SC96911

IN THE SUPREME COURT OF MISSOURI

MATTHEW D. VACCA,

Plaintiff / Respondent / Cross-Appellant,

v.

MISSOURI DEPARTMENT OF LABOR & INDUSTRIAL RELATIONS, et al.,

Defendants / Appellants / Cross-Respondents.

From the Circuit Court of the City of St. Louis, Missouri
The Honorable Julian Bush, Judge

APPELLANTS' / CROSS-RESPONDENTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This case involves the timely appeal of a final judgment, so it falls within this Court's appellate jurisdiction. Mo. Const. Art. V, § 3.

Due to multiple judgments by the trial court and cross appeals, five notices of appeal have been filed in this matter. All relate to the same suit and related judgments. Relevant here, the trial court entered its earliest judgment on November 2, 2015. LF 0596–0599; A1–4. Defendants filed post-trial motions on December 2, 2015. LF 0600-0647. Defendants filed a notice of appeal on March 3, 2016. LF 0773-0775.

The last amended judgment filed by the trial court was entered April 29, 2016. LF 0905-0907, A12-14. Defendants filed a notice of appeal from that judgment too, encompassing all previous judgments, on May 17, 2016. LF 0908-0910.

POINTS RELIED ON

I. The trial court erred in denying judgment notwithstanding the verdict, because the equitable doctrine of judicial estoppel bars Vacca's only remaining claim, in that Vacca asserted contradictory positions under oath in simultaneous proceedings according to the expediency of the moment.

- *State Board of Accountancy v. Integrated Financial Solutions, LLC*, 256 S.W.3d 48 (Mo. banc 2008).
- *New Hampshire v. Maine*, 532 U.S. 742 (2001).
- *Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905 (7th Cir. 2005).
- *Slater v. United States Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017).

II. The trial court erred in denying judgment notwithstanding the verdict, because Vacca voluntarily resigned from his employment, in that he applied for and obtained long term disability benefits that are available only to someone who is "totally incapable of performing any duties of his or her office."

- § 287.855, RSMo.
- *Altenhofen v. Fabricor, Inc.*, 81 S.W.3d 578 (Mo. App. W.D. 2002).

III. The trial court erred in failing to remit the jury's compensatory-damages verdict, because the compensatory-damages verdict was

against the weight of the evidence, in that Vacca's own physicians said he was in very poor and declining health and unable to work, as Vacca himself attested under oath in other proceedings.

- § 537.068, RSMo.
- *Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. 2013).
- *Hurst v. Kansas City, Mo. Sch. Dist.*, 437 S.W.3d 327 (Mo. App. W.D. 2014).

IV. The trial court erred in allowing the issue of punitive damages to be submitted to the jury, because there was not clear and convincing evidence that the Defendants acted with evil motive or reckless indifference, in that the Defendants had reasonable grounds to believe that Vacca had voluntarily resigned, Vacca had represented that he was unable to work, and the Defendants had accommodated Vacca's disability over a long period of time.

- *Howard v. City of Kansas City*, 332 S.W.3d 772 (Mo. 2011).
- *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. banc 1996).

V. The trial court erred in not remitting the punitive damages award against the Division on due-process grounds, because the punitive damages award was grossly excessive and arbitrary, in that Vacca's

discharge lacked reprehensibility and constituted an isolated incident concerning a single employee.

- *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014).
- *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

VI. The trial court erred in issuing a new judgment granting Vacca post-judgment interest during this appeal, because the trial court was without jurisdiction to modify its earlier final judgment, in that Vacca failed to file a timely after-trial motion and the original judgment did not need to explicitly address claims that Vacca had abandoned.

- *McGuire v. Kenoma, LLC*, 447 S.W.3d 659 (Mo. 2014).
- Mo. Rules of Civ. Pro. 81.05.
- Mo. Rules of Civ. Pro. 74.01.
- *Heckadon v. CFS Enterprises, Inc.*, 400 S.W.3d 372 (Mo. App. W.D. 2013).

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2011, Plaintiff/Respondent/Cross-Appellant Matthew Vacca ("Vacca") successfully obtained long-term disability benefits through the Missouri State Employees' Retirement System by representing to the insurer that he could no longer work, that no accommodation could be made for his disability, that his condition would never get better, and that he had quit his job. His employer treated this as constructive resignation. In 2013, Vacca successfully obtained alimony maintenance by again representing that he was totally and permanently disabled. "I just can't do it anymore," he explained under oath. In blatant contradiction to these earlier successes, Vacca testified to the jury in this retaliatory-discharge suit that he did *not* quit his job in 2011, that he was *not* disabled then, and that he *could* have continued working with accommodations for twenty more years. Vacca's conduct was plainly inequitable. Several grounds dictate reversal or a reduced verdict.

First, judicial estoppel prohibits parties from deliberately asserting contradictory positions in different courts according to the exigencies of the moment. The panel below agreed that Vacca did just that: He told both the dissolution court and the disability insurer that

he was completely disabled and unable to work, but told the jury here that he could have worked twenty more years. He even submitted contradictory physician statements within weeks of each other, one to the disability insurer, and one to the Division.

As an equitable doctrine, judicial estoppel is applied to protect the integrity of the courts from duplicitous litigators playing fast and loose with the judicial system. Here, Vacca's self-contradictory representations alone dictate estoppel. Other discretionary factors do too. As of the date Vacca filed his complaint, his statements were clearly contradictory, the dissolution court had granted him a maintenance award, and he made the contradictory statements in an unfair attempt to get duplicative awards. True, the maintenance award was later reversed on appeal on other grounds, but that reversal does not undermine the strikingly inequitable nature of Vacca's conduct: he filed this suit before the appeal and clearly sought to mislead the courts. So he should be estopped.

The lower courts misread the law, treating discretionary equitable *factors* as inflexible legal prerequisites, and leading them to think they had no discretion to estop Vacca's claim. The leading U.S. Supreme Court case on judicial estoppel cautioned against this

mistake. Equity does not involve mechanical tests, and the equities here strongly favor estoppel. The lower courts also erred by considering the appellate decision in the dissolution proceeding, and misread that decision as well.

Second, Vacca voluntarily resigned from his job when he successfully applied for long-term disability benefits under § 287.855, RSMo, so he cannot establish a causal link between his earlier discrimination claim and his eventual discharge. Such disability benefits are only available to those who are "totally incapable of performing" their professional duties. To meet that standard, Vacca's physicians told the disability insurer that he could not work even with accommodations, and he told the insurer he no longer worked for the Division. The Division, after consulting with legal counsel, simply confirmed that this conduct constituted Vacca's voluntary resignation. These facts preclude a finding of retaliatory discharge.

Third, the compensatory damages verdict—which awarded twenty years of full time salary and over a million dollars more in pain and suffering—should at least be remitted. That verdict is against the weight of the evidence. Vacca's own statements in pursuit of disability benefits and alimony maintenance, and the supporting

statements of his physicians, demonstrate that Vacca could not possibly have worked twenty more years. Only Vacca's self-serving and contradictory testimony suggests otherwise. At best, the weight of evidence suggests he could have worked only through the end of 2011—indeed, in January 2012, he said he just "can't do it anymore."

Fourth and fifth, the trial court should not have submitted the issue of punitive damages to the jury, and at the very least, should have remitted the punitive award. Punitive damages should be rare. They require clear and convincing evidence of evil motive or reckless indifference. As the Eastern District found below, this case falls far short of that standard. Vacca dropped all of his claims except his retaliatory discharge claim. Even if the Division's reliance on legal counsel and § 287.855 were misplaced, it acted reasonably when it accepted what it believed to be Vacca's voluntary resignation after carefully considering the legal question.

Sixth, the trial court had no jurisdiction to grant post-judgment interest. A judgment becomes final thirty days after it is filed, and Vacca did not request post-judgment interest within thirty days of the court's November 2015 Judgment. That Judgment did not expressly resolve some of the claims Vacca abandoned, but it did not need to. As

the Eastern District found below, settled law holds that a judgment does not have to adjudicate abandoned claims in order to be final.

STATEMENT OF FACTS

I. Vacca worked with significant disability accommodations for several years, but became upset after receiving a "successful" rating on his employment evaluation.

Vacca worked as an administrative law judge for the workers' compensation division (the "Division") from 1992 to June 2011. Tr. 77:15-21; Pl. Ex. 50, A26. Vacca was diagnosed with muscular dystrophy, a chronic illness, sometime in the 1990s.

The Division informally accommodated Vacca's medical condition in many ways over the years. For example, in 2007, the Division granted Vacca special parking privileges based on his disability. Tr. 140:19-23; 145:22-24. The Division updated the restrooms in 2009 after Vacca lodged an ADA charge with the Equal Employment Opportunity Commission. Tr. 562:15-20. And in 2008, Vacca began working from home three days a week, and holding trials and office hours the other two days. Tr. 183:12-14; 185:7-18. The Division even set up a home office for him. Tr. 280:23-24. This work-from-home accommodation continued for three years until Vacca left the Division. Tr. 188:18-189:3.

In late 2010, the chief judge of the St. Louis office of the Division rated Vacca "successful" on his performance review. Tr. 227:22 – 228:21. Then-Chief Judge Boresi also gave herself and several other judges "successful" ratings. Tr. 507:5-11. The rating upset Vacca, who later called it "pretty poor." Tr. 228:11-21; 234:5-7. Vacca testified to his belief that he could have been much more productive, but, given his limited work schedule, was given fewer trials than he would have liked. Tr. 234:14-17.

Over the next several weeks, Vacca emailed a series of complaints to human resources: he alleged the "successful" rating constituted disability discrimination and retaliation against him for his earlier discrimination complaint to the EEOC, that Chief Judge Boresi had fabricated evidence to raise the evaluations of ALJs she liked, and that Chief Judge Boresi did not give him enough trials. Pl. Exs. 29-31.

Human resources opened an investigation into Vacca's claims, and concluded on October 8, 2010 that his claims were unsubstantiated. Pl. Ex. 70. The "successful" rating was not unfavorable. *Id*. On the two days when he came into the office, Vacca often did not show until after 9:30 a.m., and so he often could not be

assigned new cases. *Id.* The report also said Vacca had not made a formal request for a reasonable disability accommodation. *Id.* Vacca filed a formal grievance repeating his allegations. The formal complaint was also found to be unsubstantiated. Pl. Ex. 34. Regarding case assignments in particular, Vacca had statistically received the same number of cases he had receive every year since his modified schedule began in 2008. *Id.* Vacca then filed similar charges with the Missouri Commission on Human Rights and the EEOC. Tr. 262:15-17; Pl. Ex. 35.

In January 2011, the ALJ Review Committee met to conduct a performance audit review of several judges, including Vacca. App. Op. at 7. The Committee asked Chief Judge Boresi to supplement her evaluation of Vacca. *Id.* Chief Judge Boresi's supplemental report detailed Vacca's "office hours and his availability when working outside the office, [and] allegations [he] had yelled, used profanity, and called attorneys practicing before [him] 'trailer trash,' 'pathetic,' and 'scum' in a staff meeting." *Id.* at 7-8. When confronted about this, Vacca doubled down by calling the attorneys "bottom feeders" and "pedophiles." *Id.* Her supplemental report referenced Vacca's new discrimination claim filed with the Commission on Human Rights

and the EEOC, and attached some of the paperwork. *Id.* at 8. For his part, Vacca alleged that Chief Judge Boresi was again acting in retaliation by attaching information about his lawsuit. *Id.* The ALJ Review Committee entered a vote of no confidence against Vacca on January 12, 2011. Tr. 310:17-24; *see also* Pl. Ex. 41, A24.

On February 14, 2011, Vacca outlined his deteriorating health and requested additional accommodations. He stated that he needed to sleep multiple times a day and to lie down frequently; that he was exhausted after being awake six hours; that he could not walk, stand, take notes or type for more than 10-15 minutes; and that he found it "very difficult" to come to the office twice a week. Pl. Ex. 44.

II. In 2011, Vacca obtained long term disability benefits after representing that he could no longer work, that no accommodation could be made, that his condition would "never" get better, and that he had quit his job.

During the same six months, Vacca began the process of filing for long term disability benefits. An administrative law judge is disabled and entitled to disability benefits if he or she becomes "totally incapable of performing any duties of his . . . office." § 287.855, RSMo. Vacca began this process in August 2010 (about the time he received the "successful" rating) and formally requested

disability in early January 2011. Tr. 318:23–319:8. His paperwork stated, "I am no longer able to work." Tr. 344:11–345:9. He told the insurance carrier that his last full day of work had been December 7, 2010, stating that he only continued "to work for my current employer to the extent of my abilities and to finish work I have begun." Pl. Ex. 36.

He submitted supporting opinions from two different physicians. The first stated that Vacca's disease had worsened, that no employment accommodation could be made for him, that he could not return to work, and that this would "*[n]ever*" change. Tr. 346:6–349:11; Pl. Ex. 37 at 2, A22 (emphasis added). The second physician recommended that Vacca stop working at his current job by February 15, 2011, and was unsure Vacca could carry on *any* kind of work. Tr. 349:12–25; Pl. Ex. 37 at 3, A23. He too stated his professional opinion that this would "never" change. *Id.*

Although he continues to receive disability benefits to this day, Vacca would later testify that he "didn't want disability" but was afraid the Division would give him a vote of no confidence—and two such votes could lead to termination. Tr. 282:20–283:9, 470:25–471:15; *see also* § 287.610, RSMo (2010).

Vacca's long term disability benefits were approved in May 2011. Tr. 318:23–319:21; *see also* Pl. Ex. 48, A25. The workers' compensation Division's director and human resources manager met with legal counsel to discuss the legal ramifications of this decision. Tr. 762:1–18; 787:17–24; 1208:15–21; 1225:1–1226:2. Based on this meeting, they believed Vacca had voluntarily resigned when he applied for and began receiving benefits because, as the law stated, those disability benefits were only available to those unable to work. Tr. 762:1–18; 787:17–24; Tr. 1222:21–1223:2. They told Vacca this. He said he wanted to keep working anyway. On May 24, the Division received a letter from a *third* personal physician. Pl. Ex. 47. This time, the physician said Vacca could continue working with some accommodations. *Id.* Nonetheless, the Division informed Vacca on June 7 that he no longer worked for the Division. Tr. 322:4–18; Pl. Ex. 50, A26. The letter stated in relevant part:

> Under § 287.855, long term disability benefits may only be awarded based upon the total incapacity of an administrative law judge to perform any duties of that position. For this reason, the award of long term disability benefits to an administrative law judge is inconsistent with that judge continuing to serve in that position. Your application for and obtaining of a decision granting you long term disability benefits is a resignation from your position as an administrative law judge.

Pl. Ex. 50, A26.

III. In 2013, another court awarded Vacca significant maintenance from his ex-spouse based on his representation that he was totally and permanently disabled, and just "c[ouldn't] do it anymore."

In January 2012, Vacca stated in his verified divorce petition that he could not work. Tr. 328:3–5, 366:1–22; Def. Ex. SSSSSS, A32–34. In the marriage dissolution proceeding, Vacca testified in May 2012 that he did not have the ability, from a mental or emotional standpoint, to work in any type of employment:

> I just can't keep facts straight anymore, and it's just difficult to do that type of thing any longer. You know, I sleep so much. I'm generally always exhausted. . . .
>
> Anybody who wants to hear I'm like a cell phone that's constantly running in the red with a battery about to die. It's just – you know, it's an exhausting day, and just getting through the daily, you know, things associated with just getting food on the table and getting up, having some kind of routine, it's just, you know, I tried to do it as long as I could, but I just – I can't do it anymore.

Tr. 367:2–368:17; Def. Ex. RRRRRR, A27-31. He later amended his verified divorce petition to say he is permanently and completely disabled other than as an administrative law judge. Tr. 469:4-17.

The dissolution court awarded Vacca significant maintenance based on his inability to work. *Vacca v. Vacca*, 450 S.W.3d 490, 491

(Mo. App. E.D. 2014). Vacca's divorce became final in May 2013. *Id.* The court awarded Vacca monthly maintenance because he was "in poor health and without adequate means to support himself." *Id.* The dissolution judgment as a whole, including monthly maintenance amount, was vacated on appeal on other grounds. *Id.*

IV. In 2015, a jury awarded Vacca $9 million in damages based on his representation that he could have continued working full time for twenty years.

Vacca also filed discrimination and retaliation (and many other) claims against the Division and Division employees.

In contrast to the testimony in his divorce case, Vacca testified under oath in this case, "I would have worked every day of my life as long as I could. . . . You can work [as an administrative law judge] virtually forever until God calls. I intended to keep working." Tr. 326:14–327:4. He told them that he would have worked until he was at least 75 years old. Tr. 331:1–10. Based on this testimony, he estimated his total lost salary at more than $2.8 million, based on 20 more full-time years on the job. Tr. 332:12–17.

During trial, he dropped nearly all of his claims. The only claim submitted to the jury was the retaliation claim alleging his discharge was caused by his earlier discrimination complaint. Tr. 1290:21 –

1291:10, 1295:16-19; Jury Instructions, LF 0510, A40. The jury verdict awarded $4 million in compensatory damages, $2.5 million in punitive damages against the Division, and $500,000 in punitive damages against the Division's director. Jury Verdict, LF 0518.

A month later on November 2, 2015, the trial court entered final judgment. LF 0596–0599; A1–4. The trial court later reduced the punitive award against the Division's director to $5,000. LF 0740–0744. Vacca did not request post-judgment interest within thirty days of the November 2 Order. *See* Order (Mar. 1, 2016), LF 0768–0772, A5–9. But months later, the trial court granted post-judgment interest anyway. *Id.* (finding the November 2 Order was not final). The court entered its last amended judgment on April 29, 2016. LF 0905–0907, A12–14. This appeal followed.

V. The Eastern District reversed the award of punitive damages and post-judgment interest, but affirmed the judgment and compensatory damages award.

The Eastern District affirmed in part and reversed in part. It affirmed the trial court's merits rulings on judicial estoppel and Vacca's resignation as a matter of law. App. Op. at 17-21. It also refused to remit the compensatory damages award, which accounted for twenty years of wages and over a million dollars more in pain and

suffering. *Id.* at 21-25. But it reversed the award of punitive damages, *id.* at 25-33, and of post-judgment interest, *id.* at 33-36. Defendants then petitioned this Court for transfer.

ARGUMENT

I. The trial court erred in denying judgment notwithstanding the verdict, because the equitable doctrine of judicial estoppel bars Vacca's only remaining claim, in that Vacca asserted contradictory positions under oath in simultaneous proceedings according to the expediency of the moment.

Vacca testified under oath to contradictory things before different courts, and backed up his contradictory claims with a slate of contradictory physician statements, according to the exigency of the moment. Such inequitable conduct undermines the integrity of the judicial system and calls for the application of judicial estoppel. The lower courts erred by artificially limiting their own equitable powers, even while largely recognizing that the equities called for estoppel of Vacca's gamesmanship.

The trial court's application of the doctrine of judicial estoppel should be affirmed unless there is no evidence to support it, it is against the weight of the evidence, or the trial court erroneously declared and applied the law. *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 139 (Mo. App. W.D. 2011). Here, the trial court committed an error of law, and this court reviews legal errors de novo. *Mantia v. Mo. Dep't of Transp.*, 529 S.W.3d 804, 808 (Mo. banc 2017).

A. Judicial estoppel is an equitable doctrine designed to protect the integrity of the judicial process from litigants playing fast-and-loose with the courts by taking contrary positions in separate proceedings.

Courts around the country "have uniformly recognized" that judicial estoppel "'prohibit[s] parties from deliberately changing positions according to the exigencies of the moment.'" *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citations omitted); *State Bd. of Accountancy v. Integrated Fin. Solutions, LLC*, 256 S.W.3d 48, 54 (Mo. banc 2008). '"Missouri courts in particular have consistently refused to allow litigants to take contrary positions in separate proceedings," in order to "ensure the integrity of the judicial process.'" *Berger v. Emerson Climate Techs.*, 508 S.W.3d 136, 142–43 (Mo. App. S.D. 2016) (quoting *Candidacy of Fletcher*, 337 S.W.3d at 146).

This Court has not yet addressed the equitable purposes behind the doctrine in detail. *State Bd. of Accountancy*, 256 S.W.3d at 54; *Taylor v. State*, 254 S.W.3d 856, 858 (Mo. banc 2008). But federal courts have. Judicial estoppel is '"an equitable doctrine invoked by a court at its discretion.'" *New Hampshire*, 532 U.S. at 750 (citation omitted). That equitable discretion should be applied "with an eye

toward" the doctrine's animating purposes. *Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905, 914 (7th Cir. 2005). Courts should invoke judicial estoppel to '"protect the integrity of the judicial process.'" *New Hampshire*, 532 U.S. at 749 (citation omitted). The doctrine thus may be used to estop "'the perception'" that the litigant has '"misled'" the courts. *Id.* at 750 (citation omitted). Conversely, judicial estoppel bars bad-faith conduct from litigants "'playing fast and loose with the courts,'" *id.* (citation omitted), or engaging in '"cynical gamesmanship'" to derive an unfair advantage, *In re Ohio Execution Protocol*, 860 F.3d 881, 892 (6th Cir. 2017) (en banc) (citation omitted). Judicial estoppel is a tool for courts to combat such "litigatory shenanigans." *Jarrard*, 408 F.3d at 914 (noting the "strong antifraud purposes animating the doctrine").

With these purposes in mind, Missouri's appellate districts have looked to three factors that "typically inform" a court's decision to apply judicial estoppel. *New Hampshire*, 532 U.S. at 750. These factors are whether "(1) a party's later position was clearly inconsistent with its earlier position, (2) the party succeeded in persuading a court to accept the earlier position, and (3) . . . the party asserting inconsistent positions would derive an unfair advantage or

impose an unfair detriment on the opposing party." *Berger*, 508 S.W.3d at 143 (quoting *Minor v. Terry*, 475 S.W.3d 124, 133 (Mo. App. E.D. 2014)); *see also Candidacy of Fletcher*, 337 S.W.3d at 140 (relying on *New Hampshire*'s list of factors as well).

But these factors are just that—equitable factors. They inform the broader purpose of the doctrine; they do not constitute hard-and-fast elements. As an equitable doctrine, judicial estoppel is not '"reducible to any general formulation of principle.'" *New Hampshire*, 532 U.S. at 750 (citation omitted). Thus, these factors are not "inflexible prerequisites" to application of judicial estoppel. *Id.* at 751. Sometimes they are simply "inapplicable." *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1182 (11th Cir. 2017). Other considerations may matter more in "specific factual contexts." *New Hampshire*, 532 U.S. at 751.

B. Vacca simultaneously took contrary positions in separate proceedings, and the equities counsel that he should have been estopped from doing so.

The equitable doctrine of judicial estoppel bars Vacca from asserting his continued ability to work in this case—with or without considering *New Hampshire*'s discretionary factors.

1. The Court should apply judicial estoppel *from the moment of filing* to prevent bad faith litigation strategies that undermine the integrity of the courts. In the Court of Appeals, both the majority opinion and the dissent agreed that Vacca took contrary positions in separate proceedings, testifying under oath in his marriage dissolution case that he was incapable of work and needed support, then testifying in this case that he *was* capable of work and was wrongfully terminated. As the majority opinion put it, "[t]he uncontested facts are that Vacca simultaneously maintained two contradictory positions as to his ability to work in order to secure his most advantageous position." App. Op. at 32.

Vacca evidenced his intent to engage in inequitable conduct from the beginning. In January 2012, Vacca pleaded in marriage dissolution proceedings that he was "permanently and completely disabled and he is no longer capable of being employed." Def. Ex. SSSSSS, A32–34; App. Op. (dissent) at 3. A few months later in September 2012, Vacca pleaded in this suit that he "was capable of performing the essential function of his job with reasonable accommodation." Pet. ¶ 26; App. Op. (dissent) at 3. A party cannot walk into one courtroom and tell one judge the light was green, then walk down the hall and tell

another judge the light was red. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 802 (1999).

Vacca filed the complaint in this case in bad faith, so he should be estopped. A judicial estoppel case from the Third Circuit, *Scarano v. Central R. Co. of N.J.*, 203 F.2d 510 (3d Cir. 1953), addresses parallel facts. Plaintiff, a railroad worker, received permanent disability benefits under the Federal Employers Liability Act on his assertion that he was totally disabled. *Id.* at 511. A month later, he sued the railroad to get his old job back. The court rightly refused to hear the new claim from "the outset." *Id.* Allowing the suit to continue, the court explained, "would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate." *Id.* at 513. Judicial estoppel is meant to "protect the courts from the litigatory shenanigans that" result when parties "swap litigation positions like hats in successive cases based on simple expediency or self-benefit." *Jarrard*, 408 F.3d at 915. Allowing a suit like Vacca's to proceed does not protect the courts.

Because Vacca's pleading were contradictory, this Court need not decide whether estoppel requires judicial acceptance of an earlier position (as discussed below). At the time Vacca filed his pleadings,

the dissolution court had accepted his prior position, and the appeals court had not yet acted. His pleadings certainly involved "play[ing] fast and loose with the courts," and they directly contradicted the successful position he took in the dissolution proceedings.

Alternatively, applying judicial estoppel based on bad faith alone would accord with other courts, like the Eleventh Circuit, which do not even look at judicial acceptance of the earlier statement. That court applies judicial estoppel if "the allegedly inconsistent positions were made under oath in a prior proceeding," and are "calculated to make a mockery of the judicial system." *Transamerica Leasing, Inc. v. Instit. of London Underwriters*, 430 F.3d 1326, 1335 (11th Cir. 2005). Both elements are easily met here. This Court has also noted the importance of the oath to judicial integrity. *State Bd. of Accountancy*, 256 S.W.3d at 54 (suggesting that whether the prior statement is taken "under oath" is relevant to the judicial-estoppel inquiry).

Vacca doubled down on his contrary statements through sworn testimony. In the dissolution proceeding, "Vacca testified he did not have the ability from a mental or emotional standpoint to work in any type of employment." App. Op. at 12. And in this case, "Vacca testified he could have worked as an ALJ *every day* . . . until he was at

least 75 years old." *Id.* (emphasis added). Vacca then enlisted *others* to make fraudulent statements on his behalf. He retained separate doctors for his insurance claim and for his retaliation claim, and had them submit contradictory physician letters only two weeks apart. App. Op. (dissent), at 3-4.

Given the doctrine's "strong antifraud purposes," *Jarrard*, 408 F.3d at 915, the equities strongly support judicial estoppel.

2. At the least, the apparent bad faith in Vacca's contradictory pleadings should shift the burden of proof to Vacca to explain why they are consistent. Faced with two federal claims that appeared facially inconsistent, but *could* be consistent in some instances, the U.S. Supreme Court ruled that summary judgment should be granted unless a plaintiff could offer a "sufficient" explanation why her claims were actually consistent. *Cleveland*, 526 U.S. at 805-06. There, plaintiff had obtained Social Security Disability Insurance (SSDI) benefits, which require that a person be "unable to do [her] previous work" or "engage in any other kind of substantial gainful work." *Id.* at 797 (citation omitted). SSDI does not inquire into possible accommodations. *Id.* Disability discrimination under the Americans with Disability Act (ADA) requires claiming that one can at least

"perform the essential functions" of one's job with reasonable accommodation. *Id.* (citation omitted).

This case is a much easier estoppel case than *Cleveland*, because Vacca affirmatively asserted that he could not work at all *even with accommodations*. "[D]irectly conflicting statements" should not be tolerated, especially when made under oath. *Id.* at 802. This Court should rule that a plaintiff's earlier "sworn statement asserting 'total disability'" requires either "an explanation" or judgment for the defendants. *Moore v. Payless Shoe Source, Inc.*, 187 F.3d 845, 847 (8th Cir. 1999) (citation omitted).

Vacca has not given a sufficient explanation for why his directly conflicting statements are actually consistent. All three judges of the Court of Appeals agreed on this too. "At no point has Vacca claimed the affirmative representations he made to the insurer that he was incapable of performing his job . . . were somehow a mistake or an inadvertence." App. Op. at 32. To the contrary, Vacca's own testimony shows the earlier statements were "strategic" and "intentional." *Id.* As for the dissolution proceedings, Vacca tried to cover his mistake in amended pleadings by saying he could do no work whatsoever other than as an ALJ. Tr. 469:4-17. But running away from earlier

statements is not an explanation. *Cleveland* allows parties to explain why both statements are true; it "does not stand for the proposition that [parties] should be allowed to explain why they gave false statements." *Johnson v. ExxonMobil Corp.*, 426 F.3d 887, 892 (7th Cir. 2005), as amended (Nov. 21, 2005) (emphasis added). "[A] person who applied for disability benefits must live with the factual representations made to obtain them, and if these show inability to do the job then," any later contradictory claims "may be rejected without further inquiry." *Opsteen v. Keller Structures, Inc.*, 408 F.3d 390, 392 (7th Cir. 2005).

Following *Cleveland*, many courts have rejected accommodation claims after a plaintiff made prior statements similar to Vacca's. *E.E.O.C. v. Greater Baltimore Med. Ctr., Inc.*, 477 F. App'x 68, 75 (4th Cir. 2012) (affirming estoppel of ADA claim, with supporting physician statements, which "indicated that [the employee] could have returned to work, directly contradicting the assertion in his SSDI application that he was and continued to be unable to work"); *Detz v. Greiner Indus., Inc.*, 346 F.3d 109, 119 (3d Cir. 2003) (applying estoppel based on plaintiff's previous "unambiguous[] indicat[ion] that his disability prevented him from working at all"); *Mitchell v. Washingtonville Cent.*

Sch. Dist., 190 F.3d 1, 7-8 (2d Cir. 1999) (affirming estoppel of ADA claim based on previous disability-claim statement of inability to walk or stand); *Hoag v. Ark. St. Highway Transp. Dep't.*, 177 F. App'x 521, 521-22 (8th Cir. 2006) (affirming summary judgment based on plaintiff's failure to reconcile statements made in support of discrimination and accommodation claims); *Gilmore v. AT&T*, 319 F.3d 1042, 1047 (8th Cir. 2003) (same). For similar reasons, this Court should apply judicial estoppel to Vacca's state-law retaliation claim.

3. In addition, all three of the discretionary equitable factors are met here. First, Vacca's statements are clearly inconsistent. *New Hampshire*, 532 U.S. at 750. Vacca's statements and testimony in the dissolution proceedings state that he was unable to maintain any employment whatsoever. Tr. 367:2–368:17; Def. Ex. RRRRRR, A28-29; Def. Ex. SSSSSS, A32–34, and LF 0336. This was inconsistent with the position he took at trial in this case, *i.e.*, that he was not only able to do his job with appropriate accommodations but could have done so *full-time* for at least *twenty more years*. Tr. 331:1–332:12–17.

Second, Vacca "succeeded in persuading a court to accept [his] earlier position." *New Hampshire*, 532 U.S. at 750. Based on Vacca's sworn testimony, the dissolution court found he was "in poor health

and with adequate means to support himself" and awarded him significant maintenance payments. *See Vacca*, 450 S.W.3d at 491. Even if the trial court's judgment was later vacated by the Court of Appeals on other grounds, the trial court's acceptance of his position undermined the integrity of judicial proceedings and showed Vacca had successfully misled the courts. Importantly, Vacca filed this suit after the trial court granted maintenance benefits, and before the appeals court vacated the dissolution court's judgment. *Id.*

Third, Vacca would derive an unfair advantage if not estopped. *New Hampshire*, 532 U.S. at 751. He successfully obtained disability benefits in 2011. He was again awarded maintenance in 2013 when the marriage dissolution court awarded him maintenance payments. It is unfair to seek triple recovery based on contradictory theories.

C. The lower courts mistakenly hobbled their discretion by converting discretionary factors into inflexible prerequisites.

The lower courts erred in two ways. First, they treated equitable factors as inflexible legal prerequisites, and so hobbled their own ability to safeguard the integrity of the judiciary. Second, they mistakenly found that the dissolution court had not accepted Vacca's

prior inconsistent statement because its judgment was vacated on other grounds on appeal.

1. Again, the majority and dissent below agreed "that Vacca simultaneously maintained two contradictory positions as to his ability to work in order to secure his most advantageous position." App. Op. at 32. As explained above, these facts alone justify judicial estoppel.

But the majority opinion erred when it turned to the three discretionary factors, App. Op. at 18, but considered only one, whether "Vacca succeeded in persuading a court to accept his earlier position," *id.* The court held that Vacca had not "succeeded in persuading a court to accept [his] earlier position," *New Hampshire*, 532 U.S. at 750, despite the dissolution court's grant of maintenance precisely because of Vacca's inability to work, App. Op. at 18. It did so because the dissolution judgment was vacated on appeal on other grounds and remanded for a new trial. App. Op. at 19. The majority opinion then compounded its mistake: "Having found Appellants failed to establish the second factor," the appeals court said it "need not discuss the remaining factors." *Id.* (citing *Vinson v. Vinson*, 243 S.W. 3d 418, 422 (Mo. App. E.D. 2007)).

That was error. *New Hampshire* expressly cautions courts not to treat these factors as "inflexible prerequisites," 532 U.S. at 751, but the lower court did just that. "Equity eschews [such] mechanical rules." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). *New Hampshire* itself says its factors are not exhaustive; it necessarily follows that they will be "inapplicable" in some cases. *Slater*, 871 F.3d at 1181 (11th Cir. 2017). It is true that some courts treat prior acceptance as a requirement for judicial estoppel. *See, e.g.*, *Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014). But precisely because "[t]here is no mechanical test," courts must "ultimately" apply judicial estoppel "on a case-by-case basis" and in light of its purpose. *Gray v. City of Valley Park, Mo.*, 567 F.3d 976, 981-82 (8th Cir. 2009). A court "should look to all the facts and circumstances of the case to decide whether a plaintiff intended to mislead the court." *Slater*, 871 F.3d at 1185. And if all the facts are considered, there is no doubt that Vacca intended to mislead the court.

2. The lower court was also mistaken to find that the dissolution court had not accepted Vacca's prior inconsistent statement. The dissolution court certainly accepted Vacca's prior inconsistent statement—it could not have granted maintenance

otherwise. *Vacca*, 450 S.W.3d at 491. That trial court decision controlled at the time Vacca filed the present suit. *See id.*; App Op. at 2 (dissenting op.) (noting that the opinion vacating the dissolution judgment was not filed until nearly a month after Vacca filed his petition claiming unlawful disability discrimination). That satisfies *New Hampshire*'s prior-acceptance factor.

Here, Vacca filed his complaint in this case before the appellate court's decision in the dissolution case. Thus, the subsequent disposition of that case on appeal has little bearing on the equitable inquiry into Vacca's motives: He filed this suit after winning on contradictory facts in the dissolution proceeding and before losing on appeal. That demonstrates prior acceptance and, more importantly, Vacca's intent to "play fast and loose" with the courts. Whether he succeeded on appeal does not change that. Moreover, the majority opinion below points to no authority suggesting that the prior statement must be accepted and then survive until *all appeals are exhausted*. The Court of Appeals confused collateral estoppel, which protects "the finality of a judgment," *Home Ins. Co. v. Butler*, 922 S.W.2d 66, 68 (Mo. App. 1996), and judicial estoppel, which protects

"the integrity of the judicial process,'" *New Hampshire*, 532 U.S. at 749 (citation omitted).

But even if the majority opinion was right to consider the appellate dissolution decision, it misread it. "The reversal of the trial court's order of dissolution . . . was completely silent on the issue or extent of Vacca's disability." App. Op. at 2 (dissenting op.). The appeals court only discussed the amount of maintenance awarded, *Vacca*, 450 S.W.3d at 490-93, while "acknowledg[ing] that Vacca had been on disability since 2011 and not[ing] the trial court's finding that Vacca was 'in poor health and without adequate means to support himself.'" App. Op. at 2 (dissenting op.); *Vacca*, 450 S.W.3d at 492.

This Court should apply the doctrine of judicial estoppel to bar Vacca's sole remaining claim, reverse, and remand with instructions that judgment should be entered for defendants.

II. The trial court erred in denying judgment notwithstanding the verdict, because Vacca voluntarily resigned from his employment, in that he applied for and obtained long term disability benefits that are available only to someone who is "totally incapable of performing any duties of his or her office."

As a matter of law, Vacca voluntarily resigned when he applied for and accepted disability benefits based on his own representation

that he could not work and had quit his job. § 287.855, RSMo. Accordingly, Vacca could not have established retaliatory discharge. Vacca's earlier voluntary decision to pursue and accept long term disability benefits broke any possible causal link between his earlier discrimination claim and the Director's June 2012 letter acknowledging Vacca's resignation. This legal question is reviewed de novo. *Mantia*, 529 S.W.3d at 808.

A. The text and context of § 287.855 show that Vacca's approval for long term disability benefits served as voluntary resignation, and Vacca's own actions acknowledge as much. "[A]ny administrative law judge who . . . becomes disabled so that he or she is *totally incapable of performing any duties of his or her office* shall be entitled to disability benefits as provided by the Missouri state employees' retirement system." § 287.855, RSMo. (emphasis added).

First, the modifier "totally" shows the statute does not apply to those who are *somewhat* capable of performing their duties under certain accommodations. An individual must be incapable wholly and entirely. *See* "Total," *Webster's New Int'l Dict.* at 2675 (2d Ed.). Total disability means something more than partial disability. As a workers' compensation ALJ, Vacca presumably knew this, so he

supported his application with physician statements that he could not work even with accommodations. Tr. 346:6–349:11; Pl. Ex. 37 at 2, A22.

Second, § 287.855 explains that these benefits are available as part of the Missouri state employees' *retirement system*. Missouri Revised Statutes §§ 287.812–287.856 outline the retirement benefits for Administrative Law Judges. The same sections do not, for example, provide for partial disability or disability accommodations. Long term disability benefits are not available until 90 days after the last day of work. Pl. Ex. 71. Here too, Vacca knew exactly what he was doing. His application stated that his last full day of work was December 7, 2010. Pl. Ex. 36. And one of the supporting physicians said he could not work past February 2011. Tr. 349:12-25; Pl. Ex. 37 at 3, A23.

So Vacca's own decision—to apply for disability benefits, and its subsequent approval—constituted voluntary resignation from his employment. The insurer accepted Vacca's representations and approved payment of disability benefits. At that point, Missouri law made it impossible for Vacca to retain his position as an administrative law judge and receive a salary. Because Vacca's

employment was legally terminated by his own actions no later than May 2012, he necessarily cannot establish a '"causal connection'" between any protected activity and the Director's June 2012 discharge letter. *Altenhofen v. Fabricor, Inc.*, 81 S.W.3d 578, 584 (Mo. App. W.D. 2002) (quoting *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir 1993)).

B. The Eastern District's opinion agreed with nearly all of this. It agreed that Vacca received long-term disability benefits through the Missouri State Employees' *Retirement System*. App Op. at 21. It agreed that Vacca obtained long-term disability benefits "by representing to the insurer" that he could not work "even with reasonable accommodations," that his application "contained specific details as to his inability to work," and that his application stated "his last full day of work was December 7, [2010]." App. Op. at 31-32.

But the majority opinion below denied Defendants' argument on appeal because "nothing in the section states that an ALJ who receives disability benefits is automatically deemed to have resigned his or her position." App. Op. at 21. This reasoning fails for two reasons. First, it suggests that Vacca was actually ineligible for benefits based on his continued employment, although it refused to pass judgment on that

question. *Id.* But that approach ignores the fact that Vacca told the insurer that his last day of work was in December 2010. Vacca should be taken at his word. Second, the lower court's argument does not align with the statutory text and context. Of course Section 287.855 does not say that disability benefits lead to termination—the statute *presumes* that some form of termination has already occurred. An individual who intends to keep working cannot receive long term disability benefits, just like such an individual could not receive a pension. Fully knowing this, Vacca applied for and received such benefits, and so voluntarily resigned. As a result, his retaliation claim must fail as a matter of law.

III. The trial court erred in failing to remit the jury's compensatory-damages verdict, because the compensatory-damages verdict was against the weight of the evidence, in that Vacca's own physicians said he was in very poor and declining health and unable to work, as Vacca himself attested under oath in other proceedings.

Even if the Court does not reverse the judgment, it at least should remit the compensatory damages. A trial court's decision on remittitur is reviewed for an abuse of discretion. *Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 36 (Mo. App. E.D. 2013).

A. Remittitur is appropriate if the verdict is against the weight of the evidence and good cause warrants a new trial on damages. § 537.068 RSMo; *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 38 & n.11 (Mo. banc 2013). In evaluating the reasonableness of a verdict, courts consider the following: "(1) loss of present and future income; (2) medical expenses; (3) plaintiff's age; (4) the nature and extent of plaintiff's injuries; (5) economic considerations; (6) awards approved in comparable cases; and (7) the trial court's and jury's superior opportunity to evaluate plaintiff's injuries and other damage." *Hurst v. Kan. City, Mo. Sch. Dist.*, 437 S.W.3d 327, 338-39 (Mo. App. W.D. 2014) (quotation marks omitted).

The evidence does not support awarding Vacca what amounts to twenty years of full-time salary, and over a million dollars in pain and suffering. Vacca's health had deteriorated and continued to do so. Aside from his personal self-serving testimony, little to no evidence suggests he could have worked full time for twenty more years. He previously stated that he could not work at all as of 2011. Tr. 367:2–368:17, 344:11–345:9. He reported to the Division in 2011 that his physical health was deteriorating. Tr. 426:1–430:3; Defs. Ex. XXXXXX, A35–39. And two physicians provided statements to the

disability insurer saying he was disabled with no expectation of recovery. Tr. 346:6 – 349:11; Pl. Ex. 37, A21–23. There was no new medical evidence to the contrary.

At the very least, the Court should remit compensatory damages to the period from June 2011 to January 2012, which corresponds to the time from when Vacca was no longer employed with the Division, Pl. Ex. 50, A26, to the time he stated in verified pleadings that he could no longer work, Tr. 366:1–22, Def. Ex. SSSSSS, A32-34. This works out to about eight months' salary, or $65,333. That amount, if doubled to account for emotional damages, would more than compensate Vacca for his putative injuries.

B. The majority opinion below refused to remit the compensatory damages award based on Vacca's own testimony, the testimony of witnesses who observed him working in 2011, and his 2011 request for additional accommodations, which was backed up by a physician report. App. Op. 24-25. But setting aside Vacca's own self-serving, self-contradicted testimony, the rest of the testimony Vacca presented *at best* only suggests Vacca could have continued working in 2011. And the weight of the evidence casts grave doubt on whether Vacca was able to work even then. Indeed, Vacca's own 2012

testimony shows that his health continued to decline to the point where he could not work at all. The weight of the evidence is certainly against the jury's conclusion that Vacca could have continued working *until 2031*.

IV. The trial court erred in allowing the issue of punitive damages to be submitted to the jury, because there was not clear and convincing evidence that the Defendants acted with evil motive or reckless indifference, in that the Defendants had reasonable grounds to believe that Vacca had voluntarily resigned, Vacca had represented that he was unable to work, and the Defendants had accommodated Vacca's disability over a long period of time.

At the very least, Vacca's successful pursuit of long term disability benefits based on his inability to work make punitive damages inappropriate. The grant of disability benefits, combined with statements from Vacca's physicians that he was no longer able to work, shows the Division acted reasonably, even if their reliance on legal counsel and § 287.855 were misplaced. There was no evidence of evil motive or reckless indifference under these circumstances.

The question whether punitive damages should have been submitted to the jury presents a question of law that is reviewed de novo. *Ellison v. O'Reilly Auto Stores, Inc.*, 463 S.W.3d 426, 434 (Mo. App. W.D. 2015).

A. By definition, punitive damages should be reserved for the worst cases. § 213.111.2, RSMo. (2015). Compared to proof on the merits, punitive damages require a significantly higher standard in two ways. First, the elements of a punitive damages award must be found by clear and convincing evidence. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. banc. 1996). Second, punitive damages require a much greater degree of moral culpability. Punitive damages may only be awarded if "the defendant intentionally acted 'either by a wanton, willful or outrageous act, or reckless disregard for an act's consequences (from which evil motive is inferred).'" *Howard v. City of Kansas City*, 332 S.W.3d 772, 788 (Mo. banc 2011) (citation omitted). The employer's intentional wrongful act must be wholly "without just cause or excuse." *Id.* (citation omitted). And the issue should not be submitted to the jury absent outrageousness caused by '"evil motive or reckless indifference.'" *Id.* (citation omitted).

B. The vast majority of retaliatory-discharge claims will not support punitive damages, which should be submitted only "sparingly." *Rodriguez*, 936 S.W.2d at 110. Here, the record shows

the Division's actions had reasonable grounds, and did not evince an evil motive or reckless indifference.

Punitive damages are certainly inappropriate where a retaliatory-discharge claim is at least questionable on the merits. As the court of appeals explained, the Division had many good-faith reasons to recognize Vacca's voluntary resignation. Vacca made repeated representations that he was no longer able to work, and he received long term disabilities benefits due to his inability to work. App. Op. 31-33.

And even if the judgment were right on the merits of the claim, retaliation alone is not enough to establish an evil motive. Nothing in the six-month period between Vacca filing his discrimination claim in November 2011 and his removal in June 2012 shows evil intent. To the contrary, Vacca worked throughout this time period (and years before) under significant workplace accommodations that required him to come to the office only twice a week while receiving full-time wages. Tr. 183:12-14; 185:7-18. The Division's ongoing willingness to accommodate Vacca's disability should preclude any finding of evil intent.

Nor is there evidence of reckless indifference in his removal. The Division Director and the head of human resources met with legal counsel to determine the legal ramifications of Vacca's successful application for long term disability benefits. That meeting suggested that Vacca had already voluntarily resigned, and the Defendants followed that advice when Director May informed Vacca that his employment had ended. Indeed, Vacca himself told the insurer that his employment had ended in December 2010. Pl. Ex. 36. Even if the Court were to disagree with Defendants' reading of § 287.855, it is at least a reasonable interpretation, not reckless indifference. And at the very least, Vacca's successful pursuit of disability benefits strongly suggested that he was "totally incapable of performing any duties of his" office under any accommodation. § 287.855, RSMo.

As the court of appeals said, punitive damages should not have been submitted to the jury when the employer simply "accept[ed] Vacca's own repeated representations [that] he was unable to perform his job." App. Op. at 32. Submitting punitive damages to the jury was an error of law warranting reversal.

V. The trial court erred in not remitting the punitive damages award against the Division on due-process grounds, because the punitive damages award was grossly excessive and arbitrary, in that Vacca's discharge lacked reprehensibility and constituted an isolated incident concerning a single employee.

Whether punitive damages comport with due-process protections is a question of law reviewed de novo. *Lewellen v. Franklin*, 441 S.W.3d 136, 145 (Mo. banc 2014).

If this Court disagrees with the Court of Appeals on whether punitive damages should have been submitted to the jury, the Court should at least remit them. The $2.5 million in punitive damages assessed against the Division was grossly excessive.

Punitive damages are subject to due-process limitations under the United States and Missouri constitutions, which prohibit the imposition of grossly excessive or arbitrary awards. *Id.* at 144-45 (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 409 (2003)). The punitive-damages award here was grossly excessive as to both Vacca's alleged harms and the Defendant's alleged conduct. *Lewellen*, 441 S.W.3d at 146 (pointing to these two factors).

Reprehensibility is the "most important factor" in assessing punitive damages and includes consideration of whether the harm

caused was physical as opposed to economic; whether the tortious conduct evinced indifference or reckless disregard of the health and safety of others; whether the target of the conduct had financial vulnerability; whether the conduct involved repeated actions or was an isolated incident; and whether the harm was the result of intentional malice or deceit. *Id.*

B. There are three grounds for remitting punitive damages here. *First,* the reprehensibility factors are entirely absent. There was no evidence of physical harm to Vacca that was caused by Defendants. There was no evidence of reckless disregard for the health and safety of others. There was no evidence that Defendants' conduct extended beyond a single employee. And again, the Defendants' decision was based on a reasonable interpretation of Missouri law, and a reasonable response to Vacca's "repeated representations [that] he was unable to perform his job." App Op. at 32.

Second, if the Court remits actual damages or orders a new trial on actual damages, it should proportionally limit punitive damages. As the U.S. Supreme Court has explained "few awards exceeding a single-digit ratio between punitive and compensatory damages . . .

will satisfy due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

Third, punitive damages should be cut in half because the jury heard prejudicial testimony. The trial court initially allowed Vacca to testify that half of punitive damages go into a tort victim's compensation fund. Tr. 82:15-83:4. Defendants' objection was initially overruled, and by the time it was later sustained, the damage was already done. *See* Tr. 83:5-84:17. This prejudicial testimony artificially inflated the punitive damages awarded.

VI. The trial court erred in issuing a new judgment granting Vacca post-judgment interest during this appeal, because the trial court was without jurisdiction to modify its earlier final judgment, in that Vacca failed to file a timely after-trial motion and the original judgment did not need to explicitly address claims that Vacca had abandoned.

The appeals court rightly reversed the trial court's award of post-judgment interest. App. Op. at 36. The question whether the trial court had jurisdiction to award post-judgment interest is a question of law that this Court reviews de novo. *McGuire v. Kenoma*, 447 S.W.3d 659, 666-67 (Mo. banc 2014).

The undisputed facts are as follows. On November 2, 2015 the trial court entered its Order and Judgment, which did not include an

award of post-judgment interest. LF 0596-0599, A1–4. Over three months later, Vacca filed a motion to amend asserting that this order was not final because it did not dispose of one of the defendants, Judge Boresi. The trial court agreed, and, on that basis, granted post-judgment interest. *See* Mar. 11 Judgment, LF 0788–0789; Apr. 29 Judgment, LF 0905–0507. There is no dispute that Vacca abandoned all claims against Judge Boresi before the case was submitted to the jury. The court instructed the jury that "Judge Boresi [was] no longer a party to the lawsuit" and Vacca did not object. Tr. 1240:8-11. The verdict form showed the same. LF 0518-0519.

On these facts, the trial court had no jurisdiction to enter a new judgment after December 2015. "A judgment is entered when a writing signed by the judge and denominated 'judgment' or 'decree' is filed." Mo. Rules of Civ. Pro. 74.01(a). "A judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed." Mo. Sup. Ct. Rule 81.05(a)(1). However, any decision "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties. . . ." Mo. Rules of Civ. Pro. 74.01(b).

As the Eastern District held, a judgment does not have to adjudicate *abandoned* claims and parties in order to be final. App. Op. at 35; *Heckadon v. CFS Enterprises, Inc.*, 400 S.W.3d 372, 377 n.3 (Mo. App. W.D. 2013) (holding that claims pleaded but not submitted to the jury were deemed abandoned, so the final judgment need not address them); *Steelhead Townhomes, LLC v. Clearwater 2008 Note Program, LLC*, 504 S.W.3d 804, 806 (Mo. App. W.D. 2016) (same); *Unnerstall Contracting Co. v. City of Salem*, 962 S.W.2d 1, 5-6 (Mo. App. S.D. 1997) (same); *Murray v. Ray*, 862 S.W.2d 931, 932 (Mo. App. S.D. 1993) (holding plaintiff had abandoned all claims against a given defendant, so the judgment was final and appealable even though it did not mention the abandoned party); *Young By and Through Young v. Davis*, 726 S.W.2d 836, 837 (Mo. App. S.D. 1987) (same).

C. The trial court's citation of *Coleman v. Meritt*, 324 S.W.3d 456, 461 (Mo. App. S.D. 2010), was inapposite. *Coleman* involved the timing of post-judgment interest and was primarily a law-of-the-case ruling. *Id.* The earlier judgment had failed to dispose of two parties, so post-judgment interest could not accrue from that earlier order. *Id.* Only after that judgment did the primary parties dismiss the other two parties by joint motion. *Id.* And the appeals court based its

ruling on law-of-the-case: plaintiff had previously appealed and failed to raise the issue of post-judgment interest, so it could not do so on the second appeal either. *Id.*

Accordingly, the November 2015 Judgment was final because it disposed of all parties and issues submitted to the jury. The trial court did not have jurisdiction to grant post-judgment interest four months later. *See McGuire*, 447 S.W.3d at 666-67 (Mo. banc 2014) (holding that post-judgment interest should not be granted if it is not found in the final judgment, and plaintiff neglects to ask for it in a timely fashion).

CONCLUSION

Defendants respectfully ask this Court to reverse the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy of the above Substitute Brief of Appellants/Cross-Respondents was served electronically by Missouri CaseNet e-filing system on April 25, 2018, to all parties of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 9767 words.

/s/ D. John Sauer
Solicitor