

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE**

R.M.A.,

Plaintiff,

v.

BLUE SPRINGS R-IV SCHOOL DISTRICT,

Defendant.

Case No. 1516-CV20874

Division 17

**ORAL ARGUMENT IS REQUESTED**

**SUGGESTIONS IN SUPPORT OF  
DEFENDANT’S MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT  
OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL**

**I. INTRODUCTION**

At trial, the jury returned a social judgment rather than a legal verdict. Plaintiff is a transgender male—found to be of the female sex at birth—who transitioned to male gender. He “came out” as male at the age of nine.<sup>1</sup> Teachers and administrators at the Blue Springs School District worked with Plaintiff and his parents throughout his education to use names and pronouns Plaintiff preferred, and to give him the same quality education and school life experience the District would attempt to provide any student. Plaintiff was referred to by the nickname, R.J., rather than his given name, Angela. Plaintiff was referred to by male pronouns, and Plaintiff participated in boys’ sports. In fact, Plaintiff’s gender transition was reflected at trial by referring to Plaintiff by male pronouns during all phases of trial and in jury instructions. But as clearly pointed out by Plaintiff’s own medical expert, gender is not the same as sex—this was the undisputed evidence at trial—and while Plaintiff arguably may be of the male gender, his is not of the male sex—this, also, was the undisputed evidence at trial. Plaintiff’s failure of

---

<sup>1</sup> Use of male pronouns in these suggestions and the accompanying motion are out of deference to Plaintiff’s gender identity and are not meant to concede that he is a member of the male sex.

proof that he was of the male sex was and is fatal to his claim, notwithstanding the jury's judgment as reflected in their verdict.

Plaintiff presented a fiction and claimed it to be law. Plaintiff chose to try his case based on his transgender status rather than his alleged male sex as a protected characteristic, and the jury, which was predisposed to sympathy on transgender issues (based on their responses during voir dire), responded to Plaintiff's tactic. However, the jury did not follow the evidence and apply the evidence to the law, as set out in the Court's instructions, for if it had, a defense verdict was the only verdict that could have been rendered. Substantial evidence was wanting on two required elements of Plaintiff's claim: (1) that his protected characteristic was being of the male sex; and (2) that his male sex was a contributing factor in the School District's decisions. *R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 425-27 (Mo. banc 2019). Had the jury followed the Court's instructions, the absence of evidence on these elements would have led to a defense verdict. The absence of evidence on these key elements puts the onus on the Court to do what the jury improperly did not: follow the law, and grant judgment to the School District. *Western Blue Print Co. v. Roberts*, 367 S.W.3d 7, 14 (Mo. banc 2012); *Glover v. Atchison, Topeka, & Santa Fe Ry. Co.*, 841 S.W.2d, 211, 212 (Mo. App. W.D. 1992); and Rule 72.01.

Likewise, there was no evidence to support punitive damages. The evidence was overwhelmingly to the contrary. The School District's actions were not based on evil motive or undertaken with reckless disregard of Plaintiff's rights. Rather, the evidence was the School District complied with most of Plaintiff's parents' requests and followed all court orders in suits filed by Plaintiff's parents. There was certainly no evidence of evil motive, just as there was no evidence of reckless disregard of Plaintiff's rights. Up to this very day, no Missouri court or

legislature has determined that a child with external female sex organs has a right to the unfettered use of a boys' bathroom or locker room in a school. Even in this case, when the Missouri Supreme Court had the opportunity to rule on the question, the Court predicated liability for use of the School District's boys-designated facilities under the Missouri Human Rights Act on Plaintiff's allegation of his male sex, not his female sex, not female anatomy and not his transgender status. *R.M.A. by Appleberry*, 568 S.W.3d at 425-27. Again, the Court is charged with following the law where the jury did not. In the face of Plaintiff's abject failure to prove the elements of a punitive damage claim, the Court must grant the School District judgment notwithstanding the jury's verdict. *Western Blue Print Co., supra; Glover, supra*; Rule 72.01.

In the alternative, the Court should grant a new trial on all issues in this case. Plaintiff's failure to adduce evidence of male sex, his choice to try a transgender status discrimination case, the introduction of irrelevant evidence over objection, and the refusal to admit relevant evidence prejudiced the School District. In addition to these errors, instructional error created prejudice to the School District. This prejudice was evident from the jury's verdicts on both liability and punitive damages. It is within this Court's sound discretion to put these errors right by granting a new trial under Rule 78. *Pasalich v. Swanson*, 89 S.W.3d 555 (Mo. App. W.D. 2002).

## II. JUDGMENT NOTWITHSTANDING THE VERDICT

The Court is required to consider the School District's motion for judgment notwithstanding verdict before the motion for new trial because the central question of a JNOV motion is submissibility. *Steward v. Goetz*, 945 S.W.2d 520, 527-28 (Mo. App. E.D. 1997)(reversing grant of new trial and remanding for entry of judgment notwithstanding verdict).

To make a submissible case, *substantial evidence* is required for every fact essential to liability. *Substantial evidence is that which, if true, has probative*

*force upon the issues, and from which the trier of facts can reasonably decide a case.* The question of whether evidence in a case is substantial and whether the inferences drawn are reasonable are questions of law.

*Id.* (quotation marks and citations omitted, emphasis supplied). Where, as here, the plaintiff fails to make a submissible case, JNOV must be granted. *Id.* at 531. To do otherwise would be to accept an injustice.

In this instance, Plaintiff's evidence failed on two essential elements: (1) Plaintiff failed to adduce substantial evidence that his sex was male; and (2) Plaintiff failed to adduce substantial evidence that his male sex was a contributing factor to the School District's decisions about Plaintiff's access to boys' bathrooms and locker rooms. There is no question Plaintiff was required to establish these elements: The Missouri Supreme Court interpreted Plaintiff's Petition to determine these were essential elements of Plaintiff's claim, *R.M.A. by Appleberry*, 568 S.W.3d at 425-27. Additionally, the verdict directing instruction given by the Court implicitly required the jury to find the first element and explicitly required the second.

**A. All of the evidence was Plaintiff's sex is female.**

Plaintiff and his counsel were determined to make this case about gender identity, not male sex. Consequently, his evidence centered on his male gender identity to create a fiction of male sex. However, the Supreme Court did not rule that this case was about gender identity discrimination; rather the Court determined Plaintiff's claim was for sex discrimination—specifically discrimination against him because he is of the **male sex** (not gender). As the dissent in *R.M.A. by Appleberry* showed, the plain and ordinary meaning of “sex,” as used in the Missouri Human Rights Act, “refers to the biological classification of individuals as male or female.” *R.M.A. by Appleberry*, 431-32 (Fisher, J., dissenting). The majority did not dispute this determination, but merely found it to be unnecessary (in a footnote). Plaintiff's expert witness, Jill Jacobson, Ph.D., **agreed** with this definition of sex. In fact, she testified the scientific

literature she relies on, the DSM 5, her website, and the American Medical Association agree that sex and gender are two different things. Sex is biological; that is to say: genetics and anatomy. Gender and gender identity are mental and intellectual constructs.

Plaintiff offered up multiple witnesses to testify that his gender is male; however, Dr. Jacobson admitted Plaintiff's sex—biologically, genetically, and anatomically—is and always has been female, not male. All of the witnesses agreed on this point. “A party is bound by the uncontradicted testimony of that party's own witnesses, including that elicited on cross-examination.” *Steward*, 945 S.W.2d at 528. That Plaintiff's sex is female rather than male was confirmed by his medical records, as well, including Dr. Jacobson's medical records. Although some witnesses may have been prompted and primed by Plaintiff's counsel to **conclude** Plaintiff's sex was male, all of them nevertheless admitted the central, biological (genetic and anatomical) fact that Plaintiff's sex is, was, and always has been female. Hence, Plaintiff's evidence fails on the essential element of his claim: he did not offer substantial evidence that his sex was male during the relevant events in this case. Instead of offering facts to support the essential element that Plaintiff was of the male sex, Plaintiff created an illusion—the fiction that Plaintiff's male gender identity is the same as male sex.

**B. All of the evidence established the School District's decisions about Plaintiff's access to boys' bathrooms and locker rooms were based on Plaintiff's female anatomy, not his purported male sex or gender identity.**

The verdict directing instruction, which was taken directly from the majority opinion in *R.M.A. by Appleberry*, required the jury to find (and therefore Plaintiff to prove): “plaintiff's male sex was a contributing factor in such denial [of full access to the boys' bathrooms and locker rooms].” 568 S.W.3d at 425<sup>2</sup>; Instruction 8. As noted above, finding Plaintiff's sex to be

---

<sup>2</sup> The majority conceded the illogic of its interpretation of Plaintiff's petition and its proposed instruction—that Plaintiff was denied unfettered access to the boys' facilities because he was a

male was implicit in the instruction; however, even more striking, Plaintiff was charged with submitting substantial evidence and his purported male sex “was a contributing factor” to the School District’s decisions to limit his access to boys’ bathrooms and locker rooms. **There was no evidence on this point.** In fact, all of the evidence was that administrators, teachers, and school board members were concerned about, and made decisions based on, Plaintiff’s female anatomy—Plaintiff’s external sex organs. The School District was aware of Plaintiff’s early concerns that being in the bathroom consistent with his birth sex was uncomfortable because of how other students reacted. The District was concerned about the privacy and safety of adolescent boy-students and Plaintiff who were expected to be in various states of undress in these facilities. School District employees told Plaintiff and his parents about concerns expressed by the parents of other students, and they testified to it at trial.

Plaintiff’s petition specifically alleges his female anatomy is the reason for the School District’s decisions: “Defendants[’] reasons 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.*” Petition for Damages, ¶ 33 (emphasis supplied). Plaintiff’s counsel cross-examined witnesses from the School District on this point. Plaintiff even stipulated to this fact in *In re: R.M.A. bnf Rachelle Appleberry [sic] v. Blue Springs R-IV School District*, Case No. 1416-CV17208. Amended Joint Stipulation of Facts, ¶ 19.<sup>3</sup> Meanwhile, the witnesses testified that, while they understood Plaintiff to be transitioning from female gender to male gender, they understood his sex to be female. Hence, Plaintiff’s “male sex” was not a contributing factor in

---

boy—but asserted such was merely a problem of proof rather than pleading. *R.M.A. by Appleberry*, 568 S.W.3d at 426 n. 5.

<sup>3</sup> The School District offered the petition (Ex. 210), amended joint stipulation (Ex. 211), and judgment from Case No. 1416-CV17208 (Ex. 212), but they were erroneously excluded on Plaintiff’s objection. See discussion, below.

the School District’s decisions; rather it was Plaintiff’s **female anatomy** that formed the basis of the School District’s decisions about bathrooms and locker rooms.<sup>4</sup> Plaintiff’s offered no evidence to the contrary on this point. The law, therefore, requires the Court to step in and grant judgment in favor of the School District notwithstanding the verdict.

**C. There was no evidence of the School District’s “evil mind” or “reckless indifference to the rights of others” to support punitive damages.**

Just as Plaintiff failed to muster substantial evidence to support his claim for discrimination in a public accommodation, he has likewise failed 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. W.D. 2005).

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 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” favoring treatment of transgender students based on their gender identity. One year later, the “Dear Colleague Letter was rescinded by the next administration.<sup>5</sup> The issue of gender versus sex has been debated to the point of confusion. However, the Missouri Supreme

---

<sup>4</sup> It bears noting that the School District did not require Plaintiff to use female-designated facilities out of deference to his gender transition.

<sup>5</sup> [Dear Colleague Letter on Transgender Students \(PDF\) \[RESCINDED\]](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf) (<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>)

Court ignored the confusion and refused to acknowledge Plaintiff's petition as stating a claim for relief under the MHRA based on his transgender status. Rather, it left it to him to attempt to prove he was denied access to **male**-designated facilities because he was of the **male** sex. *R.M.A. by Appleberry*, 568 S.W.3d at 425-27.

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 Plaintiff's rights. So, what was the evidence? Again, the uncontroverted evidence demonstrated the School District's repeated efforts to meet Plaintiff's parents' requests on multiple fronts—from nicknames, to name changes, to pronouns, to participation in boys' sports. Even Plaintiff's parents' request that Plaintiff use a single-person bathroom was met with agreement. The School District met every request and complied with each order and judgment obtained by Plaintiff's parents from the courts. Plaintiff and his parents testified they were satisfied with the School District's approach.

Then, Plaintiff changed his mind and his parents changed their requests: They wanted Plaintiff to be able to use male-designated bathrooms and locker rooms. Although the bathroom request was officially denied, Plaintiff admitted on the stand that as a practical matter, he used the bathrooms he wanted to use. As for locker rooms, for the one year in middle school when Plaintiff 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. What was the reason for this practice? Not Plaintiff's male sex! Rather, it was the fact that Plaintiff had female anatomy, and putting a child with female anatomy in a middle school boys' locker room while everyone was changing their clothes was deemed a concern based on privacy and safety. Moreover, Plaintiff's parents took the School District to court seeking an order of mandamus to

require the School District to comply with the parents' bathroom and locker room demands, and the court refused. **This Court** refused to find that Plaintiff had a right to unfettered use of the bathroom of his (or his parents') choice.<sup>6</sup> As with the other lawsuits filed by Plaintiff's parents, the School District actions were consistent with the determinations made by the Court.

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. 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 Plaintiff undressing with their sons in the locker room. All of the evidence was that Plaintiff was treated well and held up by teachers, administrators, and staff as an exemplary and well-liked student. Moreover, Plaintiff 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 Plaintiff's right to use the boys' room or boys' locker room—no such right was established, and our society is currently engaged in a decade-long tug-of-war over the question. Perhaps the jurors saw themselves as part of the tug-of-war and decided to take sides, which resulted in their verdict of liability on punitive damages. But there was no **evidence** to support the jury's verdict, and politics has no place on a verdict form. The question in this instance is not a close call. Plaintiff not only failed to meet the high evidentiary standard required to support punitive damages, he failed to meet **any** evidentiary standard. The Court is

---

<sup>6</sup> The Court refused to permit the School District to introduce the Court's judgment in the mandamus case. As set out below, this refusal was erroneous and prejudiced the School District on the underlying issue of liability, as well as punitive liability and damages.

required to grant JNOV in favor of the School District on punitive damages. *Blue*, 170 S.W.3d 477-78. To do otherwise would be unjust.

### III. NEW TRIAL

The Court should grant the School District JNOV because the Plaintiff's proof was wanting on essential elements of his liability and punitive claims, but the School District seeks a new trial on liability and damages as alternative relief, out of an abundance of caution.<sup>7</sup>

Rule 78.01 empowers the Court to grant a new trial of any issue “upon good cause shown.” The Court has wide latitude to order a new trial—largely because it saw and heard the evidence and conduct of the parties and counsel and “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). The Court is expected to determine whether the verdict went against the weight of the evidence, whether jury instructions were appropriate, and whether evidence was erroneously admitted or excluded, and to rule accordingly. *Id.*, *Pasalich v. Swanson*, 89 S.W.3d 555 (Mo. App. W.D. 2002); *Steward*, *supra*.

#### A. The verdict was against the weight of the evidence.

When a jury's verdict of liability for discrimination and punitive damages under the MHRA is “reached by the jury without regard to the evidence[,] [t]his on its own is sufficient reason to grant a new trial ....” *Mayes v. UPS, Inc.*, 593 S.W.3d 604, 618 (Mo. App. E.D. 2019). As noted above, there was **no evidence** to support the jury's verdict. However, even if the Court finds some modicum of evidence to support Plaintiff on the disputed issues of fact, the

---

<sup>7</sup> *Steward* holds an order for new trial must be reversed and remanded for entry of JNOV if, on appeal, the court determines the case was not submissible. 945 S.W.2d at 528. That said, the Court is required to rule on the School District's alternative motion for new trial even if the Court grants the motion for JNOV. See Rule 72.01(c)(1).

overwhelming weight of the evidence was that Plaintiff was not a member of the male sex, nor did the School District make decisions based on his male sex.

The excessiveness of the jury's verdict further demonstrates that the verdict was against the weight of the verdict. No evidence was adduced as to the amount or value of Plaintiff's damages—they have been described as “garden variety emotional distress” throughout the litigation. Nevertheless, when Plaintiff's counsel suggested \$150,000 as the value of Plaintiff's actual, garden-variety damages, the jury went \$25,000 higher and awarded \$175,000. When Plaintiff's counsel suggested \$2,000,000 in punitive damages, the jury doubled it. The jury in essence unjustly awarded punitive damages twice.

“There are two general types of excessive verdicts: (1) a verdict that is disproportionate to the evidence of injury and results from an ‘honest mistake’ by the jury in assessing damages; and (2) a verdict that is excessive due to trial error that causes bias and prejudice by the jury.” *Mayes*, 593 S.W.3d at 616-17. Where “Honest Mistake Excessiveness” is present and liability and damages issues are intertwined, as they are here, a new trial is proper. *Id.*, citing *Zibung v. Union Pacific R. Co.*, 776 S.W.2d 4, 6 (Mo. banc 1989). Where “Bias and Prejudice Excessiveness” is present—where trial error or misconduct prejudices the jury—a new trial is the only remedy. *Mayes*, 593 S.W.3d at 617. The test for Bias and Prejudice Excessiveness is left to the trial court's discretion, but there should be a showing that the verdict is excessive along with “some other error at trial.” *Id.*

In this instance there are a variety of trial errors and conduct that fulfill the “some other error at trial requirement.” They run from instructional error to the introduction of confusing issues related to transgender identity, Plaintiff's witnesses' outbursts about transgender suicide rates, and the inclusion of evidence when third parties did not handle Plaintiff's transgender

status in the manner he or his parents may have wished. Perhaps one of Plaintiff's most prejudicial analogies was to Jim Crow era's "separate but equal" policies—a truly shocking statement when our society generally (not a Confederate segment of our society) accepts that the two different sexes generally use their own sex-designated public bathrooms. Of course, the public policy of having separate sex-designated public bathrooms was not supposed to be the subject of this trial, so the use of the phrase injected massive prejudice into the case. The various trial errors that contributed to the jury's prejudice are set out below in more detail.

**B. The punitive damages verdict was unconstitutionally excessive.**

Punitive damages are intended to punish outrageous conduct and deter a future occurrence of similar conduct. *Van Eaton v. Thon*, 764 S.W.2d 674, 677 (Mo. App. W.D. 1988). However, the Court must eliminate or reduce punitive awards where the amount is so high as to result in a denial of due process. *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("grossly excessive or arbitrary punishments" will be overturned). Constitutionality of a punitive damage award requires the consideration of the degree of reprehensibility, of the defendant's conduct, the ratio between punitive damages and compensatory damages, and the difference between the punitive damages awarded and the civil penalties authorized in similar cases. *See BMW*, 517 U.S. at 575.

Considering reprehensibility requires consideration of factors such as whether the harm was physical or economic, whether the conduct was isolated or repeated, whether the defendant acted with reckless indifference to the health or safety of others, and whether the harm was intended. *State Farm*, 538 U.S. at 419. Here, all of the reprehensibility factors weigh in favor of the School District. Plaintiff was not subject to physical or economic harm, there was no

evidence of other similar conduct, there was no evidence of intentional harm, and the School District clearly was attempting to be mindful of the health and safety of Plaintiff and others.

Although there is no set ratio between compensatory damages and punitive damages that is determinative of the excessiveness of a punitive award, an outsized ratio can violate due process. “[F]ew awards exceeding a single-digit ratio between punitive damages and compensatory damages, to a significant degree, will satisfy due process.” *State Farm*, 538 U.S. at 425. In this instance the ratio of punitive damages to compensatory damages is 1 to 22.8. Punitive damages are nearly 23 times the amount of (the already excessive) compensatory damages. Finally, although the sovereign immunity statute is not in play in this case, it is reasonable to note that the maximum award against a public entity such as the school district for a single injury is \$459,893.00.<sup>8</sup>

Hence, by all measures, including Constitutional dimensions, the punitive damages verdict in this case is excessive.

**C. A new trial should be ordered because of instructional error.**

The Court is empowered to grant a new trial when the jury instructions are inadequate or improper. *Steward*, 945 S.W.2d at 527-28; *Wagner v. Mortgage Info. Servs., Inc.*, 261 S.W.3d 625, 637 (Mo. App. W.D. 2008). “Because the purpose of the verdict[ ] directing instruction is to hypothesize propositions of fact to be found or rejected by the jury, the verdict directing instruction must hypothesize the facts essential to the plaintiff’s claim.” *Hervey v. Missouri Dep’t of Corr.*, 379 S.W.3d 156, 160 (Mo. banc 2012). As the Court observed, “[i]n many MRHA discrimination cases, it is not disputed that a plaintiff is a member of a protected class

---

<sup>8</sup> The statutory limit as calculated for 2021 by the Department of Commerce and Insurance and published in the Missouri Register, <https://insurance.mo.gov/industry/sovimmunity.php>, pursuant to § 537.610.5, RSMo.

because the plaintiff's status as a member of a protected class is self-evident." *Id.* In such cases, the plaintiff's membership need not be submitted in the verdict director. In *Hervey*, however, the defendant disputed the plaintiff's inclusion in the protected class of disability, and the verdict directing instruction **assumed** the plaintiff's inclusion in the protected class. "Assuming a disputed fact is error." *Id.* (citation omitted). Accordingly, the Court determined the verdict director was deficient, reversed the judgment, and remanded the case.

The Court's verdict directing instruction in this case, Instruction 8, is similarly deficient. Here, the Supreme Court proposed a verdict director based on its determination Plaintiff was alleging he was member of the protected class "male sex." The Court's decision was predicated on the notion that Plaintiff's claim was that his sex was male and his male sex was the basis of the claimed discrimination. *R.M.A. by Appleberry*, 568 S.W.3d at 425. However, the School District did not admit Plaintiff's inclusion in the "male sex" class, and it disputed Plaintiff's inclusion in this category throughout the trial. The School District even elicited admissions from Plaintiff's witnesses that Plaintiff was not a member of the male sex. Nevertheless, Instruction 8 **assumed** Plaintiff was of the male sex. The School District offered an alternative verdict directing instruction for the Court's use, which would have required the jury to find Plaintiff's sex to be male (Exhibit D to the accompanying motion); however, the Court refused the instruction. Inasmuch as "[a]ssuming a disputed fact is error," the Court should have used the School District's proposed instruction and giving Instruction 8 was error.

Moreover, the School District was prejudiced by this instructional error. Plaintiff tried this case as a transgender discrimination case. Evidence related to Plaintiff's gender identity was laced throughout the case, but the evidence of Plaintiff's sex was absolutely clear: Plaintiff's sex was female, not male. Had the essential element of Plaintiff's male sex been submitted to the

jury, it would have been required to find for the School District. Hence the assumption of Plaintiff's male sex embedded in Instruction 8 was prejudicial, and a new trial is warranted.

The School District also offered an instruction on its affirmative defense of collateral estoppel, but the instruction was rejected by the Court. In fairness, the School District's position on the instruction is based on evidence that was excluded by the Court; to wit: the petition, stipulations, and judgment in *In re: R.M.A. bnf Rachelle Applebery [sic] v. Blue Springs R-IV School District*, Case No. 1416-CV17208. Since the exclusion was erroneous (as set out below), the instruction was offered, is attached to the motion for new trial as Exhibit E and is mentioned here to preserve the instructional error and demonstrate prejudice.

**D. A new trial should be ordered because of erroneous evidentiary rulings, improper comments by Plaintiff's counsel, and improper narratives of Plaintiff's witnesses.**

To be admissible, evidence must be both logically relevant and legally relevant.

*Brummett v. Burberry Limited*, 597 S.W.3d 295, 303 (Mo. App. W.D. 2019).

Evidence is logically relevant if it makes the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Legal relevance is a distinct concept. It refers to the balance between the probative value and the prejudicial effect of the evidence. That balancing requires the trial court to 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. If the prejudicial effect of the evidence outweighs its probative value, then the evidence is not relevant and should be excluded.

*Id.* At trial, the Court erroneously excluded from evidence documents and testimony about the claims, stipulations of fact, and judgment in *In re: R.M.A. bnf Rachelle Applebery [sic] v. Blue Springs R-IV School District*, Case No. 1416-CV17208. At the same time, the Court erroneously permitted Plaintiff to introduce evidence, over the School District's objection, of Plaintiff's

gender identity, and the effects a person might feel when gender identity and biological sex are not consistent.

**(1) The failure to admit evidence regarding *In re: R.M.A. bnf Rachelle Applebery [sic] v. Blue Springs R-IV School District, Case No. 1416-CV17208* was erroneous and prejudicial.**

Plaintiff introduced evidence of cases filed on his behalf to obtain relief regarding his gender identity. For instance, he was granted a formal name change, and he was granted the ability to have his gender designated as “male” on his birth certificate.<sup>9</sup> However, Plaintiff was unsuccessful in litigation his mother instituted against the School District in which he sought a court order of mandamus to require the School District to give him unrestricted access to male-designated bathrooms and locker rooms.

The petition for mandamus was filed in the Circuit Court of Jackson County and heard in Division 17, under the style *In re: R.M.A. bnf Rachelle Applebery [sic] v. Blue Springs R-IV School District, Case No. 1416-CV17208*. The petition sought, among other things, the issuance of:

a writ of mandamus against all Respondents, in both their official and individual capacities, as set forth in this Petition, commanding Respondents to grant Relator and all other transgendered students of the Blue Springs R-IV School District full and equal access to the appropriate restroom, locker room, and any other facilities segregated by sex as is consistent with their gender identity.

(Ex. A to accompanying motion, pp. 5-6, Ex. 210 at trial.) The petition cited the Missouri Human Rights Act’s public accommodation statute for legal support.

The parties entered into an “Amended Joint Stipulation of Facts” (Ex. B to accompanying motion, Ex. 211 at trial), which included the following paragraphs:

---

<sup>9</sup> The second order was obtained after Plaintiff graduated from Delta Woods, where the majority of the issues he complains about occurred.

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 8<sup>th</sup> 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.

The court's judgment dated March 15, 2015 (Ex. C to accompanying motion, Ex. 212 at trial), denied the relief requested on Plaintiff's behalf. In addition to the facts stipulated by the parties, the judgment included "Additional Factual Findings" such as the following:

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.

Additionally, the court reached the legal conclusion that Plaintiff had "failed to meet the most basic and crucial element of mandamus, in that Relators have not asserted an existing,

clear, unconditional legal right” for a transgender boy to use boys’ restrooms and locker rooms in a public school.” Ex. C, pp. 7-8. “IT IS HEREBY ORDERED that Relators have no existing, clear, unconditional legal right which allows R.M.A. to access restrooms or locker rooms consistent with R.M.A.’s gender identity.”

*Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107 (Mo. banc 2015), holds circumstantial evidence of the defendant’s state of mind is logically and legally relevant. Surely, in a case in which Plaintiff is seeking to punish the School District for its purported “evil motive or reckless indifference to the rights of others,” it is logically and legally relevant that a court found the School District’s actions were not in violation of an “existing, clear, unconditional legal right.” The jury’s verdict on punitive damages demonstrates why this evidence would have been important for the jury to consider. Testimony from the School District’s witnesses would have further explained the thought processes behind the mandamus lawsuit and how the judgment played into the School District’s decisions.

Further, the stipulations, additional findings of fact, and conclusions of law were directly related to the School District’s collateral estoppel defense. Collateral estoppel requires four elements: (1) the issue decided must be identical; (2) the prior litigation must have resulted in a final decision on the merits; (3) the party to be estopped must have been a party to the prior adjudication; and (4) that party must have had a full and fair opportunity to litigate the issue in the prior suit. *Carter v. Treasurer of State Custodian of Second Injury Fund*, 532 S.W.3d 203, 209 (Mo. App. W.D. 2017). Had the jury been provided with Exhibits A, B, and C, along with explanatory testimony, it could have considered collateral estoppel. Instead, the School District’s proposed collateral estoppel instruction was unsupported by evidence and refused.

**(2) The Court erred in admitting testimony about the Eighth Grade trip, because it was neither logically nor legally relevant to the issues in the case.**

Plaintiff introduced evidence that his gender identity was not accommodated when he went on “the Eighth Grade trip.” The Eighth Grade trip is not mentioned in Plaintiff’s petition. As a reminder: “the Eighth Grade trip” was not a school function. A teacher acted as a liaison with a sponsoring travel agent, but the trip was planned and organized outside of the School District. Participation was not only voluntary, it was outside of the School District’s control. Plaintiff’s evidence was that the sponsoring travel agent refused to allow him to room with children whose sex was male. The decision was the travel agent’s and not the School District’s, although it bears noting that parents of some of the boys expressed that they had concerns about their sons rooming with Plaintiff. The School District objected to the introduction of the Eighth Grade trip, because it was not relevant. It was not relevant, because the School District was not the decision-maker and did not set the terms and conditions of participation. Plaintiff’s counsel urged admission of the evidence based on *Diaz v. Autozoners, LLC*, 484 S.W.3d 64 (Mo. App. W.D. 2015), on the premise that it supported holding a defendant liable for discrimination by third parties in MHRA cases.

Plaintiff’s counsel did not produce a copy of the *Diaz* case to the Court or counsel; however if she had, the Court would have immediately seen that the evidence should not be admitted. *Diaz* addresses a specific situation where an employer may be held liable under the theory of negligently permitting a hostile work environment created by a customer in the employer’s workplace. The theory, as noted by the *Diaz* court is as follows: “An employer in this kind of case may be liable at most for its own negligence in allowing the conduct of its customers to turn its workplace into a hostile work environment.” *Diaz*, 484 S.W.3d at 76 (citation omitted). Not only did Plaintiff fail to plead his complaint about the Eighth Grade trip,

his petition fails to assert a hostile environment, it fails to assert a negligently permitted hostile environment created by a third party, and it fails to assert the third party create a hostile environment at the School District's school. The *Diaz* case provides absolutely no support for the admission of evidence about the Eighth Grade trip.

Meanwhile, the evidence was not logically relevant—it failed to prove or disprove anything regarding Plaintiff's access to bathrooms or locker rooms or the decision-making process relating to any such access. When it came to the Eighth Grade trip, the decisions were out of the School District's hands. Similarly, the evidence was not legally relevant. Instead, it added to Rachelle Appleberry's "list" of frustrating experiences, which required the School District to respond with cross-examination and evidence. The purpose and effect were not to prove the School District was discriminatory; rather they were to show the School District was unresponsive to a complaint—however, the complaint was outside the School District's educational environment, and its resolution was outside the School District's control. The evidence had no bearing on the issues in the case and served only to prejudice the jury.

**(3) Evidence of Plaintiff's transgender status and gender identity, along with Plaintiff's counsel's inflammatory references to "separate but equal" were irrelevant, confusing and prejudicial.**

Plaintiff's sex is uncontrovertibly female. He and others testified his gender identity is male. While Plaintiff's gender identity clearly was at the center of his and his parents' concerns, his gender identity was not relevant to the essential elements of his claim. The Missouri Supreme Court identified Plaintiff's claim as a claim related to his purported male sex, not his gender identity. As discussed during the instruction conference, the Supreme Court's view of Plaintiff's claim as one for discrimination based on Plaintiff's "male sex" was shaped by Plaintiff's brief on appeal to the Supreme Court. Plaintiff asked for the chance to try his case on the theory that he was denied access to male-designated bathrooms and locker rooms based on

his male sex, and the Supreme Court gave it to him. However, that is not the case Plaintiff tried. Instead, Plaintiff tried a transgender discrimination case. The jury was left with conflicting and confusing evidence that Plaintiff's sex was female, but his gender was male.

The confusion was amplified by Plaintiff's expert witness, Dr. Jacobson. On direct examination, Dr. Jacobson testified Plaintiff's gender identity was male, but on cross-exam, she admitted Plaintiff's sex was female. Dr. Jacobson admitted the differences between gender and sex, and she admitted these differences were significant in the scientific and medical communities. These admissions, however, rendered her direct testimony irrelevant, but not before it had created additional confusion around the issues of sex versus gender in the case. Certainly, Dr. Jacobson's testimony failed the first test of expert testimony admissibility: it failed to assist the jury because it failed to provide relevant information that was beyond the jury's knowledge. § 490.065.2(1)(a), RSMo. Dr. Jacobson's testimony should have been excluded. Its admission was far more prejudicial than probative and warrants a new trial. *McGuire v. Seltsam*, 138 S.W.3d 718 (Mo. banc 2004)(improvidently admitted expert testimony was prejudicial).

Plaintiff's witnesses, and in particular, Plaintiff's mother, injected general "facts" about transgender children and gender identity. Most egregious of these interjections was Plaintiff's mother's reference to suicide rates among transgender teens. The foundation for this statistic was non-existent, and Plaintiff's mother was certainly not in a position to act as an expert witness to provide the foundation. In addition, there was no logical relevance—Plaintiff never asserted a desire or effort to commit suicide. Likewise, there was no legal relevance—the statistic could only be used to paint a prejudicial picture of the School District as potentially causing Plaintiff's eventual demise. No doubt these sorts of outbursts contributed to the jury's

erroneous judgment on liability and punitive damages and misevaluation of the amount of damages.

Counsel for the School District objected to Plaintiff's efforts to make the case into a forum on transgender bathroom rights, and often, the Court sustained the objections; however, Plaintiffs' counsel were undeterred. When Plaintiff's counsel argued "separate but equal," it was not to argue that boys were being kept out of facilities being used by other boys, but rather to argue that **transgender** boys were being kept out of the boys' bathroom. Plaintiff's counsel's statements were about a transgender discrimination case. This issue was the focus of the School District's pretrial motion in limine and was sustained by the Court. This issue was the focus of numerous objections, which were sustained. Finally, the specific reference to the highly prejudicial use of the phrase "separate but equal" was raised in a motion in limine during trial, along with a motion for a withdrawal instruction. Unfortunately, the latter motion was overruled, and the proposed instruction was refused. The Court's rationale—that the School District had not objected to the phrase when it was first used—need not deter the Court from ruling in the School District's favor on this point.

Plain errors affecting substantial rights may be considered at a hearing on motion for a new trial, in the discretion of the court, though not raised in the motion or defectively raised, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

Rule 78.08. Here, Plaintiff's compared the School District to Jim Crow—as a piece of rhetoric, it was outrageous and grossly prejudicial. Perhaps it was rhetoric worthy of Twitter, but it was not worthy of the courtroom, and the Court is in a position to correct the resulting injustice.

**(4) The cumulative nature of the errors in this case warrant a new trial.**

The manner in which errors are raised for consideration—one at a time, each with its own argument—ignores how the errors overlap and build, each one on the other. For instance,

repeated references to Plaintiff's "male gender" exacerbated the failure to include the essential element of Plaintiff's inclusion as a member of the "male sex" in the verdict director. Plaintiff's mother's frustration in her dealings with the School District were the subject of testimony—but her "garden variety emotional distress" was not at issue and was not compensable. Plaintiff's counsel was allowed to equate the School District to the "Old South," but the School District was not allowed to show that the parties went to court in an earlier case, and the court found Plaintiff had "no existing, clear, unconditional legal right" to use the boys' bathrooms and locker room. To top it all off, Plaintiff offered evidence that a third party did not let Plaintiff share a hotel room with three boys, and then he blamed the School District. Even if individually these errors were "harmless," their cumulative weight created prejudice that was evident from the jury's verdict. The Court is well within its rights to order a new trial to ameliorate the obvious prejudice. *DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 536 (Mo. App. E.D. 1991).

#### **IV. CONCLUSION**

A trial is supposed to be a search for the truth, but Plaintiff's tactics inevitably turned the trial in this case into something else. Maybe Plaintiff's goal was a referendum of twelve specially selected people to give their opinions on an issue of the day; it was not, however, to try a case about whether Plaintiff was a member of the male sex or if his male sex was a contributing factor to limitations on his access to boys' bathrooms and locker rooms. If it had been, the trial would have been shorter and the outcome would have been much different. Plaintiff's trial tactics have led him to a dead end because he chose not to try the claim that was mandated by the Supreme Court's determination of law of the case. He was unable or chose not to present evidence that his sex was male. He was unable or chose not to present evidence that the School District's decisions were based on his male sex. He was unable or chose not to

present evidence that the School District acted with an evil motive or reckless indifference to his rights. For these shortcomings, there is only one remedy: The Court must enter judgment in favor of the School District notwithstanding the jury’s verdict. Certainly, in if JNOV is not entered, the Court should order a new trial, but its legal duty is to enter the JNOV.

Respectfully submitted,

**BATY OTTO CORONADO PC**

/s/ Mark D. Katz

|                    |          |
|--------------------|----------|
| Steven F. Coronado | MO 36392 |
| Mark D. Katz       | MO 35776 |
| Paul F. Gordon     | MO 47618 |

4435 Main Street, Suite 1100  
 Kansas City, Missouri 64111  
 Telephone: (816) 531-7200  
 Facsimile: (816) 531-7201  
[scoronado@batyotto.com](mailto:scoronado@batyotto.com)  
[mkatz@batyotto.com](mailto:mkatz@batyotto.com)  
[pgordon@batyotto.com](mailto:pgordon@batyotto.com)  
 ATTORNEYS FOR DEFENDANTS

**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2022, the original of the above and foregoing was filed with the Court via ECF Filing system, with a copy going by electronic mail to:

Mary Madeline Johnson  
220 Main Street, Suite 201  
Platte City, MO 64079  
Kansas City, MO 64111  
Telephone: (816) 607-1836  
Fax: (816) 463-8449  
[mmjohnsonlaw@gmail.com](mailto:mmjohnsonlaw@gmail.com)  
[madeline@lgbtlawkc.cl](mailto:madeline@lgbtlawkc.cl)  
ATTORNEYS FOR PLAINTIFFS

Alexander Edelman  
Katherine Myers  
Edelman, Liesen & Myers LLP  
208 W. Linwood  
Kansas City, MO 64111  
Telephone: (816) 808-6910  
Fax: 816-463-8449  
[aedelman@elmlawkc.com](mailto:aedelman@elmlawkc.com)  
[kmyers@elmlawkc.com](mailto:kmyers@elmlawkc.com)  
ATTORNEYS FOR PLAINTIFFS

/s/ Mark D. Katz  
\_\_\_\_\_  
Attorney for Defendants