

**MISSOURI COURT OF APPEALS-WESTERN DISTRICT
SPECIAL DIVISION
ALOK AHUJA, PRESIDING JUDGE
MARK D. PFEIFFER, JUDGE
THOMAS N. CHAPMAN, JUDGE**

**ALOK AHUJA, PRESIDING JUDGE
MARK D. PFEIFFER, JUDGE
ANN HANSBROUGH, SPECIAL JUDGE
(SITTING ON WD84770, STATE EX REL. BRADY V. ASHCROFT, ET AL.)**

**NOVEMBER 10, 2021
UNIVERSITY OF MISSOURI SCHOOL OF LAW
COLUMBIA, MISSOURI**

**WD83910
State of Missouri, Respondent,
v.
Coty Borst, Appellant.**

Coty Borst appeals his convictions following a jury trial for murder in the second degree and armed criminal action. The facts, as alleged, established that Borst was living with Jacob Stowers after Borst was kicked out of his parents' home. Stowers girlfriend, Madison Stizer, also began living with Stowers. On June 21, Borst, Stowers, and Stizer went to Stizer's house to pack-up her belongings to move to Stowers's home. At some point, there was an argument between Stizer and Borst, and Stowers attempted to mediate. Borst shot Stowers in his lower back, and Stowers later died from his injuries. Borst testified that he only intended to shoot Stowers in the leg and that he thought that, at worst, the shot would break Stowers's leg. Borst told police that he acted in self-defense. He testified that he shot Stowers in self-defense. Borst claimed that Stowers wanted to fight Borst, but, when Borst declined, Stowers said he was going to go get a gun. Initially, the State sought to prove that Borst was guilty of murder in the second degree because he knew, or was aware, that his conduct was practically certain to cause Stowers's death. However, during trial, the State sought to change the proposed jury instruction for murder in the second degree to one which required the jury to find that Borst acted purposefully to cause serious physical injury to Stowers. The State argued, and the court accepted, that the instruction was made in order to conform to the evidence, in light of Borst's testimony regarding his intent in shooting Stowers. The jury found Borst guilty of both murder in the second degree and armed criminal action. The court sentenced Borst to thirty years' imprisonment for the murder and fifteen years for the armed criminal action, sentences to run consecutively. This appeal followed.

Appellant's point on appeal:

The trial court erred in giving the jury a verdict directing instruction for murder in the second degree with a fatal variance from how Mr. Borst was indicted, in violation of Mr. Borst's rights to notice of the charge faced, to present a defense, to due process, and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. A fatal variance occurs when a defendant is

charged with one method of an offense but the jury is instructed on a different method, and the variance affects the defendant's ability to defend against the charge. Mr. Borst was charged with committing murder in the second degree by knowingly causing the victim's death, but the court instructed the jury to find him guilty if he caused the death of the victim with the purpose of causing serious physical injury instead, and this variance affected Mr. Borst's defense because he claimed he aimed for the victim's legs when he shot him, which he knew would cause serious physical injury but did not think it would kill the victim.

WD83915

Terrance L. Wesley, Appellant,

v.

State of Missouri, Respondent.

Terrance Wesley appeals from the circuit court's judgment denying his Rule 29.15 motion for post-conviction relief after an evidentiary hearing. The evidence at trial established that Wesley had used a firearm to rob Kyle and Abigail Fitzgerald and attempted to rob Sarah Kramer, while they were all sitting outside a coffee shop in Kansas City. Kyle Fitzgerald was able to take a picture of Wesley while Wesley was getting into his car to flee. The police used the photo and the car to find Wesley who was arrested wearing the same clothes shown in the picture. At trial, both the Fitzgeralds identified Wesley as the man that robbed them. A jury convicted Wesley of robbery in the first degree, attempted robbery in the first degree, and two counts of armed criminal action. The court sentenced Wesley to 25 years' imprisonment for the first degree and attempted robbery and ten years' imprisonment for both counts of armed criminal action, all sentences to run concurrently. Wesley filed a *pro se* motion to vacate, set aside or correct the judgment and sentences pursuant to Rule 29.15. Post-conviction counsel filed an Amended 29.15 motion. The amended motion alleged that trial counsel was ineffective for failing to promptly convey a 10-year plea offer to Wesley with competent advice and that trial counsel was ineffective for failing to promptly convey a 12-year plea offer to Wesley with competent advice. The motion court determined that Wesley knew of both offers, had a copy of the discovery in his case, and failed to show that he would have accepted either offer because he never expressed any interest in them. This appeal followed

Appellant's points on appeal:

- (1) The motion court clearly erred in denying Claim 8/9(a) of Terrance Wesley's 29.15 amended motion, in violation of Mr. Wesley's rights to due process and effective assistance of counsel, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution, when it found Mr. Wesley received effective assistance of counsel regarding the State's 10-year-total plea offer. A defendant proves ineffective assistance of counsel related to a rejected plea offer when trial counsel failed to promptly and adequately advise the defendant about the offer, and the defendant demonstrates he would have accepted the offer had he received effective assistance and the sentence he did receive after trial is harsher than the plea agreement. Mr. Wesley proved his trial counsel provided ineffective assistance for his decision about the 10-year-total plea offer by failing to adequately review and advise him about the strengths and evidence in the State's case, and, but for that ineffective

assistance, he would have accepted the 10-year-total plea offer and received a more lenient sentence.

- (2) The motion court clearly erred in denying Claim 8/9(b) of Terrance Wesley's 29.15 amended motion, in violation of Mr. Wesley's rights to due process and effective assistance of counsel, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution, when it found Mr. Wesley received effective assistance of counsel regarding the State's 12-year-total plea offer. A defendant proves ineffective assistance of counsel related to a rejected plea offer when trial counsel failed to promptly and adequately advise the defendant about the offer, and the defendant demonstrates he would have accepted the offer had he received effective assistance and the sentence he did receive after trial is harsher than the plea agreement. Mr. Wesley proved his trial counsel provided ineffective assistance for his decision about the 12-year-total plea offer by failing to promptly inform him of the offer and failing to adequately review and advise him about the strengths and evidence in the State's case, and, but for that ineffective assistance, he would have accepted the 12-year-total plea offer and received a more lenient sentence

WD84208

Trina Saunders, Appellant,

v.

Patrick Enterprises, LLC, Defendant; Missouri Employers Mutual Insurance Company, Respondent.

Trina Saunders appeals the judgment of the Boone County Circuit Court granting Missouri Employers Mutual Insurance Company's Motion to Dismiss Saunder's Amended Petition for Damages as to Missouri Employers Mutual Insurance Company. The Amended Petition alleged "Workers' Compensation Retaliation" against both Patrick Enterprises, LLC, and Missouri Employers Mutual Insurance Company. As alleged in Saunder's Amended Petition, Sanders was a full-time employee of Patrick Enterprises, LLC, which operated as a childcare center. Patrick Enterprises, LLC, was insured by Missouri Employer Mutual Insurance Company for workers' compensation coverage. Saunders alleges that she slipped and fell at work, injuring her knee. She alleged that she demanded medical treatment from her employer immediately following the accident. She claimed that, as a result, she was stripped of her vacation and leave, her duties were restricted to sitting in a chair and requiring permission to leave the chair, and she was no longer a full-time employee. When Saunders asked to have her duties and hours restored, her employer informed her that the reductions in duties and hours were decided upon in collaboration with her workers' compensation insurer and would continue. Saunders further alleged that she was offered no treatment, told to file for social security benefits, and told to apply for Aflac coverage. However, Saunders stated in her Amended Petition that Aflac ultimately denied her benefits because Patrick Enterprises, LLC, informed Aflac that it no longer employed Saunders. Missouri Employers Mutual Insurance Company moved for the Amended Petition to be dismissed as to Missouri Employers Mutual Insurance Company because Saunders: (1) failed to state facts which demonstrated an act of retaliation or discrimination by Missouri Employers Mutual Insurance Company; (2) the claim was barred by the Abatement Doctrine and Missouri Supreme Court Rule 5.27(a)(9); and Saunder's exclusive remedy was the rights and benefits provided by Chapter 287. The court granted the motion to dismiss without specifying the grounds. This appeal followed.

Appellant's point on appeal:

The circuit court erred as a matter of law in its judgment denominating order granting Missouri Employers Mutual Insurance Company's motion to dismiss Trina Saunders' amended petition as to Missouri Employers Mutual Insurance Company because Missouri Employers Mutual Insurance Company, as insurer to employer/defendant Patrick Enterprises, LLC, was a proper party defendant to the Missouri workers' compensation retaliation cause of action under RSMo, Chapter 287 "Missouri Workers' Compensation Law" and neither the "abatement clause" of Missouri Supreme Court Rule 55.27(a)(9) nor the "exclusive remedy" provision of RSMo, section 287.120(2) are applicable to the case at hand in that RSMo, section 287.030 (1998) states, in part, that "(a)ny reference to employer shall also include his or her insurer" and the provisions of RSMo, Chapter 287 must be strictly construed pursuant to RSMo, section 287.800 (2005) and the subject matter giving rise to the workers' compensation retaliation civil claim pursuant RSMo, section 287.780 (1973) is not the same as the subject matter involved in the previously filed underlying workers' compensation claim (the former's post-injury retaliatory acts vs. the latter's injury itself) and no remedy for the right to file a workers' compensation retaliation civil claim (workers' compensation retaliation) exists under RSMo, Chapter 287, "Missouri Workers' Compensation Law."

WD84470

State ex rel. Sean Brady, Respondent,

v.

John R. Ashcroft and David M. Minnick, Appellants.

John Ashcroft, Missouri Secretary of State, and David Minnick, Missouri Commissioner of Securities, appeal from the judgment and order of permanent prohibition entered by the Circuit Court of Cole County. The Enforcement Section of the Secretary of State's Securities Division filed an administrative enforcement action against Sean Brady before the Commissioner of Securities. The action alleged that Brady engaged in a years-long pattern of defrauding ten investors, beginning in 2012, while he was employed as a registered broker-dealer and investment advisor representative at First Allied Securities, Inc. The Petition alleged that Brady committed dozens of violations of the Missouri Uniform Securities Act ("MUSA"). Before the administrative enforcement action, Brady had been terminated by First Allied Securities, Inc., and, as part of that termination, his registration with the Commission was no longer effective because he was not associated with an investment adviser or broker-dealer. Additionally, Brady and his former employer entered into settlement agreements with the ten individuals he allegedly defrauded. Neither the Commissioner nor the Securities Division were signatories to the agreements. In the administrative proceeding, Brady asserted that the Commissioner lacked subject-matter jurisdiction because he did not trade "securities" regulated by the MUSA, the administrative action is time-barred under Missouri's general statutes of limitations, and the action is barred wholly or partly under the doctrines of release or offset based on the settlement agreements he signed with his investors. The Commission denied Brady's motion to dismiss. Brady then filed a writ of prohibition in the circuit court seeking to prohibit the Commissioner from exercising jurisdiction over the pending administrative proceeding for the reasons outlined in his motion to dismiss, as well as because the Commissioner lacked jurisdiction over him because he was not a registered security professional when the Petition was filed. The circuit court granted a permanent writ in prohibition, finding that the Commissioner lacked subject-matter jurisdiction

over Brady because he was not a registered professional with the Commissioner when the Petition was filed and that the settlement agreements Brady signed with his investors barred the Commissioner's claims. This appeal followed.

Appellants' points on appeal:

- (1) The circuit court erred in prohibiting the Commissioner of Securities from presiding over the entire Enforcement Petition due to Brady's registration status, because the definition of "registrant" in §409.4-412(c) does not control jurisdiction over all the conduct alleged in the Enforcement Petition, in that Brady is subject to MUSA liability under the actual controlling statutes, the Petition sought relief under multiple sections of the MUSA, and the circuit court's holding leads to absurd and illogical results not intended by the General Assembly.
- (2) The circuit court erred in prohibiting the Commissioner of Securities from presiding over the entire Enforcement Petition due to Brady's private-party settlement agreements, because under Missouri law private parties cannot contract to limit a state official's statutory powers and duties, in that the Commissioner was not a party to those agreements, the plain terms of the agreements did not speak to the Commissioner's powers and duties under the MUSA, and the Enforcement Petition seeks relief under the MUSA broader than what the settlement agreements provide.
- (3) The circuit court erred in prohibiting the Commissioner of Securities from presiding over the entire Enforcement Petition, because Brady was not entitled to a writ of prohibition, in that he would not have suffered irreparable injury in an administrative proceeding, the Commissioner had authority over the alleged misconduct at all times, Brady did not exhaust his administrative remedies, and § 536.150 does not authorize writs of prohibition in contested cases.
- (4) The circuit court erred in issuing a permanent writ of prohibition, because no other grounds raised by Brady in his writ petition support issuing a writ of prohibition, in that the Commissioner has jurisdiction over the claims in the Enforcement Petition under the relevant statutes of limitation and based on the allegations of the nature of securities he traded.