IN THE
SUPREME COURT OF MISSOURI

No. SC92145

DEBORAH HERVEY

Respondent,

v.

MISSOURI DEPARTMENT OF CORRECTIONS

Appellant.

Transferred from the Court of Appeals, Western District

SUBSTITUTE REPLY BRIEF OF APPELLANT

CHRIS KOSTER
Attorney General
RONALD HOLLIGER
General Counsel
Missouri Bar No. 23359
JAMES R. WARD
Assistant Attorney General
Missouri Bar No. 43422
JULIANNE O. GERMINDER
Assistant Attorney General
Missouri Bar No. 60836
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Facsimile: (573) 751-9456
Julianne.Germinder@ago.mo.gov
ATTORNEYS FOR APPELLANT

Table of Contents

Table of Authorities

Cases

Statutes, Rules and Other Authorities

Appellant's Reply

Point I

Instruction No. 8, the verdict director, assumed disability, resulting in prejudicial error requiring reversal for new trial. Notably, Hervey confesses that it was mandatory that the verdict director require the jury to make a finding on the contested element that Hervey was disabled. (Substitute Brief of Respondent at 29, 38.) This Court consistently has held that if a verdict director omits a contested element, no additional prejudice is required. *See e.g., Lasky v. Union Electric Company*, 936 S.W.2d 797, 801 (Mo. banc 1997). Hervey does not even cite *Lasky,* wherein this Court instructed that a verdict director must explicitly hypothesize all disputed elements, and reversed for new trial because the director did not.

Despite *Lasky*, Hervey offers two arguments in an attempt to establish that the verdict director in this case was not prejudicial. First, Hervey contends that Instruction No. 8 did not assume disability because it did not refer to "plaintiff's" disability. Second, in a functional admission that Instruction No. 8 did assume disability, Hervey contends that the standard for reversal requires some showing of other or additional prejudice beyond the fundamental instructional defect that occurred here. Both arguments are without merit.

a. The assumption of "disability" under the verdict director.

Hervey does not – and cannot – sincerely argue that the verdict director actually hypothesized the issue of Hervey's disability. Instead, Hervey contends that Instruction No. 8 did not assume or imply the existence of disability because it did not refer to "*plaintiff's* disability." The argument is pure sophistry. Instruction No. 8 refers repeatedly to "plaintiff;" no one else's disability was at issue. Apparently, Hervey would agree that Instruction No. 8 assumed the existence of disability only if it told the jury that the element had been decided and that they did not need to bother with it. In any event, there are no magic words or structure that reveals a verdict director's assumption of ultimate facts. For example, in *Coon v. Dryden,* 46 S.W.3d 81, 92 (Mo. App. 2001), the verdict director was held to assume an ultimate fact (that plaintiff suffered from pelvic inflammatory disease) without the verdict director ever referencing the ultimate fact.

b. Hervey's contention that modification of MAI 31.24 would "invite meddling" is inconsistent with the MAI's requirement that an instruction correctly state the law.

Hervey's rationale against modifying MAI 31.24 to hypothesize the element of disability is ironic for at least two reasons. First, Hervey contends

that the modification would "invite meddling," even though it actually would advance the interests of simplicity and clarity advocated by Hervey. Second, Hervey expressly acknowledges that even an MAI "instruction must be a correct statement of the law" and that disability is a required element of a disability discrimination claim. (Substitute Brief of Respondent at 32, 29, and 38.) There is no choice but to modify, as this Court has made it clear that disability is a *threshold* issue that must be determined *before* considering whether a plaintiff's disability was a contributing factor. *See Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 821 (Mo. 2007).

c. A verdict director that assumes an ultimate, disputed fact is inherently prejudicial and requires a new trial.

Hervey's suggestion that the Court must assess whether Instruction No. 8 caused additional prejudice – beyond the fact that the director did not submit and separately enumerate a threshold issue – is contrary to every decision by this Court. *Spring* and its progeny make it clear that it is fundamentally prejudicial for a verdict director to assume a disputed element and to fail to separately enumerate it, because this removes its determination from the jury. This Court consistently has instructed that this elemental defect *alone* mandates reversal and remand for a new trial. *Spring v. Kansas City Area Tranp. Auth.*, 873 S.W.2d 224, 227 (Mo. banc 1994) ("Because the

verdict directing instruction assumed and thereby removed from the jury the determination of a disputed fact, the error was prejudicial."); *Harvey v. Washington*, 95 S.W.3d 93, 98 (Mo. banc 2003); *Lasky*, 936 S.W.2d at 801. Hervey's attempt to distinguish this Court's precedent based on tortured linguistics (i.e., that the director did not refer to "plaintiff's disability") is illogical and again ignores the requirement for the jury to specifically find as a matter of fact that plaintiff is disabled.

Hervey's substantial reliance on *Agribank FCB v. Cross Timbers Ranch, Inc.*, 919 S.W.2d 256, 262 (Mo. App. S.D. 1996) to argue for an alternate analysis of prejudice likewise is misplaced. That decision is inconsistent with this Court's holdings and has never been cited by this Court, including in its later decisions in *Lasky* and *Harvey*. Significantly, in those latter decisions, this Court did not engage in an analysis of matters beyond the verdict director to determine whether the assumption of a contested element was prejudicial. Rather, this Court's analysis in *Lasky* and *Harvey* was concise, focusing solely on whether the verdict director properly and explicitly hypothesized the essential, contested elements of the claim. If it did not, the director was prejudicially defective. *See generally Lasky*, 936 S.W.2d 797; *Harvey*, 95 S.W.3d 93. As for the other cases cited by Hervey to urge an alternate analysis of prejudice, none of them involved a verdict director that assumed an ultimate fact.

d. The prejudice of the verdict director was not cured by any of the alternate analyses suggested by Hervey.

Even if considered, the various alternate analyses of prejudice found under *Agribank* would not cure the prejudice caused by the verdict director in this case. For example, Hervey suggests that Instruction No. 9 (an affirmative converse based on MAI 31.25), cured any prejudice contained in the verdict director. This converse instruction did not cure any prejudice, however, because it did not hypothesize the element of disability. Indeed it is unclear how reference in that instruction to a "complaint of disability discrimination," as Hervey seems to allege, would make it clear to the jury that disability was a disputed fact that its members needed to determine. (*See* Substitute Brief of Respondent at 45-46.) Although an affirmative converse may be offered when an ultimate disputed fact is assumed in the verdict director, the cases that have found that an affirmative converse instruction provided a cure did so only when the converse explicitly required a finding on the assumed ultimate fact. *See Agribank,* 919 S.W.2d at 262; *McMullin v. Politte*, 780 S.W.2d 94, 95-96 (Mo. App. 1989); *Cantrell v. Farm Bureau Town & Country Ins. Co. of Mo.,* 876 S.W.2d 660, 666-667 (Mo. App.

1994).[1] Instruction No. 9 did not do so here. In any event, Defendant had no duty to cure the verdict director with an affirmative converse. *Hiers v. Lemley*, 834 S.W.2d 729, 735 n.3 (Mo. banc 1992).

It cannot be seriously argued that closing argument can cure the failure of a verdict director to instruct on all disputed elements. This plainly invites mischief. Certainly, the substance of closing arguments in this case shows the flaw in such logic. Closing arguments may flesh out and explain an instruction, but they cannot substitute for a proper instruction. *See* MAI

---

[1] *See Agribank,* 919 S.W.2d at 262 (Verdict director assumed holdover of property was willful and unauthorized. Court held the prejudice of the verdict director was cured by the affirmative converse, which required a finding for the defendant if the defendant was in possession due to an oral agreement.); *Cantrell,* 876 S.W.2d at 666-667 (Verdict director assumed that plaintiff's property was a total loss. Court held that the affirmative converse, which required a finding for defendant if jury did not believe that property was a total loss, cured any prejudice.); *McMullin*, 780 S.W.2d at 95-96 (Verdict director assumed ownership or maintenance of parking lot. The court upheld the affirmative converse which explicitly precluded liability if the jury found the plaintiff had fallen on a parking lot owned by someone other than the defendant.).

6th Ed., "How to Use this Book," at p. LII-LIII [2002]. Juries are told that closing arguments are just argument anyway, and there is no indication that closing arguments did anything here other than to enhance the prejudice.

Point II

a. The limited purpose of punitive damages belies Hervey's premise that the punitive damages cap should be affected by arbitrary amounts including attorneys' fees.

Punitive damages are allowed for the *limited* purpose of punishment and deterrence and they should not be inflated by arbitrary factors, including attorneys' fees. Hervey's attempt to distract from these core aims should be disregarded.

DOC agrees that the purpose of punitive damages is to punish and deter, but such damages are meant to punish and deter for the wrongdoing of the defendant. *Call v. Heard,* 925 S.W.2d 840, 847-850 (Mo. banc 1996). More specifically, "the amount of punitive damages must somehow be related to the *wrongful act* and the actual or potential injury resulting therefrom, although there is no fixed mathematical relation between the amount of *actual damages* and the amount of punitive damages awarded." *Id.* (emphasis added). Here, DOC simply requests that the "punishment fit the crime" – that the cap on punitive damages be calculated based on DOC's purported *wrongdoing*.

Hervey does not address DOC's assertion that including attorneys' fees in the calculation of the punitive damages cap is arbitrary because attorneys'

fees typically do not correlate to plaintiff's damages and sometimes are grossly disproportionate to them. In the instant matter, Hervey's attorneys' fees amounted to $97,382.50. For this sum, Hervey obtained a judgment that consisted of actual damages of $127,056 and front pay of $36,288. Under Hervey's logic, these three figures together produced a net amount of the judgment of $260,726.50. In accordance with DOC's position, by contrast, the net amount of the judgment would be $163,344.

Under Hervey's calculation of net amount of the judgment, the attorneys' fees comprised over 37% of the "net amount." Inclusion of the fees yields a net amount of the judgment over sixty percent larger than under DOC's calculation. Including attorneys' fees in the punitive damages multiplier, in turn, inflated the punitive damages cap by $486,912.50 (97,382.50 x 5 = 486,912.50).

The arbitrariness of including attorneys' fees in the "net amount of the judgment" is underscored by a recent case. In *Tate v. Autozoners, L.L.C.*, 2012 WL 394360 (Mo. App. February 8, 2012), the plaintiff was awarded only $10,000 in compensatory damages on her claim under the MHRA, yet, the court awarded attorneys' fees of $126,381.69 (after a request of $222,172.50).[2] *Id.* at *1-2. The attorneys' fees, thus, were more than twelve times the actual

[2] Costs were also awarded of $3,511.15. Since costs are not at issue in the instant matter, the analysis of *Tate* excludes any reference to costs.

damages awarded. If Hervey's argument were applied to *Tate*, the "net amount of the judgment" would be calculated at $136,381.69 (10,000 + 126,381.69 = 136,381.69).

If punitive damages had been awarded in *Tate*, Hervey's analysis would have authorized punitive damages capped at $681,908.45 (136,381.69 x 5 = 681,908.45). By including attorneys' fees in the calculation, Hervey's interpretation would have permitted recovery of punitive damages in *Tate* up to more than 68 times the plaintiff's actual damages of $10,000. Such a ratio is clearly excessive. Although courts have been reluctant to set concrete limits on the ratio between actual damages to the plaintiff and the punitive damages award, the United States Supreme Court has stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Auto Ins. Co v. Campbell*, 538 U.S. 408, 424 (2003).

Contrastingly, if DOC's interpretation of "net amount of the judgment" were applied in *Tate* to exclude attorneys' fees, it would result in punitive damages (under the multiplier) of no more than $50,000. This ratio of punitive damages to actual damages would be five to one, consistent with due process jurisprudence. The real-world decision in *Tate* underscores the egregiousness of including attorneys' fees in determining the "net amount of the judgment." Hervey offers no alternative analysis.

b. "Net amount of the judgment" requires certain deductions to be taken from the judgment to result in a net amount -- properly those amounts not retained by the plaintiff.

Hervey's analysis of "net judgment" cases also does not undermine DOC's premise that attorneys' fees should be deducted. Hervey cites cases which offset damages awarded against both parties to determine the net amount of the judgment, because such amounts would not be retained by the party to which they were awarded. *See, e.g. Harris v. Webbe Corp.*, 669 S.W.2d 578, 579 (Mo. App. 1984); (Substitute Brief of Respondent at 57-58.). Hervey's cited cases actually go to support DOC's argument. Both types of deductions have the same premise – i.e., that funds not retained by a party should not factor into a "net judgment." Here, DOC simply submits that all amounts which will not be retained by the party be subtracted to arrive at the "net amount of the judgment."

DOC does not dispute Hervey's use of the term "judgment." It is true that a judgment may include attorneys' fees, but the dispute in this case is the meaning of the phrase "net amount of the judgment." That is where DOC and Hervey cannot agree. Similarly, DOC does not dispute that attorneys' fees may be "awarded to the plaintiff." Because a plaintiff typically does not retain these fees, however, they should not be included in the "*net* amount of

the judgment awarded to the plaintiff."

Hervey's selective sampling of cases which use the term "net judgment" is not dispositive of how the phrase "net amount of the judgment" was intended under §510.265 RSMo.. DOC admits that various deductions may be made to arrive at a net judgment and submits that attorneys' fees should be one of those deductions. Indeed, the term "net judgment" has been used to refer to the net amount after reducing a judgment by attorneys' fees. *Murray v. Joslyn*, No. 01CV221164, 2003 WL 24141284 (Mo. Cir. Ct. Nov. 7, 2003) (Court reduced settlement of $775,000 by $310,000 for attorneys' fees and $36,181.96 for expenses to arrive at "net proceeds of judgment" prior to apportioning the proceeds to the plaintiffs.).

DOC admits that the interpretation of §510.265 is an issue of first impression. With that caveat, DOC submits that *Reed v. Reed,* 10 S.W.3d 173 (Mo. App. 1999) is applicable. *Reed* supports the simple proposition that Missouri courts have arrived at a "net amount of the judgment" by first offsetting attorneys' fees. *Id*. at 183 ("Therefore, it follows that the *amount of the attorney's fees awarded* as costs for the prosecution of the contempt action are properly *offset* against Mr. Reed's dissolution judgment before arriving at *the net amount of the judgment* to which Ms. Day's attorney's lien should attach.") (emphasis added). *Reed*, in fact, is the only Missouri case which uses the operative phrase from §510.265 "net amount of the judgment."

Hervey's characterization of *Reed* only explains the finding regarding the priority of the attorneys' lien (for Ms. Reed). (Substitute Brief of Respondent at 56-58.) Hervey fails to address the court's deduction of Mr. Reed's attorneys' fees to arrive at the "net amount of the judgment." *Id.*; *Reed*, 10 S.W.3d at 183.

Hervey's attempt to distinguish *Baker v. Whitaker*, 887 S.W.2d 664, 670 (Mo. App. 1994) suffers from a similar deficiency. DOC agrees with Hervey that the case concerned the meaning of a contingency fee contract and that the court interpreted the "amount paid me" [i.e., the client plaintiff] to equate with "net amount." (Substitute Brief of Respondent at 58.) The court required that to arrive at a net amount, "any claim, expense, or offset" may properly be deducted from the judgment. *Baker*, 887 S.W.2d at 670. *Baker* thus supports DOC's position that certain deductions must be made to arrive at a "net" amount.

c. MHRA plaintiffs should be treated the same as other plaintiffs.

In most cases, the plaintiff must give up a portion of his or her damages to pay his or her counsel. The MHRA affords the added benefit of providing a plaintiff with funds to pay her attorneys. The purpose of the fee award is not to treat MHRA plaintiffs better (than other plaintiffs) by additionally allowing this amount to increase the punitive damages awarded to the

MHRA plaintiff. "The award of attorneys' fees authorized by section 213.111.2 was meant to fully compensate for the costs of prosecuting the matter to final judgment including any reasonable hours spent and costs incurred." *Tate v. Autozoners, L.L.C.*, 2012 WL 394360 at *2 (Mo. App. February 8, 2012) (citation omitted).

Hervey argues that the court should include the attorneys' fees in the "net amount of the judgment" because she was "forced to hire counsel to vindicate her statutory rights." However, every plaintiff who chooses to be represented – regardless of claim – faces that same hurdle.[3] Hervey essentially would ask this Court to decide whether an MHRA plaintiff deserves to be treated differently (and better) than a wrongful death plaintiff, who must also pay fees to her counsel, but who could not increase an award of punitive damages on that basis (because such fees have not been awarded to plaintiff by the court). MHRA plaintiffs should not be able to include a fee award as part of the net judgment because there is no support for favoring MHRA plaintiffs in this way. Is there a greater need to increase punitive

[3] The notion that an award of fees under the MHRA functions to "reimburse" plaintiff is a fiction. MHRA plaintiffs typically do not pay the attorney up front but instead enter into a contingency fee agreement in which they agree for their attorneys to get a percentage of any settlement or judgment. Plaintiffs do not typically pay funds to the attorney directly at all.

damage awards to MHRA plaintiffs than plaintiffs who have been the victims of wrongful death?

Conclusion

For the foregoing reasons, Appellant respectfully requests that this Court reverse the judgment of the trial court and award a new trial. In the event that the court finds no instructional error, it is requested that the court remand for the proper calculation of punitive damages or enter judgment as provided by Rule 84.14.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Ronald Holliger
RONALD HOLLIGER #23359
General Counsel

/s/ James R. Ward
JAMES R. WARD #43422
Assistant Attorney General

/s/ Julianne O. Germinder
JULIANNE O. GERMINDER #60836
Assistant Attorney General

Post Office Box 899
Jefferson City, Missouri 65102
(573) 751-3321
(573) 751-9456 (facsimile)
jim.ward@ago.mo.gov
julianne.germinder@ago.mo.gov

ATTORNEYS FOR APPELLANT

Certificate of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 1st day of March, 2012, the foregoing brief was filed via Missouri Courts' Electronic Filing System which served a copy of the brief on:

Bartimus, Frickleton, Robertson & Gorny, P.C.
Edward D. Robertson
Mary D. Winter
Anthony L. DeWitt
715 Swifts Highway
Jefferson City, Missouri 65109

David Lunceford
201 S.E. 1st Street
Lee's Summit, Missouri 64063

The undersigned certifies that the foregoing brief complies with the limitation contained in Rule 84.06(b), and that the brief contains 3,028 words.

/s/ Julianne Germinder
Assistant Attorney General