Case No. SC100694

IN THE MISSOURI SUPREME COURT

R.M.A.,
Appellant/Plaintiff,

v.

BLUE SPRINGS R-IV SCHOOL DISTRICT,
Respondent/Defendant.

SUBSTITUTE BRIEF OF RESPONDENT

Appeal from the Circuit Court of Jackson County
Honorable Cory L. Atkins, Division 17
Circuit Court Case No. 1516-CV20874

Transfer from the Missouri Court of Appeals
for the Western District
Case No. WD85778

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JURISDICTIONAL STATEMENT

Respondent agrees with and incorporates Appellant's jurisdictional statement, Appellant's Substitute Br., p. 8, but adds the following information for the sake of completeness:

After Appellant filed his[1] notice of appeal on October 31, 2022, the Western District of the Court of Appeals accepted the case based on its general appellate jurisdiction and assigned this matter docket number WD85778. On June 4, 2024, the Court of Appeals issued its opinion in which it reversed the trial court's amended judgment notwithstanding verdict and provisional ruling granting a new trial and directed the trial court to enter its original judgment in favor of Appellant. Application for Transfer, Attachment 1. On June 20, 2024, Respondent filed its motion for rehearing or alternatively for transfer to the Missouri Supreme Court. Application for Transfer, Attachment 2. The Court of Appeals overruled Respondent's motions on July 23, 2024. Application for Transfer, Attachment 3. Respondent filed its application for transfer to this Court on August 8, 2024. Respondent asserted the question of the application of the Missouri Human Rights Act to public sex-designated facilities is a matter of general interest and importance, and the opinion issued by the Court of Appeals was contrary to decisions issued by this Court; specifically: *R.M.A. by Appleberry v. Blue Springs R-IV School District*, 568 S.W.3d 420 (Mo. banc 2019) and *Lampley v. Missouri Commission on Human Rights*, 570 S.W.3d 16 (Mo. banc 2019). The Court granted transfer on October 1, 2024.

[1] Appellant is referred to by male pronouns throughout this brief in deference to his gender identity and his stated preference.

STATEMENT OF FACTS

A. Appellant's sex is female, and his gender is male.

Appellant's sex is female.[2] Tr. Vol. III, 394:24-395:7; 396:16-397:9; 505:12-506:12; 508:14-509:7; 509:18-510:2; 510:9-22. Sex refers to the biological differences between males and females. Tr. Vol. III, 500:14-501:4. More specifically, sex refers to the biological indicators of a male and female, understood in the context of reproductive capacity, such as sex chromosomes, gonads, sex hormones and nonambiguous internal and external genitalia. Tr. Vol. III, 499:9-500:11.[3] Everybody is assigned a sex when they are born. Tr. Vol. III, 433:23-434:5. At birth, sex is assigned based on looking at the newborn's genitalia, doing blood tests, or checking chromosomes. Tr. Vol. III, 435:10-14.

Appellant was born female. Tr. Vol. III, 395:6-7; Tr. Vol. VI, 869:8-10, 873:19-21; Tr. Vol. VII, 1082:19-21. Appellant was assigned female at birth because he was born with female genitalia. Tr. Vol. III, 505:7-11. Appellant has female genitalia. Tr. Vol. III, 394:24-395:5; 396:19-22; Tr. Vol. VI, 934:1-5; Tr. Vol. VII, 1100:7. Appellant has not had gender

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[2] Appellant's physician conflates the terms sex and gender in her testimony (*see*, *e.g.*, Tr. Vol. III, 484:20-22, "The appropriate sex [of a transgender child] is whatever the child believes, whatever sex or gender the child identifies with."). However, Appellant's physician agrees with the distinctions between the definitions of sex—as referring to biological differences—and gender—as referring to psychosocial self-perceptions and attitudes, as set out in the DSM V, Tr. Vol. III, 500:1-8, and by the American Medical Association's Journal of Ethics. Tr. Vol. III, 500:17-501:9.

[3] Appellant contends his physician testified he was not a "biological female." Appellant's Substitute Br., p. 28 n. 1. As support, Appellant cites his physician's testimony about Appellant's height and the purpose of hormone blockers, neither of which address the biological indicators identified by the authoritative DSM-V. The National Employment Lawyers Association makes a similar unsupported assertion: "Dr. Jill Jacobson testified at trial that [Appellant] was indeed born a male." NELA Br., p. 13. For support, NELA cites the testimony of Scott Young (Assistant Superintendent) and Appellant's mother (neither of whom is Dr. Jacobson). The only citation to Dr. Jacobson's testimony relates that the doctor knows Appellant and treated him, and nothing else. None of the testimony cited by Appellant or NELA establishes Appellant had the "sex chromosomes, gonads, sex hormones and nonambiguous internal and external genitalia" of a biological male.

confirmation surgery. Tr. Vol. VII, 1100:5-6. Appellant's original birth certificate listed his sex as female. Tr. Vol. VII, 1082:5-18. Appellant's genetic testing shows the normal human female karyotype of "46XX." Tr. Vol. III, 501:13-502:23; 507:23-508:12. An ultrasound of Appellant's internal genitalia revealed a "[n]ormal pelvic ultrasound. Uterus and ovaries are present and normal." Tr. Vol. III, 506:16-507:1. Appellant's medical records list his sex as female. Tr. Vol. III, 505:12-506:12; 508:14-509:7. Appellant's physician ordered a bone age study to predict how tall Appellant would grow, because there was a concern that his growth was not slowing. Tr. Vol. III, 503:16-504:20. Appellant's bone age study was compared to bone age studies for females because transgender patients' bone ages are read according to their sex. Tr. Vol. III, 504:21-505:8. In August of 2013, Appellant's physician wrote a letter to the School District identifying Appellant as female. Tr. Vol. III, 463:10-19; 510:4-22. As Appellant's mother put it when Appellant was nine years old, "Honey, I was there when you were born, you're a girl." Tr. Vol. VII, 984:22-23.

Sex and gender are different. Tr. Vol. IV, 515:25-516:4. Appellant's gender is male. Tr. Vol. II, 304:6-305:11. Gender refers to the continuum of complex psychosocial self-perception attitudes and expectations people have about members of both sexes. Tr. Vol. III, 501:5-9. Transgender is a deeply held feeling that one's gender is different from the sex one was assigned at birth. Tr. Vol. III, 447:12-17; 497:21-498:6. Being transgender is associated with the mental health diagnosis of gender dysphoria, which was previously known as gender identity disorder. Tr. Vol. III, 447:18-448:4. Treatments, including puberty blockers, are provided to transgender patients to block unwanted sexual characteristics and provide gender affirming hormones. Tr. Vol. III, 452:7-15, 470:4-18. If transgender patients do not receive treatments, they develop unwanted sexual characteristics. Tr. Vol. III, 452:7-15. For a transgender male, the treatments stop female development of female puberty. Tr. Vol. III, 470:19-24. For instance, blockers halt or slow down the development of female breasts and prevent menstruation. Tr. Vol. III, 471:14-16; 472:2-6.

Appellant has a diagnosis of gender dysphoria or gender identity disorder. Tr. Vol. III, 481:18-482:15. Appellant hated being told he was a girl when he was a small child. Tr. Vol. VI, 873:22-874:6. He did not feel like a girl, and he knew he was a boy. Tr. VI, 874:7-

11. At age twelve, Appellant was determined to be "karyotypically XX but feels like a boy." Tr. Vol. III, 507:15-21. Appellant started on puberty blockers in the Fall of 2011. Tr. Vol. III, 482:16-21. Puberty blockers prevented Appellant from naturally developing female breasts and from having a menstrual cycle. Tr. Vol. III, 495:10-496:6.

B. Appellant's transition while he was a student with the School District.

While attending elementary school, middle school, the freshman center, and high school, Appellant's sex was female. Tr. Vol. III, 396:16-397:9.

1. Appellant's transition begins in elementary school

Appellant enrolled in the School District as a female when he attended elementary school. Tr. Vol. III, 395: 8-13. Appellant's given name was Angela Marie, and he was known as Angela in elementary school.[4] Tr. Vol. III, 336:5-14, 501:20-502:6; Tr. Vol. VI, 869:2-10.

During the summer before entering fourth grade, in family conversations and medical and therapist consultations, Appellant and his mother concluded he was transgender—that he was born a girl but felt like a boy. Tr. Vol. VII, 984:12-991:4. When Appellant started fourth grade, he was documented as "female" on school records. Tr. Vol. VII, 992:8-11. After school started, Appellant's mother had a meeting with some faculty members, a therapist, and a School District representative at Appellant's elementary school to discuss "what was going on" with Appellant. Tr. Vol. VII, 992:14-993:10, 1063:18-1064:14. Everyone was respectful, sensitive to the issue, and wanted to work with Appellant's mother. Tr. Vol. VII, 1064:15-22. During the meeting, the school principal said, "from here on out we'll call Angela, R.J.," which made Appellant's mother feel good—"They [the meeting attendees] were, like, we got you kind of thing." Tr. Vol. VII, 993:1-6.

[4] Respondent means no disrespect in using Appellant's original given name. It is used to show Appellant was given and known by a typically female name before he transitioned to male, Tr. Vol. III, 336:5-14, and to dispel the assertion of "mistake."

At the beginning of the school year, Appellant's mother met with Appellant's teacher to explain the situation, and the teacher was very respectful. Tr. Vol. VII, 993:15-21. With Appellant's mother's permission, in December, Appellant's teacher told the class Appellant would no longer be known as "Angela" but instead as "R.J,"; that he would be on the boys' teams and stand in the boys' line. Tr. Vol. VII, 993:22-994:10. The teacher made it clear Appellant was the same child they knew and loved, and they would be respectful of these changes. Tr. Vol. VII, 993:22-994:10.

At the beginning of fourth grade, Appellant was using the girls' bathroom. Tr. Vol. VII, 994:11-13. Appellant told his mother this was a problem because, based on his appearance, the younger children thought he was a boy and did not understand why he was in the girls' bathroom. Tr. Vol. VII, 994:14-25. When Appellant's mother met with the school's personnel on the issue, the collective decision was for Appellant to use the nurse's restroom. Tr. Vol. VII, 995:3-7. Appellant's mother was okay with this solution "so that he wouldn't get looked at weird. So he wouldn't be nervous about going to the bathroom, use the restrooms." Tr. Vol. VII, 995:18-21. Appellant's mother did not think about asking for Appellant to use the boys' room; Appellant was very happy, and his mother was "just glad that he wasn't going to get any flack for going to the bathroom." Tr. Vol. VII, 995:22-996:4.

In the summer of 2010[5], before Appellant entered fifth grade, his name was officially changed to a typically male name. Tr. Vol. VII, 996:5-997:8. Appellant's mother probably notified the elementary school of Appellant's name change in the beginning of fifth grade. Tr. Vol. VII, 997:9-13. Appellant continued to use the nurse's restroom in fifth grade, and his mother was happy with it. Tr. Vol. VII, 997:19-24, 1067:18-22.

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[5] In many instances, the record only refers to time frames by school year. The applicable school years, which ran from late August through late May, are provided for the Court's convenience: fourth grade, 2009-2010; fifth grade, 2010-2011; sixth grade (middle school), 2011-2012; seventh grade, 2012-2013; eighth grade, 2013-2014; ninth grade (Freshman Center), 2014-2015; tenth grade (high school), 2015-2016; eleventh grade, 2016-2017; and twelfth grade, 2017-2018.

2. Appellant's transition continues in middle school

a. Middle school principal meets with Appellant's mother

Appellant entered middle school at the beginning of sixth grade. Tr. Vol. VII, 998:2-5. Before school started, the principal met with Appellant's mother and took her on a tour of the middle school building. Tr. 571:6-23. When Appellant entered middle school, Appellant's mother continued to approve of Appellant's use of the nurse's restroom and wanted the practice to continue. Tr. Vol. IV, 571:13-23, 573:7-10; Tr. Vol. VII, 1000:7-1001:18, 1068:19-1069:13. Appellant's mother told the School District she felt good about the experience Appellant had at the elementary level regarding Appellant's use of the nurse's restroom and wanted to continue with that arrangement in middle school. Tr. Vol. IV, 671:12-672:23. During the tour, the principal pointed out the nurse's restroom and told Appellant's mother Appellant could use the nurse's restroom, which was a relief to Appellant's mother. Tr. Vol. VII, 1001:2-24. The bathroom and locker room situations were the same for Appellant in seventh grade. He used the nurse's restroom to go to the bathroom and to change for PE—he would change out in the restroom and meet up with the boys. Tr. Vol. VII, 1006:14-1007:3. There was a time when the nurse's bathroom was not accessible because of construction, but there were only ten days left in the school year, so Appellant's mother did not raise the issue with the school. Tr. Vol. VII, 1006:14-25.

Before eighth grade started, Appellant's mother met with the middle school's principal and activities director to request Appellant be allowed to use the boys' bathrooms and locker room. Tr. Vol. VII, 1011:12-1012:3. From Appellant's mother's perspective, they did not know how to respond, but they were not rude. Tr. Vol. VII, 1012:4-17. During the meeting, they mentioned concerns about possible bullying. Tr. Vol. VII, 1012:18-23. In her subsequent email to the school, she agreed the school had good intentions because the principal "was always very kind to us. He's not an evil person. You know, I had good dialogue with him." Tr. Vol. VII, 1014:21-1015:6. However, Appellant was not allowed in the boys' restrooms and not given unrestricted access to the boys' locker room because he was understood to be female—to have female genitals. Tr. Vol. IV, 552:25-553:4, 592:5-14, 678:2-8, 687:6-11, 687:18-688:1.

In sixth, seventh, and eighth grade, Appellant did well academically and socially. Tr. Vol. VI, 934:6-8. He had a lot of friends, and he was elected president of the student council when he was in eighth grade. Tr. Vol. VI, 934:6-12.

b. Appellant is allowed in the boys' locker room during eighth grade sports

Appellant played football when he was in eighth grade. Tr. Vol. VI, 891:2-13. He also ran boys' track. Tr. Vol. VI, 906:14-16. The rule at the middle school was females were not permitted in the boys' locker room. Tr. Vol. IV, 677:5-8. However, the practice was to permit females who were interpreters and paraprofessionals who worked with specific boys to enter the boys' locker room after 3:20 p.m., after the boys were clothed. Tr. Vol. IV, 677:9-22. Tr. Vol. V, 744:25-745:8, 746:7-14. The final bell at school was at 3:10 p.m. Tr. Vol. V, 715:12-13; Tr. Vol. VI, 893:11-13. The practice allowed boys about five minutes to get into the locker room from their last classes, and about five minutes to get their pants on. Tr. Vol. V, 715:20-25. The football coach instructed Appellant to use a nearby single stall restroom to change out, and then, at 3:20 p.m., Appellant could come into the boys' locker room. Tr. Vol. V, 715:6-11; Tr. Vol. VI, 891:14-892:2. This arrangement was consistent with the practice already in place for other females. Tr. Vol. IV, 677:23-678:1. It was applied to Appellant because he was a female. Tr. Vol. IV, 678:2-8. Appellant was considered by the school principal and the football coach to be a member of the female sex because he was understood to have a vagina and not a penis. Tr. Vol. IV, 691:21-692:13. Tr. Vol. V, 745:13-25. The coach's view of the situation was summed up in the following exchange with Appellant's counsel:

> Q. In order to be considered male in your eyes they would need certain anatomy?
>
> A. As far as anatomy-wise, you would have a penis if you're male. As far as me treating someone the way they want to be treated that's not necessarily the case.
>
> Q. Except for certain things like this?
>
> A. Except for that five minutes.

Q. Okay. Except for five minutes. Okay.

Now, if Mr. Appleberry had been assigned male at birth and he identified as male he could have been included in those five minutes?

A. If, as I say, all I was going by was what was told, the males were in the male locker room.

Tr. Vol. V, 745:18-746:6.

3. Appellant's transition continues at the Freshman Center and in high school

Before Appellant entered ninth grade, he and his mother toured the Freshman Center with the principal. Tr. Vol. VI, 908:2-13. At that time, he was asked to continue using the nurse's bathroom. Tr. Vol. VI, 908:17-909:4. Nevertheless, he used the boys' bathroom because it was the most convenient. Tr. Vol. VI, 912:6-19. He used boys' bathroom, but typically during class time to avoid a crowd. Tr. Vol. VI, 937:21-938:12, 940:23-942:21. Appellant chose outside activities—karate and baseball—to complete his physical education requirements, so he had no need to access the locker room, and he never made a request to access the boys' locker room at the Freshman Center. Tr. Vol. VI, 931:2-13. In December 2014, while Appellant attended school at the Freshman Center, he obtained a court order to change his birth certificate from "female" to "male." Tr. Vol. VII, 1052:13-23.

From tenth grade through his senior year in high school, Appellant never used the nurse's restroom. Tr. Vol. VI, 915:5-7. Instead, he either used the single-person bathrooms or the boys' room. Tr. Vol. VI, 915:8-917:5. He was never punished for using the boys' room. Tr. Vol. VI, 917:6-8. While he was in high school Appellant earned a 4.4 grade point average, participated in debate and theater, attended sporting events, attended choir and orchestra events, and attended homecoming and prom. Tr. Vol. VI, 918:1-4, 925:16-926:14. Appellant was not denied access to any of the following activities or accommodations: football games, theatrical productions, concerts, dances, the cafeteria, the library, an academic counselor, the parking lot (when he was old enough to drive), the school bus, or

the school nurse. Tr. Vol. VI, 927:22-929:2. When he attended events, he used the men's room, which was the bathroom of his choice. Tr. Vol. VI, 929:3-8.

C. Two erroneous and prejudicial evidentiary rulings at trial

1. The trial court refuses to admit evidence of mandamus proceeding filed by Appellant against the School District demanding unrestricted access to male-designated facilities

During trial, the School District twice attempted to offer evidence about the litigation of a petition for writ of mandamus filed by Appellant against the School District. Tr. Vol. III, 402:25-405:21; Vol. VII, 1072:1-1073:20. The petition for writ of mandamus was an effort by Appellant to obtain a writ directing the School District to permit him unrestricted access to male-designated facilities. D108, Appx. pp. A016-A022. When the School District attempted to offer evidence of the mandamus proceedings, Appellant objected on the basis of relevance. Tr. Vol. III, 403:18-404:1; Vol. VII, 1072:5-1073:5. The School District argued the mandamus litigation was relevant because Appellant raised the issue on direct examination of his father, Tr. Vol. III, 404:2-7, the evidence was relevant to Appellant's mother's bias and the defense of collateral estoppel, and the Appellant had opened the door to the inquiry. Tr. Vol. VII, 1072:14-17, 1073:6-7. The School District also argued the mandamus litigation and the judgment denying relief were relevant to defend against Appellant's claim for punitive damages. Tr. Vol. VII, 1098:13-17. On both occasions, the trial court took the matter under advisement with directions to the School District's counsel not to continue with the line of questioning. Tr. Vol. III, 405:5-20; Vol. VII, 1073:9-11. The School District made an offer of proof. Tr. Vol. VII, 1102:4-1103:15. Ultimately, the trial court refused to permit testimony about the mandamus case and refused admission of the petition and judgment. Tr. Vol. VII, 1096:5-1098:25.

In late July of 2014, between Appellant's eighth- and ninth-grade years, Appellant (by his mother as next friend) filed a petition in mandamus. D108, Appx. pp. A016-A022. Among other things, Appellant alleged the Appellant was a "female to male minor child," the School District had denied Appellant access to the male-designated restrooms and locker rooms at the middle school and was going to refuse such access to Appellant at the

Freshman Center. D108 pp.2,3, Appx. pp. A017, A018. Appellant asserted "Respondents have engaged in illegal sex discrimination against R.M.A. based on his gender identity by prohibiting him access to the boys' restrooms and locker rooms." D108 p.4, Appx. p. A019. He also alleged, "Respondents' refusal to provide R.M.A. access to the boys' restrooms and boys' locker rooms is based entirely on R.M.A.'s gender identity because it conflicts with his assigned sex at birth." D108 p.5, Appx. p. A020. He asserted the School District and other respondents were duty-bound under the MHRA public accommodations statute to give him access to the same facilities as "other male students." D108 pp.4-5, Appx. pp. A019-A020. Appellant sought the following relief:

> Relator requests this Court issue a Writ of Mandamus directing Respondents School District, School Board and Superintendent to provide Relator R.M.A. the same access to facilities and the same privilege of using said facilities as is given to all other male children attending school within the School District or otherwise attending educational or extra-curricular related functions at any school maintained and operated by the School District.

D108 p.4, Appx. p. A019.

The circuit court refused to issue a writ of mandamus. On March 5, 2015, the court reasoned:

> Relators are seeking this Court's adjudication on an unsettled area of law. Relator's own counsel admitted as much in oral arguments on February 11, 2015. Relators have admitted that no specific Missouri law or case provides R.M.A. with a specific right, as a transgender student, to utilize the restroom or locker room facilities of R.M.A.'s choice. In this case the Relators have failed to meet the most basic and crucial element of mandamus, in that ***Relators have not asserted an existing, clear, unconditional legal right. No direct authority exists in this jurisdiction that clearly and unconditionally imposes a duty on the Respondents to provide Relator R.M.A., a female to male transgender minor child, with unhindered access to the boys' restrooms, locker rooms, and any other boys' facilities within the Blue Springs R-IV School District on the basis of Relator's chosen gender identity.***
>
> * * * *
>
> More specifically, the Court finds Relators' arguments citing three general civil rights statutes which they claim support their petition in mandamus to be unpersuasive. The three general civil rights statutes cited by

> Relators are as follows: Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"); Title IX of the Educational Amendments Act of 1972 (hereinafter "Title IX"); and, the Missouri Human Rights Act (hereinafter "MHRA"). ***None of these statutes impose a clear and unconditional obligation on the Respondents which would give rise to the issuance of a writ of mandamus.***

D110 pp.7-8, Appx. pp. A029-A030 (emphasis supplied).

The circuit court also noted factual stipulations between Appellant and the School District—among them, matters at issue in the trial of this case, including:

> 16. Until R.M.A.'s attendance of the eighth grade at Delta Woods Middle School, Relators had expressed satisfaction with the School District's treatment of R.M.A. and the accommodations made to support R.M.A.
>
> 17. Relators expressed an interest in R.M.A. having access to the boys' locker room and restrooms during the 8th grade school year.
>
> * * * *
>
> 19. R.M.A. still possesses female genitalia; the standard of care for gender confirmation surgery requires an individual reach the age of 18 years before such surgery will be performed, if the individual chooses to do so.
>
> 20. Relator's Writ of Mandamus is requesting that this Court mandate that a student with female genitalia, who identifies as male, be allowed to use the boys' restrooms and locker rooms.

D110 pp.3-4, Appx. pp. A025-A026.

Further, the circuit court's judgment contained factual findings which, if published to the jury, would have directly contradicted a finding that the School District operated with any evil motive:

> 24. While Relator R.M.A. has not been subject to harassment or bullying, the Court finds that the introduction of a transgender female to male student into the boys' restroom and locker room does present unique challenges in protecting not only R.M.A., but also in respecting the rights and safety of all students utilizing those facilities.
>
> 25. Respondents have denied Relator R.M.A.'s access to the boys' restrooms and locker rooms, in part and understandably, due to the possible safety issues that could arise from allowing a student with female genitalia to freely access boys' restroom and locker room facilities.

> 26. Respondents' supervision and access to facilities afforded to R.M.A. are consistent with the supervision and access afforded to other students based upon their current male or female anatomy.
>
> 27. Respondents have been accommodating of R.M.A. and this student's particular needs as to gender identity since R.M.A. was a fourth grade student.
>
> 28. Under the accommodations provided by the Respondents, R.M.A. has flourished academically and socially.

D110 pp.4-5, Appx. pp. A026-A027.

2. The trial court admits evidence of purported gender identity discrimination by a travel agency not in the School District's control

Appellant offered evidence about an eighth-grade trip to New York and Washington, D.C. during the summer between eighth and ninth grade. Tr. Vol. IV, 620:20-622:18. The school tries to make the trip annually, but the trip is not affiliated with the School District. Tr. Vol. IV, 621:6-9. The School District objected based on relevance. Tr. Vol. IV, 622:24-623:6. Appellant's counsel argued the evidence was admissible—that the School District had a duty to stop discrimination by a third-party under *Diaz v. Autozoners, LLC*, 484 S.W.3d 64 (Mo. App. 2015). Tr. Vol. IV, 623:7-19. After extended argument by counsel, the Court took the objection under advisement pending an offer of proof. Tr. Vol. IV, 622:24-629:14. During the offer of proof, the middle school principal was asked about the decision that Appellant was to room with his mother during the eight-grade trip, while other students were permitted to choose their roommates. Tr. Vol. IV, 651:10-652:22. He testified there was no relationship between the School District and the travel agency that ran the eight-grade trip. Tr. Vol. IV, 656:25-657:6. He also testified room designations were dictated by the third-party company, and the trip was off the school grounds. Tr. Vol. IV, 657:7-13. After the offer of proof, the trial court ruled as follows:

> So here's my rationale, not addressing any other reasons for relevancy. Both sides have kind of pounded the drum of punitive damages are at issue, state of mind is at issue. I think it is relevant to the state of mind, so I'm going to let it in.

Tr. Vol. IV, 660:1-6. During the subsequent questioning of the middle school principal, the School District renewed its objection for the record based on both logical and legal relevance, and the trial court overruled the objection. Tr. Vol. IV, 664:3-15.

Appellant, himself, did not testify about the eighth-grade trip. Tr. Vol. VI, 868:20-945:1. However, Appellant's mother testified about her complaints that Appellant, a transgender boy with female genitals, was not going to be permitted to share a hotel room in New York City with boys from his class. Tr. Vol. VII, 1045:1-1052:9. This issue does not appear in the petition. D1. The evidence was that the class trip was organized by a travel agent that was not associated with the School District, Tr. Vol. IV, 665:21-24, 680:23-25, and that the travel agent set the rules for who could share hotel rooms. Tr. Vol. IV, 667:11-17, 681:1-4. The evidence included Appellant's mother's emails with School District personnel and testimony about her frustration over the matter. Tr. Vol. VII, 1045:1-1052:7. Appellant's mother also testified about her direct contacts with the travel agency's attorney. Tr. Vol. VII, 1046:25-1049:5. It also included evidence that parents of some of the other boys objected to the proposed rooming arrangements. Tr. Vol. IV, 682:14-683:6; Vol. VII, 1050:19-1052:3. In the end, Appellant roomed with one of his male friends because his mother gave permission. Tr. Vol. VII, 1050:2-18.

D. Appellant's damages arguments and the damages verdicts

During closing argument to the jury, Appellant's counsel only argued for non-economic compensatory damages starting in Appellant's eighth grade year. Tr. Vol. VII, 1133:11-21. She recommended annual amounts that declined by $10,000 per year, beginning with $50,000 for eighth grade and ending with $10,000 for twelfth grade. Tr. Vol. VII, 1133:11-21. The total amount she suggested was $150,000. Tr. Vol. VII, 1133:18-19. The jury increased this amount by $25,000 to $175,000 in its verdict. D93 p.1.

The jury also determined the School District was liable for punitive damages. D93 p.1. During the closing argument on punitive damages, Appellant's counsel anchored a damages calculation to the ten minutes Appellant waited before entering the boys' locker room in eighth grade:

> Let's say he was alone in there for five minutes, right? Let's say it was five minutes, it wasn't the full ten. In other words, if you want to say something to the School District. You want to say something to them. We don't like. We would suggest five minutes equal $500,000. Let's say you want to say something stern to the School District, so we'll say seven minutes, right? Seven minutes of time that he was alone, $700,000. Let's say you want to yell, you want to be heard loudly. Ten minutes, a million dollars. Okay. Let's say you want to make the earth shake, double it and go to 2 million. That is my suggestion.

Tr. Vol. VIII, 1176:11-25. The jury awarded $4,000,000 in punitive damages, double the amount Appellant suggested to "make the earth shake." D93 p.2.

POINTS RELIED ON

POINT I: THE TRIAL COURT CORRECTLY GRANTED JNOV TO THE SCHOOL DISTRICT BECAUSE APPELLANT FAILED TO OFFER EVIDENCE THAT HIS MALE SEX WAS A CONTRIBUTING FACTOR TO THE SCHOOL DISTRICT RESTRICTING HIS ACCESS TO MALE-DESIGNATED LOCKER ROOMS AND BATHROOMS.

Lampley v. Missouri Commission on Human Rights, 570 S.W.3d 16 (Mo. banc 2019)

Pittman v. Cook Paper Recycling Corp., 478 S.W.3d 479 (Mo. App. 2015)

R.M.A. by Appleberry v. Blue Springs R-IV School District, 568 S.W.3d 420 (Mo. banc 2019)

Self v. Midwest Orthopedics Foot & Ankle, P.C., 272 S.W.3d 364 (Mo. App. 2008)

4 C.S.R. 180-3.040(11)(eff. Nov. 10, 1973)

4 C.S.R. 180-3.040(16)(eff. Nov. 10, 1973)

POINT II: THE TRIAL COURT CORRECTLY GRANTED A NEW TRIAL TO THE SCHOOL DISTRICT AS CONDITIONAL RELIEF BECAUSE THE JURY'S VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

Badahman v. Catering St. Louis, 395 S.W.3d 29 (Mo. banc 2013)

R.M.A. by Appleberry v. Blue Springs R-IV School District, 568 S.W.3d 420 (Mo. banc 2019)

Taylor v. F.W. Woolworth Co., 641 S.W.2d 108 (Mo. banc 1982)

POINT III: THE TRIAL COURT'S VERDICT DIRECTOR TO THE JURY WAS CORRECT BECAUSE IT FOLLOWS THE LAW, AS PREVIOUSLY DECIDED BY THIS COURT.

Doe 1631 v. Quest Diagnostics, Inc., 395 S.W.3d 8 (Mo. banc 2013)

Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752 (Mo. banc 2010)

R.M.A. by Appleberry v. Blue Springs R-IV School District, 568 S.W.3d 420 (Mo. banc 2019)

Walton v. City of Berkeley, 223 S.W.3d 126 (Mo. banc 2007)

POINT IV: THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF A MANDAMUS CASE BETWEEN THE PARTIES RESOLVED IN FAVOR OF THE SCHOOL DISTRICT BECAUSE THE EVIDENCE WAS LOGICALLY AND LEGALLY RELEVANT IN THAT IT TENDED TO SHOW THE SCHOOL DISTRICT DID NOT ACT WITH EVIL MOTIVE OR RECKLESS INDIFFERENCE TO APPELLANT'S RIGHTS, AND THE EXCLUSION RESULTED IN PREJUDICE TO THE SCHOOL DISTRICT.

Burnett v. Griffith, 769 S.W.2d 780 (Mo. banc 1989)

Lewellen v. Universal Underwriters Insurance Co., 574 S.W.3d 251 (Mo. App. 2019)

Mitchell v. Kardesch, 313 S.W.3d 667 (Mo. banc 2010)

State v. Tisius, 92 S.W.3d 751 (Mo. banc 2002)

POINT V: THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF APPELLANT'S MOTHER'S COMPLAINTS ABOUT AN EIGHTH-GRADE TRIP BECAUSE THE EVIDENCE WAS NOT LOGICALLY OR LEGALLY RELEVANT IN THAT THE TRIP WAS NOT PLANNED OR RUN BY THE SCHOOL DISTRICT, AND THE SCHOOL DISTRICT SUFFERED PREJUDICE AS A RESULT.

Burnett v. Griffith, 769 S.W.2d 780 (Mo. banc 1989)

Mitchell v. Kardesch, 313 S.W.3d 667 (Mo. banc 2010)

State v. Tisius, 92 S.W.3d 751 (Mo. banc 2002)

Swartz v. Gale Webb Transportation Co., 215 S.W.3d 127 (Mo. banc 2007)

ARGUMENT

INTRODUCTORY ARGUMENT

This case has never been about discrimination toward Appellant. Its apparent goal was to make a point—but not a point that applies to Appellant, because Appellant was not treated badly. Appellant's statement to a therapist in the summer between his ninth and tenth grade years puts the facts of this case in context:

> A. "He states that he is well supported by his family and socially."
>
> Q. Go ahead.
>
> A. "The family presently has a legal suit with the Blue Springs School District to help strengthen their nondiscrimination policies, but [Appellant] states ***he is not at all affected by discriminatory policies at the school***. For instance, he says he uses the boys' bathroom but typically during class time to avoid a crowd."

Tr. Vol. VI, 942:9-18 (reading from Exhibit 202)(emphasis supplied).

A. This is Appellant's second trip to the well for the same bucket of water.

"*It's like déjà vu all over again.*"[6]

Appellant's complaints stem from the trial court's compliance with this Court's 2019 opinion in *R.M.A. by Appleberry*. The trial court operated with the understanding it was bound by the law of the case and acted accordingly. Even Appellant's counsel admit, "[t]his is Appellant's second visit to the Court on this matter, and what he seeks is substantially the same as what he sought before…." Appellant's Substitute Br., p. 20. However, Appellant complaints arise not from the trial court failing to follow this Court's prior rulings, but rather from the trial court adhering to this Court's rulings. Hence, this Court should uphold the trial court's judgment granting JNOV or provisionally granting a new trial, and this Court should uphold the trial court's verdict directing instruction which came directly from this Court's opinion in *R.M.A. by Appleberry*, 568 S.W.3d at 425.

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[6] Nate Scott, *The 50 greatest Yogi Berra quotes*, USA TODAY, Mar. 28, 2019, https://ftw.usatoday.com/2019/03/the-50-greatest-yogi-berra-quotes.

> The doctrine of law of the case provides that a previous holding in a case constitutes the law of the case and precludes relitigation of the issue on remand and subsequent appeal. *State v. Graham,* 13 S.W.3d 290, 293 (Mo. banc 2000); *Rodriguez v. Suzuki Motor Corp.,* 996 S.W.2d 47, 61 (Mo. banc 1999). The doctrine governs successive adjudications involving the same issues and facts. *Shahan v. Shahan,* 988 S.W.2d 529, 533 (Mo. banc 1999). 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. *Graham,* 13 S.W.3d at 293; *Shahan,* 988 S.W.2d at 533.

Walton v. City of Berkeley, 223 S.W.3d 126, 128-29 (Mo. banc 2007); *see also Williams v. Kimes*, 25 S.W.3d 150, 153-54 (Mo. banc 2000).

> The doctrine of law of the case is necessary to ensure uniformity of decisions, 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.[7]

American Eagle Waste Indus., LLC v. St. Louis Cnty., 379 S.W.3d 813, 825 (Mo. banc 2012)(citations and quotation marks omitted).

This case first came to the Court's attention in an appeal from the trial court's dismissal of Appellant's petition for failure to state a claim upon which relief could be granted. *R.M.A. by Appleberry*, 568 S.W.3d at 424. The Court's task was to evaluate Appellant's petition and determine whether it stated a claim under the MHRA's prohibition against sex discrimination in a public accommodation. The Court did not discuss in detail the positions asserted by the parties in their briefs, except to comment on their emphasis on sex stereotyping analysis under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). *R.M.A. by Appleberry*, 568 S.W.3d at 426 n.4. The Court

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[7] Appellant has not accused this Court of any erroneous ruling in *R.M.A. by Appleberry*. If Appellant believed this Court made an erroneous ruling in *R.M.A. by Appleberry*, he could have filed a motion for rehearing in *R.M.A. b/n/f Rachelle Appleberry v. Blue Springs R-IV Sch. Dist.*, SC96683, to raise the error. Appellant filed no such motion.

concluded Appellant's petition stated a claim for sex discrimination under the MHRA based on a "simple and straightforward" analysis. *Id*. The analysis began with a reiteration of the elements of a sex discrimination claim, followed by what "a verdict director in this case would state (in substance if not in form)." *Id*. at 425 (parenthetical in original).

The Court interpreted Appellant's petition for the purposes of this case as raising the straightforward question of whether the School District discriminated against Appellant because of his male sex, rather than the novel question of whether gender identity or transgender status was protected under the MHRA. The Court put it this way: "***R.M.A. does not claim protection under the MHRA based on his transgender status*** but, rather, based on his sex." *Id*. at 427 n.9 (emphasis added). The Court noted Appellant's petition alleged "R.M.A.'s legal sex is male," which it ruled was sufficient to allege membership in the protected class of the male sex. *Id*. This allegation, combined with Appellant's allegations of being refused access to boys' bathrooms and locker rooms, and his male sex being a contributing factor to the refusal, were deemed sufficient to state a claim. *Id*. at 426-28.

In brief, this Court:

- analyzed Appellant's petition against the elements of claims for sex discrimination in a public accommodation under the MHRA;
- determined Appellant's petition pleaded a claim for sex discrimination based on his protected status as a male;
- explicitly found the petition did not seek protection under the MHRA based on his transgender status; and,
- set out the verdict director for the parties and the trial court to use based on the allegations in Appellant's petition.

Appellant never amended his petition, *see generally* D1, so this Court's rulings in *R.M.A. by Appleberry* are the authoritative and binding interpretation of Appellant's petition, the claim the petition sets out under the MHRA, and the manner in which the petition sets out that claim. This Court further explained the relationship of Appellant's allegations to his MHRA claim by providing the applicable verdict director—which was

helpful to the parties and the trial court, as there is no Missouri Approved Instruction on point. *Id*. at 425.

The law of the case doctrine is meant to "ensure uniformity of decisions, protect the parties' expectations, and promote judicial economy." *American Eagle Waste Indus., LLC*, 379 S.W.3d at 825. Certainly, the trial court and the School District relied on the Court's rulings. Meanwhile, Appellant tried to dodge them, or in some instances, outright ignored them. This Court should uphold the trial court's rulings for the following reasons:

- The trial court conformed its decisions to prior rulings announced in *R.M.A. by Appleberry*;
- The School District relied on the rulings in *R.M.A. by Appleberry* at trial; and,
- To do otherwise would increase the burden on the court system not just in this case, but in others, as well.

After all, if this Court does not require these parties and the trial court to follow the law of the case in this matter, parties will be encouraged to take unnecessary and unwarranted additional trips to the well in their cases, which would defeat the goals of the law of the case doctrine.

B. The medical declaration of Appellant's sex as female was not a "mistake."

"*There is no swifter route to the corruption of thought than through the corruption of language.*"[8]

Appellant's argument does George Orwell proud. Appellant uses the words "mistake" and "mistakenly" thirteen times in his brief—each time to refer to a physician's purported "mistake" in determining Appellant's sex to be female at birth. By contrast, the word "mistake" appears only three times in the testimony at trial, and never in the context of asserting the doctor who assigned Appellant's sex as female at birth made a "mistake" by doing so. Tr. Vol. III, 434:14-15; Tr. Vol. IV, 521:6-13.

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[8] George Orwell, "*Propaganda and Demotic Speech*," All Art is Propaganda: Critical Essays, (George Packer ed. 2008).

The word "mistake" means: "a wrong judgment" and "a wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention."[9] As Appellant apparently now sees it, when he was born, a qualified physician observed Appellant's healthy and normal-appearing female genitals and "mistakenly" exclaimed, "It's a girl!" This purported "mistake" was repeated time and time again—by Appellant's parents who were familiar with Appellant's anatomy when they named him "Angela" and enrolled him in school as a girl, Tr. Vol. III, 394:24-395:13; and even by his expert witness who, as Appellant's physician, kept medical records and wrote a letter to the School District identifying Appellant as a female. Tr. Vol. III, 505:12-506:12; 508:14-509:7; Tr. Vol. III, 463:10-19; 510:4-22. Appellant even insinuates this Court approved the term "mistake" as describing a physician's designation of a baby's sex at birth based on the baby's genitals. Appellant's Substitute Br., p. 30, *citing R.M.A. by Appleberry,* 568 S.W.3d at 428. Of course, this Court did no such thing.

The use of the term "mistake" is a new tactic and reflects a rhetorical evolution in Appellant's case—the evidence has always been the same, but the words Appellant uses to characterize his circumstances have changed. In October 2014, Appellant described himself to the MCHR as "a high school freshman and a female to male transgender teenager attending school in the Blue Springs R-IV School District." D3 p. 2. The word "mistake" does not appear in Appellant's MHRA complaint. D3. The word "mistake" is never used in Appellant's petition. D2. In fact, when the parties were originally before this Court, Appellant did not use the words "mistake" and "mistakenly" in his briefing in any context. *See*, Substitute Br. of Appellant R.M.A., *R.M.A. b/n/f Rachelle Appleberry v. Blue Springs R-IV Sch. Dist.*, SC96683[10]; and, Substitute Reply Br. of Appellant R.M.A., *R.M.A. b/n/f*

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[9] *Mistake*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/mistake#dictionary-entry-2.

[10] To the extent it is required for this argument, Respondent asks the Court to take judicial notice of the Court's file in *R.M.A. b/n/f Rachelle Appleberry v. Blue Springs R-IV Sch. Dist.*, SC96683.

Rachelle Appleberry v. Blue Springs R-IV Sch. Dist., SC96683. Similarly, the word "mistake" and its derivations make no appearance in this Court's opinion in the first appeal of this case. *See generally*, *R.M.A. by Appleberry*, *supra*.

Appellant's new rhetorical device implicitly accepts his failure to meet his original goal; namely: to have gender identity or transgender status declared a protected category within the definition of "sex" under the MHRA. Substitute Br. of Appellant R.M.A., pp. 12, 17-35, *R.M.A. b/n/f Rachelle Appleberry v. Blue Springs R-IV Sch. Dist.*, SC96683. Appellant's tortured use of the word "mistake" manifests the fiction—unsupported by any evidence—that his sex (not his gender identity) was male from birth. It is meant to erase the disparity between his sex and gender identity and eliminate the need to consider his transgender status. Hence, Appellant's assignment to the female sex was a doctor's "mistake"; therefore, his sex is and always was "male," notwithstanding his vagina, uterus, ovaries, and 46XX karyotype—or so Appellant would have it. Tr. Vol. III, 501:13-502:23; 506:16-507:1; 507:23-508:12. In this way, Appellant manages to redefine not only "mistake," but also "male" and "sex." Inasmuch as his assignment as female was just a "mistake," Appellant can pretend his female sex organs lose their stature as biologically defining body parts and become mere "characteristics" subject to analysis for sexual stereotyping under *Lampley v. Missouri Commission on Human Rights*, 570 S.W.3d 16 (Mo. banc 2019).

Appellant's characterization of his sex assignment at birth as a "mistake" conveniently fixes a second problem for Appellant in his case. In reading the petition, this Court decided Appellant's allegation that his "legal sex is male" sufficiently alleged the second element of his sex discrimination claim—his membership in the protected class of the male sex. *R.M.A. by Appleberry*, 568 S.W.3d at 427. However, Appellant's birth certificate was not ordered to be changed to reflect his designation as male until December 14, 2014, nearly 15 years after Appellant's birth. Tr. Vol. III 386:15-25. (The copy of Appellant's amended birth certificate offered at trial showed an issue date of May 22, 2015. Tr. Vol. III, 388:4-389:4.) Appellant's evidence relating to his experiences of being denied access to the boys' bathrooms and allowed only restricted access to the boys' locker room

in middle school—which were the bulk of his claims—were focused on the 2013-2014 school year, which predated his status as a "legal male" by more than six months. Hence, Appellant needs a way to back-date his membership in the protected class of the male sex, and what better way to do so than to declare his assignment to the female sex a "mistake" from the start?

NELA engages in similar wordplay. For instance, it confidently asserts "Plaintiff is a biological male." NELA Br., p. 6. To support the proposition, NELA cites Appellant's father's testimony that Appellant is "as much a male as anybody else in this room. ***What's between your legs does not define you as a man.***" Tr. Vol. III, 412:18-20 (emphasis supplied). According to the Diagnostic and Statistics Manual of Mental Disorders-V and the American Medical Association, the biological indicators of sex include gonads, Tr. Vol. III, 499:13-501:4, so in the biological sense, "what's between your legs," among other things, does define a person as male or female. Obviously, Appellant's father was speaking metaphorically, but NELA cites it as "biology." Likewise, NELA cites testimony that Appellant identified himself as male to his doctor as evidence of biology, Tr. Vol. III, 484:23-485:7—where the medical standard literally defines transgender as when a person's identified gender is different than his or her sex. Tr. Vol. III, 447:12-17; 497:21-498:6. In fact, all of NELA's citations to the record for this fundamental proposition are to Appellant's gender and not his biological sex. (E.g., Appellant "should be considered male," Tr. Vol. III, 490:22; testimony about the procedure for gender modification, Tr. Vol. III, 489:19-490:17; "the appropriate sex is whatever the child believes … identifies with," Tr. Vol. III, 484:20-22; a *non sequitur* about when puberty blockers are administered, Tr. Vol. III, 469:2-6; Appellant was assigned the female sex at birth, Tr. Vol. VI, 873:19-21; Appellant's mother did internet research and found information about "this thing it's called transgender," Tr. Vol. VII, 985:11-14, 986:17-23). Hence, NELA relies on testimony that

implicates Appellant's "complex psychosocial self-perception attitudes and expectations"—in other words, his gender—not his biological sex.[11]

NELA also argues Missouri law "does not distinguish between 'legal' sex and 'biological' sex." NELA Br., p. 6. The issue is not one of distinguishing between legal and biological sex as a matter of law; rather the distinction is raised by Appellant in his petition. D2, p. 5 ("R.M.A.'s legal sex is 'male'"). This Court relied on this very allegation as a reason to find Appellant had adequately pleaded his sex is male. *R.M.A. by Appleberry*, 568 S.W.3d at 427. NELA's assertion that there is no distinction in Missouri law between "legal" sex and "biological" sex undermines Appellant's allegation and this Court's basis for finding Appellant alleged a viable claim. Once again, Appellant and NELA's positions are exposed as a rhetorical evolution—redefining words in the futile effort to shoehorn the facts into a viable cause of action.

Appellant's protestations aside, his doctor did not make a "mistake" by assigning Appellant's sex as female at birth. Each of the thirteen times Appellant uses the word "mistake" to describe his birth sex assignment, he stretches the definition beyond breaking. Likewise, Appellant is biologically of the female sex, not the male sex. George Orwell would be outraged by Appellant and NELA's Newspeak, but perhaps Inigo Montoya said it best: "You keep using that word. I do not think it means what you think it means."[12]

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[11] *See also* Appellant's petition, which identifies Appellant as a "female to male transgender teenager who was born a female child." D2, p.4.

[12] THE PRINCESS BRIDE (motion picture), released Oct. 9, 1987, 20th Century Studios, Metro-Goldwin-Mayer, Lionsgate and Vestron, Distributors.

POINT I: THE TRIAL COURT CORRECTLY GRANTED JNOV TO THE SCHOOL DISTRICT BECAUSE APPELLANT FAILED TO OFFER EVIDENCE THAT HIS MALE SEX WAS A CONTRIBUTING FACTOR TO THE SCHOOL DISTRICT RESTRICTING HIS ACCESS TO MALE-DESIGNATED LOCKER ROOMS AND BATHROOMS.

A. The trial court's ruling survives *de novo* review.

The Court will affirm the grant of a judgment notwithstanding the verdict if the plaintiff failed to make a submissible case. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011)(standard of review for affirming grant of directed verdict). "To determine whether a directed verdict or judgment notwithstanding the verdict should have been granted this Court applies essentially the same standard." *Ellison v. Fry*, 437 S.W.3d 762, 768 (Mo. banc 2014).

> To determine whether the evidence was sufficient to support the jury's verdict, an appellate court views the evidence in the light most favorable to the verdict. A motion for directed verdict or JNOV should be granted if the defendant shows that at least one element of the plaintiff's case is not supported by the evidence.

Id., *citing Moore*, 332 S.W.3d at 756.

"A case is submissible when each element essential to liability is supported by legal and substantial evidence." *Brock v. Dunne*, 637 S.W.3d 22, 26 (Mo. banc 2021)(citation and quotation marks omitted). "Substantial evidence is evidence that "has probative force on the issues, and from which the trier of fact can reasonably decide the case.'" *Id*., *quoting Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 814 (Mo. banc 2003). "The Court will not supply missing evidence or give [Appellant] the benefit of unreasonable, speculative or forced inferences." *Id*. (citation and quotation marks omitted). The Court "will affirm the trial court's JNOV ruling if the trial court's ruling was proper for any reason, even if its assigned grounds were wrong." *Fischer v. First Am. Title Ins.*, 388 S.W.3d 181, 186-87 (Mo. App. 2012)(citation and quotation marks omitted). Here, the trial court correctly granted JNOV because Appellant failed to support his claim with substantial evidence

showing his male sex was a contributing factor in the School District's decisions about his access to the boys' restrooms and locker rooms. Additionally, Appellant failed to support his claim that he is of the male sex—as opposed to his male gender—with substantial evidence.

B. Appellant failed to support each element of his claim with substantial evidence

1. Appellant failed to support the element that his "male sex was a contributing factor in the denial of full an equal use and enjoyment of the male-designated facilities

This Court has determined one of the elements of Appellant's claim is that he was denied unrestricted access to the boys' restrooms and locker rooms because of his "status as a member of a protected class." *R.M.A. by Appleberry*, 568 S.W.3d at 425. Based on the allegations in Appellant's petition, this Court determined Appellant was alleging his membership in the protected class of "male sex," such that Appellant alleged, and was required to prove, his "male sex" was a contributing factor in the denial of such unrestricted access. *Id.*[13]

During the post-trial motions, the School District challenged Appellant to complete the following sentence to identify the evidence adduced to show his male sex was a contributing factor to the denial of his use of male bathrooms and locker rooms: "The evidence introduced to establish this element was [*insert specific testimonial or documentary evidence here*]." D140 p. 3. Appellant has never accepted this challenge—to identify in a simple sentence a single piece of evidence introduced on a required element of his claim. The record is replete with evidence showing the reason why Appellant's access to the boy's bathrooms and locker rooms was restricted was because of his female genitals. Tr. Vol. IV, 552:25-553:4, 592:5-14, 678:2-8, 687:6-11, 687:18-688:1; 691:21-692:13; Tr. Vol. V, 745:13-746:6. In fact, Appellant admitted he has female genitals, and he admitted

[13] Appellant omits the modifier "male" in when he recounts this Court's explication of the second required element of Appellant's claim.

(at least at the time of trial) he had not had gender confirmation surgery. Tr. Vol. VII, 1100: 5-7. The School District's concern in restricting his access was based on safety and privacy related to his female genitals. Tr. Vol. IV, 556:9-15. This evidence was never refuted.

At this stage, Appellant's failure to identify any evidence of his male sex being a contributing factor in any alleged discrimination by the School District should be taken as his concession that no such evidence was adduced at trial. Appellant's meets his failure with three tactics: (1) He asserts he was required to show only his sex—not his male sex—was a contributing factor in the discrimination; (2) He asserts reliance on his female genitalia as the basis for his access to the boys' rooms is a sex stereotype to which *Lampley* and *Price Waterhouse* apply; and (3) He asserts he should have been permitted unrestricted access to the boys' restrooms and locker rooms based on his male gender as opposed to being denied access based on his female sex.

a. Appellant was required (and failed) to show his male sex was a contributing factor

From the outset, Appellant has brought forth is discrimination complaint based on access to sex-designated bathrooms and locker rooms. He does not challenge the legal propriety of sex-designated facilities; rather, his complaint is that he was refused access to boys-designated facilities in a public school based on his legal sex. In other words, his point is that he should have been permitted access to the boys' facilities based on his gender identity. The evidence at trial was the School District treated Appellant based on his gender identity in other ways, but not when it came to access to the boys' facilities.

Appellant asserts he should not be required to prove his male sex was the contributing factor; rather proof that his sex—unmodified by the word "male"—was a contributing factor is sufficient. This Court's prior opinion shows why Appellant is wrong. Quoting from the petition, this Court noted "the petition specifically alleges that 'R.M.A.'s legal sex is male.' Petition at ¶ 25." *R.M.A. by Appleberry*, 568 S.W.3d at 427. Appellant also alleges he was "born as a female child," D2 p. 4, and the reasons given "for denying Plaintiff R.M.A. access to the same accommodations as other boys is that Plaintiff R.M.A. is transgender and is alleged to have female genitalia." D2 p. 5. Hence Appellant alleged

his inclusion in both the male and female protected classes. He also alleged his transgender status. This Court rejected the notion that Appellant claimed entitlement to unrestricted access to the boys-designated facilities based on either his female sex or his transgender status. *Id*. at 427 n.7. The Court did not use the opportunity to disallow sex-designated bathrooms or locker rooms (hence restricting Appellant's access to the boys-designated facilities was not prohibited based on Appellant's female sex), nor did the Court take the opportunity to recognized gender identity or transgender status as a protected class under the MHRA. Accordingly, based on the allegations in Appellant's petition and this Court's holding, Appellant was required to prove his male sex—not is sex as a general matter and not his gender identity—was the basis of alleged discrimination.

b. The School District's reliance on Appellant's female genitalia to restrict access to the boys' room was not sex stereotyping

Appellant invites this Court to accept his female genitals as a mere "gender-related trait" of the sort that would be subject to sex stereotyping analysis. Although the court of appeals accepted Appellant's invitation, this Court should not. Simply put, Appellant's invitation misreads this Court's decision in *Lampley* and is meant to put this Court on track to recognize transgender status as a protected class under the MHRA. Although Appellant urged the Court to recognize transgender status as a protected class when this case was first before this Court, *see* Substitute Br. of Appellant R.M.A., pp. 12, 17-35, *R.M.A. b/n/f Rachelle Appleberry v. Blue Springs R-IV Sch. Dist.*, SC96683, the Court refused to reach this result. In fact, the Court specifically denied the recognition of transgender status as protected under the MHRA was within the scope of Appellant's allegations. *Id*. at 427 n.9.

Appellant now comes to the Court to suggest that restricting his access to the boys' restrooms and locker rooms based on his female genitals is sex stereotyping rather than a reference to a defining fact by which the sexes are distinguished. In *R.M.A. by Appleberry*, the Court recognized that to state a claim, Appellant was required to identify a protected class by reason of which he allegedly faced discrimination. He chose to allege his male sex. *Id*. at 425-27. The evidence at trial was: Sex refers to the biological differences between males and females. Tr. Vol. III, 500:14-501:4. More specifically, sex refers to the

biological indicators of a male and female, understood in the context of reproductive capacity, such as sex chromosomes, gonads, sex hormones and nonambiguous internal and external genitalia. Tr. Vol. III, 499:9-500:11. Genitals are not behaviors, clothing, or make-up choices; rather, they are definitional of sex—to find otherwise would ultimately cause the word "sex" to lose any meaning in the context of the MHRA and a host of other statutes.

Meanwhile, what does Missouri look to when it determines sex stereotyping?[14] *Lampley* is this Court's definitive statement. In *Lampley*, the MCHR terminated administrative proceedings filed by a gay man who claimed he suffered discrimination because of sex.

> In his factual recitation, Lampley stated he is a gay man. Lampley elaborated ***he does not exhibit the stereotypical attributes of how a male should appear and behave***. Lampley alleged other similarly situated co-workers, ***those who were not gay and exhibited stereotypical male or female attributes, were treated differently***. Because he exhibited non-stereotypical behaviors, Lampley asserted he was subjected to harassment at work.

Lampley, 570 S.W.3d at 19 (emphasis supplied). The Commission terminated its investigation because it read the complaint as asserting a claim based on discrimination because of sexual orientation, and "the investigator concluded sexual orientation is not protected by the Act." *Id*. at 20.[15]

In its analysis, the Court first addressed the holding in *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo. App. 2015), in which the court of appeals held the MHRA does not prohibit discrimination based on a person's sexual orientation. The *Lampley* decision did not question the holding in *Pittman*; rather the Court held *Pittman* was inapplicable because it did not address sex stereotyping. The Court determined

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[14] Note: The Court took pains to explain that sex stereotyping is not a distinct type of sex discrimination claim, but rather is merely evidence of discrimination. *R.M.A. by Appleberry*, 568 S.W.3d at 426 n.4; *see also Lampley*, 570 S.W.3d at 26-27 (Wilson, J. concurring).

[15] Additional facts about the second complainant and the administrative procedural aspects of the case are omitted for the purposes of concision.

"Lampley's sexual orientation was merely incidental to the sex discrimination complaints filed," *Lampley*, 570 S.W.3d at 23, and Lampley's complaint was discrimination based on sex because "he did not conform to generally held sexual stereotypes." *Id*.

Referring to *Price Waterhouse*, the Court showed how "[s]tereotyping may give rise to an inference of unlawful discrimination upon a member of a protected class." *Id*. at 24. In *Price Waterhouse*:

> a female senior manager was denied partnership after partners referred to her as "macho" and needing "a course at charm school." She was advised that to become a partner she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Id., *quoting Price Waterhouse*, 490 U.S. at 235. The Court cited *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2nd Cir. 2017) for the propositions that gays, lesbians, and bisexual individuals do not have less protection under discrimination statutes; "[h]owever, standing alone, the characteristic of being gay, lesbian, or bisexual cannot sustain a sex stereotyping claim."

The Court specifically found "[s]exual orientation is incidental and irrelevant to sex stereotyping." *Id*. at 25. In other words, the fact that Lampley was gay, was irrelevant to his discrimination claim. Even though being a gay man involves romantic attraction to men instead of women, the Court found homosexuality was not the sort of characteristic at issue for sex stereotyping—to have done otherwise would have ultimately led to the recognition of sexual orientation as a protected category. The Court's analysis holds more strongly this case. Here, Appellant argues the actual biological features of sex are characteristics amenable to sex stereotyping analysis. However, if the definitional features of being gay are not characteristics for sex stereotyping, the same holds true for the biological indicators of a male and female understood in the context of reproductive capacity—to hold otherwise would be to recognize transgender status as a protected class under the MHRA.

The issue here is not what clothing Appellant wore, or if he used make-up or acted like a boy (or a girl, for that matter). Rather, the defining features, as identified by the coach

for unrestricted access to the eighth-grade boys' locker room was this: "As far as anatomy-wise, you would have a penis if you're male." Tr. Vol. V, 745:20-21.

c. Under the MHRA, "sex" means "biological sex"

Appellant takes issue with the dissent's definition of "sex" in *R.M.A. by Appleberry*. The dissent noted the absence of a statutory definition for the word "sex," and accordingly consulted the dictionary for its "plain and ordinary meaning." *R.M.A. by Appleberry*, 568 S.W.3d 431-32 (Fischer, J., dissenting). "Each of these definitions is premised either directly or indirectly on 'sex' as a biological classification of individuals as male or female." *Id*. Appellant may disagree with the dissent, but Appellant's expert witness confirmed the psychological and medical fields do not:

> Q. Let me give you the actual copy of the DSM-V. I just want you to read this section right here. Read that.
>
> A. "In the chapter sex and sexual refer to the biological indicators of a male and female, understood in the context of reproductive capacity, such as being sex chromosomes, gonads, sex hormones and nonambiguous internal and external genitalia."
>
> Q. You agree with the DSM-V definition, do you not?
>
> A. Yes, but there's a spectrum.

Tr. Vol. III, 499:23-500:8.

> Q. So would you agree with the following definition that's included in the AMA Journal of Ethics. "Sex refers to the biological differences between males and female." Would you agree with that?
>
> A. Yes.

Tr. Vol. III, 500:25-501:4.

Hence, while Appellant disagrees with the dissent, his doctor and dictionaries do not. The majority in R.M.A. by Appleberry may have held out the possibility of Appellant's "legal male" status as providing a basis for his discrimination claim; however, it does not help Appellant in this case. First, by the time Appellant achieved legal male status (six months after he graduated middle school), the bulk of the alleged discrimination he faced had come and gone: In middle school, Appellant wanted, but was not allowed, to use the

boys' restrooms; and he wanted unrestricted access to the boys' locker room but had to wait ten minutes while the boys got their pants on. By the time he was at the Freshman Center, he was using the boys' restroom. Tr. Vol. VI, 942:9-18. Accordingly, Appellant was not a "legal male" when he was allegedly being discriminated against in access to the boys' designated facilities in eighth grade. While Appellant was in eighth grade, he was a "child or adolescent whose gender identity is different than their assigned sex," Tr. 497:21-498:6; in other words, a transgender child or adolescent according to the AMA. Certainly, his "legal male" status, which was granted in ninth grade, did nothing to change Appellant's medical and psychological status, and it did nothing to change his biology. However, even were the Court to recognize Appellant's right to access to boys' restrooms and locker rooms in public schools because of his "legal male" status, Appellant was not denied access to the bathrooms of his choice by the time that status was conferred.

2. Appellant's primary authorities are of no help to his case

Other than *R.M.A. by Appleberry* and *Lampley*, Appellant primarily cites one Missouri case and one federal case to support his position; however, neither support his case.

a. Self v. Midwest Orthopedics Foot & Ankle, P.C.

Appellant cites *Self v. Midwest Orthopedics Foot & Ankle, P.C.*, 272 S.W.3d 364 (Mo. App. 2008), apparently because it contains some language he deems helpful to his cause. In fact, the case does not help Appellant at all. In *Self*, the plaintiff, a woman, heroically performed her job as a billing clerk (including while she was hospitalized) during her difficult pregnancy. She was fired two weeks before she gave birth. On appeal from the circuit court's dismissal, the court of appeals held the plaintiff's allegation "that a gender-related trait—pregnancy—was a factor in respondent's decision to discharge her" was sufficient to state a claim. *Self*, 272 S.W.3d at 371.

Self fails to provide support for Appellant's position. First and foremost, the female plaintiff was not seeking access to a bathroom designated for men. In fact, the Missouri Commission on Human Rights has long recognized the MHRA imposes a duty on employers to provide equal access to separate bathrooms for men and women:

> The employer's policies and practices must assure appropriate physical facilities to both sexes. The employer may not refuse to hire men or women, or deny men or women a particular job because there are no restroom or associate facilities, unless the employer is able to show that the construction of the facilities would be unreasonable for such reasons as excessive expense or lack of space.

4 C.S.R. 180-3.040(11)(eff. Nov. 10, 1973). Likewise, the 1973 regulations prohibited discrimination against female job applicants based on pregnancy. 4 C.S.R. 180-3.040(16)(eff. Nov. 10, 1973)

Appellant's reference to pregnancy as a "gender-related trait" provides an interesting illustration of how our language is changing. It may be that in 1973, and in 2008 when *Self* was decided, sex and gender were used as synonyms. However, the definition of gender has expanded to include "the continuum of complex psychosocial self-perception attitudes and expectations people have about members of both sexes." Tr. Vol. III, 501:5-9. For instance, when the MCHR originally published its regulations, it did not refer to "pregnant persons." Fifty years hence, it is not unheard of that transgender men may become pregnant and deliver babies. This demonstrates pregnancy is no longer a "gender-related trait," because a person of either the male gender or the female gender may become pregnant. Now, pregnancy is only a sex-related trait; that is, a trait related to "biological indicators of a male and female, understood in the context of reproductive capacity, such as sex chromosomes, gonads, sex hormones and nonambiguous internal and external genitalia. Tr. Vol. III, 499:9-500:11. Pregnancy is obviously "biological" by nature, and while biological women may become pregnant, regardless of their gender—biological men cannot.

b. Bostock v. Clayton County, Georgia

Appellant's references to *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020) are also unavailing. In *Bostock*, the United States Supreme Court recognized transgender status and sexual orientation as protected categories for the purposes of employment discrimination under Title VII. On its own terms, the Court confined its reasoning and its decision to Title VII. In fact, in *Department of Education v. Louisiana*,

603 U.S.866, 144 S.Ct. 2507 (2024), the Court refused to stay a preliminary injunction imposed by lower courts on the implementation of a new Department of Education rule issued under Title IX. In its per curium opinion, the Court noted:

> Importantly, all Members of the Court today accept that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity.

Id. at 867, 2509-10. In fact, the majority in *Bostock* cautioned litigants and other courts from reading its decision to apply to other statutes and circumstances—specifically bathrooms.

> ***The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.*** The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term "'discriminate against'" refers to "distinctions or differences in treatment that injure protected individuals." *Burlington N. &S.F.R.*, 548 U.S. at 59, 126 S.Ct. 2405. Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Bostock, 140 S.Ct. at 1753 (emphasis supplied). Hence, *Bostock*'s holding is, by its own terms, limited to terminations of employment under Title VII. The Court denied it would even apply its decision to sex-segregated bathrooms, locker rooms and dress codes in the employment context, much less in the context of public accommodations and the bathrooms and locker rooms used by school children. Accordingly, *Bostock* does not supply authority in Appellant's favor.

C. The trial court should also have granted the School District's motion for JNOV based on absence of evidence Appellant was of the male sex

1. Preservation of the issue for appeal and standard of review

The School District preserved this issue for appellate review by including it in its Motion for Directed Verdict at the Close of Plaintiff's Evidence, D88 p. 1-2, its Motion for Directed Verdict at the Close of All the Evidence, D91 p. 1-2, and Defendant's Motion for Judgment Notwithstanding Verdict or in the Alternative, Motion for New Trial. D107 p. 1; D113 pp. 4-5. The School District is not required to file a cross appeal on this issue because it was not "aggrieved" by the trial court's judgment. *Rouner v. Wise*, 446 S.W.3d 242, 249 n. 5 (Mo. banc 2014). Therefore, a cross-appeal is neither necessary nor appropriate. *Ritter v. Ashcroft*, 561 S.W.3d 74, 83 n. 3 (Mo. App. 2018). The School District also included this issue in its Respondent's Brief in the court of appeals. Record on Appeal, Respondent's Br., pp. 16-17. A trial court's denial of a motion for JNOV is subject *to de novo* review on appeal. *Li Lin v. Ellis*, 594 S.W.3d 238 (Mo banc 2020).

2. Appellant failed to prove his sex is male

This Court determined for Appellant to state a claim of sex discrimination, "he must allege he is either male or female." *R.M.A. by Appleberry*, 568 S.W.3d at 427 n.7. Rather than allege he was discriminated against by denying or restricting his access to boys' restrooms and locker rooms based on his female sex, Appellant chose to allege the denial and restriction were based on his male sex. *Id*. Appellant's claim to status as a male was because his "legal sex is male." *Id*. at 424. Appellant might be tempted to state that his sex is male because his gender is male, notwithstanding his female genitalia; however, this statement invokes the definition of transgender status, and the Court specifically held "R.M.A. does not claim protection under the MHRA based on his transgender status." Id. at 427 n.9.

Accordingly, Appellant's claim is confined to discrimination based on his male sex. As the dissent in *R.M.A. by Appleberry* rightly noted, and as Appellant's doctor confirmed, sex is understood in the context of reproductive capacity. Here, Appellant's biology is that

of a female. He has female genitals. Vol. VII, 1100:5-7. His genetic testing shows the normal female karyotype of "46XX." Tr. Vol. III, 501:13-502:23; 507:23-508:12. He has a uterus and ovaries. Tr. Vol. III, 506:16-507:1. Even his expert's medical records list his sex as female. Tr. Vol. III, 505:12-506:12; 508:14-509:7.

Appellant's status as a "legal male," if it is indicative of "sex" at all, only pertains to matters after Appellant graduated middle school. Inasmuch as Appellant was using the bathrooms of his choice at the Freshman Center and in high school, Appellant's legal status as a male is moot for the purposes of this case. Appellant's complaints are centered in his eighth-grade year. During eighth grade, Appellant was a member of the female sex, and it was his female sex—his female genitalia—that kept him out of the boys' bathroom and required a brief waiting period before he could enter the boys' locker room.

D. The trial court should also have granted the School District's motion for JNOV because there was no evidence to show the School District's evil motive or reckless indifference to the rights of others

1. Preservation of the issue for appeal and standard of review

The School District preserved this issue for appellate review by including it in its Motion for Directed Verdict at the Close of Plaintiff's Evidence (D88 p.2), its Motion for Directed Verdict at the Close of All the Evidence (D91 p.2), and Defendant's Motion for Judgment Notwithstanding Verdict or in the Alternative, Motion for New Trial (D107 p.2; D113 pp.7-10). The School District has not filed a cross appeal on this issue because it was not "aggrieved" by the trial court's judgment. *Rouner v. Wise*, 446 S.W.3d 242, 249 n. 5 (Mo. banc 2014). Therefore, a cross-appeal is neither necessary nor appropriate. *Ritter v. Ashcroft*, 561 S.W.3d 74, 83 n. 3 (Mo. App. 2018). The School District also included this issue in its Respondent's Brief in the court of appeals. Record on Appeal, Respondent's Br., pp. 17-21. A trial court's denial of a motion for JNOV is subject *to de novo* review on appeal. *Li Lin v. Ellis*, 594 S.W.3d 238 (Mo banc 2020).

2. The evidence was the School District did not treat Appellant with indifference to his rights or based on an evil motive

Appellant's failure to muster substantial evidence to support his claim for discrimination in a public accommodation, extends to his failure to muster evidence to meet the higher standard of clear and convincing evidence required to establish entitlement to punitive damages.

> Punitive damages are appropriate only when the defendant's conduct is outrageous due to evil motive or reckless indifference to the rights of others. It is not the commission of the tort that matters, but the conduct or motive that provides the basis for punitive damages. Punitive damages are extraordinary and harsh, and so the evil motive or reckless indifference must be proven by clear and convincing evidence.

Blue v. Harrah's North Kansas City, LLC, 170 S.W.3d 466, 477 (Mo. App. 2005).

While Appellant's lawsuit is narrowly focused on his thwarted desire to unfettered use of the bathrooms and locker rooms of his choice while he was in eighth grade, his treatment by the School District in all other facets of school life was positive. Appellant's mother initiated this lawsuit. When Appellant began transitioning and Appellant's mother's first met with school personnel to address the issue, everyone was respectful, sensitive to the issue, and wanted to work with her. Tr. Vol. VII, 1064:15-22. During the meeting, the school principal said, "from here on out we'll call Angela, R.J.," which made Appellant's mother feel good—"They [the meeting attendees] were, like, we got you kind of thing." Tr. Vol. VII, 993:1-6. Even with Appellant was in eighth grade and his mother demanded the middle school personnel grant him unrestricted access to the boys' facilities, they did not know how to respond, but they were not rude. Tr. Vol. VII, 1012:4-17. She agreed the school had good intentions because the principal "was always very kind to us. He's not an evil person. You know, I had good dialogue with him." Tr. Vol. VII, 1014:21-1015:6.

Meanwhile, Appellant had good experiences throughout his academic career in the School District. While he was in high school Appellant earned a 4.4 grade point average, participated in debate and theater, attended sporting events, attended choir and orchestra events, and attended homecoming and prom. Tr. Vol. VI, 918:1-4, 925:16-926:14.

Appellant was not denied access to any of the following activities or accommodations: football games, theatrical productions, concerts, dances, the cafeteria, the library, an academic counselor, the parking lot (when he was old enough to drive), the school bus, or the school nurse. Tr. Vol. VI, 927:22-929:2. When he attended events, he used the men's room, which was the bathroom of his choice. Tr. Vol. VI, 929:3-8.

It should not be lost on the Court that the question of gender identity—particularly when it comes to bathroom access—has been a political football for more than a decade. The ground shifts with each election cycle. While this case was pending (and after the School District's decisions in this case), the U.S. Department of Justice and the U.S. Department of Education issued a "Dear Colleague Letter" outlining one strategy of handling students based on assertions of transgender gender status. One year later, the "Dear Colleague Letter was rescinded by the next administration.[16] The issue of gender versus sex has been debated to the point of confusion—although Appellant's expert physician admitted the clear differences in her testimony.

To make a case for punitive damages, *Blue* requires not just substantial evidence of the underlying tort, but clear and convincing evidence of evil motive or reckless disregard of Appellant's rights. So, what was the evidence? Again, the uncontroverted evidence demonstrated the School District's repeated efforts to meet Appellant's parents' requests on multiple fronts—from nicknames to name changes, to pronouns, to participation in boys' sports. Tr. Vol. VII, 992:8-994:10. Even Appellant's parents' request that Appellant use a single-person bathroom was met with agreement. Tr. Vol. VII, 994:11-996:4. Appellant and his parents testified they were satisfied with the School District's approach. Tr. Vol. VII, 994:11-996:4., 1000:7-1001:18.

Then, Appellant changed his mind and his parents changed their requests: They wanted Appellant to be able to use male-designated bathrooms and locker rooms in middle

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[16] Dear Colleague Letter on Transgender Students (PDF) [RESCINDED] (https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf)

school. Tr. Vol. VII, 1010: 3-17. Although the bathroom request was officially denied, Appellant admitted on the stand that as a practical matter, he used the bathrooms he wanted to use. Tr. Vol. VI, 916:8-917:8, 929: 6-13. As for locker rooms, for the one year in middle school when Appellant needed to use a locker room, he was permitted access to the boys' locker room after dressing out in a separate area and giving the boys a short time to do the same. Tr. Vol. IV, 676:20-677:4, Vol. V, 715:3-717:21, Vol. VI, 937:9-17.

There was no evidence—much less clear and convincing evidence—of the School District's "evil motive." Instead, the School District's motive was to protect the privacy and safety of children in its care. It is worth noting the School District was not alone in this concern, as evidence was presented that parents of other students contacted the School District to express their objections to Appellant undressing with their sons in the locker room. Tr. Vol. IV, 678:9-680:3. All of the evidence was that Appellant was treated well and held up by teachers, administrators, and staff as an exemplary and well-liked student. Moreover, Appellant liked the teachers, administrators, and staff, and held some of them as his moral exemplars (his efforts to paint them otherwise at trial notwithstanding). There was no evidence—much less clear and convincing evidence—of reckless disregard of Appellant's right to use the boys' room or boys' locker room.

At the time Appellant was a student at the School District, there was no authority in Missouri that had applied MHRA's sex discrimination prohibitions to permit transgender middle school and high school students to use the sex-designated bathrooms or locker rooms based on their gender identity. Here, the imposition of punitive damages could not have been rendered because of a disregard for Appellant's rights; it could only have been rendered because the School District did not predict that a future court might find transgender students have the right to use the bathroom of their gender identity (which has still not been established).

POINT II: THE TRIAL COURT CORRECTLY GRANTED A NEW TRIAL TO THE SCHOOL DISTRICT AS CONDITIONAL RELIEF BECAUSE THE JURY'S VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

A. The trial court's decision to conditionally grant a new trial should be reviewed for abuse of discretion, not *de novo*

The trial court "has broad discretion to grant a new trial on the ground that the verdict is against the weight of the evidence, and its discretion will be affirmed by an appellate court absent manifest abuse of that discretion." *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 39 (Mo. banc 2013).

> The rationale that supports applying this standard of review is that the trial court is in the best position to weigh the quality and quantity of the evidence and to determine whether justice has been done. If the trial court finds a verdict is against the weight of evidence, it must have the discretion to order a new trial to protect the right to a jury trial.

Id. (citations and internal quotation marks omitted).

B. The trial court's conditional grant of a new trial was within its broad discretion

Appellant attempts to rely on *Lifritz v. Sears, Roebuck, & Co.*, 472 S.W.2d 28 (Mo. App. 1971), to strip the trial court of its discretion, but its reliance is misplaced. As *Taylor v. F.W. Woolworth Co.*, 641 S.W.2d 108 (Mo. banc 1982), demonstrates, a trial court may erroneously declare a plaintiff's failure to make a submissible case, and yet still grant a new trial because the verdict was against the weight of the evidence.[17]

The procedural facts in *Taylor v. F.W. Woolworth* are instructive, because the rulings on JNOV and the motion for a new trial were decoupled by unusual circumstances. The plaintiff obtained a favorable verdict for personal injuries, and the defendant filed its motion for JNOV or new trial. *Id*. at 109. The trial court granted JNOV because (in the

[17] This argument assumes the trial court's JNOV is reversed, which is neither conceded by the School District nor warranted by the evidence and law.

court's view) the plaintiff failed to establish the property owner's notice of the property defect. *Taylor v. F.W. Woolworth Co.*, 592 S.W.3d 210, 211 (Mo. App. 1979). The trial court did not rule on the defendant's motion for new trial. *Taylor*, 641 S.W.2d at 109. The plaintiff filed its notice of appeal while the motion for new trial was still pending. *Id*. On appeal, the court of appeals reversed the JNOV and remanded the case to the trial court for a ruling on the motion for new trial. *Id*. On remand, the trial court granted the motion for new trial because the verdict was against the weight of the evidence, and the plaintiff appealed again. *Id*. In upholding the grant of the new trial, the Supreme Court held:

> The court of appeals' ruling that the evidence was sufficient to make out a submissible case was not a determination of the weight to be accorded that evidence. That determination is left to the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.

Id. at 111.

Two points are worth noting in *Taylor*. First, the trial court's only complaint regarding the sufficiency of the plaintiff's evidence was its erroneous belief of the failure to adduce evidence on the issue of notice. *See Taylor*, 592 S.W.2d at 211. Second, the appellate record fails to specify in what way the trial court believed the verdict was against the weight of the evidence. Presumably, the trial court—having been admonished that plaintiff had introduced sufficient evidence of the owner's notice—determined the verdict was against the weight of the evidence on the same required element.

Here, the trial court found Appellant's case was neither submissible nor supported by the weight of the evidence on the second element of Appellant's claim: "plaintiff's male sex was a contributing factor in such denial [of access to males' restrooms and locker rooms]." D97 p. 11. Had the parties and the trial court faced the same procedural anomaly as in *Taylor*, the trial court could have simply ruled Appellant's verdict was "against the weight of the evidence" without elaboration, and there would be no basis for appeal. *See*, *e.g., Laws v. St. Luke's Hospital*, 218 S.W.3d 461, 467-68 (Mo. App. 2007). In fact, this is precisely how the trial court ruled in its first amended judgment. D150 p. 2.

In its amended judgment dated May 27, 2022, the trial court found as follows:

> The Court would conditionally grant in part and deny in part Defendant's motion for new trial finding the verdict to be against the weight of the evidence.

D150 p. 2.

Although the trial court's ruling was within its discretion as noted in *Laws*, Appellant urged the court to further amend its judgment to specify precisely why it found the verdict was against the weight of the evidence. D154 pp. 10-15. The trial court issued a second amended judgment with a new ruling stating as follows:

> The Court would conditionally grant in part and deny in part Defendant's motion for new trial finding the verdict to be against the weight of the evidence ***in that the sole and uncontradicted evidence at trial was the school district made its decisions based on genitalia, not sex***.

D156 p. 2 (emphasis added to show the difference in findings).

That the trial court focused on the same point—the evidence (or lack of evidence) of discrimination because of Appellant's purported male sex should not invalidate the grant of a new trial. In fact, having determined the legal insufficiency of Appellant's evidence on the second element of Appellant's cause of action, it would have defied logic for the trial court to determine the verdict was in line with the weight of the evidence on the second element. In this case, as in most cases, the trial court ruled on the post-trial motions without the benefit of a trial transcript. It was required to rely on its memory and the arguments of counsel. Hence, the trial court could determine no evidence was adduced to support the second element of Appellant's claim based on its memory, and grant JNOV. As an alternative, the trial court could grant the motion for new trial because the evidence—if sufficient to submit the case to the jury—was nonetheless of so little weight that it made no impression on the court. The trial court could have replaced the words "sole and uncontradicted" with "weight" and Appellant would have no complaint:

- "… finding the verdict to be against the weight of the evidence in that the weight of the evidence at trial was the school district made its decisions based on genitalia, not sex."

Or, not to put too fine a point on it, the trial court could have said it was:

- "… finding the verdict to be against the weight of the evidence in that the court's only memory of the evidence at trial was the school district made its decisions based on genitalia, not sex, and the plaintiff's evidence to the contrary—if any was adduced—was so insignificant as to have made no impression on the court."

To prefer either of these two findings over the trial court's finding about the "sole and uncontradicted evidence," set out in its second amended judgment, is to put form over substance, eliminate an important discretionary function of the trial court, and unfairly prejudice the School District which—in the view of the trial court—should be able to retry part or all off its case in the event an appellate court finds JNOV was improvidently granted.

Appellant unreasonably uses *Lifritz* as "gotcha" cudgel against the trial court. By encouraging the trial court to specify the element for which a finding in Appellant's favor was against the weight of the evidence—Appellant led the trial court to what Appellant now calls error. Meanwhile, parties on appeal and appellate courts have the benefit of picking over trial transcripts—tweezers and magnifying glass in hand—in search of any evidence that might rob the trial court of its discretion. The trial court had no such opportunity. To the extent that *Lifritz* sanctions such a result, this Court should overturn it, as it holds trial courts to an unreasonable standard, and it encourages opaque rulings such as "against the weight of the evidence," unadorned by specifics which would assist the parties in putting on their case at a new trial.

POINT III: THE TRIAL COURT'S VERDICT DIRECTOR TO THE JURY WAS CORRECT BECAUSE IT FOLLOWS THE LAW, AS PREVIOUSLY DECIDED BY THIS COURT.

Appellant's Point III appears to be a *non sequitur*. He asserts the trial court erred in granting JNOV because the verdict director was erroneous—even though the jury found in Appellant's favor. Appellant never raised this point to the trial court, and therefore it is not preserved for appeal. After the trial court entered the amended judgment in favor of the

School District, D150, Appellant filed a motion to amend the amended judgment, D152, asserting, among other things,

> 11. Additionally, the court had previously erred in certain rulings on the jury instructions and the admission of evidence.
>
> 12. If the Court were to grant a new trial, it should reconsider those erroneous rulings.

D152, p.2. Appellant addressed the matter further in his supporting suggestions, D153, pp. 16-19, once again, in the context of the appropriate verdict director should the court grant a new trial. At no time did Appellant ask the trial court to consider the issue in the context of JNOV. The trial court never had the opportunity to consider the form and content of the verdict director in the context of JNOV, and this Court should not permit such review at this point. In the event the Court is inclined to review the matter *ex gratia*, the School District offers the following argument.

A. The trial court's ruling survives *de novo* review

"Whether a jury was instructed properly is a question of law that this Court reviews *de novo*." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 766 (Mo. banc 2010).

> Where there is no applicable MAI, the instruction will be reviewed to determine "whether the jury [could] understand the instruction and whether the instruction follows applicable substantive law by submitting the ultimate facts required to sustain a verdict."

Doe 1631 v. Quest Diagnostics, Inc., 395 S.W.3d 8, 13 (Mo. banc 2013), *quoting First Bank v. Fischer & Frichtel, Inc.*, 364 S.W.3d 216, 219 (Mo. banc 2012). Even if the instruction is erroneous, a new trial is not automatically granted. Rather, the Court "must then determine whether the error misdirected, misled or confused the jury, resulting in prejudicial error and justifying the grant of a new trial." *Id*. It follows that a trial court's instruction need not be perfect, so long as it follows the law, submits the ultimate facts, and does not mislead or confuse the jury.

Here, there is no applicable MAI verdict director for discrimination in a public accommodation. *R.M.A. by Appleberry*, 568 S.W.3d at 425. However, the trial court did not need to consult MAI or fashion its own verdict director based on the applicable law

and ultimate facts, because this Court had already applied the law to the factual allegations in Appellant's petition and prepared a verdict director:

> But MAI 38.01(A), which applies to employment discrimination claims under section 213.055, can be made applicable with only minor modifications. Using MAI 38.01(A) as the starting point, therefore, a verdict director in this case would state (in substance if not in form):
>
> > Your verdict must be for plaintiff [R.M.A.] if you believe:
> >
> > First, defendants [School District and School Board] denied plaintiff full and equal use and enjoyment of the males' restroom and locker room facilities at defendants' school, and
> >
> > Second, plaintiff's male sex was a contributing factor in such denial, and
> >
> > Third, as a direct result of such conduct, plaintiff sustained damage.

Id. Hence, Appellant is asking this Court to apply *de novo* review to overturn the trial court's decision to follow the verdict director written by this Court when it applied Missouri law to the allegations in Appellant's petition filed in this case.[18] Were we to cut out the trial court as the middleman, Appellant appears to demand this Court to conduct *de novo* review of its own decision—without any basis. *See* Introductory Argument § A, *supra*; *see also Walton v. City of Berkeley*, 223 S.W.3d 126, 129 (Mo. banc 2007)(" The [law of the case] doctrine governs successive adjudications involving the same issues and facts.").

B. The verdict director was not erroneous

Appellant fails to cite or refer to any legal standard by which jury instructions are to be considered, which suggests the standard does not support his position. At no point does he argue that the verdict director failed to "follow[ ] applicable substantive law by submitting the ultimate facts required to sustain a verdict." *Doe 1631*, 395 S.W.3d at 13. Nor does he argue the verdict director "misdirected, misled or confused the jury, resulting in prejudicial error and justifying the grant of a new trial." *Id*. In fact, Appellant is not even requesting a new trial—so his complaints about the verdict director seem to be beside the point.

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[18] Appellant never sought to amend his petition. *See generally* D1.

Appellant's complaints about the verdict director—none of which is viable—are as follows:

- The trial court was not required to use this Court's "example jury instructions."
- The trial court erred in refusing to give Appellant's proffered jury instruction, because Appellant's claims are not limited to being discriminated against based on his "male sex."
- The trial court erred in refusing to give Appellant's proffered jury instruction, because Appellant's public accommodations claims went beyond deprivation of access to "the males' restroom and locker room facilities."

1. The verdict director follows the law of the case

As noted in Introductory Argument §A, this Court went to great lengths to examine, evaluate, and expound on Appellant's petition, and its relationship to the MHRA. This Court, faced with the novel question of a biological female who had achieved "legal male" status, was required to explain precisely how this unusual situation would fit within existing law. *R.M.A. by Appleberry*, 568 S.W.3d at 427.

Appellant had requested this Court to recognize his transgender status as protected under the MHRA, but the Court failed to do so. Instead, the Court implicitly recognized a member of the female sex does not have a right to enter boys' restrooms and locker rooms in public schools. *Id*. at 426-27. It further took Appellant at his word that he desired access to the boys' facilities based on his alleged legal male sex, not his biological female sex. *Id*. at 427 n. 7. In answer to the dissent's assertion Appellant was attempting to state a claim upon his transgender status, this Court made its interpretation of the petition crystal clear: "***R.M.A. does not claim protection under the MHRA based on his transgender status but, rather, based on his sex***." *Id*. n. 9 (emphasis supplied).

The Court noted Appellant "must allege he is either male or female." *Id*. n. 7. In this situation, where Appellant's allegations (and ultimately, the evidence) asserted his association with both biological female sex and male legal sex, it was necessary to establish the basis upon which he believed he was entitled to access of male-designated facilities. Certainly, in the absence of a recognition of transgender status as a protected characteristic

under the MHRA, it would be lawful to refuse a biological female access to the boys' restrooms and locker rooms. Under the MHRA, it could only be unlawful to refuse Appellant access to boys' facilities because of his male sex. Hence, the second element required the specification of "male sex." To fail to include the word "male" would have permitted the jury to find against the School District for denying Appellant access to the boys' room because of his female sex or his transgender status, neither of which is consistent with Missouri law. Having engaged in the detailed review of Appellant's petition and the law—including responses to the dissent's vigorous challenges—the Court's reasoning, which resulted in the construction of Court's verdict director, binds the parties, and it bound the trial court, as well. *Walton*, 223 S.W.3d at 129.

2. The law of the case is that Appellant's claims are limited to discrimination based on his male sex

Appellant's position on this point is striking. Appellant claims discrimination based on his male sex is not his only claim. What's more, he cites his petition for the proposition that he is claiming discrimination based on his transgender status. This Court already has determined these issues for these parties on Appellant's petition in this case. When this matter was originally before this Court, Appellant was asking this Court to overturn the dismissal of his petition for failure to state a claim. *R.M.A. by Appleberry*, 568 S.W.3d at 423. The context and meaning of Appellant's petition were the central issues. This Court went to great lengths to interpret Appellant's petition under Missouri law. In this context, this Court specifically stated, "***R.M.A. does not claim protection under the MHRA based on his transgender status but, rather, based on his sex***." *R.M.A. by Appleberry*, 568 S.W.3d at 427 n. 9 (emphasis supplied).

Appellant cites his allegations that he is a "transgender male," apparently to suggest his transgender status should alter this Court's proposed instruction—without regard to this Court's earlier decisions. In making this assertion, Appellant gives voice to the dissent's concern that Appellant's petition was, in fact, an effort to establish recognition of transgender status as an MHRA protected category. *Id*. at 432 (Fischer, J., dissenting). This interpretation of Appellant's petition was specifically rejected by the majority. *Id*. at 427 n.

7. The law of the case doctrine does not allow Appellant to view his petition in a light specifically rejected by this Court in its earlier decision, and the Court should reject this argument—again.

3. Appellant's complaint that his claim is not limited to deprivation of access to "males' restroom and locker room facilities" is simply inaccurate

Appellant's redefinition of the word "mistake" is not the only rhetorical stretch in Appellant's brief. He complains the verdict director insufficiently portrayed the extent of the facilities to which he was allegedly denied access. This Court's verdict director, based on Appellant's petition, determined "males' restroom and locker room facilities" was a sufficient description of the Appellant's public accommodations at issue for a jury's consideration. Nevertheless, Appellant complains the description fails to include showers—forgetting apparently that the showers are in the "locker room facilities." Appellant complains the reference to "males' restrooms" insufficiently asserts his claim that he also was denied access to multi-stall restrooms. Surely, the jurors—who had access to sex-designated, multi-stall bathrooms at the Jackson County Courthouse—could be expected to understand the configuration of public bathrooms. The purpose of the verdict director is to identify the ultimate facts—not evidentiary facts—for the jury's consideration. "The evidentiary facts are the subject of jury argument. Only the ultimate disputed facts should be hypothesized in the instructions."[19] Listing each and every scrap of evidence and rhetoric in a verdict director merely serves to render the instruction unnecessarily long, argumentative, and confusing. Once again, the verdict director did not misdirect, mislead, or confuse the jury—which is the standard Appellant is required to meet to show prejudicial error. *Id.* Here, there was no error, and certainly, no prejudice.

[19] John C. Milholland, *Why and How to Instruct a Jury*, p. LXXXI, MISSOURI APPROVED JURY INSTRUCTIONS (8th ed. 2020).

POINT IV: THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF A MANDAMUS CASE BETWEEN THE PARTIES RESOLVED IN FAVOR OF THE SCHOOL DISTRICT BECAUSE THE EVIDENCE WAS LOGICALLY AND LEGALLY RELEVANT IN THAT IT TENDED TO SHOW THE SCHOOL DISTRICT DID NOT ACT WITH EVIL MOTIVE OR RECKLESS INDIFFERENCE TO APPELLANT'S RIGHTS, AND THE EXCLUSION RESULTED IN PREJUDICE TO THE SCHOOL DISTRICT.

A. Respondent preserved this issue for appellate review.

The School District twice attempted to offer evidence about the litigation of a petition for writ of mandamus filed by Appellant against the School District. Tr. Vol. III, 402:25-405:21; Vol. VII, 1072:1-1073:20. The petition for writ of mandamus was an effort by Appellant to obtain a writ directing the School District to permit him unrestricted access to male-designated facilities. D108, Appx. pp. A016-A022. The School District intended not only to elicit testimony from Appellant's parents about the mandamus case and the proceedings—which were resolved in favor of the School District—but also to offer the petition and the court's judgment. Tr. Vol. III, 404:19-21; Vol. VII, 1096:5-1098:25. The trial court sustained Appellant's objection. Tr. Vol. VII, 1072:1-1073:12, 1096:5-1098:25. The School District included this evidentiary issue in its motion for JNOV or new trial. D107 pp.3,4; D113 pp.16-18. The School District also included this issue in its Respondent's Brief in the court of appeals. Record on Appeal, Respondent's Br., pp. 22-28. The School District has not filed a cross appeal on this issue because it was not "aggrieved" by the trial court's judgment. *Rouner, supra*. Therefore, a cross-appeal is neither necessary nor appropriate. *Ritter, supra*.

B. The trial court's ruling is subject to review for abuse of discretion

The trial court abused its discretion when it excluded evidence of Appellant's failed lawsuit which sought a writ of mandamus requiring the School District to afford Appellant unrestricted access to male-designated bathrooms and locker rooms.

> The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion. This standard gives the trial court broad leeway in choosing to admit evidence, and its exercise of discretion will not be disturbed unless it is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. In part, such broad leeway is granted to ensure the probative value of admitted evidence outweighs any unfair prejudice. For evidentiary error to cause reversal, prejudice must be demonstrated.

Mitchell v. Kardesch, 313 S.W.3d 667, 674-75 (Mo. banc 2010)(internal quotation marks and citations omitted). "Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial." *Elliott v. State*, 215 S.W.3d 88, 93 (Mo. banc 2007). Hence, "the trial court's decision will be reversed only if the error was so prejudicial that it deprived the defendant of a fair trial." *Id*.

C. The tests for logical and legal relevance

"The general rule of law is that defendants may admit evidence tending to mitigate damages." *Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 662 (Mo. App. 1991). To pass the test for relevance, the evidence must be both logically and legally relevant. *State v. Tisius*, 92 S.W.3d 751, 760 (Mo. banc 2002).

> 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 than it would be without the evidence, or if it tends to corroborate the evidence which itself is relevant and bears on the principal issue of the case.

Id. (citation omitted).

Logical relevance is not the end of the inquiry; to be admissible, the evidence must also be legally relevant. *Kroger-Eberhart v. Eberhart*, 254 S.W.3d 38, 43 (Mo. App. 2007), *citing State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992)(Thomas, J., concurring). Legal relevance "is a determination of the balance between the probative and prejudicial effect of the evidence." *Tisius*, 92 S.W.3d at 760.

> To determine legal relevance, the court must weigh the probative value, or usefulness, of the evidence against its costs, specifically the dangers of unfair prejudice, confusion of the issues, undue delay, misleading the jury, waste of time, or needless presentation of cumulative evidence. The trial court must measure the usefulness of the evidence against its cost, and if the cost

outweighs the usefulness, then the evidence is not legally relevant, and the court should exclude it.

Kroger-Eberhart, 254 S.W.3d at 43.

D. Appellant's claim for punitive damages made evidence of the mandamus case both logically and legally relevant

Evidence showing a culpable mental state is required to establish a claim for punitive damages. *Fabricor, Inc. v. E.I. DuPont de Nemours & Co.*, 24 S.W.3d 82, 96 (Mo. App. 2000). The plaintiff bears the burden of proving—by clear and convincing evidence—the defendant acted "with a culpable mental state…either by a wonton, willful or outrageous act or reckless disregard (from which evil motive is inferred). *Id*. at 96-97, *quoting Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. banc 1989). It is not enough to show the commission of an intentional tort, rather, it is "the defendant's state of mind which prompted [the commission of the intentional tort] that forms the basis for a punitive damage award." *Id*., *quoting Burnett*, 769 S.W.2d at 787; *see also*, *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107 (Mo. banc 2015)(circumstantial evidence of the defendant's state of mind is logically and legally relevant). In fact, the trial court's instruction to the jury on whether to find the School District liable for punitive damages required finding the School District's conduct to be "outrageous because of defendant's ***evil motive or reckless indifference to the rights of others***." D97 p.15, Instruction 11 (emphasis supplied). The trial court verbalized its recognition that the School District's state of mind was relevant to punitive damages and the "wide latitude" allotted to the admissibility of state-of-mind evidence—albeit when he was overruling the School District's objection to Appellant's evidence purportedly offered to show the School District's state of mind to support punitive damages. Tr. Vol. IV, 660:1-6; *see* Point V, *infra*.

Here, Appellant filed a petition for a writ of mandamus to seeking a court's writ to the School District to provide "R.M.A. the same access to facilities and same privilege of using said facilities as is given all other male children attending school within the School District." D108 p.4, Appx. p. A019. One of the elements of Appellant's case in mandamus was to prove "an existing, clear, unconditional right" to his requested remedy. D110 p.6,

Appx. p. A028. The court determined Appellant "lack[ed] an existing, clear and unconditional legal right based upon the MHRA and upon which a writ of mandamus could issue." D110 p.11, Appx. p. A033. Further, in its analysis, the circuit court determined:

> … at the present time the MHRA does not provide a basis for the issuance of a writ of mandamus in this case because it does not clearly and unequivocally establish a legal right for Relator R.M.A. to have unhindered access to the boys' restrooms, locker rooms, and any other boys' facilities within the Blue Springs R-IV School District on the basis of Relator R.M.A.'s expressed gender identity.

D110 p.12, Appx. p. A034.

The court issued the following order:

> IT IS HEREBY ORDERED that Relators have no existing, clear, unconditional right which allows Relator R.M.A. to access restrooms or locker rooms consistent with R.M.A.'s gender identity[.]
>
> IT IS HEREBY FURTHER ORDERED that Relators' requested Writ of Mandamus is denied and that the costs of this action should be taxed to Relators.

D110 p.13, Appx. p. A035.

Hence, Appellant filed a mandamus proceeding against the School District in which Appellant was required to prove the existence of clear and unconditional right to use the School District's male-designated facilities. Appellant lost his mandamus case because he failed to prove his right to use the male-designated facilities was existing, clear, and unconditional. Then, he sued the School District in the present case for, among other things, punitive damages, and took on the burden to prove the School District's evil motive or reckless indifference to rights. Then, the trial court prohibited the School District from defending against punitive damages by using the mandamus ruling to show it was not recklessly disregarding Appellant's rights—because while Appellant allegedly suffering discrimination—a court of competent jurisdiction had ruled Appellant did not have an existing, clear, and unconditional right to use the bathroom or locker room associated with his gender identity.

E. The School District suffered prejudice because of the trial court's ruling to exclude the evidence

A trial court's exclusion of logically relevant evidence prejudices a defendant when the exclusion closes off an argument the defendant's actions "were either not reprehensible or were only slightly reprehensible" to avoid or mitigate punitive damages. *Lewellen v. Universal Underwriters Ins. Co.*, 574 S.W.3d 251, 277 (Mo. App. 2019). In *Lewellen*, the defendant's answer was stricken, and a default judgment was entered as discovery sanctions. During the trial on damages, the defendant attempted to offer the testimony of his attorney from a prior case, the disposition of which was at issue, so the attorney could explain the advice he had given in the prior case. *Id*. The trial court erroneously excluded the attorney's testimony because it believed the defendant was attempting to use the evidence to relitigate the previously decided liability issues. *Id*. The court of appeals determined the error was of constitutional dimensions—it "stripped this proceeding of due process protections and of [the defendant's] right for a jury to decide punitive damages." *Id*.

In the present case, the trial court's decision prevented the School District from arguing it simply did not knowingly or recklessly violate Appellant's right to unfettered use to male-designated facilities, because a circuit court judge ruled no such right was clear and unconditional at the time. Certainly, the jury could have considered this evidence—along with the court's findings about the reasonableness of the School District's actions—in mitigation of Appellant's requested punitive damages. It would have been reasonable to argue the court told the School District (and Appellant) the School District was handling a difficult situation reasonably well under the circumstances and under the then-existing state of the law.

There is evidence of prejudice beyond the foreclosing of an important argument to avoid or mitigate punitive damages—the verdict, itself. During closing argument, Appellant argued the School District simply refused to follow the law:

> So it sounds like the defendant doesn't seem to fully grasp what is being said here. ***Just like they didn't fully grasp what's been being said at least since 2013 to them.***
>
> There's [sic] still telling you, their lawyer just came up here and told you what they did wasn't that bad. It wasn't that bad. They had their hearts in it. ***It was really about the privacy and the safety of all of these other students.***
>
> We've gone over this quite a few times now and I know you understand, but they don't. That it is not okay to treat a person differently because of their sex, because of the fears or speculation or discomfort of others who are not in that protected class. You can't do that. It is not proper under their policies. It is not proper under the instructions you read. ***That is the entire reason that we are here. They refuse to follow the law. It sounds like they refuse to learn the law.***

Tr. Vol. VIII, 1186:1-22 (emphasis supplied).

Had the jury been provided testimony about, and documents from, the mandamus case, it would have known:

- The School District "fully grasped" and relied on what the circuit court said about the School District's efforts to accommodate Appellant and the understanding of Appellant's rights at the time he was a student;
- The circuit court had confirmed the School District's concerns about safety and privacy were legitimate; and,
- The School District did not knowingly refuse to follow the law, because the law was not clear at the time (a point acknowledged by Appellant's counsel in statements to the court during the mandamus case).

Appellant argued several values for punitive damages, from $500,000 to $2,000,000—the latter being Appellant's "suggestion" would "make the earth shake." Tr. Vol. VIII, 1176:13-25. However, the jury came back at $4,000,000—double what Appellant's counsel suggested. Meanwhile, the trial court's evidentiary ruling prevented the School District from arguing its actions fell within the Appellant's existing, clear, and unconditional rights, as they were known at the time—and as a circuit court judge had instructed the parties. Using Appellant's counsel's words, in the mandamus case the circuit court found "what they did wasn't that bad" (or wasn't bad at all), and the jury in this case

was not allowed to consider it—on its own merits or as evidence of the School District's state of mind.

The trial court's refusal to admit evidence of the mandamus proceeding and rulings was so prejudicial the School District was denied a fair trial. Accordingly, this Court should remand this case for a new trial if the trial court's judgment is not affirmed.

POINT V: THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF APPELLANT'S MOTHER'S COMPLAINTS ABOUT AN EIGHTH-GRADE TRIP BECAUSE THE EVIDENCE WAS NOT LOGICALLY OR LEGALLY RELEVANT IN THAT THE TRIP WAS NOT PLANNED OR RUN BY THE SCHOOL DISTRICT, AND THE SCHOOL DISTRICT SUFFERED PREJUDICE AS A RESULT.

A. Respondent preserved this issue for appellate review

The School District objected to the introduction of evidence concerning the eighth-grade trip to New York City and Washington, D.C. Tr. Vol. IV, 622:24-623:6, 625:19-626:2; 627:7, 658:9-24, 664:7-11. The School District objected based on relevance. Tr. Vol. IV, 622:24-623:6. Appellant made an offer of proof which showed the decision regarding Appellant's rooming arrangements was not that of the School District, but instead was solely that of the third-party touring company. Tr. Vol. IV, 656:25-657. Nevertheless, the Court ruled the evidence was relevant to the School District's state of mind for the purpose of punitive damages. Tr. Vol. IV, 660:1-6. Later in the trial, Appellant's mother also testified about her experience dealing with the trip. Tr. Vol. VII, 1045:1-1052:9. Although there was no objection raised at that time, the issue was preserved, because the trial court's position on testimony about the eighth-grade trip was clearly established. *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 133 (Mo. banc 2007). The School District included this evidentiary issue in its motion for JNOV or new trial. D107 p. 4, D113 p. 19. The School District also included this issue in its Respondent's Brief in the court of appeals. Record on Appeal, Respondent's Br., pp. 28-32. The School District has not filed a cross appeal on

this issue because it was not "aggrieved" by the trial court's judgment. *Rouner, supra*. Therefore, a cross-appeal is neither necessary nor appropriate. *Ritter, supra*.

B. The trial court's ruling is subject to review for abuse of discretion

The trial court's ruling admitting evidence about the eighth-grade trip is subject to review for abuse of discretion. *See* Point IV.B., *supra*. The trial court abused its discretion when it admitted evidence of the process of assigning rooms for the eighth-grade trip, which was not a school function, Tr. Vol. IV, 665:21-24, 680:23-25, and the rules for who could share hotel rooms were set by the travel agency. Tr. Vol. IV, 667:11-17, 681:1-4.

C. Evidence of the eighth-grade trip was not logically or legally relevant

The trial court justified the inclusion of information about the eighth-grade trip because it purportedly showed evidence of the School District' mental state. Tr. Vol. IV, 660:1-17. But it is clear that the issue was controlled by "Ms. Sousa," an attorney for the agency. Tr. Vol. VII, 1046:22-1049:5. In the end, the evidence showed the decision was left to the travel agent or the hotel, not the School District, Tr. Vol. IV, 667:11-17, 681:1-4, so the matter had absolutely nothing to do with a public accommodation under the School District's control, and nothing to do with the School District's state of mind.

As part of the story, Appellant's mother even testified about how she felt[20] when she confronted another boy's mother who had negative feelings about rooming with Appellant: "I felt like I was punched in the gut. We were kind of friends up at school." Tr. Vol. VII, 1050:20-1051:10. "I was shocked. Really, you know, it hurt. I felt like I had been betrayed. She said, 'What if something were to happen?'" Tr. Vol. VII,1051:8-10. This part of her testimony ended with her saying the incident left her "drained" and "frustrated," which was irrelevant to these proceedings. Tr. Vol. VII,1052:4-9. Hence, the jury was treated to a mother's frustration in trying to work out something for her child over which the School

[20] The School District objected to testimony about Appellant's mother's feelings based on relevance earlier in her direct examination, but the objection was overruled. Tr. Vol. VIII, 1043:18-1044:11.

District had no control. The jury was exposed to her disappointment when she was told by other parents that they had concerns about Appellant rooming with their sons.

The following exchange between Appellant's attorney and mother is telling insofar as the complete irrelevance to this case:

> Q. Okay. What solution did you end up reaching regarding R.J.'s rooming situation?
>
> A. Well, I had felt so kicked around at that point. ***And R.J. had no idea until honestly a couple of weeks ago that this whole thing transpired around the eighth grade trip.*** I was able to shield him from a lot of stuff. He did not know I was writing all of these letters. He did not know this was all going on.

Tr. Vol. VII,1049:6-14 (emphasis supplied). The upshot was that Appellant's mother demanded that the travel agency supply its transgender policy, it apparently had none, and Appellant roomed with a male friend (not the one whose mother objected). Tr. Vol. VII,1049:19-1050:5. Meanwhile, Appellant had no knowledge about the room selection issue until a few weeks before trial. He did not even testify on the subject at trial.

D. *Diaz v. Autozoners* provides no basis for the admission of the eighth-grade trip into evidence

Diaz v. Autozoners—the case repeatedly touted by Appellant's counsel to the trial court—has no bearing on the admissibility of Appellant's mother's interactions with the third-party travel agency or how she felt she was treated. *Diaz* held an employer may be held liable under the MHRA if the employer negligently permits a third party, such as a customer, to create a hostile work environment in the workplace. *Diaz*, 484 S.W.3d at 76-77.

First and foremost, Appellant's petition is not an employment case, and it does not assert harassment or hostile environment claims. D2. Further, Appellant's petition limits his complaints to denial or restriction of his access to the boys' bathrooms and locker rooms on the School District's premises and makes no mention of third-party discrimination (or negligence in permitting such discrimination). As was abundantly clear from the evidence, the trip occurred during the summer, when school was not in session, Tr. Vol. IV, 621:4-9,

the rules concerning rooming assignments were established by the third-party travel agency or the hotels where children were housed, Tr. Vol. IV, 667:11-17, 681:1-4, and Appellant ultimately roomed with one of his male friends—just as his mother desired. Tr. Vol. VII, 1050:19-1052:3. Appellant was shielded from the situation by his mother, so he did not even suffer emotional distress damages from the situation. Tr. Vol. VII,1049:6-14. Ultimately, the only restriction on Appellant's rooming situation was enforced by another boy's mother, not the School District—and apparently, not even the travel agency or hotels. Tr. Vol. VII,1052:4-9. Finally, *Diaz* makes no reference to the admissibility of third-party discrimination as being relevant to a defendant's state of mind. Hence, *Diaz* had no application at trial, and it has none here.

E. The School District suffered prejudice because the evidence was admitted

Was the inclusion of the evidence about the eighth-grade trip prejudicial? It takes up eight pages of Appellant's mother's direct examination. Tr. Vol. VII, 1045:1-1052:9. Here, the trial court admitted evidence of the decision of one or more independent actors over whom the School District had no control as evidence of the School District's mental state—for the purpose of punitive damages. At the same time, as noted in Point IV, the trial court excluded evidence showing that the School District did not have the requisite mental state to support an award of punitive damages. These decisions cannot be read together and justified as logical—they can only be seen as against the logic of the circumstances. The transcript shows the trial court struggling with the evidence both parties wanted to present about "state of mind"; however, in these two instances, the trial court simply got it wrong.

The School District's purportedly culpable state of mind had nothing to do with this evidence. Neither did Appellant's damages. It was a compelling story; however, it was neither logically nor legally relevant. Combined with the rejection of evidence concerning the mandamus case, the decision to admit the evidence of the eighth-grade trip was patently unfair, and the prejudice is evident on its face.

The trial court's decision to admit evidence about the eighth-grade trip was so prejudicial the School District was denied a fair trial. The prejudice was compounded by

the refusal to admit evidence of the mandamus proceedings. Accordingly, this Court should remand this case for a new trial if the trial court's judgment is not affirmed.

CONCLUSION

In the end, this case is defined by Appellant's petition and what this Court decided was the meaning of Appellant's petition within the context and constraints of the MHRA. Unsurprisingly, when this case returned to the trial court on remand, the School District took this Court's rulings in *R.M.A. by Appleberry* very much to heart: Appellant pleaded a sex discrimination case in which he alleged his male sex was a contributing factor in the School District's decision to prohibit him from using the boys' bathrooms, and to require him to wait ten minutes (really only five) before he entered the boys' locker room in eighth grade. Appellant's problem from the start was that his "male sex" had nothing to do with the limitations placed on his use of the male-designated facilities; rather, his female genitals were the factor: he has a vagina and not a penis. Appellant would have preferred the Court to recognize his transgender status as protected under the MHRA, but the Court chose not to do so. In fact, this Court determined Appellant had failed to allege a transgender discrimination claim. The parties are before the Court again, after having tried the case on the same petition interpreted by the Court in *R.M.A. by Appleberry*. The School District relied on this Court's opinion in developing its trial strategy and its legal arguments. The trial court relied on this Court's opinion in making legal rulings and fashioning the verdict director. Appellant's complaints all stem from compliance with the law of the case by the School District and the trial court. The trial court's rulings should be affirmed, and Appellant's appeal should be denied on all points.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE WITH THE SUPREME COURT RULES

I, Mark D. Katz, hereby certify that I am one of the attorneys for Respondent Blue Springs R-IV School District, and that the foregoing Substitute Brief of Respondent:

1. Includes all the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b); and
3. Contains 20939 words, not including the Table of Contents and Table of Authorities.

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CERTIFICATE OF SERVICE

The undersigned certifies a true and correct copy of the above and foregoing Substitute Brief of Respondent and a copy of the appendix thereto was served on counsel of record for the parties on Thursday, December 26, 2024, by electronic mail, as follows:

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