d 156 (Mo. 2012), this Honorable Court held that failure to instruct on an essential element is an error even if a trial court purports to follow MAI. Here, of course, the Court did not purport to follow MAI but, even if it had done so, the submission of Plaintiff's retaliation claim without including the requirement to prove that Defendant had a "reasonable, good faith belief" that Defendants' conduct was wrongfully discriminatory would have been reversible error.

In *McCrainey*, 337 S.W.3d at 753–754, the Court held that, with respect to a retaliation claim under the Missouri Human Rights Act ("MHRA"), Plaintiff, in filing a discrimination charge with the Missouri Human Rights Commission must have reasonably

believed in good faith that the employer's conduct discriminated against him in the way precisely alleged.

In *Mignone v. Missouri Dep't of Corr.*, 546 S.W.3d 23 (Mo.App. W.D. 2018), *reh'g and/or transfer denied* (Mar. 22, 2018), *transfer denied* (May 22, 2018), the Court held in a retaliation case that an essential element is that the person making the complaint "had a reasonable good faith belief that there were grounds for the claim of discrimination or harassment," citing *inter alia McCrainey*, 337 S.W.3d 746. The court, also citing *Hervey*, 379 S.W.3d 156, stated the verdict director must instruct the jury to find all of the elements for the Plaintiff. Opinion at *10. See also *Minze v. Missouri Dept. of Pub. Safety*, 437 S.W.3d 271, 275–76 (Mo.App. W.D. 2014); *Shore v. Children's Mercy Hosp.*, 477 S.W.3d 727, 735 (Mo.App. W.D. 2015); *Soto v. Costco Wholesale Corp.*, 502 S.W.3d 38, 47 (Mo.App. W.D. 2016); *Vacca v. Missouri Dep't of Labor & Indus. Relations, Div. of Worker's Comp.*, ED 104100, 2017 WL 5146154 (Mo.App. E.D. Nov. 7, 2017), *reh'g and/or transfer denied* (Jan. 3, 2018), *transferred to Mo. S.Ct. sub nom. Vacca v. Missouri Dep't of Labor & Indus. Relations*, SC 96911, 2019 WL 1247074 (Mo. Mar. 19, 2019); see also *Markham v. Wertin*, 861 F.3d 748, 757 (8th Cir. 2017) (retaliation claim under the Missouri Human Rights Act requires good faith reasonable belief in the conduct he or she approved); *Carter v. CSL Plasma Inc.*, 63 F. Supp. 3d 1034, 1048 (W.D. Mo. 2014) (Plaintiff needs only to have a good faith, reasonable belief that the conduct opposed was protected by the MHRA in order to proceed on a retaliation claim); *Shirrell v. Saint Francis Med. Ctr.*, 24 F. Supp. 3d 851, 862 (E.D. Mo. 2014), *aff'd sub nom. Shirrell v. St. Francis Med. Ctr.*, 793 F.3d 881 (8th Cir. 2015).

2. *Federal Court Decisions on the Participation Clause Should be Considered*

Here, despite the fact that Plaintiff's Petition does not clearly or by any reasonable implication state that Plaintiff's claim of retaliation is brought solely under the participation clause, if the Court were ultimately to conclude that Plaintiff implicitly elected prior to submission to proceed solely on a claim of retaliation in violation of the participation clause, Appellants urge that proof that the underlying charge of discrimination was brought reasonably and in good faith was still an essential element upon which the jury should have been instructed. This Honorable Court has decided that Missouri Appellate Courts will find Federal decisions highly persuasive when there is no clear guidance in a statute or in Missouri Appellate decisions. *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 115 (Mo. 2015).

This is an issue that has divided the Federal Courts regarding a similar statute (Title VII, *Slagle v. County of Clarion*, 435 F.3d 262, 263, 266–68 (3d Cir. 2006)), with regard to whether an essential element of a retaliation claim under the participation clause requires a good faith reasonable belief in a claim of discrimination.[6] At least four Federal Courts

[6] Federal Courts which have taken the position that "good faith, reasonableness" is not an element of a Title VII case are: *Slagle v. County of Clarion*, 435 F.3d 262, 263, 266–68 (3d Cir. 2006); *Fantini v. Salem State Coll.*, 557 F.3d 22, 38 (1st Cir. 2009); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978).

of Appeal have held that "good faith, reasonableness" is an element of a participation clause case under Title VII. See First Circuit Pattern Instruction 5.1, Footnote 7, citing *Fantini v. Salem State Coll.*, 557 F.3d 22, 38 (1st Cir. 2009), *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 581–82 (6th Cir. 2000); see also 3rd Circuit Pattern Instruction Civil 5.1.7; *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890–91 (7th Cir. 2004); see 7th Circuit Pattern Instruction Civil 3.02; *Gilooly v. Missouri Dept. of Health & Senior Services*, 421 F.3d 734, 741–42 (8th Cir. 2005). Four other courts have taken no position on this issue. See *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 581–82 (6th Cir. 2000); *Wesolowski v. Napolitano*, 2013 WL1286207 (S.D. Ga. 2014) at #7 (appears to have reserved ruling on this issue); *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173–174 (2d Cir. 2005), (the Court ultimately did not address the good faith issue); *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1151–52 (10th Cir. 2008) (did not decide whether a good faith instruction was required in participation clause cases). The better-reasoned Federal cases hold that a "good faith, reasonable belief" is an essential element in retaliation cases. See *Gilooly v. Missouri Dept. of Health & Senior Services*, 421 F.3d 734, 741–43 (8th Cir. 2005)).

3. *Principles of statutory interpretation support Appellants' position*

The argument in favor of a good faith requirement with respect to participation clause cases is well set forth in a recent article by Sarah Applegate, *Liar, Liar, Retaliation Claim on Fire: Egei v. Johnson: Protecting An Employee's Right to Dishonesty (White Paper)*, Neb.L.Rev. (November 28, 2017) (https://lawreview.unl.edu/white-paper-liar-liar-retaliation-claim-fire-egei-v-johnson-protecting-employee%E2%80%99s-right-dishonesty) ("Article"). In discussing the participation clause under Title VII, 42 U.S.C.

§2000(e), the writer urges that statutory interpretation of the participation clause supports the requirement that a charge of discrimination in connection with a retaliation claim must be made in good faith for the following reasons:

First, the author states that the "participation clause and the opposition clause should, at the very least, not be interpreted inconsistently. Similar statutory provisions should be interpreted consistently. Requiring good faith in both clauses would create consistency." Footnotes omitted at, Article at p. 21. See also pp. 17-29, 31-34.

Second, in interpreting the participation clause, courts generally employ one of two different statutory interpretation approaches: The "plain meaning" approach and the "purposive" approach.[7]

Under the "plain meaning" language of the participation clause, "participate in any manner," the term "manner" can mean the way that something is done or happens or the way that a person normally behaves, especially while with other people. Under this approach, courts have held that the statute on its face does not protect bad faith participation, Article at pp. 18-20, citing *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890 (7th Cir. 2004); *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 746 (7th Cir. 2010); see also Article at pp. 21-23.

[7] These statutory interpretations are consistent with Missouri Law. Sullivan, *Statutory Interpretation in Missouri*, 59 S. Mo. B. 120 (2003).

The author also notes that under the "purposive" approach, bad faith participation should not be protected from retaliation. See Article at pp. 23-25.[8]

Third, the form for a Charge of Discrimination requires that the claimant declare under penalty of perjury that the foregoing is true and correct, which may be considered as imposing a good faith requirement. Opinion, p. 9, fn. 11; Article at p. 25.

In this regard, the Appellate Court's Opinion in interpreting the MHRA did not analyze the wording of the statute as the Federal Courts have done. Instead, it held, in part, that it "cannot add statutory language where it does not exist." Opinion at p. 7. However, the Appellate Court overlooked the principle of statutory interpretation that "statutes should be construed in such a way as to avoid unreasonable or absurd results." *Kershaw v. City of Kansas City*, 440 S.W.3d 448, 458 (Mo.App. W.D. 2014).

4. *Gentry's claim may be considered as an opposition clause claim.*

According to the Equal Employment Opportunity Commission ("EEOC"), discussing Title VII, 42 U.S.C. §2000(e) "protected participation and opposition are not mutually exclusive categories." The EEOC advises, "depending on the facts, the same conduct may qualify for protection as both 'participation' and 'opposition,' however, the opposition clause protects a broader range of conduct than the participation clause." EEOC Enforcement Guidance on Retaliation and Related Issues at 10 (https://www.eeoc.gov/eeoc/newsroom/release/8-29-16.cfm). In this case, Gentry's Charge of Discrimination can be considered both "opposition to a practice prohibited by

[8] The author also states that good faith should be presumed. See pp. 25-27.

this Chapter" (opposition clause) and "participation" by filing his charge." (participation clause). RSMo § 213.070(2) (West).

If pursuing a charge alleging discrimination is within the "opposition clause" but is solely "participation," then, the distinction between the opposition and participation clauses is meaningless. Quite clearly, one who brings a claim alleging that he has been discriminated against by virtue of a wrongful employer practice "opposes" such discrimination. Likewise, one who files a charge both opposes and participates under MHRA. But, one who does not bring his own claim but, rather, testifies, assists or "otherwise participates" in an investigation is merely "participating." The statute is intentionally broad so as to protect and encompass both opposing discrimination and participating in an investigation into or resolution of claims of discriminatory activity brought by another. It would make no sense, however, to define the act of bringing one's own claim opposing discrimination solely as "participation" but not "opposition."

In this case, the record is clear that Gentry's claim may be considered "opposition" and "participation." For two years in pre-trial, proceedings during trial and in the first appeal, Plaintiff urged that the opposition clause applied. The first appellate decision agreed as did the trial court in admitting evidence of discrimination. Only at the Instruction Conference did Gentry urge the Court for the first time that his claim was a participation clause claim only.

E. Failure to instruct the jury on an essential element of Plaintiff's claim is reversible error.

Failure to instruct the jury on an essential element of Plaintiff's claim is reversible error. *Hervey v. Missouri Dept. of Corr.*, 379 S.W.3d 156 (Mo. 2012). Thus, when, as in this case, a particular MAI does not accurately state the law or should be modified to comport with the evidence, it should not be given. *Hervey*, 379 S.W.3d 156, 159. Defendants were prejudiced by the failure of the Court to instruct the jury in this regard and are therefore entitled to a new trial.

The parties are entitled to a jury determination of this element as it was a contested matter. See generally *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. 2003) (parties are entitled to a jury trial regarding a claim under the Missouri Human Rights Act). See also Mo. Sup. Ct. R. 69.01(a): "The right of a trial by jury as declared by the Constitution or as given by statute shall be preserved to the parties inviolate."

F. Whether Plaintiff acted in good faith was contested at the liability phase of the trial and Defendants were prejudiced by the failure to instruct the jury on this essential element of the retaliation claim.

As stated above, Defendants presented substantial evidence that Gentry was not discriminated against when Orkin terminated him and that Gentry had acted in bad faith when he filed a claim of discrimination. Defendants were prejudiced by the Trial Court's failure to instruct the jury on this issue.

G. The law of the case mandates that an instruction should have been given containing the essential element that Gentry made his charge with a good faith and reasonable belief of discrimination.

The Court of Appeals in the first appeal of this case ruled that an essential element of a retaliation claim under the MHRA was that an essential element of Gentry's claim was that he brought his charge of discrimination with a good faith and reasonable belief that he had been fired for discriminatory reasons. *Gentry*, 490 S.W.3d at 789. Therefore, under the law of the case, an instruction on this element should have been given in this case. *Walton v. City of Berkeley*, 223 S.W.3d 126, 128–129 (Mo. Banc. 2007).

H. Judicial Estoppel

The doctrine of judicial estoppel precludes Gentry from asserting on appeal a legal position, directly contrary to his previous position in the first appeal, in pre-trial proceedings and again at trial.

The doctrine of judicial estoppel prevents litigants from taking contrary positions in different proceedings, even when the prior statements were not made under oath. *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 145 (Mo.App. W.D. 2011). To ensure the integrity of the judicial process, Missouri courts have consistently refused to allow litigants to take contrary positions in separate proceedings. "Plaintiff cannot have it both ways and ought not to be allowed to play 'fast and loose' with the court whenever it suits his purpose." *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137 (Mo.App. W.D. 2011). See also *Vacca v. Missouri Department of Transportation, et al.*, 2019 WL1247074 (Supreme Court of Missouri, March 19, 2019).

II. THE TRIAL COURT ERRED IN REFUSING DEFENDANTS' PROFFERED INSTRUCTION REGARDING DEFENDANTS' EXERCISE OF THEIR BUSINESS JUDGMENT BECAUSE DEFENDANTS' PROFFERED INSTRUCTION MET THE REQUIREMENTS OF MO. SUP. CT. R. 70.02(b), WAS A PROPER VERDICT DIRECTING INSTRUCTION BASED UPON DEFENDANTS' THEORY OF THE CASE, WAS SUPPORTED BY THE EVIDENCE THAT THE POSITIONS PLAINTIFF APPLIED FOR WERE ALREADY FILLED AND THAT PLAINTIFF HAD PREVIOUS UNSATISFACTORY JOB PERFORMANCE IN THAT HAD THE JURORS BEEN ALLOWED TO CONSIDER DEFENDANTS' PROFFERED INSTRUCTION REASONABLE JURORS COULD HAVE CONCLUDED THE FAILURE TO INTERVIEW OR REHIRE WAS THE RESULT OF A BUSINESS JUDGMENT DECISION AND NOT RETALIATION.

A. Standard of Review and Preservation of Error

Whether the trial court properly gave a jury instruction is a question of law subject to *de novo* review. *Hemphill v. Pollina*, 400 S.W.3d 409, 415–16 (Mo.App. W.D. 2013). Appellate review is conducted in the light most favorable to the record and, if the instruction is supported by any theory, its submission is proper. *Hervey v. Missouri Dept. of Corr.*, 379 S.W.3d 156, 159 (Mo. 2012). Reversal is granted only where instructional error results in prejudice that materially affects the merits of a case. *Id.* "The party challenging the instruction must show that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice to the party challenging the instruction." *Id.*

Appellants submitted a proposed business judgment instruction in proper form but it was refused by the Court. TR 870-871.

B. Defendants' Proffered Business Judgment Instruction

Defendants' Proffered Business Judgment instruction reads as follows:

> You may not return a verdict for Plaintiff just because you might disagree with Defendants' decision or believe it to be harsh or unreasonable.

A4.

C. Defendants' instruction regarding the exercise of their business judgment met the requirements of Mo. Sup. Ct. R. 70.02(b).

Missouri Supreme Court Rule 70.02(b) specifically permits an instruction that is not a Missouri Approved Jury Instruction "where there is no applicable MAI so that an instruction not in MAI must be given." Defendants' instruction concerning their exercise of business judgment met the requirements of Missouri Supreme Court Rule 70.02(b) that the instruction "be simple, brief, nonpartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.

D. Discussion.

1. *Case law supports the giving of a business judgment instruction*

Case law supports the giving of the business judgment instruction. *See* Eighth Circuit Manual Model Jury Instructions Civil 5.11 (a copy of which is included in the Appendix to this Brief at A5; see also LF Doc #156), which references *Walker inter alia* and *Stemmons v. Missouri Dept. of Corr.*, 82 F.3d 817, 819 (8th Cir. 1996). In *Stemmons v. Missouri Dept. of Corr.*, 82 F.3d 817 (8th Cir. 1996) the court stated that "[i]n an

employment discrimination case, business judgment instruction is 'crucial to a fair presentation of the case,' [and] the district court must offer it whenever it is proffered by the defendant." In *Scamardo* the court stated that the necessity of giving a business judgment instruction applies with equal force to an employment retaliation case.[9]

[9] The following cases reverse verdicts in an employment matter because of a failure to give a business judgment instruction and/or have approved a business judgment instruction. *Veronese v. Lucasfilm Ltd.*, 212 Cal. App. 4th 1, 151 Cal. Rptr. 3d 41 (2012), *as modified on denial of reh'g* (Dec. 28, 2012); pp. 20-24 and the following cases cited in that opinion *Veronese*, 212 Cal. App. 4th at 22–24; *Walker v. AT & T Techs.*, 995 F.2d 846 (8th Cir. 1993); *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989); *Bell v. Gas Serv. Co.*, 778 F.2d 512, 515 (8th Cir. 1985); *Jorgensen v. Modern Woodmen of Am.*, 761 F.2d 502, 505 (8th Cir. 1985); *Smith v. Monsanto Chem. Co.*, 770 F.2d 719, 723 n.3 (8th Cir. 1985); *Scamardo v. Scott County*, 189 F.3d 707, 710–711 (8th Cir. 1999); *Hefferman v. Bd. of Trustees of Illinois Cmty. Coll. Dist. 508*, 310 F.3d 522, 529 (7th Cir. 2002); *Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d 277, 280-281 (5th Cir. 1999); *Marin v. Am. Meat Packing Co.*, 204 Ill. App. 3d 302, 562 N.E.2d 282, 287 (1990); *Schuhmacher v. N. Dakota Hosp. Ass'n*, 528 N.W.2d 374, 382 (N.D. 1995). A member of Gentry's law firm was on the 8th Circuit Subcommittee on Model Civil Instructions in 2013 when the Business Judgment Instruction was published. See A 31.

2. *The McBryde decision was incorrectly decided*

In *McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162 (Mo.App. E.D. 2006), *overturned due to legislative action* the Missouri Court of Appeals held that the trial court did not commit reversible error by failing to submit a business judgment instruction to the jury. An article in the *Missouri Bar Journal* entitled "The Case for a Business Judgment Instruction Under the Missouri Human Rights Act," by Ortbals,[10] Jr., 64 J. Mo. B. 182, 185 (2008) outlines why *McBryde* was not decided correctly. Therein, the author wrote:

> But *McBryde* relied upon shaky case law and did not substantively analyze the considerations that favor a business judgment instruction. Further, *McBryde* did not hold—nor has any Missouri court ever held—that submitting a business judgment instruction to the jury was error …
>
> A. *McBryde's Flawed Reasoning:*
>
> Without any substantive analysis, *McBryde* concluded that because the Supreme Court of Missouri had not approved an MAI business judgment instruction, the trial court's failure to submit one to the jury was not reversible error. In rejecting Eighth Circuit precedent on the issue, the court cited three federal decisions for support: *Julian v. City of Houston, Texas, Trident Investment Management, Inc. v. Amoco Oil Co.,* and *Kelley v. Airborne Freight Corp*. But a closer look at these three federal decisions demonstrates that they do not reject using a business judgment instruction.
>
> In fact, *Trident Investment Management* is not even an employment discrimination decision; nor does it discuss a business judgment instruction. *Julian*, on the other hand, actually is an employment decision that involves a business judgment instruction—but it actually endorses using business judgment language. There, the employer argued that the trial court erred in refusing to submit the employer's proffered business judgment instruction. The court disagreed because the trial court's instructions already communicated that the employer had a right to exercise its business

[10] Ortbals, at the time of writing this article, was an attorney with the Ogletree firm, one of the trial attorneys for the Defendants. He is presently a partner in another firm.

judgment. Because the trial court had already instructed the jury that the employer could exercise its business judgment, the employer was not entitled to the specific language it requested. Further, the Fifth Circuit has since followed *Julian* to approve a business judgment instruction, noting that *Julian* had approved similar business judgment language.

Similar to *Julian*, *Kelley* held that the trial court did not err in failing to submit a business judgment instruction, but the court stated that a business judgment instruction could have been useful in the case. Further, the court noted that while a business judgment instruction may not be required in all cases, when assessing an employer's non-discriminatory reason, the jury must focus on the employer's motivation—not its business judgment. Footnotes omitted.[11]

3. *The MAI justification instruction, given by the trial court, 38.02, is not an instruction on the same subject.*

The trial court gave a lawful justification instruction under MAI 38.02 (A.17) which reads as follows:

Your verdict must be for Defendant Danny Biron on Plaintiff Gentry's retaliation claim if you believe:

First, Defendant Danny Biron did not interview and did not hire Plaintiff Gentry because Plaintiff Gentry's previous job performance at Orkin, LLC was unacceptable; and

[11] The Missouri legislature has abrogated the *McBryde* decision and made mandatory the giving of a business judgment instruction. §213.101.2 RSMo.

Second, in doing so, Plaintiff's July 2013 Charge of Discrimination was not a contributing factor.[12]

The wording of the business judgment instruction is different from the justification instruction. The justification instruction was tendered as a converse of the Plaintiff's verdict directing instructions regarding the issue of whether Appellants' actions were a "contributing factor" and whether Gentry's previous job performance at Orkin, LLC was unacceptable. (Instructions No. 7 and 9). The proffered "business judgment instruction" would have informed the jury not to return a verdict for Plaintiff "just because he might disagree with defendant's decision or believe it to be harsh and unreasonable." The proposed business judgment instruction should have been given because the justification instruction was not on the same subject as the business judgment instruction. See Mo. Sup. Ct. R. 70.02(b).

[12] In May 2018, this Honorable Court approved a new title and "Historical Note" for MAI 38.02. This instruction now is given for causes of action accruing before August 28, 2017. Missouri Approved Instructions, Seventh Edition. At the same time, the Court approved MAI 38.02—a new Business Judgment Instruction for causes of action accruing on or after August 28, 2017. The wording of the new Business Judgment Instruction is similar to the Business Judgment Instruction submitted to the trial court in this case. It does not appear that this Honorable Court promulgated a justification instruction for causes of action accruing after August 28, 2017.

4. *The court erred in failing to give Defendants' requested business judgment instruction because it was supported by the evidence and was based upon Defendants' theory of the case*

Defendants are entitled to have their defense, within the pleadings and evidence, submitted to the jury by a proper instruction. *Anderson v. Welty*, 334 S.W.2d 132 (Mo.App. 1960). The Court does not have discretion on whether to give a proffered instruction if the proffered instruction is required by law and supported by the evidence. *Templemire v. W & M Welding, Inc.*, WD74681, 2012 WL 6681950 (Mo.App. W.D. Dec. 26, 2012), *as modified*. Defendants' theory of the case was that they properly refused to rehire or interview Gentry because the positions he applied for were already filled by the time of his "applications" and for the reason of his past unsatisfactory performance—a proper exercise of business judgment. Substantial evidence at trial was admitted to support this theory of the case. Had the 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.

III. THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS' OBJECTIONS TO PLAINTIFF'S LINE OF QUESTIONING DURING CROSS EXAMINATION IN THE PUNITIVE DAMAGE PHASE OF THE TRIAL AS TO WHETHER DEFENDANTS WOULD ADMIT TO THE RETALIATORY CONDUCT AND TAKE RESPONSIBILITY FOR THEIR ACTIONS BECAUSE SUCH EVIDENCE WAS IN VIOLATION OF DEFENDANTS' RIGHTS TO A JURY TRIAL UNDER MO. CONST. ART. I, § 22(a) AND UNDER MO. SUP. CT. R. 69.01(a) IN THAT DEFENDANTS HAVE A CONSTITUTIONAL RIGHT TO JURY TRIAL UNDER THE MISSOURI HUMAN RIGHTS ACT, WHICH INCLUDES THE RIGHT TO CONTEST LIABILITY THROUGHOUT ALL PHASES OF TRIAL.

A. Standard of Review and Preservation of Error

The standard of review for whether Defendants' constitutional rights have been violated is de novo *State v. Aaron*, 218 S.W.3d 501 (Mo.App. W.D. 2007).

The standard of review for the trial court's decision to admit or exclude evidence at trial is abuse of discretion. *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 872 (Mo.App. E.D. 2009).

During the trial, Defendants objected to Plaintiff's line of questioning as to whether Defendants would admit to the retaliatory conduct. The court overruled the objection to this line of questioning. TR 946-947.

B. Discussion

1. *Plaintiff's evidence at punitive damage phase of the trial*

Plaintiff presented evidence that Orkin did not admit it retaliated against Plaintiff for filing a charge of discrimination and refused to take responsibility for its actions. TR 945-947, 953.

2. *Law*

In *Allstate Ins. Co. v. Marotta*, 125 So. 3d 956, 960 (Fla. Dist. Ct. App. 2013), the Court held that it is improper for counsel to suggest in closing argument that a defendant should be punished for contesting damages at trial or to defend claims in court. See also *R.J. Reynolds Tobacco Co. v. Robinson*, 216 So. 3d 674, 680–682 (Fla. Dist. Ct. App. 2017), *reh'g denied* (May 17, 2017), *review denied*, SC17-1130, 2017 WL 5986208 (Fla. Dec. 4, 2017); *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753, 759–760 (Fla. Dist. Ct. App. 2016).

3. *Admission of evidence that Defendants' refusal to take responsibility for discriminating against Plaintiff was irrelevant to the determination of punitive damages and in violation of Defendants' right to a jury trial and under* Mo. Sup. Ct. R. 69.01(a).

Defendants had a constitutional right to jury trial under the Missouri Human Rights Act which included the right to contest liability. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. 2003). It was improper for the plaintiff to present evidence and argument (see discussion in Point IV of this Brief) contrary to that constitutional right as guaranteed to them under Mo. Sup. Ct. R. 69.01(a) and under Missouri Supreme Court Rule 69.01(a).

A7. Such evidence was irrelevant to the jury's determination of punitive damages because the jury should not be permitted to punish the Defendants for the exercise of their rights.

IV. THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS' OBJECTION TO PLAINTIFF'S CLOSING ARGUMENT COMMENTING ON DEFENDANTS' FAILURE TO ACKNOWLEDGE RESPONSIBILITY FOR RETALIATION DURING CROSS EXAMINATION OF DEFENDANTS IN THE PUNITIVE DAMAGES PHASE OF THE TRIAL BECAUSE THE CLOSING ARGUMENT VIOLATED DEFENDANTS' RIGHT TO A JURY TRIAL UNDER MO. CONST. ART. I, § 22(a) IN THAT DEFENDANTS HAVE A CONSTITUTIONAL RIGHT TO JURY TRIAL UNDER THE MISSOURI HUMAN RIGHTS ACT WHICH INCLUDES THE RIGHT TO CONTEST LIABILITY AT ALL PHASES OF TRIAL AND THE ARGUMENT THAT DEFENDANTS HAD FAILED TO ACKNOWLEDGE RESPONSIBILITY FOR RETALIATION AGAINST PLAINTIFF DURING THE PUNITIVE DAMAGES PHASE OF THE TRIAL WAS AN IMPROPER BASIS FOR THE JURY TO RENDER A VERDICT FOR PUNITIVE DAMAGES.

A. Standard of Review and Preservation of Error

Whether a new trial should be granted because of improper closing argument is subject to an abuse of discretion standard. *Giddens v. Kansas City Southern Railway*, 937 S.W.3d 300, 309 (Mo.App. W.D. 1996). Plain error review is provided for by Mo. Sup. Ct. R. 84.13(c). Thus, "plain error occurs in closing argument only if the closing argument contains reckless assertions, unwarranted by proof and intended to arouse prejudice, which, therefore, may be found to have caused a miscarriage of justice." *Morgan Publications*,

Inc. v. Squire Publishers, Inc., 26 S.W.3d 164, 170 (Mo.App. W.D. 2000), *as modified* (Aug. 1, 2000) (quotation omitted). Moreover, the trial court has a duty to restrain counsel firmly and unflinchingly and to require counsel to proceed in an orderly and lawyer-like manner even though no objection is made. *Critcher v. Rudy Fick, Inc.*, 315 S.W.2d 421, 427 (Mo. 1958). When there is no objection, there is ordinarily a forfeiture of any right to complain on appeal. *Hoskins v. Business Men's Assurance*, 116 S.W.3d 557, 575 (Mo.App. W.D. 2003). However, the Court may nonetheless grant a new trial. *Hoskins* at 976.

The prejudicial effect of whether a closing argument is subject to an abuse of discretion standard. *St. Francis Med. Ctr. v. Hargrove*, 956 S.W.2d 949, 952 (Mo.App. S.D. 1997). See also *Critcher v. Rudy Fick, supra*; *Giddens, supra*

The standard of review for whether Defendants' constitutional rights have been violated is de novo *State v. Aaron*, 218 S.W.3d 501 (Mo.App. W.D. 2007).

During the trial, defendants objected to plaintiff's line of questioning as to whether defendants would admit to the retaliatory conduct. The court overruled the objection to this line of questioning. TR 946-947. Since the trial court overruled the objection, it is respectfully suggested that there was no need to further object during closing argument.

1. *Plaintiff's argument regarding defendants' lack of acceptance of responsibility*

As set forth in Point III of this Brief, Plaintiff presented evidence in the punitive damages phase of the trial that Defendants did not take responsibility for retaliating against Gentry.

Plaintiff's counsel then argued to the jury that Orkin's and Biron's failure to acknowledge responsibility for retaliation against Gentry was a basis for the jury to render a verdict of punitive damages against Orkin and Biron. TR 958, 965-966.

2. *It was improper to argue in closing argument that a defendant should be punished for contesting damages at trial or to defend claims in court and this argument denied the Defendants their constitutional right to a jury trial*

This argument was error. In *Allstate Ins. Co. v. Marotta*, 125 So. 3d 956, 960 (Fla. Dist. Ct. App. 2013), the Court held that it is improper for counsel to suggest in closing argument that a defendant should be punished for contesting damages at trial or to defend claims in court. See also *R.J. Reynolds Tobacco Co. v. Robinson*, 216 So. 3d 674, 680–682 (Fla. Dist. Ct. App. 2017), *reh'g denied* (May 17, 2017), *review denied*, SC17-1130, 2017 WL 5986208 (Fla. Dec. 4, 2017); *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753, 759–760 (Fla. Dist. Ct. App. 2016).

3. *Defendants' constitutional right to a jury trial was violated*

Defendants had a constitutional right to jury trial under the Missouri Human Rights Act which included the right to contest liability. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. 2003). It was improper for the plaintiff to present evidence and argument contrary to that constitutional right or guaranteed to them under Mo. Const. art. I, § 22(a) (A6) and under Mo. Sup. Ct. R. 69.01(a). A7.

V. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL, JUDGMENT NOTWITHSTANDING THE VERDICT, AND MOTION TO AMEND THE JUDGMENT BECAUSE DEFENDANTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES IN THAT PLAINTIFF DID NOT, IN HIS PETITION, SEPARATELY STATE THE AMOUNT OF PUNITIVE DAMAGES SOUGHT TO BE RECOVERED AS REQUIRED BY RSMo § 509.200 (West) AND MO. SUP. CT. R. 55.05 And 55.19.

A. Standard of Review and Preservation of Error

Whether a Petition states a claim upon which relief can be granted is subject to *de novo* review by the Court. *Pollard v. Swenson*, 411 S.W.2d 837 (Mo.App. 1967). The trial court has no discretion in ruling a matter of law on a motion for new trial. *Ivy v. Hawk*, 878 S.W.2d 442 (Mo. en banc 1994). Although there is case law generally that the court has discretion with regard to ruling on motions to amend judgments rendered under Rule 75.01. (*Stroup v. Leipard*, 981 S.W.2d 600, 603 (Mo.App. W.D. 1998)), it is respectfully urged that this standard does not apply under the facts of this case. The standard of review for whether the court erred in ruling a motion for new trial is an abuse of discretion. *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 250 (Mo. 2006). Defendants also preserved this issue by asserting it in their Motion for Judgment Notwithstanding the Verdict, to Amend Judgment and for a New Trial. LF Doc #152, pp. 17-20.

B. Plaintiff's prayer for damages

The Plaintiff's Petition in this case prayed for punitive damages but did not state an amount. LF DOC #2, p. 5.

C. Discussion

1. *Missouri Statute and Missouri Supreme Court Rules require that the amount of punitive damages should be pled in the petition*

RSMo § 509.200 (West)) (A11) states as follows: "In actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered." Similarly, RSMo § 509.050(2) (West) provides as follows: "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." See also Missouri Supreme Court Rule 55.05 which states "If a recovery of money be demanded the amount should be stated …". A12.

2. *Punitive damages are not "fair and reasonable" damages.*

Rule 55.19 also states: "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 which are fair and reasonable." (Emphasis added). Missouri Supreme Court Rule 55.05 states: "If a recovery of money be demanded, the amount shall be stated, except that in actions for damages based upon an alleged tort, no dollar amount shall be included in the demand except to determine the proper jurisdictional authority, but the prayer shall be

for such damages as are fair and reasonable." A13. (Emphasis added). Section 509.050(2) RSMo, provides as follows: "If a recovery of money be demanded, no dollar amount or figure shall be included in the demand except to determine the proper jurisdictional authority, but the prayer shall be for such damages as are fair and reasonable." A9 (Emphasis added). Clearly these Missouri Supreme Court Rules, as well the statute which does not require a specific prayer for a specific amount of damages, refer only to actions in tort and more specifically to damages which are "fair and reasonable."

Punitive damages, however, do not come within the definition of "fair and reasonable" because they are not intended to compensate. Thus, "a jury's assessment of the extent of the plaintiff's injuries is essentially a factual determination, where its imposition of punitive damages is an expression of its moral condemnation." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001).[13] Plaintiff's Petition does not allege damages which are fair and reasonable

[13] In *Bowolak v. Mercy E. Communities*, 452 S.W.3d 688, 703–04 (Mo.App. E.D. 2014), the court stated that an action under the Missouri Human Rights Act was analogous to a tort. The court however did not specifically address any of the Missouri Supreme Court rules or statute regarding pleading punitive damages as that issue was not before the court. In *Hill v. Ford Motor Co.*, 324 F. Supp. 2d 1028 (E.D. Mo. 2004), the court, addressing the issue as to whether or not there was a sufficient pleading of the jurisdictional amount to remove the case to Federal Court held that Mo. Sup. Ct. R. 55.05 and 55.19 did not require that the amount of punitive damages be pled. The decision, however, did not

and thus the exception to pleading the specific amount of damages found in these Missouri Supreme Court Rules and statute does not apply. See also *Harris v. Jungerman*, 560 S.W.3d 549, 555 (Mo.App. W.D. 2018) (punitive damages must be pled and proven).

3. *Missouri case law has determined that the specific amount of punitive damages must be pled*

Missouri case law clearly holds that the amount of punitive damages must be stated in the Petition. *See Brown v. Payne*, 264 S.W.2d 341, 345 (Mo. 1954); *Green v. Study*, 286 S.W.3d 236, 243 (Mo.App. S.D. 2009); *Benson v. Jim Maddox Nw. Imports, Inc.*, 728 S.W.2d 668, 669–70 (Mo.App. E.D. 1987).

In *Boyer v. Grandview Manor Care Ctr., Inc.*, 805 S.W.2d 187 (Mo.App. W.D. 1991), the jury awarded plaintiff $300,000 in punitive damages against Grandview and $330,000 in punitive damages against a co-defendant. The trial court entered judgment against Grandview for $100,000 and $30,000 for the co-defendant even though the verdict was for $300,000 of punitive damages. The Court decided, however, that since the prayer for the total amount of punitive damages was $100,000, the trial court should have entered judgment for punitive damages in the total sum of $100,000 and not the total sum of $130,000.

In *David v. Chatter, Inc.*, 270 S.W.3d 471, 481 (Mo.App. W.D. 2008), cited by Gentry, a case where the plaintiffs sought punitive damages under a count in the petition

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address the provision in these Rules regarding pleading that the damages were "fair and reasonable" and is contrary to a long line of Missouri cases as discussed herein.

for tortious interference with a contract, the court held that no specific dollar amount of punitive damages had to be pled. The court stated: "Rule 55.19 states that in actions upon an alleged tort, 'no dollar amount or figure shall be included in the demand' for punitive damages. This supersedes any inconsistent statues or rules. Rule 41.02, point denied."

Appellants respectfully suggest, however, that the decision in *David v. Chatter* is erroneous because 55.19 does limit its application solely to tort claims for "fair and reasonable" damages. In any event, in *Chatter*, a common law tort was alleged, making the case distinguishable from this case.

4. *Plaintiff should not be permitted to amend his pleading to conform to the evidence*

In *Green v. Study*, 286 S.W.3d 236, 243–44 (Mo.App. S.D. 2009), the Court held that, since the Plaintiff had failed to plead the amount of punitive damages, Plaintiff had no right to request the trial court to amend the pleadings to conform to the evidence under Mo. Sup. Ct. R. 55.33. Nor did the trial court *sua sponte* have the right to amend the pleadings in this regard. Plaintiff has, therefore, no right at this point in the case to amend his pleadings to plead the specific amount of punitive damages.

In view of the foregoing, the Judgment in this case should be amended so that Plaintiff is awarded nothing for punitive damages. In the alternative, Defendants are entitled to a new trial on the issue of punitive damages.

VI. THE TRIAL COURT ERRED BY INSTRUCTING THE JURORS IN INSTRUCTIONS NO. 6 AND NO. 8 THAT THE JURY COULD FIND IN FAVOR OF PLAINTIFF IF DEFENDANT ORKIN EITHER FAILED TO INTERVIEW OR HIRE PLAINTIFF BECAUSE INSTRUCTING THE JURY IN THE DISJUNCTIVE TO INCLUDE "FAILURE TO INTERVIEW" AS A GROUNDS FOR LIABILITY WAS NOT SUPPORTED BY THE LEGALLY SUFFICIENT EVIDENCE IN THIS CASE IN THAT PLAINTIFF'S TESTIMONY THAT HE FELT HURT AND BETRAYED AS A RESULT OF DEFENDANTS' FAILURE TO INTERVIEW HIM IS NOT A SUFFICIENT BASIS TO SUPPORT A JURY VERDICT IN FAVOR OF PLAINTIFF ON THE FAILURE TO INTERVIEW CLAIM.

A. Standard of Review and Preservation of Error

Whether the trial court properly gave a jury instruction is a question of law subject to *de novo* review. *Hemphill v. Pollina*, 400 S.W.3d 409, 415–16 (Mo.App. W.D. 2013). Appellate review is conducted in the light most favorable to the record and, if the instruction is supported by any theory, its submission is proper. *Hervey v. Missouri Dept. of Corr.*, 379 S.W.3d 156, 159 (Mo. 2012). Reversal is granted only where instructional error results in prejudice that materially affects the merits of a case. *Id.* "The party challenging the instruction must show that the offending instruction misdirected, misled, or confused the jury, resulting in prejudice to the party challenging the instruction." *Id.* (citing *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 90–91 (Mo. 2010)).

Defendants objected to Instructions 6 and 8 and related instructions and 7, 9, 10, 11, 12, 13 and 14 at trial. TR 854-868, 858-888.

Defendants also submitted instructions on this issue in proper form but they were refused by the Court. TR 853-857, 859-860. Jury Instruction Nos. 6, 7, 8, 9, 10, 11, 12, 13 and 14 are included at A1, A2, A16-A22. Defendants' proffered instructions are included in the Appendix to this Brief at A3, A14-A15, A24. Defendants included this argument in their Motion for New Trial. LF Doc #151, pp. 75-78; LF Doc #179.

B. Instructions

1. *Verdict Directing Instructions*

Verdict Directing Instruction No. 6 reads as follows:

> Your verdict must be for Plaintiff and against Defendant Orkin, L.L.C. on Plaintiff's claim of unlawful retaliation if you believe:
>
> First, either
>
> Defendant Orkin, L.L.C. did not interview Plaintiff, or
>
> Defendant Orkin, L.L.C. did not hire Plaintiff, and
>
> Second, Plaintiff's July 2013 Charge of Discrimination was a contributing factor in any such conduct in Paragraph First, and
>
> Third, as a direct result of any such conduct, Plaintiff sustained damage.

TR 883-885; A1.

Verdict Direction Instruction No. 7 reads as follows:

Your verdict must be for Defendant Orkin, LLC on Plaintiff Gentry's retaliation claim if you believe:

First, Defendant Orkin did not interview and did not hire Plaintiff Gentry because Plaintiff Gentry's previous job performance at Orkin, LLC was unacceptable; and

Second, in doing so, Plaintiff's July 2013 Charge of Discrimination was not a contributing factor.

TR 885; A16.

Verdict Directing Instruction No. 8 reads as follows:

Your verdict must be for Plaintiff and against Defendant Danny Biron on Plaintiff's claim of unlawful retaliation if you believe:

First, either

Defendant Biron did not interview Plaintiff, or

Defendant Biron did not hire Plaintiff, and

Second, Plaintiff's July 2013 Charge of Discrimination was a contributing factor in any such conduct in Paragraph First, and

Third, as a direct result of any such conduct, Plaintiff sustained damage.

TR 886; A2.

Verdict Directing Instruction No. 9 reads as follows:

Your verdict must be for Defendant Danny Biron on Plaintiff Gentry's retaliation claim if you believe:

First, Defendant Danny Biron did not interview and did not hire Plaintiff Gentry because Plaintiff Gentry's previous job performance at Orkin, LLC was unacceptable; and

Second, in doing so, Plaintiff's July 2013 Charge of Discrimination was not a contributing factor.

TR 886; A17.

Verdict Directing Instruction No. 10 reads as follows:

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained as a direct result of the conduct mentioned in the evidence.

TR 886; A18.

Verdict Directing Instruction No. 11 reads as follows:

If you find the issues in favor of plaintiff, and if you believe the conduct of defendant Orkin, L.L.C. as submitted in Instruction Number 6 was outrageous because of defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find plaintiff entitled under Instruction Number 10, you may find that Defendant Orkin, L.L.C. is liable for punitive damages.

You may consider harm to others in determining whether defendant's conduct was outrageous.

If you find that defendant is liable for punitive damages in this stage of the trial, you will be given further instructions for assessing the amount of punitive damages in the second stage of trial.

TR 887; A19.

Verdict Directing Instruction No. 12 reads as follows:

You must not find Defendant Orkin, LLC liable for punitive damages under Instruction Number 11 unless you believe the conduct of Defendant Orkin, LLC as submitted in Instruction Number 6 was outrageous because of Defendant Orkin, LLC's evil motive or reckless indifference to the rights of others.

TR 887; A20.

Verdict Directing Instruction No. 13 reads as follows:

If you find the issues in favor of plaintiff, and if you believe the conduct of Defendant Danny Biron as submitted in Instruction Number 8 was outrageous because of defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find plaintiff entitled under Instruction Number 10, you may find that Defendant Biron is liable for punitive damages.

You may consider harm to others in determining whether defendant's conduct was outrageous.

If you find that defendant is liable for punitive damages in this stage of the trial, you will be given further instructions for assessing the amount of punitive damages in the second stage of trial.

TR 887-888; A21.

Verdict directing Instructions No. 14 reads as follows:

You must not find Defendant Danny Biron liable for punitive damages under Instruction Number 13 unless you believe the conduct of Defendant Danny Biron as submitted in Instruction Number 8 was outrageous because of Defendant Orkin, LLC's evil motive or reckless indifference to the rights of other.

TR. 888; A22.

2. *Defendants' Proffered Instructions*

Defendants' Proffered Instructions read as follows:

Your verdict must be for Plaintiff Gentry and against any Defendant you find responsible, if you believe:

First, Plaintiff Gentry was employed by Orkin, LLC, and

Second, Plaintiff Gentry filed a charge with the Missouri Human Rights Commission regarding what he in good faith reasonably believed was discrimination, and

Third, Defendants failed to rehire Plaintiff Gentry, and

Fourth, Plaintiff's charge of discrimination was a contributing factor in such Defendants' decision not to rehire Plaintiff Gentry, and

Fifth, as a direct result of such failure to rehire, Plaintiff Gentry sustained damage.

A3.

Your verdict must be for Defendant Orkin, LLC on Plaintiff Gentry's retaliation claim if you believe:

First, Defendant Orkin, LLC failed to rehire Plaintiff Gentry because Plaintiff Gentry's previous job performance at Orkin, LLC was unacceptable; and

Second, in so doing, Plaintiff's charge of discrimination was not a contributing factor.

A14.

Your verdict must be for Defendant Danny Biron on Plaintiff Gentry's retaliation claim if you believe:

First, Defendant Danny Biron failed to rehire Plaintiff Gentry because Plaintiff Gentry's previous job performance at Orkin, LLC was unacceptable; and

Second in so doing, Plaintiff's charge of discrimination was not a contributing factor.

A15.

In addition, Defendants submitted their own damages instruction which read as follows:

If you find in favor of Plaintiff Gentry, then you must award Plaintiff Gentry such sum as you believe will fairly and justly compensate Plaintiff Gentry for any damages you believe Plaintiff Gentry sustained as a direct

result of the failure to rehire mentioned in the evidence. If you find that Plaintiff Gentry failed to mitigate damages as submitted in Instruction No. __ in determining Plaintiff Gentry's total damages, you must not include those damages that would not have occurred without such failure.

A24.

C. Discussion

1. *Each of the disjunctive verdict directing instructions must be supported by evidence which would support a verdict for the Plaintiff.*

Jury Instruction Nos. 6 and 8 are disjunctive verdict-directing instructions. "Where, as here, a disjunctive instruction is submitted to the jury, each alternative submitted in the instruction must be supported by evidence which, if true, would support a verdict for the party submitting the instruction." *Griffin v. Kansas City S. Ry. Co.*, 965 S.W.2d 458, 460 (Mo.App. W.D. 1998), *as modified* (Apr. 28, 1998).

MAI 1.02 states in relevant part:

> [T]he jury should not be instructed on a theory of recovery or defense not supported by the evidence and that any such submission, whether in the conjunctive or disjunctive, should be reversible error. A theory of recovery or defense should not be submitted unless it can stand alone.

Thus, "inasmuch as [an] instruction [is] drawn in the alternative, it [is] necessary that each and every one of the ... hypotheses be supported by the evidence, since, with a general verdict returned for plaintiff, the appellate court cannot determine upon which of the theories the jury found, and if it should appear that one or more of the theories was without support in the evidence, then, for all we can say, the jury may have improperly

returned its verdict upon that theory." *Whitehead v. Fogelman*, 44 S.W.2d 261, 263 (Mo.App. 1931).

2. *Failing to interview does not support a verdict for Plaintiff*

Failing to interview Plaintiff does not lead to the conclusion that Plaintiff suffered damage as a result; failure to interview does not entitle Plaintiff to anything. Plaintiff had been an employee of Orkin for many years and Gentry did not address why the failure to interview him was necessary or would have resulted in him being hired. The required causal connection between the Defendants' alleged failure to interview and Plaintiff's claimed damage is completely lacking. A verdict director that includes conduct that is non-actionable, i.e., failure to interview, is instructional error. *See, e.g., Tisch v. DST Sys., Inc.*, 368 S.W.3d 245, 256 (Mo.App. W.D. 2012).

3. *Plaintiff's evidence for failure to interview—emotional distress- did not support a verdict for damages.*

At the conclusion of the trial in this matter, the jury awarded actual damages in the amount of $120,892.00. The jury made no distinction whether the award of damages was for emotional distress or for compensatory damages for items like lost wages, etc. and, therefore, in order for Defendants to be liable for $120,892.00 in damages the Plaintiff must have presented sufficient evidence on both emotional distress damages and compensatory damages. See *Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477, 513 (Mo.App. W.D. 2010), *as modified* (Feb. 1, 2011) (holding "where the jury is instructed in the alternative or in the disjunctive on two grounds of liability, there must be a submissible case for both submissions.")

Under the MHRA, actual damages include damages for emotional distress. *Biggs v. Missouri Comm'n on Human Rights*, 830 S.W.2d 512, 516 (Mo.App. E.D. 1992).

In this case, the only evidence Plaintiff submitted on the issue of emotional distress was as follows:

> Question: How did it feel when you had—after sending an email in, getting the response that said, I don't have any open positions, and you see an open position, and then you apply and you don't hear any response one way or the other? How did that make you feel?
>
> Answer: Well, I felt hurt and betrayed.

TR 731.

This is not sufficient evidence for a jury to find an award of damages for emotional distress.[14]

The limited testimony relating to damages for emotional distress in this case is similar to the limited testimony of emotional distress in *Biggs v. Missouri Comm'n on Human Rights*, 830 S.W.2d 512 (Mo.App. E.D. 1992). In Biggs, the Commission of the Missouri Human Rights argued that the trial court erred when it reversed its order requiring Respondent to pay complainant $3,000.00 plus interest for "deprivation of civil rights, emotional distress and humiliation." *Biggs*, 830 S.W.2d at 516. The only evidence of *Biggs'* damages was the following statement:

[14] Plaintiff's counsel stated in post-verdict proceedings that it was a mistake to submit disjunctive verdict directors because it was impossible to ascertain whether the verdict for damages was for failure to hire or failure to interview. TR 976, 1215.

> I was very distressed. At that time, I was going through a divorce, so I—I needed a place, and I was concerned about my children's emotional stability, as well as my own. So I was very distressed during that time. And I felt—I felt they were just trying to ignore me, because I—they never would return my calls. I always had to contact them to get a final answer. And they were—they would not give me a definite answer. *Id.*

Like the insufficient evidence in the *Biggs* case, Plaintiff's evidence of emotional distress based on testimony that he felt "hurt and betrayed" was not sufficient to support an award for damages.

4. *Conclusion*

Because of the error in instructing in the disjunctive, the entire judgment in this case must be reversed and Defendants awarded a new trial.

VII. TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT PLAINTIFF FAILED TO MITIGATE HIS DAMAGES AND IN REFUSING DEFENDANTS' PROFFERED INSTRUCTION SUBMITTING PLAINTIFF'S FAILURE TO MITIGATE HIS DAMAGES BECAUSE THE RULING IS CLEARLY AGAINST THE LOGIC OF THE CIRCUMSTANCES THEN BEFORE THE TRIAL COURT AND/OR IS SO ARBITRARY AND UNREASONABLE AS TO SHOCK THE SENSE OF JUSTICE AND INDICATE LACK OF CAREFUL CONSIDERATION IN THAT THE EXCLUDED EVIDENCE AND PROFFERED INSTRUCTION WERE PROPER BOTH AS A MATTER OF LAW AND FACT AND FAILURE TO ALLOW THE JURY TO CONSIDER THE PROFFERED EVIDENCE AND INSTRUCTION WAS PREJUDICIAL TO DEFENDANTS AND MATERIALLY IMPACTED THE VERDICT AS THE JURY AWARDED MORE IN DAMAGES THAN WOULD HAVE BEEN AWARDED IF THE EVIDENCE HAD BEEN ALLOWED AND THE INSTRUCTION HAD BEEN SUBMITTED.

A. Standard of Review

The standard of review governing a trial court's decision to admit or exclude evidence at trial is abuse of discretion. *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 872 (Mo.App. E.D. 2009). The trial court abuses its discretion when the challenged ruling is based upon a clear error of fact or law or is clearly against the logic of the circumstances then before the trial court or is so arbitrary and unreasonable as to shock the

sense of justice and indicate lack of careful consideration. *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. 2014); *Hazelcrest III Condo. Ass'n v. Bent*, 495 S.W.3d 200, 207 (Mo.App. E.D. 2016).

Whether the trial court has properly refused or given a jury instruction is a question of law subject to *de novo* review. *Hemphill*, 400 S.W.3d at 415–16. Appellate review is conducted in the light most favorable to the record and, if a timely proffered instruction is supported by any theory and evidence, its submission is proper. *Hervey*, 379 S.W.3d at 159. Reversal should be granted when instructional error results in prejudice that materially affects the merits of a case. *Id.*

B. Evidence of Plaintiff's failure to mitigate his damages.

Orkin's original Answer (LF Doc #5 and #6), its Amended Answer (LF #63, #65 and #66) , and its Second Amended Answer (LF #103 and #229), each pled Orkin's first affirmative defense that Gentry failed to mitigate his damages "in failing to actively seek and gain subsequent employment sufficient to offset any alleged damages." This affirmative defense was not stricken, withdrawn or waived.

Prior to the commencement of trial, the Court considered each of the 14 topics raised by Plaintiff in his Motion *in Limine* in the motion. TR 2-14. Plaintiff's Motion *in Limine* seeking to exclude Orkin's evidence regarding Gentry's failure to mitigate his damages was identified as topic "number four." TR 8. After argument by the parties, the Court reaffirmed its previous decision to "sustain" the Plaintiff's motion on the failure to mitigate damages issue. TR 11. The Court, then, stated to Orkin's counsel: "if there's an offer of

proof that you would like to make at the time of trial in this regard, I'll be more than happy to consider it. But at this time, the motion is sustained." *Id.*

Thereafter, during trial following seating of the jury, the Court made the following record:

> We are back on the record in Gentry versus Orkin, outside of the presence of the jury. There was a request by the Defendant to allow -- make an offer of proof and additional argument in regard to the Court's motion in limine ruling regarding the argument that the Plaintiff failed to mitigate his damages. That was the motion in limine filed by the Plaintiff regarding the Plaintiff's failure to mitigate damages. The Court sustained that motion in limine and the Defense would like the opportunity to make an offer of proof in that regard. So Mr. Gumbel?

TR 322.

At the Court's invitation, then, counsel for Orkin proceeded to make a very specific offer of proof of Orkin's evidence to establish its thrice-pled affirmative defense that Gentry failed to mitigate his damages after his termination by Orkin on June 1, 2012. TR 322-340; LF Doc #163, 164, 165, 166, 167, 168, 169, 170. *See also* LF Doc #9, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33; LF Doc #34, pp. 5-9; LF Doc #41, pp. 7-9. Counsel for Orkin again argued Orkin's legal position and theories supporting Orkin's continued efforts to renew Orkin's objection to the position the Court had announced prior to trial and to persuade the Judge to admit the proffered evidence.

After consideration of Orkin's offer of proof and argument, the Court reaffirmed its pre-trial ruling granting Gentry's motion *in limine* and again excluded the proffered evidence. In ruling on the issue, the Court stated:

> The Court finds that, although I would tend to agree with Mr. Holman that the affirmative defense was not properly pled, but even if I were to concede

> that point and say that it was properly pled, the Court finds that the Defense has failed to meet the evidentiary requirement as set forth in the Stewart case that was cited by – cited earlier and then also in the -- yeah, Stewart versus Board of Education as cited in the trial brief filed with the Court.

TR 470-471. As more fully discussed below, this Court's ruling is clearly contrary to both fact and law. Orkin had pled the affirmative defense of failure to mitigate three times. The Court's rescission of the proffered evidence was also clearly contrary to and, in light of the claims alleging retaliatory failure to hire and lost back and front pay, the logic of the circumstances is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.

Thereafter, the Court, having refused to admitted the proffered evidence which would have shown abject failure to even look for, much less, obtain commensurate employment that was reasonably available, the Court refused Orkin's tendered MAI instruction hypothesizing Gentry and presenting Orkin's theory of defense that failed to mitigate his damages. (A 23; TR 868-870). The issues raised herein were presented in post-judgment motions and overruled. LF Doc #111, 112, 152, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172; A23.

C. Instructional error

Orkin offered the following MAI instruction regarding Gentry's failure to mitigate his damages:

> If you find in favor of the Plaintiff, you must find the Plaintiff failed to mitigate damages if you believe:
>
> First, Plaintiff Gentry failed to make reasonable efforts to find another job with the same or similar rate of pay or abandoned his search for a similar position to that which he previously held, and

Second, Plaintiff Gentry thereby failed to use ordinary care, and

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

The phrase "ordinary care" as used in this instruction means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

A23.

D. Discussion

There is no debate that the failure to mitigate damages is an affirmative defense. *State v. Polley*, 2 S.W.3d 887, 892 (Mo.App. W.D. 1999). A party properly pleads an affirmative defense by including a "short and plain statement of the facts showing that [it] is entitled to the defense or avoidance." Rule 55.08. Orkin's first affirmative defense pled three times provided a "short and plain statement of the facts showing that it is entitled to the defense" of failure to mitigate damages by stating Gentry failed to mitigate his damages "in failing to actively seek and gain subsequent employment sufficient to offset any alleged damages." The affirmative defense as pled in this case was more than a mere conclusory statement or bare legal assertion. *Cf. Echols v. City of Riverside*, 332 S.W.3d 207 (Mo.App. W.D. 2010) (averment that "Plaintiff's claims are barred in whole or in part by Plaintiff's failure to mitigate damages" is insufficient because it is merely a legal conclusion).

A basic tenet of employment law provides that where an employer discharges an employee (or fails to hire an applicant), such individual might be entitled to back and/or front pay but must make reasonable efforts to minimize his damages. *See, e.g., Spencer v. Millstone Marina, Inc.*, 890 S.W.2d 673, 677 (Mo.App. W.D. 1994) (where wrongfully

discharged employee "fails to minimize [her] damages, 'the employer [shall be permitted to] reduce damages recoverable by a wrongfully discharged employee by whatever the employee has earned or by reasonable diligence could have earned during the period of [her] wrongful discharge"'); *See also Bus. Men's Assur. Co. of Am. v. Graham*, 891 S.W.2d 438, 447 (Mo.App. W.D. 1994). A failure to mitigate damages can reduce or, even, eliminate the Plaintiff's amount of recovery in the event a jury finds in his favor. *See id.*

In order to prevail on a "failure to mitigate damages" defense, a defendant has the burden of proving that a plaintiff did not exercise ordinary care to minimize his damages. This burden is articulated in the Missouri Supreme Court's MAI 32.29 for "failure to mitigate damages" discussed below. During trial, Gentry urged the Court to ignore the established legal standard set out in MAI 32.29 for failure to mitigate in situations where employees have lost their jobs (or, where an applicant is not hired). Specifically, Plaintiff erroneously relied upon and misstated as precedent the *dicta* in *Stewart v. Bd. of Ed. of Ritenour Consol. Sch. Dist., R-3*, 630 S.W.2d 130, 134 (Mo.App. E.D. 1982) to apply a higher evidentiary burden to Defendant's "failure to mitigate" defense. Here, consistent with its failure to mitigate affirmative defense under controlling precedent and MAI, Orkin offered proof during trial, which if admitted into evidence, would have satisfied Orkin's burden of proving Gentry did not exercise ordinary care to minimize his damages by seeking reasonable commensurate employment that was available. TR 322-336.

1. *Availability of employment positions.*

(a) Gentry was qualified for a variety of employment positions.

Orkin proffered evidence of Gentry's experience and his Bachelor's Degree from Central Missouri State University where he studied education. *See* Pl.'s Resume, LF Doc #24. He spent 42 years working for various employers such as Earl M. Jorgensen Steel, Do It All Travel, Adlard Dental, and Orkin Pest Control. *Id.* Gentry's prior work experiences spanned a broad range of industries from manufacturing, travel, healthcare, and pest control, and included both lower-level and management positions. Accordingly, Gentry's resume, on its face, shows Gentry was well suited for a number of positions in a wide range of local industries. *See id.* Given his education and experience, the proffered evidence shows it is reasonably likely Gentry would have obtained a comparable job if he had made any effort to seek such employment.

(b) There were employment positions available to Gentry.

Orkin proffered evidence to the Court concerning employment positions available to Gentry in Lee's Summit which he made no effort to exhaust. TR 322-324. Orkin offered statistics published by the United States Bureau of Labor Statistics to show that the Missouri unemployment rate declined from 6.8% in June 2012 (when Plaintiff was terminated) to 6.5% in July 2013 (when Plaintiff reapplied) to 5.8% in July 2014 (when the above-styled action was filed). LF Doc #26. In 2012, Kansas City ranked 14th out of the 50 largest cities for lowest unemployment rate. LF Doc #27. In 2013, Kansas City ranked 26th out of the 50 largest cities for lowest unemployment rates. LF Doc #28. A 2012-2013 statistical report published by the Lee's Summit Economic Development

Council showed that there were over 200 mid-sized companies in the area with at least 25 employees. LF Doc #29; see also LF Doc #32. The Council also listed many employers in the Lee's Summit area. LF Doc #29. A news article published in February 2012 shows that there were job fairs scheduled in August and October of 2012 in neighboring Kansas City and Overland Park, one of which featured over 500 available jobs. LF Doc #30; see also LF Doc #31. The Kansas City Missouri Employment Resource Center specifically provides resources for job seekers over 40 years of age of which Plaintiff never took advantage. *See* Kansas City Mo. Emp't Res. Ctr. - Emp't Ctr., https://www.ldsjobs.org/ers/ct/center/68595?lang=eng. LF Doc #33.

2. *Gentry unreasonably made no attempt to apply for any such job.*

Gentry made virtually no effort to find other employment. Orkin proffered Gentry's deposition testimony on April 21, 2015, that he had not had any in-person job interviews and had only one phone interview. TR 323; LF Doc #25, pp. 22-29. He did look at want ads in the newspaper. *Id*. Gentry testified that the only geographic area he would have even considered inquiring into was within the immediate 10-mile radius of Lee's Summit, Missouri. LF Doc #25 at p. 29. He never completed a single employment application other than the one he submitted to Orkin.[15] Further, he never contacted a headhunter or any other

[15] On August 17, 2015, Plaintiff's counsel served Defendants with supplemental responses to Orkin's discovery requests regarding Plaintiff's efforts to seek employment and mitigate his potential damages which stated that he filled out his first application with a prospective

professional for assistance in obtaining employment. LF Doc #25, at p. 27. *See Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975) (stating that a reasonable person seeking employment would have checked want ads, registered with employment agencies, discussed employment opportunities with friends and acquaintances if that person was sincere about obtaining employment).

E. A jury instruction should have been given on Gentry's failure to mitigate damages.

The trial court erred in refusing to give Orkin's requested MAI instruction on mitigation of damages. See A23, MAI 32.29 (failure to mitigate). The Court based its refusal to admit evidence of failure to mitigate on two palpably erroneous conclusions: (1) that Orkin had not pled the affirmative defense of failure to mitigate; and (2) even if Orkin properly pled this defense, the proffered evidence was not sufficient. In both respects the Court was wrong.

In stating the reasons for rejecting the proffered evidence, the Court relied in part upon *Stewart v. Bd. of Ed. of Ritenour Consol. Sch. Dist., R-3*, 630 S.W.2d 130 (Mo.App. E.D. 1982). Even if, however, the *dicta* in *Stewart* was ever accepted as precedent on the issue of mitigation of damages, the *Stewart* decision predated MAI 32.29 and was not applicable law at the time of trial. MAI 32.29 was the approved instruction that applied and should have been given under Orkin's affirmative defense theories if supported by

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employer and as of August 14, 2015, secured his first job (part-time). LF Doc #131. This was not a good faith effort to secure employment.

reasonably sufficient evidence of failure to mitigate. *Hervey*, 379 S.W.3d at 159 (citing *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 608 (Mo. 2008)).

Hence, MAI 32.29 constituted the Missouri Supreme Court's statement of the law on failure to mitigate, which superseded any prior inconsistent standard set forth in case law. *See e.g.*, *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 820 (Mo. 2007), *overturned due to legislative action* ("whenever Missouri Approved Instructions contain an instruction applicable in a particular case that the appropriate party request or the court decides to submit such instruction shall be given to the exclusion of any other instructions on the same subject"). See *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 820 (Mo. 2007) in which the Court stated that the evaluation of a MHRA claim must follow Missouri Approved Instructions.

A defendant is entitled to have his theories of defense within the pleadings and evidence submitted by proper instructions. *Anderson v. Welty*, 334 S.W.2d 132 (Mo.App. 1960). A trial judge does not have discretion whether to give a proffered instruction if the proffered instruction currently hypothesizes applicable law and is supported by the evidence. *Marion v. Marcus*, 199 S.W.3d 887 (Mo.App. W.D. 2006); *Marion v. Marcus*, 199 S.W.3d 887 (Mo.App. W.D. 2006); *Shutt v. Chris Kaye Plastics Corp.*, 962 S.W.2d 887, 890 (Mo. 1998). The prejudicial impact of failure to submit a proffered instruction supported by sufficient evidence is dependent upon determination of whether the failure to admit the proffered evidence and/or rejection of the instruction might reasonably have materially impacted the verdict. In a retaliatory refusal to hire case seeking back and front pay under MHRA, the failure to submit to the jury the issues of whether Gentry failed to

mitigate his damages under an applicable MAI instruction supported by evidence is, by definition, error. *Marion*, 199 S.W.3d 887

Because pre-trial rulings on motions *in limine* are preliminary, a party seeking to offer evidence during trial is required to raise the evidentiary issue at an appropriate time during trial so as to give the court a fair opportunity to reconsider a preliminary ruling regarding the admissibility of the evidence. The purpose of proffering the evidence is two-fold: (1) to re-assert a party's position in opposition to the trial court's preliminary ruling; and (2) to provide the court with an opportunity to reconsider and, perhaps, reverse or modify its preliminary ruling. *State v. Bisher*, 255 S.W.3d 29 (Mo.App. S.D. 2008). In order to preserve for appeal an allegation of error in refusing to admit evidence, then, the record must establish that the proponent of the evidence gave the court a fair opportunity to know the evidence that the party would have offered and to know why the evidence should have been admitted as relevant and material to the proponent's claims or theories of defense. In order to satisfy its burden, then, the proponent of the evidence must "proffer" the evidence in a manner required by the court to specifically identify the evidence and arguing the parties' position during trial. *Id.* The record in this case clearly establishes that Orkin satisfied its burden of proffering its very specific evidence of failure to mitigate during trial precisely as the Judge had invited Orkin to do by stating "if there is an offer of proof that you would like to make at the time of trial in this regard, I'll be more than happy to consider it. But at this time, the Motion is sustained." TR 11. After the trial commenced, the Court affirmed its intent to exclude evidence of failure to mitigate and invited Orkin to make an offer of proof in support of its continued objection to the Court's position. TR

322. Thereafter, Orkin made a very specific and lengthy offer of proof of the precise evidence of failure to mitigate that Orkin was prepared to present and would have presented but for the Court's refusal to accept such evidence. TR 322-340.

Based upon the pleadings and evidence proffered to the court during trial, Orkin should have been permitted to present its mitigation evidence to the jury to prove failure to mitigate. But for the Court's erroneous refusal to admit Orkin's timely and properly proffered evidence that Gentry: (1) was capable of obtaining commensurate employment; (2) such employment was reasonably available; and (3) Gentry's failure to make any reasonable effort to obtain such employment, the timely proffered MAI instruction submitting the affirmative defenses of failure to mitigate would have been supported by evidence.

Accordingly, both the evidentiary error and the instructional error are inextricably linked and constituted abuse of discretion that was so prejudicial as to require reversal under *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. 2014) and *Hervey*, 379 S.W.3d at 159 (citing *Bach*, 257 S.W.3d at 608).

In the alternative, Plaintiff should have been prohibited from admitting evidence at trial related to back-pay damages because Plaintiff failed to make reasonable good faith efforts to mitigate his alleged damages. *See E.E.O.C. v. Riss Int'l Corp.*, 76-CV-560-W-6, 1982 WL 277, at *2 (W.D. Mo. Mar. 29, 1982) (an employee "is not entitled to back-pay for periods during which he voluntarily remained in idleness." (internal citations omitted)); s*ee also Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 502 (8th Cir. 1998) (court reduced

MHRA plaintiff's award of front-pay because the plaintiff failed to make an honest, good faith effort to mitigate his damages by obtaining full-time employment.)

The Court's ruling excluding the proffered evidence of Gentry's failure to mitigate his damages "in failing to actively seek and gain subsequent employment sufficient to offset any alleged damages," is clearly against the logic of the circumstances, and/or is so arbitrary and unreasonable as to shock the sense of justice and indicate lack of careful consideration. The Court's ruling denying Orkin's proffered MAI instruction which would have been supported by sufficient evidence but for the Judge's erroneous exclusion of such evidence materially affected the verdict and resulted in the jury awarding more in damages than would have been awarded had the jury been allowed to consider the instruction. Orkin is, therefore, entitled to a reversal of the judgment.

CONCLUSION

For the errors asserted in this Brief, either individually or cumulatively, Appellants request this Honorable Court to grant them the following relief: (1) Appellants request this Honorable Court reverse the punitive damages judgments below and to enter judgments for the Appellants; or (2) Appellants also request this Honorable Court to grant them a new trial both on the liability and/or damages and punitive damage (alternatively) phases of the trial; or (3) if either the compensatory damages or punitive damages judgments are reduced or eliminated, Appellants also request this Honorable Court remand this case to the trial court for further proceedings regarding reducing the judgment for attorney's fees and costs.

Appellants also request this Honorable Court to grant them such other and further relief as the Court may deem just and proper in the premises.

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CERTIFICATE OF COMPLIANCE

The undersigned, having been duly sworn upon his oath, states that the above and foregoing Brief of Appellant:

1. Complies with the requirements contained in Rule 84.06.

2. Complies with the word limitation requirements contained in Rule 84.06(b).

3. Contains 18,631 words based on the word count of Microsoft Word Office 2012, which was used to prepare said brief.

4. Complies with the page limitation requirements of Special Rule 360.

5. Contains the requirements contained in Rule 55.03.

6. Complies with the requirements contained in Rule 84.06(c).

7. A CD-ROM is not being filed pursuant to Special Rule 333(d) as said brief is being electronically filed. The scan is virus-free.

James R. Wyrsch

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Subscribed and sworn to before me this 22nd day of May, 2019.

Notary Public

My Commission Expires:

RENEE ISING
Notary Public-Notary Seal
STATE OF MISSOURI
Jackson County
My Commission Expires June 30, 2020
Commission # 12552262

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one true and complete copy of the foregoing Substitute Brief of Appellant and one true and complete copy of the Appendix to the foregoing Substitute Brief were electronically filed and all were sent, in accordance with Rule 84.06(g), via United States Mail, first class postage prepaid, on this 22nd day of May, 2019, to:

ATTORNEY FOR RESPONDENT

/s/ James R. Wyrsch
ATTORNEYS FOR APPELLANT