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' SUBSTITUTE REPLY AND CROSS-RESPONDENTS' BRIEF IN RESPONSE

JOSHUA D. HAWLEY
Attorney General
D. John Sauer
Mo. Bar No. 58721
First Assistant and Solicitor
Peter T. Reed
Deputy Solicitor
Mo. Bar No. 70756
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-1800; (573) 751-0774 (fax)
John.Sauer@ago.mo.gov

Counsel for Appellants/Cross-Respondents

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INTRODUCTION

The opening brief of the Department of Labor and Industrial Relations, Division of Workers' Compensation (The "Division"), explained that Plaintiff/Respondent/Cross-Appellant Matthew Vacca ("Vacca") applied for and received long-term disability benefits in 2011 by representing that he could no longer work even with an accommodation. He successfully obtained alimony maintenance (later reversed) in 2013 by again representing that he was totally and permanently disabled. Vacca nonetheless pled and testified in this retaliatory-discharge case both that he was able to work in 2011, and that he planned to continue to work for twenty more years.

Vacca's brief in response cannot escape the "[t]he uncontested facts," App. Op. 32, of Vacca's contradictory statements to the disability insurer, to the marriage-dissolution court, and to the jury below. Those uncontested facts, combined with the lower court's legal errors, warrant complete reversal on several grounds.

Vacca's cross-appeal is also meritless, and need not be reached by the Court at all if it holds that punitive damages should not have been submitted to the jury.

REPLY BRIEF IN SUPPORT OF APPELLANTS' APPEAL

I. Vacca should be estopped from asserting his retaliatory discharge claim and should be held to his prior judicial statement, made under oath, that he was unable to work.

"Missouri Courts . . . have consistently refused to allow litigants to take contrary positions in separate proceedings," applying judicial estoppel 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 In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 146 (Mo. App. W.D. 2011)). The Court should do the same here. Vacca testified under oath in marriage-dissolution proceedings that he was unable to work, and then, within months, filed his pleading in this case asserting that he *was* able to work. He then testified to the jury not only that he could have continued working, but had intended to work for twenty more years. The equities show that Vacca should be held to his earlier sworn testimony and judicially estopped from asserting his contradictory sworn position in this case.

The State's opening brief outlined three bases for that conclusion. First, judicial estoppel should apply to Vacca's September 2012 pleading based on his prior sworn inconsistent statement asserting total disability. Second, judicial estoppel should at least dictate that Vacca's earlier sworn statement of total disability shifts the burden to Vacca to show his position in this suit is not inconsistent. Third, judicial estoppel should apply because all

three of the discretionary estoppel factors are met—Vacca's statements are clearly contradictory; the marriage-dissolution court accepted his earlier contrary statement as of May 2013 when it granted maintenance, even though that decision was vacated on appeal on other grounds; and Vacca gained an unfair advantage through his ever-changing statements.

Standard of review. Vacca correctly points out that some federal courts review the application of judicial estoppel using an abuse-of-discretion standard while others review the issue *de novo*, Resp. Br. 45-48, but he is mistaken to believe this dispute is relevant here, *see In re Ohio Execution Protocol*, 860 F.3d 881, 891 (6th Cir. 2017). As explained in the State's opening brief, either standard requires this Court to reverse if the lower court "erroneously declared or applied the law." *Candidacy of Fletcher*, 337 S.W.3d at 139-140; *see also Chevron Corp. v. Donziger*, 833 F.3d 74, 128 (2d Cir. 2016) (noting legal errors are cause for reversal under either standard).

Moreover, Vacca's standard-of-review argument confirms that the lower court legally erred by treating discretionary factors as inflexible prerequisites. The cases he cites apply a deferential standard precisely because judicial estoppel is an "'equitable doctrine'" that places a "'high premium on'" the trial court's "'flexibility'" to determine "'whether a litigant is playing fast and loose with the court.'" Resp. Br. 47 (quoting *Alt. Sys. Concepts v. Synopsys, Inc.*, 374 F.3d 23, 30-31 (1st Cir. 2004)). Here, Vacca

was undoubtedly playing fast and loose with the courts, *see*, *e.g.*, App. Op. 32, but the lower courts mistakenly believed they did not have the authority to apply judicial estoppel, *see id.* at 18.

Preservation. Vacca argues that judicial estoppel was not preserved below, Resp. Br. 48-53, but the Court should reject this argument as well. Defendants raised judicial estoppel throughout this case. The Division raised judicial estoppel in its motion for summary judgment. LF 208. The Division also raised judicial estoppel in its motion for judgment notwithstanding the verdict. LF 600-617. Vacca now argues that the two motions raised different judicial-estoppel arguments. Resp. Br. 50-51. But Vacca argued previously that the Division's two judicial-estoppel arguments were so similar that the law of the case barred consideration of the later argument. LF 678. Once again, Vacca is guilty of shifting positions for the sake of litigation advantage. The Division has argued throughout that Vacca should be judicially estopped from asserting "that he is able to perform the essential job functions of an ALJ" at the time of his discharge. LF 213 (motion for summary judgment). When the trial court denied the Defendants' motion for summary judgment, it explained:

> "But for the reversal of the maintenance award in the dissolution act, the Court would have little doubt that Plaintiff cannot claim to be unemployable *and at the same time demand damages for wrongful termination of employment* subsequent to the date of his allegation of disability in the dissolution action."

LF 341 (emphasis added). As the Division has continually argued and continues to argue today, Vacca cannot, as a matter of law, assert wrongful termination of his employment. By his own statements, he was unable to do his job even with reasonable accommodations.

Moreover, Vacca's preservation argument suffers from an even more fundamental weakness. Judicial estoppel does not need to be raised by a party at all—it is an equitable doctrine designed to preserve the integrity of the courts that a court may raise *sua sponte*. Vacca incorrectly argues that judicial estoppel must be raised and preserved "during trial" and in response to testimony. Resp. Br. 48-52. Judicial estoppel is an equitable doctrine "'invoked by a court at its discretion.'" *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citation omitted). Because judicial estoppel "'is intended to protect the courts rather than the litigants, . . . it follows that a court, even an appellate court, may raise the estoppel on its own motion." *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) (citation omitted). This principle is "generally recognized." *Eilber v. Floor Care Specialists, Inc.*, 807 S.E.2d 219, 222-23 & n.4 (Va. 2017) (citation omitted) (collecting cases and noting the support of at least five federal circuits). In fact, at least one court suggested that it had an "'independent duty' . . . to raise judicial estoppel sua sponte." *Id.* at 222 (citing cases). Judicial estoppel is squarely before the

Court, not only because it was repeatedly raised by the Defendants and ruled on by the lower courts, but also because of this Court's independent authority to protect the judiciary.

Lastly, Vacca suggests the Division's Point Relied On raising judicial estoppel violated Rule 84.04(d) because it did not "identify Vacca's allegedly conflicting positions." Resp. Br. 52-53, 58-59. This argument is meritless. A Point Relied On is intended to provide clear notice of the ground for appeal, not give an exhaustive restatement of the facts underlying a claim. Indeed, "[a]ny reference to the record *shall be limited* to the ultimate facts necessary to inform the appellate court and the other parties of the issues. *Detailed evidentiary facts shall not be included*." Rule 84.04(d)(4) (emphasis added). The Division's Point Relied On informs Vacca and the Court of the issue raised on appeal—Vacca's contradictory statements—without including the "[d]etailed evidentiary facts" that are better explained in the body of the brief. "The function of this rule is to give notice" and that function was plainly satisfied here. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647 (Mo. banc 1997).

Judicial Estoppel Bars Vacca's Claims. The lower courts did not dispute that Vacca made sworn, contradictory statements to different courts. *See, e.g.*, LF 341 (asserting "little doubt" that judicial estoppel would apply if the dissolution judgment had not been overturned); App Op. at 32 ("The

uncontested facts are that Vacca simultaneously maintained two contradictory positions as to his ability to work"). Missouri courts "have consistently refused to allow litigants to take contrary positions in separate proceedings to ensure the integrity of the judicial process." *Candidacy of Fletcher*, 337 S.W.3d at 146. But both lower courts mistakenly believed they could *not* invoke judicial estoppel without "judicial acceptance" of Vacca's prior sworn statement, and believed the reversal of the dissolution judgment precluded such a finding. That judgment was mistaken for three reasons.

First, judicial estoppel should have applied to Vacca's September 2012 pleading based on his prior sworn inconsistent statement asserting total disability. Opening Br. 23-26. Vacca swore under oath in May 2012 that he was unable to work:

> **Question:** In your opinion, do you have the ability to – to concentrate and just from a – from a mental standpoint or emotional standpoint on any type of employment?
> **Answer:** No.

Tr. 367:2-368:17, Def. Ex. RRRRRR, Apt. App'x A27-31. In response to the next question he confirmed "I can't do it anymore." *Id.* But, a few months later in September 2012, he directly contradicted that statement when he pleaded in this suit that he "was capable of performing the essential function of his job with reasonable accommodation." Pet. ¶ 26. Vacca's "inconsistent positions were made under oath in a prior proceeding," and his contradictory

pleadings in September 2012 were "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). Vacca's bad-faith pleadings alone are legally sufficient to invoke judicial estoppel. Judicial acceptance is not required. *Id.*

Vacca says little, if anything, in response to this argument. Like the lower courts, Vacca suggests that *New Hampshire*'s three discretionary factors—including judicial acceptance—are "elements" and says judicial estoppel has been "reduced to" those factors. Resp. Br. 53-56. But the case law he cites says differently. As both the Eastern and Western Districts have recognized, "judicial estoppel cannot be reduced to a precise formula or test." *Zedner v. United States*, 547 U.S. 489, 504 (2006); *Vinson v. Vinson*, 243 S.W.3d 418, 422 (Mo. App. E.D. 2007); *Candidacy of Fletcher*, 337 S.W.3d at 144 ("[T]he three factors set forth in *New Hampshire* are not fixed or inflexible prerequisites."). Instead, "Missouri Courts in particular" have "consistently refused to allow litigants to take contrary positions in separate proceedings." *Candidacy of Fletcher*, 337 S.W.3d at 146. They have done so not because a list of elements was met, but "to ensure the integrity of the judicial process." *Id.* As for the judicial-acceptance factor in particular, several decisions note that judicial estoppel may apply even if the prior statement was "not made in a court at all." *Id.* at 144; *State ex rel. KelCor,*

Inc. v. Nooney Realty Trust, Inc., 966 S.W.2d 399, 403 (Mo. App. E.D. 1998); *Monterey Dev. Corp. v. Lawyer's Tile Ins. Corp.*, 4 F.3d 605, 609 (8th Cir. 1993). Judicial acceptance is a factor for consideration in applying the doctrine, not an inflexible prerequisite.

Second, this Court should at least hold that Vacca'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 does not respond to this legal argument either, Resp. Br. 56-59, although he does attempt to explain why his statements are not contradictory. That explanation falls short and should be rejected, as discussed below.

Third, this Court should find Vacca is judicially estopped because *New Hampshire*'s three discretionary factors were all met.

First, Vacca advanced "clearly inconsistent" positions, *New Hampshire*, 532 U.S. at 750, only a few months apart. He stated under oath in marriage-dissolution proceedings that he was unable to work. Tr. 367:2-368:17, Def. Ex. RRRRRR, Apt. App'x A27-31 ("I can't do it anymore"). But a few months later, he pled that he "was capable of performing the essential function of his job with reasonable accommodation." Pet. ¶ 26. And he later told the jury in this case, again under oath, that he could have worked every day for another twenty years. Tr. 331:1-332:17.

Vacca's arguments in response fall short, Resp. Br. 56-59, because they are contradicted by his prior actions and statements. He first argues that his testimony was consistent because he could still work in June 2011 when discharged, but was no longer able to work "seven months after" in January 2012. Resp. Br. 57. This argument contradicts Vacca's testimony at trial that he planned to work every day for twenty more years. Tr. 331:1-332:17. (It also suggests compensation for future wages should be limited to this seven-month window. *See infra* Point III.)

Vacca also argues that his statements are consistent when taken in context because his retaliatory discharge "caused the emotional problems" that were "the reason he could no longer work" by January 2012. Resp. Br. 57-59. Vacca's prior representations undermine this argument too. As early as January 2011—before his discharge—Vacca told the insurance company "I am no longer able to work" and said his last full day of work had been December 7, 2010. Tr. 344:11–345:9. He backed those statements up with supporting opinions from two different physicians: they explained that Vacca could not work, no accommodation could be made, and that his condition would "never" improve enough to return. Tr. 346:6-349-25; Pl. Ex. 37 at 2-3, A22-23.

In other words, Vacca's discharge cannot explain Vacca's contradictory statements because Vacca had made the same contradictory statements

before his discharge. As the majority opinion put it below, "[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. 32. He played the same game six months later, by simultaneously maintaining to the dissolution court that he was unable to work, while telling the trial court below that he *was* able to work. Vacca's own words undercut his current explanation of his contradictory testimony.

Vacca next argues that the Court should ignore the statements he made in his disability benefits application, because they "were unsworn and were not offered in a judicial proceeding." Resp. Br. 59. On the contrary, "Missouri courts have applied the doctrine of judicial estoppel in circumstances where the prior statements were not made under oath and even when the prior statements were not made in a court at all." *Candidacy of Fletcher*, 337 S.W.3d at 144-45 (citing *State ex rel. KelCor, Inc.*, 966 S.W.2d at 403-04). And here, Vacca's prior statements give context to his contradictory judicial statements. On its face, Vacca's sworn testimony in his marriage-dissolution case was inconsistent with his pleading and testimony in this case. Context shows that these contradictory statements were only two in a long line of self-interested contradictions: (1) In January 2011 Vacca said he could not work, even with accommodations, and never would be able to do so, Tr. 346:6-349-25; Pl. Ex. 37 at 2-3, A22-23; (2) in April and May 2011

he said he was able to work, Pl. Ex. 47 at 3; (3) in January 2012 his pleadings said he could not work, Def. Ex. SSSSSS, A32–34; (4) in May 2012 he testified that he could not work, Def. Ex. RRRRRR, A27-31; (5) in September 2012 he pled that he could work, Pet. ¶ 26; (6) in May 2013 he was granted spousal maintenance based on his testimony that he could not work, *see Vacca v. Vacca*, 450 S.W.3d 490, 491 (Mo. App. E.D. 2014); and (7) in 2015 he told the jury in this case that he intended to work full time for twenty more years, Tr. 331:1-332:17. In other words, he zig-zagged back and forth at least seven times in formal representations regarding his ability to work, always taking the position that would result in financial gain to him. His many prior inconsistent statements confirm that his statements to the courts were also inconsistent, and they confirm that it would be profoundly inequitable to allow him to recover here.

Vacca also argues that positions are only "clearly inconsistent" if they are based on "the same facts, relate to the same legal standard, and involved the same legal issues." Resp. Br. 56. As Vacca's supporting citations show, he confuses judicial estoppel with collateral estoppel. *See Berger v. Emerson Climate Techs.*, 508 S.W.3d 136, 142-145 (Mo. App. E.D. 2016) (analyzing the two types of estoppel differently). Vacca is free to assert alternative *legal* positions—such as long-term disability or a reasonable accommodation, or spousal maintenance or the ability to work—but he cannot make "purely

factual contradictions" in support of those claims. *Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 807 (1999). Judicial estoppel applies to bar Vacca's contradictory *factual* positions, not alternative *legal* positions.

Moving to the second discretionary factor, Vacca's prior inconsistent statement was also judicially accepted. Again, Vacca should be judicially estopped as of September 2012, when he demonstrated bad faith by filing pleadings contradicting his May 2012 sworn testimony. But at the very least, Vacca should be judicially estopped as of May 2013, when the marriage-dissolution court granted Vacca significant spousal maintenance because he was "in poor health and without adequate means to support himself." *Vacca*, 450 S.W.3d at 491. Despite having won that case based on the factual representation that he was unable to work, Vacca continued to allege contradictory facts in this case. Doing so demonstrated Vacca's intent to "'play fast and loose with the courts.'" *State ex rel. KelCor, Inc.*, 966 S.W.2d at 403 (citation omitted).

Vacca, like the lower court, says the trial court's acceptance of his prior inconsistent testimony does not matter because the maintenance award was reversed on other grounds prior to the trial in this case. Resp. Br. 59-60. That response ignores the long period of time *before trial* when Vacca continued to assert contradictory facts despite judicial acceptance of contrary facts in his divorce proceedings. Doing so evinced bad faith and constituted

an assault on the integrity of the judicial process. Vacca's argument also confuses judicial estoppel with a theory of unjust enrichment: judicial estoppel is not focused merely on preventing plaintiffs from obtaining double recovery, but is designed to "preserve 'the dignity of the courts and insure order in judicial proceedings.'" *Candidacy of Fletcher*, 337 S.W.3d at 144 (quoting *Edwards v. Durham*, 346 S.W.2d 90, 101 (Mo. 1961)). The grant and subsequent reversal of spousal maintenance in Vacca's divorce case illustrate the "chaotic and unpredictable results" that follow when litigants are allowed to take inconsistent factual positions. *Candidacy of Fletcher*, 337 S.W.3d at 144.

New Hampshire's third discretionary factor is also met: Vacca's inconsistent positions unfairly benefited him and unfairly prejudiced the Division and its employees. Vacca says he did not benefit because the maintenance reward was reversed and his disability award did not cover his full salary. Resp. Br. 61-62. Put aside whether he was actually unjustly enriched from his three claims—although he certainly would be if the Court were to affirm the jury's compensatory-damages award and Vacca's disability and pension benefits were not offset. As the Division's opening brief explained, "[i]t is unfair to *seek* triple recovery based on contradictory theories," whether one is successful or not. Opening Br. 30 (emphasis added). Again, five months before his discharge, Vacca told Standard Insurance that

he was unable to work even with accommodations and backed up his statements with letters from two physicians. Seven months after his discharge, his divorce pleadings said much the same thing. Vacca derived an unfair benefit, and the Division was unfairly prejudiced, when he told the jury that, at the time of his charge, he intended to work full time for twenty more years, and the jury awarded damages on that basis. That contradictory testimony "was the sole reliance for damages in the present case." App. Op. 4 (Richter, J., dissenting). Vacca should be held to his word.

II. Vacca voluntarily resigned based on his representations to the insurance company that he was "totally incapable of performing" his job, and so he cannot establish the causal link needed to support a retaliation claim.

The Division's opening brief argued that Vacca's receipt of disability benefits under § 287.855, RSMo, constituted voluntary resignation based on his own representations that he was "'totally incapable of performing any duties'" of his office. Opening Br. 34 (quoting § 287.855, RSMo). Vacca's response asserts that "[t]here are no facts which support the notion Vacca was 'totally incapable of performing any duties of his office.'" Resp. Br. 64 ("Appellants' argument is fallacious because it presumes that Section 287.855 allows the state to extend disability benefits only to employees who cannot perform any job duties.").

That response proves the Division's point. The statute expressly says disability benefits are *only* available to ALJs who are "totally incapable of performing any duties." Vacca's disagreement is not with the Division's factual characterizations, but with the statutory text. The "fact" that established that he was legally totally incapable of performing his job duties, as Director May's letter explained, was his receipt of disability benefits. Letter, Apt. App'x at A39. And his own supporting representations that he could not work and had quit his job established that his disability was not temporary. Both his application and his two supporting physicians said he was totally incapable of working, that an accommodation would not help, and that his condition would not improve. Pl. Ex. 36; Tr. 349:12-25; Pl. Ex. 37, Apt. App'x at A21-23. Vacca stated that his last full day of work was December 7, 2010. Pl. Ex. 36. One of the supporting physicians recommended that Vacca not work past February 2011. Tr. 349:12-25; Pl. Ex. 37, Apt. App'x at A23.

Vacca's other arguments are mistaken as well. Vacca says that the Division's reading of the law is wrong because the same rule would apply to instances of temporary total disability. Resp. Br. 64. This is not true. The Division's position is far narrower than he suggests. ALJs who are unable to work for a durational period of time under their doctor's orders would not be deemed to have voluntarily resigned. Nor is this a case of temporary total

disability. Vacca's application and supporting doctors' notes explained that Vacca's inability to work was permanent. His condition had "regressed," both doctors indicated that they did not expect the condition to improve, and one doctor expressly wrote that Vacca would be "unable to return" to work. Pl. Ex. 37 at 2, Apt. App'x at A22; *see also* Apt. App'x at A23. The Division's position is consistent with how other agencies treat long-term disability. *See, e.g.*, 1 CSR 20-3.070(6)(C) (stating that "[a]n employee who applies and is approved by the applicable state benefit system for long-term disability or retirement status shall be deemed to have voluntarily resigned (with reemployment eligibility)," except under limited circumstances).

Vacca next argues that ALJs may only be removed on certain grounds provided by law. Resp. Br. 65; *see* § 287.610, RSMo. That argument is beside the point. The Division argues not that he was removed, but that he voluntarily resigned. Just as applying for and accepting retirement benefits would indicate voluntary resignation, Vacca's application for and receipt of long-term disability benefits indicated voluntary resignation.

Vacca also suggests that the Division's position conflicts with §§ 104.500 and 104.518, RSMo, because some employees return to work after receiving disability benefits, Resp. Br. 65-66. It is true that other forms of disability benefits are available. But again, Vacca applied for and received long term disability benefits, Apt. App'x at A25, based on his own

representation that he had quit his job and was permanently unable to work. Apt. App'x at A21-23. As Director May's letter explained, § 287.855 "does not authorize . . . partial disability status." Letter, Apt. App'x at A39.

Vacca also suggests that it would violate the Americans With Disabilities Act to require termination "without considering a disabled employee's ability to continue to work with reasonable accommodations." Resp. Br. 66. That is not at all what happened here or what the Division argues. Vacca's own application for benefits stated that his last day of work was in December 2010 because of his inability to work. Apt. App'x at A21-23. His supporting physicians stated that he was totally incapable of working even with accommodations. *Id.* He received disability benefits based on those representations. Ex. 48, Apt. App'x at A25. The Division simply took him at his word.

Because Vacca terminated his employment no later than May 2012, he 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)).

III. The Court should at least remit the compensatory damages based on Vacca's physicians' statements about his declining health and inability to work.

Even if the Court does not reverse the judgment outright, it should at least remit the compensatory damages. The $4 million in compensatory damages was evidently based on Vacca's testimony that he could have worked for twenty more years—despite his poor and declining health—and includes over a million dollars more in pain and suffering. The trial court abused its discretion when it refused to remit a grossly excessive award that was against the weight of the evidence. *See* § 537.068, RSMo; *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 38 & n.11 (Mo. banc 2013).

Vacca responds, first, that it is "impossible" to determine whether the compensatory-damages award included twenty years of lost wages. Resp. Br. 67-70, 73. It is true that the jury award is not broken down line by line. But assuming twenty years of lost wages is not speculation either. The award matches the suggestions of Vacca's own arguments and demonstratives at trial, which suggested twenty years or "over $2.8 million" in lost wages. Resp. Br. 71. At any rate, in evaluating the reasonableness of the verdict, the Court should consider lost future income. *Hurst v. Kan. City, Mo. Sch. Dist.*, 437 S.W.3d 327, 338-39 (Mo. App. W.D. 2014). The future income award should have been relatively small given all the evidence of Vacca's declining health, and his January 2012 testimony that he was no longer able to work.

Vacca also recites alleged past acts of discrimination and the alleged harm that flowed from those acts as support for a large compensatory award. Resp. Br. 70-73. Much of this evidence relates to claims that Vacca abandoned, and so cannot be used to support damages. For instance, Vacca says the Division's "non-responsiveness" to his discrimination complaints led to his declining health. Resp. Br. 71-73. He also says the Division's "no confidence" vote and his office reassignment led to emotional distress and declining health. *Id.* These allegations supported Vacca's abandoned discrimination claim, not his retaliatory discharge claim. As with punitive damages, the Court should "not consider evidence relevant only for the purpose of establishing Vacca's untested claims of discrimination" when reviewing compensatory damages. App. Op. 29.

Lastly, Vacca says the opening brief ignored evidence of Vacca's continued ability to work, such as the letters of Dr. Taylor—the third doctor who wrote letters on Vacca's behalf. Resp. Br. 67-68; 70-71. As the opening brief explained, the question is not just whether Vacca could have worked in 2011, it is whether he could have continued working for twenty years. Opening Br. 40-41. No evidence supports this conclusion except Vacca's own testimony, and that statement is contradicted by his own prior statements about his inability to work, and two doctor's notes he submitted in support of

his disability claim, both of which say Vacca was unable to work even in 2011.

As for Dr. Taylor's letters, Resp. Br. 70-71, the opening brief discussed them several times, *see* Opening Br. 14, 26, 40. Dr. Taylor's diagnosis, like that of every other doctor, supports remitting the damages award. In January 2011, Dr. Taylor explained that Vacca's condition was "progressive" and "worsening," causing impairment that made Vacca "an appropriate candidate for long term disability." *See* Letter, Apt. App'x at A39. In April 2011, Dr. Taylor explained that Vacca's "ability to write" had become "significantly impaired." Pl. Ex. 47. He could manage about two hours on a "good day" and "none at all" on a bad day. *Id.* He was unable to work in any capacity for longer than "two to three hours at a time" and certainly was incapable of a "regular five-day work week." *Id.* As for the next twenty years, Dr. Taylor explained that Vacca's condition was "not treatable" and in "insidious decline." *Id.*

Thus, even the evidence that Vacca identifies as his best evidence casts significant doubt on whether Vacca was able to continue working in 2011. His own testimony in January 2012 showed that, by then, he was unable to work at all. The weight of the evidence falls strongly against the jury's conclusion that Vacca could have continued working *until 2031*.

IV. Punitive damages should not have been submitted to the jury because the Division did not act "without just cause or excuse."

The Division's opening brief explained that the trial court erred in allowing the issue of punitive damages to be submitted to the jury, because there was not substantial, clear and convincing evidence that the Defendants acted with evil motive or reckless indifference. Opening Br. 41-44. Vacca's response to this argument suffers from four fundamental mistakes.

First, contrary to Vacca's mistaken assertion that punitive damages are "generally support[ed]" in intentional-tort cases, Resp. Br. 79, this Court has said punitive damages are an "extraordinary" remedy that should be applied "sparingly." *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996); *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 160 (Mo. banc 2000) (finding evidence could support ordinary standard of proof but not submission of punitive damages to the jury); *see also Kan. City v. Keen Corp.*, 855 S.W.2d 360, 378 (Mo. banc 1993) (Holstein, J., concurring) ("Punitive damages are not favored."). They are meant as punishment for and deterrence of truly egregious conduct. Punitive damages require both a higher standard of proof (clear and convincing evidence), and a different kind and degree of bad motive (outrageous because of evil motive or reckless indifference). These standards apply just as much in intentional tort cases as negligence cases. *Hoyt v. GE Capital Mortg. Servs., Inc.*, 193 S.W.3d 315, 323

(Mo. App. E.D. 2006) ("It is not so much the commission of the intentional tort as the conduct or motives, i.e., the defendant's state of mind which prompted its commission, that form the basis for a punitive damage award."). Thus, "[s]ubmission of a punitive damages claim to the jury warrants special judicial scrutiny." *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226 (Mo. banc 2001) *overruled on other grounds*, *Badahman*, 395 S.W.3d at 40.

To ensure that punitive damages remain rare and subject to meaningful judicial scrutiny, the evidence must meet the "higher standard" of clear and convincing evidence. *Rodriguez*, 936 S.W.2d at 111. Proof satisfying a lesser standard may be enough to make a submissible case for the underlying tort, but not to submit punitive damages. The Court must separately conclude that a reasonable jury could find by clear and convincing evidence that retaliation was a contributing factor in Vacca's dismissal. That high standard was not met here.

Second, contrary to Vacca's mistaken assertion that inconvenient facts "must be disregarded," Resp. Br. 79, this Court has said punitive damages should only be submitted if a defendant's actions are "without just cause or excuse." *Howard v. City of Kansas City*, 332 S.W.3d 772, 788 (Mo. banc 2011) (citation omitted). In Missouri, a retaliatory-discharge claim requires proof that an earlier discrimination suit was a "contributing factor" to discharge. *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 665, 668 (Mo. banc 2009). But

punitive damages require proof that a defendant's conduct was "without just cause or excuse." *Howard*, 332 S.W.3d at 788. That is, Vacca must prove that "just cause or excuse" was *not* even a contributing factor. An employer's conduct is not "'outrageous because of evil motive,'" *id*. (citation omitted), if it was even partly motivated by good faith.

Vacca's legal error leads him to disregard the contributing factors that should have barred submission of punitive damages. As the Court of Appeals noted, Vacca repeatedly represented that he was unable to perform the functions of his job, "even with reasonable accommodations." App. Op. 32. He stated in writing that "his last full day of work was December 7, 2010" and that he was physically "unable to work as of January 1, 2011." *Id.* "At no point has Vacca claimed that these statements "were somehow a mistake or an inadvertence." *Id.* These representations were at least a contributing factor in the Division's decision to "accept[] Vacca's own repeated representations that he was unable to perform his job." *Id.*; *see also Alcorn*, 50 S.W.3d at 248 & n.22 (noting contributory negligence weighs against punitive damages).

Likewise, Vacca does not dispute that, based on his representations, he received disability benefits under § 287.855, RSMo. Director May sought the advice of legal counsel, and, as his letter to Vacca explained, believed that the acceptance of disability benefits under § 287.855, RSMo, constituted

voluntary resignation. Pl. Ex. 50, Apt. App'x at A26. This Court has reversed punitive-damages awards based on good-faith reliance on counsel. *See Lopez*, 26 S.W.3d at 160-61 (reversing punitive damages in part because defendant "obtained the advice of counsel" and relied on it); *Alcorn*, 50 S.W.3d at 248 (holding that one factor which "weigh[s] against submission of punitive damages" is that "the defendant did not knowingly violate a statute [or] regulation" and noting defendant "cooperated with" and "reli[ed] upon" the regulatory process); *Walker v. Gateway Nat'l Bank,* 799 S.W.2d 614, 617 (Mo. App. E.D. 1990) (reversing punitive damages because defendant "presented evidence that its employees were acting on the advice of counsel and with [a] good faith belief"). Vacca's receipt of long term disability benefits under § 287.855, RSMo, and Director May's good-faith belief that this constituted voluntary discharge—as it would under similar programs, *see* 1 CSR 20-3.070(6)(C)—was at least a contributing factor in his actual discharge. Even if a jury might find that Vacca's earlier discrimination suit was also contributing factor to his discharge, Vacca did not show by clear and convincing evidence that the Division's actions were *without* just cause or excuse. *Howard*, 332 S.W.3d at 788.

Vacca gives two related reasons why these many inconvenient facts supposedly "must be disregarded." Resp. Br. 79. Vacca argues that whether a defendant exhibited good faith is a question "for the jury," so reliance on

legal counsel is "irrelevant to submissibility of punitive damages." Resp. Br. 85-86. This gets the standard wrong, as *Lopez*, *Alcorn*, and *Walker* show. In each of these cases, an appellate court reversed the submission of punitive damages precisely because defendant exhibited good faith. *Lopez*, 26 S.W.3d at 161; *Alcorn*, 50 S.W.3d at 248; *Walker,* 799 S.W.2d at 617. Whether the evidence supports finding a lack of good faith "'is a question of law'" for the court, not an issue for the jury. *Howard*, 332 S.W.3d at 788 (citation omitted). "A submissible case for punitive damages requires clear and convincing proof" that the employer's conduct was "'outrageous because of evil motive'" and "'without just cause or excuse.'" *Id.* (citations omitted). Vacca also seems to argue that because the Court must view the evidence in the light most favorable to submissibility, it must assume that any evidence of good faith is pretextual. Resp. Br. 75, 79, 86. Again, this argument is incorrect. "To so hold would make punitive damages mandatory in every proven case of retaliatory discharge." *Altenhofen*, 81 S.W.3d at 592. Pretext is not presumed; it must be proven. Vacca bears the burden of establishing a lack of good faith by clear and convincing evidence. *Howard*, 332 S.W.3d at 788.

Third, Vacca again relies on testimony and evidence submitted in support of his unproven and withdrawn claims, Resp. Br. 79-80, 82-84, but the submissibility of punitive damages is limited to evidence presented in

support of the underlying retaliation claim. *May v. AOH Holding Corp.*, 810 S.W.2d 655, 657 (Mo. App. S.D. 1991) ("In determining the issue presented, this court considers only the conduct submitted to the jury by Instruction 11, upon which the verdict for punitive damages was returned."); *see also Thaller v. Skinner & Kennedy Co.*, 315 S.W.2d 124, 126 (Mo. banc 1958). The Court should look only "to the conduct relevant to the retaliatory discharge" claim to determine if punitive damages should have been submitted, and it should "not consider evidence relevant only for the purpose of establishing Vacca's untested claims of discrimination." App. Op. 29.

By dropping his other claims, Vacca limited the evidence to (1) the fact that he complained of discrimination; (2) the fact that Director May informed him of his discharge; and (3) evidence tending to show a causal relationship between the complaint and the discharge. *See* Jury Instruction 7, LF 510. The jury did not have to find that the underlying complained-of conduct was in fact discriminatory. *Id.*

Vacca assumes that the jury *did* decide the discrimination claims, however, by repeatedly assuming favorable inferences on unproven and withdrawn claims. "[A]ny assumption that Appellants or others actually discriminated against Vacca . . . is improper because it is not intrinsic to the verdict rendered and would amount to a punitive damages award on Vacca's unproven, unsubmitted claims." App. Op. 29. Consider, for example, the

bullet point list in Vacca's brief at pages 82-84. Because Vacca withdrew his discrimination claim, he also abandoned the supporting allegations that the Division "failed to take effective action to stop discriminatory conduct," Resp. Br. 82; that his revised schedule was an officially-granted reasonable accommodation rather than an informal arrangement, *id.*; that the investigation into his complaints was a "sham," *id.* at 83; that senior staff acted discriminatorily other than in his discharge, *id.*; that the Division's "no confidence" vote was discriminatory (it did not lead to discharge), *id.* at 84; that the Division treated similarly situated persons differently, *id.*; that his performance review was discriminatory, *id.*; and that his move to a different office was discriminatory, *id.* Vacca cannot ask for punitive damages based on allegations he intentionally abandoned. But Vacca says the Court should assume the jury relied on this evidence anyway. If the jury did, that alone warrants reversal. It is precisely this kind of argument that requires "careful judicial scrutiny." *Alcorn*, 50 S.W.3d at 247-48.

Besides, even considering all the evidence in the record, Resp. Br. 79-84, there would still not be clear and convincing evidence that the Division acted "without just cause or excuse." Even if his discharge were the final act in a series of discriminatory and retaliatory actions, the immediate but-for cause of that discharge was nonetheless Vacca's decision to apply for and accept long-term disability benefits. If that decision was a contributing cause

of the discharge, then punitive damages should not have been submitted to the jury.

Fourth, the Division properly preserved and raised these arguments. Vacca argues that the Division did not preserve its challenge to the submissibility of punitive damages in a motion for directed verdict at trial. Resp. Br. 75-77. Vacca did not make this waiver argument in the Court of Appeals. He accordingly "waived the waiver" on appeal. *See City of Harrisonville v. McCall Serv. Stations*, 495 S.W.3d 738, 750 n.6 (Mo. banc 2016) (suggesting a party must properly raise a preservation argument on appeal before that issue should be decided); *see also* Rule 83.08(b) (a party's substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief"). The argument also lacks merit. The Division asked that the court decide the retaliation claim in a directed verdict rather than submit the claim to the jury. Tr. 1275. It necessarily also argued that punitive damages should not be submitted on that claim. At the end of trial, the Division renewed its motion for a directed verdict. Tr. 1285. And it stated a few minutes later that it was "objecting to the submissibility of punitive damages both in the instruction on punitive damages and punitive damages submitted in the verdict form." Tr. 1291. The Division objected to both submissibility and the verdict form, and that is enough to preserve the issue for appeal. The cases Vacca cites are distinguishable, Resp. Br. 75-77,

because here, the verdict form and dispositive motions were handled together after the close of evidence. In any event, if the Court has any preservation concerns, it can vacate the punitive damages award as a violation of Due Process for the same reasons that punitive damages should not have been submitted to the jury: by acting at least partially in good faith, the Division demonstrated a lack of reprehensibility.

Vacca also argues that the Division altered the basis of its claim by listing additional facts in its Point Relied On. Resp. Br. 77-79. But Rule 83.08(b) does not prohibit a party "from improving the brief with more detailed legal analysis." *Cox v. Kan. City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 n.4 (Mo. banc 2015). The Division permissibly explained how Vacca's "repeated representations that he was unable to perform his job," App. Op. 32, led the Division to believe he had legally resigned. Not only did the Division preserve that argument below, the Court of Appeals ruled in Vacca's favor on this point partly on that very basis. *Id.*

In sum, punitive damages should be submitted only "sparingly," *Rodriguez*, 936 S.W.2d at 110, and only upon clear and convincing proof that an employer's actions were without just cause or excuse. Vacca did not meet that high burden here.

V. The punitive-damages award was grossly excessive and arbitrary in violation of the Due Process Clause.

The Division's opening brief explained that, if this Court agrees with the Court of Appeals that punitive damages should have never been submitted to the jury, the Court does not need to address the State's due process claim. But if the Court upholds the submission of punitive damages, it has an independent duty to review the constitutionality of the punitive-damages award.

The $2.5 million in punitive damages assessed against the Division was grossly excessive because the Division's actions lacked reprehensibility. The Division's actions lacked reprehensibility under the constitutional standard for the same reasons they were not "without just cause and excuse" under the submissibility standard: Vacca stated in writing that his last day of work was in December 2010, he explained that he was unable to work even with accommodations, he backed up those statements with letters from his physicians, and he subsequently received long-term disability benefits based on those representations. The Division did not act reprehensibly when it simply took Vacca at his word. *See* Letter, Pl. Ex. 50, A26.

Vacca's contrary arguments do not disturb that conclusion. Vacca first argues that he suffered physical harm, not just economic harm, because the "severe emotional distress . . . worsened his physical condition." Resp. Br. 89-

90. Without minimizing Vacca's deteriorating health, emotional distress is not the same as physical harm. The case Vacca relies on, *Diaz v. Autozoners, LLC*, 484 S.W.3d 64 (Mo. App. W.D. 2015), recognizes that "emotional and psychological harm" is "neither physical nor economic." *Id.* at 90. Although punitive damages are still a possibility in such cases, the nature of the alleged harm weighs against Vacca's claim.

Citing his prior complaints, Vacca next argues that the Division acted reprehensibly because his retaliatory discharge was supposedly not an isolated incident. Resp. Br. 90-91. This argument is misplaced because Vacca voluntarily abandoned his underlying discrimination claim. Again, granting punitive damages based on the underlying discrimination allegations "amount[s] to a punitive damages award on Vacca's unproven, unsubmitted claims." App. Op. 29. That the jury heard significant evidence on withdrawn claims should "heighten[]" this Court's due process concerns. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (noting the danger of arbitrary punitive damages awards "is heightened when the decisionmaker is presented with evidence having little bearing on the amount that should be awarded"). The very fact that Vacca abandoned those claims suggests Vacca could not prove any other instances of discrimination.

Third, Vacca argues that his discharge was reprehensible because of "trickery and deceit" because, he says, the Division's legal explanation for his

discharge was "contrived." Resp. Br. 91-92. As explained in the previous section, however, the jury could have found that retaliation was a "contributing factor" in Vacca's discharge without finding that the legal basis cited for the discharge was contrived or in bad faith. Vacca also repeats the allegation that the earlier investigation was a "sham" and based on a "false claim" about Vacca's work accommodations. Resp. Br. 92. Again, those allegations were made in support of an abandoned claim. The Division acted at least partly in good faith based on the advice of legal counsel.

Relatedly, Vacca says the Division's argument should be denied because the Division *only* argued a lack of reprehensibility. Resp. Br. 87-88. Reprehensibility is the "'most important indicium of the reasonableness of a punitive damages award.'" *State Farm*, 538 U.S. at 419 (citation omitted). If the Division's conduct lacked reprehensibility, then the punitive-damages award was not reasonable. Thus, the punitive damages are disproportionate to the harm alleged and submitted to the jury.

Further, the Division's opening brief argued that if the Court remitted the jury's compensatory-damages award, it should also revisit the punitive-damages award, because the Due Process Clause prohibits excessive punitive damages. Opening Br. 46-47. Vacca responds that the current ratio comports with due process. Resp. Br. 92-93. But the Division asks the Court

to review the punitive-to-compensatory damages ratio if it first remits compensatory damages.

The Division's opening brief also argued that it suffered prejudice when the trial court allowed Vacca to discuss the Missouri Tort Victim's Compensation Fund, which receives half of the punitive-damages award. Opening Br. 47. That prejudicial testimony adds one more reason to conclude that the jury's punitive-damages award is arbitrary. Vacca suggests this argument is not preserved by the Point Relied On, Resp. Br. 93-95, but it is fully preserved. The Division's counsel immediately objected to Vacca's prejudicial testimony, and the objection directly supports the Point Relied On. *See Cox*, 473 S.W.3d at 114 n.4. Punitive damages were not reasonable and should be vacated because the Division did not act reprehensibly, because Vacca withdrew his unproven claim that the Division engaged in prior discriminatory acts, and because the jury was prejudicially influenced by improper testimony about the Fund.

VI. Vacca is not entitled to post-judgment interest because he did not file a timely after-trial response to the November 2 Judgment.

The Court of Appeals rightly held that Vacca abandoned all claims against Defendant Boresi, and that abandoned claims do not need to be adjudicated. App. Op. 33-36. If so, then the trial court's November 2 Judgment controls post-judgment interest, not the March 11 Judgment.

Vacca does not dispute that he abandoned all claims against Defendant Boresi before the case was submitted to the jury, but he takes the position that Rule 74.01(b) required the trial court to "adjudicate" his abandoned claims. Resp. Br. 96-97; 100-105. Each of his arguments is mistaken.

Vacca first says that Rule 74.01(b) requires a judgment to "adjudicate" all claims, and the November 2 Judgment did not "adjudicate" the claims against Defendant Boresi. Resp. Br. 100-01. But, as Vacca concedes, "adjudicate" means "'to settle finally . . . on the merits.'" *Id.* (quoting *In the Interest of T.A.S.*, 62 S.W.3d 650, 658 (Mo. App. W.D. 2001)). A plaintiff's decision to abandon a claim, after the start of trial, settles that claim "finally" such that there is nothing left to decide. Indeed, once a claim is abandoned, the merits *cannot* be decided. Words take their meaning from context. *State ex re. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018) ("The plain and ordinary meaning . . . is determined from the words' usage in the context of the entire statute."). Thus, as Vacca's own reading of "adjudicate" suggests, Rule 74.01 only requires a final judgment to adjudicate *the remaining* claims, not those previously dismissed or abandoned. That also fits the rule's broader purpose: a final judgment is one "'leaving nothing for future determination.'" *Ndegwa v. KSSO, LLC*, 371 S.W.3d 798, 801 (Mo. banc 2012). As of November 2, the trial court had nothing left "for future determination" besides post-judgment motions.

Vacca next argues that all three districts of the court of appeals were wrong when they held that a final judgment need not adjudicate abandoned claims. Resp. Br. 101-103. They are wrong, he says, because they "did not consider the current Rule 74.01(b)" as amended in 1988. Resp. Br. 102. That is simply mistaken, both as a matter of precedent and of substance. As to precedent, *Steelhead Townhomes, L.L.C. v. Clearwater 2008 Note Program, LLC*, 504 S.W.3d 804, 805, 807 (Mo. App. W.D. 2016), explained that claims abandoned "on the record before the circuit court at trial" are "disposed of" for purposes of Rule 74.01. The Court of Appeals knew the state of the Rules of Civil Procedure. As to substance, Vacca misreads Rule 74.01(b). Rule 74.01(b) is an expansion, not a restriction, on appellate jurisdiction. It creates "an exception to the final judgment rule," *Ndegwa*, 371 S.W.3d at 801. It does not "abrogate" that rule as Vacca contends, Resp. Br. at 102.

The dispositive question is whether abandoned parties and claims must be adjudicated in a final judgment under Rule 74.01(a), and the controlling case law holds that they do not. "In Missouri, an abandoned legal theory no longer remains an issue for any purpose." *Cross v. L.S.M.C., Inc.,* 464 S.W.3d 237, 242 (Mo. App. W.D. 2015); *see Heckadon v. CFS Enterprises, Inc.*, 400 S.W.3d 372, 377 n.3 (Mo. App. W.D. 2013); *Unnerstall Contracting Co. v. City of Salem*, 962 S.W.2d 1, 5-6 (Mo. App. S.D. 1997).

Vacca also argues that Rule 67.02(b) does not allow a plaintiff to voluntarily dismiss claims, once a jury is impaneled, without a written order. Resp. Br. 102-105. But that is not what happened here. Vacca confuses voluntary dismissal of a claim under Rule 67.02 (which is without prejudice) with voluntary abandonment of a claim at trial (which is with prejudice). A claim voluntarily dismissed under Rule 67.02 can be brought again "'as if the suit were never brought.'" *State ex rel. Moore v. Sharp*, 151 S.W.3d 104 (Mo. App. S.D. 2004) (citation omitted). A party generally cannot voluntary dismiss a case after the court empanels the jury. The case must be submitted to the jury or abandoned. Rule 67.02(b) provides a limited third choice. It lets a party "seek leave of court to dismiss without prejudice." *Benson Optical Co., Inc. v. Floerchinger*, 810 S.W.2d 531, 536 (Mo. App. E.D. 1991). But when the court does *not* dismiss under Rule 67.02(b), and a party does *not* submit the claim to the jury, it "constitutes . . . abandonment." *Id.*

Here, Vacca abandoned all claims against Defendant Boresi during trial. Tr. 1240:8-11; LF 0518-0519. The trial court acknowledged in its March 11, 2016 judgment that "Plaintiff Matthew Vacca elected to abandon his claims against defendant Karla Boresi and to submit to the jury only his . . . retaliation claim." LF 0788. An abandoned claim "'no longer remain[s] an issue for any purpose.'" *Cross*, 464 S.W.3d at 242 (quoting *Roddy v. Gen. Motors Corp.*, 380 S.W.2d 328, 332 (Mo. 1964)). Those claims accordingly did

not need to be, and indeed "should not have been," subsequently decided by the trial court. *Cross*, 464 S.W.3d at 242.

The cases Vacca cites do not disturb this conclusion. Resp. Br. 102-105. He again cites *Coleman v. Meritt*, 324 S.W.3d 456 (Mo. App. S.D. 2010). The opening brief already explained why *Coleman* is inapposite. Opening Br. 49-50. Vacca also cites *Sangamon Assocs., Ltd. v. Carpenter 1985 Fam. P'ship, Ltd.*, 112 S.W.3d 112 (Mo. App. W.D. 2003). *Sangamon* supports the Division, not Vacca. As a close reading shows, the plaintiff asked the trial court to dismiss the claims without prejudice while the parties tried to resolve it out of court. *Sangamon*, 112 S.W.3d at 116 ("We are going to give it a shot to see if we can stay out of Court and get things wound up . . ."). The parties and the trial court agreed the claim should be dismissed without prejudice. *Id.* at 116-17. The parties had no intention of abandoning the claim—noting on the record that they might have to refile it. *Id.* This case is unlike *Sangamon* because no party suggests Vacca's claims should have been dismissed without prejudice. Rather, the record shows that the parties and the court agreed that Vacca abandoned all claims against Defendant Boresi. Tr. 1240:8-11; LF 0518-0519.

Finally, Vacca makes the alternative argument that the November 2, 2015 Order and Judgment was not the final judgment because the trial court

granted Director May's post-trial motion to remit punitive damages. Resp. Br. 105-107. This argument is also without merit.

An order granting a motion to remit the judgment does not create an amended judgment. *See Dangerfield v. City of Kansas City*, 108 S.W.3d 769, 775 (Mo. App. W.D. 2003), *abrogated on other grounds in Blue Ridge Bank and Trust Co. v. Hart*, 152 S.W.3d 420, 425 (Mo. App. W.D. 2005)). "[T]he entry after remittitur is a correction of the judgment originally entered and not actually a new judgment. The appealable judgment is the original judgment (as corrected of course) but still the appeal is from the original judgment, that is from what remains of it." *Steuernagel v. St. Louis Pub. Serv. Co.*, 238 S.W.2d 426, 429 (Mo. banc 1951).

There is no question that Vacca failed to timely seek post-judgment interest. The jurisdiction of the trial court extends only 30 days after entry of final judgment, and then up to 90 days more upon the filing of a timely after-trial motion. *Martin, Malec & Leopold, P.C. v. Denen*, 285 S.W.3d 383, 386 (Mo. App. E.D. 2009). Following the Court's February 22, 2016, Memorandum Opinion and Order, the judgment became final as to everything except the limited issue of Plaintiff's ability to elect a new trial on punitive damages as to Defendant May. The remittitur did not reopen the judgment for a request and decision on post-judgment interest.

The November 2, 2015 Order and Judgment was the final judgment. The court was without jurisdiction to grant post-judgment interest several months later. Accordingly, the award of post-judgment interest should be reversed. *McGuire v. Kenoma, LLC*, 447 S.W.3d 659 (Mo. banc 2014).

RESPONSE TO VACCA'S CROSS APPEAL

On cross-appeal, Vacca argues that the trial court should not have remitted the punitive-damages award against Director May. Resp. Br. 109-117. If this Court agrees with the Court of Appeals that punitive damages should not have been submitted to the jury in the first place, then Vacca's cross-appeal should be denied as moot. *See* App. Op. at 33. Vacca's cross appeal should also be denied on the merits.

I. Remittitur was timely raised and preserved (Responds to Vacca's Point Relied On I).

A. Standard of Review

Whether the trial court had jurisdiction to issue a remittitur based on the post-judgment timing of the court's order is a question of subject matter jurisdiction. "When the facts are uncontested, the determination of the court's authority to hear a case is purely a question of law that is reviewed *de novo*." *State v. Cross*, 497 S.W.3d 271, 276 (Mo. App. E.D. 2016).

B. Argument

Remittitur of compensatory and punitive damages was timely raised in Defendants' Motion for a New Trial On Damages Or In The Alternative For a Remittitur, filed December 2, 2015—thirty days after final judgment. *See* LF 618-631. The Division and Director May ("Defendants") properly moved for remittitur of statutory and punitive damages under Rule 78.10. LF 618. And they cited the proper statutory authority for remittitur of damages, § 537.068, RSMo. LF 618. The Defendants explained that "remittitur is appropriate where the verdict is against the weight of the evidence." LF 619 (citing *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 38 (Mo. 2013)).

As for the merits, Defendants asked that the punitive-damages award be vacated or "reduced substantially." LF 630; LF 743 (citing Defendants' request for remittitur). Defendants compared the compensatory and punitive damages awards from similar cases. LF 621-22. Defendants argued that the punitive-damages award was excessive compared to "the alleged harms of Vacca and the alleged conduct of defendants." LF 628. Specifically, the Defendants argued that "'[p]unitive damages are intended to punish . . . and deter.'" LF 629-30 (quoting *Ellison v. O'Reilly Automotive Stores, Inc.*, 463 S.W.3d 426, 439 (Mo. App. W.D. 2015)). The punitive-damages award was far more than necessary to punish and deter because "[t]here was no evidence in this case" that the Division and May had engaged in "prior such conduct"

or likelihood that they would repeat it "in the future." *Id.* Picking up on this argument, and also relying on *Ellison*, the trial court explained that a punitive-damage award should not "exceed[] what is necessary to punish and deter." LF 742. Applying that standard, the court explained that "Mr. May's misdeed was not even a crime, and he gained nothing by it. The court thinks that $5,000 is sufficient to punish Mr. May and to deter others from such misconduct." LF 744.

Vacca says the Defendants had to do three other things to preserve remittitur of punitive damages, but he is mistaken as to all three. Vacca suggests that Defendants had to specifically cite § 510.263.6, RSMo, in order to preserve the issue, Resp. Br. 111, but he cites no authority for such a technical rule. That statute only authorizes remittitur, and Defendants naturally cited the remittitur standard in § 537.068, RSMo, instead. Vacca also says Defendants failed to argue that the punitive-damages award was against the weight of the evidence. Resp. Br. 111. But Defendants *did* specifically argue that the award was excessive compared to Vacca's alleged harms and Defendants' alleged conduct, and that it exceeded what was necessary to punish and deter. Vacca also says defendants did not introduce evidence of Director May's financial condition. Resp. Br. 111. But the trial court did not rely on Director May's financial condition; it only speculated that "a much more modest sum will ordinarily suffice to punish and deter"

"the great majority." LF 743. The heart of the trial court's decision was that Director May "gained nothing by" his alleged misdeeds, and so had no motive to repeat them. LF 744. Defendants properly raised remittitur of punitive damages, and the trial court adopted their arguments.

II. The trial court's remittitur of punitive damages was not a grossly excessive abuse of discretion (Responds to Vacca's Point Relied On II).

A. Standard of Review

The trial court is granted "broad discretion in ordering remittitur." *Uxa ex. rel Uxa v. Marconi*, 128 S.W.3d 121, 135 (Mo. App. E.D. 2003) (citing *Lopez v. Three Rivers Elec. Co-op, Inc.*, 92 S.W.3d 165, 175 (Mo. App. E.D. 2002)). A trial court's grant of remittitur will not be overturned without an "abuse of discretion so grossly excessive that it shocks the conscience and shows that both the trial judge and the jury abused their discretion." *Id.*

B. Argument

The trial court acted reasonably in remitting punitive damages against Director May from $500,000 to $5,000. The court explained that punitive damages must not exceed what is "necessary to punish and deter"—"destruction of the wrongdoer is not the goal." LF 743. Director May's misdeed was relatively minor, it was not a crime, and "he gained nothing by it." LF 744. Thus, little was needed to punish his misdeed and deter similar future conduct. By comparison, a half million dollars in punitive damages

would have been plainly excessive—"a much more modest sum will ordinarily suffice." LF 743.

Vacca argues, again, that Director May did not present evidence about his financial wealth. Resp. Br. 114-117. But the trial court did not reduce the punitive-damages award against Director May because of perceived financial hardship. LF 743. Its argument was simpler than that: a $500,000 award, it explained, will nearly always "serve[] to destroy the wrongdoer, not just punish and deter." LF 743. There was no reason to believe Director May was the exception.

Vacca also ignores the rest of the trial court's order. LF 740-744. The trial court's explanation of the law closely follows the factors outlined by this Court in *Lewellen v. Franklin*, 441 S.W.3d 136, 144 (Mo. 2014). The court "must review punitive damages awards and consider the reprehensibility of the defendant's misconduct, the disparity between the harm and the award, and the difference between the award and civil penalties authorized or imposed in comparable cases." *Id.* Far from relying "exclusively" on financial status, Resp. Br. 116, the trial court emphasized that Director May "gained nothing by" his alleged misconduct. LF 744. Half a million dollars in punitive damages against an individual is nearly always excessive. The disparity was even more clear here because Director May did little worthy of punishment or future deterrence. *Id.* That the award against Director May

was one hundred times as great as the maximum civil penalty allowed by law only confirmed that it was meant to destroy, not to punish. *Id.* The trial court set the reduced punitive-damage award at the high end, matching the maximum civil penalty allowed in Missouri. *Id.*

The trial court's remittitur was not an abuse of discretion. The issue was properly preserved, argued by Defendants, and ruled on by the trial court. LF 741-743.

CONCLUSION

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

Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General

/s/ *D. John Sauer*
D. John Sauer
Mo. Bar No. 58721
First Assistant and Solicitor
Peter T. Reed
Deputy Solicitor
Mo. Bar No. 70756
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-1800
(573) 751-0774 (Facsimile)
John.Sauer@ago.mo.gov

Attorneys for Appellants/Cross-Respondents

July 9, 2018

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy of the above Appellants' Substitute Reply and Cross-Respondents' Brief in Response was served electronically by Missouri CaseNet e-filing system on July 9, 2018, to all parties of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) for cross appeals and that the brief contains 10,350 words.

/s/ *D. John Sauer*
Solicitor