IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

R.M.A.,	
Plaintiff,	Case No. 1516-CV20874
v.	Division 17
BLUE SPRINGS R-IV SCHOOL DISTRICT,	**ORAL ARGUMENT IS REQUESTED**
Defendant.	

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

I. INTRODUCTION

A. Motion for JNOV

In his opposition to entry of an order of judgment notwithstanding the verdict or a new trial, Plaintiff holds tight to the misapprehension that this case is about transgender rights rather than Plaintiff's purported male sex and whether Plaintiff's male sex was a contributing factor to his access to male-designated bathrooms and locker rooms at school. The Missouri Supreme Court—at Plaintiff's invitation—interpreted Plaintiff's petition as claiming the latter. Plaintiff's brief in the Supreme Court argued, among other things, the petition asserted he suffered discrimination based on his male sex. The Supreme Court accepted Plaintiff's characterization of the petition, which resulted in its finding that Plaintiff stated a claim based on his "male sex." *R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 425 (Mo. banc 2019). Plaintiff was not required to make this argument to the Court—he could have stood solely on his request for the Court to recognize gender identity as being included in the term "sex" under the MHRA—but he chose not to. Hence, he invited the Supreme Court's interpretation of the petition, he invited the elements prescribed by the Court, and he invited the burden to prove that

he was of the male sex and that his male sex was a contributing factor in the restrictions on his access to male-designated facilities.

In spite of the actual holding in *R.M.A by Appleberry*, Plaintiff proceeded at trial as if the Supreme Court had endorsed gender identity as a protected category under the MHRA prohibitions against sex discrimination. He attempted to confuse the concepts of sex and gender—concepts his expert testified are quite distinct—and he grounded the trial of his case on the notion that the basis of discrimination he alleged was gender identity, not male sex—as if the Supreme Court had not decided the issue. Plaintiff's trial strategy and tactics left glaring holes in his case—the one he invited the Supreme Court to require him to prove.[1] He neglected to prove that he was of the male sex, and he neglected to prove that the School District's restriction on his access to male-designated facilities was because of his purported male sex. These failures rendered Plaintiff's case unsubmittable. Accordingly, the Court must grant the School District judgment notwithstanding the verdict on Plaintiff's case-in-chief.

The deficiencies in Plaintiff's case-in-chief require the Court to grant the School District judgment notwithstanding the verdict on punitive damages, as well. Even more, the Court should grant JNOV on punitive damages because of Plaintiff's utter failure to produce evidence of the School District's evil motive or reckless indifference to Plaintiff's rights.

B. Motion for New Trial

Plaintiff's opposition to a new trial is similarly unavailing. In the main, Plaintiff's response to the School District's motion for new trial appears to be: "The Court has already

[1] In light of complaints mentioned in Plaintiff's opposition to the pending motion, it bears pointing out that the arguments in this motion are not meant to hurt the feelings of Plaintiff or his counsel. The arguments are, however, meant to address choices Plaintiff and his counsel made in this case and to demonstrate why—in the instance of a judgment notwithstanding the verdict—they led Plaintiff to fail to prove his case, and why—in the instance of a motion for new trial—they led Plaintiff to focus the jury on irrelevant matters to the School District's prejudice.

ruled on that issue." The response begs the question: "In hindsight, were the decisions of the Court, counsel, and the jury erroneous, and if so, is a new trial warranted?" The new trial motion is the forum for the questions to be raised, so the Court may consider them outside the crucible of trial. Here, the jury's verdict raises questions about jurors' bias and prejudice, the verdict director assumed a disputed element, relevant evidence that tended to exonerate the School District was excluded to the School District's prejudice, and irrelevant evidence that injected sympathy to Plaintiff was admitted to the School District's prejudice. These are hallmarks that cry out for a new trial, and the Court's discretion would be rightly exercised to grant one.

II. JNOV IS REQUIRED BECAUSE PLAINTIFF FAILED TO ESTABLISH TWO ELEMENTS OF HIS CASE WITH SUBSTANTIAL EVIDENCE AND FURTHER FAILED TO ESTABLISH ENTITLEMENT TO PUNITIVE DAMAGES WITH SUBSTANTIAL EVIDENCE.

A. Plaintiff failed to introduce substantial evidence that the School District denied him unrestricted access to male-designated bathrooms and locker rooms because of Plaintiff's male sex.

Plaintiff fails in his attempt to oppose JNOV because there was no evidence that his purported male sex was a contributing factor in the decision to deny Plaintiff unrestricted access to the School District's male-designated bathrooms and locker rooms. Although Plaintiff's response on this issue is long-winded, it completely misses the point. The easy—and briefer—response would have been something like this: "The evidence introduced to establish this element was [*insert specific testimonial or documentary evidence here*]." However, Plaintiff is unable to complete the sentence because no such evidence was introduced. Instead, and contrary to the express requirements in the verdict directing instruction prescribed by the Missouri Supreme Court, Plaintiff argues that he was not required to offer evidence on this point. Therefore, it bears reviewing what the Missouri Supreme Court instructed the parties and this Court would be required at trial:

> There is no Missouri Approved Instruction (MAI) for submitting a plaintiff's public accommodation claim under section 213.065 to a jury. But MAI 38.01(A), which applies to employment discrimination claims under section 213.055, can be made applicable with only minor modifications. Using MAI 38.01(A) as the starting point, therefore, a verdict director in this case would state (in substance if not in form):
>
> > Your verdict must be for plaintiff [R.M.A.] if you believe:
> >
> > * * * *
> >
> > Second, ***plaintiff's male sex was a contributing factor in such denial*** [of full and equal use and enjoyment of the males' restroom and locker room facilities at defendants' school], ….

R.M.A. by Appleberry, 568 S.W.3d at 425 (emphasis supplied).

Instead of following the Missouri Supreme Court's directions, Plaintiff argues that any consideration of sex is prohibited under the public accommodations provisions of the MHRA. One might see why Plaintiff's position would be of interest in employment cases.[2] However, in making this argument, he forgets (or hopes the Court will forget) that his case involves bathrooms and locker rooms—facilities which our society routinely designates by sex.[3] Therein lies the crux of the matter: Plaintiff wishes to be considered as male based on his gender identity. However, his sex is female, and his chromosomes and genitals were and are readily identified as female.[4] Based on the Missouri Supreme Court's formulation in the appeal of this

---

[2] Plaintiff exclusively cites to employment cases decided under the federal government's Title VII (42 U.S.C. § 2000(e), *et seq*.), the MHRA (§ 213.055, RSMo.), and Missouri common law. *See*, *e.g.*, *Thomas v. McKeever's Enters., Inc.*, 388 S.W.3d 206 (Mo. App. W.D. 2012) (age discrimination in employment); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. banc 2010) (common law wrongful termination of employment); *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020) (Title VII employment discrimination).

[3] Plaintiff clearly knows the implication of his argument would mean the end of separate sex-designated bathrooms and locker rooms. He is so uncomfortable with this result that he filed a motion in limine to prevent the School District from arguing this result as naturally flowing from the logic of his argument.

[4] For reasons surpassing understanding, Plaintiff appears to believe it might be a meaningful distinction that the School District's merely assumed (rather than knew) he had female reproductive organs, including external genitalia. Not only did Plaintiff testify that this

case, it is not unlawful discrimination based on Plaintiff's female sex to restrict his access to male-designated bathrooms and locker rooms. The alternative would have been to recognize a MHRA claim based on Plaintiff's transgender status—which the Missouri Supreme Court chose not to do.

Plaintiff attempts to shore up his position that the nature of his sex is irrelevant to his claim of sex discrimination by pointing to the United States Supreme Court's decision in *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020). This is not Plaintiff's first effort to have this Court apply this **federal** decision on a **federal** **employment** discrimination statute to the **Missouri** Human Rights Act's **public** **accommodations** sections. This Court was not persuaded to do so before, and it should not do so now. First and foremost, the Missouri Supreme Court has already spoken on the issue in this case, and the law of the case applies. *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-29 (Mo. banc 2007). Accordingly, a federal case involving different facts, different parties, and a different statute that addresses alleged discrimination in a different setting has no bearing on this matter.

Further, the majority in *Bostock* specifically advised other courts, attorneys, and litigants that its decision does not reach sex-segregated bathrooms and locker rooms. In fact, the Court believed the question of bathrooms and locker rooms, as it was raised in *Bostock* was a straw man argument because the facts of the case involved an employee's termination, not sex-segregated facilities. In light of Plaintiff's repetitive citation to *Bostock*, the United States Supreme Court's admonishment—and clear limitation of its ruling—is worth reading in its entirety:

---

purported assumption was correct (gender confirmation surgery is not performed on children under the age of 18), but Plaintiff also **stipulated** to this fact in *R.M.A. b/n/f Rachelle Applebery [sic] v. Blue Springs R-IV Sch. Dist., et al.*, 1416-CV17208, Defendant's Ex. 211, attached hereto as Ex. A, *see* Stipulations Nos. 3 and 19.

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

Bostock, 140 S.Ct. at 1753 (emphasis supplied). Hence, *Bostock*'s holding is, by its own terms, limited to terminations of employment under Title VII. The Court refused to acknowledge its holding would apply to restrictions to sex-segregated employee bathrooms even under Title VII. It follows, then, that it provides no guidance in this case, which is not an employment termination case, but does involve access to sex-segregated bathrooms. Undeterred by this admonishment, Plaintiff has done precisely what *Bostock* said should not be done. In fact, in all his briefing citing *Bostock*, both before and after trial, Plaintiff neglected to advise this Court of this relevant limitation on its holding. This Court should follow the Supreme Court's admonishment, even if Plaintiff has ignored it.

It is worth noting that Plaintiff's argument asks the Court to do what it refused to do during the instruction conference; that is: strip the word "male" from the verdict director prescribed by the Missouri Supreme Court. Plaintiff's reasoning then and now ignores the import of *R.M.A. by Appleberry* and the limitations clearly delineated in *Bostock*. It ignores that this case is about sex-designated bathrooms—for which there is no prohibition in Missouri law, and it means to put state-wide bathroom and locker room policy into play on this Court's desk.

Even the Missouri Supreme Court chose not to engage on this front. In fact, the Missouri Supreme Court implicitly endorsed the notion of sex-segregated bathrooms by including the word "male" as an adjective to modify the phrase "restroom and locker room facilities" in the first element of its verdict director and the word "sex" in the second element. During the instruction conference, Plaintiff offered the same arguments and authorities to attempt to convince the Court to rewrite the Missouri Supreme Court's verdict director. Time has not rendered Plaintiff's arguments more persuasive. However, they do stand as an admission by Plaintiff that the inclusion of the adjective "male" presented them with problems of proof during the trial, and now, post-trial.

Plaintiff's argument against JNOV on male sex as a contributing factor simply fails to establish any basis to avoid entry of judgment in favor of the School District. Plaintiff points to **no evidence** that anything other than his female genitalia was considered in the decision to limit his access to male-designated bathrooms and locker rooms. Instead, he asserts considering sex in the context of sex-designations of bathrooms and locker rooms constitutes unlawful discrimination. Unfortunately for Plaintiff, neither the Missouri Supreme Court in *R.M.A. by Appleberry*, nor the United States Supreme Court in *Bostock*, provides any basis for Plaintiff's position.

B. Plaintiff failed to introduce substantial evidence of his male sex.

Here, at least, Plaintiff attempts to assert he actually introduced evidence that his sex is male. His first position is a *pro forma* attempt to claim he need not produce such evidence, because discrimination based on sex is prohibited, but this argument ignores the point that this case centers on access to sex-designated bathrooms and locker rooms—which are not prohibited in Missouri law. *See* § II.A., *supra*. But Plaintiff moves on to claim there was testimony he was

male or possibly even that his sex was male. His argument, and the evidence upon which he relies are insufficient to meet the requirement that he establish by substantial evidence that his is of the male sex.

In fact, Plaintiff's interpretation of the term "substantial evidence" would strip the modifier "substantial" and replace it with the word "any." However, our courts use the term "substantial evidence" intentionally, and it has meaning: "The term 'substantial evidence' both implies and comprehends ***competent*** evidence." *Fujita v. Jeffries*, 714 S.W.2d 202, 206 (Mo. App. E.D. 1986) (emphasis supplied).

> "Substantial evidence" is evidence which, if true, has probative force upon the issues, i.e., evidence favoring facts which are such that reasonable men may differ as to whether it establishes them; ***it is evidence from which the trier or triers of fact reasonably could find the issues in harmony therewith***; it is evidence of a character sufficiently substantial to warrant the trier of facts in finding from it the facts, to establish which the evidence was introduced.

Collins v. Div. of Welfare, 364 Mo. 1032, 1037, 270 S.W.2d 817, 820 (Mo. banc 1954) (emphasis supplied). Here, Plaintiff mistakenly assumes testimony that "he was male" (which ignores the distinction between sex and gender) or even testimony that "his sex was male" is sufficient to establish his "male sex" for the purposes of this case. The mere utterance of the words does not render the evidence competent. Each witness who testified Plaintiff is male, to the extent asked, **also** testified Plaintiff has XX chromosomes (not the male XY), a uterus and ovaries, and female external genitalia. Considering the definition of sex as "refer[ring] to the biological classification of individuals as male or female," *R.M.A. by Appleberry*, 431-32 (Fisher, J., dissenting), any testimony that Plaintiff was of the male sex was simply incompetent, unsubstantial evidence.[5]

[5] In making this argument, the School District does not impugn Plaintiff's assertion that he has transitioned to male **gender**. Rather, the School District productively engaged with Plaintiff and his parents as to his gender identity and transgender status throughout his elementary and

Consider, for example, a brick that a witness insists is lighter than air.

Q: Does it float in the air?

A: No.

Q: If you pick it up and let it go does it fall down?

A: Yes.

Q: So, the brick is **not** lighter than air, true?

A: False. It is lighter than air.

The witness's insistence does not constitute "substantial evidence" that the brick is lighter than air, because definitionally, it is not; that is: it is not "evidence from which the trier or triers of fact reasonably could find the issues in harmony therewith." *Collins*, 270 S.W.2d at 820. Likewise, here, Plaintiff's evidence that he is of the male sex is not competent, because definitionally, he is not. Testimony that Plaintiff has female chromosomes and female sex organs is not in harmony with the claim that he is of the male sex.

Incidentally, classifying Plaintiff's sex as female rather than male is not a genuine matter of controversy in this case. Plaintiff's treating physician and expert witness, Dr. Jacobson, admitted both the distinction drawn between sex and gender and that Plaintiff's sex is female during her testimony. Plaintiff called Dr. Jacobson to the stand to testify about transgender issues, but she was required to admit that her profession distinguishes between sex and gender—even her website makes that distinction. She was also required to admit that Plaintiff has XX chromosomes and female reproductive organs.[6] Finally, Dr. Jacobson was required to admit that

---

secondary education. The School District does, however, contest Plaintiff's claim that he is of the male sex.

[6] Plaintiff points out he did not develop breasts as an adult female would, probably because of the administration of hormone blockers; however, prepubescent girls also do not have adult female breasts, but they are nevertheless females.

the medical records she generated consistently identified Plaintiff's sex as female, not male, over a period of years.[7] Plaintiff's **gender** may be male, but his sex is not. Testimony that Plaintiff "is male" or that his sex is male was not competent evidence of "male sex," as Plaintiff's sex is no more male than a brick is lighter than air.

Accordingly, the Court should grant JNOV because of Plaintiff's failure to introduce substantial evidence that he was of the male sex.

C. Plaintiff failed to introduce evidence to support punitive damages.

Plaintiff's defense of his punitive damages claim fails, once again, to identify a single piece of evidence that could support any award of punitive damages.[8] Plaintiff points to two points of testimony: (1) Steve Cook, the School District's corporate representative, testified he, personally, was not familiar with the Missouri Human Rights Act or that it prohibited discrimination in schools; and (2) that a school board member did not, personally, consider whether Plaintiff's claim had any merit.

---

[7] Plaintiff makes much of Dr. Jacobson's testimony that sex designations may be less clear-cut when there are chromosomal or morphological anomalies, such as Turner's syndrome where one of a female's X chromosomes may be partially or completely missing, or such as gonadal dysgenesis which involves defects in the embryonic development of gonads. However, there is no evidence or claim that Plaintiff suffered from any such anomalies. Instead, the evidence was that Plaintiff has generally normal XX chromosomes and female reproductive anatomy. Hence, the testimony about sex abnormalities was tangential to the case, if relevant at all, and it did nothing to distinguish the bright line between Plaintiff's female sex and the male sex he was required to prove by competent and substantial evidence.

[8] Lest we forget (as apparently Plaintiff has) in his prior lawsuit against the School District, Plaintiff stipulated: "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." Ex. A, Stipulation No. 16. The only thing that changed was Plaintiff changed which bathrooms and locker rooms he wanted to use. Otherwise, the School District was "accommodating of R.M.A. and this student's particular needs as to gender identity since R.M.A. was a fourth-grade student." Judgment, *R.M.A. b/n/f Appleberry v. Blue Springs R-IV School District*, Case No. 1416-CV17208, p. 5, Trial Ex. 212, attached hereto as Ex. B.

Taking the corporate representative's testimony first: Not having familiarity with a particular statute or its contents is not the same as asserting the School District's—or even the witness's—evil motive or reckless disregard of Plaintiff's rights. In fact, there is plenty of evidence the School District knew and acted on the premise that students should not be subjected to discrimination **based on sex**. The source of that right—whether by Missouri statute, federal statute, or constitutional provision—is quite irrelevant. Likewise, whether a particular school board member considered the merits of a particular student's claim fails to show evil motive or even indifference. Plaintiff made no showing that the board member was assigned to perform any actions regarding Plaintiff's situation or that she had any authority to act on her own or to bind the School District by her own thoughts or actions.

More to the point, however, Plaintiff's right—the one that is issue in this case—to use the School District's male-designated facilities despite his female sex was (and continues to be) undecided. The most recent statement on the question was rendered by Hon. Jack Grate, formerly of Division 17, who found as follows regarding Plaintiff and the School District on the question at hand:

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

> unpersuasive. ***The general civil rights statutes cited by Relators are as follows: … the Missouri Human Rights Act (hereinafter "MHRA"). None of these statutes impose a clear and unconditional obligation on the Respondents*** which would give rise to the issuance of a writ of mandamus.
>
> * * * *
>
> ***Relators also lack an existing, clear and unconditional legal right based upon the MHRA and upon which a writ of mandamus could issue.*** Legislative history and recent legislative actions show that the MHRA specifically does not extend its protection to gender identity in the State of Missouri. The current language of the statute states that "All persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation, as hereinafter defined, without discrimination or segregation on thee grounds of race, color, religion, national origin, sex, ancestry, or disability." Mo. Ann. Stat. § 213.065. ***Notably missing from this definition are the terms "transgender" and/or "gender identity."***

Judgment, *R.M.A. b/n/f Appleberry v. Blue Springs R-IV School District*, Case No. 1416-CV17208, pp. 7-11 (emphasis supplied), Trial Ex. 212, attached hereto as Ex. B.[9]

To assert that the School District disregarded (recklessly or otherwise) Plaintiff's "right" to use male-designated bathrooms and locker rooms presupposes the **existence** of that right. So far, Judge Grate found no such right, the Missouri Supreme Court found no such right, and even the United States Supreme Court in *Bostock* declared it was not deciding such a right exists. Plaintiff's comparison of this case to *Howard v. City of Kansas City*, 332 S.W.3d 772 (Mo. banc 2011), is inapt. In *Howard*, the city council loudly rejected an entire panel of applicants for a municipal judgeship based on the race of each applicant. The city attempted to avoid liability for its blatant race discrimination by claiming the plaintiff, one of the candidates, was not an employment applicant or employee under the MHRA. In other words, the city's position was

[9] The School District is cognizant of the fact that the Judgment in *R.M.A. b/n/f Appleberry v. Blue Springs R-IV School District*, Case No. 1416-CV17208 (Trial Exhibit 212), along with the supporting stipulations (Trial Exhibit 211), were excluded from evidence at trial. This passage shows, yet again, the relevance of the evidence, its persuasive nature, and the prejudice engendered by its exclusion.

that it was OK to engage in blatant race discrimination in employment, in part because the plaintiff was not an employee or applicant. The case at bar is worlds different: Here, (1) we have a situation of bathroom and locker room access—which is legally restricted based on sex, (2) we have a statute that prohibits discrimination based on sex but which throughout its decades-long history and various iterations has never been applied to prohibit sex-designated bathrooms and locker rooms, and (3) we have a transgender student who wanted to use male-designated facilities to conform to his gender identity but not his sex. Here, Plaintiff was permitted the same access to male-designated facilities as other members of the female sex.

Plaintiff has yet to point to any Missouri statutory or decisional authority that has applied prohibitions against sex discrimination to require a school district to permit a transgender student to use sex-designated bathrooms or locker rooms according to the student's gender identity rather than the student's sex. Make no mistake: Plaintiff is not asking this Court to impose the jury's punitive damage verdict because the School District disregarded Plaintiff's right to use the boys' room; rather, Plaintiff is demanding this Court to impose the jury's punitive damage verdict because the School District did not **predict that a future court might find transgender students have the right to use the bathroom of their gender identity**.

The School District is entitled to JNOV on Plaintiff's underlying claim, which, on its own, entitles the School District to JNOV on punitive damages. However, there is simply no basis in law or fact to find evidence of evil motive or disregard of Plaintiff's rights under the evidence in this case, and the Court should, accordingly, grant judgment notwithstanding verdict in favor of the School District on Plaintiff's punitive damage claim.

III. THE COURT SHOULD ORDER A NEW TRIAL IN LIGHT OF EXCESSIVE VERDICTS, INSTRUCTIONAL ERRORS, AND EVIDENTIARY ERRORS.

A. The Court should order a new trial because of the verdict was against the weight of the evidence and the compensatory and punitive verdicts were excessive.

The School District will not burden the Court with arguments showing the weight of the evidence against the verdict for Plaintiff far outpaced any evidence in favor of the verdict, because those arguments are largely similar to submissibility in this case. Suffice it to say for example, if a witness's unfounded, opinion testimony that Plaintiff "is male" is enough to establish a submissible case on the issue of Plaintiff's purported male sex, then a finding that he is of the "male sex" is nevertheless against the weight of the evidence in light of his XX chromosomes and reproductive anatomy.

Plaintiff's defense of the amount of the compensatory damages verdict is generic and theoretical, at best. Here, Plaintiff presented no evidence of special damages: no evidence of lost wages, no evidence of private school costs occasioned by leaving the public school system because of purported discrimination, and no evidence of expenses for medical treatment occasioned by the purported discrimination. Plaintiff's only compensatory damage claim was for emotional distress—and "garden variety" emotional distress at that. During argument, Plaintiff's counsel picked a number out of thin air: $150,000. Where did that number come from? It was not mentioned in evidence. Did it consider the stipulated fact that "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?"[10] Probably not, since that stipulation was excluded from evidence. Not to be outdone, the jury awarded Plaintiff $175,000 in compensatory damages. Again, on what

[10] Trial Exhibit 211, Stipulation No. 16.

evidence? We may charge juries with making these decisions, but not when passion overcomes reason. It is true that for one academic year Plaintiff had to wait ten minutes before he entered the locker room of his choice and for some period of time did not use the bathroom of his choice, but his choices were accommodated in every other respect of school life. He had, by any measure, a massively successful scholastic experience at the School District, both academically and socially. There was no evidence Plaintiff endured any teasing or other external adverse effects from his limited access to male-designated facilities. At bottom, based on its experience, this Court should be able to look at the damage verdict and say: "I see where the jury could get to this number." Neither Plaintiff's counsel's suggestion nor the jury's verdict can pass this test.

The jury's punitive damages verdict fails the same test—it is untethered to, and therefore unbound by, any evidence—but here, the dimensions are constitutional, as well. Plaintiff identifies the question as to whether **a state** has due process rights, and correctly points out the question is undecided by the Eight Circuit Court of Appeals. However, in *In re Real Estate Title and Settlement Svcs. Antitrust Litigation*, 869 F.2d 760 (3rd Cir. 1989), the court applied the requirements of due process under the Fifth Amendment to the United States Constitution to **school boards**. "[W]e believe that the school boards are persons within the meaning of the Fifth Amendment due process clause. Although they may derive their funding from the state, we think that the school districts, whom the school boards represent, are more like private corporations—which can be persons under the due process clause—than like states." *Id*. at 765. In light of the Eighth Circuit's silence on school boards or school districts, the Third Circuit's ruling is persuasive. In the meantime, Plaintiff's citation to *Howard* for the proposition that the Missouri legislature has waived the due process issue misreads the *Howard* decision. In *Howard*, the Court addressed the city's argument on submissibility that it should be immune

from a punitive damage award under the MHRA by virtue of sovereign immunity and the general prohibition from awarding punitive damages against a public entity. *Howard*, 332 S.W.3d at 786-88. The Court found that prior affirmances of punitive damages awards under the MHRA, coupled with the legislature's silence, meant that punitive damages could be assessed against public entities. *Id*. The Court did not determine the question of whether the amount of the punitive damages was excessive (constitutionally or otherwise), nor was it asked to. More to the point made by Plaintiff: The Court did not decide the Missouri legislature had waived the rights of public entities to contest punitive damages awards because they are excessive on constitutional or other grounds.

As for the requirements to render a punitive damage award constitutionally sound, Plaintiff points to instances where some state court decisions have disregarded the bright-line guardrails identified by the United States Supreme Court in, for instance, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). So, although the Supreme Court has identified single-digit ratios as being reasonable, Plaintiff has found exceptions to the rule. What is interesting, is Plaintiff fails to point to any **evidence** that justifies the 1 to 22.8 ratio in **this case**. Otherwise, Plaintiff's argument is nothing more than an invitation to an arms race without any boundaries. The Court in *State Farm* found the facts form the boundaries and determined as a matter of law most facts egregious enough to call for punitive damages are sufficiently addressed by single-digit ratios. Plaintiff shows the Court nothing to take this case outside of this constitutionally sanctioned boundary.

B. The Court should order a new trial because the verdict director impermissibly assumed an essential element of Plaintiff's case, even though the element was contested.

1. Failure to instruct on the element of male sex.

Plaintiff's efforts to oppose a new trial on this issue fail to meet the nature of the case. Here, an essential element of Plaintiff's claim is that he is of the male sex, which under the instruction would be the basis for his unrestricted admission to male-designated facilities. The Court's verdict director, Instruction No. 8, assumed Plaintiff's male sex even though the issue was hotly contested at trial. Oftentimes, a Plaintiff's inclusion in a protected category is uncontested: for instance, when an African American claims race discrimination in employment, or when a woman claims to have been fired because of her sex. However, there are occasions when the matter is disputed, and the evidence is taken on the issue. In those cases, the verdict director is required to account for the disputed element. *See*, *e.g.*, *Hervey v. Missouri Dep't of Corr.*, 379 S.W.3d 156 (Mo. banc 2012). Here, the question is whether Plaintiff suffered unlawful discrimination when his access to boys' bathrooms and locker rooms was restricted. Plaintiff claims to be male, but his chromosomes and reproductive system, including his external genitalia, are female. While the question of Plaintiff's male sex should be a matter for directed verdict or JNOV, to the extent there is any factual question on the issue, it should have been posed to the jury, and this Instruction No. 8 failed to do.

Plaintiff first asserts Plaintiff's "male sex" is of no consequence to this case—even though his case is based on the limitation of his access to male-designated facilities and the interplay of his chosen male gender and his female sex. This was the same argument Plaintiff made to have the word "male" stripped from the verdict director and to avoid JNOV. It is no more persuasive here than in the other contexts where this argument has been made. It bears noting however, that Plaintiff's position that any decision based on sex constitutes unlawful discrimination cuts against his goal in this case. Plaintiff claims his chosen male gender should have given him unrestricted access to boys' rooms and locker rooms at school. Hence, Plaintiff

wants and endorses sex-segregated facilities. He wanted to be able to use facilities that banned other members of the female sex, and presumably, he did not want other members of the female sex to use the male-designated facilities. So, under Plaintiff's construct, it is permissible to use sex-based determinations to keep members of the female sex out of the boys' rooms and locker rooms, but those rules should not have applied to him. By including the modifier "male" in the Court's verdict director, *R.M.A. by Appleberry*, 568 S.W.3d at 425, the Court implicitly acknowledged and accepted the notion that, with respect to bathrooms and locker rooms, sex-designation was permissible. If sex-designation for such facilities is permissible, it follows that the question of whether a person is of the sex designated for the facility at issue is an essential element, and an essential element cannot be assumed. *Hervey*, 379 S.W.3d at 160.

Plaintiff's second argument is that the School District's request for including the element of Plaintiff's male sex was inconsistent with its position that the verdict director handed down by the Court in *R.M.A. by Appleberry* constitutes the law of the case. Here, Plaintiff takes advantage of the context in which the Court decided *R.M.A. by Appleberry*. The case went to the Supreme Court based on the trial court's grant of dismissal for failure to state a claim—the School District had not yet filed an answer, so that the Court could not have known what issues would be contested. In testing whether the petition stated a claim, the Court looked at generalized statements of the elements of sex discrimination claims in case law and under the Missouri Approved Instructions. The Court took a general verdict director for employment discrimination and modified it to set out the elements pled in the petition. In doing so, the Court assumed, as in most sex discrimination cases, that the Plaintiff's sex would not be in issue. *R.M.A. by Appleberry*, 568 S.W.3d at 424-426. This assumption is evident in the Court's opinion, because the Court notes as the first element of a discrimination case "(1) plaintiff is a

member of a class protected by section 213.065." *Id*. at 425. Yet, Plaintiff's inclusion in the protected class of "male sex" is omitted from the Court's verdict director. The School District's position on whether Plaintiff was of the male sex was not before the Supreme Court, and therefore, the verdict director the Court constructed reflected the assumption reflected by the realities of most cases. Hence, the question was not decided by the Court, and the School District's reliance on the law of the case doctrine is not inconsistent with seeking the jury's determination of the essential element of Plaintiff's male sex.

2. Failure to instruct on collateral estoppel.

Finally, Plaintiff asserts instructing on the issue of collateral estoppel would violate the law of the case. Once again, Plaintiff ignores the posture of the case on appeal. The School District had filed a motion to dismiss because the petition failed to state a claim and because it was barred by res judicata. The trial court granted the motion to dismiss. During the appeal, it became evident to the School District's counsel that res judicata was not a ripe for determination at the dismissal stage, but rather should have been addressed in a motion for summary judgment. *See*, *e.g.*, *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 498-99 (Mo. banc 1991). The School District accordingly withdrew its opposition to Plaintiff's appeal on the issue because the question should have been raised at a later stage in the litigation. Hence, the posture of the case precluded an adjudication on the merits by the Missouri Supreme Court in *R.M.A. by Appleberry*. In fact, the words "res judicata" and "collateral estoppel" do not appear in the decision.

On the other hand, contrary to Plaintiff's argument, collateral estoppel is most assuredly appropriate in this case. In *Kesler v. Curators of the Univ. of Mo.*, 516 S.W.3d 884 (Mo. App. W.D. 2017), a professor who was denied tenure sued a university and various individuals for

various contractual and tort claims. Prior to suing for damages, the professor filed suit seeking both prohibition and mandamus to require the university to provide new tenure review proceedings and prevent his dismissal. The writ case was tried and decided on the merits, and the writs were denied. The university and other defendants sought and obtained summary judgment in the damages case on the grounds of res judicata and collateral estoppel. The court of appeals upheld the decision noting, *inter alia*, that the identity of the thing sued for was the same. In *R.M.A. b/n/f Appleberry v. Blue Springs R-IV School District*, Case No. 1416-CV17208, Plaintiff sued for a writ of mandamus requiring the School District to grant Plaintiff and all other transgender students access to the bathrooms and locker rooms of their respective gender identities, and the Court refused. The reason for the denial was "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." As in *Kesler*, the fact that Plaintiff's first lawsuit sought mandamus does not change the applicability of the issue preclusion afforded by collateral estoppel. Plaintiff should not be permitted to litigate the same issue on multiple occasions against the same parties. Here, all of the requirements of collateral estoppel were met, and a collateral estoppel instruction was warranted.

C. The Court should order a new trial because of erroneous and prejudicial evidentiary rulings.

Plaintiff does not argue with the standard applied to determine whether or not a piece of evidence is probative. So, the parties agree that evidence must be both logically and legally relevant to be admissible. *Brummett v. Burberry Limited*, 597 S.W.3d 295, 303 (Mo. App. W.D. 2019). Not only must the piece of evidence make an element at issue in the case more or less probable than it would be without the evidence, but the evidence's prejudicial effect also must not outweigh its probative value. *Id*. In this instance, and at Plaintiff's insistence, the Court

erred by omitting relevant evidence that would have been taken in the School District's favor and admitting irrelevant evidence that was taken in Plaintiff's favor. Plaintiff provides almost no support for any of his positions on these issues, so that the School District is content to rely on its prior briefing; however, two issues bear highlighting because they are substantively critical to the case. The first is exclusion of evidence of and from the prior case between the parties that ruled against Plaintiff on the question of Plaintiff's access to male-designated bathrooms and locker rooms, *R.M.A. b/n/f Appleberry v. Blue Springs R-IV School District*, Case No. 1416-CV17208. The second is admission of evidence of the decision by a third party not to permit Plaintiff to room with boys on a trip to New York City.

1. The petition, stipulations, and judgment in *R.M.A. b/n/f Appleberry v. Blue Springs R-IV School District*, Case No. 1416-CV17208.

Plaintiff asserts, without referencing any law, the reason for excluding evidence of the prior lawsuit between the parties—the one which found no existing legal requirement to permit Plaintiff unrestricted access to male-designated bathrooms and locker rooms—would confuse the jury because of a differing legal standard. Although the question came up in the context of a writ of mandamus, the burden of proof—preponderance of the evidence—was the same. The facts, issues, and parties were identical. And the question—whether Plaintiff had a clear and existing legal right to unrestricted access to the boys' facilities—was substantially similar. If there is a differing legal standard, Plaintiff has failed to identify it or to supply any case law that indicates it is too prejudicial to be permitted in evidence. Plaintiff's position is too general and unsupported to justify the exclusion of the requested exhibits. At the same time, the nature of Plaintiff's admissions in his petition and stipulations, and conclusions reached by the court were essential to address Plaintiff's case-in-chief and his claim for punitive damages. Plaintiff's failure to meet the specificity of the School District's argument for the admission of the

documents with any specifics of his own should speak volumes to the Court. The Court should have admitted the petition, stipulations, and judgment from *R.M.A. b/n/f Appleberry v. Blue Springs R-IV School District*, Case No. 1416-CV17208. The School District was prejudiced by their exclusion, and the Court should, in fairness, grant a new trial.

2. The "eighth-grade" trip.

The Court erred in admitting evidence of Plaintiff's mother's problems over the eight-grade trip because the issues involved the rules imposed by a third party at a non-school event over which the School District exercised no control. Plaintiff disagrees that his counsel mis-cited *Diaz v. Autozoners, LLC*, 484 S.W.3d 64 (Mo. App. W.D. 2015), to induce the Court to admit the evidence, but he offers no alternative versions of the discussion before the bench or the reasonable construction of the holding in *Diaz*. Instead, he asserts simply the evidence was relevant to show the School District's state of mind. On what basis? Here it is important to clearly characterize the "eighth-grade" trip based on the evidence: It was a voluntary trip offered by a third party and traditionally taken by students under parental supervision at the end of the eighth-grade year. The School District's sole involvement was that a teacher volunteered to facilitate communications between the parents and the travel agent. Somehow, the School District (according to Plaintiff) should have found another travel agent who would have permitted Plaintiff to room with boys in New York City—even though the School District had no relationship with the travel agent, no school funds were expended for the trip, the trip was taken outside the auspices of the School District, and the School District exercised no control over the function. Even if the accommodations in New York City were "public accommodations," they were not public accommodations in Missouri or subject to the jurisdiction of the MHRA. The admission of the eight-grade trip evidence was not logically relevant to any issue in the case—not even, as Plaintiff claims, the School District's state of mind. As for legal relevance, the

prejudice of Plaintiff's mother complaining about her frustration, the confusion over who could control the travel agent, and the potential for the jury to punish the School District for something over which the School District had no control was patent. The Court was misled by Plaintiff's citation to *Diaz*. The evidence of the eighth-grade trip should not have been admitted, and ordering a new trial is the appropriate remedy.

IV. CONCLUSION

Plaintiff's fallback argument to avoid both JNOV and a new trial is to assert simply that it is never appropriate to consider a person's sex in any context under the MHRA. To support his position, Plaintiff relies exclusively on employment cases—and one can certainly understand why it is inappropriate to consider a person's sex when it comes to employment. But this is not an employment case; it is a public accommodations case that involves bathrooms and locker rooms in schools. And, at least up to this point, our society permits sex-designated (or as Justice Gorsuch put it "sex-segregated") public bathrooms and locker rooms. Close scrutiny shows that even Plaintiff thinks there should be sex-segregated facilities, he just thinks the designation of "female sex" should not apply to him. He thinks his gender transition should render his sex male, and he should be treated accordingly. However, this formulation shows Plaintiff's claim to be one that asserts discrimination based on his transgender status, and the Missouri Supreme Court did not recognize that cause of action in *R.M.A. by Appleberry*.

Plaintiff is perfectly willing, in fact he wants, for other females to be prohibited from the bathrooms and locker rooms to which he demands access. He wants to be in the boys' room and the boys' locker room with the boys. Therein lies the irony and the unfairness when Plaintiff's counsel decries "separate but equal." We, as a society, have endorsed separate but equal when it comes to sex-designated bathrooms. We have sex-segregated bathrooms in the Jackson County

Courthouses, in the Western District Court of Appeals Courthouse, and in the Missouri Supreme Court's Courthouse. This is precisely why Plaintiff was required to prove he was of the male sex, and why his failure to introduce competent evidence on this point is fatal to his case. It is precisely why Plaintiff had to prove that his male sex was the basis of the School District's refusal to grant Plaintiff unrestricted access to the facilities designated for boys, and why his failure to introduce any evidence on this point is fatal to his case.

Plaintiff brought this case to put Missouri's sex-designated bathroom policy at issue. Judge Grate rightly saw Plaintiff did not have a clear right to use the bathroom of his gender identity. Decisions issued by the Missouri Supreme Court and the United States Supreme Court have done nothing to change the MHRA's application to the facts of this case. The Court should enter judgment notwithstanding the verdict to put the verdict in line with the law as it currently exists, not as Plaintiff would like it to be. Alternatively, the Court should grant the School District's motion for new trial to ameliorate the errors that occurred during the trial of this case.

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
mkatz@batyotto.com
pgordon@batyotto.com
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 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
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
kmyers@elmlawkc.com
ATTORNEYS FOR PLAINTIFFS

/s/ Mark D. Katz
Attorney for Defendants