IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

R.M.A.,	)	
	)	
Plaintiff,	)	
	)	Case No. 1516-CV20874
v.	)	
	)	Div. 17
BLUE SPRINGS R-IV SCHOOL DISTRICT,	)	
	)	
Defendant.	)	

SUGGESTIONS IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

COMES NOW Plaintiff R.J. Appleberry (hereinafter "Plaintiff"), by and through his undersigned counsel, and for his Suggestions in Opposition to Defendant Blue Springs R-IV School District's (hereinafter "Defendant") Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial (hereinafter, "Motion"), states as follows:

NATURE OF THE CASE

This is an action for sex discrimination in public accommodate under the Missouri Human Rights Act, RSMo. § 213.010 *et seq.* ("MHRA"). After a five (5) day trial, the jury reached a verdict, finding for Plaintiff on the sole count in his petition, awarding Plaintiff one hundred seventy-five thousand dollars ($175,000.00). (Signed Verdict at 1). The jury also found that Plaintiff was entitled to punitive damages, and after a brief punitive damages phase, the jury deliberated again and returned a verdict of four million dollars ($4,000,000.00) in punitive damages. (*Id.* at 1-2). After the verdict was returned, this Court entered an order acknowledging the jury's verdict and directing Plaintiff to "submit briefing on the issues of additional equitable relief/attorneys' fees no later than 5:00 p.m. on January 14, 2022," which Plaintiff did file. (*See* Jury Trial Order and Partial Judgment at 2). Before Plaintiff's deadline for filing his motion had

passed, Defendant filed its Motion seeking Judgment Notwithstanding the Verdict ("JNOV") or, in the alternative, a new trial, along with its Suggestions in Support of Defendant's Motion for Judgment Notwithstanding Verdict or in the Alternative, Motion for New Trial (hereinafter "Suggs. in Supp." or "Suggestions").

ARGUMENT

This action involves serious claims that implicate important matters of public policy. The Missouri legislature has ensured everyone in the state "the full and equal use and enjoyment within this state of any place of public accommodation" because "[a]ll persons within the jurisdiction of the state of Missouri are free and equal." RSMo. § 213.065.1. Simply, Defendant failed to treat Plaintiff in accordance with that statute and a legally constituted jury found in Plaintiff's favor.

Defendant has suffered a serious rebuke from this jury, and seemingly has responded by lashing out. In addition to its legal arguments (which, as Plaintiff will explain, below, are inaccurate or unpersuasive), Defendant's motion is full of attacks on the character and integrity of Plaintiff, his counsel, and the jury.[1] In addition to being completely unfounded, these attacks harm our legal system and the important role it plays in our society. *See* Principles of Civility, VII. Moreover, they do not support granting the relief that Defendant seeks, as the arguments do not demonstrate the specific standards for a new trial set by law. Defendant has failed to meet its burden to show that it is entitled to any of the post-trial relief it seeks, and therefore its motion should be denied.

[1] The attacks are too numerous to repeat or even reference here, but include assertions that "Plaintiff['s counsel] presented a fiction and claimed it to be law" (Sugg. in Supp. at 2); that "[i]nstead 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" (*Id.* at 5); and that "[a]t trial, the jury returned a social judgment rather than a legal verdict," meaning they violated their oath. (*Id.* at 1).

I. Judgment Notwithstanding the Verdict

Plaintiff has made a submissible case on each element of the claim submitted to the jury; thus, Defendant's motion should be denied. Rule 72.01(b) provides that "a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the motion for a directed verdict." While Defendant did move for a directed verdict, that motion was properly denied, and this motion should be denied as well.

1. Legal Standard

The standard for granting a motion for judgment notwithstanding the verdict is extremely high. To defeat such a motion, a plaintiff need only make a submissible case by offering evidence "supporting every fact essential to a finding of liability." *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 104 (Mo. banc 2010) (citing *Clevenger v. Oliver Ins. Agency, Inc.*, 237 S.W.3d 588, 590 (Mo. banc 2007)). In determining whether the evidence was sufficient to support a jury's verdict, a court "views the evidence in the light most favorable to the verdict and the plaintiff is given the benefit of all reasonable inferences." *Id.* Moreover any "[c]onflicting evidence and inferences are disregarded." *Id.* A jury verdict is only reversed "if there is a **complete absence of probative facts** to support the jury's conclusion." *Id*. (emphasis added).

Given this extraordinarily high standard, there is no question that Defendant has failed to meet its burden of showing it is entitled to a Judgment Notwithstanding the Verdict.

2. Plaintiff offered evidence supporting each element of his claim of discrimination under the MHRA

Defendant seeks JNOV on the jury's finding in Plaintiff's favor on the issue of liability. Defendant asserts that Plaintiff failed to present submissible evidence of two of the elements of his claim: (1) "that his sex was male; and (2) . . . that his male sex was a contributing factor to

the School District's decisions about Plaintiff's access to boys' bathrooms and locker rooms." (Suggs. in Supp. at 4).[2] Plaintiff did present a submissible case that he was male, and that his male sex was a contributing factor in the School District's discrimination.

A. Plaintiff introduced sufficient evidence regarding his sex

Plaintiff introduced more than enough evidence that he is a member of the protected class of "sex." He also submitted more than sufficient evidence that his sex is male. Even if Plaintiff was required to prove that his sex was male, Defendant would not be entitled to JNOV. Plaintiff, both of his parents, and Plaintiff's expert witness, Dr. Jill Jacobson each testified that Plaintiff was male. Not only did each of them testify to the specific fact that he was male, but they also testified at length about his being male, including but not limited to, testimony about the fact that though he was assigned female at birth (which Dr. Jill Jacobson explained is a speculative assignment), but is in fact a male. Dr. Jill Jacobson described specific anatomical facts supporting Plaintiff being male. Plaintiff's birth certificate states he is "male." Thus, Plaintiff offered substantial evidence showing not only that he was a member of the protected class of "sex," but that he was male.

Defendant all but concedes this fact. While doing so, it characterizes the testimony as witnesses being "prompted and primed by Plaintiff's counsel to conclude Plaintiff's sex was male."[3] (Suggs. in Supp. at 5). The testimony being referenced is from sworn witnesses, subject to cross-examination, given in open Court. It should go without saying: "[t]estimony is

[2] Plaintiff disputes that he had to prove that his sex was male. Rather, he needed only to prove that he was a member of the protected class of "sex." In any event, Plaintiff submitted sufficient evidence that he is both "male" and a member of the protected class of "sex."

[3] Defendant therefore is also arguing that the witnesses did in fact conclude Plaintiff's sex is "male," but apparently takes issue with the questions which elicited said testimony. Notably, few objections were made by Defendant's counsel during this trial and it does not appear Defendant is arguing the Court improperly ruled on any questions which elicited said testimony. Contrary to Defendant's argument, the questions of his counsel at trial were proper. In any event, without properly objecting at trial to the form of the questions, the arguments have not been appropriately preserved.

evidence." *State v. Rice*, 573 S.W.3d 53, 65 (Mo. banc 2019). Defendant has not offered, and Plaintiff cannot find, any authority for the tacit assertion that when a witness "conclude[s]" something, they are not giving testimony, or that testimony is not evidence. Indeed, Missouri law specifically permits an expert witness (like Dr. Jacobson) to give "[t]estimony . . . in the form of an opinion or inference" even if it "embraces an ultimate issue to be decided by the trier of fact." RSMo. § 490.065.2 (2016). Also, notably, plaintiff's in MHRA cases are permitted to provide testimony as to their membership in a protected class (i.e., state their age in an age discrimination case). Defendant's continued disagreement regarding Plaintiff's sex does not negate the evidence presented at trial; rather, it only further goes to demonstrate the necessity and importance of the jury's verdict. Indeed, correcting discriminatory beliefs and behaviors is why the MHRA is so vital to our society. As demonstrated, there is **not** a complete absence of probative facts that Plaintiff was a member of a protected class, sex, and that his sex was male, as Defendant would have this Court conclude.

The arguments Defendant makes regarding evidence it elicited on cross-examination and how that evidence should be characterized are improper in support of JNOV. (*See* Sugg. in Supp. at 4-5). When reviewing a motion for JNOV, courts disregard any evidence or inferences that conflict with the verdict. *Keveney*, 304 S.W.3d at 104. Moreover, Defendant misstates or mischaracterizes the evidence. For example, Defendant inaccurately suggests that Plaintiff only offered testimony that "his gender is male" and Defendant further states in its motion that "Dr. Jacobson admitted Plaintiff's sex—biologically, genetically, and anatomically—is and always has been female, not male" and that "[a]ll of the witnesses agreed on this point." (Sugg. in Supp. at 5). **This is simply not true**; as the transcript will reflect, this is not what the testimony was at trial. As previously mentioned, multiple witnesses testified that Plaintiff's **sex** was male.

Moreover, Dr. Jacobson explained—in her expert opinion—why the evidence Defendant points to as "proving" that Plaintiff is female (such as Plaintiff having typically "female" chromosomes) does not mean that he is female. Defendant argued that this is incorrect, and had the opportunity to call Dr. Jacobson's expert testimony into question, either through cross-examination or by providing their own expert. But the jury was permitted to believe the testimony in favor of Plaintiff.

Defendant's erroneous characterization of the evidence appears to be based, at least in part, on an equally erroneous characterization of the law. Defendant avers that the dissenting opinion in the Missouri Supreme Court's ruling on this case "showed[that] the plain and ordinary meaning of 'sex,' as used in the [MHRA], 'refers to the biological classification of individuals as male or female.'" (Sugg. in Supp. at 4) (citing *R.M.A.*, 568 S.W.3d at 431-32 (Fisher, J., dissenting)). It went on to claim that "[t]he majority did not dispute this determination, but merely found it to be unnecessary (in a footnote)." (*Id.*) (omitting any citation). In fact, the majority opinion expressly rejected the dissent's determination, noting that "there is nothing ambiguous about [the term "sex"] or the context in which it is used," and rejects 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, 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). Lower Court "are bound by the majority opinion" of the Missouri Supreme Court. *Self v. Midwest Orthopedics Foot & Ankle*, 272 S.W.3d 364, 368 (Mo. App. W.D. 2008). Thus, Defendant's attempt to apply the dissent's definition of "sex" as a matter of law is entirely without merit.

Equally unpersuasive is Defendant's attempt to apply the definition as a matter of fact.[4] Defendant cites caselaw that holds that "[a] party is bound by the uncontradicted testimony of that party's own witnesses, including that elicited on cross-examination." (Sugg. in Supp. at 4) (quoting *Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. App. E.D. 1997)). Yet, despite Defendant's attempts to characterize it otherwise, the testimony of Plaintiff's witnesses was that his sex was male. Thus, any testimony Defendant attempts to categorize as showing otherwise is not uncontradicted. Defendant asserts that Dr. Jacobson "agreed with this definition of sex" and "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." (Sugg. in Supp. at 5). In fact, Dr. Jacobson did not agree with Defendant's definition, and, importantly, the fact that sex and gender may be different things in accordance with some medical literature (notably, not in the context of any legal definition) does not mean that Plaintiff's sex is not male. And again, in the context of JNOV these arguments are entirely irrelevant, as the Court' disregards any evidence or inferences that are inconsistent with the verdict. *Keveney*, 304 S.W.3d at 104. Plaintiff need only offer a single piece of evidence supporting each element, which, in this case, he more than did.

B. Plaintiff introduced sufficient evidence that his male sex was a contributing in Defendant's discrimination against him

Next, Defendant argues that Plaintiff adduced no evidence that his male sex was a contributing factor in Defendant's discrimination. (Suggs. In Supp. At 5-7). In support of this position, Defendant asserts that "all of the evidence was that [Defendant's agents] were concerned about, and made decisions based on, Plaintiff's female anatomy—Plaintiff's external

[4] It appears that Defendant is taking the position that "sex" is a fixed, binary classification based on some combination of anatomy, chromosomes, and other physical characteristics, which is assigned at birth and cannot change. Because Defendant never states this explicitly, it is unclear whether this is an assertion of fact or law. Either way, Defendant is wrong, and is not entitled to JNOV (or a new trial).

sex organs." (*Id.* at 6). First, this was not what "all of the evidence" indicated. While Defendant's agents more or less asserted in their testimony that this was a reason for their behavior, there was no evidence offered that stereotypically female anatomy means someone is of the "female" sex. Indeed, the testimony demonstrated the opposite; that anatomy does not automatically equal sex. And, the evidence was that Plaintiff did not have all of the stereotypical "female" anatomy (Dr. Jacobson testified that he did not develop breasts). Additionally, as Defendant concedes, Scott Cook admitted that the school did not ask every student about their external sex organs. From that, a jury could have reasonably inferred that Plaintiff's anatomy was not the actual reason for their actions, but rather that it was Plaintiff's male sex that was a reason for their discriminatory conduct.

Even if the evidence did somehow show that Plaintiff's anatomy was of the "female sex" (which it did not), that would not mean that his sex was not a *contributing* factor. Missouri courts have long held that a party engages in unlawful discrimination if the plaintiff's protected status (here, his sex) is **any part** of the basis for the decision. *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206, 214 (Mo. App. W.D. 2012). The discriminatory act "'is no less reprehensible because that factor was not the only reason' why plaintiff was" discriminated against. *Id.* (quoting *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 94 (Mo. banc 2010)). There was evidence that Plaintiff's male sex, along with the fact that he was not assigned that sex a birth, was the reason for the discrimination.

Similarly, Defendant also points to the fact that "Plaintiff's petition specifically alleges his female anatomy is the reason for the School District's decision: 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***.'" (Suggs. in Supp. at 6)

(quoting Petition for Damages, ¶ 33) (emphasis supplied by Defendant). First, the Petition is not **evidence** in this case. More importantly, even if it had been, it did not say that Plaintiff "had female genitalia" but rather that he was *alleged* to have. Dr. Jacobson testified that certain parts of Plaintiff's anatomy, though *stereotypically* female, did not make him was female. More importantly, the evidence Defendant points to does not actually show that Plaintiff's male sex was not a contributing factor in the discrimination. In fact, Defendant conceded that if Plaintiff had been a female with typically female anatomy, he would not have been discriminated against. Thus, he was discriminated against by Defendant because he did not meet Defendant's stereotypical, unfounded, version of what a "male" is.

In this country, we are long past the dark days where discriminatory beliefs can be imposed on students by schools; today, thankfully, schools must not discriminate against children due to their sex, or any other protected class. This country has seen many examples of mistaken discriminatory beliefs being corrected and no longer accepted by society. Though he is not a "cisgender" male, that does not mean Plaintiff is not of the male sex. This is what the evidence clearly demonstrated at trial. The mistaken belief that if someone is assigned one sex at birth, that their sex can never be corrected to the opposite sex, is simply inaccurate. That is what the evidence at this trial clearly demonstrated to the jury. It is unfortunate Defendant choses to continue to perpetuate its inaccurate beliefs, but those beliefs do not negate the evidence Plaintiff presented at trial in support of the essential elements of his claim.

Similarly, throughout its briefing, Defendant attempts to draw a distinction between "transgender" discrimination and "sex" discrimination. This argument is not supported by law or logic. As the United States Supreme Court recently recognized, "**it is impossible to discriminate against a person for being . . . transgender without discriminating against that**

individual based on sex." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1741 (2020) (emphasis added). The reason for this conclusion does not arise from the legislative history of Title VII. Rather, it is a logical conclusion drawn by the Court. Under Title VII, the causation standard is at least a but-for standard. *Id.* at 1739 (citing *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 346, 360 (2013)). Such "causation is established whenever a particular outcome would not have happened 'but for' the purported cause." *Id.* (citing *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, (2009)). "In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id.*

This can be a "sweeping" standard, and there can frequently be more than one but-for cause of an event. *Id.* In the context of a civil rights claim, this also "means a defendant cannot avoid liability just by citing some *other* factor that contributed to its" discriminatory act. *Id.* (emphasis in original). Missouri Courts have long used the same standard in MHRA cases, recognizing that discrimination occurs if the plaintiff's protected class (here, sex) is any part of the reason for the discriminatory act. *Thomas*, 388 S.W.3d at 214. Put another way, "if changing the [plaintiff's] sex would have yielded a different choice by the [defendant]—a statutory violation has occurred." *Bostock*, 140 S. Ct. at 1741. 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 assigned female at birth, takes the action because of sex. *Id.* at 1741-42.

Here, there was evidence of exactly that. There was testimony that Plaintiff was male, and that Plaintiff was assigned female at birth. There was also testimony that if Plaintiff was a **female** assigned female at birth, he would have been allowed to change in the locker room with sports teams he was on and that he would have had access to all of the restrooms for his sex. But

because he was a **male** assigned female at birth, he was denied access to those facilities, and therefore his sex was a but-for cause of the discrimination. The fact that there is another word ("transgender") that generally describes the fact that Plaintiff is a male who was assigned female at birth does not change the fact that this is also 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)). Defendant's attempt to hide behind that word should be as unpersuasive to the Court as a matter of law as it was to the jury as a question of fact.

Defendant's arguments also seem to be based upon an incorrect presumption that sex discrimination is limited to categorical discrimination against all males or all females. *See* (*See* Suggs. in Supp. 5-6 n.2). Missouri Courts have consistent rejected such a narrow interpretation of the statute, finding, for example, that discrimination "based on pregnancy is actionable under the MHRA" as sex discrimination. *Self*, 272 S.W.3d at 370. Further, as the United States Supreme Court explained (in the context of Title VII):

> Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII.

Bostock, 140 S. Ct. at 1742.

The inconsistency of Defendant's position on this issue with the established law is illustrated by a comment it made, that "[t]he 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 boy—but asserted such was merely a problem of proof rather than pleading." (Suggs. in Supp. 5-6 n.2) (citing *R.M.A.*, 568 S.W.3d at 426 n.5). This completely mischaracterizes the Supreme Court's holding. It simply noted that "[t]he dissent suggests this opinion wrongly presumes R.M.A. will be able to present evidence regarding his

sex and whether his sex was a contributing factor . . . this ignores the standard of review" in which the Court accepts the pleadings as true. *R.M.A.*, 568 S.W.3d at 426 n.5. In no way does the Supreme Court "concede the illogic" of its position, it simply notes that any evidentiary considerations are improper on a motion to dismiss. *Id.* Moreover, the majority expressly rejects the dissent's assertion that Plaintiff will have to prove that his "biological" sex was a contributing factor. *Id.* at 427 n.8.Plaintiff provided evidence that he was of the male sex, and that his male sex was a contributing factor in Defendant's discriminatory actions. Because Plaintiff has presented probative evidence of each element of his claim, Defendant is not entitled to JNOV.

3. Plaintiff made a submissible case for punitive damages under the MHRA

Defendant argues that Plaintiff did not make a submissible claim on punitive damages. Under Missouri law, a plaintiff is entitled to punitive damages if the plaintiff proves by clear and convincing evidence that the defendant's conduct was outrageous because of the defendant's evil motive or reckless indifference to the rights of others. *Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516, 520 (Mo. banc 2009) (citing *Brady v. Curators of the Univ. of Mo.*, 213 S.W.3d 101, 107 (Mo. App. E.D. 2006)). "If a defendant intentionally does a wrongful act, and knows at the time the act was wrongful, it is done wantonly and with a bad motive." *Claus v. Intrigue Hotels, LLC*, 328 S.W.3d 777, 783 (Mo. App. W.D. 2010) (internal quotation omitted). "An evil intent may also be implied from reckless disregard of another's rights and interests." *Id.* Under the MHRA:

> Punitive damages are authorized because often in discrimination cases, the actual monetary harm to the employee is small, but discrimination is so insidious in society that the legislature has found it necessary to allow the assessment of punitive awards to punish the wrongdoing and deter future discriminatory conduct.

Holmes v. Kansas City, Missouri Bd. of Police Commissioners, 364 S.W.3d 615, 628 (Mo. App. W.D. 2012) (internal quotations omitted). The same evidence supporting Plaintiff's substantive claim for discrimination under the MHRA may be considered in meeting his burden of presenting evidence to submit punitive damages.

> Evidence supporting the employee's substantive claim and his claim for punitive damages need not be mutually exclusive, and often is not. The employee's evidence in support of his MHRA claim may also meet his burden for submitting punitive damages to the jury. As *there is no bar to proof of the employer's liability also providing the basis for punitive damages,* it follows that the *Plaintiff may also show the discriminatory conduct supporting punitive damages by circumstantial evidence.* The rationale for allowing the jury to make reasonable inferences in determining liability is the same as that on the substantive claim: employers may act to prevent the development of direct evidence and a clear evidentiary trail of discriminatory intent is rare.

Id. at 629, (internal quotations omitted) (emphasis added). The Court further explained that it "is the rare case where the defendants openly announce an intention to discriminate," so requiring such direct evidence "would eviscerate the legislature's intent to ferret out insidious discrimination and to discourage such conduct, not only by the defendant, but by others" through the deterrent use of punitive damages. *Id.* at 629 n.8.

Defendant avers that Plaintiff did not provide any evidence to support a finding of punitive damages, going so far as to ask "[s]o, what was the evidence?" (Suggs. in Supp. at 8). As the transcript will reflect, Plaintiff adduced substantial evidence from which a jury could easily have inferred Defendant's reckless disregard for Plaintiff's rights under the MHRA. For example, Steve Cook, Defendant's corporate representative and the principal and Delta Woods Middle School when Plaintiff attended, testified that **he did not know even what the MHRA was, or that it prohibited discrimination at the school**. A member of Defendant's school board testified that they barely gave the case any time of day, and never even took the time to consider whether Plaintiff's claim had merit based upon relevant developments in the law

(including the decision in this very case). All of this shows Defendant's reckless disregard for Plaintiff's rights under the MHRA. Similarly, Plaintiff's mother testified to her extensive efforts to inform and educate Defendant's leadership about the issues implicated in this case, and Defendant repeatedly disregarded those efforts. Their failure to engage with her is circumstantial evidence of their reckless disregard for his rights (or even open hostility towards them).

Defendant goes into substantial detail describing its conduct, pointing to the ways in which it did not discriminate against Plaintiff. (Suggs. in Supp. at 8). Such an argument is irrelevant, as on a motion for JNOV, the Court views the evidence "and all inferences drawn therefrom in the light most favorable to the verdict." *Darks v. Jackson County*, 601 S.W.3d 247, 259 (Mo. App. W.D. 2020) (internal quotations omitted). Missouri courts "view the evidence and all reasonable inferences in the light most favorable to submissibility [of punitive damages] and disregard all evidence and inferences which are adverse thereto." *Id.* Even when reviewing the grant of punitive damages, they "not overturn a jury verdict unless there is a complete absence of probative facts to support the verdict" because "JNOV is a drastic action that can only be granted if reasonable persons cannot differ on the disposition of the case." *Id.* Thus, any argument by Defendant that certain evidence shows that there was not a submissible case for punitive damages is irrelevant, as the Court should either disregard such evidence or the inference therefrom to the extent they support granting JNOV. Those factually arguments are additionally unpersuasive, because they were plainly rejected by the jury when it rendered its verdict.

Defendant also argues, without any legal authority supporting its position, that the state of the law means that it should not be liable for punitive damages. (*See* Suggs. in Supp. at 7-9). While Plaintiff has not found any authority directly dealing with the issue, he does note that there are cases where the Missouri Supreme Court has upheld an award of punitive damages while at

the same time clarifying the law by resolving a question of liability under the MHRA. For example, in *Howard v. City of Kansas City*, the Court ruled on the scope of protection of the MHRA by deciding whether the decision by the city council about the appointment of a municipal judge was an employment decision covered by the MHRA. 332 S.W.3d 772, 778-86 (Mo. banc 2011) (finding that it was covered). In the same case, the Court upheld an award of punitive damages. *Id.* at 786-89.

While Defendant attempts to cloud the issue by relitigating its factual arguments, those arguments were properly made to the jury at trial. Plaintiff adduced facts from which the jurors could have found punitive damages, and therefore there was not the "complete absence of probative facts to support the verdict" that was necessary for JNOV. *Darks*, 601 S.W.3d at 259. Therefore, Defendant's motion for JNOV should be denied.

II. New Trial

1. The verdict was not against the weight of the evidence.

Defendant seeks, in the alternative, a new trial. However, it wholly fails to demonstrate any reason for this Court to overturn the verdict reached by the jury after sound deliberation. Defendant vaguely argues that the verdict was against the weight of the evidence in this case. That is inaccurate.

As Plaintiff noted earlier, Defendant has mischaracterized much of the evidence presented at the trial of this case. For example, while it claimed that all of the testimony pointed to Plaintiff's sex being female, it was, in fact, the case that Plaintiff, his parents, and the only expert that testified in the case, Dr. Jacobson, testified that Plaintiff's sex was male. Defendant pointed to certain traits of Plaintiff (such as his chromosomes and his anatomy) to suggest that they somehow proved he was female. But Dr. Jacobson's testimony was that those traits, though

stereotypically female, do not show that Plaintiff was female. Given that this was the only expert testimony the jury heard, it is impossible to say that their verdict was against the weight of the evidence. Defendant was free to produce its own expert, but it declined to do so. It cannot now complain that the jury had no basis to believe the only expert it heard from on the matter.

Similarly, as Plaintiff explained above, all of the evidence it characterized as showing that Plaintiff's male sex was not a *contributing* factor showed no such thing. While Defendant attempts to characterize its decision as being about Plaintiff's anatomy, it conceded that it does not ask most of its student about their anatomy. More importantly, the evidence showed that if Plaintiff had been a female with female anatomy, he would not have been discriminated against. Thus, even the evidence Defendant points to does not support its arguments, and certain was not enough to say that the jury's decision was against the weight of the evidence.

Next, Defendant suggests that the excessiveness of the jury's award "further demonstrates that the verdict was against the weight of the verdict [sic]." (Suggs. in Supp. at 11). Defendant focuses on the fact that the jury awarded more than Plaintiff's counsel asked for in closing arguments. (*Id.*). But Defendant offers no authority to suggest that such an increase from the jury in any way shows excessiveness. Defendant does not cite any authority about the awarding of emotional distress damages under the MHRA.

> The actual damages recoverable under the MHRA may include awards for emotional distress and humiliation. Damages for emotional distress and humiliation may be established by testimony or inferred from the circumstances. Intangible damages, such as pain, suffering, embarrassment, emotional distress, and humiliation do not lend themselves to precise calculation. Each case requires individualized contemplation and consideration by the trier of fact.

Soto v. Costco Wholesale Corp., 502 SW 3d 38, 54-55 (Mo. App. W.D. 2016) (internal quotations omitted). Here, the jury could easily have found that a large award of emotional distress damages was justified, both as established by testimony and inferred from the

circumstances. Plaintiff testified to the isolation and humiliation he felt at being singled out and treated as different. He (and his father) testified to the fact that these feelings were so strong that at times he avoided drinking any beverages so he would not need to use the restroom while at school. Dr. Jacobson testified to the potential health consequences of doing so.

At the time Defendant subjected Plaintiff to the discrimination that led to this emotional distress, Plaintiff was a child, including in middle school. The jury could have easily inferred that inflicting emotional distress and humiliation on a child is far worse than doing so on an adult. Moreover, the public accommodation at which Plaintiff was discriminated against was not a restaurant or retail store that Plaintiff might visit infrequently and have the choice of not frequenting. Rather, they were public school, that Plaintiff was required to attend nearly every weekday during the school year for most of the day. Indeed, Plaintiff was compelled by law to attend. RSMo. § 167.031. This is another circumstance supporting a large award.

These same facts could also have supported the jury's large punitive damages award. Not only was Defendant's conduct egregious, but because it was being done by a public entity, it was essentially being done in their name (if they live in Blue Springs). Especially given the testimony about the school board's lack of attention to the case, the jury may have felt that the only way to deter future discrimination was to award an amount that the school board could not ignore.

Next, Defendant provides a lengthy analysis of Honest Mistake Excessiveness and Bias and Prejudice Excessiveness. (Suggs. in Supp. at 11-12). However, this analysis is entirely premised on the conclusion that the verdict was excessive, which, as previously explained, is a position Defendant has not supported. Defendant mentions certain "trial errors" which are mostly discussed below, which is where Plaintiff will respond to them. No part of the jury's verdict was against the weight of the evidence and this Court should not grant Defendant's motion.

2. There was nothing unconstitutional about the punitive damages verdict.

Next, Defendant argues that the jury's punitive damages award is so excessive that it violates Defendant's due process rights. Defendant avers that "the Court must eliminate or reduce punitive awards where the amount is so high as to result in a denial of due process." (Suggs. in Supp. at 12) (quoting *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996)). The United States Supreme Court noted that in *Gore*, it "instructed courts reviewing punitive damages to consider three guideposts: (1) the reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

First, Defendant has not even established that it has the due process rights that the case law it cites implicates. There is a circuit split as to whether "whether a state's political subdivisions are afforded due process" rights, and while the Eighth Circuit expressed "some doubt political subdivisions of the state are afforded constitutional rights apart from those which derive from the state itself" it declined to rule directly on the issue. *South Dakota v. US Dept. of Interior*, 665 F.3d 986, 990 n.4 (8th Cir. 2012) (comparing *In Re Real Est. Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 765 n. 3 (3d Cir. 1989) (political subdivisions have due process rights), with *City of E. St. Louis v. Cir. Ct. for the Twentieth Jud. Cir., St. Clair Cnty., Ill.*, 986 F.2d 1142, 1144 (7th Cir. 1993) (they do not)). To the extent Defendant has any due process rights that derive from the state, it can be reasonably inferred that the state waived those rights as it relates to punitive damages when it expressly made Defendant, a political subdivision of the state, liable for punitive damages under the MHRA. *Howard*, 332 S.W.3d at 786-89.

When Missouri courts apply *State Farm* to an MHRA case, "only the first two guideposts are considered [because] '[t]he factor of comparative penalties is inconsequential . . . in an MHRA case.'" *Mignone v. Missouri Dept. of Corrections*, 546 S.W.3d 23, 43 (Mo. App. W.D. 2018) (quoting *Diaz v. Autozoners, LLC*, 484 S.W.3d 64, 90 (Mo. App. W.D. 2015)). The degree of reprehensibility of Defendant's conduct is the most important in considering the reasonableness of an award of punitive damages. *Id.* (quoting *State Farm*, 538 U.S. at 419). In determining how reprehensible a party's conduct, was, court considers whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. at 43-44 (quoting *State Farm*, 538 U.S. at 419). Defendant avers that "all of the reprehensibility factors weigh in favor of the School District." (Suggs. in Supp. at 12). This is plainly incorrect. First, while "it is true that [the] harm was neither physical nor economic, it was certainly emotional and psychological." *Mignone*, 546 S.W.3d at 44 (quoting *Diaz*, 484 S.W.3d at 90). It also showed an indifference to the health and safety of others. Dr. Jacobson testified to the importance of gender transition (including social transition) to the mental health of transgender people such as Plaintiff. She also testified to the risk of physical harm (such as dehydration) when someone avoids drinking liquid so they do not have to go to the restroom (as Plaintiff testified was the case). Moreover, Plaintiff was an incredibly vulnerable target. He was a minor who had no ability to avoid going to school, and, indeed, was compelled by law to attend. And the conduct was ongoing, lasting from the time Plaintiff was in Eighth Grade until he graduated, and occurred at Delta Woods Middle School, the Freshman Center, and High School.

Next, Defendant mentions the ratio between the compensatory and punitive damages, suggesting that while there is no set formula, that ratio here is somehow too high.. (Suggs. in Supp. at 13). Yet the case law makes clear that in MHRA cases, "Missouri courts have approved punitive damages awards in MHRA cases with even higher ratios between the actual and punitive damage awards" than "ten-to-one." *Mignone*, 546 S.W.3d at 45 (noting that "[w]e recently collected several such cases in *McGhee v. Schreiber Foods, Inc.*, 502 S.W.3d 658, 675 (Mo. App. W.D. 2016)"). Take for example a "MHRA case where jury awarded $6.75 million in punitive damages, $50,000 in compensatory damages, trial court remitted the punitive damages to $450,000, and this court found the amount of remittitur to be abuse of discretion and increased the punitive damages award to $3.75 million." *Id.* (citing *Lynn v. TNT Logistics N. Am. Inc.*, 275 S.W.3d 304, 310 (Mo. App. W.D. 2008). That is a ratio of 75. Thus, it is clear that the ratio in this case is not excessive, thus neither a new trial nor remittitur is appropriate.

3. There was no instructional error that warrants the grant of a new trial.

Defendant complains that the jury instructions were improper. Specifically, it complains about the Court's failure to add to the verdict director an element that Plaintiff's sex is male. (Suggs. in Supp. at 13-15). Defendant argued that, where Plaintiff's membership in a protected class is at issue, that it can become an element. (*Id*. at 13-14) (citing *Hervey v. Missouri Dep't of Corr.*, 379 S.W.3d 156, 160 (Mo. banc 2012)). However, Defendant is incorrect both in its assertion that Plaintiff had to prove that his sex was male and that Defendant was prejudiced by the Court's failure to give the instruction that Defendant requested.

In a disability discrimination claim, the Missouri Supreme Court held that where plaintiff's status as a person with a disability is in dispute, the verdict director must include as an element that the plaintiff has a disability (as defined by the MHRA). *Hervey*, 379 S.W.3d at 160.

Defendant seeks to extend this to any classification under the MHRA. However, there is an important distinction between a disability and sex. The MHRA's definition of "disability" is clearly written to only include some conditions (and, by extension, those people who have such conditions). *See* RSMo. § 213.010(4) (2016). By contrast, everyone has a sex, a race, etc. While *Hervey* suggests that any protected class could be an element, such a statement is dicta, and no case has actually held that a plaintiff must prove they are a member of a protected class like sex.

Nor can Defendant meaningfully claim it was prejudiced by the Court's failure to give its version of the Instruction. It took the position that the verdict director, as laid out by the Supreme Court, was the law of the case. (Memorandum in Support of Defendants' Motion in Limine to Exclude Evidence of Plaintiff Being Transgender at 3). If that were true, this Court would have no authority to deviate from instructions. *See Walton v. City of Berkeley*, 223 S.W.3d 126, 128–29 (Mo. banc 2007). By asserting that the Supreme Court's recitation of the instructions as the law of the case, Defendant told this Court that it had to use them (albeit by implication). It cannot now claim to be prejudiced when this Court has done exactly what it said the Court must do.

Defendant also complains about the Court's failure to submit its instruction on collateral estoppel. (Suggs. in Supp. at 15). However, such an instruction is foreclosed by the doctrine of the law of the case, which applies not only to "all points presented and decided," but also "matters that arose prior to the first adjudication and might have been raised but were not." *Walton*, 223 S.W.3d at 129. Defendant included this issue in its Motion to Dismiss, which was granted before being overturned by the Missouri Supreme Court. While the issue was contested before the Court of Appeals, after the case was transferred to the Missouri Supreme Court, Defendant conceded that it was not entitled to dismissal on this basis.

Moreover, even if this claim was not precluded by the law of the case, it clearly would not apply. The elements of collateral estoppel are: 1) the issue presented is identical to an issue previously adjudicated; 2) the prior adjudication resulted in a judgment on the merits; 3) the party against whom the doctrine is asserted was either a party to or in privity with a party to the previous litigation; and 4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior adjudication. *Johnson v. Missouri Dept. of Health and Senior Services*, 174 S.W.3d 568, 580 (Mo. App. W.D. 2005). When "the party against whom estoppel is sought had to satisfy a significantly higher burden" in the prior action, there is no "identity of issues and the doctrine of collateral estoppel cannot apply." *In Interest of TG*, 965 S.W.2d 326, 334 (Mo. App. W.D. 1998). Here, the prior action involved a petition for mandamus, which imposes a far higher burden on Plaintiff, so collateral estoppel cannot apply.

4. There were no evidentiary issue that justifies granting a new trial.

In its final argument for a new trial, Defendant complains of various evidentiary issues. However, none support the granting of a new trial.

A. Evidence from the Mandamus action.

Defendant complains of the Court's failure to admit exhibits from Plaintiff's previous action in mandamus. (Suggs. in Supp. at 16-18). First, Defendant claims these documents would be relevant to its state of mind, as Plaintiff was denied mandamus. (*Id.* at 16) (citing *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107 (Mo. banc 2015)). However, mandamus is a completely different standard than an action under the MHRA. As Plaintiff argued at trial, this different standard would be extremely confusing to the jury, and require extensive testimony explaining that difference. Because the undue prejudice and delay this would cause outweighs the limited probative value, the Court correctly ruled that the evidence was not legally relevant.

Defendant also complains about its claim of collateral estoppel. (*Id.* at 18). As Plaintiff has already explained, such a claim is not only barred by the doctrine of the law of the case, it is also entirely meritless, because the completely different standards of a mandamus action and one under the MHRA means Defendant, as a matter of law, cannot prove the first element, that the issues decided are identical.

B. Evidence about the Eighth Grade trip.

Defendant complains of the admission of evidence related to the Eighth Grade trip, asserting that it was not relevant because the school district was not the decision maker. (Suggs. in Supp. at 19). It then goes on to suggest that the basis for the Court accepting the evidence was a misrepresentation by Plaintiff of a holding in the Court of Appeals. (*Id.* at 19-20) (citing *Diaz*, 484 S.W.3d at 76). While Plaintiff does not agree with Defendant's characterization of what was said or the holding in *Diaz*, all of that is irrelevant thus Plaintiff will not waste the Court's time arguing that point here. The Court decided to admit the evidence because it went to the school district's state of mind. And, indeed, Plaintiff asked (for example) whether the third-party's treatment of Plaintiff led Defendant to use (or consider using) a different company. This is relevant to Defendant's state of mind, which is an element of the case.

C. Evidence that Plaintiff was transgender.

Defendant complains about evidence "of Plaintiff's transgender status and gender identity" and in doing so, makes numerous statements that are unsupported or simply untrue. First, Defendant repeats some of its erroneous factual assertions that it made in its JNOV section (e.g. "Plaintiff's sex is uncontrovertibly female" (Suggs. in Supp. at 20)). Plaintiff has addressed why these are incorrect above, and will not repeat himself.

Defendant also asserts that "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." (Suggs. in Supp. at 20-21). Defendant does not cite to Plaintiff's briefing or anything in the Supreme Court's decision that suggests it was based on that briefing. In fact, Plaintiff's brief argued that his being transgender and certain facts connected to it were inherently "gender related traits" that were protected under the MHRA's prohibition on sex-discrimination. See Substitute Appellant Brief at 19 (citing *Self*, 272 S.W.3d 371). The Supreme Court did not reach that question, instead finding that, because Plaintiff plead that he was discriminated against because of his sex. *R.M.A.*, 568 S.W.3d at 427 (citing Petition, ¶ 35, 42, 50).

Defendant makes other statements unsupported by the record or any authority. (Suggs. in Supp. at 20-22). These seem to be based upon its (still unspoken) presumption that "sex" means "biological sex" as Defendant secretly defines it (to be fixed as assigned at birth based upon things such as anatomy and chromosomes). Again, the binding majority opinion specifically rejected a judicial amendment of the MHRA to prohibit discrimination based on "biological sex." *R.M.A.*, 568 S.W.3d at 427 n.8. Thus, Defendant's arguments are entirely erroneous. For example, Defendant mischaracterizes Dr. Jacobson's testimony, saying that "On direct examination, Dr. Jacobson testified Plaintiff's gender identity was male, but on cross-exam, she admitted Plaintiff's sex was female [which] rendered her direct testimony irrelevant, but not before it had created additional confusion around the issues of sex versus gender in the case." (Suggs. in Supp. at 21). In fact, Dr. Jacobson testified that Plaintiff's sex was male, and that the

characteristics Defendant had pointed to, while typically female, did not mean that Defendant was female. Defendant also asserts, without analysis or explanation, that "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." (*Id.* at 21) (RSMo. § 490.065.2(1)(a)). This statement is unsupported and wrong. Dr. Jacobson talked at length about the fact that Plaintiff's sex was male and explained how someone who was assigned female at birth can actually be male. This testimony relied upon Dr. Jacobson's formal training and decades of experience. It is exactly the type of testimony an expert should give.

Defendant complains that "Plaintiff's witnesses, and in particular, Plaintiff's mother, injected general 'facts' about transgender children and gender identity" including a "reference to suicide rates among transgender teens." (Suggs. in Supp. at 21). Generally, such a statement is far to vague for Plaintiff to respond to, or to preserve any claim of error. As to the specific allegation about Plaintiff's mother discussing suicide rates, that was not offered as a fact in and of itself, but was part of her explanation for why she took the steps she did. The Court offered the parties a limiting instruction on evidence such as that, which Defendant (and Plaintiff) declined. More importantly, these very statistics were admitted during Dr. Jacobson's testimony, without objection from Defendant. I could not possibly be prejudiced by Plaintiff's mother mentioning them again.

D. Plaintiff's counsel's use of the phrase "separate but equal."

Defendant also complains about "the specific reference to the highly prejudicial use of the phrase 'separate but equal'" and the fact that its motion and proposed withdrawal instruction on the matter were not given by the Court. (Suggs. in Supp. at 22). Defendant concedes that the reason the Court gave at the time was that the phrase had already come into evidence repeatedly

without Defendant's objection. (Suggs. in Supp. at 22). In response to this, Defendant vaguely references the concept of plain error. (*Id.*) (citing Rule 78.08). However, Defendant offers neither authority nor analysis for how plain error would apply to the un-objected to admission of purportedly prejudicial evidence, or which of Defendant's substantial rights are impacted by such an admission.

Moreover, not only is Plaintiff's use of the phrase "separate but equal" not, as Defendant asserted "outrageous and grossly prejudicial," but rather it accurately described the law at issue in the case. The section of the MHRA under which Plaintiff's claim arises specifically makes it unlawful to "to **segregate** or discriminate against any [] person in the use [of schools or other places of public accommodation] on the grounds of…race…sex." RSMo. § 213.065.2 (2016). The statute makes no distinction between discrimination/segregation on the basis of "race" and "sex." *Id.* Defendant's seeming outrage at Plaintiff's use of the phrase "separate but equal" does not support its claim that the use of such a phrase was prejudicial. Segregation is illegal under the MHRA based on sex, based on race, and based on membership in the other protected classes. Here, not only was Plaintiff segregated based on his sex, but what he was provided was **unequal.**

E. Because no evidence was erroneously admitted, there is no "cumulative" effect.

Defendant discusses the cumulative effect of improperly admitted evidence. (Suggs. in Supp. at 22-23). However, as Plaintiff has explained, none of the evidence was improperly or erroneously admitted, so there is no prejudice to accumulate.

WHEREFORE, for the aforementioned reasons, Plaintiff RMA respectfully requests this Court DENY Defendant's Motion for JNOV or alternatively for a new trial, and for such further relief his Honorable Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2022, the above and foregoing was filed with the Clerk of the Circuit Court of Jackson County, Missouri via the Case.Net electronic filing system which serves a copy via electronic mail, to:

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