IN THE SUPREME COURT OF MISSOURI

No. SC97712

J.L. WILSON,

Respondent,

v.

THE CITY OF KANSAS CITY, MISSOURI,

Appellant.

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

POINT I – Wilson's permanent partial disability rating in the workers' compensation context was not relevant to his claim of disability discrimination under the Missouri Human Rights Act

In addressing the City's Point I in his Substitute Brief, Wilson makes a number of arguments that have nothing to do with the City's contentions that the permanent partial disability rating in the worker's compensation context was not relevant to his claim of disability discrimination under the Missouri Human Rights Act (MHRA), R.S.Mo. § 213.010 to § 213.137. The City is not challenging jury instructions through this point and is not contesting the award of punitive damages either. (Substitute Brief of Respondent at pp. 13-14; 16-17; 21). Rather, the City's focus is directed to the fact that Wilson was allowed to present a workers' compensation disability determination as evidence to meet his burden of proof for a claim of disability discrimination, which requires an analysis that is distinct from workers' compensation.

Wilson's Substitute Brief does not even attempt to dispute the factual background in the City's Substitute Brief surrounding Dr. Divelbiss's assignment of the permanent partial disability rating. These facts are critical for evaluating the relevance of the disability rating in this case. Dr. Divelbiss has testified in detail regarding the disability rating he assigned Wilson. (Deposition of Dr. Divelbiss at 33:00-39:45). He testified how he arrives at such a rating in general and what he did to arrive at the specific rating he assigned to Wilson. (Deposition of Dr. Divelbiss at 34:50-37:00). By assigning Wilson a 15-percent permanent partial disability for his right elbow epicondylitis, Dr. Divelbiss concluded

Wilson's elbow was 15-percent less usable than it was before the condition. (Deposition of Dr. Divelbiss at 38:10-39:25). Then, Wilson's attorney asked whether Dr. Divelbiss rated "Wilson as disabled in his report." (Deposition of Dr. Divelbiss at 39:35-40:00). Dr. Divelbiss responded that he assigned Wilson a permanent partial disability rating. (Deposition of Dr. Divelbiss at 39:35-40:15).

Only upon the City's questioning did Dr. Divelbiss state this disability rating he assigned to Wilson was not part of Wilson's treatment and was not needed to either diagnose or treat Wilson's epicondylitis. In fact, the information contained in the disability rating report Dr. Divelbiss published was pulled from other medical records which contained the descriptions of Wilson's treatment under his care. (Deposition of Dr. Divelbiss at 51:45-52:35). Upon further questioning from the City, Dr. Divelbiss admitted Wilson's right elbow epicondylitis would not make him unable to communicate, unable to walk or ambulate, unable to care for himself, unable to socialize with others, unable to educate himself, unable to transport himself, or unable to do any job training, so long as the training was not something very heavy. (Deposition of Dr. Divelbiss at 53:25-55:05).

This testimony from Dr. Divelbiss demonstrates that he did not consider the definitional criteria for a disability under the MHRA when determining his disability rating for Wilson. (Deposition of Dr. Divelbiss at 33:00-39:45; 51:45-55:05). R.S.Mo. § 213.010(4) defines "disability," in relevant part, as "a physical or mental impairment which substantially limits one or more of a person's major life activities, being regarded as having such an impairment, or a record of having such an impairment, which with or without reasonable accommodation does not interfere with performing the job."

The circuit court's decision to allow into evidence this workers' compensation permanent partial disability rating was an abuse of discretion. It was not cured in this case, and could not be cured in this case, by any further explanation from Wilson's counsel in closing argument or the provision of a proper jury instruction. The City acknowledged Wilson's epicondylitis at the outset of the trial (Transcript 54:4-55:22; 62:3-21); it vigorously contested this epicondylitis rendered him disabled under the MHRA. (Transcript 743:9-751:17). This Court should recognize that juries are likely to give undue weight to a medical doctor's assessment of disability in the workers' compensation context in a case arising under the MHRA. During Dr. Divelbiss's testimony, as an expert witness, he utilized the term "disability" in a way that was unrelated to one of the ultimate issues in this case.

"A determination of prejudice by erroneous admission of evidence depends largely upon the facts and circumstances of the particular case." *Khan v. Gutsgell*, 55 S.W.3d 440, 443 (Mo. App. E.D. 2001). The appropriate question then is whether the erroneously admitted evidence had any reasonable tendency to influence the verdict of the jury. *Id.*; *Chester v. Shockley*, 304 S.W.2d 831, 835 (Mo. 1957). In Missouri, courts have recognized that certain testimony from particular individuals is likely to have great influence on juries. One example of such testimony is an investigating officer's assessment of the relative degree of fault of the parties in a traffic accident. *Kearbey v. Wichita Se. Kan.*, 240 S.W.3d 175, 184 (Mo. App. W.D. 2007). "[I]t is simply not an officer's duty or province to offer an opinion regarding civil liability." *Khan*, 55 S.W.3d at 443. Proper subjects for opinion by an officer with experience involving car accidents and reconstruction of those accidents

include objective items such as the speed of the vehicles involved when such an opinion is based upon the physical evidence the officer observed at the scene of the accident. *Kearbey*, 240 S.W.3d at 184. In an automobile negligence case, an officer of the law may not state his opinion as to which party to an auto accident was at fault or which actions of the parties contributed to the accident. *Id.*

Similar to the investigating officer in an automobile accident, juries are likely to give undue weight to a medical doctor's testimony in a case involving a disability in a disability discrimination case under the MHRA. Wilson acknowledges this to be the case and calls such medical evidence "persuasive": "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." (Substitute Brief of Respondent at p. 12). In this case, Dr. Divelbiss was able to testify that Wilson had a permanent partial disability rating. (Deposition of Dr. Divelbiss at 39:35-40:15). However, the facts surrounding Dr. Divelbiss's disability rating process demonstrate he did not consider the MHRA definition of disability when he arrived at Wilson's 15-percent permanent partial disability. (Deposition of Dr. Divelbiss at 33:00-39:45; 51:45-55:05). It was not within the province of Dr. Divelbiss in a disability discrimination case to testify regarding disability from the workers' compensation context. Thus, as argued by the City throughout this appeal, this "persuasive" evidence was not legally relevant and was prejudicial to the City.

There are a variety of factors which indicate the City was prejudiced by the admission of Dr. Divelbiss's permanent partial disability rating for Wilson's elbow in this

case. First, Wilson presented Dr. Divelbiss as his first witness at trial. (Transcript 75:2-5; Deposition of Dr. Divelbiss). As a result, while still forming its initial impressions of the case, the jury first heard that a medical doctor had already found Wilson to have a permanent partial disability, though in the distinct workers' compensation context. This was the first element Wilson had to prove for his claim for disability discrimination. *See Hervey v. Missouri Dep't of Corrections*, 379 S.W.3d 156, 159 (Mo. banc 2012) (a claim of disability discrimination requires a plaintiff to show he or she is legally disabled, the plaintiff was discharged, and the disability was a factor in the plaintiff's discharge). Additionally, Wilson emphasized the fact Dr. Divelbiss had concluded he had a permanent partial disability at various occasions during his testimony and the testimony of other witnesses. During his own testimony, Wilson's attorney confirmed with Wilson that he had "ended up with a partial permanent disability rating." (Transcript 305:23-25). Later during the trial, Wilson's counsel repeatedly questioned Meg Conger, a member of the City's Reasonable Accommodation Committee, about Wilson's workers' compensation disability rating. (Transcript 594:4-14). Finally, during his closing arguments Wilson's attorneys emphasized and reiterated Dr. Divelbiss's permanent partial disability rating. This argument was used to establish Wilson was disabled for purposes of his claim under the MHRA. (Transcript 722:15-22; 738:8-15). Specifically, Wilson's attorney argued:

> Let's talk about Dr. Divelbiss. He talked about having surgery on Wilson. James Wilson's elbow has a permanent partial disability at 15 percent for his workers' comp. rating. That's a payment rate out of work

comp. ***But he has a permanent partial disability. Permanent, that's pretty easy. Disability, that's pretty easy.***

(Transcript 722:15-22) (emphasis added). To further emphasize this disability rating, Wilson's attorney returned to discuss it when the Court alerted him that he had three minutes of remaining argument time. He stated "[p]ermanent partial disability. Permanent means permanent." (Transcript 738:8-15). For these reasons, this Court should hold that the permanent partial disability rating Dr. Divelbiss assigned to Wilson in workers' compensation was not legally relevant and unduly prejudiced the City.

As far as the City is aware, there is no Missouri authority on this issue. Wilson's analysis of the Court of Appeals decision in *Bowolak v. Mercy East Communities*, 452 S.W.3d 688 (Mo. App. E.D. 2014), to hold that a permanent partial disability rating is probative evidence in an MHRA disability discrimination case is misleading. (Substitute Brief of Respondent at pp. 12-13). In *Bowolak*, the Court of Appeals stated there was "sufficient evidence to allow the jury to find that [the plaintiff] had a record of impairment in connection with [a] severe back injury" and proceeded to discuss the evidence which supported its conclusion. 452 S.W.3d at 696. Among the evidence the Court of Appeals discussed was a settlement reflecting a 32-percent permanent partial disability. *Id.* This settlement was offered into evidence at trial by the defendant to support its claim that the plaintiff's injury was not as severe as claimed. *Id.* at 703. The defense argued the monetary amount of the workers' compensation settlement were relevant to establish the severity of the plaintiff's injury. *Id.* The Court of Appeals disagreed. *Id.*

The City's arguments here are far different than *Bowolak*. Here, the City did not introduce the disability rating, but argued the disability rating was irrelevant. The analysis of legal relevance requires a court to balance "the probative value of the proffered evidence against its prejudicial effect on the jury." *State v. Tisius*, 92 S.W.3d 751, 760 (Mo. banc 2002). There is nothing in the Court of Appeals' opinion in *Bowolak* which discusses whether the Court properly admitted evidence of the workers' compensation settlement over objection, whether the plaintiff was properly allowed to argue the settlement as part of his proof of disability under the MHRA, or whether the evidence of a disability rating is probative to a claim of disability under the MHRA and not outweighed by its prejudice to the opposing party. In short, because the *Bowolak* opinion does not contain any of the necessary relevance analysis required by Missouri law, it is of little use in this case.

Finally, to the extent explanation is required, the City is not contending Dr. Divelbiss should not have been allowed to testify in this case. The City acknowledges that Dr. Divelbiss had relevant information regarding his treatment of Wilson, his diagnosis of Wilson's elbow condition, and his opinions that Wilson's epicondylitis requires a specific medical restriction. His testimony related to those issues went to the elements of Wilson's claim for disability discrimination under the MHRA. However, Dr. Divelbiss's testimony related to the permanent partial disability rating should have been excluded.

For these reasons, and the analysis contained in the City's Substitute Brief, this Court should find the circuit court abused its discretion in admitting the workers' compensation permanent partial disability rating. The admission of this evidence was

prejudicial to the City. This point should be granted on appeal and the amended judgment should be reversed and the case remanded to the circuit court for further proceedings.

POINT II – There is no statutory provision in the MHRA allowing a party to recover its litigation expenses

The City has appealed from an amended judgment in the circuit court which awarded Wilson litigation expenses totaling $9,644.56. (LF D86 p.3). These awarded litigation expenses included lunches during trial, dinner following a day of trial, soda and water during trial, parking expenses, postage expenses, filing and service fees, retainers for expert witness depositions, video deposition expenses, and non-itemized entries for "reimbursement for trial" and "blow ups." (LF D65 and D66). In his brief, Wilson makes no reference whatsoever to the actual expenses he has been awarded. He does not cite any statute which explicitly allows for any of the awarded litigation expenses and does not provide the Court with any authority from any Missouri court or any other jurisdiction in which all of these specific litigation expenses were found to be awardable. Instead, Wilson focuses on an argument he passingly made before the circuit court and argues that in this case, without exception, all of his awarded litigation expenses should be recoverable as attorneys' fees. (Substitute Brief of Respondent at pp. 25-30). He also maintains his position that the term "court costs" should include litigation expenses. (Substitute Brief of Respondent at pp. 30-34). This Court should reject those arguments.

In Missouri, awarding costs is within the sound discretion of the trial court and should not be reversed unless the trial court abused its discretion. *Trimble v. Pracna*, 167 S.W.3d 706, 716 (Mo. banc 2005). If a judgment awards costs or expressly refuses to award

costs in a manner that is inconsistent with the law, it is axiomatic that the trial court has abused its discretion. *Riggs v. State Dep't of Soc. Services*, 473 S.W.3d 177, 182 (Mo. App. W.D. 2015). Generally, in Missouri civil cases the prevailing party is able to recover its costs against the other party unless another provision is made by law. *See* R.S.Mo. § 514.060 ("In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law"); Supreme Court Rule 77.01 ("In civil actions, the party prevailing shall recover his costs against the other party, unless otherwise provided in these rules or by law"). Section 213.111.2 of the MHRA constitutes a "different provision" which "is made by law" and modifies a court's ability to award costs. § 514.060.

The plain language of Section 213.111.2 of the MHRA places significant limits on a court's power to award costs to a prevailing party in a case brought pursuant to the Act. This section provides in full:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award court costs and reasonable attorney fees to the prevailing party, other than a state agency or commission or a local commission; except that, a prevailing respondent may be awarded court costs and reasonable attorney fees only upon a showing that the case is without foundation.

R.S.Mo. § 213.111.2 (2016). The first instance which demonstrates this section limits the general rule for awarding costs is through explicit language which makes the award fully discretionary. Section 514.060 and Supreme Court Rule 77.01 both utilize the language

"the party prevailing shall recover his costs" which makes an award of costs generally mandatory. *See Bauer v. Transitional School Dist. of City of St. Louis*, 111 S.W.3d 405, 408 (Mo. banc 2003) (Generally, the word "shall" connotes a mandatory duty). However, § 213.111.2 utilizes the word "may," which indicates that a court's award of costs in an MHRA case is discretionary. *See City of Cottleville v. American Topsoil, Inc.*, 998 S.W.2d 114, 117 (Mo. App. E.D. 1999) (the use of "may" indicates the court's decision is discretionary); *State ex rel. Nixon v. Boone*, 927 S.W.2d 892, 897 (Mo. App. W.D. 1996) (use of the word "may" in a statute implies alternate possibilities and that the conferee of the power has discretion in the exercise of the power). Next, § 213.111.2 limits a court's discretion to award a prevailing party only its "court costs." This section does not permit an award of any "costs," which may arguably be construed to include other expenses. *See, e.g., Zweig v. Metropolitan St. Louis Sewer Dist.*, 412 S.W.3d 223, 249 (Mo. banc 2013) ("the language in section 23 referring to costs makes clear that a successful taxpayer-plaintiff should be reimbursed for all out-of-pocket expenses). Although "court costs" is not defined in the MHRA, the legislature has defined the term in Chapter 488, the statutory chapter which governs "Court Costs." Missouri courts are required to interpret and apply statutory provisions with reference to each other, in order to determine the legislature's intent. *State ex rel. Evans v. Brown Builders Elec. Co., Inc.*, 254 S.W.3d 31, 35 (Mo. banc 2008); *In re G.F.*, 276 S.W.3d 327, 330 (Mo. App. E.D. 2009) (adopting the definition of court costs in § 488.010 for the Child Protection Orders Act (R.S.Mo. § 455.500 to § 455.538)). As stated in the City's Substitute Brief, the definition of "court costs" in R.S.Mo. § 488.010 should be applied in this case: court costs are "the total of fees,

miscellaneous charges and surcharges imposed in a particular case." § 488.010(1). Finally, and perhaps most importantly, § 213.111.2 limits a court's ability to award court costs to only certain prevailing parties and under specific circumstances. According to this section of the MHRA, certain prevailing respondents (state agencies and commissions and local commissions) cannot recover court costs in any circumstances while all other prevailing respondents can only recover their court costs upon a showing that the plaintiff's case was without foundation. § 213.111.2.[1]

The plain language of § 213.111.2 demonstrates the legislature made a number of considered policy decisions when it included this court cost-shifting provision in the MHRA in place of the general rule regarding costs contained in both § 514.060 and Supreme Court Rule 77.01. The legislature has permitted a plaintiff the ability to recover only his or her court costs when prevailing, but has also limited a plaintiff's potential exposure in the event of a losing case by requiring a respondent to show a lack of foundation before recovering its court costs. Wilson's pleas in his Substitute Brief that this Court should now allow a plaintiff to recover any out-of-pocket expenses not traditionally considered court costs as part of the attorney fee award or that this Court should interpret the term "court costs" to also include "litigation expenses" are, in reality, pleas that this Court legislate policy provisions into the MHRA which cannot be found in the Act's plain

[1] The legislature has since amended § 213.111.2 to specify that a prevailing respondent may now be awarded attorney reasonable attorney fees only upon a showing that the case was without foundation. There is no such restriction for court costs any longer. Nonetheless, the amendments to this section do not affect the City's particular arguments in this case because the term "court costs" has remained constant for a prevailing plaintiff.

language. (Substitute Brief of Respondent at pp. 25-34). Such action would violate Missouri's constitutional separation of powers. A court lacks authority to read into a statute "a legislative intent that is contrary to its plain and ordinary meaning." *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc 2002); *Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). Rather than legislate, a court's function is "to declare the law as [the court] discover[s] it in the text furnished [to it] by the [legislature] and when [it] has done so [its] authority ends." *W. Cent. Mo. Region Lodge v. City of Grandview*, 460 S.W.3d 425, 446 (Mo. App. W.D. 2015). The legislature may wish to change the MHRA to include "litigation expenses" as potential recovery for a prevailing plaintiff in a discrimination case, but this Court cannot rewrite the statute to achieve Wilson's desired result in this case.

A somewhat recent example of federal legislative action following a court decision construing a civil rights cost-shifting statute demonstrates that legislatures can capably deal with these issues. In 1991, the U.S. Supreme Court considered the question whether fees for services rendered by experts in civil rights litigation could be shifted to the losing party pursuant to 42 U.S.C. § 1988, which permits the award of "a reasonable attorney's fee." *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 84, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). The U.S. Supreme Court concluded that § 1988 conveyed no authority for a court to shift the prevailing party's expert fees to the losing party. *Id.* at 102, 111 S.Ct. 1138. In response to that decision and a series of others interpreting the Civil Rights Acts of 1866 and 1964, Congress passed the Civil Rights Act of 1991, which the President signed into law on November 21, 1991. *Landgraf v. USI Film Products*, 511 U.S. 244, 249-

51, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). Section 113 of the Civil Rights Act of 1991 responded to the Supreme Court's decision in *Casey* and expressly amended § 1988 by providing that an award of attorney's fees to a prevailing party may include expert fees. *Id.* at 251, 114 S.Ct. 1483. This route followed by the separate branches of the federal government demonstrates how the separation of powers should apply in this case.

As the City has already discussed in its Substitute Brief, the Missouri legislature is well-versed in drafting cost-shifting provisions. When the legislature has determined that "litigation expenses" should be recoverable in a specific action, it has included that term explicitly. *See* R.S.Mo. §§ 136.315, 448.3-111, and 547.370. Additionally, there are numerous other cost-shifting statutes in which the legislature has included more expansive terms than "court costs" to allow a party for greater recovery when prevailing in litigation. The City has cited a number of these statutes in its Substitute Brief and need not repeat them here. (See Substitute Brief of Appellant at pp. 37-38). The MHRA's plain language of "court costs," when interpreted and applied in reference to other statutes and case law, demonstrates the circuit court has erred in awarding Wilson litigation expenses in this case.

Moreover, in his brief, Wilson provides no parameters for what he believes should be considered "out-of-pocket expenses incurred by the attorney" that may be reimbursable to a prevailing plaintiff as part of the attorney fee award in an MHRA case. His argument seems to be that any out-of-pocket expenses incurred in an MHRA case should be reimbursable as attorneys' fees. (Substitute Brief of Respondent at pp. 25-28). This case alone demonstrates that Wilson's proposed rule that all litigation expenses submitted are reimbursable would become immediately unmanageable. Wilson continues to seek

reimbursement for lunches during trial, dinner following a day of trial, soda and water during trial, parking expenses, postage expenses, filing and service fees, retainers for expert witness depositions, video deposition expenses, and non-itemized entries of "reimbursement for trial" and "blow ups." (LF D65 and D66). Yet, he cites nothing in the record to show that these are normally charges that become the responsibility of a fee-paying client. It strains belief that any fee-paying client would expect to pay all of the litigation expenses Wilson seeks in this case.

The legislature made considered policy decisions when it drafted § 213.111.2 of the MHRA. Its inclusion of the term "court costs" must be respected; this term is not ambiguous and does not include litigation expenses. This Court should follow the plain language of the MHRA, reverse the amended final judgment of the circuit court, and remand this case for further proceedings so the judgment may be modified to include an award of court costs which is actually permitted by law.

CONCLUSION

For the foregoing reasons, along with those asserted in its Substitute Brief, the City respectfully requests this Court reverse the circuit court's amended final judgment and remand this cause for a new trial. In the event this Court does not reverse the amended final judgment and remand for a new trial, the judgment should be reversed and remanded for further proceedings so that it may be modified to only include an award of court costs which is permitted by law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Missouri Supreme Court Rule 84.06(c), this Substitute Reply Brief contains the information required by Missouri Supreme Court Rule 55.03; (2) complies with the limitations in Missouri Supreme Court Rule 84.06(b); and (3) contains 4,4430 words, exclusive of the sections exempted by Missouri Supreme Court Rule 84.06(b), which was determined using the word count feature in Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellant's Substitute Reply Brief has been filed today, September 20, 2019, with the Court's efiling system. That system will serve a copy to all counsel of record in this case by electronic mail.

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