IN THE MISSOURI SUPEME COURT

R.M.A.,	)	
	)	
Appellant/Plaintiff,	)	
	)	
v.	)	**Case No. SC100694**
	)	
BLUE SPRINGS R-IV SCHOOL DISTRICT,	)	
	)	
Respondent/Defendant.	)	
	)	

ON APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY
HONORABLE CORY L. ATKINS

SUBSTITUTE BRIEF OF APPELLANT R.M.A.

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by Judge Cory L. Atkins of the Jackson County Circuit Court (hereinafter, the "Trial Court") on claims for relief under the Missouri Human Rights Act, RSMo. § 213.010 *et seq.* ("MHRA") for public accommodation discrimination on the basis of sex. (D2 p. 7-8). After a jury trial resulting in a verdict in favor of Plaintiff/Appellant R.M.A. (hereinafter, "Appellant"), Respondent/Defendant Blue Springs R-IV School District (hereinafter, "Respondent") filed a motion seeking judgment notwithstanding the verdict ("JNOV") or, in the alternative, a new trial. (D107 p. 1). After entering its Judgment (D147) in favor of Appellant, the Trial Court entered its Amended Judgment grating JNOV and conditionally granting a new trial on May 27, 2022. (D150). On June 27, 2022, Appellant filed a motion to amend the Amended Judgment. (D152). The Trial Court entered its Second Amended Judgment on September 19, 2022. (D156 p. 2; App. A3). Appellant filed his Notice of Appeal on October 31, 2022. (D157).

STATEMENT OF FACTS

a. Procedural History

On October 24, 2014, Appellant filed a Charge of Discrimination with the Missouri Commission on Human Rights (hereinafter, "MCHR") alleging sex discrimination by Respondent. (D3 p. 1-2). On July 8, 2015, the MCHR issued a Right to Sue letter, authorizing Appellant to file a lawsuit against Respondent. (D4 p. 1). Appellant timely filed his Petition for Damages (hereinafter, "Petition") on October 2, 2015. (D2).

On November 20, 2015, Respondent filed a Motion to Dismiss. (D5). On June 28, 2016, the Trial Court entered an Order of Dismissal and Entry of Judgment (hereinafter, "2016 Judgment"), dismissing Appellant's Petition, with prejudice. (D13 p. 2). Appellant appealed the 2016 Judgment to this Court, which affirmed the dismissal. *R.M.A. v. Blue Springs R-IV School Dist.*, No. WD80005 (Mo. App. W.D. July 18, 2017). Appellant filed his Application for Transfer and, on January 23, 2018, the Missouri Supreme Court granted Appellant's Application. On February 26, 2019, the Supreme Court vacated the 2016 Judgment and remanded the case to the Trial Court for further proceedings. *R.M.A. v. Blue Springs R-IV School Dist.*, 568 S.W.3d 420, 430 (Mo. banc 2019) (*R.M.A. I*).

On remand, the parties completed discovery. (*See* D1 p. 22-25). On July 31, 2020, the Trial Court denied Respondent's Motion for Summary Judgment. (D52 p. 1). The case was tried to a jury starting on December 6, 2021. (D102 p. 1). Jury selection was completed on December 6, 2021, and Appellant presented evidence to the jury from

December 7th to 10th. (D147 p. 1). At the close of Appellant's evidence, and again at the close of all evidence, Respondent moved for a directed verdict, which was denied. (D147 p. 1). On December 10, 2021, the jury returned a verdict in Appellant's favor, awarding him compensatory damages in the amount of one hundred seventy-five thousand dollars ($175,000.00) and, following the punitive damages portion of the bifurcated trial, four million dollars ($4,000,000.00) in punitive damages. (D93 p. 1-2). The Trial Court then entered a Jury Trial Order and Partial Judgment, giving Appellant until January 14, 2022, to submit briefing on equitable relief and attorneys' fees. (D102 p. 2).

On January 12, 2022, Respondent filed its Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for New Trial. (D107 p. 1) (hereinafter, "After-Trial Motion"). On January 14, 2022, Appellant filed his Motion for Attorneys' Fees, Costs, Equitable Relief, and Interest with Incorporated Suggestions in Support. (hereinafter, "Motion for Fees") (D114 p. 1). On May 27, 2022, The Trial Court granted the Motion for Fees, entering its Judgment in favor of Appellant for one hundred seventy-five thousand dollars ($175,000.00) in compensatory damages, four million dollars ($4,000,000.00) in punitive damages, and five hundred fifty-eight thousand three hundred thirteen dollars and seventy-two cents ($558,313.72) in attorneys' fees and costs, all bearing interest at 5.75 percent. (D147 p. 2).

Also on May 27, 2022, after the entry of its Judgment, the Trial Court entered its Amended Judgment, granting JNOV and conditionally granting a new trial. (D150). On June 27, 2022, Appellant filed his Motion to Amend the Amended Judgment (hereinafter, "Appellant's Motion to Amend"), requesting the Trial Court amend its Amended

Judgment to deny both JNOV and a new trial, and to reinstate the verdict and its first May 27, 2022 Judgment. (D152 p. 2). On September 19, 2022, the Trial Court entered its Second Amended Judgment; the only substantive change being that it clarified its basis for conditionally granting a new trial. (D156 p. 2; App. A3). Appellant filed his Notice of Appeal on October 31, 2022. (D157).

On June 4, 2024, the Missouri Court of Appeals for the Western District, Division One, reversed the Trial Court's grant of JNOV and new trial. (Signed Majority Opinion of the Court of Appeals [hereinafter "Opinion"], 36).

b. Relevant Facts

Appellant is a male. (Transcript Vol. III, 412:16-20; 484:23-485:7; 490:18-24; Vol. VI, 869:11-12). He was mistakenly assigned the sex of female at birth. (*Id.*; Transcript Vol. VI, 873:19-21; Vol. VII, 984:12-23). To correct this mistake, he received treatment from Dr. Jill D. Jacobson, M.D., and other medical professionals. (Transcript Vol. III, 437:11-18). Dr. Jacobson, a board-certified endocrinologist, professor of pediatrics, and attending physician specializing in pediatric endocrinology, who runs a clinic specializing in sex development of children at Children's Mercy Hospital, provided expert testimony in this matter. (Transcript Vol. III, 423:18-22; 428:24-429:1; 432:21-22). Respondent provided no expert testimony.

Babies are assigned a sex by a doctor when they are born. (Transcript Vol. III, 434:1-2). To assign a baby a sex, a doctor typically looks at the baby's physical appearance, including genitalia, and makes a best guess as to what the baby's sex is; however, sometimes this guess is incorrect. (Transcript Vol. III, 433:1-22; 435:5-18).

Whether the baby is truly one sex or another is much more complicated than simply saying one set of genitalia equals male and one set equals female. (Transcript Vol. IV, 510:3-18). As such, sometimes, the sex assigned to a person at their birth by a doctor is not their correct sex; rather, it is a mistake. (Transcript Vol. III, 434:14-16; 435:5-8; Vol. IV, 512:17-21).

A person who is mistakenly assigned the wrong sex at birth is "very insistent, persistent, and consistent" in their statements and actions indicating that they are the opposite sex of that which was mistakenly assigned to them at birth (which was assigned before they could speak and correct the mistake being made). (Transcript Vol. III, 453:10-21). Appellant has always known that he is male. (Transcript Vol. VI, 874:2-11). Early in his life, he did not have the words to articulate this. (*Id.* at 876:17-23). Once he learned to speak, he approached his mother, with tears in his eyes and said, "mom, I'm a boy." (Transcript Vol. VII, 985:1-2). His mother researched his actions and statements and discovered there were other children and adults all over the world who also knew they were mistakenly assigned the wrong sex at birth. (Transcript Vol. VII, 985:11-14; 986:17-23). As soon as Appellant's mother explained this to him, it immediately "answered all of the questions." (Transcript Vol. VI, 877:6-23). After this, they sought help of medical professionals and went see therapists and doctors, including Dr. Jacobson. (Vol. III, 410:23-411:8; Vol. VII, 989:4-990:5).

Dr. Jacobson began treating Appellant in 2009, when he was nine years old. (Transcript Vol. III, 478:20-23). His diagnosis and treatment included numerous medical steps, tests, and evaluations, including being evaluated by mental health professionals and

determining he was unequivocally insistent, persistent, and consistent about his true sex. (*Id.* at 453:5-21). Further, his diagnosis and treatment included both him and his family being seen by an entire team at Children's Mercy Hospital, which includes an endocrinologist, a psychologist, an adolescent medicine doctor, and a social worker. (*Id.* at 454:10-25). The fact that Appellant was assigned the wrong sex at his birth was also confirmed by two separate therapists outside of Children's Mercy. (Vol. III, 477:4-478:10).

When a child needs to correct their sex from that mistakenly assigned at birth—as Appellant did at the time he first began treatment—they typically do so by first transitioning socially, followed by a medical transition. (*Id.*, 458:16-20). When Appellant was in fourth grade, he began correcting the mistake made at his birth through social transition by living his life as the male he is, including publicly using male pronouns and the name Robert Mitchell, which is also his father's name, or "R.J." (Robert Junior) for short. (Transcript Vol. III, 324:7-325:25; 335:1-8; Vol. IV, 537:12-538:17). Several years after this, Appellant began receiving hormone blockers to reaffirm his correct sex, first receiving shots, and then undergoing surgery to insert a hormone blocking implant. (Vol. III, 478:11-19; 489:19-490:17). Appellant did not ever develop breasts or have a menstrual cycle. (Vol. III, 495:10-17; 469:3-6).

Appellant was a student in Respondent's schools from elementary school until he graduated high school. In fourth grade he was attending Voy Spears Element School. (Transcript Vol. VI, 880:11-881:5). Following Voy Spears, he attended Delta Woods Middle School for three years. (*Id.*, at 883:13-15; 886:11-13). In the ninth grade,

Appellant attended school at the Freshman Center. (*Id.*, at 907:24-908:1). Following that, he attended Blue Springs South High School for three years and graduated. (*Id.*, at 914:5-11).

Respondent did not permit Appellant to use the boys' restrooms or locker rooms at its schools. (Transcript Vol. IV, 553:9-12; Vol. V, 794:18-25; Vol. VI 884:21-885:4; 891:11-17). While every other student participating in sports had access to some facility that had a shower and a locker, Appellant did not. (Transcript Vol. IV, 553:9-554:2). Despite many repeated requests for change, Respondent never changed its position on the matter. (*Id.* at 593:14-594:10).

This exclusion inflicted genuine harm upon Appellant. Having to use separate restrooms, apart from where the other students would go, caused him humiliation and embarrassment. (Transcript Vol. VI 892:21-25). In elementary school, middle school, and at the Freshmen Center, Appellant was required to use the nurse's office to use the restroom and to change for PE class and for sports. (Transcript Vol. VII, 908:2-22, 911:10-12, 994:18-995:7; 997:19-24, 1000:7-1001:15, 1002:3-9, 1006:14-1007:3, 1010:3-10). The single stall bathroom Appellant had to use had no shower and had no locker for Appellant to store his things. (Transcript Vol. IV, 553:9-554:2). Being confined to only one single stall bathroom made it difficult for Appellant to have time to go to the bathroom and the bathroom was not close to his classes. (Transcript Vol. VII, 912:9-13, 913:6-13). Appellant was sometimes late to gym class due to having to change for class in the nurse's office and being singled out in this way caused him embarrassment. (Transcript Vol. VII, 903:2-904:11).

In eighth grade, Appellant went out for football and boys' track. (Transcript Vol. III, 347:14-24, 350:15-23, 359:1-3). He was not permitted to use the male restroom or locker room for changing. (Transcript Vol. IV, 794:18-25). In fact, he was required to use a single stall restroom, by himself, to change out for sports. (Transcript Vol. IV, 721:17-722:3). He was required to wait in that room until 3:20 p.m., when Respondent would finally permit him to join his teammates. (Transcript Vol. IV, 619:6-11; Vol. V 716:25-717:2). Indeed, Appellant was publicly humiliated by Respondent when he was reprimanded for entering the locker room a few minutes early. (Transcript Vol. VI, 893:20-895:16).

Additionally, by being excluded from the locker room, Appellant was deprived of one of the most important parts of being on a team, which is the camaraderie and friendship that form between players. (Transcript Vol. III, 353:13-20; Vol. VI, 901:16-902:14). The other male students were allowed to use the male restrooms and were allowed to use the male locker rooms; they were able to access the many male restrooms around the school, and they were provided lockers, showers, and were able to spend time with their friends and teammates in the facilities. (Transcript Vol. IV, 553:9-554:2, 696:17-23; Vol. IV-V, 700:3-13, 715:14-25; Vol. VI, 884:16-20, 901:16-902:14).

The humiliation of being singled out was so severe, that Appellant did everything he could to avoid using the restrooms, including holding his urine and restricting his fluid intake. (Transcript Vol. III, 365:18-366:7; Vol. VI, 912:6-913:5). Indeed, Appellant only went to the bathroom at school three times at school his entire freshman year. (Transcript Vol. VI, 911:18-24).

In high school, Respondent continued to refuse to permit Appellant to use the male facilities. (Transcript Vol. VI, 914:20-25). Instead, Respondent required him to use single stall restrooms, which he often could not use because they were occupied by other students. (Transcript Vol. VI, 914:20-916:7). Part of the reason Appellant stopped playing sports was because he was excluded from the male facilities. (Transcript Vol. VI, 943:3-10).

Respondent's agents made inconsistent statements about why Appellant was denied access to the males' restroom and locker room facilities at Appellant's schools. For example, they claimed that Appellant was excluded because he was considered female. (Transcript Vol. IV, 678:2-5). Yet, Respondent also repeatedly acknowledged that Appellant was considered male. (Transcript, Vol. IV, 537:24-538-17; Vol. V, 762:2-19). At times, Respondent claimed that he was considered "female" because of his genitalia. (Transcript Vol. IV, 687:6-688:3). Yet, they admitted that Respondent did not determine the sex of any other student because of their genitalia. (*Id.* at 687:6-688:3; 696:10-697:3-13). Elsewhere, Respondent stated that it based its understanding of the sex of its students upon their birth certificate, which it required every student to provide. (Transcript Vol. V, 770:13-20; 856:13-19). However, even after Respondent was provided with an amended birth certificate stating that Appellant is male, it failed to stop discriminating against him. (Transcript Vol. VII, 1042:17-1043:3).

An important step in a person correcting their sex mistakenly assigned to them at birth, is socially transitioning, which includes utilizing the restroom and locker room facilities for their correct sex. (Transcript Vol. III, 457:8-17; 458:21-459:3). Failure to

permit an individual to use the bathroom associated with their correct sex can cause the individual harm both physically and mentally. (*Id.* at 451:15-21; 459:22-461:23). Indeed, for those individuals who do not receive adequate treatment for their legitimate need to correct the sex they were mistakenly assigned at birth, the rate of attempted suicide is forty-one percent (41%); whereas among the general population, the attempted suicide rate is between 6 percent (6%) and thirteen and nine-tenths percent (13.9%). (*Id*. at 451:15-21).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING JNOV BECAUSE APPELLANT MADE A SUBMISSIBLE CASE, IN THAT THERE WAS EVIDENCE THAT HE WAS SUBJECTED TO PUBLIC ACCOMMODATION DISCRIMINATION, AND HIS SEX WAS A CONTRIBUTING FACTOR FOR SUCH TREATMENT.

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

Lampley v. MCHR, 570 S.W.3d 16 (Mo. banc 2019)

Bostock v. Clayton County, Georgia, 590 U.S. 644, 662 (2020)

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

RSMo. § 213.065 (2016)

II. THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL BECAUSE IT DID SO ON NON-DISCRETIONARY GROUNDS THAT ARE INACCURATE AS A MATTER OF LAW, IN THAT APPELLANT MADE A SUBMISSBLE CASE.

Brooks v. SSM Health Care, 73 S.W.3d 686 (Mo. App. S.D. 2002)

Lifritz v. Sears, Roebuck, & Co., 472 S.W.2d 28 (Mo. App. 1971)

Andersen v. Osmon, 217 S.W.3d 375 (Mo. App. W.D. 2007)

RSMo. § 213.065 (2016)

III. THE TRIAL COURT ERRED IN GRANTING JNOV BECAUSE IT HAD ERRONEOUSLY LIMITED APPELLANT'S CLAIM, IN THAT THE JURY INSTRUCTIONS WERE MORE LIMITED THAN THE SCOPE OF HIS CLAIMS.

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

Marion v. Marcus, 199 S.W.3d 887 (Mo. App. W.D. 2006).

RSMo. § 213.065 (2016)

ARGUMENT

The MHRA makes a powerful statement regarding its protection against public accommodation discrimination.

> All persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation . . . without discrimination or segregation on the grounds of . . . sex[.]

RSMo. § 213.065.1 (2016).

This is Appellant's second visit to this Court on this matter, and what he seeks is substantially the same as what he sought before—for the Trial Court to apply the plain language of the MHRA as it is written. Instead, it effectively amended the statute's language, tacitly adding language this Court expressly rejected in its prior ruling. Appellant requests only that this Court follow its prior ruling and require the Trial Court to do the same.

POINT I – THE TRIAL COURT ERRED IN GRANTING JNOV BECAUSE APPELLANT MADE A SUBMISSIBLE CASE, IN THAT THERE WAS EVIDENCE THAT HE WAS SUBJECTED TO PUBLIC ACCOMMODATION DISCRIMINATION, AND HIS SEX WAS A CONTRIBUTING FACTOR FOR SUCH TREATMENT

In granting JNOV to Respondent, the Trial Court erred by misinterpreting evidence, ignoring substantial evidence submitted by Appellant to prove his case, and erroneously concluding that Appellant had not proven his case. Despite the Trial Court not acknowledging all the significant evidence Appellant adduced, even the evidence described in the Second Amended Judgment would have been sufficient to support

Appellant's claims. Thus, the Second Amended Judgment should be vacated, and the original Judgment should be reinstated by law.

a. Preservation for Appellate Review

Appellant preserved this issue for appellate review. He opposed both motions for directed verdict (Transcript Vol. VII 1091:13-1093:18; 1105:13-1106:11) and Respondent's After-Trial Motion. (D131 p. 3-12). He also filed Appellant's Motion to Amend. (D152 p. 2).

b. Standard of Review

The trial court's decision to grant a motion for JNOV is a question of law that is reviewed de novo. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011); *see also, Darks v. Jackson County*, 601 S.W.3d 247, 259 (Mo. App. W.D. 2020) (quoting *Mercer v. BusComm, Inc.*, 515 S.W.3d 238, 242 (Mo. App. E.D. 2017)).

c. JNOV Standard

"JNOV is a drastic action that can only be granted if reasonable persons cannot differ on the disposition of the case." *Ark.-Mo. Forest Prods., LLC v. Lerner*, 486 S.W.3d 438, 447 (Mo. App. E.D. 2016). Indeed, this Court has observed that "we indulge 'a presumption favoring the reversal of a JNOV, and we will not overturn a jury verdict unless there is a **complete absence of probative facts** to support the verdict.'" *Darks*, 601 S.W.3d at 259 (quoting *Ark.-Mo. Forest Prods.*, 486 S.W.3d at 447) (emphasis added).

In reviewing the grant of JNOV, Missouri appellate courts review the full record "to determine whether a submissible case was made." *Id.* To make a submissible case, a

plaintiff "must provide 'substantial evidence for every fact essential to recovery.'" *Id.* "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide a case." *Id.* (internal quotations omitted). In deciding whether substantial evidence exists, this Court "presume[s] the evidence presented by the plaintiff is true, and view[s] it 'and all inferences drawn therefrom in the light most favorable to the verdict[.]'" *Id.* (internal citations omitted).

The elements that Appellant had to prove at trial are set forth in the MHRA:

> It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation . . . or to segregate or discriminate against any such person in the use thereof on the grounds of . . . sex.

RSMo. § 213.065.2 (2016).

Thus, the elements are: (1) Respondent denied Appellant full and equal use and enjoyment of the facilities in Respondent's schools, (2) Appellant's sex was a contributing factor in such denial; and (3) as a result of such conduct, Appellant sustained damaged. *See R.M.A.*, 568 S.W.3d at 425 ("[u]sing MAI 38.01(A) as the starting point"). Because Appellant admitted substantial evidence of each element of his claim, the Trial Court erred in granting JNOV.

d. The Trial Court judgment granting JNOV is erroneous on its face, because the facts as it describes them constitute a submissible case

JNOV is primarily a question of evidence, asking whether "there is a complete absence of probative facts to support the verdict." *Darks*, 601 S.W.3d at 259 (internal

quotation marks omitted). Whether a trial court can grant a JNOV based on "[s]ubmissibility of a claim is a question of law subject to *de novo* review." *Miller-Weaver v. Dieomatic Inc.*, 657 S.W.3d 245, 256 (Mo. App. W.D. 2022). Here, the Trial Court's judgment granting JNOV constitutes reversible error on its face, because the evidence, as the judgment characterizes it, supports Appellant's claims.

In granting JNOV, the Trial Court focused on "the second element of the verdict director" which it held "required Plaintiff prove his male sex was a contributing factor in Defendant's decision" to discriminate against Appellant. (D156 p. 2; App. A3). It held that "[t]he sole, uncontradicted evidence at trial was that Plaintiff was excluded from the male facilities because of his female genitalia," and, based upon that finding, held that "Plaintiff failed to establish a submissible case," entitling Respondent to JNOV. (*Id.*). This ruling is fatally flawed.

By basing its decision on the fact that Appellant (a male) does not conform to Respondent's stereotype of what a male should be, Respondent made Appellant's sex a contributing factor (at least) in its decision; in so doing, Respondent violated the MHRA. In other words, "the School District's contention that it discriminated against R.M.A. because of his female genitalia itself necessarily establishes discrimination 'on the ground[ ] of . . . sex.'" (Opinion, 26-27). Rather than being a basis for granting JNOV, the facts as the Trial Court found them support the jury's verdict. Thus, Trial Court's grant of JNOV must be reversed.

1. The motivation described by the Trial Court is sex discrimination, supporting the verdict reached by the jury

The Trial Court's grant of JNOV must be reversed because the motivation for Respondent discriminating against Appellant upon which the Trial Court based its ruling *is* sex discrimination under the MHRA.

A. The motivation described by the Trial Court is a gender-related trait

It is well-settled law in Missouri that a plaintiff may state "an actionable claim under the MHRA" for sex discrimination by alleging that a "gender-related trait . . . was a factor" in the discriminatory act against him. *Self v. Midwest Orthopedics Foot & Ankle*, 272 S.W.3d 364, 371 (Mo. App. W.D. 2008) (quoting *Midstate Oil Co. v. MCHR*, 679 S.W.2d 842, 846 (Mo. banc 1984)). Plainly, a person's genitalia are a "gender related trait." *See, id.* (pregnancy is a gender-related trait); *see also*, *Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016) (discrimination because of genitalia is sex discrimination). The jury was free to conclude that Appellant was male, and the Trial Court's grant of JNOV did not assert that Appellant failed to prove that he is male.

Under the reasoning the Trial Court used to grant JNOV, the evidence demonstrated that Respondent discriminated against a male student (Appellant) because of his "female" genitalia. This can neither legally nor logically be considered anything but sex discrimination. Genitalia is a gender-related trait; the Trial Court indirectly acknowledges this, labeling the genitalia with a sex-based term ("female"). This is not a mere coincidental choice of words. It is impossible to describe Respondent's reasoning (as the Trial Court ruled in its judgment) without using such gendered terms. Thus,

evidence showing this to be the reason for Appellant's exclusion means that he has proven his case, and the Trial Court erred as a matter of law.

B. The motivation described by the Trial Court is sex stereotyping

The Trial Court's finding supports the verdict, rather than a grant of JNOV, because Respondent's motivation in the Trial Court's finding constitutes sex stereotyping, which shows that sex was the reason for the discrimination. "Sex discrimination is discrimination, it is prohibited by the" the MHRA, and a person alleging discrimination "may demonstrate this discrimination through evidence of sexual stereotyping." *Lampley v. Mo. Comm'n on Human Rights*, 570 S.W.3d 16, 25 (Mo. banc 2019). Sex stereotyping is not a different type of sex discrimination; rather it "is one way to ***prove*** a claim of sex discrimination, i.e., 'sex stereotyping' can be evidence of sex discrimination." *R.M.A.*, 568 S.W.3d at 426 n.4 (emphasis in original). In holding that this doctrine is applicable to MHRA cases, the Missouri Supreme Court cited *Price Waterhouse v. Hopkins*, a case in which "a female senior manager was denied partnership" because she was "'macho' and needing 'a course at charm school'" and "[s]he 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.'" *Lampley*, 570 S.W.3d at 24 (quoting 490 U.S. 228, 251, 109 S.Ct. 1775, 1791, 104 L.Ed.2d 268 (1989)). When a defendant "relies upon sex stereotypes" in their decision, "that evidence may support an inference of sex discrimination." *Id.* (citing *Price Waterhouse*, 490 U.S. at 235). As this Court noted in *Lampley*, "[s]ince *Price*

Waterhouse, it is clear an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination *because the discrimination would not occur but for the victim's sex*." *Id.* (quoting *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1040 (8th Cir. 2010) (emphasis in original)). In other words, a defendant who, for example, refuses to serve a woman who speaks loudly, but will serve a man who speaks at the same volume is discriminating against that woman because of her sex. Sex is the only difference between the loud woman who is being discriminated against, and the loud man who are not. "Further, '*Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine.'" *Id.* (quoting *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001)).

Thus, Trial Court's finding that Respondent discriminated against Appellant because he does not meet the stereotypical notions of what it means to be male (i.e., because he has "female genitalia") does not protect Respondent; rather it proves Respondent's liability. Therefore, JNOV must be reversed.

2. Appellant can find no legal reasoning supporting Trial Court's holding on the issue of JNOV

Appellant's arguments are supported by clear caselaw from this Court. On the other hand, Appellant has found no authority for the Trial Court's contrary position. In making its ruling on JNOV, the Trial Court did not explain its legal reasoning. (D156 p. 2; App. A3). Similarly, Respondent did not cite a single case supporting its argument on the topic in its motion. (D113 p. 5-6). While Appellant cannot determine the legal basis

for the Court's ruling, he will address what he anticipates to be possible arguments in support of it.

A. Under the MHRA, "sex" does not mean what this Court's dissent in *R.M.A. I* referred to as "biological sex"

To the extent the Trial Court's judgment is based upon a definition of "sex" pushed by Respondent, its ruling was in error and must be reversed. This Court has already ruled in Appellant's favor on the meaning of "sex," reversing the Trial Court's grant of Respondent's Motion to dismiss. *R.M.A.*, 568 S.W.3d at 430. That decision was binding on the Trial Court in this case; Missouri's Constitution makes clear that this is "the highest court in the state" and that its "decisions shall be controlling in all other courts." MO. CONST. art. V, § 2. The majority opinion is the opinion of the Court. Rule 84.15. Thus, lower courts "are bound by the majority opinion" of this Court. *Self*, 272 S.W.3d 368.

In addition to this Court's holding in *R.M.A. I*, there was also a dissenting opinion, which held that the term "sex" under the MHRA meant "biological sex." 568 S.W.3d at 431-32 (Fisher, J., dissenting)). It went on to reason that, because of this, Appellant could not make a case of sex discrimination. *Id.* at 433. However, "[t]he majority opinion by which we are bound, however, rejected the dissent's view of R.M.A.'s sex." (Opinion, 13-15) (quoting *R.M.A.*, 568 S.W.3d at 427 n.7-9).

Indeed, the majority opinion expressly rejected this portion of the dissent. It noted that "there is nothing ambiguous about [the term sex] or the context in which it is used," and rejected the notion that the term "needs construction or that such construction should

result in hitherto undiscovered elements." *R.M.A.*, 568 S.W.3d at 427 n.8. It goes on to directly reject the dissenting opinion's claim that the MHRA prohibits discrimination on the ground of "biological" sex only, noting that "the MHRA makes no mention of 'biological' or 'legal' sex . . . the MHRA simply uses the word 'sex,' wholly unqualified." *Id.* (citing RSMo. § 213.065 (2016)). Finally, it noted the inconsistency of "an opinion emphasizing the significance of adhering to the plain language of the statute" for needing to "add the word 'biological' to the statute to reach its result." *Id.* Further, no definition of the term "biological sex" is found anywhere within the MHRA.

Despite this clear rejection, Respondent brazenly, and inaccurately, misrepresented to the Trial Court that "[t]he majority did not dispute" the dissent's reading of the MHRA to only cover "biological sex." (D113 p. 4).

To the extent the Trial Court relied on Respondent's misrepresentation of this Court's majority opinion grant JNOV because it found Appellant's male "biological" sex was not a contributing factor in the discrimination, the ruling was clearly erroneous.[1] Thus, the Judgment granting JNOV should be reversed.

B. Discrimination on the grounds of sex is not limited to categorical distinctions between males and females

Under Missouri law, sex discrimination has never been limited to categorical distinctions between males or females as a group. To the extent the Trial Court's decision

[1] Even if the standard were "biological sex," JNOV would still be in error. The testimony of Dr. Jacobson indicates that Appellant was not a "biological female" as the dissent had presumed (without a factual basis for doing so). (Transcript, Vol. III, 493:9-15). Further, Appellant's biology indicates he is male. (Transcript Vol. III, 492:7-9; 493:4-8; 495:24-496:6; Vol. IV, 510:3-18).

is based upon this narrow view of the MHRA, such a ruling is erroneous. Tacit in Respondent's arguments (including for JNOV) is the suggestion that the discrimination prohibited by the MHRA as being "on the grounds . . . of sex" is limited to discrimination against one group or the other *as a whole*. For example, in mischaracterizing this Court's holding in *R.M.A. I*, Respondent described "the illogic" of Appellant's claim that he "was denied unfettered access to the boys' facilities because he was a boy." (D113 p. 5-6 n.2). Respondent plainly suggests that, unless it was excluding *all* boys from the boys' restrooms, it was not doing so on the grounds of sex.

This interpretation of the MHRA is directly at odds with well-established case law. For example, Missouri courts have repeatedly held that pregnancy discrimination is a form of sex discrimination, because a "gender-related trait . . . was a factor" in the decision to take the discriminatory action. *Self*, 272 S.W.3d at 366 (quoting *Midstate Oil*, 679 S.W.2d at 846). Even though it is not a categorical distinction between males and females, it is recognized as a form of sex discrimination. Similarly, a "decision based on sex-based stereotypical attitudes" constitutes sex discrimination. *Lampley*, 570 S.W.3d 25. In other words, discriminating against someone because of what type of male he is, or because of his gender-related traits, is discrimination because of his male sex.

"In deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination caselaw that is consistent with Missouri law." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007). Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), "liability is not limited to" those who "treat the class of men differently than the class of

women. Instead, the law makes each instance of discriminating . . . an independent violation." *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 662 (2020).

Sex discrimination under the MHRA is limited to a discriminatory animus that covers each individual member of a protected class. If, as is the case here, the decision was made on the grounds of sex, the actions violate the MHRA. Thus, the Trial Court's judgment granting JNOV is erroneous.

C. The MHRA's protection does not exclude persons simply because they are transgender

To the extent the Trial Court granted JNOV because Appellant is a transgender male, such a ruling is in error. Respondent advanced such an argument, without citation to any authority. (*See, e.g.*, D113 p. 2-3, 14, 20-22). And while the Trial Court gave no indication that this was the basis for its ruling, as it offered no explanation, it is addressed herein to the extent its Second Amended Judgment may have relied on Respondent's arguments.

As Appellant sets forth above, the Trial Court's finding constitutes discrimination because of sex under the MHRA. The fact that there is another word ("transgender") that describes the fact that Appellant is a male who was mistakenly assigned female at birth does not change the fact that this is sex discrimination. *See, R.M.A.*, 568 S.W.3d at 428 (citing *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996)).

As the Court of Appeals noted, "Justice Neil Gorsuch's opinion in *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644 (2020) is instructive." (Opinion, 25-26). In that case, the United States Supreme Court ruled that "it is impossible to discriminate against

a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 590 U.S at 660. This was not based upon a specific interpretation of Title VII, but "because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex." *Id.* at 660-61. It noted that, "if changing the [Appellant's] sex would have yielded a different choice by the [Respondent]—a statutory violation has occurred" because Appellant's sex is a but-for cause of that choice. *Bostock*, 590 U.S. 659-60. Thus, a party which takes a discriminatory action against a male who was assigned female at birth, but who would not take the same action against a female who was assigned female at birth, takes the action because of sex. *Id*. As Justice Gorsuch recognized, this decision was not an expansion or new interpretation of Title VII, it merely "involve[d] no more than the straightforward application of legal terms with plain and settled meanings." *Id.* at 662

The reasoning in *Bostock* is consistent with Missouri law, which applies the same standard of causation. *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206, 214 (Mo. App. W.D. 2012) (if the protected class is any part of the reason for the decision, that is discrimination). And Missouri courts are guided by federal authority consistent with the MHRA. *Daugherty*, 231 S.W.3d at 818.

Here, the Court should follow United States Supreme Court's reasoning in *Bostock*, as it is equally applicable to the MHRA. However, even if it does not, Appellant has proven a case of sex discrimination under existing Missouri law governing the MHRA. At a minimum, the Court should reject any arguments that attempt to exclude, as

a group, transgender people from the statute's protections, or create an artificial distinction between sex discrimination in this case and others.

e. The Trial Court erred in granting JNOV because Appellant submitted substantial evidence to support element two of his claim, demonstrating that his male sex was the reason Respondent discriminated against him, which misinterpreted

At trial, Appellant presented the jury with an abundance of evidence, which supported each element of his claim and laid out in detail how Respondent deprived him of his rights under the MHRA, leading the jury to properly find in his favor as instructed by the Trial Court.[2]

The only element that was genuinely at issue in Respondent's After-Trial Motion, and the only element for which the Trial Court granted JNOV, was the second. (D113 p.4). As laid out in the jury instructions, Appellant's "male sex was a contributing factor in" the denial of full and equal use and enjoyment found in the first element. (D97 p. 12; App. A5). In granting JNOV, the Trial Court based its decision on a single finding of fact, stating "[t]he sole, uncontradicted evidence at trial was that Plaintiff was excluded from the male facilities because of his female genitalia." (D156 p. 2; App. A3). First, it is important to note that the Trial Court's decision does not state that Appellant failed to prove that he is male. Although Respondent separately raised this as part of the basis for

[2] As Appellant sets forth in Point III, the Trial Court's jury instructions improperly limited the scope of Appellant's claim; however, even under those limitations, Appellant still produced more than enough evidence to prevail under the JNOV standard.

its After-Trial Motion, the Trial Court made no mention of it in the Second Amended Judgment. *Compare* (D156 p. 2; App. A3) *with* (D113 p. 4-5).

A plaintiff's protected class (here, sex) is a contributing factor[3] if it plays *any* part of the reason for the discriminatory act. *Thomas*, 388 S.W.3d at 214. Sex discrimination occurs whenever a "gender-related trait . . . was a factor" in the discriminatory action. *Self*, 272 S.W.3d at 371 (quoting *Midstate Oil*, 679 S.W.2d at 846). Moreover, "[s]ex discrimination is discrimination, it is prohibited by the" the MHRA, and a person alleging discrimination "may demonstrate this discrimination through evidence of sexual stereotyping." *Lampley*, 570 S.W.3d at 25.

1. This Trial Court's conclusion about the facts is entirely unsupported by the record in this case

The Trial Court's ruling on JNOV appears to ignore the record before it. In granting JNOV, the Trial Court based its decision on a single finding of fact, stating "[t]he sole, uncontradicted evidence at trial was that Plaintiff was excluded from the male facilities because of his female genitalia." (D156 p. 2; App. A3). Even cursory review of the factual record shows this not to be the case.

When questioned as to why it treated Appellant differently than the other males, Respondent gave various reasons, all of which support Appellant's claim. Indeed, at times, Respondent claimed the differing treatment of Appellant versus other males was because of certain assumptions Respondent made about Appellant's anatomy which, as

[3] As this Court has previously noted, Appellant's claim was filed with the MCHR more than two year before the MHRA was amend to change this causation standard. *R.M.A.*, 568 S.W.3d at 425 n.3.

explained above, *is* sex discrimination. For example, Steve Cook said the differing treatment of Appellant, as opposed to other males, was because of "girl parts or boy parts" such as "[g]enitals" and "breasts." (Transcript Vol. IV, 687:6-688:3). Yet, Appellant never had breasts. (Transcript Vol. III, 495:14-17). Indeed, Respondent's agents conceded that they did not actually know what Appellant's anatomy was, and they were just guessing. (Transcript Vol. IV, 699:1-4; Vol. V 802:17-803:6). And Respondent did not check any other student's genitalia to determine their sex. (Transcript Vol. IV, 687:6-688:3; 696:10-697:3-13). This, alone, would be sufficient for a jury to reasonably infer that Respondent's actions were not done solely "because of [Appellant's] female genitalia." If that was Respondent's real motivation, it would have checked every student.

Elsewhere, Respondent testified that it based its understanding of the sex of its students upon their birth certificate, which it required every student to provide. (Transcript Vol. V, 770:13-20; 856:13-19). Despite this, even after Respondent was provided with an amended birth certificate indicating that Appellant is male, it failed to stop discriminating against him. (Transcript Vol. VII, 1042:17-1043:3). Thus, the evidence was that Respondent was basing its decision not on what a birth certificate said, but on Appellant's incorrect sex mistakenly assigned at birth. Indeed, Respondent confirmed this when it conceded that if Appellant had provided a birth certificate showing he was male at the time he enrolled, it would not have questioned his male sex. (Transcript Vol. V, 852:12-17).

The Trial Court erred in finding that "[t]he sole, uncontradicted evidence at trial was that Plaintiff was excluded from the male facilities because of his female genitalia"

(D156 p. 2; App. A3). Clearly, there is at least one other sex-based reason in the record from which the jury could have concluded was the reason Respondent excluded Appellant from the male facilities. More importantly, Appellant offered substantial evidence supporting the jury's verdict in his favor on the second element.

2. Appellant submitted substantial evidence that his male sex was a contributing factor in his being denied access to the males' restrooms and locker rooms

The evidence supporting the jury's conclusion that Appellant's male sex was a contributing factor in Respondent's discrimination was not only sufficient, it was overwhelming. Indeed, virtually all the evidence admitted at trial on this element supported Appellant's case. Sex discrimination occurs whenever a "gender-related trait . . . was a factor" in the discriminatory action. *Self*, 272 S.W.3d at 371 (quoting *Midstate Oil*, 679 S.W.2d at 846).

First, the evidence showed that Appellant is male. (Transcript Vol. III, 412:16-20; 484:23-485:7; 490:18-24; Vol. VI, 869:11-12). Respondent repeatedly acknowledged that it considered Appellant male, and that it treated him as male for nearly all purposes. (Transcript, Vol. IV, 537:24-538-17; Vol. V, 762:2-19).

As explained above, the evidence also showed that the decision was based on gender-related traits. There was evidence that Respondent's decision was based upon its guesses about whether Appellant had "girl parts or boy parts." (Transcript Vol. IV, 687:6-688:3, 699:1-4; Vol. V 802:17-803:6). Other evidence showed that Respondent's decision was based on its understanding of Appellant's sex assigned at birth. *See*, (Transcript Vol. V, 770:13-20; 856:13-19, 852:12-17; Vol. VII, 1042:17-1043:3).

Clearly, both of these are gender-related traits. Thus, the evidence showed that Appellant's male sex was a contributing factor in the discrimination to which he was subjected.

3. Appellant submitted substantial evidence that Respondent engaged in sex stereotyping

The evidence also showed that Respondent engaged in sex stereotyping. "Sex discrimination is discrimination, it is prohibited by the" the MHRA, and a person alleging discrimination "may demonstrate this discrimination through evidence of sexual stereotyping." *Lampley*, 570 S.W.3d at 25. "Since *Price Waterhouse*, it is clear an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." *Id.* at 24.

The exact same thing is true here. Appellant is a male who was incorrectly assigned female at birth. (Transcript, 505:4-8; 537:12-23; 691:1-4; 873:19-21). If he were a female assigned female at birth, he would have been able to change in the locker room with his teammates and use the normal restrooms with all the other females. (Transcript Vol. IV, 573:11-15). Indeed, even accepting (for the sake of argument) the Trial Court's factual conclusions, Appellant nevertheless prevails. Appellant is a male. (Transcript Vol. III, 412:16-20; 484:23-485:7; 490:18-24; Vol. VI, 869:11-12). According to the Trial Court, Appellant has "female genitalia," and that fact is the only reason he was excluded from the facilities. From that, it could be reasonably inferred by Respondent's own admission that if Appellant were a female with female genitalia, he would have been able

to change in the locker room with his teammates and use the normal restrooms with all the other females. In either version of the facts, Appellant would not have been discriminated against but for his sex, thus proving his case.

Moreover, as mentioned above, Respondent claimed the differing treatment of Appellant versus other males was because of certain assumptions Respondent made about Appellant's anatomy. *See*, *e.g.*, (Transcript Vol. IV, 687:6-688:3). Testimony from Dr. Jacobson was that not all boys are born with genitals traditionally associated with boys. (Transcript Vol. III, 433:18-22). Dr. Jacobson was clear that one set of genitals does not determine whether someone is a particular sex; males may have genitalia typically associated with females, and vice versa. (Transcript Vol III, 433:18-22; Vol. IV, 510:3-18). In other words, it is a stereotype that all males have certain genitalia. Thus, when Appellant showed that Respondent discriminated against him because he allegedly failed to conform to that stereotype, that was evidence that Respondent discriminated against him because of his male sex.

As explained above, evidence showed that Respondent's decision was based on its understanding of Appellant's sex assigned at birth. *See*, (Transcript Vol. V, 770:13-20; 856:13-19, 852:12-17; Vol. VII, 1042:17-1043:3). Dr. Jacobson, the only expert witness in the case, testified that sex assigned at birth is not always accurate. (Transcript Vol. IV 435:10-18). In other words, it is a stereotype that males are assigned male at birth. Thus, when Appellant showed that Respondent discriminated against him because he failed to conform to that stereotype, that was evidence that Respondent discriminated against him because of his male sex.

f. The Trial Court erred in granting JNOV, as Appellant offered substantial evidence of elements one and three of his MHRA public accommodation discrimination claim

Appellant offered substantial evidence of each element of his claim. While Appellant has discussed the second element at length, the verdict director included two other elements: that Respondent denied Appellant "full and equal use and enjoyment of the males' restroom and locker room facilities at" Respondent's schools; and that "as a direct result of such conduct, plaintiff sustained damage." (D97 p. 12). Respondent did not argue that Appellant failed to offer substantial evidence of either element, and in granting JNOV, the Trial Court did not rely on either of them. (D113 p.4). (D156 p. 1-2; App. A2-A3). Thus, Appellant will discuss these elements only briefly.

1. Appellant submitted substantial evidence to support element one of his claim, demonstrating that he was denied full and equal use and enjoyment of the facilities at Respondent's schools

At trial, the jury heard from witnesses on both sides that Respondent did not provide Appellant "full and equal" use and enjoyment of its facilities, but instead deprived him of his rightful access to public facilities. To support the first element of his claim, Appellant offered evidence that he was denied "full and equal use and enjoyment" of the males' restroom and locker room facilities at Respondent's schools. *R.M.A.*, 568 S.W.3d at 425. The MHRA makes public accommodation discrimination an "unlawful discriminatory practice" whether it is done "directly or indirectly," even if the discrimination is only attempted. RSMo. § 213.065.2 (2016); *see also*, *Doe ex rel. Subia v. Kansas City, Missouri School District*, 372 S.W.3d 43, 51-52 (Mo. App. W.D. 2012)

(finding that the school district's failure to prevent harassment constituted an indirect denial of the facilities).

Appellant testified he was not allowed to enter the males' restrooms or locker rooms at Respondent's schools. (Transcript Vol. VI 884:21-885:4; 891:11-17). School Board Member Kay Coen admitted that Appellant was not permitted to use the males' restrooms or locker rooms. (Transcript Vol. V, 794:18-25). Administrator Steve Cook acknowledged that every other male student aside from Appellant who played sports had full access to the male locker room. (Transcript Vol. IV, 553:9-12). Due to this exclusion, while every other student participating in sports had access to some facility that had a shower and a locker, Appellant did not. (Transcript Vol. IV, 553:9-554:2). In elementary school, middle school, and at the freshmen center, Appellant was required to use the nurse's office to use the restroom and to change for PE class and for sports. (Transcript Vol. VII, 908:2-22, 911:10-12, 994:18-995:7; 997:19-24, 1000:7-1001:15, 1002:3-9, 1006:14-1007:3, 1010:3-10). Being confined to only one single stall bathroom made it difficult for Appellant to have time to go to the bathroom and the bathroom was not close to his classes. (Transcript Vol. VII, 912:9-13, 913:6-13). Appellant was sometimes late to gym class due to having to change for class in the nurse's office and being singled out in this way caused him embarrassment. (Transcript Vol. VII, 903:2-904:11). The other male students were allowed to access the many male restrooms around the school. (Transcript Vol. IV, 553:9-554:2, 696:17-23; Vol. IV-V, 700:3-13, 715:14-25; Vol. VI, 884:16-20, 901:16-902:14). The facilities Respondent required Appellant to use in high school were

one-stall single user restrooms, which were frequently occupied, preventing Appellant from using them. (Transcript Vol. VI, 914:20-916:7).

Throughout Appellant's time attending school in Respondent's School District, Respondent never changed its position on the matter. (Transcript Vol. IV, 593:14-594:10). Plainly, Appellant showed that he was denied the full and equal use and enjoyment of the males' locker rooms and restrooms, and the Trial Court did not determine otherwise.

2. Appellant submitted substantial evidence to support element three of his claim, demonstrating that he was damaged by Respondent

Appellant suffered precisely the kind of humiliation and injury to his dignity that the MHRA is meant to prevent. Claims under the MHRA are "intended to compensate injuries caused by the . . . deprivation of a plaintiff's civil rights" and therefore damages "may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances." *Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 170-71 (Mo. App. W.D. 1999) (internal citations omitted). Here, Appellant adduced substantial evidence of precisely those damages.

Appellant testified that when he was playing sports, he had to use a separate, single stall restroom that was not accessed by any other student to change and put on his uniform. (Transcript Vol. VI 892:1-20). Having to use this separate restroom, which was near the male locker room where his teammates where changing, was embarrassing, as other students would walk by and see him entering/exiting the segregated restroom. (Transcript Vol. VI 892:21-25). Appellant also was humiliated by being singled out in

having use the nurse's restroom to change clothing for PE class, and to use the restroom. (*Id.*, 903:2-11). It made him feel embarrassed and awkward and it sometimes made him late for the start of class (*Id.*, 903:12-904:1). The humiliation of being singled out like this was so severe, that Appellant did everything he could to avoid using the restroom at school, including holding his urine and restricting his fluid intake. (Transcript Vol. III, 365:18-366:7; Vol. VI, 912:6-913:5). In fact, Appellant only went to the bathroom three times his entire freshman year of high school to avoid the embarrassment of being singled out by using the separate restroom. (Transcript Vol. VI, 911:18-24).

Evidence that Respondent denied Appellant access to the same facilities as other students and made him use separate, segregated bathrooms would, by itself, be enough to draw an inference of harm. *See, Red Dragon Rest.*, 991 S.W.2d at 165 (the refusal of service at a restaurant supported damages). Here, Appellant has gone further, giving detailed evidence of the humiliation and emotional distress that Respondent's unlawful discrimination caused him, and the Trial Court did not grant JNOV on this element, thus demonstrating that Appellant met his burden.

g. Conclusion

The MHRA is a remedial law, which Missouri courts have long recognized should be interpreted "liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case." *Subia*, 372 S.W.3d at 48 (quoting *Red Dragon Rest.*, 991 S.W.2d at 166-67) (internal quotations omitted). For reasons it failed to fully explain, the Trial Court took the extraordinary step of throwing out the verdict of a duly sworn jury. Upholding that decision would run

counter to the extensive case law that has been cited by Appellant, and undermine the MHRA's dictate that Appellant, like all Missourians, is "free and equal" and "entitled to the full and equal use and enjoyment" of public accommodations. RSMo. § 213.065.1 (2016).

POINT II – THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL BECAUSE IT DID SO ON NON-DISCRETIONARY GROUNDS THAT ARE INACCURATE AS A MATTER OF LAW, IN THAT APPELLANT MADE A SUBMISSBLE CASE

The Trial Court erred in conditionally granting Respondent's Motion for New Trial because its decision was based upon the same misinterpretation of the law as its grant of JNOV.

a. Preservation for Appellate Review

Appellant preserved this matter for review. Appellant opposed Respondent's motion for new trial. (D131 p. 15-17). The Trial Court nevertheless entered its First Amended Judgment, conditionally granting the Motion for New Trial. (D150 p. 2). Appellant filed his Motion to Amend Amended Judgment, asking the Trial Court to amend the Amended Judgment to deny a new trial. (D152 p. 2). Thus, the issue was preserved for appellate review.

b. Standard of Review

Generally, the standard of review for a motion for new trial is an abuse of discretion. *Thomas*, 388 S.W.3d at 210. This is because, as it relates to the weighing of evidence, "[t]he trial court is in the best position to weigh the quality and quantity of the evidence and to determine whether justice has been done." *Badahman v. Catering St.*

Louis, 395 S.W.3d 29, 39 (Mo. banc 2013) (internal quotations omitted). However, "[a] trial court has *no discretion* when ruling on an issue of law in a motion for new trial." *Ivy v. Hawk*, 878 S.W.2d 442, 445 (Mo. banc 1994) (emphasis added) (citing *Carothers v. Montgomery Ward and Co.*, 745 S.W.2d 170, 172 (Mo. App. W.D. 1987)).

c. The Trial Court abused its discretion by granting a new trial based upon Appellant's failure to make a submissible case, because Appellant did make a submissible case

As the Court of Appeals noted, "the trial court's conditional new-trial ruling was plainly based on its view" that Appellant failed to make a submissible case. (Opinion at 36). "The law is well established that if the plaintiff makes a submissible case, an order granting a new trial to the defendant after a verdict for the plaintiff for the reason that the plaintiff failed to make a submissible case would be arbitrary and an abuse of discretion.'" *Brooks v. SSM Health Care*, 73 S.W.3d 686, 691 n.5 (Mo. App. S.D. 2002) (citing *Lifritz v. Sears, Roebuck and Co.*, 472 S.W.2d 28, 33 (Mo. App. 1971)). Thus, the Trial Court's grant of a new trial must be reversed.

Even after granting JNOV, trial courts must also conditionally rule on motions for a new trial. Rule 72.01(c)(1). They are also required to "specify the grounds for granting or denying the motion for the new trial." *Id.* Here, the Trial Court did exactly that; conditionally granting in part and denying in part the portion of Respondent's After-Trial Motion, that sought a 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; App. A3) (citing 16 Mo. Prac., Civil Rules Practice § 72.01(c):1 (2021 ed.)).

In doing so, the Trial Court did not weigh the evidence, but instead applied the same (erroneous) ruling of law as in granting JNOV. The Second Amended Judgment gave the same reason for both. (D156 p. 2; App. A3) (granting JNOV because "[t]he sole, uncontradicted evidence at trial was that Plaintiff was excluded from the male facilities because of his female genitalia" and granting a new trial because "the sole and uncontradicted evidence at trial was the school district made its decisions based on genitalia, not sex"). As argued above, this decision was erroneous as a matter of law, as Appellant made a submissible case. Thus, the Trial Court abused its discretion in conditionally granting Respondent's motion for new trial. *Brooks*, 73 S.W.3d at 691 n.5.

Moreover, "[w]hen a trial court grants a new trial on a specified basis, that ruling constitutes an overruling of all other grounds asserted by the movant in its motion for a new trial." *Andersen v. Osmon*, 217 S.W.3d 375, 378 (Mo. App. W.D. 2007) (internal quotation omitted). One of Respondent's arguments for a new trial was to adopt its arguments for JNOV. (D113 p. 10) ("[a]s noted above, there was no evidence to support the jury's verdict") (emphasis omitted). Plainly, the Trial Court adopted this as its sole basis for granting a new trial, and in so doing, overruled all the other grounds asserted by Respondent, including a traditional weighing of the evidence by the Trial Court. Thus, the Trial Court's decision is a ruling on the law, not a weighing of the evidence, and should be reviewed de novo.

d. Conclusion

The Trial Court conditionally granted Respondent's motion for new trial for the same reason as it granted JNOV: its misinterpretation of the MHRA, and its erroneous

conclusion that Appellant did not make a submissible case. Because Appellant did so, the decision is an abuse of discretion, and it should be reversed.

POINT III – THE TRIAL COURT ERRED IN GRANTING JNOV BECAUSE IT HAD ERRONEOUSLY LIMITED APPELLANT'S CLAIM, IN THAT THE JURY INSTRUCTIONS WERE MORE LIMITED THAN THE SCOPE OF HIS CLAIMS

In granting JNOV to Respondent, the Trial Court erred because it based its ruling on a set of elements which were far more limited in scope than Appellant's actual case. Appellant's claims were not as limited as the Trial Court held. At trial, it insisted on using the example jury instructions set forth by this Court in *R.M.A. I*. (Transcript Vol. VI 959:12-15; 962:11-21). It put this standard into the jury instructions, in the form of a verdict director:

> INSTRUCTION 8
>
> Your verdict must be for plaintiff if you believe:
>
> First, defendant 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.

(D97 p. 12; App. A5). In its final judgment it went even further, holding that "the Supreme Court of Missouri instructed that as pleaded, the verdict director in this case *must* read:" and quoted that instruction. (D156 p. 1; App. A2) (quoting *RMA*, 568 S.W.3d at 425) (emphasis added). It also emphasized the fact that Appellant had not amended his Petition. (D156 p. 1 n.2; App. A2). Because this standard was too limited, and because JNOV was based upon this standard, dismissal was improper, and this Court should reverse JNOV.

a. Preservation for Appellate Review

Appellant has preserved this issue for appellate review. He opposed both the motions for directed verdict (Transcript Vol. VII 1091:13-1093:18; 1105:13-1106:11) and the motion for JNOV. (D131 p. 3-12). He also filed a motion to amend the amended judgment which granted JNOV. (D152 p. 2).

Appellant also properly preserved his challenge to the jury instruction. He submitted an alternative verdict director. (D105 p. 8). During the hearing on the jury instructions, he objected to the giving of this verdict director. (Transcript Vol. VI 957:6-959:11). And, in arguing his post-trial motion, he requested that, if the trial court granted Respondent's motion for new trial, this error in instructing the jury be corrected. (D153 p. 16-19).

b. Standard of Review

"The trial court's decision to grant a motion for JNOV is a question of law that we review de novo." *Darks*, 601 S.W.3d at 259 (quoting *Mercer*, 515 S.W.3d at 242). Similarly, the trial court's refusal to give an instruction offered by a party is reviewed de novo. *Cluck v. Union Pac. R. Co.*, 367 S.W.3d 25, 32 (Mo. banc 2012). In so doing, this Court evaluates "whether the instructions were supported by the evidence and the law." *Id.* Jury instructions "shall be given or refused by the court according to the law and the evidence." Rule 70.02(a). "The imperative 'shall' in Rule 70.02(a) does not admit discretion on the part of the trial judge if the proffered instruction is supported by the evidence and the law and is in proper form." *Marion v. Marcus*, 199 S.W.3d 887, 891 (Mo. App. W.D. 2006).

c. Procedural posture

At the outset, Appellant notes the unusual procedural posture of this Point. Generally, a party seeking reversal based upon instructional error must show that such "error results in prejudice and materially affected the merits of the action." *Cluck*, 367 S.W.3d at 32. Here, the instructional error only disadvantaged Appellant while advantaging Respondent. As set forth below, it narrowed the scope of Appellant's claims, and limited the basis on which the jury could find in his favor. However, because the error only impacted the issue of liability—on which Appellant prevailed—he was not prejudiced by the error at trial.[4] Thus, this instructional error could not have been the basis for granting a new trial following the jury verdict that was entered in this case. Instead, Appellant raises this point because the disadvantage which Appellant overcame with the jury was then improperly used in the JNOV reasoning.

d. The Trial Court was not required to use the example jury instructions from the this Court's opinion

The Trial Court's erred in holding that this Court instructed what the jury instructions "must read" in the case. First, this is not what this said. In setting forth the example verdict director, it is clear that this Court was hypothesizing an example of what "a verdict director in this case would state (in substance if not in form)" to identify the elements Appellant would have to prove. *R.M.A.*, 568 S.W.3d at 425. A verdict director was needed to analyze whether Appellant had pleaded "ultimate facts" which are "those the jury must find to return a verdict for the plaintiff." *Id.* (citing *Johnson v. Auto*

[4] Additionally, Respondent did not preserve the point that there should be a new trial due to instructional error

Handling Corp., 523 S.W.3d 452, 463 (Mo. banc 2017)). However, this Court never instructed the Trial Court that it must use that verdict director.

Moreover, this Court set out *a* verdict director in this case, not *the* verdict director. Respondent's Motion to Dismiss (at issue on appeal) sought only a complete dismissal of Appellant's case. (D3 p. 1-2). Thus, if there were any viable claims, dismissal was improper and reversal was required. *R.M.A.*, 568 S.W.3d at 424 (quoting *Bromwell v. Nixon*, 361 S.W.3d 393, 398 (Mo. banc 2012)) ("this Court reviews the petition to determine if the facts alleged meet the elements of a recognized cause of action"). The Supreme Court set forth one such claim, which was sufficient to support reversal; that does not make it the only one available to Appellant under that Petition.

Nothing in this Court's decision required the Trial Court to use its example verdict director. Moreover, not only was the Trial Court not required to use that verdict director, it lacked the discretion to do so.

e. The Trial Court erred in refusing to give Appellant's proffered instructions that were supported by law and evidence

By erroneously deciding that it was bound to use this Court's example verdict director, the Trial Court's violated the Rules of Civil Procedure and binding precedent. It is well-established in Missouri that when a party asks that a certain instruction be given, a trial court has no discretion to refuse it "if the proffered instruction is supported by the evidence and the law and is in proper form." *Marion*, 199 S.W.3d at 891 (citing Rule 70.02(a)). Here, Appellant offered a different verdict director which, as set forth below,

was supported by the evidence and law and was in proper form. (D105 p. 8). Thus, the Trial Court was required to accept it.

f. Appellant's allegations of sex discrimination are not limited to claims that he was discriminated against because of his "male sex"

Appellants claims for sex discrimination were not limited to discrimination against him because of his "male sex." The Trial Court included such a limitation in the verdict director. (D97 p. 12; App. A5). It also mentioned it in granting JNOV. (D156 p. 2; App. A3). By imposing such a limitation, and seemingly granting JNOV based upon it, the Trial Court erred, and its decision should be reversed.

The Trial Court emphasized the fact that Appellant did not amend his initial pleadings. (D156 p. 1 n.2; App. A2). "Pleadings present, define, and isolate the issues, so that the trial court and all parties have notice of the issues" and, as a result, "relief awarded in a judgment is limited to that sought by the pleadings." *Norman v. Wright*, 100 S.W.3d 783, 786 (Mo. banc 2003). However, Appellants Petition was not so limited on this matter. As this Court noted, Plaintiff did plead that he was male. *R.M.A.*, 568 S.W.3d at 427 (citing D2 p. 5 ¶25). Plaintiff also pleaded that he "is a transgender male" (D2 p. 7 ¶49) and other allegations regarding his sex (*See* D2 p. 4 ¶18). Moreover, he alleged that he was discriminated against because of "his sex" not because of "his male sex." (D2 p. 7 ¶50). The mere fact that is Appellant male is not the only thing he pleaded about his sex, and therefore not the only basis for him to show that his sex was a contributing factor in the discrimination.

Appellant proffered a version of the instruction that listed the second element as "plaintiff's sex was a contributing factor in such denial." (D105 p. 8). The instruction was supported by the evidence and the law. Here, Appellant produced evidence about his sex at trial that supported a wider scope. As explained above, Appellant set forth evidence beyond the fact that he is male. (Transcript Vol. III, 412:16-20; 484:23-485:7; 490:18-24; Vol. VI, 869:11-12). He provided evidence that he was transgender male. (Transcript Vol. VI, 871:12-14). He provided evidence that he was assigned female at birth and transitioned to male. (Transcript, 505:4-8; 537:12-23; 691:1-4; 873:19-21).

Appellant's proffered instruction was also supported by law. This language is consistent with the MAI, which says to "insert one or more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, age or disability" in the equivalent to that portion of the instruction. MAI 38.01(A). It does not say to insert Plaintiff's particular membership within the classification, such as "male sex" or "Christian religion." Indeed, where the appellate courts have specifically quoted instructions actually given, it is clear that "sex" rather than "male sex" is what should be used. *See, e.g., Howard v. City of Kansas City*, 332 S.W.3d 772, 779 (Mo. banc 2011); *Alhalabi v. Mo. Dept. of Natural Resources*, 300 S.W.3d 518, 527 (Mo. App. E.D. 2009). Plaintiff should not have been required to demonstrate more than other plaintiffs due to the type of "male" that he is.

Appellant's claims regarding sex discrimination were not limited to the fact that he was discriminated against because of his "male sex," and the granting of JNOV on that basis is erroneous and should be reversed.

g. Appellant's allegations of public accommodation discrimination are not limited to claims that he was deprived access to "the males' restroom and locker room facilities"

Similarly, the Trial Court improperly limited the scope of Appellant's claims as to which of Respondent's facilities were involved in the discrimination. It limited the verdict director to "the males' restroom and locker room facilities" (D97 p. 12; App. A5) and did the same in granting JNOV. (D156 p. 2; App. A3).

Relief can be limited to the allegations in the pleadings. *Norman*, 100 S.W.3d at 786. However, Appellant's Petition was not limited to allegations about males' restrooms and locker rooms. For example, he pleaded more broadly that he "received different and inferior access to *public facilities* because of his sex." (D2 p. 7 ¶43) (emphasis added). And he alleged that he "was discriminated against in his use of a public accommodation on the grounds of his sex." (D2 p. 7 ¶50).

Appellant proffered a version of the instruction that listed the first element as "defendant School District denied plaintiff full and equal use and enjoyment of any of the advantages, facilities, services, or privileges at any of defendants' schools." (D105 p. 8). The instruction was supported by the evidence and the law. Appellant provided evidence of discrimination beyond the males' restrooms and locker rooms, including the fact that he was denied access to any shower facilities while he was at school. (Transcript Vol. IV 553:9-22). There was also evidence that he was completely denied access to multi-stall restrooms, instructing him to only use the single-stall restrooms (which were often inaccessible to him between classes). (Transcript Vol. VI 892:21-25). Further, Appellant offered evidence that while every other student participating in sports had access to some

facility that had a shower and a locker, Appellant did not. (*Id.* at 553:9-554:2). It is also supported by law, reflecting the language of the statute itself. RSMo. § 213.065.2 (2016).

h. Conclusion

The trial court improperly limited the scope of Appellant's claims, and improperly instructed the jury subject to those limitations. For those reasons, JNOV should be reversed.

CONCLUSION

Because both decisions were based on the same misinterpretation of the MHRA, the Trial Court erred both in granting JNOV and a new trial. Appellant requests this Court reverse the judgment of the Trial Court granting JNOV and a new trial and remand the case for an entry of a judgment consistent with the jury's verdict and the Trial Court's initial Judgment (D147 p. 1-2) in the case.

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CERTIFICATE UNDER RULE 84.06(c)

I, Alexander Edelman, hereby certify that I am one of the attorneys for Appellant R.M.A., and that the foregoing Brief of Appellant:

(1) Includes the information required by Rule 55.03;

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

(3) Contains thirteen thousand seventy-six (13,076) words.

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CERTIFICATE OF SERVICE

I, Alexander Edelman, hereby certify that I am one of the attorneys for Appellant R.M.A., and that on the 3rd day of December 2024, I caused a copy of the aforesaid Brief of Appellant and a copy of the appendix thereto to be served upon counsel for the Respondents by electronic mail, sent to:

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