SUPREME COURT OF MISSOURI
en banc

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

APPELLANTS' SUBSTITUTE REPLY BRIEF

JAMES R. WYRSCH, MO# 20730
jimwyrsch@whmlaw.net
STEPHEN G. MIRAKIAN, MO #29998
smirakian@whmlaw.net
MARILYN B. KELLER, MO #39179
mbkeller@whmlaw.net
WYRSCH HOBBS & MIRAKIAN, P.C.
1200 Main, Suite 2110
Kansas City, MO 64105
816-221-0080 Telephone
816-221-3280 Facsimile
Attorneys for Appellants

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I. RESPONSE TO RESPONDENT'S POINT I

In his Substitute Brief, Respondent concedes that he argued to the Missouri Court of Appeals and the trial court that Missouri law required him to prove as an element of his retaliation claim that his July 2013 Charge of Discrimination was founded on a reasonable, good faith belief that Appellants discriminated against him. Respondent does not dispute that he represented to the trial court repeatedly, for over two years, that a reasonable, good faith belief is an essential element to his claim. Respondent even admits that he diverged from his unwavering assertions regarding the essential elements of his retaliation claim only during the jury charge conference, when Respondent abruptly reversed positions and remarkably argued that Missouri law did not require him to prove that he held a reasonable, good faith belief of discrimination to prevail on his retaliation claim. Respondent reversed positions only after the trial court allowed otherwise irrelevant, highly inflammatory, and inadmissible evidence at trial (over Appellants' objection) on the basis that such evidence was relevant to Respondent's burden to demonstrate that Respondent's Charge of Discrimination was founded upon a reasonable, good faith belief that he was subject to age and disability discrimination. Respondent argues that his curiously timed and highly prejudicial about-face was warranted because of evidentiary rulings at trial, and suggests that he was wrong on the law earlier, but now is correct. This Court should reject Appellants' incomplete description of the trial court proceedings and inconsistent reading of the Missouri Human Rights Act ("MHRA").

A. Facts

Respondent's Substitute Brief obfuscates the trial court proceedings in an attempt to hide Respondent's improper attempt to introduce highly inflammatory evidence relating to alleged age and disability discrimination only to reverse positions at the jury charge conference by arguing that Missouri law did not require him to prove that he held a reasonable, good faith belief of discrimination. Here is what occurred in the trial court.

Throughout the entire trial court proceedings until the jury charge conference, Respondent represented to the trial court that Missouri law required him to prove that his Charge of Discrimination was founded on a reasonable, good faith belief that Appellants discriminated against him. Respondent repeatedly relied on *McCrainey v. Kansas City, Missouri School District*, 337 S.W.3d 746, 754 (Mo. App. W.D. 2011) in arguing to the trial court that evidence of Appellants' alleged underlying acts of age and disability discrimination were relevant and admissible to prove his retaliation claim.

For example, in arguing in opposition to Orkin's Motion *in Limine* to bar evidence of the supported acts of age and disability discrimination, Respondent represented to the trial court:

> **MR. HOLMAN**: Our response is, simply, Your Honor, as noted by the Court of Appeals in rejecting their – their appeal, part of the background evidence necessary to support a claim is that he had a good faith reasonable belief that he was subjected to discrimination based on age and/or disability.
>
> . . .
>
> So I'm not going to ask any of those [Orkin] witnesses whether or not they believe that they were terminated because of their age. But I think based – consistent with the Cox case and consistent with Court of Appeals ruling that we are required to show good faith reasonable belief in that this evidence was

> of course going to be relevant for purposes of the trial, we should be able to call them as witnesses.

TR 29-33.

And, later in the trial, Plaintiff maintained:

> I think the Court of Appeals, in rejecting their Motion to Compel Arbitration, noted that the 2012 Charge of Discrimination was always going to be relevant for purposes of Mr. Gentry's protected activity, i.e., good faith reasonable belief. Their jury instructions, you know, have propounded that issue to the jury, i.e., that he had a reasonable good faith belief that he was subject to age and/or disability discrimination … But I think that the Plaintiff needs to be able to at least rebut the Defendants' explanation. And as I understand the Court, the Court is saying we can do that.

TR 339-340 (emphasis added).

Respondent's repeated representation that evidence of the alleged age and disability discrimination underlying his Charge of Discrimination was relevant to demonstrate that Plaintiff had a reasonable, good faith belief that Defendants discriminated against him resulted in the trial court allowing the admission of otherwise irrelevant, highly prejudicial, and inadmissible evidence at trial. For example, over Appellants' objection, the trial court permitted Respondent to present evidence of alleged age and disability discrimination through the testimony of two former Orkin employees. TR 649-678. The court also permitted Respondent, again over Appellants' objection, to present evidence of age and disability discrimination (as well as violation of Orkin's Leave of Absence Policy), through the one-hour deposition of another Orkin employee. TR 679-690. Critically, Respondent acknowledged that he introduced this (and other) evidence to prove that he had a good faith, reasonable basis for his Charge of Discrimination . P. Ex. 99, TR 690, 845;see also Appellants' Substitute Brief at pp. 10-11. The trial court indisputably relied on

Respondent's representations regarding the law, holding that the evidence—irrelevant to the other issues in the case and highly prejudicial to Appellants—was admissible because Respondent had the burden to prove that he filed his Charge of Discrimination based on a reasonable, good faith belief of discrimination. TR 685-686.

Moreover, following Respondent's representation that Missouri law required Respondent to prove that he had a good faith basis for his discrimination charge as an element of his retaliation claim, the trial court allowed Gentry to testify to his good faith belief. TR 705, 707-10. While the trial court denied admission of the Charge of Discrimination itself, the Court allowed Respondent to discuss the Charge of Discrimination in the context of his reasonable, good faith belief of discrimination: "I think you can talk about it [the Charge of Discrimination] and whether or not he had a good faith belief whether or not he thought he did." TR 708. Respondent then testified as to his reasonable, good faith belief of discrimination underlying his Charge of Discrimination. TR 710.[1] Respondent testified that the Missouri Human Rights Commission helped him prepare the Charge of Discrimination. TR 710. And in closing argument, Respondent told the jury that the Commission told Respondent to "file a charge." TR 927. Counsel for Gentry further misstates the Record by stating Defendants stipulated to admission of the discriminatory acts evidence to which the Record confirms counsel for Defendants timely objected. The Record clearly demonstrates (TR 706-707) that there was no stipulation as

[1] The Court also ruled that Gentry could not testify that he was terminated because of his disability and age. TR 708-709.

to "protected activity" or to admission of evidence of acts of discrimination. Further, the Court of Appeals in its Opinion in this case at fn. 12 specifically held that there was no such stipulation. *Gentry v. Orkin, et al.*, 2018 WL6738892, fn 12. To the contrary, when Defendants' counsel was specifically asked if he would stipulate that Gentry had a reasonable, good faith belief, Defendants' counsel answered "no." TR 707. As Defendants' counsel noted, "a lot of that evidence, unfortunately, has already come in and you all were putting in as good faith belief." TR 707. The filing of the Charge was included in the verdict directing instruction. A1, 2.

B. Discussion

1. *Judicial Estoppel*

(a) Waiver.

Respondent contends that this Court should excuse his eleventh-hour about-face because Appellants purportedly waived the issue of judicial estoppel by failing to raise it in the trial court. Respondent is both factually and legally wrong. Even so, whether Appellants raised the issue of judicial estoppel in the trial court is irrelevant. Judicial estoppel precludes Respondent in this Court from asserting a legal position contrary to his previous position. Appellants were not required to raise the issue of judicial estoppel in the trial court for this Court to bar Respondent from taking a position on appeal that is inconsistent from the positions he took for over two years in the trial court and that the trial court relied upon in allowing otherwise irrelevant, unfairly prejudicial, and inadmissible evidence at trial. Because the judicial estoppel doctrine protects the judicial system, courts

regularly consider judicial estoppel *sua sponte*. *See, e.g., Grigson v. Creative Artists Agency*, 210 F.3d 524, 530 (5th Cir. 2000). *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) (citing *Allen v. Zurich Ins. Co.* 667 F.2d 1162, 1168, n.5 (4th Cir. 1982)); *Eilber v. Floor Care Specialists, Inc.*, 492 Va. 438, 807 S.E.2d 219, 222-223, n. 4 (2017).[2] Accordingly, even if Appellants did not expressly cite judicial estoppel in the trial court, such failure would not absolve Respondent of his wrongful effort to manipulate these judicial proceedings.

(b) The doctrine of judicial estoppel should be applied in this case.

Gentry succeeded in persuading both the Court of Appeals during the interlocutory appeal regarding the Arbitration Motion and, then, the trial court that a reasonable good faith filing of the Charge was an essential element of his claim. Hence, not only were the arguments by Gentry's counsel in the Court of Appeals and trial court before the instruction conference polar opposites to the position argued in opposing Defendants' tendered verdict director (under *McCrainey v. Kansas City, Missouri School District*, 337 S.W.3d 746 (Mo. App. W.D. 2011)) but, further, counsel for Gentry was successful in his 180-degree reversal of legal theory. See *New Hampshire v. Maine*, 532 U.S. at 750-751 (2001) (judicial estoppel should be applied to protect judicial integrity and to prevent inconsistent

[2] This Honorable Court in *Vacca v. Missouri Department of Labor and Industrial Relations*, 2019 WL1247074 (Mo. 2019) in footnote 4, addressed this issue without deciding it.

judgments as a safeguard against the impression that one of two courts is wrong or manipulation or deceit by inconsistent arguments.) *New Hampshire v. Maine,* 532 U.S. 742, 750 (2001) protected against the "evil of litigants intentionally attempting to force such a result on the courts." *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990).

As is manifest by the Record, all of the factors set forth in this Honorable Court's decision in *Vacca v. Missouri Department of Labor and Industrial Relations*, 2009 WL1247074 (S.Ct. 2019) discussing judicial estoppel are met in this case. First, the positions taken by Gentry in the Court of Appeals on the interlocutory appeal and in the trial court were diametrically opposed to the position that Gentry took during the instruction conference and on appeal of the trial verdict. Second, Gentry succeeded in convincing the trial court to accept his position by admitting substantial evidence of age and disability discrimination. He also succeeded in convincing the Appeals Court that Orkin had waived any right to arbitration because Orkin should have known based largely upon previous decisions including *McCrainey*, that evidence of age and disability discrimination would be admissible at trial. Third, it is clear that Gentry derived an unfair advantage in taking inconsistent positions. After having convinced the Appellate and trial courts that reasonable good faith filing of the Charge was an element which, then, enabled Gentry to put on substantial evidence of discrimination that would not otherwise have been admissible and with all the damaging evidence ringing in the jurors' ears, did a complete reversal legal argument and convinced the Court to reject Defendants' verdict director because reasonable, good faith is not an element." This 180-degree turn contravenes *Vacca* at *11, *12.

Because, however, the doctrine of judicial estoppel is intended to protect both the judicial system and the litigants, detrimental reliance by the opponent of the party against whom the doctrine is applied is not even necessary. *Matter of Cassidy*, 892 F.2d 637, 641, fn. 2 (7th Cir. 1990); *In the Matter of Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). Cases generally hold that there is no requirement that the position taken in the first case was even necessary to the determination of the underlying case in order for that position to form the basis of judicial estoppel in a later case. *Frazer*, "Reassessing the doctrine of judicial estoppel: The implications of the judicial integrity rationale," 101 Virginia Law Review at 1501, 1512 (2015).

(c) Gentry has not shown that the Doctrine of Judicial Estoppel should not be applied.

Gentry asserts that the Doctrine of Judicial Estoppel should not be applied to him because the facts presented in the trial court were different than when he was asserting that he had to prove that he filed a Charge of Discrimination in good faith and reasonably in that the Court excluded same of his evidence. But in order to assert successfully that the doctrine does not apply to him, Gentry had to prove that his previous assertions were made by mistake or inadvertence. *In Re Election Candidacy of Fletcher*, 337 S.W.3d 137, 139-46 (Mo. App. W.D. 2011). Gentry has made no such claim in this Court and, therefore, his argument in this respect should be overruled. In any event, should this Honorable Court decide that "different facts" may be an exception to the application of judicial estoppel, see discussion of this issue below under the "Law of the Case."

2. *Law of the case.*

(a) Waiver.

As with judicial estoppel, a court can raise or consider the law of the case *sua sponte* because the court itself has an interest in preventing repetitive litigation and preserving judicial integrity. *Bollinger v. Oregon*, 172 Fed. Appx. 770, 771 (9th Cir. 2006); *U.S. v. Wallace*, 573 F.3d 82, 90, n.6 (1st Cir. 2009) (the "potential law of the case doctrine is ultimately directed at conserving judicial resources and preserving the integrity of our own processes … We therefore reject any information in our cases that we cannot raise the law of the case issues *sua sponte* if we deemed it appropriate." (citing *Maxfield v. Cintas Corp. No. 2*, 487 F3d 1132, 1135 (8th Cir. 2007); *Bollinger*, 172 F. App'x at 771; *DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d 73, 76 (2nd Cir. 1992), and *Grigson v. Creative Artist Agencies*, 210 F.3d 524, 530 (5th Cir. 2000)). Accordingly, this Court should apply the law of the case and hold that Respondent was compelled to demonstrate at trial as an element of his retaliation claim that his Charge of Discrimination was grounded in a reasonable, good faith belief of discrimination.

(b) The law of the case doctrine applies.

The doctrine of the law of the case provides that a previous holding in a case constitutes the law of the case and precludes re-litigation of the issue on remand and subsequent appeal. The doctrine governs successive adjudications involving the same issues and facts. Generally, the decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and

might have been raised but were not." *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-129 (Mo. 2007).

This Honorable Court has summarized the function of the law of the case doctrine:

> The doctrine of the law of the case is necessary to ensure uniformity of decision, protect the parties' expectations, and promote judicial economy. The doctrine is "more than merely a courtesy: it is the very principle of ordered jurisdiction by which the courts administer justice." Appellate courts do have discretion to consider an issue when there is a mistake, a manifest injustice, or an intervening change of law. But when there is no "demonstrable error in the first decision," law of the case is "peculiarly appropriate."

Am. Eagle Waste Indus., LLC v. St. Louis Cty., 379 S.W.3d 813, 825 (Mo. 2012) (citation omitted).

Absent different issues, different facts or change in law after remand, the law of the case established by an appellate court precludes not only the trial court from reconsidering issues determined by the first appeal but also precludes the appellate court in later appeals from revisiting issues determining that appeal. *Gamble v. Hoffman*, 732 S.W.2d 890 (Mo. 1987).Respondent contends that the law of the case does not apply to bar his newfound disavowal of the reasonable, good faith element of his retaliation claim because the issues on remand purportedly were "substantially different" than the issues raised in the first appeal. Not so. In the first appeal, the court of appeals held that Appellants waived their right to arbitration. *Gentry v. Orkin, LLC*, 490 S.W.3d 784, 789 (Mo. Ct. App. 2016). The court agreed with Respondent that Appellants knew of their right to arbitration contained in Respondent's previous employment agreement with Orkin when Respondent filed his complaint "because one of the elements that Gentry had to establish to make a prima facie

case of retaliation was that he had complained of discrimination." *Id.* Appellants thus had knowledge that Respondent's retaliation claim was related to his termination from (and employment agreement with) the company. Critically, the court of appeals cited *McCrainey* for the proposition that Respondent had knowledge of the discrimination charge by virtue of the filing of the complaint, *id.*, which is the very case in which the court of appeals held that "a plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim." *McCrainey*, 337 S.W.3d at 754. The court of appeals' holding was not overturned by this Court. Accordingly, the court of appeals' previous holding binds all further proceedings in this case, and Respondent was compelled to prove that his Charge of Discrimination was predicated on a reasonable, good faith belief of discrimination.

(c) Gentry has failed to show that the doctrine of law of the case does not apply.

Some courts have held that the law of the case doctrine may not be applied when there is a substantial difference in the evidence and facts upon two adjudications. See *Davis v. General Elec. Co.*, 991 S.W.2d 699, 703 (Mo. App. 1999), overruled on the other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222-232 (Mo. banc 2003). In *Walton v. City of Berkley*, 223 S.W.3d 126 (Mo. 2007), the court held that the law of the case may not apply where the issues or evidence are substantially different from those vital to the first adjudication on judgment. *Id.* at 130. Here, however, there was no substantial difference between the evidence as argued initially by Plaintiff and as argued at the instructional conference. The only difference being that during trial Plaintiff's counsel

argued to the court that a reasonable good faith basis for the Charge was essential whereas at the instruction conference, after virtually all the discrimination evidence was in, he argued reasonable good faith basis was not an essential element. Gentry also argued that the court had excluded the Charge itself and held that Gentry could not testify that he was terminated because of age or disability. TR 708-709. But, as set forth in Appellants' Substitute Brief at pp. 4-5, Gentry introduced very substantial evidence of his good faith in filing the Charge of Discrimination. The filing of the Charge was included in the verdict directing instruction.

As the Court said in *Walton*, "the law of the case doctrine is important because it protects the party's expectations and promotes uniformity of decisions in judicial economy. It can advance those goals only if it applies nearly on the time, and discretion is disregarded as exercised only in rare and compelling situations not found here."

C. Interpretation of the Statute to Require Reasonable, Good Faith Filing of Charge of Discrimination

An essential element of a retaliation claim under the opposition clause and the participation clause of the MHRA is that the plaintiff's discrimination charge was predicated on a reasonable, good faith belief of discrimination. Respondent concedes, as he must, that Missouri courts uniformly hold that a reasonable, good faith belief is an element claim of retaliation under the opposition clause. See Respondent's Substitute Br. at 30. Nor does Respondent dispute that the majority of federal appellate courts to address the issue have held that a reasonable, good faith belief is an element to a retaliation claim

under the substantially-similar participation clause under Title VII. See Appellants' Substitute Br. at 30-32. Rather, Respondent asks this Court to depart from bedrock principles of statutory interpretation and carve out a unique exception under Missouri statute to absolve a plaintiff bringing a retaliation claim under the participation clause from proving that his discrimination charge was founded on a reasonable, good faith belief of discrimination. This Court should decline Respondent's specious invitation.

As discussed thoroughly in Appellants' Substitute Brief, that the reasonable, good faith belief element applies to the participation clause of the MHRA is entirely consistent with the rationale of *McCrainey v. Kansas City Missouri School District*, 337 S.W.3d 746 (Mo. Ct. App. W.D. 2011), and has strong support of several federal appellate courts. See Substitute Br. at 30-32.

Courts resoundingly hold that a "reasonable, good faith" requirement should be implied in "opposition clause" cases. *See, e.g.*, *Mignone v. Missouri Dep't of Corr.*, 546 S.W.3d 23, 38-39 (Mo. Ct. App. W.D. 2018); *Minze v. Missouri Dep't of Pub. Safety*, 437 S.W.3d 271, 275-76 (Mo. Ct. App. W.D. 2014); *McCrainey*, 337 S.W.3d at 753-54. Missouri law requires courts, when determining the legislative intent of a statute, to read the provisions of the statute in context and harmonize the provisions. *Missouri Sun Aviation, Inc. v. C-3 Communications Avionics Systems, Inc.*, 533 S.W.3d 720, 724 (Mo. 2017). The statute provides that it is unlawful for an employer to "retaliate or discriminate in any manner against any other person because such person <u>has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner</u> in any investigation, proceeding or hearing conducted

pursuant to this chapter." RSMo § 213.070. Courts widely hold that the opposition clause requires the plaintiff to prove that he had a reasonable, good faith belief that the practice he opposed was unlawful; no such language is expressly provided in the statute. Reading the participation clause in its proper context, it does not contain language materially different from the opposition clause. No reason exists to read the participation clause differently from the clearly-established reading of the substantively similar opposition clause.

Moreover, as the court in *McCrainey* held, a reasonable, good faith belief of discrimination underlying the plaintiff's discrimination charge is necessary to effect legislative intent in enacting the MHRA to "prevent plaintiffs from prevailing on retaliation claims that are entirely frivolous." 337 S.W.3d at 753. The Seventh Circuit, in holding that a plaintiff must demonstrate that he had a reasonable, good faith belief of discrimination in the context of a retaliation claim under the participation clause of Title VII, reasoned:

> The purpose of requiring that plaintiffs reasonably believe in good faith that they have suffered discrimination is clear. Title VII was designed to protect the rights of employees who in good faith protect the discrimination they believe they have suffered and to ensure that such employees remaining free from reprisals or retaliatory conduct. Title VII was not designed to "arm employees with a tactical coercive weapon" under which employees can make baseless claims simply to "advance their own retaliatory motives and strategies."

Mattson v. Caterpillar, Inc., 359 F.3d 885, 890 (7th Cir. 2004) (quoting *Spadola v. N.Y. City Transit Auth.*, 242 F. Supp. 2d 284, 292 (S.D.N.Y. 2003)). If the participation clause did not require a plaintiff to prove a reasonable, good faith basis of discrimination, a

disgruntled employee terminated from a company could prevail on a retaliation claim by simply filing an utterly baseless discrimination charge and reapplying for the position, in the hope that the company will refuse to hire him. If the company fails to hire the plaintiff and he can convince a jury that a causal relationship exists between the unfounded charge and the adverse action, the plaintiff has prevailed on his retaliation claim. The company is precluded entirely from introducing any evidence that the discrimination charge itself was pretextual. The MHRA does not countenance such a perversion of discrimination claims.

Rather, the only reasonable construction of the participation clause of the Missouri Human Rights Act is to interpret it in accord with the opposition clause—that the plaintiff must prove that his discrimination charge had a reasonable, good faith belief of discrimination. See *Kershaw v. City of Kansas City*, 440 S.W.3d 448, 458 (Mo. App. W.D. 2004) (recognizing the principle of statutory interpretation that "statutes should be construed in such a way as to avoid unreasonable or absurd results").

Respondent argues that because Appellants objected to the Charge of Discrimination at trial, Appellants waived any objection to the trial court's erroneous jury instruction omitting the reasonable, good faith belief element from Respondent's retaliation claim. (Respondent's Substitute Br. at 40-43.) Respondent's waiver argument misses the mark. Appellants' objection to the admission of the Charge of Discrimination itself was predicated on the highly prejudicial nature of the detailed description of the alleged conduct underlying the age and discrimination charge. Appellants did not oppose the evidence on the basis that it was irrelevant because Appellants did not need to prove a reasonable, good faith belief of discrimination as an element to his retaliation claim.

II. RESPONSE TO RESPONDENT'S POINT II

Respondent raises several fleeting arguments in opposition to Appellants' appeal from the trial court's wrongful refusal to provide Appellants' proposed business judgment instruction. Each argument flounders.

First, Respondent's arguments that Appellants failed to preserve their objections to the trial court's denial of the instruction is misguided. Appellants unquestionably proposed the instruction. A4. To the extent Respondent argues that Appellants failed to preserve the issue on the grounds that Appellants "never argued *McBryde [v. Ritenour School Dist.*, 207 S.W.3d 162, 170-171 (Mo. App. E.D. 2006)] should be overruled" in the trial court (Respondent Opposition Br. at 50), Appellants were not required to raise such an argument to preserve the issue for appeal. *McBryde* is an Eastern District case, so it was not binding on the trial court.

Moreover, Respondent fails to quote Appellants' entire objection, which was as follows: "Defendants object to the non-submission of this Instruction because they believe it would be fair to the Plaintiff and it is fair to the Defendant and is prejudicial to Defendants to not instruct the jury that they cannot award a verdict just because they believe something that the Defendant did was unfair." Appellants' objection was sufficient to preserve the error.

Second, Respondent also mistakenly argues that Appellants cited no authority for the proposed business judgment instruction. At trial, Appellants cited 8th Cir. Model Jury Instruction 5.11 (A4) and attached a copy of the Eighth Circuit Pattern Instruction to their proposed instruction. The Eighth Circuit Instruction cited *Walker v. AT&T Technologies*,

995 F.2d 846 (8th Cir. 1993), in which the Eighth Circuit held that an employer is entitled to make business judgments regarding personnel decisions. Instead, Respondent most importantly has failed to address the arguments made in the *Law Review* article about *McBryde* but simply reasserted to making an attack in the article based on the fact that the lawyer who wrote the article formerly was with one of the law firms representing Orkin and Biron in this case. This is hardly an adequate response. Respondent's Substitute Brief thus had no rebuttal to the arguments set forth in Appellants' Substitute Brief. See Substitute Br. at 40-41.

As set forth in the Appellants' Substitute Brief, Appellants were prejudiced by the failure to give this instruction. The business judgment instruction did not present the same defense as the justification instruction. Rather, the justification instruction directed the jury to consider whether Appellants had a non-retaliatory reason for refusing to hire Respondent, while the proffered instruction gave additional meaning to the justification instruction and directed the jury that it must give full weight to any non-retaliatory justification and not hold a potentially unfavorable justification against Appellants in reaching its verdict. Appellants were thereby prejudiced by the failure to give this instruction and reversible error occurred.

III. RESPONSE TO RESPONDENT'S POINT III

The trial court erred in allowing Respondent to ask Appellants in the punitive damages phase of the trial whether Appellants took responsibility for the alleged wrongdoing, which violated Appellants' rights to defend themselves against the allegations

in the liability phase before a jury (Respondent did not respond to Appellants' argument that their constitutional right to a jury trial was violated. *Clark v. Ruark*, 529 S.W.3d 878, 885 (Mo. App. W.D. 2017). Respondent again endeavors to avoid error on appeal, claiming that Appellants purportedly failed to preserve the issue at trial. But as demonstrated in Appellants objected at trial to Respondent's questioning on the grounds that it was "highly prejudicial." TR 946-47. Respondent's attempt to prejudice the jury against Appellants for embracing their right to trial by jury as purportedly failing to take responsibility for their alleged conduct runs afoul of settled law.

Respondent contends that his questions were relevant to punitive damages because they were intended to elicit evidence concerning Appellants' remorse for their alleged conduct. The principal case relied on by Gentry is *Boshears v. Saint-Gobain Clamar, Inc.*, 272 S.W.3d 215 (Mo. App. W.D. 2008), does not support Plaintiff's argument. In *Boshears*, plaintiff asked a corporate representative of the defendant "if he would let [an employee] do this [allegedly wrongful action] again tomorrow." The court ruled that these questions would be relevant to punitive damages and more particularly to "conscious disregard," and referred to *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155 (Mo. App.1997), stating "[a]ctions subsequent to those for which damages are sought may be relevant and 'admissible under an issue of exemplary damages if so connected with the particular acts as tending to show defendant's disposition, intention, or motive in the commission of the particular acts for which damages are claimed.'" *Id.* at 174 (citation omitted). *Boshears* does not provide a basis for Plaintiff to seek an admission of wrongdoing from the defendant in the punitive damages phase of a case or an agreement

with the initial jury verdict as a basis to argue enhanced punishment for refusing to so admit.

Likewise, the case of *Lewellen v.* Franklin, 441 S.W.3d 136, 147-148 (Mo. 2014), is inapposite. *Lewellen* concerned "bait and switch practices" not limited to the plaintiff's underlying allegations. While this Honorable Court noted that the defendant "showed no remorse or effort to rectify the consequences of his unlawful practices," the Court referenced only the defendant's widespread "unlawful practices" and that the defendant failed to respond to discovery requests in the case, resulting in sanctions. . This Court's recognition of remorse in the context of ubiquitous wrongdoing and abuse of litigation is a far cry from penalizing a defendant for exercising its constitutional right to a jury in defending against the plaintiff's lawsuit.

By overruling the Defendants' objection, the trial court abused its discretion in allowing Plaintiff to unfairly and unconstitutionally introduce evidence designed simply to punish Defendants for exercising their constitutional rights to trial by jury.

IV. RESPONSE TO RESPONDENT'S POINT IV

For the reasons set forth above in Section III, the trial court abused its discretion in allowing Respondent to argue to the jury in closing that it should penalize Appellants because they failed to acknowledge responsibility for retaliation. Respondent predictably claims that Appellants failed to preserve the issue on appeal, but to no avail. As set forth in Appellants' Brief, Appellants objected during the punitive damage phase to Respondent's questioning regarding Appellants' purported failure to acknowledge

responsibility. TR 946-947. As stated in Appellants' Brief (Appellants' Substitute Br. at 48), once that objection was overruled there was no need to further object during closing argument. See *Hammer v. Waterhouse*, 895 S.W.2d 95, 106 (Mo. App. W.D. 1995) (repeated objections do not need to be made to similar evidence or similar line of questioning when proper objection was raised initially and overruled).

Gentry did not respond at all to Appellants' assertion that their constitutional right to a jury trial was violated by the closing argument of Gentry's counsel. See in this regard *Clark v. Ruark*, 529 S.W.3d 878, 885 (Mo. App. W.D. 2017) (plain error occurred when a party was denied his right to a jury trial in a civil case).

V. RESPONSE TO RESPONDENT'S POINT V

Appellants are entitled to judgment as a matter of law on Respondent's claims for punitive damages because Respondent failed in his petition to separately state the amount of punitive damages sought to be recovered as required under Missouri law.

Respondent again seeks to avoid the issue on appeal, claiming that Appellants failed to preserve the issue. Appellants raised this purely legal issue in their Motion for Judgment Notwithstanding the Verdict, to Amend Judgment and for a New Trial. In *City of Greenwood v. Martin Marietta Materials, Inc.*, 299 S.W.3d 606 (Mo. App. W.D. 2009), the court held that the failure to raise sufficiency of the Petition before the trial does not constitute waiver. *Id.* at 615. Moreover, the trial court has no discretion in ruling a matter of law in a motion for new trial. *Ivy v. Hawk*, 878 S.W.2d 440-442 (Mo. en banc 1994).Appellants preserved this issue because it was presented to the trial court in the

Motion for New Trial as well as the Motion for Judgment Notwithstanding the Verdict, or to Amend the Judgment and for New Trial. See also Rule 84.13(a).

Even if, however, this Court finds that the matter was not presented to the trial court, it is clear that this Court should reverse the trial court's judgment under the plain error rule, see Missouri Supreme Court Rule 84.13(c).

Respondent's overly-technical reading of the Missouri Supreme Court Rules fails to trump Missouri Statute's clear requirement that "[i]n actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered." RSMo § 509.200. While Missouri Supreme Court Rules may trump inconsistent provisions of the Missouri statutes, Respondent has failed to demonstrate conclusively that the Missouri Supreme Court Rules even apply to his action. The Missouri Supreme Court Rules exempt only tort actions from the pleading requirement. Rule 55.19. Simply because that claims under the Missouri Human Rights Act may be construed as "analogous" to tort claims is insufficient to trigger the Missouri Supreme Court Rules exception from Missouri statute's specific pleading requirements. *Compare State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 87 (Mo. 2003) (stating that a MHRA case is analogous to a tort in the context of whether a guarantee of a jury trial exists); *Soto v. Costco*, 502 S.W.3d 38, 57 (Mo. App. W.D. 2016) (holding that the tort interest rate applied to MHRA); *Bowolak v. Mercy East Communities*, 452 S.W.3d 688, 704 (Mo. App. E.D. 2014) (MHRA case "analogous" to a tort for purposes of statutory interest rate on a judgment).

Even if Respondent was correct that Missouri Supreme Court Rules trump the Missouri Statute, the Rules require Respondent to include in his complaint a prayer for damages that are fair and reasonable. Respondent failed entirely to allege damages that were "fair and reasonable." Gentry has failed to meet the requirements under Missouri Supreme Court Rules 55.19 and 55.05 and §509.200 RSMo. The cases cited by Respondent in his response are inapposite. In *Davis v. Chatter, Inc.*, 270 S.W.3d 471, 481 (Mo. App. W.D. 2008), the plaintiffs sought punitive damages under a count in the petition for tortious inference with a contract, and the court simply held that no specific dollar amount for punitive damages had to be pled. That decision has no bearing on Respondent's failure to plead "fair and reasonable" damages in his complaint, which, by Respondent's own admission, is an express requirement of the Missouri Supreme Court Rules.

VI. RESPONSE TO RESPONDENT'S POINT VI

Respondent erroneously claims that the error asserted in Point VI was not preserved with regard to the verdict directing instructions submitted on Defendants' failure to interview. Appellants specifically objected to Respondent's instructions (TR 853-854; 859) and offered their own instructions, which did not contain the wording "failure to interview." Substitute Brief at pp. 55-62. Appellants objected that "we do not believe there has been two causes of harm." TR 857.

The transcript clearly reflects that Respondent's only evidence of damages was that he felt "hurt and betrayed." As the court of appeals recognized in *Biggs v. Missouri*

Commission on Human Rights, 830 S.W.2d 512 (Mo. App. E.D. 1992), mere "distress" is not sufficient evidence to support a claim of emotional distress damage for failure to interview. *Id.* at 516.

The principal cases cited by Respondent on this point are inapposite. In *Keeney v. Hereford Concrete Products, Inc.*, 911 S.W.3d 622, 625-26 (Mo. 1995), the court stated only that a person claiming retaliation under the MHRA must suffer "damages" due to an act of reprisal without stating what was meant by "damages." In *Mignone v. Missouri Department of Corrections*, 546 S.W.3d 23, 36-37 (Mo. App. W.D. 2018), there was testimony not just that a transfer to a more dangerous assignment was "stressful" but also that a log entry made her feel "degraded like no other;" she also presented testimony from a clinical social worker that to a reasonable degree of medical certainty she suffered "emotional distress." Plaintiff presented no such testimony.

VII. RESPONSE TO RESPONDENT'S POINT VII

Respondent's argument in opposition to Appellants' position asserted in Point VII of the Substitute Brief is neither persuasive nor consistent with the facts of the case or Missouri law for the following reasons:

A. The defense was properly pled.

Appellants pled the affirmative defense of failure to mitigate damages in a manner consistent with and required by the Missouri Rules of Procedure and Missouri cases in Appellants' original answer and in its First and Second Amended Answer. Defendants set

out a short, plain statement of ultimate fact both hypothesizing failure to mitigate damages consistent with MAI 32.29.

Because the Appellants have thoroughly addressed the issue of whether Appellants pled a short, plain statement of ultimate fact sufficient to establish the affirmative defense of failure to mitigate damages in the Substitute Brief, Appellants will not, in this Reply Brief, restate its argument. Rather, Appellants merely urge that the only way a party can plead the mitigation of damages affirmative defense is to recite the dicta in *Stewart v. Board of Education of Ritenour Consol. School District R-3*, 630 S.W.2d 130 (Mo. App. 1982) is neither an accurate statement of Missouri law nor persuasive. Appellants respectfully suggest that it is not now and never has been the law of Missouri that, in order for a party to plead claims or defense with reasonable specificity a party must plead every evidentiary or ultimate fact to establish a claim or defense.

B. Plaintiff failed to file a motion to make more definite and certain.

Appellants pled in its original Answer, its First Amended Answer and again in their Second Amended Answer the "fact" that Plaintiff failed to even "actively seek," much less accept, employment sufficient to offset his alleged damages. Certainly, had Respondent believed that the short plain statement of fact, to-wit: "Mr. Gentry did not actively seek and gain subsequent employment sufficient to offset any alleged damages" was confusing and/or insufficient, Respondent should have filed a Motion to make more definite and certain. Indeed, this Honorable Court had held that a party waives a right to complain of a failure to plead adequately an affirmative defense by failing to file a motion to make more

definite and certain. *State ex rel. Harvey v. Wells*, 955 S.W.2d 546, 547 (1997). Instead, after all discovery had concluded, during which time Respondent had a full opportunity to have inquired of Appellants as to the factual basis for the affirmative defense of failure to mitigate damages, Respondent moved *in limine* to bar any evidence of the affirmative defense and the Court granted the Motion.

C. The failure to mitigate evidence was timely proffered.

Respondent's principal argument is that Appellants were not entitled to the proffered failure to mitigate damages instruction because, after the trial court granted the Motion *in Limine* and excluded evidence of Respondent's failure to mitigate his damages, Respondent did not preserve its objection to the Court's granted Motion *in Limine* by timely and properly proffering the evidence Appellants would have presented to establish failure to mitigate damages. (Respondent's Substitute Br. at 62-67.) While Respondent correctly cites Missouri law, here, Appellants made a timely detailed proffer of the evidence of failure to mitigate damages:

The record clearly establishes that after the jury had been selected, Appellants proffered their evidence of failure to mitigate precisely when the trial court invited Appellants to do so. The Court noted that Defendant had made a request to make an offer of proof or additional argument regarding the Court's pre-trial grant of Motion *in Limine* precluding evidence of failure to mitigate damages, stating "[t]he Court sustained the motion *in limine* and the defense would like an opportunity to make an offer of proof in that regard. So, Mr. [Appellants' counsel]?" Appellants counsel then made its proffer of

the overwhelming evidence demonstrating that Respondent failed entirely to mitigate his damages.

In responding to Appellants' argument to this effect in its Substitute Brief, Respondent asserts two cases, neither of which constitutes a holding supporting Respondent's argument that in order to preserve an issue for appeal, a proffer must be presented during the evidentiary phase of the trial. Respondent cites to this Honorable Court's holding in *Hancock v. Shook*, 100 S.W.3d 786 (Mo. 2003), and in *Smith v. Brown & Williamson Tobacco Corp*, 410 S.W.3d 623, 636. In *Shook*, this Court rejected an argument that a motion *in limine* should have been denied, reasoning that the appellant failed to preserve his argument during motions in limine because he "did not attempt to present the excluded evidence at trial or make an offer of proof." 100 S.W.3d at 802; *see also Brown & Williamson*, 410 S.W.3d at 636 (same).

Neither *Shook* nor *Brown & Williamson* have any application here because, not only did Appellant make a very specific offer of proof, both of testimonial evidence and documentary evidence that Appellants sought to present but, further, did so during trial precisely when the offer of proof was requested by the Court.

D. The Defendants tendered instruction (A23; TR 868-870) was proper.

In this case, any suggestion that Appellants did not properly and timely proffer the evidence is wholly without merit. That being the case, the Appellants' argument that the failure to mitigate damages instruction tendered by Appellants was either an incorrect statement of the law or would not have been supported by reasonably sufficient evidence

but for the Court's exclusion of the evidence Appellants proffered is neither persuasive nor supported by the Record on Appeal or governing case law. Moreover, the argument that the tendered instruction did not state any facts in ¶¶ Second and Third under MAI 32.29 is incorrect. By its terms, MAI 32.29 only requires the facts to be set forth in ¶ First.

E. Mitigation of damages is an affirmative defense under MHRA.

Gentry waived the argument that there was no affirmative defense in this regard because he never raised it in the trial court.

Gentry, nonetheless, asserts that neither the MHRA nor the regulations issued thereunder specifically provide for an affirmative defense of mitigation of damages. Substitute Brief at p. 64, citing *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 767 (Mo. App. E.D. 1999). The *Pollock* case referenced the MHRA and regulations issued thereunder. However, a review of the regulations issued under the MHRA (8 CSR 60-3.010, et seq.), does, in fact, provide for certain affirmative defenses in other contexts. See 8 CSR 60-3.020(2); 8 CSR 60-3.040(16); 8 CSR 60-3.060(1)(F)(3) and 8 CSR 60-3.080(7). In other instances, the regulations specifically prohibit an affirmative defense. See, e.g., 8 CSR 60-3.040(17)(D)(2). The regulations specifically do not address one way or another whether mitigation of damages is an affirmative defense under the MHRA. In *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919, 926-927 (Mo. App. S.D. 2012), the court assumed without deciding that there was an affirmative defense of "direct threat." (CF MAI 38.01(A) (Note on Use 4) (committee takes no position as to the availability of

affirmative defenses in Missouri human rights cases, citing *Wells v. Lester E. Cox Medical Centers*).

Thus, mitigation of damages is an affirmative defense under the MHRA.

Certainly, in a case where the evidence of emotional distress was extremely scant and the actual damages awarded matched almost exactly with the "backpay" to which Respondent's economist testified, any argument that error in failing to admit the evidence of failure to mitigate damages and in rejecting the tendered failure to mitigate instruction would not reasonably have affected the ultimate damages verdict would be wholly without merit and contrary to both law and common sense.

Accordingly, under the legal authorities cited by Appellants in its Substitute Brie\f as well as the arguments and authorities cited in this Reply Brief, Appellants respectfully urges that the trial court's error as set out in Point VII in the Substitute Brief is reversible error requiring remand of the matter to the trial court for new trial.

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; (2) Appellants also request this Honorable Court to grant a new trial on the liability and/or damages and, alternatively, the punitive damage phases of the trial; or (3) if this Court vacates either the compensatory damages or punitive damages judgments, 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.

WYRSCH HOBBS MIRAKIAN, P.C.

/s/ James R. Wyrsch

James R. Wyrsch MO #20730
One Kansas City Place
1200 Main Street, Suite 2110
Kansas City, MO 64105
Phone: 816-221-0080
Fax: 816-221-3280
jimwyrsch@whmlaw.net
ATTORNEYS FOR APPELLANT

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 7,682 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

James R. Wyrsch

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Subscribed and sworn to before me this 5th day of August, 2019.

Renee Ising

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 5th day of August, 2019, to:

ATTORNEY FOR RESPONDENT.

/s/ James R. Wyrsch
ATTORNEYS FOR APPELLANT