

Supreme Court No. SC92796

IN THE MISSOURI SUPREME COURT

SARAH BADAHMAN,

Respondent,

vs.

CATERING ST. LOUIS, et al.,

Appellants.

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
THE HONORABLE JULIAN BUSH, CIRCUIT JUDGE
CAUSE No: 0922-CC09062

COURT OF APPEALS NO. ED97516

SUBSTITUTE REPLY BRIEF OF THE APPELLANTS

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ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING BADAHMAN’S MOTION FOR ADDITUR BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THE JURY’S AWARD WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE JURY VERDICT, THE EVIDENCE SUPPORTS THE AWARD OF \$11,250 IN ACTUAL DAMAGES.

A. The Evidence is to be Viewed in the Light Most Favorable to the Jury Verdict.

In Badahman’s Substitute Brief, she argues that the proper standard of review of an order granting additur is to view the evidence in the light most favorable to the trial court’s order, rather than in the light most favorable to the jury verdict. In doing so, Badahman makes the same argument as the dissent in *Wiley v. Homfeld*, 307 S.W.3d 145 (Mo.App. W.D. banc 2009), relying on the same cases as did the dissent therein. In Badahman’s argument: (1) completely ignores the language of §537.068, which requires that the trial court, in reviewing a motion for additur/remittitur look at the evidence in the light most favorable to the jury verdict; (2) misconstrues this Court’s precedent in *Firestone v. Crown Ctr. Redevelopment Corp.*, 693 S.W.2d 99 (Mo. banc 1985); and (3) ignores the difference between a motion for additur/remittitur and a motion for new trial, incorrectly arguing that the same standard of review is appropriate for both.

Section 537.068 permits a court to enter an order of additur or remittitur only if, after “reviewing the evidence in support of the jury verdict” the court finds the verdict to be

less than fair or reasonable or excessive. In *Wiley*, the majority recognized that this language requires the trial court to view the evidence in the light most favorable to the jury's verdict. Specifically, it held "That statute only vests the trial court with discretion to remit a verdict if the evidence, viewed in the light most favorable to the verdict, does not support the amount awarded by the jury. § 537.068. The trial court has no authority to alter the jury's verdict unless that threshold requirement is met." *Id.* at 148. In footnote 2 of the majority's opinion, it addressed the argument of the dissent that this language should be read to allow the trial court to review all of the evidence admitted at trial, finding such argument to be inconsistent with both the statutory language and this Court's decision in *Firestone*. The Court noted in footnote 2 that,

Although the legislature subsequently reinstated a form of remittitur, the whole of the common law was not incorporated in the statute. The legislature could easily have provided for the trial court to remit a verdict if "the admissible evidence" does not support the award but it chose not to incorporate such language in the statute.

Clearly, the statutory language requires the trial court to grant deference to the jury's verdict if it is within the range supported by the evidence. As the Court stated in *Wiley*:

when reviewing a trial court's grant of remittitur, an appellate court must first review whether the trial court had the statutory authority under § 537.068 to remit the jury's verdict. Entering remittitur where the jury's verdict is supported by the evidence would obviously be an

abuse of discretion as it assumes authority not granted to the court by § 537.068. The only way to review the trial court's decision in this regard is to view the evidence in the light most favorable to the verdict, as the trial court was required to do in assessing whether the jury's verdict was supported by the evidence.

Thus, §537.068, by its very language, requires that when reviewing an order granting additur/remittitur (or alternatively a new trial), appellate courts must review the evidence in the light most favorable to the jury's verdict.

Badahman argues that the Court in *Wiley* misconstrued *Firestone*, and that this Court's decision in the latter case did not hold that the proper standard of review of a remittitur order was to review the evidence in the light most favorable to the jury verdict. However, this is clearly what this Court held in *Firestone*. In that case, the trial court had granted remittitur in the amount of \$2,250,000.00 out of a total verdict of \$15,000,000. Defendant sought additional remittitur of \$7,500,000.00, while plaintiff sought restoration of the full jury verdict. In holding that the trial court erred by ordering remittitur, the Court there held that:

The jury is vested with a broad discretion in fixing fair and reasonable compensation to an injured party, *Graeff [v. Baptist Temple of Springfield]*, 576 S.W.2d [291], at 309 [(Mo. banc 1978)], and the foregoing evidence of plaintiff's injuries substantiates the jury's award to her in this case. Such a record does not authorize a trial court in the exercise of reasonable discretion to order any portion of it remitted,

and the jury's verdict must be restored. *Dodd [v. Missouri-Kansas-Texas R. Co.]*, 193 S.W.2d [905] at 907 [Mo. 1945].

Firestone at 109-110.

It is clear both from the language used by the Court regarding the jury's discretion, and by the citation to *Dodd* that this Court viewed the evidence in the light most favorable to the jury verdict. Specifically, this Court held at page 907 of the *Dodd* decision that, "In considering the question of whether a verdict is excessive a court must take into consideration the plaintiff's evidence in its most favorable light to plaintiff. This for the reason that a jury has weighed the evidence and found in plaintiff's favor." There can have been no other reason for this Court, in *Firestone*, to have cited *Dodd*, other than to reaffirm that this is the proper standard under which to review a remittitur order (and, by extension, to an additur order).

Further, as found by the majority in *Wiley*, this Court in *Firestone*, by both the above-quoted language from pages 109-110 of that opinion, and the reference to *Dodd*, clearly overruled, *sub-silentio*, *Steuernagel v. St. Louis Pub. Service Co.*, 361 Mo. 1066, 238 S.W.2d 426 (1951) and the other cases cited by both Badahman (and the dissent in

Wiley) in support of the position that the appropriate standard of review is one deferential to the trial court's order of additur/remittitur.¹

Badahman argues that the only grounds on which Defendant in *Firestone* argued for remittitur was based upon dueling testimony by the parties' respective expert witnesses concerning the appropriate discount rate. However, this is not necessarily clear from the Court's opinion. Prior to holding that the evidence substantiated the verdict, the Court reviewed the evidence concerning Ms. Firestone's extensive injuries. Further, even assuming the sole basis for seeking remittitur was the discount rate, the parties' experts offered two contrary opinions regarding the appropriate rate (plaintiff's expert testified the proper discount rate was 1.6%, while defendant's expert opined the rate should be 9.5%). If Ms. Badahman is correct in arguing that a remittitur/additur order should be viewed in the light most favorable to such order, then the trial judge should have been upheld based upon testimony of defendant's expert. This is not what happened. Clearly, the Court in *Firestone* reviewed the evidence in a light most favorable to the jury verdict.²

¹ Badahman cites to the decision in *Carter v. Kinney*, 1994 Mo.App. LEXIS 1514 (Mo.App. W.D. Sept. 27, 1994) for the proposition that if this Court is changing the law, it most often "expressly declares" that it is doing so, rather than doing so *sub silentio*. *Badahman's Substitute Brief*, 13. However, that case was transferred to this Court, so the Court of Appeals decision is a nullity and should be ignored.

² Badahman also argues, at p. 15 of her Brief, that the Court in *Crawford v. Shop 'n Save Warehouse Foods, Inc.*, 91 S.W.3d 646 (Mo.App. E.D. 2002) did not state what standard

Badahman also argues that the same standard of review should be applied to an additur/remittitur order as applied to any other order granting a new trial.³ However, this ignores the substantial difference between the purpose of a general motion for new trial and a motion for additur, as well as the procedural differences. In *Massman Const. Co. v. Missouri Highway & Transp. Com'n*, 914 S.W.2d 801 (Mo.banc 1996), the plaintiff had moved for additur. In response to this motion, the trial court granted a new trial, without ruling on the issue of additur. As extensively discussed at pp. 25-26 of Appellants'⁴

of review it was utilizing. However, after noting that a trial court may grant remittitur “when following review of the evidence in support of the jury’s verdict the court finds that the jury’s verdict ... exceeds fair and reasonable compensation for plaintiff’s injuries and damages (internal quotations and citation omitted),” the Court held that the court abused its discretion based on its finding that “There was sufficient testimony that Crawford would need future medical care.” Thus, the Court held that because the evidence was sufficient to support the jury verdict, the trial court erred in ordering remittitur. In other words, it viewed the evidence in the light most favorable to the verdict.

³ Indeed, many of the cases cited by Badahman in her brief are cases where a new trial order was issued, without any motion for additur/remittitur having been made. For instance, of the eight cases cited on p. 8 of Badahman’s Brief, a motion for additur/remittitur had been made in only three of these cases.

⁴ Appellants Catering St. Louis and Erker will hereinafter sometimes be referred to jointly as “CSL”.

Opening Brief, this Court held that, “(a) motion for additur significantly differs from an ordinary motion for new trial in terms of issues covered and in terms of the potential outcome.” *Id.* at 803. That discussion will not be repeated here. Ultimately, the Court held that a new trial could not be granted based on an additur motion without the trial court first granting additur, and the defendant having an opportunity to accept or decline. Given both the substantive and procedural differences between a motion for additur/remittitur and an ordinary new trial motion, and that additur/remittitur are statutorily based remedies, it is appropriate to apply a different standard of review.

As the Court in *Wiley* noted in footnote 6 of its opinion, giving deference to the trial judge’s assessment of credibility and weighing of the evidence in determining whether s/he had authority to grant additur/remittitur would lead to “absurd results”. Such a standard of review would result in the case being reviewed “as though it were a court-tried case and not a jury trial.” Thus, if a trial judge ordered additur/remittitur, the appellate court “would simply be reviewing the verdict entered by the trial court to see if it is supported by the evidence and is not against the weight of the evidence with no regard for the jury’s verdict.” This would result in a grant of unfettered discretion to the trial judge to enter a verdict anywhere within the range of the evidence presented at trial. The Court then gave an example of how such deference would play out.

Assume Defendant intentionally destroyed a painting owned by Plaintiff, and Plaintiff sued. Plaintiff’s expert testified that the painting was worth \$100,000. Defendant admitted liability but presented expert testimony that the painting was worth \$75,000. The

jury entered an award of \$100,000. On a motion for remittitur, the trial court remitted to \$75,000. Clearly, had the trial court properly viewed the evidence in the light most favorable to the jury verdict as required by statute, it could not have found the verdict was not supported by the evidence or that it had the statutory authority to remit. The jury verdict was clearly within the range of damages supported by the evidence. If, however, we were required to review the evidence in the light most favorable to the trial court's decision to remit, then we could not find that the trial court abused its discretion because there was evidence in the record that could support the lesser award entered by the court.

Wiley, 307 S.W.3d at 150, fn. 6.

Applying a standard of review which is deferential to the jury's verdict does not, as suggested by Badahman, either eviscerate the trial court's authority to make a discretionary determination as to whether verdicts are against the weight of the evidence or permit the Court of Appeals to conduct a de novo review of the evidence (see pp. 9-10 of Badahman's brief). While a trial court will retain discretion to order additur/remittitur where the amount of the verdict is not supported by the evidence, applying a standard deferential to the jury's verdict properly prohibits a judge from acting as a super juror, with authority to order a verdict adjusted to anywhere within the range of the evidence. Nor will the Court of Appeals be allowed to conduct a de novo review of the evidence. Instead, if the jury's verdict is within the range established by the evidence, the Court of Appeals would be

required to sustain the jury's verdict. Such an approach recognizes the constitutionally required role of the jury as the ultimate finder of fact, and is consistent with the statutory language and this Court's precedent.

B. Viewing the Evidence in the Light Most Favorable to the Court's Order of Additur Would Infringe Upon CSL's Right to Trial by Jury

In CSL's Opening Brief, it cited *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. banc 2012), and various cases cited therein (or cited in case cited in *Watts*) in support of the proposition that applying a standard of review of an order of additur/remittitur whereby the evidence is reviewed in the light most favorable to the jury verdict is constitutionally mandated by Art. I, §22 of the Missouri Constitution, and that application of a standard less deferential to the jury verdict would violate the right to jury trial. That argument will not be repeated here.

Badahman does not address any of the cases cited by CSL in its Opening Brief, other than *Watts*, attempting to simply dismiss those cases on the basis that they "all involve the constitutionality of legislatively-imposed damage caps or limits on judicial discretion, neither of which are at issue in the present case." However, as detailed in CSL's Opening Brief, these cases contained extensive discussion concerning the limits on the exercise of additur/remittitur, because defendants in those cases had argued that if additur/remittitur were constitutional, so were damage caps. Thus, the discussion in those cases is extremely relevant to the standard of review constitutionally required of additur/remittitur orders.

Even in the discussion of *Watts* in Badahman’s brief, she ignores the discussion of remittitur in that case, where, among other things, this Court stated that, “Although the precedent regarding judicial remittitur is inconsistent precedent, the inconsistency stems from a long-standing reluctance in the common law to tamper with the jury’s constitutional role as finder of fact.” *Id.* at 639.

Badahman relies on *Gentry by Gentry v. Douglas*, 744 S.W.2d 788 (Mo. banc 1988) for the proposition that a trial court has virtually unfettered discretion to order a new trial on the grounds that a verdict is against the weight of the evidence. In that case, the defendant argued §510.330 RSMo. and Mo. S.Ct. Rule 78.02 were unconstitutional on the grounds that by allowing the trial court to grant a new trial on the basis that the verdict was against the weight of the evidence, the statute and rule infringed defendant’s right to a jury trial. The Court did not address the issue of the proper standard of review in that case. In fact, the Court stated that the argument made by defendant that the judge was no more qualified to determine the credibility of one expert medical witness over another was properly directed to the issue of abuse of discretion, rather than the facial constitutionality of the statute and rule. *Id.* at 790.

In any event, no motion for additur/remittitur was made in *Gentry*. Based upon both Art. I, §22, and this Court’s opinions in *Firestone* and *Watts*, both trial courts and appellate courts must view the evidence in the light most favorable to the jury’s verdict when reviewing an order of additur/remittitur. A standard less deferential to the jury’s verdict does violence to a litigant’s right to a jury trial.

C. No Basis Exists to Grant Additur to Award Plaintiff All of Her Claimed Lost Wages.

Badahman's argues that there was no evidence that her "economic damages resulted from anything other than her termination...." *Respondent's Substitute Brief*, 21. CSL does not believe the evidence on this point was clear. Badahman relies on a case in which not only was the precise amount of damages not in question, the cause for those damages was also not in question, unlike in the present case. In *Brown v. Lanrich, Inc.*, 950 S.W.2d 235 (Mo.App. E.D. 1997), cited by Badahman at page 22, the jury awarded damages of \$1.00 when the undisputed medical expenses were \$7,684.32. Further, there was no dispute about whether these damages were incurred because of the accident.

In the instant case, however, the amount of the damages and the conduct causing the damage is not so clearly delineated. Even assuming there is no dispute concerning the difference between Badahman's actual earnings and what she would have earned had she remained at CSL, it does not follow that her reduced earnings resulted solely because of the conduct of CSL. A person injured by being run over by a car, may also have another injury to the same body part, during the relevant time frame, or have a pre-existing injury. In *Brown*, however, there was no evidence of any other cause for the plaintiff's personal injuries. That cannot be said here.

Both Badahman and her sister testified about Badahman suffering emotional damages. TR 169-172. Badahman asked the jury to compensate her for the emotional harm she claimed she suffered as a result of her termination. TR 93. Hence, her emotional

damages were something that the jury may have considered when it rendered its verdict, which was not addressed by the trial court or by Badahman in this appeal.

Nevertheless, the jury returned a verdict against CSL of \$11,250.00 in actual damages, (L.F. 87) which is precisely equal to three months' salary at the rate that Badahman was paid during her employment with Appellant CSL. This comports with the evidence that Badahman was out of work for approximately two to three months after being terminated by Appellant CSL. TR 86.

As described in CSL's opening brief, there are a myriad of reasons the jury could have decided to award Badahman only \$11,250.00 in actual damages. The jury could have concluded that she would not have lasted at CSL more than three months longer in any event, due to her transportation issue; or, that she preferred a job closer to home or working for a family member. She also testified that she did not try to get a release from Kelly Services so that she could work for Manpower and that choice could have led the jury to believe that her claimed lost wages were not solely the result of the alleged discrimination by CSL, especially since the Manpower job may have offered comparable pay to CSL. TR 85, 179-180.

Since the jury is the fact finder, it is not appropriate for Badahman to second guess why it did not grant her the entire amount of her claimed lost wages, and it was not appropriate for the trial court to conclude that the jury was required to find her entitled to the entire wage differential.

Badahman ineffectually attempts to distinguish CSL's reliance on *Root v. Manley*, 91 S.W.3d 144, 146 (Mo.App. E.D. 2002) and *Tomlin v. Guempel*, 54 S.W.3d 658, 660

(Mo.App. E.D. 2001). Although the trial court in *Root* denied the motions for additur and new trial, the principles that the court of appeals relied upon have equal application here. The court there noted the importance of deferring to the jury's discretion after it has weighed the evidence, stating that "In conducting that evaluation [of the plaintiff's injuries and pain and suffering], the jury is charged with the task of weighing witness credibility and testimony, and the amount of damages awarded falls primarily within their discretion." *Id.* at 146. The court continues by listing considerations that the jury "may" have been pondering when it reached the verdict.

... the jury *may* consider numerous things in its verdict, and the "verdict can be reasonably accounted for on the theory that the jury believed only enough of plaintiff's evidence to fix liability." *Id.*

Root v. Manley, 91 S.W.3d at 146, *quoting*, *Davidson v. Schneider*, 349 S.W.2d 908, 913 (Mo. 1961).

Likewise, in *Tomlin*, the court's holding relies upon the well-established principle that the determination of damages is principally within the jury's discretion. 54 S.W.3d at 660. "The jury is vested with the discretion to enter a verdict for damages it finds reasonably necessary to compensate a plaintiff for injuries resulting from an accident. It is the jury's duty to judge the credibility of witnesses and to weigh and value a witness's testimony. The jury's discretion includes accepting or rejecting all or part of the plaintiff's claimed expenses." *Id.*, *quoting*, *Havel v. Diebler*, 836 S.W.2d 501, 504 (Mo.App. W.D. 1992).

The jury here considered many facts, and when viewed in the light most favorable to the jury's verdict, the evidence supports its award of \$11,250 in actual damages. "If a damage award is within the range of the evidence, a jury's verdict is not erroneous although the amount is not precisely in accordance with the evidence of either party. *DeLong v. Hilltop Lincoln-Mercury, Inc.*, 812 S.W.2d 834, 841 (Mo.App. E.D. 1991)." *Total Econ. Athletic Mgmt. Of Am., Inc. v. Pickens*, 898 S.W.2d 98, 108 (Mo.App. W.D. 1995).

As for the issue raised by Badahman with regard to the jury instruction on damages, she argues that the critical distinction between this case and *Ralph v. Lewis Bros. Bakeries, Inc.*, 979 S.W.2d 509 (Mo.App. 1998), was that, in this case, "the trial court found, the jury's award of damages was *not* supported by the evidence presented at trial and the instruction given." *Badahman's Substitute Brief*, 23 (underlined emphasis added). On the contrary, however, in its order finding additur appropriate, the trial court did not refer to the damages instruction whatsoever. See, L.F. 115.

The jury was instructed to "award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained as a direct result of the occurrence mentioned in the evidence." *Appendix to Appellant's Substitute Brief*, A15. The instructions did not instruct the jury to find lost wages for the entire period when she was out of work and the period when she received reduced wages. Moreover, no objection was raised about the damages instruction given to the jury.

As the court said in *Ralph*, "Written instructions are the only means to inform the jury of the law and that their decisions must be based on that law." *Id.* at 516. "The

amount of a damage award is, under proper instructions, a matter resting within the sound discretion of the jury.” *Id.* (Emphasis added). Importantly, Badahman’s attorney asked in closing argument, “Again, the amount is up to you, but I’m going to suggest that you fully compensate Ms. Badahman for her lost wages in the amount of \$44,979, [and] that you award her an additional \$150,000 to compensate her for the emotional distress that she has suffered.” TR 447-448. Badahman’s counsel specifically did not argue to the jury that, if it found for Badahman, it must award her at least the full amount of her claimed lost wages. In fact, Badahman’s counsel did not even argue to the jury that her claimed lost wages were solely a result of Appellants’ alleged discriminatory actions.

Thus, the jury received its instructions to come to a fair and just amount of compensation and determined, in its discretion, that \$11,250 was fair and reasonable. This amount was not less than what was fair and reasonable.

II. THE TRIAL COURT ERRED IN GRANTING BADAHMAN'S MOTION FOR ADDITUR BECAUSE §537.068 RSMO, AND MO.S.CT. RULE 78.10, TO THE EXTENT THAT THEY PERMIT ADDITUR, ARE AN UNCONSTITUTIONAL INVASION OF A LITIGANTS' RIGHT TO TRIAL BY JURY AS GUARANTEED BY ARTICLE I, §22(a) OF THE MISSOURI CONSTITUTION, IN THAT THE STATUTE AND RULE ALLOW THE TRIAL JUDGE TO SUBSTITUTE HIS JUDGMENT FOR THAT OF THE JURY AS TO THE PROPER AMOUNT OF DAMAGES, AND IN THAT ADDITUR, UNLIKE REMITTITUR, WAS NOT RECOGNIZED BY THE COMMON LAW AT THE TIME THE MISSOURI CONSTITUTIONAL PROVISION PROTECTING THE RIGHT TO A JURY TRIAL WAS ADOPTED.

A. The Issue of Additur Is Not Moot.

Badahman argues that the constitutionality of the additur statute, §537.068 R.S.Mo., is a moot issue because CSL refused to consent to additur and the trial court ordered a new trial. However, the logical extension of this argument is that a constitutional challenge could never be made to the additur statute. Missouri S.Ct. Rule 78.10(d) provides, in part, that: "A party consenting to additur... may not initiate the appeal on that ground but may raise the issue on the other party's appeal." This is in keeping with the general rule that a party who consents to a judgment is "not aggrieved" thereby, and may therefore not appeal from a judgment to which he has consented. *Nations v. Hoff*, 78 S.W.3d 222 (Mo.App.

E.D. 2002). It is untenable that a party aggrieved by a trial court's order would have no avenue available to appeal that order.

More importantly, Badahman's argument is contrary to the Supreme Court's decision in *Veach v. Chicago and North Western Transp. Co.*, 719 S.W.2d 767 (Mo.banc 1986). There, on plaintiff's appeal from the remittitur order, the Supreme Court vacated the trial court order and remanded to determine whether a new trial was appropriate. The Court of Appeals, on the other hand, had found the remittitur order moot based on plaintiff's refusal to accept remittitur and would have upheld the trial court's order of a new trial.⁵ Clearly, the Supreme Court rejected the argument that Plaintiff's refusal to accept remittitur mooted any challenge to the order of remittitur.

⁵ Badahman's counsel is well aware of this Court's holding in *Veach*, but glaringly omitted any discussion of it from Badahman's Substitute Brief in this Court. Badahman had argued in her Brief before the Court of Appeals that the Court of Appeals decision in *Veach* supported her position that an appeal of an unaccepted additur order is moot. In response, undersigned counsel cited and discussed this Court's decision in *Veach*, which held just the opposite, that an unaccepted order of additur/remittitur may be appealed. This is part of a pattern of disingenuous arguments by Badahman's counsel where he cites to court of appeals decisions that have been effectively vacated by transfer to this Court (see fn. 1, supra) or where he simply ignores case law that is contrary to the position he argues, even though he is well aware of such precedent.

Additionally, Badahman cites several cases from other states where a refusal to accept additur rendered the additur order moot; however, these cases carry no weight given the contrary decision of this Court in *Veach*. Further, the decision in *Stephenson v. Upper Valley Family Care, Inc.*, 2008 Ohio App. LEXIS 2425 (Ohio Ct. App. June 13, 2008) was an unpublished opinion, of questionable precedential value. And, in *State ex rel. Herman v. Southern Ariz. Land Co.*, 424 P.2d 181, 183 (Ariz. Ct. App. 1967), the defendant (the state of Arizona) simply acknowledged in its reply brief “that the question of additur ‘is probably really a moot question at this particular point.’” See, *Badahman’s Substitute Brief*, 26-27.

Moreover, Badahman misstates the trial court’s ruling on additur in the instant case, stating that “even though the trial court made a preliminary determination that additur was appropriate, the trial court ultimately did not apply the additur statute and simply ordered a new trial on the issue of damages.” See, *Badahman’s Substitute Brief* 26 (emphasis added). In fact, as illustrated by the trial court’s order, the trial court actually analyzed additur in Missouri as compared to that found wanting by the U.S. Supreme Court in *Dimick v. Schiedt*, 293 U.S. 474 (1935) and found that the Missouri statute is constitutionally sufficient. L.F. 115. It then referred to and applied the statute by finding additur appropriate and sustaining Badahman’s Motion for Additur. L.F. 115. As part of its order, the trial court ruled that the parties had 14 days to elect a new trial⁶ and that if a party elected a new trial, it would be on damages only. (L.F. 115).

⁶ The trial court later amended the order to allow the parties 30 days to elect a new trial.

Therefore, this was not “simply” an order for a new trial, but rather a deliberate application by the trial court of the additur statute (after consideration of the issue of its constitutionality). The issue of the constitutionality of the additur statute is ripe, and should be addressed by this Court.

B. Additur Pursuant to § 537.068 RSMo. Invades the Province of the Jury in Violation of Art I, § 22 of the Missouri Constitution.

Badahman agrees with CSL that no Missouri appellate court has addressed this precise issue. However, Badahman ignores in its argument this Court’s decisions that were cited in CSL’s opening brief, namely *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752 (Mo. banc 2010). There, after noting that the common law precedents involving a judge’s power to order remittitur are reviewed in *Dimick v. Schiedt*⁷, this Court held that: “The analysis of the right to jury trial in federal courts under the 7th Amendment to the United States Constitution is the same historical analysis as that required for Missouri’s right to jury trial”, except that Missouri analyzes the right to jury as of passage of its constitution in 1820, instead of the date of adoption of the Seventh Amendment to the U.S. Constitution, 1791. *Klotz* at 780. *See also Diehl v. O’Malley*, 95 S.W.3d 82 (Mo. banc 2003).

Instead, Badahman tries to distinguish the reasoning in *Dimick* by noting the differences in the language between the Seventh Amendment and Art. I, §22 of the Missouri Constitution. However, *Klotz* and *Diehl* makes clear that the analysis used by the

⁷ 293 U.S. 474 (1935)

Court in *Dimick* is to be used to determine whether a particular procedure violates Art. I, §22.

Badahman further attempts to distinguish *Dimick* by arguing that the Supreme Court's decision was focused exclusively on the fact that, although the defendant consented to an increase in the award, the plaintiff had not. *Badahman's Substitute Brief*, 30. However, this was not the crucial factor in the Supreme Court's decision. The Court's paramount concern was the distinction between the role of the court to determine the law and the role of the jury to determine the facts, and ensuring that both were protected. As the Court said:

...the power to conditionally increase the verdict of a jury does not follow as a necessary corollary from the power to conditionally decrease it. As the court below correctly pointed out [] in the case of a conditional remittitur, 'a jury has already awarded a sum in excess of that fixed by the court as a basis for a remittitur, which, at least, finds some support in the early English practice; while in the second case no jury has ever passed on the increased amount, and the practice has no precedent according to the rules of the common law.'

Dimick, 293 U.S. at 485.

The Court continued:

Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the

unlawful excess-in that sense that it has been found by the jury-and that the remittitur has the effect of merely lopping off an excrescence. But, where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.

Id. at 486.

Hence, although an increased verdict is potentially not harmful to a plaintiff (albeit there the plaintiff did not consent), the Supreme Court's overriding concern was that additur would "bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication...." *Id.* at 486-487. And, the jury is the fact finder.

Badahman also cites a decision from a single federal court and cases from several other states that she argues are persuasive, starting with *Clay v. Gordon*, 205 F.3d 1339 (6th Cir. 2000), an unpublished opinion. Even there, however, the court found additur inappropriate, holding that it was granted in "contravention of Clay's Seventh Amendment right to a jury trial. *Id.* at *4.

Badahman then cites *Genzel v. Halverson*, 80 N.W.2d 854 (Minn. 1957) as persuasive. However, as one Minnesota court stated, the court in *Genzel* held that "the Minnesota Constitution differs from the United States Constitution on retrying jury verdicts." *Runia v. Marguth Agency, Inc.*, 420 N.W.2d 641, 644 (Minn. Ct. App. 1988) *aff'd in part, rev'd in part*, 437 N.W.2d 45 (Minn. 1989). And the Court in *Genzel* specifically cited another procedure "judgment non obstanto verdedicto", which the U.S.

Supreme Court found to violate the Seven Amendment, but which Minnesota courts had held did not violate the Minnesota provision guaranteeing a right to jury trial. In other words, Minnesota does not interpret the right to jury trial in the same way as federal courts have interpreted the Seventh Amendment. In this way, Minnesota jurisprudence is at sharp variance with Missouri case law, and should not be followed by the courts of this state.⁸

This highlights the problem with Badahman's argument based on case law from other states. She neither sets forth the language of the additur provisions of these foreign states, the provisions of their state constitutions guaranteeing the right to jury trial, nor explains the standards by which each state's courts assess the provisions of their right to jury trial. To the extent that the analysis used by each state cited by Badahman does not utilize the same historic analysis as federal case law applying the Seventh Amendment, and approved by this Court in *Klotz*, these cases are of no persuasive value as to the interpretation of Art. I, §22.

Notably, courts in at least several states have held additur to be unconstitutional. See e.g., *Bohrer v. Clark*, 590 P.2d 117, 121 (Mont. 1978); and *Bozeman v. Busby*, 639 So.

⁸ Additionally, Badahman cites *Supinger v. Stakes*, 495 S.E.2d 813 (Va. 1998) for the proposition that the court there upheld additur as long as the party opposing additur is permitted to either consent thereto or elect a new trial. However, the court there actually held Virginia's additur statute unconstitutional because it did not require both parties' consent. Anything it said about whether additur would be constitutional if the statute required consent was mere dicta.

2d 501, 502-03 (Ala. 1994), holding that a statute permitting a trial court to grant additur as to punitive damages “undercuts the traditional function of the jury.”

Illinois courts have also held that additur is only permissible in the case of liquidated damages. *Ross v. Cortes*, 420 N.E.2d 846, 850 (Ill.App. 1981). The court in *Ross* cited the decision in *Bernesak v. Catholic Bishop of Chicago* 409 N.E.2d 287(Ill.App. 1980), and described it as a case involving unliquidated damages for personal injuries. The court in *Bernesak* said:

We decline to accept plaintiff’s computations with respect to either element of lost income as a basis for entering an additur, a device which may be applied, if at all, to cases in which the inadequacy of the verdict is due to the omission of a specific, liquidated form of damages (citations omitted), rather than unliquidated tort damages of the character here presented. *Hong v. Williams* 128 N.E.2d 655.

In other words, the court in *Bernesak* specifically held that use of additur was not appropriate in a case involving a claim of lost income. Ultimately, the court in *Ross* reached a similar conclusion, holding that: “additur should be limited to cases where the inadequacy of the verdict is due to the omission of some specific definitely calculable item (citation and internal quotation omitted).”

Furthermore, as cited in Appellant’s Opening Brief, several Missouri cases recognize that additur was never adopted by, or allowed in, Missouri courts. *See, e.g. Kortjohn v. Altenbernd*, 14 Mo.App. 342, 344–45 (1883); *Worley v. Tucker Nevils, Inc.*, 503 S.W.2d 417, 424 (Mo. banc 1973) (stating that Missouri has never adopted the additur

doctrine); and *Stahlheber v. American Cyanamid Co.*, 451 S.W.2d 48, 65 (Mo.1970) (declining to adopt additur as a means of resolving inadequate verdicts). Badahman cites no contrary Missouri case law that would indicate that additur was ever part of the common law prior to passage of Missouri's constitution, or even that it was utilized for many, many years thereafter.

Because the practice of additur did not exist at common law in 1820, when Missouri's first constitution, with a provision identical to present day Art. I, §22, was adopted, §537.068 R.S.Mo. and Mo. S.Ct. Rule 78.10, at least insofar as they authorize additur, are unconstitutional.

III. THE TRIAL COURT ERRED IN ENTERING AN ORDER GRANTING A NEW TRIAL ON DAMAGES ONLY BECAUSE EVEN IF IT IS NOT UNCONSTITUTIONAL FOR A TRIAL COURT TO GRANT ADDITUR, THE PORTION OF MISSOURI SUPREME COURT RULE 78.10 WHICH PERMITS A COURT TO GRANT A NEW TRIAL AS TO DAMAGES ONLY WHEN A PARTY REJECTS ADDITUR IS AN UNCONSTITUTIONAL INVASION OF A LITIGANT'S RIGHT TO TRIAL BY JURY, IN THAT IT ALLOWS THE JUDGE TO ESSENTIALLY DECIDE THE ISSUE OF LIABILITY.

A. CSL's Constitutional Claim Was Not Waived.

Badahman argues that CSL waived their argument that Rule 78.10 is unconstitutional when they did not make the argument in the trial court. On the contrary,

after the trial court sustained Badahman's motion for additur, the trial court impermissibly stated that if either party "should make such an election [of a new trial], the new trial shall be on the issue of damages only." L.F. 115. Amazingly, this declaration was in the same order wherein the trial court stated, "the evidence for liability was far from overwhelming..." L.F. 115. Thereafter, CSL filed an election of a new trial, without limiting it to damages only. L.F. 118.

Even before the trial court ruled, CSL filed a Memorandum in Opposition to Plaintiff's Motion for Additur or, in the Alternative, for a New Trial on the Issue of Damages. At that point, CSL properly raised the issue of the unconstitutionality of additur. L.F. 97. Shortly thereafter, CSL also filed a Supplemental Memorandum in Opposition to Plaintiff's Motion for Additur – Addressing the Issue of the Unconstitutionality of Additur. L.F. 107. On the same day as this Supplemental Memorandum was filed, the trial court issued its order granting additur or, in the alternative, a new trial as to damages only. L.F. 114. Up until that time, Appellant CSL was unaware the trial court was considering ordering a new trial as to damages only. Therefore, the first reasonable opportunity for CSL to raise this issue was on appeal. CSL did not waive this issue.

B. Badahman's Supporting Case is Distinguishable.

Badahman's argument that *Lilly v. Boswell*, 242 S.W.2d 73 (Mo. 1951) addresses the precise issue of the unconstitutionality of Rule 78.10 for allowing a trial court to grant a new trial on less than all issues, is disingenuous. *Lilly* was a personal injury case arising from an automobile collision. After plaintiff obtained a verdict of \$1,750, she filed a

limited motion for a new trial on the issue of damages for the reason that the verdict was “grossly inadequate,” which motion was granted. *Id.* at 74.

This Court rejected the defendants’ argument that “(a) the issue of damages is so interwoven with other fact issues that they cannot be separated without prejudice to them, and (b) the inadequacy of the verdict shows on its face that it was a compromise or an effort to ‘give the old lady something from the insurance company.’” *Id.* at 78-79. In rejecting the first argument out of hand, this Court said, “The question of who was at fault can have no bearing upon the nature, extent, duration or compensatory value of her injuries. Liability or non-liability cannot affect them in any manner.” *Id.* at 79. Plaintiff was a rear seat passenger injured in the accident and could not be contributorily negligent. There simply was no issue of liability in that case.

Contrary to the *Lilly* case, here, even the trial court noted that Badahman’s evidence of liability was “far from overwhelming.” L.F. 115. Thus, to order that the new trial be only on damages is completely contradictory to the jury verdict. *Lilly* should be ignored. By its impermissible order granting additur, or alternatively ordering a new trial on damages only, the trial court upset the “sanctity of the jury’s deliberations, and the verity and honesty of their verdict...” *Id.* at 79, quoting, *Thompson v. City of Lamar*, 17 S.W.2d 960, 976 (Mo. 1929).

IV. THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL AS TO DAMAGES ONLY BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL AS TO DAMAGES ONLY IN THAT THE ISSUES OF LIABILITY AND DAMAGES ARE SO INTERTWINED THAT ANY NEW TRIAL SHOULD BE AS TO BOTH DAMAGES AND LIABILITY.

In the instant case, the question is whether the issue of damages (both actual and punitive) are so intertwined with issues of liability as to make trial on only damages manifestly unfair to CSL. Where the issues of liability and damages are significantly intertwined, any new trial must be on the issues of both liability and damages. *Massman Const. Co. v. Missouri Highway & Transp. Comm'n.*, 948 S.W.2d 631, 634 (Mo.App. W.D. 1997).

CSL will certainly be prejudiced if a new jury is simply instructed that liability has been determined and it is up to them to only decide damages, including punitive damages (particularly when the first jury awarded only \$2,000.00 in punitive damages against Appellant CSL and found Appellant Erker, the decision maker, not liable for any punitive damages). Indeed, the threat of a higher award of punitive damages is real, particularly in an employment discrimination case which is greatly dependent upon liability issues.

Further, it appears that the jury rejected Badahman's claim for emotional distress damages. Thus, the new jury will be unleashed to embark on a roving commission in which it will be permitted to consider awarding increased damages, including punitive damages and emotional distress damages.

In *Badahman's Substitute Brief*, she fails to refute CSL's contention that the issues of liability and damages are significantly intertwined in this case; instead, Badahman relies on the trial court's discretion to determine what issues should be retried. As already noted, however, the trial court noted that "the evidence for liability was far from overwhelming." L.F. 115. It seems abundantly clear that in such a case, especially where punitive damages are in the mix, a new trial as to all issues is warranted.

Badahman relies on *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. banc 1989) for the argument that she should not have to risk her verdict on her discrimination claim. *Badahman's Substitute Brief*, 35. Yet, an important distinction exists in that case, upon which this Court relied. This Court held that the trial court had improperly refused to instruct on punitive damages, and the question was whether a new trial could be awarded to consider punitive damages alone or whether the new trial shall be granted as to both actual and punitive damages. The issue of liability on retrial was not a consideration for this Court.

Finally, Badahman chose to risk her verdict on the discrimination claim by challenging the jury's verdict in the first instance. CSL was then put to the "Hobson's" choice between accepting the additur or risking the jury's decision wherein it apparently chose not to award emotional distress damages, found Erker not liable for punitive damages and found CSL liable for a relatively small amount of punitive damages. This was not a risk CSL initiated.

CONCLUSION

CSL respectfully requests this Court reverse the trial court's decision and remand to the trial court with an order to enter judgment in accordance with the jury verdict, or alternatively, order a new trial as to all issues.

Respectfully Submitted

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that I caused true and correct copies of the foregoing document to be served upon the parties receiving notice through the Court's ECF system by filing with the Court's ECF system at the date and time filed.

/s/ David R. Bohm

CERTIFICATE OF COMPLIANCE

By submitting this Substitute Reply Brief, the undersigned counsel for Appellants hereby certifies the following:

1. This brief conforms with Missouri Rule of Civil Procedure 55.03;
2. This brief conforms with Missouri Rule of Civil Procedure 84.06(b) and Eastern District Local Rule 360 relating to length;
3. The number of words used in this brief is 7,458;

/s/ David R. Bohm

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