IN THE SUPREME COURT OF MISSOURI

SC97712

J.L. WILSON,

Respondent/Plaintiff,

v.

CITY OF KANSAS CITY, MISSOURI,

Appellant/Defendant.

ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
Hon. Robert M. Schieber and Hon. Charles H. Mckenzie, Circuit Judges
Circuit Court Case No. 1416-cv23151

SUBSTITUTE BRIEF OF RESPONDENT J.L. WILSON

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I. APPELLANT'S POINT I – THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED THE JURY TO HEAR ORAL TESTIMONY AND ARGUMENT RELATED TO THE DISABILITY RATING DR. DIVELBISS ASSIGNED TO RESPONDENT BECAUSE THAT EVIDENCE WAS RELEVANT, IN THAT IT SUPPORTED BOTH RESPONDENT'S CLAIMS THAT HE HAD A DISABILITY UNDER THE MHRA AND FOR PUNITIVE DAMAGES.

The trial Court did not err when it denied Appellant's motion in limine and motion for new trial regarding oral testimony and arguments relating to the disability rating Dr. Divelbiss gave Respondent. The relevance of such evidence outweighed the remote possibility of prejudice.

a. Standard of Review and Preservation of Error

The admissibility of evidence "lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Howard v. City of Kansas City*, 332 S.W.3d 772, 786 (Mo. banc 2011) (quoting *Mitchell v. Kardesch*, 313 S.W.3d 667, 674-75 (Mo. banc 2010)). A trial court decision about the admissibility of evidence "is reviewed for an abuse of discretion" and:

> A trial court abuses its discretion only if its decision to admit or exclude evidence is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.

State v. Blurton, 484 S.W.3d 758, 769 (Mo. banc 2016) (internal quotations omitted). Moreover, "[f]or evidentiary error to cause reversal, prejudice must be demonstrated." *Mitchell*, 313 S.W.3d at 675 (quoting *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009).

Appellant avers, without citing any authority, that it "preserved this error for appeal" by filing a motion in limine, by requesting a continuing objection, and by filing a motion for new trial. (Appellant's Substitute Brief [hereinafter "App. Sub. Brief"], 21). Respondent does not dispute that Appellant has preserved its objection to the admission of the evidence, but it has not preserved any objection to the jury instructions or the way in which Respondent argued about the evidence.

b. While not identical to the definition of disability under the MHRA, the standard for permanent partial disability under the Worker's Compensation Law is relevant to that analysis.

Appellant's entire argument in Point I rests on the difference between the definition of disability under the Missouri Human Rights Act ("MHRA") and the standard for a permanent partial disability under the Worker's Compensation Law. While the two definitions are different, the fact of Respondent's permanent partial disability is relevant to the issue of whether he was disabled under the MHRA.

The MHRA's definition of disability applicable to this case is "a physical . . . impairment which substantially limits one or more of a person's major life activities . . . which with or without reasonable accommodation does not interfere with performing the job." RSMo. § 213.010(4) (2016). Disability under the Worker's Compensation Law is different. First, the law has no overall definition of the term "disability." Relevant to this matter, a "[p]ermanent partial disability" is "a disability that is permanent in nature and partial in degree." RSMo. § 287.190.6(1). It includes injuries such as "loss by severance, total loss of use, or proportionate loss of use of" certain body parts, including arms, legs, hands, and feet. RSMo. § 287.190.1. The section on permanent partial disabilities also

allows compensation for other "permanent injuries causing a loss of earning power." RSMo. § 287.190.3. A permanent partial disability is an injury to a body part that renders the injured person partially or fully unable to use that part, or that prevents economic activity by the person injured.

Because of this difference, Appellant claims that in the context of an MHRA claim for disability, the "workers' compensation disability determination" is "irrelevant." (App. Sub. Brief, 25). However, the determination (and the fact of Appellant having received it) is relevant to the issues in the case, even if the two standards are not identical.

Under Missouri law, a trial court considering the admissibility of evidence engages in a two-part test, analyzing both logical and legal relevance. "Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case." *State v. Tisius*, 92 S.W.3d 751, 760 (Mo. banc 2002). The legal relevance analysis requires the trial court to balance "the probative value of the proffered evidence against its prejudicial effect on the jury." *Id.*

1. The fact of Respondent's permanent partial disability and his rating are relevant to his disability under the MHRA.

Although the two standards are different, the fact of Respondent's permanent partial disability is logically relevant to the issue of whether or not he has a disability under the MHRA. As stated above, at issue is whether the physical impairment substantially limits at least one major life activity. In this case, Respondent's physical

impairment—his epicondylitis—is also his injury that proportionally reduced the use of his arm. Thus, Dr. Divelbiss' evaluation of the degree of that limitation is relevant.

The proportional extent to which Respondent's epicondylitis restricts his ability to use his arm is relevant because it tends to make more (or, one could argue, less) probable the highly relevant fact that Respondent was substantially limits one or more major life activities. And, indeed, Appellant effectively conceded this point, arguing that fifteen percent was not substantial in its closing argument. (Transcript, 750:20-751:3). Respondent argued it was. (*Id.*, 773:10-16). Clearly, the rating is probative of a highly relevant fact, and therefore logically relevant.

While medical testimony or expert opinions regarding a condition are not necessary to demonstrate that a plaintiff is disabled under the MHRA, such evidence is clearly not only relevant but persuasive.

It is also relevant that the condition was permanent. Jury Instruction 7 informed the jury that a "[m]inor temporary illnesses shall not be considered physical or mental impairments resulting in a disability" (D56 p.15, RA15). The fact that Dr. Divelbiss rated Respondent as having a permanent partial disability meant the impairment was "permanent in nature." RSMo. § 287.190.6(1). Thus, the "permanent" part of the rating is also logically relevant.

Appellant has cited no authority supporting its claim that a rating of a permanent partial disability is not probative of disability under the MHRA. The closest authority Respondent has found on the issue appears to hold the opposite. In *Bowolak v. Mercy East Communities*, a settlement that reflected a "permanent partial disability" was

considered to be "sufficient evidence to allow the jury to find that [plaintiff] had an actual impairment." 452 S.W.3d 688, 696 (Mo. App. E.D. 2014). While a settlement is not the same as a doctor's rating, a worker's compensation settlement must be approved by an administrative law judge. RSMo. § 287.390.1. It constitutes an adjudication of a kind. Furthermore, the opinion makes clear that because of the settlement, "the jury was aware that Bowolak's 2002 injury resulted in a 32 percent permanent partial disability." *Bowolak*, 452 S.W.3d at 703. Unlike the rating, the monetary amount of the settlement had "no probative value," and the appellate court upheld the lower court's redaction of the dollar figure. *Id.* Additionally, the court found that the disability rating constituted a "record of impairment" which constituted a disability. *Id.* at 696. Relevant authority recognizes that a rating of permanent partial disability *is* relevant to whether a plaintiff is disabled under the MHRA.

The conclusion that Respondent had a permanent partial disability, and that his restriction was at fifteen percent (15%) is probative of whether he had a disability under the MHRA, even if the standards are not identical.

2. The provision of the rating demonstrates knowledge on the part of Appellant, which is relevant to punitive damages.

In addition to the relevance of the rating itself to the key question of whether Respondent's epicondylitis substantially limited one or more major life activity, the fact that Appellant had received the disability rating as having a permanent partial disability shows the knowledge Appellant (through its agents) had of Respondent's condition, and the extent of it. That fact is relevant to issues of punitive damages.

Under the MHRA, a plaintiff can recover damages where a defendant's conduct was outrageous because of such defendant's evil motive or reckless indifference to the rights of others. *Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516, 520 (Mo. banc 2009). Part of Respondent's argument at trial was that Appellant failed to follow its own processes for determining whether Respondent should have received a reasonable accommodation, showing a reckless disregard for his rights. For example, in his closing arguments, Respondent invited the jury to "do what [Appellant] should have done" and evaluate Respondent's condition using the "three factors" that Appellant's agent Meg Conger testified she was trained to use in analyzing a condition to "see if it substantially limits one or more major life activities" and therefore requires accommodation; the factors were the "nature and severity of impairment, how long will it . . . is expected to last, and permanent or long-term impact or expected impact." (Transcript, 736:6-14). When analyzing the last factor, Respondent pointed out that the "[p]ermanent or long-term impact expected" was "Forever. Permanent partial disability. Permanent means permanent." (Transcript 738:13-15). The fact that Appellant had this knowledge, yet did not grant Respondent a reasonable accommodation, is evidence of its reckless disregard for Respondent's rights.

Despite Appellant's contentions to the contrary, the disability rating provided by Dr. Divelbiss is relevant, both to show the existence of Respondent's disability, and to show the extent of Appellant's knowledge. Thus, when weighing the probative value, the circuit court had a strong basis for finding the evidence admissible.

c. The evidence is legally relevant, and Appellant has not demonstrated any prejudice or confusion on the part of the jury.

In an analysis of legal relevance, the probative value of the evidence must be weighed against its potential prejudicial effect. "Evidence is legally relevant when the probative value of the evidence outweighs 'unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness.'" *State v. Taylor*, 466 S.W.3d 521, 528 (Mo. banc 2015) (quoting *Johnson v. State*, 406 S.W.3d 892, 902 (Mo. banc 2013)).

Appellant averred that "the principle there are separate and distinct definitions of 'disabled' would have confused the jury in this case." (Supp. App. Brief, 26). However, Appellant has failed to show that such confusion existed at all, let alone that it was so obvious that the Trial Court's failure to recognize it was an abuse of discretion. This is particularly true considering the evidence's logical relevance, discussed above, which Appellant almost entirely disregards.

Appellant cannot show any confusion on the part of the jury. The only argument it makes is that "[t]he jury heard from Dr. Divelbiss, an expert witness, who used the term 'disability' in a way that was unrelated to the ultimate issue in the case and the jury was not provided any meaningful explanation of the distinction between the two types of disability." (App. Sub. Brief, 26). This is twice inaccurate. As described above, the standards are not unrelated. Moreover, the jury was provided with more than enough explanation for them to understand the distinction. The jurors were instructed on the applicable standard for liability under the MHRA. (D56 p.14, App. 23). The jury was

further instructed in detail as to the definition of disability under the MHRA. (D56 p.15, App. 24). Were Appellant truly concerned with the jurors misunderstanding the standard, it could have proposed an instruction which clarified to the jury that there was a difference between the determination of disability made by Dr. Divelbiss and that under the MHRA. Appellant made no such request. Moreover, Appellant cannot now object to the adequacy of the jury instruction, as it had no such objection at the time.

Respondent never claimed that his rating of permanent partial disability itself meant he was disabled under the MHRA. In fact, he did just the opposite. Before even mentioning Dr. Divelbiss in her opening statement, counsel for Respondent made it clear to the jurors that in deciding whether Respondent had a disability, their "job at the end of this case is going to be to apply *the definition the Court gives you* to the facts in this case." (Transcript, 21:22-24) (emphasis added).

Following its allegation that the rating is confusing to the jury, Appellant cites three (3) cases. (App. Sub. Brief, 26-27) (citing *Hervey v. Missouri Dep't of Corrections*, 379 S.W.3d 156, 159 (Mo. banc 2012); *Switzer v. Switzer*, 373 S.W.2d 930, 939 (Mo. banc 1964); *Barr v. Plastic Surgery Consultants, Ltd.*, 760 S.W.2d 585, 588 (Mo. App. E.D. 1988)). None of these cases support Appellant's position. Two cases stand for the proposition that evidence with no probative value should not be admitted. *Switzer*, 373 S.W.2d at 939; *Barr*, 760 S.W.2d at 588. As Respondent has pointed out (and as both the court in *Bowolak* and the Court of Appeals below agreed) the evidence does have probative value. The other case Respondent cited, *Hervey*, held that the verdict director must instruct the jury to determine whether the plaintiff met the definition of disability.

379 S.W.3d at 159. Based upon that decision, Missouri Approved Instruction 38.01(B) was created. *See* Committee Comment (2016 Revision) to MAI 38.01(B), comment D. The jury was given that instruction. (*See* D56 p.14, App. 23). If anything, *Hervey* supports Respondent's argument that there could be no prejudice because the jury was properly instructed on the standard.

Appellant also claims that Respondent "made a closing argument that this disability rating conclusively proved his disability under the MHRA." (App. Sub. Brief, 27). This statement is untrue, and Appellant cites nothing to support its assertion. However, in its Statement of Facts, Appellant claimed that "Wilson's attorney argued to the jury that this workers' compensation disability rating established that Wilson was disabled for purposes of his claim under the MHRA" and citing two portions of the transcript, block quoting one of them. (*Id.*, 17-18) (citing Transcript 722:15-22; 738:8-15). However, Respondent never argued that the disability rating, by itself, conclusively proved disability under the MHRA.

In the first section quoted, Respondent made clear that the rating was "a payment rate out of work comp." (Transcript 722:19). Respondent's counsel also said "Permanent, that's pretty easy. Disability, that's pretty easy." (Transcript 722:20-21). The first sentence accurately highlighted the relevant fact (see page 11-14, *infra*) that Respondent's condition was permanent. The second, indicated that it was Respondent's condition, which his counsel had been referring to as a disability, that was permanent.

In theory, a juror might have heard this to suggest that the rating equated the MHRA definition of disability. Key to analyzing such a possibility are things such as the

tone of the statement and the broader context of the entire trial. The trial court is in a much better position to make such a judgment and is thereby vested with broad discretion on evidentiary matters. The admission of these four words certain fall well short of being clearly against the logic of the circumstances, shockingly unreasonable and arbitrary, and indicatives of a lack of careful, deliberate consideration.

In the second portion of Respondent's closing argument cited by Appellant, Respondent discussed the duration of his medical condition, pointing out that it was expected to last forever, and was identified as a "[p]ermanent partial disability" emphasizing that "[p]ermanent means permanent." (Transcript 738:14-15). Plainly, Respondent was not arguing that his rating as disabled meant he was disabled under the MHRA. Moreover, because the relevant definition includes that the condition "is permanent in nature," the rating is probative of the relevant fact that his injury is permanent, Appellant cannot claim to be prejudiced by such statement in any way. *See* RSMo. § 287.190.6(1).

Additionally, to the extent that Appellant is complaining of how Respondent argued his case (in closing arguments or elsewhere), rather than what evidence was admitted, such objection has not been preserved for appeal. Appellant's objection was only to the rating being admitted, not to what arguments Respondent made about it.

Furthermore, Appellant had the opportunity to distinguish the standards during its closing arguments. Counsel for Appellant discussed Dr. Divelbiss' testimony extensively. (Transcript 744:24-752:2). She even discussed the permanent partial disability rating.

(*Id.*, 750:18-22). Unlike counsel for Respondent, who clarified that this was a different standard, she never took the opportunity to disabuse the jury of its purported confusion.

Appellant has failed to show that the admission of the disability rating caused any confusion among the jury, and certainly not to the degree that it constitutes an abuse of discretion. Therefore, the Trial Court's judgment should be affirmed.

d. Appellant has failed to show that the purported error was prejudicial

Finally, even if the evidence were improperly admitted, and even if that constituted an abuse of discretion, the case would not be reversable because Appellant has failed to demonstrate that the error was prejudicial. Under Missouri law, an appellate court will only reverse when the party challenging the ruling show that the "error was outcome-determinative." *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 768 n.12 (Mo. banc 2011). Appellant has failed to meet this burden.

When a party fails to allege on appeal "that *had this evidence not been admitted at trial that a different result would have been reached by the jury*" it fails to meet the requirement of showing the error was prejudicial. *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 187 (Mo. App. W.D. 2012) (emphasis in original). "This alone is a basis for this Court to deny this Point Relied On." *Id.* (citing *Claus v. Intrigue Hotels, LLC*, 328 S.W.3d 777, 788 (Mo. App. W.D.2010)). Where, for example, the "plaintiffs presented voluminous evidence" on the fact issue in question that was "unrelated to" the purportedly erroneous evidence, there was no prejudice. *Id.*

Here, Appellant never directly argued that the verdict would have been different if the jury had not heard the purportedly objected to evidence. It used much less conclusive

statements, identifying only "a reasonable probability the jury used this permanent partial disability rating . . . to influence its determination that Wilson proved all elements of his claim of disability discrimination." (App. Sub. Brief, 29). It even seemed to suggest that there was a presumption of prejudice, complaining that "[a]fter the circuit court denied the City's motion *in limine* . . . there was little that occurred during the trial to lessen its prejudicial effect." (*Id.*, 28). Not only is this untrue, with the jury repeatedly being explained the proper standard, it misses the point that Appellant needs to show how the error caused the verdict against it.

Appellant argues that the evidence allowed Respondent "to unfairly discredit the City's defense that he was not a qualified individual with a disability for purposes of the MHRA." (App. Sub. Brief, 28). However, it never argues how this would have happened. Indeed, in the next sentence of its brief, Appellant quotes its closing arguments: "Is there a physical impairment here? Absolutely. The question is, is it a physical impairment that substantially limits a major life activity?" (*Id.*) (quoting Transcript 743:17-20). Nor was this the only time the jury was told what they had to decide to find Respondent had a disability. The jurors were properly instructed in the definition of disability. (D56 p. 15, App. 24). Appellant can point to no indication that the jury did not follow all these directions to apply the proper standard.

Conversely, there is a strong indication that the jury was considering the proper standard. During the trial, the jurors sent a question to the Court, asking for "further clarification of the definition . . . of substantial." (Transcript 787:21-22). The only place the word substantial (or a conjugation thereof) appears in the jury instructions is under

the definition of disability, which is "a physical or mental impai1ment which *substantially* limits one or more of a person's major life activities . . . " (Jury Instruction 7 D56 p. 15, App. 24) (emphasis added). The Instruction goes on to say that "Plaintiff is substantially limited in performing a major life activity if he is unable to perform a major life activity, or is significantly restricted as to the condition, manner, or duration under which he can perform a particular major life activity." (*Id.* at ¶ (C)). It does not, however, give any further clarification on the definition of the word "substantial[ly]." Plainly, the jurors had not been confounded into concluding that Plaintiff had a "disability" based on Dr. Divelbiss' rating but were carefully wrestling with the precise definition in the instructions. This shows the admission of the rating, if erroneous, was not prejudicial.

Additionally, Respondent presented voluminous evidence to support the claim that he had a physical condition (his epicondylitis) that substantially affected one or more of his major life activities. For example, Respondent provided the jury with Exhibit 45, which was two hundred sixty-seven (267) pages of Plaintiff's medical records showing the extent and effect of his injury. Plaintiff also testified extensively to the effect his epicondylitis had on him. (*See* Transcript, 279:8-10; 283:1-7; 289:10-16; 291:1-10; 312:17-18; 382:3-15). As in *McGuire*, Respondent cannot show the admission of the rating report was outcome determinative considering all the other evidence supporting the jury's verdict. 375 S.W.3d at 187.

Appellant cannot show that the admission of disability rating caused any confusion on the part of the jury, and therefore it cannot show such a decision was outcome determinative. The decision of the trial court should be affirmed.

e. Conclusion

Dr. Divelbiss' rating of Respondent as having a permanent partial disability of fifteen percent was both logically relevant and legally relevant. The Trial Court did not err in admitting the evidence, and clearly did not abuse its discretion. Moreover, even if the evidence was erroneously admitted, Appellant cannot show that such an admission was prejudicial. Therefore, the decision of the Trial Court should be affirmed.

II. APPELLANT'S POINT II – THE TRIAL COURT DID NOT ERR IN AWARDING RESPONDENT HIS LITIGATION EXPENSES, BECAUSE IT IS WITHIN THE DISCRETION OF THE TRIAL COURT TO CONSIDER SUCH EXPENSES COURT COSTS OR ATTORNEYS' FEES.

The trial Court did not err when it awarded Respondent his litigation expenses. Such an award has been found by the Court of Appeals to be within the circuit court's discretion when awarding attorneys' fees under the MHRA. Moreover, substantial authority also supports permitting such an award as part of attorneys' fees. Therefore, the trial court's award of such expenses was not an abuse of discretion.

a. Standard of Review and Preservation of Error

The decision to award court costs and reasonable attorney fees to the prevailing party is within the sound discretion of the trial court and should not be reversed absent a showing that the trial court abused its discretion. *Hesse v. Missouri Dep't of Corrections*, 530 S.W.3d 1, 6 (Mo. App. W.D. 2017).

Appellant avers that it has preserved its argument in Point II, that there is no statutory provision supporting the award in question. However, later in its brief, Appellant implores that this Court "must require parties and their attorneys to produce

much more detailed documentation when seeking reimbursement for any type of court costs." (App. Sub. Brief, 39 n.5). To the extent that this plea meant to be an allegation of error or a request for the Court to act in this case, such an allegation was not preserved for appeal. Appellant never claimed that it preserved the issue of whether the documentation of Respondent's request was sufficient to justify the award. Moreover, Appellant cannot include such an argument in its substitute brief, because it was not raised before the Court of Appeals. Missouri Supreme Court Rule 83.08(b).

b. The Court of Appeals has decided that awarding litigation expenses is within the discretion of a trial court.

Missouri law provides the trial court with the discretion to award litigation expenses in MHRA cases. "In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those case in which a different provision is made by law." RSMo. § 514.060. In case brought under the MHRA, trial courts "may award court costs and reasonable attorney fees to the prevailing party." RSMo. § 213.111.2. (2016). This decision "is within the sound discretion of the trial court and should not be reversed absent a showing that the trial court abused its discretion." *Riggs v. State of Missouri Dep't of Soc. Services*, 473 S.W.3d 177, 182 (Mo. App. W.D. 2015). Under these provisions, the Court of Appeals has decided that a circuit court has the discretion to award "litigation expenses" in MHRA cases. *Hesse*, 530 S.W.3d at 6. Additionally, other statutes grant courts authority to award certain other expenses. *See* RSMo. § 492.590 (providing for the awarding of deposition costs and expenses).

While this Court is not bound by the decision of the Court of Appeals, Respondent avers that the decision in *Hesse* is sound and should be adopted by this Court. As Respondent will explain below, the decision is consistent with the long-held understanding of MHRA.

c. Awarding litigation expenses is consistent with the purposes of the MHRA's fee award provision.

The award of litigation expenses is consistent with the purposes of the MHRA's fee award provision. Missouri courts follow the "American rule" that litigants generally are responsible for their own attorney fees. *Holmes v. Kansas City, Missouri Bd. of Police Commissioners*, 364 S.W.3d 615, 630 (Mo. App. W.D. 2012). The MHRA is an exception to this rule, specifically providing for attorney fees for plaintiffs prevailing in discrimination suits, including against the state and its political subdivision. *Id.* (citing *Howard*, 332 S.W.3d at 788); RSMo. § 213.111.2 (2016).

> The reasons [for permitting attorneys fees] are twofold: (1) to fully make the plaintiff "whole" by compensating her for the costs of bringing suit, and (2) to deflect that discrimination suits may result in nominal or small monetary damages.

Howard, 332 S.W.3d at 788. The MHRA "recognizes the public purpose served by litigation that vindicates the rights of those who are discriminated against." *Gilliland*, 273 S.W.3d at 523.

While the foregoing discussed the award of attorney's fees, the same reasoning applies to the award of "court costs." For a plaintiff to be made whole by "compensating her for the costs of bringing suit," *all* the costs of bringing suit—not just the cost of the attorneys' time or filing fees—must be recoverable. *See Howard*, 332 S.W.3d at 788.

Similarly, to achieve the public purpose of vindicating the interests of those discriminated against in litigation, even when the suit "may result in nominal or small damages," trial courts should have the discretion not only to award attorneys' fees, but litigation expenses as well. *Howard*, 332 S.W.3d at 788. Thus, the decision in *Hesse* to permit the trial court broad discretion in awarding trial expenses is fully consistent with the purpose of the statute's provision permitting the trial court to award fees.

d. Courts have long recognized reimbursable out-of-pocket expenses as being recoverable as Attorneys' fees

As previously explained, the Court of Appeals has found the litigation expenses at issue in this case to be recoverable as court costs (at the circuit court's discretion). *See Hesse*, 530 S.W.3d at 6. Before the Court of Appeals, this settled the matter. That court has recognized that it "is bound by the doctrine of stare decisis" which "directs that, once a court has laid down a principle of law" it must "adhere to that principle, and apply it to all future cases" in which "the facts are substantially the same." *Hinkle v. AB Dick Co.*, 435 S.W.3d 685, 688 (Mo. App. W.D. 2014) (internal quotations omitted). Thus, the decision in *Hesse* stood "as authoritative precedent unless and until it is overruled." *Id.*

However, this Court is not so bound. It is "the highest court in the state" and its decisions are "controlling in all other courts," not the other way around. Mo. Const. Art. V § 2. The Court is free to "agree with the holding of the court of appeals" in a previous case and follow its reasoning. *See Lester v. Sayles*, 850 S.W.2d 858, 871 (Mo. banc 1993) (agreeing with *Larabee v. Washington*, 793 S.W.2d 357, 359-60 (Mo. App. W.D. 1990). However, it is "not bound to follow the court of appeals" rulings, such as the

"interpretation of" a statute, and is "free to determine that the court of appeals' interpretation was erroneous." *State v. Severe*, 307 S.W.3d 640, 648-49 (Mo. banc 2010) (Breckenridge, J. dissenting). Thus, while Respondent requests the Court follow the Court of Appeals' ruling in *Hesse*, he acknowledges that it is not bound to do so.

1. Respondent's reimbursable out-of-pocket expenses are recoverable as attorneys' fees

Even if this Court declines to follow *Hesse*, it should nevertheless uphold the circuit court's judgment. Although the trial court designated the award as Litigation Expenses (D86 p. 3 ¶ D), "this Court will affirm on any ground that supports the circuit court's judgment, regardless of the grounds on which the circuit court relied." *Stanley v. State*, 420 S.W.3d 532, 543 n.9 (Mo. banc 2014) (citing *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006)); *see also*, *Lough v. Rolla Women's Clinic*, 866 S.W.2d 851, 852 (Mo. banc 1993) (citing *Swink v. Swink*, 367 S.W.2d 575, 578 (Mo. 1963)). Those out-of-pocket expenses not traditionally considered court costs have long been recoverable as attorneys' fees (where, as here, there is an applicable an exception to the American Rule).

Federal Courts have long held that the provision of federal law providing for the award of "a reasonable attorneys' fee" in civil rights cases allows for the award of "reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee paying client." *Sturgill v. United Parcel Service, Inc.*, 512 F. 3d 1024 (8th Cir. 2008) (citing 42 U.S.C. § 2000e-5(k); *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 529 (5th Cir.2001)). This approach has even approved by the United States Supreme Court, in addition to multiple Federal Circuits. *See West Virginia Univ.*

Hospitals, Inc. v. Casey, 499 U.S. 83, 87 n.3 (1991) (citing *Northcross v. Board of Ed. of Memphis Schools*, 611 F. 2d 624, 639 (6th Cir. 1979); *see also United States Football League v. National Football League*, 887 F.2d 408, 416 (2nd Cir. 1989).

"In deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination caselaw that is consistent with Missouri law." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007). As explained above, this interpretation is consistent with Missouri Court's understanding of the MHRA's fee shifting provisions. Thus, this Court should adopt the federal approach and permit such out-of-pocket expenses to be taxed as attorneys' fees, at least in MHRA cases.

Nor is this view entirely limited to federal cases. The Missouri Court of Appeals upheld an award for a bill which included "out-of-pocket expenses" under a statute that provided for the payment of "a reasonable fee" for an attorney replacing in a prosecution an interested district attorney. *State v. Van Black*, 715 S.W.2d 568, 570 (Mo. App. S.D. 1986) (citing RSMo. § 56.130). In analyzing the propriety of an attorneys' fee award, the Court of Appeals compared the amount given to both the actual fees and the "out-of-pocket litigation expenses." *See Alongi v. Alongi*, 72 S.W.3d 592, 596-97 (Mo. App. W.D. 2002) ("Wife incurred total attorney fees . . . of $36,656 plus out-of-pocket litigation expenses of $17,141.85. The court's award of $18,000 is less than half of Wife's fees and less than one-third of her expenses"). Thus, Missouri courts have at least considered some out-of-pocket expenses reimbursable as attorneys' fees.

Therefore, to the extent not includable as "court costs," Respondent's "Litigation Expenses" granted by the Court that are reimbursable out-of-pocket expenses were within the circuit court's discretion to grant as part of an award of attorneys' fees.

2. This argument is not barred by Rule 83.08(b)

Respondent anticipates that Appellant will claim that this argument should be struck because it was not made before the Court of Appeals. A substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." Missouri Supreme Court Rule 83.08(b). However, this Court's decisions applying the rule make clear that it applies to new claims of error, i.e. new claims about why the conduct of the trial court was improper, rather than new legal arguments. *See*, *e.g.*, *Sun Aviation v. L-3 Communications*, 533 S.W.3d 720, 730 n. 8 (Mo. banc 2017); *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 629-30 (Mo. banc 2014). The Rule "does not prohibit a party filing a substitute brief with this Court from improving the brief with more detailed legal analysis than that articulated below." *Cox v. Kansas City Chiefs Football Club*, 473 S.W.3d 107, 114 n.4 (Mo. banc 2015). Additionally, Respondent's review of the case law on this matter has never found the rule being applied against an argument made by a respondent, only against appellants' new claims. *See*, *Sun Aviation*, 533 S.W.3d at 730 n. 8; *State v. Bazell*, 497 S.W.3d 263, 267 n.4 (Mo. banc 2016); *J.A.R.*, 426 S.W.3d at 629-30. While the rule is not expressly restricted to appellants, this emphasizes that it is new claims of error, not new arguments of law, that the rule is meant to prohibit.

Finally, even if Rule 83.08(b) could apply to Respondent's argument, this Court should decline to do so. This Court decided not to apply Rule 83.08(b) where briefs

before the Court of Appeals were expedited. *State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 691 n.2 (Mo. banc 2005). Respondent declined to make this argument before the Court of Appeals because such argument was foreclosed by the doctrine of stare decisis (see above). Respondent made this argument in his Suggestions in Opposition before the trial court. (D67 p. 14) (citing *Neufeld v. Searle Laboratories*, 884 F.2d 335, 342 (8th Cir. 1989); *Laffey v. Northwest Airlines, Inc*., 746 F.2d 4, 30 (D.C. Cir. 1984). Those were filed on May 19, 2017. (D67 p. 1). The Missouri Court of Appeals decided *Hesse* on September 19, 2019. 530 S.W.3d 1. Respondent's Brief was filed in the Court of Appeals on October 1, 2018, citing *Hesse* and arguing that it controlled under the doctrine of stare decision. (Respondents Brief, 38-43). Respondent could not reasonably argue that *Hesse* was incorrectly decided, and that some or all of the costs in question were permissible as attorneys' fees, rather than court costs.

In *Zobel*, this Court decided to allow the Appellant's point relied on despite the fact that "the decision to abandon the arguments presented to the circuit court and the court of appeals . . . runs afoul of the premise of orderly litigation that underlies the rule" 167 S.W.3d at 691 n.2. Here, Respondent did not abandon his argument; instead, he has made it before each court in which it was viable. Because Respondent's argument that these expenses are includable in the calculation of attorneys' fees as reimbursable out-of-pocket costs does not run afoul of Rule 83.08(b), this Court should consider it.

If this Court does not opt to follow the Court of Appeal's decision in *Hesse* that it is within the trial court's discretion to include all the expenses at issue as court cost, it

should follow the long held view that they are instead includable as reimbursable out-of-pocket expenses that can be included in an award of attorneys' fees.

e. Appellant's arguments are wholly unpersuasive

Appellant has made several arguments in support of its position that the circuit court's award of Respondent's litigation expenses is not permitted as court costs under the MHRA. However, when examined considering the relevant authority, none of these arguments persuasively support Appellant's Point II.

1. As a remedial statute, the MHRA should be interpreted broadly, not narrowly

First, Appellant cites a number of cases for the proposition that any award of court costs must be arise from a statute, and that "[s]tatutes allowing the taxation of costs are strictly construed." (App. Sub. Brief, 33) (citing, e.g., *State v. Richey*, 569 S.W.3d 420, 423 (Mo. banc 2019)). Here, the fees in question do arise from a statute, the MHRA. *See* RSMo. § 213.111.1 (2016). Moreover, the cases holding that cost statutes be narrowly construed were not referring to the MHRA. The MHRA is a remedial statute. *Lampley v. Missouri Commission on Human Rights*, 570 S.W.3d 16, 23 (Mo. banc 2019) (citing *Howard*, 332 S.W.3d at 779). "Remedial statutes . . . are construed broadly to effectuate the statute's purpose." *Tolentino v. Starwood Hotels & Resorts*, 437 S.W.3d 754, 761 (Mo. banc 2014). Thus, while other costs statutes might be narrowly construed, the MHRA should be broadly construed, and Appellant's arguments are without merit.

2. The canons of statutory construction support Respondent's definition of "court costs"

Next, Appellant acknowledges that "the term 'court costs' . . . is not defined by the MHRA," but avers that the "tools of statutory interpretation demonstrate the legislature did not intend to allow a prevailing party to recover its litigation expenses in an action under the MRHA." (App. Sub. Brief, 35). Ironically, one of the canons of statutory interpretation that Appellant cites is the principle that "[t]he legislature is presumed to have intended *every word, provision, sentence, and clause* in a statute to be given effect." (*Id.*) (citing *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018)) (emphasis in App. Sub. Brief). Despite this, Appellant argues that the "court costs" awarded in section 213.111 are nothing more than those available to any prevailing party under Missouri statutes. If that were the case, the inclusion of that term in that statute would have no effect, as those costs would be awarded merely by the fact of there being a private cause of action. The canon's of construction support Respondent's interpretation of the statute, not Appellant's.

3. The definition of court costs in RSMo. § 488.010 is inapplicable to the MHRA

Appellant avers that "Section 488.010 [of the Missouri Revised Statutes] provides the definition of court costs that should be applied in this case." (App. Sub. Brief, 36). However, it gives no reason why this should be the case. The section itself makes clear that the definition only applies "[a]s used in sections 488.010 to 488.020[] and section 488.005[]." RSMo. § 488.010. Additionally, where other statutes were written using that definition of the term "court costs," they expressly say so. *See* RSMo. § 143.782(2);

RSMo. § 506.363. There is no reason for this Court to apply the definition in section 488.010 to the MHRA.

4. Definitions in other statutes do not show that the MHRA excludes litigation expenses

Next, Appellant avers that "[i]f the Missouri legislature had intended litigation expenses to be included within a prevailing party's recovery under the MHRA, it would have used different, and more expansive, language." (App. Sub. Brief, 37). In support of this proposition, it cites several statutes which either expressly permit the award of something defined as "litigation expenses" or expressly provide for a more expansive recovery. (*Id.* at 37-38) (citing, *e.g.*, RSMo. § 136.315; RSMo. § 407.130; RSMo. § 448.3-111). While Appellant cites the existence of these statutes, it fails to cite any case law supporting its conclusion.

In other contexts, it may be advisable to look to different statutes for the meaning of undefined terms; however, the Court should not do so here. Unlike other terms of art, the phrase "court costs" appears hundreds of times within Missouri's statutes, and has different meanings in different places. *Compare* RSMo. § 479.350 ("costs, fees, or surcharges which are retained by a county, city, town, or village upon a finding of guilty or plea of guilty") *with* RSMo. § 488.010(1) ("the total of fees, miscellaneous charges and surcharges, imposed in a particular case"). More importantly, the Missouri legislature specifically stated that "[t]he provisions of" the MHRA "shall be construed to accomplish the purposes thereof and any law inconsistent with any provision of this chapter shall not

apply." RSMo. § 213.101 (2016). Thus, it is clear the legislature did not intend the MHRA to be limited by other statutes that were inconsistent with its remedial purpose.

Additionally, the specific examples cited by Appellant are unpersuasive. For example, Appellant cites a statute applicable to tax cases. (App. Sub. Brief, 37) (citing RSMo. § 136.315). The legislature provides, in a narrow set of circumstances, for certain taxpayers to recover their costs and attorneys' fees in administrative and judicial proceedings involving tax enforcement. In that statute, the legislature chose to set those limitation by using one-off definitions for terms. For example, the statute limits those who can so recover by defining "party" as "a natural person or sole proprietorship with a Missouri adjusted gross income of less than seventy-five thousand dollars in each of the two taxable years preceding the date of filing . . ." RSMo. § 136.315.1(1). Similarly, the statute defines "reasonable litigation expenses" as "those actual expenses, not in excess of ten thousand dollars, that the administrative hearing commission or court finds were reasonably incurred . . ." RSMo. § 136.315.1(4). The obvious reason the MHRA does not have similar language is that the legislature intended no such limitation on the recovery of costs. Appellant's claim that it shows the legislature did not intend parties to be able to recover costs under the MHRA is unpersuasive.

Appellant also cites to a provision of "the Uniform Condominium Act" which "permits a condominium association to recover 'all litigation expenses, including reasonable attorney's fees.'" (App. Sub. Brief, 37) (citing RSMo. § 448.3-111) (emphasis removed). Again, it is entirely unconvincing to say that the legislature's use of this

language here shows a lack of intent elsewhere, when (as Appellant acknowledges), this provision is part of a uniform law, and the wording was imported directly into the statute.

Still another statute cited by Appellant supports Respondent's position. Appellant points to a statute that applies to certain actions under the Missouri Merchandising Practice Act (MMPA) brought by the attorney general. (App. Sub. Brief, 37) (RSMo. § 407.130). The title of that section is "Assessment of court costs" and it permits the attorney general to "recover as costs, in addition to *normal court costs*, the cost of the investigation and prosecution of any action to enforce the provisions of this chapter." (RSMo. § 407.130) (emphasis added). The statute refers to what the attorney general can recover the both as "court costs" (in the title) and as "costs" (in the section) and distinguishes both from "normal court costs." Like the MHRA, the MMPA is a remedial statute. *Antle v. Reynolds*, 15 S.W.3d 762, 766 (Mo. App. W.D. 2000) (citing *Hagan v. Dir. of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998)). Thus, if the Court is going to adopt any definition of "court costs" from another statute, it should use the one in the title of Section 407.130.

Appellant has failed to make any persuasive argument that this Court should reject the approach of the circuit court, of the Court of Appeals, and of many federal courts, and ignore the well settled precedent that the MHRA is a remedial statute that should be broadly interpreted.

f. Conclusion

The Court of Appeals addressed this question in *Hesse*, and its decision is consistent with both the purpose of the MHRA and well-established case law. It was not

an abuse of discretion for the trial court to award litigation expenses. Therefore, the trial court's amended judgment awarding such expenses should be affirmed.

CONCLUSION

Respondent J.L. Wilson respectfully requests this Court affirm the judgment of the circuit court on all claims, award Respondent his attorneys' fees on appeal, and remand with leave for Respondent to request the judgment be again amended to reflect additional attorneys' fees related to the appeal.

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CERTIFICATE UNDER RULE 84.06(c)

I, Alexander Edelman, hereby certify that I am one of the attorneys for Respondent J.L. Wilson, and that the foregoing Brief of Respondent:

(1) Includes the information required by Rule 55.03;

(2) Complies with the limitations contained in Rule 84.06(b); and

(3) Contains eight thousand four hundred sixteen words (8,416) words.

The undersigned further certifies that the disk submitted with this Brief has been scanned for viruses and is virus-free.

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I, Alexander Edelman, hereby certify that I am one of the attorneys for Respondent J.L. Wilson, and that on the 26th day of August 2019, electronically filed the foregoing, causing it to be served upon:

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