IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

[redacted])
)
Appellant,)
)
v.) [redacted]
)
[redacted]) Opinion filed: October [redacted] 2021
,)
)
Respondent.)

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE ADAM L. CAINE, JUDGE

Division One: W. Douglas Thomson, Presiding Judge,
Alok Ahuja, Judge and Karen King Mitchell, Judge

[redacted] ("[redacted] appeals the judgment of the Jackson County Circuit Court dismissing his claims under the Missouri Human Rights Act (the "MHRA") for failure to state a claim upon which relief can be granted. [redacted] asserted claims of sex discrimination and retaliation against the [redacted]'s (the "[redacted] moved to dismiss the action for failing to state a claim upon which relief can be granted, which the trial court granted. On appeal, [redacted] claims the trial court erred in granting [redacted] motion to dismiss for failure to state a claim upon which relief may be granted because: (1) the

interstate compact (the "Compact") that created [redacted] does not include issues of employment discrimination in its subject matter and, therefore, does not preclude the application of the MHRA to [redacted] (2) the "concurred in" clause of the Compact does not preclude the application of the MHRA to [redacted] in that the MHRA is "complementary or parallel" to the Kansas Act Against Discrimination (the "KAAD") and does not impose an impermissible unilateral burden on [redacted] (3) the dismissal of [redacted] claims based on an unpleaded affirmative defense was improper; (4) [redacted] should be judicially estopped from denying that it is subject to the MHRA; and (5) [redacted] should be equitably estopped from denying that it is subject to the MHRA. We affirm.

Factual and Procedural History

[redacted] an African-American male, was employed as a bus driver for the [redacted] from November 2015 until March 2016. The [redacted] is a [redacted] created in [redacted] pursuant to the Compact, an interstate compact between the state of Missouri and Kansas. On February [redacted] 2017, [redacted] filed a petition ("Petition") against [redacted] alleging that while he was an employee of [redacted] he was subjected to sex discrimination and retaliation in violation of the MHRA. [redacted] alleged that during his classroom training, his cell phone inadvertently recorded the training instructors making offensive discriminatory remarks about [redacted] reported the conduct and claimed he was treated less favorably than his classmates due to his reporting.

After [redacted] completed his classroom training, he began driving a bus for [redacted] While [redacted] was a bus operator, he was involved in two separate incidents. In the first incident, the bus that [redacted] was operating hit a curb. In the second incident, the bus he was operating was struck by another vehicle. [redacted] alleged he received a write-up for each of these incidents and was subsequently terminated from employment for these two infractions. [redacted] alleged he knew of a female employee who also had two infractions but her employment was not terminated. [redacted] alleged he was treated less favorably than female employees and retaliated against for reporting and opposing discrimination. [redacted] sought compensatory and punitive damages.

[redacted] removed the case to federal court. However, the cause was remanded back to the circuit court upon the federal court's grant of [redacted] motion to remand. Thereafter, [redacted] filed a motion to dismiss [redacted] Petition with prejudice for failure to state a claim upon which relief can be granted. In its accompanying suggestions in support of its motion, [redacted] argued that the [redacted] is not subject to the MHRA because [redacted] was created by the Compact, which was approved by an act of Congress. [redacted] claimed that because Kansas had not expressly agreed that the burdens of the MHRA may be imposed on [redacted] the MHRA cannot be applied to [redacted] also asserted that the Petition does not allege facts showing the state of Kansas had expressly concurred in having the MHRA applied to [redacted]

While the motion to dismiss was pending, our Eastern District handed down decisions in *Jordan v. Bi-State Development Agency*, 561 S.W.3d 57 (Mo. App. E.D. 2018) and *Emsweller v. Bi-State Development Agency of Missouri-Illinois Metro. Dist.*, 591 S.W.3d 495 (Mo. App. E.D. 2019). After additional briefing and oral argument by the parties, the trial court entered its judgment ("Judgment") granting the [redacted] motion to dismiss finding [redacted] Petition failed to state a claim upon which relief may be granted.

In the Judgment, the trial court found "[u]nder Missouri law, one party to an interstate compact is prohibited from enacting legislation that would impose unilateral burdens upon the compact, absent the concurrence of the other parties to the compact," citing *KMOV TV, Inc. v. Bi-State Development Agency of Missouri-Illinois Metro. Dist.*, 625 F.Supp.2d 808, 812 (E.D. Mo. 2008). The trial court found the Petition failed to allege facts establishing the state of Kansas, a party to the Compact, concurred in having the MHRA apply to [redacted] The trial court also found [redacted] is not subject to suit under the MHRA as it imposes an impermissible unilateral burden on [redacted] citing *Jordan,* 561 S.W.3d at 61-62 and *Emsweller,* 591 S.W.3d at 500.

[redacted] appeals.

Standard of Review

"A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition." *Wyman v. Mo. Dept. of Mental Health*, 376 S.W.3d 16, 18 (Mo. App. W.D. 2012). We review the trial court's dismissal for failure to state a claim

upon which relief can be granted *de novo*. *Id.* "A court reviews the petition in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Id.* "'In order to avoid dismissal, the petition must invoke substantive principles of law entitling plaintiff to relief and . . . ultimate facts informing the defendant of that which plaintiff will attempt to establish at trial.'" *Jordan*, 561 S.W.3d at 59 (citation omitted).

Analysis

[redacted] raises five points on appeal. [redacted] claims the trial court erred in granting [redacted] motion to dismiss for failure to state a claim upon which relief may be granted because the Compact does not preclude the application of the MHRA to [redacted] it was improperly based on an unpleaded affirmative defense; and [redacted] should be judicially and equitably estopped from denying that it is subject to the MHRA.

We begin our analysis with Point II as it addresses the central issue of this appeal and the application of the recent opinions of our Eastern District in *Jordan* and *Emsweller,* wherein the same issue was decided rendering those cases authoritative precedent.[1]

[1]The court of appeals is generally bound to follow its own precedential decisions under the doctrine of *stare decisis*. *Tillman v. Cam's Trucking, Inc.*, 20 S.W.3d 579, 584 n.9 (Mo. App. S.D. 2000). "Under the doctrine of *stare decisis*, a court follows earlier judicial decisions when the same point arises again in litigation." *Id.* "[S]tare decisis is the cornerstone of our legal system. 'It is identity of principle not similarity of facts, which furnishes authoritative precedent.' Where the same or analogous issue was decided in an earlier case, such case stands as authoritative precedent unless and until it is overruled." *M & H Enterprises v. Tri-State Delta Chemicals, Inc.*, 984 S.W.2d 175, 178 n.3 (Mo. App. S.D. 1998) (citations omitted).

Point II

In Point II, [redacted] argues that the trial court erred in granting [redacted] motion to dismiss for failure to state claims of discrimination and retaliation under the MHRA because the court misinterpreted the "concurred in" clause of [redacted] Compact in that the MHRA is complementary or parallel to KAAD and does not impose an impermissible unilateral burden on [redacted] and, therefore, the "concurred in" clause does not preclude application of the MHRA to [redacted] We disagree.

Kansas and Missouri entered the Compact that created [redacted], [redacted] Section 238.010 RSMo (1965) and section K.S.A. 12-2524 (1982). [redacted] was created for operation of a public transit system in the states of Kansas and Missouri. *Kansas City Area Transp. Authority v. Ashley*, 478 S.W.2d 323, 324 (Mo. 1972). In section 238.010, art. 3, section 11, the [redacted] Compact provides that [redacted] shall have the power: "To perform all other necessary and incidental functions; and to exercise such additional powers as shall be conferred on it by the Legislature of either State ***concurred in*** by the Legislature of the other and by Act of Congress." (Emphasis added).

> The Compact Clause ("the Clause") of the U.S. Constitution permits states to enter into interstate compacts pursuant to congressional approval. U.S. Const. art. I, § 10, cl. 3. Interstate compacts "represent a political compromise between states, not a commercial transaction." *KMOV TV, Inc. v. Bi-State Dev. Agency of the Missouri-Illinois Metro. Dist.*, 625 F.Supp.2d 808, 810 (E.D. Mo. 2008). Bi-state entities created pursuant to the Clause are unique because three separate sovereigns are involved—the federal government and two states. *Hess v. Port Authority of Trans-Hudson Corp.*, 513 U.S. 30, 41, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994). It is the nature of interstate compacts they "shift[ ] a part of a state's authority to another state or states, or to the agency the several states jointly create to run the compact." *KMOV*, 625

> F.Supp.2d at 810. In a bi-state compact, one state may not enact legislation that unilaterally imposes burdens upon the compact "absent the concurrence of the other signatories." *Bi-State Dev. Agency of the Missouri-Illinois Metro. District v. Dir. of Revenue*, 781 S.W.2d 80, 82 (Mo. banc 1989). There is no consensus amongst courts over the meaning of "concurrence." The majority view is the "application of states' laws to the compact [is proper only] if the states' legislation contains an express statement that they intend to amend the compact." *KMOV*, 625 F.Supp.2d at 812; *see also Malverty v. Waterfront Comm'n of New York Harbor*, 71 N.Y.2d 977, 529 N.Y.S.2d 67, 524 N.E.2d 421 422 (1988) (holding only legislation with the express legislative approval of the other state may affect the compact).

Jordan, 561 S.W.3d at 60. However, "Missouri is in the minority of states which, in limited circumstances, allows an interstate compact to be subject to one state's legislation without the express concurrence of the other state." *Id.*

In *Redbird Engineering Sales, Inc. v. Bi-State Development Agency of Missouri-Illinois Metro. Dist.*, 806 S.W.2d 695, 698-701 (Mo. App. E.D. 1991), the court analyzed whether Missouri's public works bond statute unilaterally imposed an impermissible burden on the bi-state agency created by an interstate compact between the states of Missouri and Illinois. There, the Eastern District adopted the "complementary or parallel" standard to determine when it is permissible for the legislation of one signatory of an interstate compact to affect the compact.[2] *Id*. at 701.

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[2]The majority view is referred to by the parties as the "New York approach" and the minority view, adopted by Missouri per the Eastern District in *Redbird*, as the "New Jersey approach." The New Jersey approach which utilizes the complementary or parallel standard, is less stringent as the New York approach requires express approval of legislation to burden the compact. *Jordan,* 561 S.W.3d at 60. The parties acknowledge that our courts have applied the New Jersey approach using the complementary or parallel standard in *Redbird*, *Jordan*, *Emsweller*. Nonetheless, [redacted] includes a footnoted argument that it preserves its argument that Missouri should apply the New York approach while conceding "it makes no difference for purposes of this appeal." [redacted] claims that because an interstate compact approved by Congress is a federal law, the local federal trial courts' adoption of the New York approach, citing *KMOV TV,* 625 F.Supp.2d at 810 and *Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n*, 902 F.Supp. 1046 (D. Neb. 1995), should be followed by Missouri courts. However, this argument fails in that more recently, the local

Redbird recognized that "one party to an interstate compact may not enact legislation which would impose burdens upon the compact absent the concurrence of other signatories." *Id.* However, *Redbird* found the "the corollary of that proposition is that the agency may be made subject to complementary or parallel state legislation [of the other state]." *Id.*

In applying the complementary or parallel standard, the *Redbird* court found that Missouri and Illinois had complementary public works bond statutes which were strikingly similar requiring the bonding of public works contractors and that precedent in both states similarly concluded that the statutory bond requirement for public works should be liberally construed. *Id.* The *Redbird* court concluded, "Since the legislation in both states is for all intents and purposes identical insofar as our inquiry is concerned, and the courts of each state are in accord as to the construction of their respective acts, we disagree with the trial court's final conclusion that any imposition of liability for the commissioners' failure to require the statutory bond on this project would have imposed an impermissible, unilateral burden." *Id.* at 702.

More recently, in *Jordan*, Appellant, an African-American female, was employed as a bus driver for Bi-State, an entity created by an interstate compact between Missouri and Illinois. *Id.* at 58. Appellant brought an action against Bi-State alleging sexual harassment and retaliation by her supervisor. *Id.* at 58-59. Bi-State filed a motion to dismiss for failure to state a claim upon which relief may be

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federal trial court followed *Jordan* expressly agreeing with its rationale, which utilized the New Jersey approach in *Gustafson v. Bi-State Development Agency of Missouri-Illinois Metro. Dist.*, 361 F.Supp.3d 917 (E.D. Mo. 2019). Regardless, we are not compelled to follow the federal trial court's opinion.

granted, which the trial court granted. *Id.* at 59. On appeal, Appellant asserted the trial court erred in dismissing her petition because the MHRA and the Illinois Human Rights Act ("IHRA") are complementary or parallel laws. *Id.*

The Eastern District found *Redbird* instructive on the application of the complementary or parallel standard while also noting it did not provide a bright-line test. *Id.* at 60. The *Jordan* court stated, "*Redbird* does not explicitly state that the phrases 'for all intents and purposes identical' or 'the courts of each state are in accord as to the construction of their respective acts' constitute a bright-line test for whether legislation is complementary or parallel[.]" *Id.* The *Jordan* court further noted that *Redbird* does not "otherwise provide significant guidance on the proper application of the standard." *Id.*

In applying the complementary or parallel standard, the Eastern District noted that the MHRA and the Illinois Human Rights Act ("IHRA") are similar on a general level as both address employment discrimination and retaliation claims. *Id.* at 61. However, the Court held that when the Appellant's claims accrued, the MHRA and the IHRA had different burdens of proof and, as such, were not complementary or parallel. *Id.* The court stated, "When Appellant filed her petition, the standard for MHRA claims was whether discrimination was a 'contributing factor'[3] in the

[3]On August 28, 2017, the MHRA was amended and its standard for assessing claims of discrimination changed from the "contributing factor" standard to the "motivating factor" standard. *Bram v. AT&T Mobility Services, LLC*, 564 S.W.3d 787, 794 (Mo. App. W.D. 2018); section 213.010 (2), (6), (19) RSMo (2017). The new standard under the MHRA is analogous to the one used in employment discrimination claims under federal law, but does not apply retroactively to discriminatory conduct alleged prior to the amendment. *Id.* at 794-96. Because [redacted] filed the instant case on February [redacted] 2017, and the discriminatory conduct is alleged to have occurred prior to August 2017, the pre-amendment MHRA standard applies for assessing [redacted] claims of discrimination.

challenged employment decision(s)" but "under the IHRA, an employee must prove discrimination was the 'motivating factor[.]'" *Id.* at 61.

> [T]he broadening of potential liability introduced by the contributing factor standard belies the notion that that MHRA and IHRA are 'complementary.' The contributing factor standard increased the risk of an employer incurring liability for employment discrimination in Missouri. It increased the burden placed on employers. The increased burden on employers cannot be deemed 'complementary' because the IHRA had fixed a higher burden of proof for the same type of claim.

Id.

The Eastern District concluded that as a result of the different burdens of proof, the MHRA imposed a burden on Bi-State that the IHRA did not. *Id.* In rejecting Appellant's assertion that the different burdens of proof are not meaningful in a jury trial, the court stated, "With differing burdens of proof the MHRA and IHRA are not identical for all intents and purposes." *Id.* The court further noted that unlike *Redbird*, judicial accord was not present. *Id.* The court concluded, "In sum, the increase in potential employer liability that accompanied the different burdens of proof under the MHRA and IHRA imposed an impermissible unilateral burden on Bi-State. Therefore, the acts were not complementary or parallel under *Redbird*. Respondents are not subject to suit under the MHRA." *Id* at 62.

Likewise, in *Emsweller*, the Eastern District followed its holding in *Jordan* in finding Bi-State, as an interstate compact, could not be sued under the MHRA. 591 S.W.3d at 500. There, Appellant was employed by Bi-State as a service manager in its Call-A-Ride Division. *Id.* at 497. Appellant voiced his belief to his supervisors that Bi-State's practice of refusing transport service to certain locations for Medicaid

riders was discriminatory of African-American riders. *Id.* Shortly thereafter, Appellant was terminated from employment. *Id.* Appellant filed a petition against Bi-State alleging his termination violated the MHRA. *Id.* After the *Jordan* decision was issued, Bi-State filed a motion for judgment on the pleadings asserting the interstate compact defense, which the trial court granted. *Id.* On appeal, the Eastern District affirmed citing *Jordan* in finding Bi-State is not subject to suit under the MHRA as the statutes existed prior to the 2017 amendments. *Id.* at 499-500.

The holdings of *Redbird*, *Jordan*, and *Emsweller* are instructive as to the application of the complementary or parallel standard to the present case. Here, like *Jordan* and *Emsweller*, when [redacted] claims accrued, the MHRA and KAAD had different burdens of proof, and, thus were not complementary or parallel. [redacted] filed his petition under the MHRA against the [redacted] a bi-state entity created by an interstate compact. [redacted] action accrued prior to the 2017 amendments of the MHRA and, thus, the contributing factor standard for MHRA claims applies. Like the IHRA in *Jordan*, under KAAD, an employee must prove discrimination was the motivating factor. *Beech Aircraft Corp. v. Kansas Human Rights Com'n*, 864 P.2d 1148, 1151 (1993) (The KAAD utilizes the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 383 (Mo. banc 2014) (Kansas follows the *McDonnell Douglas* burden shifting framework which is "commonly referred to as the 'motivating factor' analysis."). Accordingly, the analysis in *Jordan* applies here.

> [T]he broadening of potential liability introduced by the contributing factor standard belies the notion that that MHRA and [KAAD] are

> 'complementary.' The contributing factor standard increased the risk of an employer incurring liability for employment discrimination in Missouri. It increased the burden placed on employers. The increased burden on employers cannot be deemed 'complementary' because the [KAAD] had fixed a higher burden of proof for the same type of claim.

Jordan, 561 S.W.3d at 61. As a result of the different burdens of proof, the MHRA imposes a burden on [redacted] that the KAAD does not. The different burdens of proof render the acts not identical for all intents and purposes. The increase in potential employer liability that accompanies the different burdens of proof under the MHRA and the KAAD imposes an impermissible unilateral burden on [redacted] Accordingly, the acts were not complementary or parallel under *Jordan* or *Redbird* and the [redacted] is not subject to suit under the MHRA.

Under *Jordan,* the different burdens of proof in the Missouri and Kansas anti-discrimination statutes is sufficient to find the [redacted] is not subject to the MHRA. However, we note the MHRA and the KAAD are also different in that the pre-2017 amendments MHRA allowed punitive damages, which [redacted] sought, and did not employ a cap on damages, whereas the KAAD did not allow punitive damages and employed a cap on damages. See section 213.111.1;[4] K.S.A. 44-1005(k) (2004) (compensatory damages for pain, suffering, and humiliation capped at $2,000); *Brady v. Curators of University of Mo.*, 213 S.W.3d 101, 107 (Mo. App. E.D. 2006); *Dixson v. Mo. Dep't of Corrections*, 586 S.W.3d 816, 824 (Mo. App. W.D. 2019) (The 2017 amendments set a cap on damages codified in section 213.111.4). As a result, the

[4]Unless otherwise indicated, all statutory citations are to RSMo (2000) as updated by supplement through 2015.

MHRA further imposes an impermissible unilateral burden on the [redacted] beyond what was found sufficient in *Jordan*.[5]

[redacted] argues the trial court erred in relying on *Jordan* and *Emsweller* as they were wrongly decided because neither addressed that Bi-State is not designated as a political subdivision of Missouri and, therefore, "it appears that Bi-State could not fall within the MHRA's definition of "employer" rendering any complementary or parallel discussion irrelevant because "Bi-State could not have been subject to the MHRA anyway." This argument fails because even were we to find that Bi-State was not subject to the MHRA for an *additional* reason, which we are not, it does not negate the Eastern District's complementary or parallel analysis.

[redacted] argues the *Jordan* and *Emsweller* courts misapplied the complementary or parallel standard by incorrectly relying on *Redbird* for the "identical for all intents and purposes" interpretation of the standard. [redacted] mischaracterizes the Eastern District's analysis in *Jordan*. As discussed *supra*, the *Jordan* court expressly stated that *Redbird* did not provide a bright-line test. While the *Jordan* court found that the different burdens of proof rendered the MHRA and the IHRA not identical for all intents and purposes, that was only one piece of the court's analysis. The *Jordan* court also found that the difference in burdens of proof belies the notion that the MHRA and the IHRA were complementary or parallel and that there was no judicial

[5]Banks relies on New Jersey cases which hold that the "complementary or parallel" standard is satisfied if the corresponding statutes in the compacting states are "substantially similar." *See*, *e.g.*, *Ballinger v. Del. River Port Auth.*, 800 A.2d 97, 101-02 (N.J. 2002); *Santiago v. N.Y. & N.J. Port Auth.*, 57 A.3d 54, 58 (N.J. Super. App. Div. 2012). None of the Missouri cases addressing Compacts Clause issues have expressly adopted the "substantially similar" test. But even if it applied, it would not be satisfied here, given the significant substantive differences between the pre-2017 MHRA and the KAAD.

accord. Moreover, the *Jordan* court did not make a pronouncement that the complementary or parallel standard means identical for all intents and purposes.

Furthermore, to the extent [redacted] relies on a denial of a writ of prohibition by this court in *State ex rel. Kansas City Area Trans. Auth. v. Fahnestock*, No. WD81500, (Mo. App. W.D. February 15, 2018), to support this argument, that argument fails because "[t]he mere denial of a petition for writ of prohibition where the appellate court issues no opinion is not a conclusive decision on the merits of the issue presented." *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. banc 1999). Notably, both the underlying circuit court judgment prompting the petition for writ of prohibition and this court's order denying the petition pre-date *Jordan* and *Emsweller*.

[redacted] cites New Jersey authority for his argument that where the legislation is not complementary, the court must determine whether the bi-state agency impliedly consented to unilateral state regulation. While we are not bound by New Jersey authority, [redacted] argument that [redacted] impliedly consented to the MHRA fails. In support of this argument, [redacted] argues that [redacted] admitted it was an employer under the MHRA in several lawsuits brought against [redacted] however, the admissions were made in answers that pre-dated *Jordan* and *Emsweller*. However, [redacted] fails to cite any authority in support of his conclusion that these admissions can be treated as implied consent to the application of the MHRA. "Appellants have the obligation to cite to appropriate and available legal precedent to support their points-relied-on." *Chipperfield v. Mo. Air Conservation*

Com'n, 229 S.W.3d 226, 238 (Mo. App. S.D. 2007). "Failure to cite the law or explain the absence of the law preserves nothing for review." *Id.*

Finally, we reject [redacted] argument that [redacted] agreement with Local 1287, Amalgamated Transit Union demonstrates its implied consent to the MHRA. The agreement to follow all applicable laws does not provide implied consent that all laws are applicable to [redacted]

Accordingly, we find the trial court did not err in granting [redacted] motion to dismiss for failing to state a claim upon which relief may be granted as the MHRA and the KAAD are not complementary or parallel and, as such, the MHRA imposes a impermissible unilateral burden on [redacted]

Point II is denied.

Point I

In Point I, [redacted] makes an alternative argument to Point II, that the Compact does not preclude the application of the MHRA to [redacted] because matters of employment discrimination are not within the scope of the Compact. [redacted] relies on the unmistakability doctrine for his argument that because the Compact is silent as to employment discrimination, there is nothing precluding the participating states from legislating on matters of employment discrimination. We disagree that the unmistakability doctrine applies because the unmistakability doctrine has never been recognized by Missouri courts in any context; and even in jurisdictions that recognize the unmistakability doctrine, it has not been applied to a similar compact,

where the issue concerns whether the laws of one of the compacting states can be applied to an entity created by the compact itself.[6]

The unmistakability doctrine "provides that when the *government enters into a contract with a private person*, the government can change the law, notwithstanding the contract, unless there is an unmistakable promise not to act." Construction and Application of Unmistakability Doctrine, 16 A.L.R.7th Art. 1 (2016) (emphasis added). It "'is a rule of contract construction that provides the sovereign powers of a state cannot be contracted away except in unmistakable terms.'" *Kimberly-Clark Corp. & Subsidiaries v. Commissioner of Revenue*, 880 N.W.2d 844 (Minn. 2016) (citation omitted); *U.S. v. Winstar Corp.*, 518 U.S. 839, 871-74 (1996)). It "'provides that contracts limiting the government's future exercise of regulatory authority must be expressed in unmistakable terms.'" *U.S. v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1145 (E.D. Cal. 2001) (citation omitted).

As previously stated, Missouri courts have never recognized the unmistakability doctrine, a fact which [redacted] fails to acknowledge or address. Moreover, no case in any jurisdiction suggests that it applies in the instant case. The unmistakability doctrine has been utilized in other jurisdictions where the government enters a contract with a private person or business and the analysis is whether the unmistakability doctrine bars contentions that the government could not act. For example, the doctrine has been raised where government contractors or

[6]To further demonstrate the limited application of the unmistakability doctrine, a search for the unmistakability doctrine across all state courts returned only 27 cases in which it was referenced in only 11 states.

employees contend that the government could not reduce or limit salaries or compensation. *See Rhode Island Broth. of Correctional Officers v. Rhode Island*, 357 F.3d 42 (1st Cir. 2004); *Rhode Island Laborers' Dist. Council v. State of R.I.,* 145 F.3d 42 (1st Cir. 1998). It has also been raised where government employees contend the government could not change governmental pension and retirement contributions, rates, or payments. *See Taylor v. City of Gadsden*, 767 F.3d 1124 (11th Cir. 2014); *Justus v. State*, 336 P.3d 202 (Colo. 2014). The doctrine has also been raised by individuals challenging the governments ability to change the rules applicable to subsidized low-cost housing programs. *See Grass Valley Terrace v. U.S.*, 46 Fed. Cl. 629 (2000), *Kimberly Associates v. U.S.,* 261 F.3d 864 (9th Cir. 2001). The doctrine has also been raised by private parties that have entered into contracts with the government for timber, mining and other natural resource development. *See U.S. v. Westlands Water Dist.*, 134 F. Supp. 2d 1111 (E.D. Cal. 2001). These cases demonstrate that in jurisdictions where the unmistakability doctrine is recognized, it applies where the government contracts with a private person or business.

Here, the government did not enter into a contract with private person or party but with another government. The contract, the Compact, is between Missouri and Kansas. There is no authority that supports [redacted] argument that the unmistakability doctrine applies in this case, even if Missouri recognized it.

[redacted] cites *Kimberly-Clark Corp. & Subsidiaries v. Commissioner of Revenue*, 2015 WL 3843986 (Minn. Tax Ct. Regular Div. 2015), to support his assertion that the unmistakability doctrine applies to interstate compacts. There, it was held that

the unmistakability doctrine applied to a taxpayer's claim regarding Minnesota's amendment of its enactment of the Multistate Tax Compact. However, the Multistate Tax Compact is not analogous to the Compact. The Multistate Tax Compact was drafted by subcommittee on state taxation of interstate commerce established by Congress to propose legislation providing uniform standards to be observed by the States in imposing income taxes on income derived from interstate commerce. *Id.* at 2. Any State was free to enact the Multistate Tax Compact.

In contrast, the Compact in the instant case was entered into between two states and created [redacted], not an adoption of laws on one subject matter. The court in *Kimberly-Clark*, utilized the unmistakability doctrine in interpreting the terms of the Multistate Tax Compact. Unlike *Kimberly-Clark*, the Compact did not adopt a set of uniform laws and, therefore, the analysis is not a matter of contract interpretation. Instead, it is a matter of whether each states' laws will impose a unilateral impermissible burden on the Compact, as discussed in Point II.

[redacted] also cites *Tarrant Reg'n Water Dist. v. Herrmann*, 569 U.S. 614 (2013), which involved an interstate compact allocating water rights among Oklahoma, Texas, Arkansas and Louisiana within the Red River basin. Like, *Kimberly-Clark*, the unmistakability doctrine was used in interpreting the terms of the compact and not comparable to the analysis in the present case. *Id.* at 631-33.

The proper inquiry is set forth in our analysis of Point II, whether the legislation of one state unilaterally burdens the compact entity without the concurrence of the other state.

Point I is denied.

Point III

In Point III, [redacted] claims the trial court erred in granting [redacted] motion to dismiss his Petition because the dismissal was improperly based on an unpleaded affirmative defense. We disagree.

[redacted] argues the trial court found "the Petition failed to allege facts establishing the state of Kansas, a party to the compact, has concurred in having the MHRA apply to [redacted] citing *KMOV TV*, 625 F.Supp.2d at 812, but that [redacted] was not required to do so. [redacted] relies on a characterization the federal court made in its order granting [redacted] motion to remand the matter back to state court finding the Petition did not allege facts raising a federal question and the presence of an affirmative defense is insufficient to confer federal question jurisdiction. In that order, the federal court stated that [redacted] argument is "akin to an affirmative defense because [redacted] compact argument could defeat [redacted] claim even if [redacted] proves every element of h[is] causes of action." [redacted] claims we are bound by the federal court's determination that [redacted] argument is akin to an affirmative defense as the law of the case and, accordingly, [redacted] was required to set forth its argument in a pleading to a preceding pleading as required by Rule 55.08.

Rule 55.08 provides, in pertinent part: "In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances[.] . . . A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or

avoidance." However, Rule 55.27(a)(6) provides that every defense to a claim asserted in a pleading must be asserted in a responsive pleading except for a limited set of defenses, including failure to state a claim upon which relief can be granted, that may (at the option of the pleader) be asserted by motion. Thus, "[a] narrow exception to the pleading requirement exists whereby the defendant may file a motion to dismiss for failure to state a claim under Rule 55.27(a)(6) when it appears from the face of the petition that an affirmative defense is applicable." *Murray-Kaplan v. NEC Ins., Inc.*, 617 S.W.3d 485, 494 (Mo. App. E.D. 2021). "Such a motion may be granted only where the affirmative defense is 'irrefutably established' by the face of the petition itself." *Id.*

Here, [redacted] filed a motion to dismiss for failure to state a claim upon which relief may be granted. Even if the Compacts Clause issue were treated as an affirmative defense, the motion was properly granted as [redacted] exemption from the MHRA's coverage was established on the face of the Petition in light of the holdings in *Jordan* and *Emsweller*. Per the Petition, [redacted] brought his actions for unlawful discrimination and retaliation pursuant to the MHRA; [redacted] was employed by [redacted] a [redacted] created pursuant to the Compact between Kansas and Missouri; and the Compact gives [redacted] powers conferred on it by the legislature of either state concurred in by the legislature of the other. Once the opinions in *Jordan* and *Emsweller* were issued, no additional facts were needed, and the motion to dismiss for failure to state a claim was irrefutably established by the face of the Petition. *Jordan* and *Emsweller* established that Missouri applied the

complementary or parallel standard to determine whether a state concurred in the other state's law and that contributing factor and motivating factor burdens of proof were sufficiently different as to not qualify as complementary or parallel. Thus, a comparison of the burdens of proof between the MHRA and the KAAD required no additional facts to conclude that they were not complementary or parallel in that the KAAD utilizes the motivating burden of proof like the Illinois statute in *Jordan*. Thus, as a matter of law, the Petition failed state a claim upon which relief may be granted and the trial court did not err in granting said motion.

Point III is denied.

Points IV and V

In Points IV and V, [redacted] claims the trial court erred and/or abused its discretion in granting [redacted] motion to dismiss because [redacted] should be judicially and equitably estopped from denying that it is subject to the MHRA due to its previous admissions in prior litigation that it was an "employer" within the MHRA's definition of the term. We disagree.

Standard of Review

"To the extent this [c]ourt is determining the purely legal question of what factors must be shown to invoke judicial estoppel, the standard of review is *de novo*." *Vacca v. Mo. Dep't of Labor and Indus. Relations*, 575 S.W.3d 223, 230 (Mo. banc 2019). "To the extent this [c]ourt is reviewing the circuit court's discretionary application of judicial estoppel to the facts of the case, the standard of review is an abuse of discretion." *Id.* "'A ruling constitutes an abuse of discretion when it is 'clearly against the logic of the circumstances then before the court and is so

unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.'" *Stephen W. Holaday, P.C. v. Tieman, Spencer & Hicks, L.L.C.*, 609 S.W.3d 771, 780 (Mo. App. W.D. 2020) (citation omitted).

Analysis

"[J]udicial estoppel is not a cause of action with elements that must be proven and that are prerequisites to its application." *Vacca,* 575 S.W.3d at 235. Rather, judicial estoppel "is a flexible, equitable doctrine intended to preserve the integrity of the courts." *Id.* "All factors that are relevant should be considered by the Court, but once a party takes truly inconsistent positions, there are no inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." *Id.* Factors to consider include: (1) a party's later position is clearly inconsistent with its earlier position; (2) whether the party was successful in persuading a court to accept the party's earlier position such that judicial acceptance of an inconsistent position in a later proceeding would create the perception that a court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 232-233. These factors "are guideposts, not elements, intended to assist courts in identifying when judicial estoppel should be applied to preserved the integrity of the judicial process and prevent litigants from playing 'fast and loose' with the courts." *Id.* at 236.

Equitable estoppel requires the party asserting it establish the following elements: (1) an admission, statement, or act inconsistent with the claims afterwards

asserted and sued upon; (2) action by the other party on the faith of the admission, statement or act; and (3) injury to the other party from allowing the first party to contradict or repudiate the admission, statement or act. *Bi-State Development Agency of Missouri-Illinois Metro. Dist. v. Warren*, 581 S.W.3d 654, 665 (Mo. App. W.D. 2019); *Ditto, Inc. v. Davids*, 457 S.W.3d 1, 17 (Mo. App. W.D. 2014). "'Equitable estoppel arises from the unfairness of allowing a party to belatedly assert known rights on which the other has, in good faith, relied thereby and become disadvantaged.'" *Ditto,* 457 S.W.3d at 17 (citation omitted).

The basis for [redacted] argument for both forms of estoppel is that [redacted] admitted in prior litigation that it was an "employer" within the definition of the term under the MHRA and equates that to an admission that it was subject to the MHRA. [redacted] claims [redacted] current position, that it is not subject to the MHRA, is therefore, inconsistent with its previous admission; that the court in the previous litigation was misled into believing that [redacted] was subject to the MHRA; and by now asserting that it is not subject to [redacted] is imposes an unfair detriment on [redacted] because he will be left without any remedy.

[redacted] argument fails to demonstrate that judicial or equitable estoppel is appropriate under these circumstances. There was not a misleading of a court or a belated assertion of known rights. Here the change in position occurred in response to the Eastern District's holdings in *Jordan* and *Emsweller*. The previous admissions were made prior to these holdings. Moreover, an admission that [redacted] came within MHRA's definition of employer does not amount to an admission that [redacted]

[redacted] is subject to the MHRA. MHRA defines "employer" as "includes the state, or any political or civil subdivision thereof." Article III of the Compact names [redacted] a political subdivision. Section 213.101(7). An admission that [redacted] was an employer under this definition admits nothing about whether or not it is *subject* to the MHRA. Nonetheless, even assuming [redacted] admitted it was subject to the MHRA in previous litigation, the change in their position was due to the holdings in *Jordan* and *Emsweller* and, as such, was not done in an attempt to play "fast and loose" with the courts. *Vacca*, 575 S.W.3d at 236. It is simply a matter of the Eastern District stating that the MHRA is not applicable. *Jordan*, 561S.W.3d at 62; *Emsweller*, 591 S.W.3d at 500. The trial court did not abuse its discretion in failing to apply judicial or equitable estoppel.

Points IV and V are denied.

Conclusion

We affirm the trial court's judgment.[7]

W. DOUGLAS THOMSON, JUDGE

All concur.

[7]During the pendency of this appeal, the [redacted] filed a motion to strike a portion of [redacted] appendix as it includes a collective bargaining agreement ("CBA") between Local 1287, Amalgamated Transit Union and the [redacted] that was not part of the record below, has not been authenticated, and may not be included in [redacted] appendix. The motion to strike is rendered moot by this opinion.