IN THE SUPREME COURT OF MISSOURI

No. SC92796

SARAH BADAHMAN,

Respondent,

vs.

CATERING ST. LOUIS, INC., ET AL.,

Appellants.

Appeal from the Circuit Court of the City of St. Louis, Missouri
Honorable Julian Bush, Circuit Judge
Case No. 0922-CC09062

Transferred from the Missouri Court of Appeals, Eastern District
Appeal No. ED97516

SUBSTITUTE BRIEF OF RESPONDENT

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Respondent's Employment with Appellants

On March 6, 2008, Appellants Catering St. Louis, Inc. ("CSL") and Mark Erker ("Erker"), the owner and president of CSL, offered Respondent Sarah Badahman a job as a Recruiter. Transcript ("Tr.") pp. 54-55, 198; Trial Exhibit R. Respondent's title was changed to "Recruiter and Retention" prior to the beginning of her employment. Tr. p. 55. Respondent's first day of work with Appellants was March 17, 2008. Tr. p. 56. She received a salary of $45,000 per year during her employment with Appellants. Tr. pp. 55-56.

Respondent was diagnosed with epilepsy when she was a child and has periodically experienced seizures during her life. Tr. p. 70. On July 14, 2008, after returning from a visit with her neurologist, Respondent told Joan Vosholler ("Vosholler"), the Director of Human Resources for CSL, that she had epilepsy and that her neurologist was going to suspend her driver's license. Tr. pp. 69-70, 232-33. Vosholler told Respondent that she did not think Respondent would be able to continue performing her job without a driver's license. Tr. p. 73. Respondent then told Vosholler that it was illegal to discriminate against her because of her disability. Tr. p. 79.

The following day, Respondent spoke to Erker about her conversation with Vosholler. Tr. p. 79. She told Erker that it was illegal for Vosholler to have told her that she did not believe Respondent would be able to perform her job. Tr. p. 79. Despite having her driver's license suspended, Respondent was able to continue performing her job for Appellants for approximately two weeks before her employment ended. Tr. p. 73.

On August 1, 2008, Vosholler told Respondent that Erker wanted to meet with her. Tr. pp. 79-80. During their meeting, Respondent and Erker had a discussion about how Respondent would be able to perform her job without a driver's license. Tr. pp. 80-81. Respondent told Erker that she would be able to get around by using taxi cabs or Metrolink, or by obtaining rides from co-workers. Tr. pp. 80-81. Erker told Respondent that CSL could not afford to pay for a taxi cab or private driver for her, even though Respondent never asked CSL to pay for her transportation. Tr. p. 81. At the conclusion of the meeting, Erker informed Respondent that her employment was being terminated. Tr. pp. 81-82. Respondent's last day of employment with Appellants was August 1, 2008. Tr. p. 83. Appellants paid Respondent severance pay equal to one week of her annual salary. Tr. p. 85.

Respondent's Claims Against Appellants

On September 17, 2009, Respondent filed this action against CSL, Erker, and Vosholler pursuant to the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.010 *et seq.* L.F. p. 14. Respondent alleged that Appellants discriminated against her because of her disability and retaliated against her in violation of the MHRA. *Id.* From April 26 to April 29, 2011, the parties tried this case before the Honorable Julian Bush in the Circuit Court of the City of St. Louis, Missouri.[1]

[1]On April 21, 2011, Respondent voluntarily dismissed her claims against Vosholler. L.F. p. 6. In addition, Respondent chose to proceed to trial only on her disability discrimination claim and did not submit her retaliation claim to the jury.

Evidence Regarding Respondent's Damages

During the trial, Respondent presented evidence that she sustained economic damages and emotional distress as a result of her termination by Appellants. With regard to her economic damages, Respondent testified that she began looking for another job immediately after Appellants terminated her employment. Tr. p. 85. In October 2008, Respondent obtained a job with Gateway Healthcare as a Practice Manager. Tr. pp. 86-87. She received a salary of $27,000 per year in that job. Tr. p. 87.

After working for Gateway Healthcare for approximately eight months, Respondent obtained a different job as a Practice Manager for Rashid Dalal, M.D. Tr. p. 87. Respondent received a salary of $33,000 per year in that job and she continued to hold that job at the time of trial. Tr. pp. 87-88.

During her testimony at trial, Respondent presented documentary evidence of the total amount of wages that she had received from employment between the date of her termination by Appellants and the date on which the trial began. Tr. pp. 88-92; Trial Exhibits 23-27. Respondent also presented a spreadsheet containing a calculation of the lost wages that she sustained as a result of her termination by Appellants. Tr. p. 92; Trial Exhibit 28. Appellants' counsel objected to the admission of Exhibit 28 into evidence on the grounds that it was not relevant, lacked foundation, and was prepared solely for the purpose of the litigation. Tr. p. 92. The trial court overruled the objections and received Exhibit 28 into evidence. Tr. p. 92.

Exhibit 28 showed that if Appellants had not terminated her employment, Respondent would have earned approximately $122,596.08 in wages from Appellants

between August 1, 2008, and the date of trial. Trial Exhibit 28. Exhibit 28 also showed that Respondent earned $76,750.98 in wages from other employment during that period of time. *Id.* After giving Appellants credit for the severance that they paid Respondent, Exhibit 28 showed that Respondent sustained $44,979.72 in lost wages as a result of her termination by Appellants. Tr. p. 93; Trial Exhibit 28.

Appellants did not dispute the accuracy of the evidence that Respondent submitted to support her economic damages. The only argument that Appellants made was that Respondent had failed to properly mitigate her damages by failing to obtain a written release from a non-compete agreement from a previous employer. Tr. pp. 179-81, 427-28. The trial court rejected that argument because it was not supported by the evidence and refused to allow Appellants to submit a mitigation instruction to the jury. Tr. pp. 427-28.

During closing argument, Respondent's counsel asked the jury to return a verdict in favor of Respondent on her claim against CSL and Erker and to compensate her for the economic damages and emotional distress that she suffered. Tr. pp. 446-48. Specifically, Respondent's counsel asked the jury to fully compensate Respondent for her lost wages in the amount of $44,979. Tr. pp. 447-48. The only mention of damages that Appellants' counsel made during his closing argument was when he argued to the jury that Respondent's testimony regarding her emotional distress was not credible. Tr. pp. 469-70. Appellants' counsel did not mention Respondent's lost wages at any point during his closing argument and never questioned the accuracy or legitimacy of Respondent's lost wages. Tr. pp. 450-70.

The Jury's Verdict

On April 29, 2011, the jury returned a unanimous verdict in favor of Respondent on her disability discrimination claim against Appellants. L.F. p. 87. The jury awarded Respondent actual damages in the amount of $11,250. *Id.* The jury also found that CSL was liable for punitive damages and assessed $2,000 in punitive damages against CSL. L.F. pp. 86-87. The trial court entered judgment in accordance with the jury's verdict on May 12, 2011. L.F. p. 106.

Post-Trial Proceedings

On May 4, 2011, pursuant to Mo. Rev. Stat. § 537.068 and Rules 78.01 and 78.02 of the Missouri Rules of Civil Procedure, Respondent filed a motion for additur or, in the alternative, for a new trial on the issue of damages. L.F. p. 89. In her motion, Respondent argued that the jury's award of damages was against the weight of the evidence because it was less than the uncontroverted amount of Respondent's lost wages. *Id.* Accordingly, Respondent asked the trial court to increase the amount of the jury's award because it was less than fair and reasonable compensation for Respondent's damages. *Id.* Alternatively, Respondent asked the trial court to grant her a new trial solely on the issue of damages. *Id.*

In response to Respondent's motion, Appellants argued, *inter alia*, that an order of additur would violate article I, section 22(a) of the Missouri Constitution, which provides for the right to trial by jury. L.F. pp. 97, 103. On May 12, 2011, the trial court ordered the parties to provide additional briefing regarding the constitutionality of additur. L.F. p. 3.

On June 2, 2011, the trial court issued an order granting Respondent's motion for additur. L.F. p. 114. The trial court found that the evidence regarding the amount of Respondent's lost wages was uncontradicted and that the jury's award of damages was against the weight of the evidence. L.F. p. 115. In its order, the trial court gave the parties 14 days to elect a new trial rather than consent to additur. *Id.* The order stated that if either party elected a new trial, the new trial would be on the issue of damages only. *Id.* On June 16, 2011, the trial court amended its order to give the parties 30 days to decide whether to elect a new trial. L.F. p. 116.

On June 30, 2011, Appellants declined to consent to additur and instead elected a new trial on the issue of damages. L.F. p. 118. On July 19, 2011, the trial court issued an order setting aside the judgment in this case and ordering a new trial on the issue of damages only. L.F. p. 117. Appellants then filed their Notice of Appeal on August 11, 2011. L.F. p. 120. On September 7, 2011, the trial court issued a Judgment Nunc Pro Tunc to denominate its July 19, 2011, order as a judgment. L.F. p. 127.

On July 17, 2012, the Court of Appeals determined that the trial court abused its discretion in granting Respondent's motion for additur and ordering a new trial on the issue of damages. *See Badahman v. Catering St. Louis*, 2012 Mo. App. LEXIS 897 (Mo. App. E.D. July 17, 2012). The Court of Appeals ordered the trial court to reinstate the jury's verdict of $11,250 in actual damages. *Id.* On October 30, 2012, this Court granted Respondent's application for transfer.

ARGUMENT

I. The Trial Court Did Not Abuse its Discretion in Finding That the Jury's Award of Damages Was Against the Weight of the Evidence (Point I).

A. Standard of Review

A trial court's authority to order additur emanates from section 537.068 of the Missouri Revised Statutes. Section 537.068 was enacted by the Missouri legislature in 1987 in response to this Court's decision in *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99 (Mo. 1985), which abolished the practice of remittitur in Missouri. As part of that statute, in addition to reinstating remittitur, the legislature gave trial courts the authority to "increase the size of a jury's award if the court finds that the jury's verdict is inadequate because the amount of the verdict is less than fair and reasonable compensation for plaintiff's injuries and damages." Mo. Rev. Stat. § 537.068. Although section 537.068 "does not expressly use the term 'additur,' traditional additur was clearly intended by the juxtaposition with remittitur." *Tucci v. Moore*, 875 S.W.2d 115, 116 (Mo. 1994).

Before a trial court may order additur, it must make a preliminary determination that a new trial is warranted, either for good cause or because the verdict is against the weight of the evidence. *Tucci*, 875 S.W.2d at 116 (citing Mo. R. Civ. P. 78.01 and 78.02). In the present case, after weighing the evidence, the trial court found that the jury's award of $11,250 to Respondent was inadequate and that a new trial on the issue of damages was warranted. L.F. p. 115. A trial court's determination that a verdict is inadequate "has long and repeatedly been held to be tantamount to a ruling that such

verdict is against the weight of the evidence." *Friedman v. Brandes*, 439 S.W.2d 490, 492 (Mo. 1969). This is clear from the trial court's order, in which the trial court stated that the jury's verdict was "surely against the weight of the evidence." L.F. p. 115.

Once a trial court determines that additur is appropriate, it has two options—it can increase the amount of the verdict with the defendant's consent, or it can order a new trial. *Massman Constr. Co. v. Missouri Highway & Transp. Comm'n*, 914 S.W.2d 801, 803 (Mo. 1996). In either case, the trial court has made a ruling on the weight of the evidence, which is "peculiarly within the discretion of the trial court." *Slusher v. United Electric Coal Cos.*, 456 S.W.2d 339, 340 (Mo. 1970). A trial court's ruling that a verdict was against the weight of the evidence is presumptively correct, *State ex rel. State Highway Comm'n v. Vaught*, 400 S.W.2d 153, 155 (Mo. 1966), and will not be reversed except in the case of a manifest abuse of discretion. *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 250 (Mo. 2006).

"The trial court's broad discretion in this regard results from its inherent superiority, vis-a-vis the appellate courts, in weighing the evidence adduced at trial." *O'Neal v. Agee*, 8 S.W.3d 238, 241 (Mo. App. E.D. 1999). "As long as plaintiff makes a submissible case, the court's grant of a motion for new trial on this ground is virtually unfettered." *Brown v. Lanrich, Inc.*, 950 S.W.2d 235, 237 (Mo. App. E.D. 1997). As the Court of Appeals noted in *Pisha v. Sears Roebuck & Co.*, 496 S.W.2d 280 (Mo. App. 1973), "[t]he outer perimeter of discretion possessed by trial courts is best exemplified when a new trial is granted on the ground the verdict is against the weight of the evidence." 496 S.W.2d at 284.

This Court has repeatedly held that in reviewing a trial court's ruling on the weight of the evidence, whether the ruling results in additur, remittitur, or a new trial, appellate courts must view the evidence and all reasonable inferences therefrom in the light most favorable to the trial court's decision. *See Morris v. Israel Bros., Inc.*, 510 S.W.2d 437, 447 (Mo. 1974); *Combs v. Combs*, 295 S.W.2d 78, 80 (Mo. 1956); *Sanders v. Illinois Cent. R.R. Co.*, 270 S.W.2d 731, 738 (Mo. 1954); *Nix v. Gulf, Mobile & Ohio R.R. Co.*, 240 S.W.2d 709, 712-13 (Mo. 1951); *Steuernagel v. St. Louis Pub. Serv. Co.*, 238 S.W.2d 426, 431-32 (Mo. 1951). This is because "[t]he trial court had the right to consider and weigh the conflicting evidence offered by defendant and to evaluate all of the evidence in the light of the trial court's opportunity to see, hear and observe plaintiff and the various witnesses who testified." *Steuernagel*, 238 S.W.2d at 431. By contrast, it is well-settled in Missouri that appellate courts are not permitted to weigh the evidence. *See Slusher*, 456 S.W.2d at 340; *Plas-Chem Corp. v. Solmica, Inc.*, 434 S.W.2d 522, 527 (Mo. 1968).

Despite these well-established principles of law, Appellants contend that in determining whether a trial court has abused its discretion in ordering additur or remittitur, an appellate court must view the evidence in the light most favorable to the verdict. *See Substitute Brief of the Appellants*, p. 14. In support of their argument, Appellants rely upon *Wiley v. Homfeld*, 307 S.W.3d 145 (Mo. App. W.D. 2009), a decision from the Western District of the Court of Appeals that appears to have completely eviscerated the authority of trial courts to make discretionary determinations as to whether verdicts are against the weight of the evidence. Respondent submits that

Wiley was wrongly decided, conflicts with this Court's precedent, and does not accurately reflect the appropriate standard of review.

In *Wiley*, the plaintiff obtained a verdict of $400,000 on her negligence claim against the defendant. 307 S.W.3d at 147. The defendant then filed a motion for new trial, judgment notwithstanding the verdict, and/or remittitur. *Id.* The trial court denied the motions for new trial and judgment notwithstanding the verdict, but ordered that the jury's verdict be remitted by $300,000. *Id.* After the remittitur, the trial court entered judgment in favor of the plaintiff in the amount of $100,000.[2] *Id.*

On appeal, the Court of Appeals recognized the trial court's authority to order remittitur pursuant to section 537.068. *Id.* at 148. However, instead of giving deference to the trial court's findings regarding the weight of the evidence, the Court of Appeals essentially conducted a *de novo* review by placing itself in the same position as the trial court. The court held that when reviewing a trial court's grant of remittitur, it "must first review whether the trial court had the statutory authority under § 537.068 to remit the jury's verdict." *Id.* at 148. The only way to do that, in the court's opinion, was to "view the evidence in the light most favorable to the verdict, as the trial court was required to do

[2]Although *Wiley* involved remittitur rather than additur, Missouri courts have traditionally analyzed additur and remittitur the same way because the "doctrine of additur is a corollary of remittitur, and encompasses the same principles." *See Norris v. Barnes*, 957 S.W.2d 524, 528 n.3 (Mo. App. W.D. 1997).

in assessing whether the jury's verdict was supported by the evidence."[3] *Id.* After viewing the evidence in this manner, the Court of Appeals found that the trial court abused its discretion in ordering remittitur and entered judgment in favor of the plaintiff in the amount of the original jury verdict. *Id.* at 152.

Recognizing that the foregoing standard conflicted with the holdings of several decisions from this Court, including *Steuernagel*, *supra*, the Court of Appeals attempted to justify its newly-created standard by finding that this Court, in *Firestone*, overruled those decisions *sub silentio*. *Wiley*, 307 S.W.3d at 148-49. According to the Court of Appeals, this Court's citation to *Dodd v. Missouri-Kansas-Texas R.R. Co.*, 193 S.W.2d 905 (Mo. 1946), in the *Firestone* decision constituted "a clear rejection of *Steuernagel*

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[3]*Wiley* involved a situation where there was a final judgment that required the plaintiff to remit a portion of the jury's verdict. It is not clear from the Court of Appeals' decision in *Wiley* whether the court would use the same standard of review in a case where the trial court found that additur or remittitur was appropriate, but ultimately ordered a new trial after one of the parties refused to consent to additur or remittitur, as in the present case. Respondent submits that the standard of review should be the same in both situations because regardless of the outcome, the trial court's order is premised upon its finding that the verdict is against the weight of the evidence. Nevertheless, in the event this Court finds that different standards of review should be used, the trial court in the present case did not actually enter a judgment requiring additur and, therefore, *Wiley* is inapplicable.

and the other prior cases that had reviewed remittitur in the light most favorable to the trial court."[4] *Wiley*, 307 S.W.3d at 148-49.

There are at least two significant flaws in the Court of Appeals' analysis in *Wiley*. First, there is nothing in the *Firestone* decision that indicates which standard of review this Court was using in reviewing the order of remittitur in that case, and it was inappropriate for the court in *Wiley* to assume, without any rational basis, that this Court was changing a standard of review that had been in place for decades. Most of the evidence in *Firestone* regarding the plaintiff's damages appears to have been undisputed and the decision does not describe the basis for the trial court's determination that remittitur was appropriate. *Firestone*, 693 S.W.2d at 108-09. The only evidence that was in dispute, and the only possible ground for remittitur cited by the defendants, related to the discount rate to be used to reduce the plaintiff's future damages to present value. *Id.* at 109. However, this Court was unable to determine which discount rate was reflected in the jury's verdict and found that "the discount rates established no ground for

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[4]In *Dodd*, this Court held that "[i]n 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." 193 S.W.2d at 907. Five years later, in *Steuernagel*, this Court stated that the "Court in the *Dodd* case actually applied the 'abuse of discretion' rule applicable to the trial court, instead of the rule applicable to appellate courts, previously stated in the opinion." 238 S.W.2d at 431.

remittitur." *Id.* Therefore, the Court determined that the evidence did "not authorize a trial court in the exercise of reasonable discretion to order any portion of [the jury's award] remitted" and reinstated the verdict. *Id.* at 110. It is entirely possible that this Court viewed the evidence in the light most favorable to the trial court's order and was simply unable to find any evidence to support the trial court's finding that the verdict was against the weight of the evidence.

The second significant flaw in the Court of Appeals' analysis in *Wiley* is the conclusion that this Court overruled *Steuernagel* and similar cases *sub silentio* when there is no clear indication in *Firestone* that this Court was changing the applicable standard of review. As the Court of Appeals noted in *Carter v. Kinney*, 1994 Mo. App. LEXIS 1514 (Mo. App. W.D. Sept. 27, 1994), this Court does, on occasion, change the law *sub silentio*, but it "frequently expressly declares that it is changing the law when it does so." 1994 Mo. App. LEXIS 1514, at *8-9. As noted previously, this Court did not state which standard of review it was using in *Firestone*. Although the Court cited *Dodd* in its decision, it did not quote any language from *Dodd* and it certainly did not indicate any intent to change the standard of review in cases involving a trial court's discretionary power to weigh the evidence.

Trial courts have long had the authority to order new trials in cases where the verdict is against the weight of the evidence. *See Watts v. Lester E. Cox Medical Ctrs.*, 376 S.W.3d 633, 638 (Mo. 2012) ("By the late 1600s, the English common law authorized judges to exercise control over juries by granting new trials in cases in which the verdict was deemed inconsistent with the evidence."). Section 537.068 does nothing

to change that authority, but merely gives trial courts additional options to avoid the expense and delay associated with further trials. *See McCormack v. Capital Elec. Constr. Co.*, 159 S.W.3d 387, 394 (Mo. App. W.D. 2004). The *Wiley* decision inexplicably creates different standards of review depending upon whether the trial court orders a new trial or instead orders additur or remittitur, even though, in both cases, the trial court's order is based upon a finding that the verdict was against the weight of the evidence. Such a practice may result in even more confusion and inconsistency than what this Court attempted to eliminate in *Firestone*. *See Firestone*, 693 S.W.2d at 110 (finding that application of remittitur had been "frought with confusion and inconsistency").

The *Wiley* decision would also give appellate courts authority to determine on their own whether a verdict is against the weight of the evidence, a task which this Court has held on multiple occasions is within the exclusive province of the trial court. *See, e.g., Beesley v. Howe*, 478 S.W.2d 649, 653 (Mo. 1972). As Judge Welsh stated in his dissenting opinion in *Wiley*:

> "The issue regarding the proper standard of review then dissolves into a single determination of who is in the better position to determine whether the jury's verdict is against the weight of the evidence, this court on the record before us or the trial judge who presided over the trial. It is difficult to justify substituting the judgment of judges who review the evidence on the cold, impersonal record for that of the judge who presided over the trial and heard and observed the witnesses and parties during the trial."

Wiley, 307 S.W.3d at 160 (Welsh, J., dissenting). For the foregoing reasons, this Court should overrule *Wiley* as wrongly decided and apply the standard of review previously set forth by this Court in *Steuernagel* and its progeny.

Appellants have also cited *Crawford v. Shop 'n Save Warehouse Foods, Inc.*, 91 S.W.3d 646 (Mo. App. E.D. 2002), and *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126 (Mo. App. E.D. 1999), to support their argument that this Court should review the evidence in the light most favorable to the verdict. A close examination of those cases, however, shows that neither supports the standard of review urged by Appellants.

In *Crawford*, the Court of Appeals did not expressly state which standard of review it was using. In addition, the Court of Appeals' finding that the trial court abused its discretion in ordering remittitur had nothing to do with the trial court's weighing of the evidence, but was based upon the Court of Appeals' determination that the trial court misapplied the law with regard to the proof necessary to recover certain types of damages. *Crawford*, 91 S.W.3d at 652-53. Therefore, *Crawford* is inapposite to the present case.

In *Hatch*, the trial court found that the verdict was supported by the evidence and *denied* the defendants' motion for remittitur, which is an important distinction from the case at bar. *Hatch*, 990 S.W.2d at 131. Because the trial court in *Hatch* had already determined that the verdict was supported by the evidence and was not excessive, the Court of Appeals, by limiting its review to evidence supporting the verdict, was actually viewing the evidence in the light most favorable to the trial court's ruling.

In *Sanders, supra*, this Court explained the difference between reviewing a trial court's decision to uphold a verdict and reviewing a trial court's determination that a verdict is against the weight of the evidence:

> "Where the trial court has let the verdict stand, it is the duty of the appellate court to consider the evidence which tends most strongly to support the verdict, and to disregard conflicting evidence. But where, as in this case, the trial court has ruled the motion for a new trial upon the amount of the verdict and thus upon the weight of the evidence, the appellate court . . . will not be concerned with the amount of the verdict, but will rather look to see whether the evidence, *viewed in its most favorable light for upholding the action of the trial court,* does in fact afford reasonable and substantial support for the trial court's order or remittitur."

270 S.W.2d at 738 (emphasis added) (internal citations omitted). *Accord Voss v. Anderson*, 745 S.W.2d 189, 192 (Mo. App. E.D. 1987); *Goodin v. May*, 474 S.W.2d 33, 35-36 (Mo. App. 1971).

As the foregoing discussion demonstrates, the appropriate standard for this Court to use is to review the evidence in the light most favorable to the trial court's ruling. If the evidence, viewed in this manner, reasonably supports the trial court's decision, then there has been no abuse of discretion and the trial court's judgment must be affirmed. *See Combs*, 295 S.W.2d at 80; *Sanders*, 270 S.W.2d at 738.

B. Viewing the Evidence in the Light Most Favorable to the Trial Court's Ruling Does Not Infringe upon the Right to Trial by Jury as Provided by the Missouri Constitution.

In an attempt to support the standard of review that they propose, Appellants contend that viewing the evidence in the light most favorable to the trial court's ruling would violate article I, section 22(a) of the Missouri Constitution, which provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate . . ." MO. CONST. art. I, § 22(a). To bolster their argument, Appellants have cited this Court's recent decision in *Watts, supra*, as well as several cases from other jurisdictions. Those cases, however, all involve the constitutionality of legislatively-imposed damage caps or limits on judicial discretion, neither of which are at issue in the present case.

In *Watts*, this Court held that section 538.210 of the Missouri Revised Statutes, which limits the amount of damages that a plaintiff can recover in a tort action against a health care provider, is unconstitutional because it violates the constitutional right to trial by jury. 376 S.W.3d at 637-46. Nowhere in that decision did the Court question the discretionary authority of trial courts to determine whether a verdict is consistent with the evidence presented at trial, which is what the trial court did in the present case. To the contrary, the Court noted in *Watts* that the English common law, upon which Missouri's common law is based, recognized by the late 1600s that trial courts had such authority. *Id.* at 638.

This Court has previously addressed the constitutionality of section 510.330 and Rule 78.02, which recognize the authority of trial courts to grant new trials on weight of

the evidence grounds. In *Gentry v. Douglas*, 744 S.W.2d 788 (Mo. 1988), the jury returned verdicts in favor of the defendant. 744 S.W.2d at 789. The trial court then granted the plaintiff's motion for a new trial on the ground that the verdicts were against the weight of the evidence. *Id.* On appeal, the defendant argued that section 510.330 and 78.02 deprived him of his right to a trial by jury under article I, section 22(a) "because they encourage trial judges to substitute their feelings concerning credibility of witnesses for the findings of the jury and thereby violate the traditional role of juries as fact finders." *Id.* at 789-90.

In its decision, this Court noted that a trial court's discretion to grant a new trial on weight of the evidence grounds is "firmly entrenched in Missouri law." *Id.* at 789. Furthermore, in explaining the rationale for deferring to the trial court's decision regarding the weight of the evidence, the Court stated that "[t]he trial court is in the best position to weigh the quality and quantity of the evidence and to determine whether justice has been done." *Id.* at 790. In fact, according to the Court, a trial court's discretion to order a new trial on the ground that the verdict is against the weight of the evidence is necessary to *protect* the right to trial by jury. *Id.* at 790. For these reasons, the Court found that section 510.330 is constitutionally valid. *Id.*

If trial courts are permitted under the Missouri Constitution to order new trials when the verdict is against the weight of the evidence, then there can certainly be no constitutional violation for appellate courts to defer to the trial courts' discretion under those circumstances. Requiring appellate courts to view the evidence in the light most favorable to the jury's verdict, as Appellants propose, would essentially convert the

standard of review into a *de novo* review and would ignore the superior ability of the trial court to hear, observe, and weigh the evidence at trial.

Appellants assert that the standard of review urged by Respondent would "destroy the presumption of correctness attaching to the jury verdict, and replace it with the presumption that the trial court was correct in granting additur (or remittitur)." *See Substitute Brief of the Appellants*, p. 24. As an initial matter, the trial court in the present case did not actually order additur. It found that additur was appropriate, but ultimately ordered a new trial on the issue of damages after Appellants refused to consent to additur. Moreover, Appellants ignore the well-established principle under Missouri law that a trial court's order granting a new trial on the ground that the verdict was against the weight of the evidence is *presumptively correct*. *See Vaught*, 400 S.W.2d at 155; *Warren Davis Properties V, L.L.C. v. United Fire & Casualty Co.*, 4 S.W.3d 167, 172 (Mo. App. S.D. 1999); *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 359 (Mo. App. E.D. 1993). Deferring to the trial court's judgment in situations where the trial court has the exclusive right to weigh the evidence after the jury has returned its verdict does not infringe upon the right to trial by jury provided by article I, section 22(a) of the Missouri Constitution.

C. The Trial Court's Order Granting Respondent a New Trial on the Issue of Damages Should Be Affirmed Because the Evidence in the Record Provides Reasonable and Substantial Support for the Trial Court's Order.

After considering and weighing the evidence presented at trial, the trial court found that the jury's award of $11,250 in damages was inadequate because it was less than fair and reasonable compensation and was "surely against the weight of the

evidence." L.F. p. 115. As the trial court noted, the evidence of Respondent's lost wages was uncontradicted. *Id.* The trial court also found that the jury's verdict was not the result of passion or prejudice, but rather was the result of an honest error by the jury. *Id.*

The evidence in the record provides reasonable and substantial support for the trial court's decision and, therefore, its judgment should be affirmed. At trial, the jury unanimously found that Appellants terminated Respondent's employment because of her disability and that Respondent sustained damages as a result of her termination. L.F. p. 87. There is no question that Respondent made a submissible case on her claim for damages. The evidence at trial was undisputed that Appellants terminated Respondent's employment on August 1, 2008, and that Respondent was receiving a salary of $45,000 per year at the time of her termination. Respondent testified that she was unemployed for about two months before she found a job as a Practice Manager for Gateway Healthcare, which paid only $27,000 per year. Tr. pp. 86-87. After working for Gateway Healthcare for about eight months, Respondent went to work as a Practice Manager for Rashid Dalal, M.D., where she earned a salary of $33,000 per year. Tr. pp. 87-88. Respondent still held that job at the time of trial. Tr. p. 88.

Respondent's testimony about her subsequent employment and earnings was corroborated by tax records and W-2 forms that the trial court admitted into evidence without objection from Appellants. Tr. pp. 88-92; Trial Exhibits 23-27. Respondent also offered into evidence, and the trial court admitted, a spreadsheet showing that Respondent sustained a total of $44,979.72 in lost wages as a result of her termination by Appellants. Tr. pp. 92-93; Trial Exhibit 28. There was no evidence at trial that

Respondent's economic damages resulted from anything other than her termination by Appellants, and Appellants never disputed the accuracy of Respondent's calculations. As the trial court properly found, the evidence that Respondent sustained lost wages in the amount of $44,979.72 was uncontradicted. L.F. p. 115. Respondent clearly made a submissible case on her claim for damages and the trial court was well within its discretion in determining that the jury's award of damages was against the weight of the evidence.

Appellants emphasize in their brief that it is up to the jury to decide whether Respondent lost wages as a result of Appellants' discriminatory conduct and, if so, in what amount. While it is true that "the determination of damages is principally the jury's decision," *Tomlin v. Guempel*, 54 S.W.3d 658, 660 (Mo. App. E.D. 2001), it is equally true that the jury's decision regarding damages "is always subject to the supervisory power of the trial court to determine whether or not the verdict is against the weight of the evidence." *Williams v. Funke*, 428 S.W.2d 11, 17 (Mo. App. 1968).

In an effort to show that the trial court abused its discretion in ordering a new trial on the issue of damages, Appellants have identified a number of possible explanations for the jury's award of damages. *See Substitute Brief of the Appellants*, pp. 28-29. For example, Appellants contend that the jury could have found that Respondent lost wages only for the period when she was unemployed, or that Respondent failed to prove that her lost wages were the result of discrimination by Appellants. As discussed previously, however, the evidence must be viewed in the light most favorable to the trial court's order. By considering Appellants' possible explanations, this Court would be doing

exactly the opposite and would also be weighing the evidence, which "are both contrary to what is permissible for an appellate court to do in deciding causes of this character." *Goodin,* 474 S.W.2d at 36. As the court noted in *Goodin*, appellate courts must "blind [themselves] to all proof offered in opposition to plaintiff's testimony of personal injuries and special damages, and accept at face value all of plaintiff's evidence relative to the nature and extent of his injuries and damages." *Id.* Respondent unquestionably presented evidence at trial to support her contention that her lost wages amounted to $44,979.72. Therefore, the trial court did not abuse its discretion in finding that the jury's award was against the weight of the evidence.

Appellants have cited *Root v. Manley*, 91 S.W.3d 144 (Mo. App. E.D. 2002), and *Tomlin v. Guempel*, *supra*, to support their argument that the trial court abused its discretion. Those cases, however, are distinguishable because they involved a different procedural posture than the present case. In both *Root* and *Tomlin*, the trial court *denied* the plaintiffs' motions for additur and for new trial and, thus, a different standard of review applied. *See Root*, 91 S.W.3d at 145-46; *Tomlin*, 54 S.W.3d at 660. When a party appeals a trial court's *denial* of a motion for new trial alleging inadequacy of damages, "the jury's exercise of its discretion is conclusive unless the verdict is so shockingly inadequate as to indicate that it is the result of passion and prejudice or a gross abuse of its discretion." *Leasure v. State Farm Mut. Auto. Ins. Co.*, 757 S.W.2d 638, 640 (Mo. App. W.D. 1988). By contrast, in the present case, the Court need only determine whether Respondent made a submissible case on her claim for damages. *See Brown*, 950 S.W.2d at 237.

Relying upon *Ralph v. Lewis Bros. Bakeries, Inc.*, 979 S.W.2d 509 (Mo. App. S.D. 1998), Appellants also contend that there was no basis for the trial court to have found that additur was appropriate because the instruction submitted to the jury regarding damages did not instruct the jury that it must award Respondent lost wages for the period of time that she was unemployed *and* the period of time when she was earning a lower salary than she earned while employed by Appellants. Appellants' reliance upon *Ralph* is misplaced.

In *Ralph*, the plaintiff obtained a verdict in his favor on his claim of retaliatory discharge. 979 S.W.2d at 511. On appeal, the defendant argued that a new trial or remittitur was required because the jury improperly awarded the plaintiff damages for lost income after he became disabled and was no longer able to work. *Id.* at 516. The Court of Appeals held that the defendant essentially waived that argument because it never objected to the damage instruction as being a misstatement of the law and never offered an alternate instruction. *Id.* at 517. The Court of Appeals found that there was ample evidence to support the jury's verdict based on the instruction given because the jury was never instructed that it could not award the plaintiff damages for the period of time when he was unable to work. *Id.* at 516-17.

The critical distinction between *Ralph* and the present case is that in the present case, as the trial court found, the jury's award of damages was *not* supported by the evidence presented at trial and the instruction given. The uncontroverted evidence at trial showed that Respondent lost $44,979 in wages as a result of her termination by Appellants and Respondent's counsel asked the jury to compensate Respondent for the

full amount of her lost wages. Tr. pp. 447-48. Furthermore, the jury was instructed pursuant to Missouri Approved Instruction (MAI) 4.01 that if it found in favor of Respondent, it must award her such sum as it believed would fairly and justly compensate her for any damages that the jury believed she sustained as a direct result of the occurrence mentioned in the evidence.[5] *See Appendix to Substitute Brief of the Appellants*, p. A15. The trial court, in its order, found that there was nothing in the

[5]Appellants' argument on this point is completely inconsistent. On the one hand, Appellants contend that neither a new trial nor additur was appropriate because Respondent did not ask for a jury instruction that would have required the jury to award her damages in an amount that was at least as much as her claimed lost wages. *See Substitute Brief of the Appellants*, p. 34. On the other hand, Appellants recognize that it would have been error for the trial court to have given such an instruction to the jury. *Id.* Rule 70.02(b) states that "[w]henever Missouri Approved Instructions contain an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject." Mo. R. Civ. P. 70.02(b). There is no dispute that MAI 4.01 was the appropriate instruction to give in this case, and there is nothing contained in the Notes on Use for MAI 4.01 that would have authorized the parties to modify that instruction. As this Court held in *Brown v. St. Louis Public Service Co.*, 421 S.W.2d 255 (Mo. 1967), an unnecessary modification to MAI 4.01 constitutes error and will be presumed to be prejudicial. 421 S.W.2d at 259.

evidence that would have justified the jury awarding damages in an amount less than $44,979 and that the jury's verdict was, therefore, against the weight of the evidence. The Court of Appeals' decision in *Ralph* is clearly distinguishable from the present case and does not aid Appellants' argument.

As the foregoing discussion demonstrates, Respondent made a submissible case on her claim for damages and Appellants have failed to establish that the trial court abused its discretion in finding that the jury's award of damages was against the weight of the evidence and ordering a new trial on the issue of damages. Therefore, the trial court's judgment should be affirmed.

II. Mo. Rev. Stat. § 537.068 Does Not Violate the Right to Trial by Jury Provided by the Missouri Constitution (Point II).

A. Standard of Review

Appellants contend that section 537.068 infringes upon their right to trial by jury as provided by article I, section 22(a) of the Missouri Constitution. "Constitutional challenges to a statute are reviewed de novo." *Sanders v. Ahmed*, 364 S.W.3d 195, 202 (Mo. 2012). "A statute is presumed to be constitutional and will not be held unconstitutional unless it clearly and undoubtedly contravenes the constitution." *Id.* "The courts will enforce a statute unless it plainly and palpably affronts fundamental law embodied in the constitution." *Id.* "The party claiming that the statute is unconstitutional bears the burden of proof." *Id.*

B. The Validity of Section 537.068 is a Moot Issue Because Appellants Refused to Consent to Additur.

In *Tucci*, *supra*, this Court held that additur "inherently has two components: (1) a finding that a new trial is required unless (2) the defendant consents to increasing the judgment." 875 S.W.2d at 116. *See also* Mo. R. Civ. P. 78.10(b) (stating that "the court's order shall afford each party opposing [additur] the option to file an election of a new trial"). In the present case, the trial court determined that a new trial on the issue of damages is required because the jury's award of damages was against the weight of the evidence. L.F. p. 114. In addition, the trial court gave either party the right to elect a new trial on the issue of damages rather than consent to additur. L.F. pp. 114-16.

Appellants chose not to consent to additur and instead elected a new trial on the issue of damages. L.F. p. 118. As a result, even though the trial court made a preliminary determination that additur was appropriate, the trial court ultimately did not order additur and simply ordered a new trial on the issue of damages. L.F. p. 117. The only issue in this appeal, therefore, is whether the trial court erred in granting a new trial. *See Brown*, 950 S.W.2d at 236-37 (limiting review to question of whether trial court properly granted new trial on the issue of damages after defendant declined additur). *See also Stephenson v. Upper Valley Family Care, Inc.*, 2008 Ohio App. LEXIS 2425, at *21 (Ohio Ct. App. June 13, 2008) ("When an additur is rejected, its amount in relation to the evidence or whether the court erred in providing for or arriving at the amount of the additur is moot."); *State ex rel. Herman v. Southern Ariz. Land Co.*, 424 P.2d 181, 183 (Ariz. Ct. App. 1967) (holding that issue regarding constitutionality of additur was moot

because the defendant "failed to accept additur suggested by the trial court, and a new trial has been granted"). Because Appellants refused to consent to additur in the present case, the validity of section 537.068 is not ripe for review and this Court should decline to address that issue.

C. Section 537.068 Does Not Infringe Upon the Constitutional Right to Trial by Jury Because the Parties Must Consent to Additur.

In the event this Court decides to address the constitutionality of additur in Missouri, it is clear that additur does not violate the Missouri Constitution because additur cannot be forced upon a party without that party's consent. Therefore, Appellants' argument that section 537.068 is unconstitutional must be rejected.

No Missouri appellate court has addressed this precise issue. In support of their argument, Appellants rely primarily on the United States Supreme Court's decision in *Dimick v. Schiedt*, 293 U.S. 474, 55 S. Ct. 296, 79 L. Ed. 603 (1935), which held that additur violates the Seventh Amendment to the United States Constitution. 293 U.S. at 486.

The Seventh Amendment, of course, is not applicable to the states. *Rice v. Lucas*, 560 S.W.2d 850, 857 (Mo. 1978). Moreover, there is a significant difference between the Seventh Amendment and article I, section 22(a) of the Missouri Constitution. The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and no fact tried by a jury shall be otherwise re–examined in any Court of the United States, than according to the rules of the common law.*" U.S. CONST. amend. VII (emphasis added).

As other courts have recognized, the language at the end of the Seventh Amendment was a significant factor in the Supreme Court's decision in *Dimick*. *See Drummond v. Mid-West Growers Coop. Corp.*, 542 P.2d 198, 206 (Nev. 1975); *Kraas v. American Bakeries Co.*, 164 So. 565, 568 (Ala. 1935). No such language appears in article I, section 22(a).

More importantly, however, "[w]hile the right to a jury trial in a civil action at law is guaranteed, it is a personal right which may be waived." *Meadowbrook Country Club v. Davis*, 421 S.W.2d 769, 772 (Mo. 1967). As noted previously, a trial court cannot order additur based solely upon the plaintiff's request; the defendant must also consent to additur. *See, e.g., Horizon Mem. Group, L.L.C. v. Bailey*, 280 S.W.3d 657, 672 (Mo. App. W.D. 2009) (recognizing that "the circuit court can order a remittitur but cannot compel it"). This procedural safeguard ensures that the defendant will not be involuntarily deprived of its right to have a jury decide disputed issues of fact regarding damages. If the defendant consents to additur, then it waives its right to a jury trial and there is no constitutional violation. Conversely, if the defendant refuses to consent to additur, then it receives exactly what the Missouri Constitution guarantees—the right to trial by jury.

The importance of consent was recognized by Missouri appellate courts as far back as 1883 in the case of *Kortjohn v. Altenbernd*, 14 Mo. App. 342 (Mo. App. 1883). In that case, after a jury found in favor of the defendant, the trial court issued an order stating that unless the defendant consented to a judgment against him in the amount of six dollars, the plaintiff's motion for a new trial would be sustained. 14 Mo. App. at 343. Upon reviewing the trial court's order, the Court of Appeals stated that "it is against all

principle of jury trials that, where a verdict has been rendered for defendant, the court shall set aside that verdict, and *without the consent of both parties* find for plaintiff, and determine the amount of his damage." *Id.* at 344-45 (emphasis added). Consent of the parties is critical, which is what makes the use of additur constitutionally permissible.

Cases from other jurisdictions that have addressed this issue are persuasive. For example, in *Genzel v. Halvorson*, 80 N.W.2d 854 (Minn. 1957), the Supreme Court of Minnesota was asked to decide whether additur infringed upon the constitutional guarantee of a jury trial. 80 N.W.2d at 856. The Minnesota Constitution, like the Missouri Constitution, provides that "the right of trial by jury 'shall remain inviolate.'" *Id.* at 858 (quoting MINN. CONST. art. 1, § 4). After examining authorities from Minnesota and other jurisdictions, the court concluded that "the trial court was within its constitutional power in raising the amount of damages *with the consent of the defendant.*" *Id.* at 859 (emphasis added).

Similarly, in *Adams v. Wright*, 403 So. 2d 391 (Fla. 1981), the Supreme Court of Florida rejected the defendants' argument that the additur statute abridged their right to a jury trial. As the court noted,

> "The statute clearly provides for a new trial in the event the party adversely affected by the remittitur or additur does not agree with the remittitur or additur. In other words, the complaining party need not accept the decision of the judge with respect to remittitur or additur. The party may have the matter of damages submitted to another jury. Defendants' attack on the constitutionality of the statute is without merit."

403 So. 2d at 395. The highest courts in other jurisdictions have also concluded that additur passes constitutional muster as long as the party opposing additur has the option to either consent to additur or elect a new trial. *See Supinger v. Stakes*, 495 S.E.2d 813, 816 (Va. 1998); *McCall v. Waer*, 487 S.W.2d 308, 310 (Tenn. 1972); *Caudle v. Swanson*, 103 S.E.2d 357, 363 (N.C. 1958); *Fisch v. Manger*, 130 A.2d 815, 823 (N.J. 1957); *Markota v. East Ohio Gas Co.*, 97 N.E.2d 13, 17-18 (Ohio 1951).

Even in *Dimick*, the problem was that the plaintiff never requested additur and yet the district court ordered additur with the consent of the defendant only. *See Dimick*, 293 U.S. at 475 (noting that plaintiff's "consent was neither required nor given"). That was a crucial fact upon which the Supreme Court relied in finding that the use of additur was unconstitutional, as reflected in the following passage:

> "When . . . the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, *with the consent of the defendant only*, may, by assessing an additional amount of damages, 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? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'"

293 U.S. at 486 (emphasis added).

As the trial court in the present case correctly noted in its order, "additur in Missouri is very different than the additur found wanting in *Dimick*" because of the requirement of consent. L.F. p. 114. If the plaintiff in *Dimick* had requested additur and the defendant consented to it, the outcome of that case would likely have been much different. This is confirmed by the fact that even after *Dimick* was decided, federal courts have found additur to be appropriate in cases where the parties have given their consent. *See, e.g., Clay v. Gordon*, 2000 U.S. App. LEXIS 2097, at *9 (6th Cir. Feb. 10, 2000) ("Federal courts, however, have recognized exceptions to the *Dimick* rule when the plaintiff consents to additur or the amount of damages is undisputed.").

Because this Court has held that a trial court can order additur only with the consent of the defendant, additur does not violate the right to trial by jury provided by the Missouri Constitution and there is no basis for Appellants' argument that section 537.068 is unconstitutional.

III. The Portion of Rule 78.10 of the Missouri Rules of Civil Procedure That Allows a Trial Court to Grant a New Trial as to Damages Only Does Not Violate the Right to Trial by Jury Provided by the Missouri Constitution (Point III).

Rule 78.10(b) of the Missouri Rules of Civil Procedure states that if a trial court sustains a motion for additur, the court's order "shall afford each party opposing such relief the option to file an election of a new trial" and "shall specify whether the new trial will be on damages or on all issues." Mo. R. Civ. P. 78.10(b). Appellants contend that Rule 78.10 is unconstitutional to the extent that it gives trial courts discretion to grant a

new trial as to damages only. According to Appellants, the trial court's failure to give them the option of electing a new trial as to all issues violated their right to trial by jury as provided by article I, section 22(a) of the Missouri Constitution.

As an initial matter, Appellants have waived their right to challenge the constitutionality of Rule 78.10. "It is firmly established that a constitutional question must be presented at the earliest possible moment 'that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived.'" *Meadowbrook, supra*, 384 S.W.2d at 612 (quoting *Securities Acceptance Corp. v. Hill*, 326 S.W.2d 65, 66 (Mo. 1959)). "To properly raise a constitutional question, one must: (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review." *United C.O.D. v. State of Missouri*, 150 S.W.3d 311, 313 (Mo. 2004).

On May 12, 2011, Appellants filed a memorandum in opposition to Respondent's motion for additur or, in the alternative, for a new trial on the issue of damages. L.F. p. 97. That was the first available opportunity for Appellants to argue that Rule 78.10 violates the Missouri Constitution. Appellants' memorandum, however, contains no such argument. *Id.* In fact, at no time while this case was pending in the trial court did Appellants ever suggest that Rule 78.10 is unconstitutional. Appellants failed to preserve this argument for appellate review and that argument is not properly before this Court.

Furthermore, there is no basis for Appellants' argument that Rule 78.10 violates article I, section 22(a) of the Missouri Constitution, to the extent that it allows a trial court to grant a new trial on less than all issues. This Court addressed this precise issue in *Lilly v. Boswell*, 242 S.W.2d 73 (Mo. 1951). In that case, the plaintiff, after obtaining a verdict in her favor, moved for a new trial on the issue of damages on the ground that the verdict was grossly inadequate. 242 S.W.2d at 74. The trial court granted the plaintiff's motion. *Id.* The defendants argued on appeal that the trial court's order constituted an abuse of discretion and an invasion of their "fundamental and inherent rights." *Id.* at 77.

In rejecting the defendants' argument, this Court cited the United States Supreme Court's decision in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188 (1931). In *Gasoline Products*, the Court held that the Seventh Amendment to the United States Constitution "does not prohibit the introduction of new methods for ascertaining what facts are in issue . . . or require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury." 283 U.S. at 498. This Court followed that reasoning in *Lilly* and held that "[t]here can be no sound reason for requiring a litigant to submit to the hazards and expense of resubmitting the issue of liability where the issue of damages can be tried anew without prejudice." *Lilly*, 242 S.W.2d at 78.

For these reasons, Appellants' argument that Rule 78.10 violates the Missouri Constitution must be rejected.

IV. The Trial Court Did Not Abuse its Discretion in Ordering a New Trial on the Issue of Damages Only (Point IV).

Appellants' final argument is that the trial court abused its discretion in ordering a new trial on the issue of damages only. The law is clear that "it is within the sound discretion of the trial court to determine whether all the issues or just a particular issue should be retried." *Phillips v. Lively*, 708 S.W.2d 369, 373 (Mo. App. W.D. 1986). "A new trial may be granted on less than all issues only when it is made to appear from the record that one or more issues have been properly considered and that a new trial limited to the remaining issue will not result in injustice or prejudice to the defendant." *Krygiel v. Don Darr Pontiac, Inc.*, 668 S.W.2d 267, 268 (Mo. App. E.D. 1984). "The trial court is presumed to have weighed and considered the evidence and the possibility of prejudice to the parties prior to rendering its decision regarding the extent of the new trial." *Phillips*, 708 S.W.2d at 373. "No one is better qualified than the judge who tried the case to determine whether justice requires a new trial of all the issues in the case or only of particular issues." *Id.* For this reason, "appellate courts have been 'liberal' in deferring to the trial court's action in the ordering of a new trial." *Id.* (quoting *Coonis v. City of Springfield*, 319 S.W.2d 523, 528 (Mo. 1958)).

In support of their argument, Appellants contend that "there will be no judicial economy achieved by trying only the issue of damages" and that "the issues of damages and liability are so intertwined that any new trial should be as to all issues, and not just limited to the issue of damages." *See Substitute Brief of the Appellants*, p. 51. However, as this Court has recognized, "[t]he mere fact that a new trial limited to damages only

will require some utilization of the evidence supporting liability is not a sufficient reason to require a new trial on all issues." *Burnett v. Griffith*, 769 S.W.2d 780, 791 (Mo. 1989). Furthermore, Appellants have not explained how they will be prejudiced if the jury is required to decide damages and not liability. To the contrary, Respondent is the one who will be prejudiced if she is required to give up her unanimous verdict and retry the issue of liability, when that issue has already been properly considered. *See Burnett*, 769 S.W.2d at 791 (finding that plaintiff was not required to risk his verdict on assault and battery claim "to question the propriety of the trial court's ruling prohibiting the punitive damages submission").

After hearing the evidence at trial, the trial court believed that Appellants would not be prejudiced by ordering a new trial solely on the issue of damages. The trial court's order is "presumed correct" and there is no basis for finding that the trial court abused its discretion in this case. *See Krygiel*, 668 S.W.2d at 268. Although there may be some overlap in the evidence regarding liability and damages, the trial court is certainly capable of determining which evidence from the prior trial is necessary to support Respondent's claim for damages and it will not be necessary to retry the entire case. *See Burnett*, 769 S.W.2d at 791. Therefore, the trial court's judgment should be affirmed.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court affirm the trial court's order and judgment granting Respondent a new trial on the issue of damages only.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations set forth in Rule 84.06(b). According to the word count function of Microsoft Word, the foregoing brief, from the Table of Contents through the Conclusion, contains 11,125 words.

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