IN THE SUPREME COURT OF MISSOURI

MATTHEW D. VACCA,

Respondent/Cross-Appellant

vs.

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

Appellants/Cross-Respondents

No. SC 96911

Appeal from the Circuit Court of the City of St. Louis
The Honorable Julian L. Bush, Circuit Judge

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STATEMENT OF JURISDICTION

The jury returned its verdict in favor of Respondent/Cross Appellant Matthew Vacca on September 25, 2015. LF 518. The court entered a purported judgment in accordance with the verdict on November 2, 2015. LF 596-97. Appellants/Cross-Respondents Missouri Department of Labor and Industrial Relations and Brian May filed timely post-trial motions for judgment notwithstanding the verdict or, alternatively, new trial on damages or in the alternative remittitur. LF 600-647.

The court concluded that the November 2, 2015, ruling was not a judgment under Rule 74.01(b) and entered judgment on the verdict on March 11, 2016. LF 788-789. Appellants refiled their post-trial motions on March 21, 2016. LF 793-840. The court granted May's motion for new trial or in the alternative remittitur as to the amount of punitive damages only and denied all other post-trial motions. LF 740-744, 892-893. Vacca accepted remittitur pursuant to Rule 78.10(b). On April 29, 2016, the court entered an amended judgment reducing the punitive damages awarded against May in accordance with its remittitur order. LF 905-907. On May 17, 2016, DOLIR and May filed a notice of appeal from the amended judgment. LF 908-910. On May 27, 2016, Vacca filed a notice of appeal to initiate a cross-appeal challenging only the grant of remittitur in accordance with Rule 78.10(d). LF 915-917.

Because this appeal does not involve any matter within the exclusive jurisdiction of the Missouri Supreme Court, the Missouri Court of Appeals for the Eastern District initially had jurisdiction of this appeal. Mo. Const. Art. 5, §§ 3 & 15. On November 7, 2017, the court of appeals issued its opinion, affirming the judgment in part and reversing

in part. This Court, having sustained DOLIR and May's timely application for transfer, has jurisdiction over the appeal.

STATEMENT OF FACTS[1]

In 1992, Matthew Vacca was appointed as an administrative law judge in the Missouri Department of Labor and Industrial Relations (DOLIR), Division of Workers' Compensation (DWC). Tr. 77; Ex. 50 (App. A26).[2] Since 2008 Vacca was disabled and working under a reasonable accommodation. Tr. 89-90, 234-235, 980; Ex. 40 at 2-4. Vacca was fired on June 7, 2011, after Brian May, a DOLIR Director, learned that he was receiving a $738.22 per month long-term disability benefit known as a "return to work incentive." Tr. 322-23; Ex. 48; Ex. LLLL (Resp't App. A34). This is a minimum benefit designed to encourage disabled employees to continue working and is approximately $4,200 per month less than the full long-term disability benefit. Ex. LLLL (Resp't App. A34); Ex. 48; Ex. 71; Tr. 321-323, 1261-63; Smith Dep. 127-128.[3] Vacca qualified for the return to work incentive because he was disabled within the meaning of the disability

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[1] Appellants' statement of facts is incomplete, inaccurate, and argumentative, and omits evidence favorable to Vacca in contravention of the standard of review applicable to most of the issues. Accordingly, Vacca elects to provide this Court with a separate statement of facts pursuant to Rule 84.04(f).

[2] Citations to Appellants' Appendix are abbreviated "App. A__" and citations to Respondent's Appendix are abbreviated "Resp't App. A__".

[3] Laura Smith is the corporate representative of Standard Insurance Company. Smith Dep. at 4-5. A DVD containing the excerpts of her video deposition played at trial and a written transcript of these excerpts were filed as exhibits in the court of appeals.

policy and was working. Ex. 71; Tr. 127-133. Vacca did not receive full long-term disability benefits while serving as an ALJ. Tr. 323, 1272, 1277; Smith Dep. at 127-132.

Director May maintained that Vacca could not keep his job and receive long-term disability benefits. Ex. 50 (App. A26); Ex. 71; Tr. 322-24, 758-763. He insisted that Vacca's receipt of disability benefits constituted a voluntary resignation and ordered Vacca removed from the premises. Ex. 50 (App. A26); Tr. 325.

Director May's firing of Vacca was the culmination of DOLIR's campaign to oust Vacca from his position. It commenced when Vacca requested certain reasonable accommodations related to his disability. Ex. 13. The campaign began in 2008 and included Chief Judge Karla Boresi and DOLIR management including Director Peter Lyskowski, Investigator Cornell Dillard, Director Rebman and Director Brian May, who with DOLIR management ultimately terminated Vacca under false pretenses. Ex. 51.

In 1996 Judge Vacca had self-reported to DOLIR that he was handicapped because he suffered from a condition affecting three or more of the major parts of the body—he suffered from muscular dystrophy. Ex. 1, 2; Tr. 85-86, 922. In 2004, Missouri Vocational Rehabilitation, another state agency, classified Vacca as a severely disabled person. Ex. 40 at 5-9; Tr. 343-44. Vacca's condition worsened over the years and he was experiencing mobility problems by 2007 and 2008. Ex. 14; Tr. 146-149.

ACCESSIBILITY ISSUES

In 2008, Vacca expressed concerns about the accessibility of the office restroom and requested that it be made ADA-compliant. Ex. 13. DOLIR was aware of Vacca's disability and need for accommodation. In two complaints to DOLIR (on February 5,

2008, and February 15, 2008), Vacca raised the issue that the men's restroom was not safe or accessible to him, relying upon the Americans With Disabilities Act and Missouri Human Rights Act as support for his request that DOLIR make this basic workplace accommodation. Ex. 13; Tr. 158, 164. Vacca was concerned regarding the accessibility of the men's restroom based upon his mobility limitations. Ex. 13. Vacca testified that all he wanted to do was be able to use the restroom while he was at work. Tr. 158. In March 2008 Vacca was injured in a fall in the same restroom because it was not handicap accessible. Tr. 155-56. The fall occurred because the grab bar had been improperly installed and gave way under his weight. Tr. 155. Vacca seriously injured his shoulder in that fall and experienced a significant medical setback as a result. Tr. 155-157; Ex. 17. On May 29, 2008, Vacca fell a second time in the restroom, again because the grab bar was not properly re-installed. Ex. 18; Tr. 175-177.[4] His requests for this most basic

[4] In an email reporting the problem to Chief Judge Kohner, Vacca stated:

> FYI, the handicapped grab bar in the men's bathroom has again pulled away from the wall. I barely bumped it with my cane and it fell to the radiant heat flange. The plate was screwed into the same hole/base it was screwed into when it broke under my weight earlier this year. Placing the support in the same weakened spot means the bar has no structural integrity. I suggest a shorter bar be obtained and both ends be sunk into the wooden jamb, not the drywall.

Ex. 18.

accommodation was falling on deaf ears. Ex. 18; Tr. 172-173.[5] By July 2008, increasingly frustrated by DOLIR's inaction, Vacca filed an ADA complaint with the EEOC to try to get DOLIR's attention. Tr. 274-76.

Vacca had angered DOLIR management by his request for equal treatment. Prior to his MHRA/EEOC complaints related to his continued requests for an accessible restroom, Vacca had enjoyed good relations with all the other ALJs and the bench was "cordial." Tr. 986-88. Not long after Vacca's request for accommodation, he heard from Chief Judge Kohner and other judges that he "sent a threatening memo to Jefferson City" and DOLIR was "angry with both Kohner and Vacca." Ex. 13; Tr. 159-160. DOLIR retaliated against Vacca by scrapping the entire construction project planned in St. Louis, which included upgraded ADA-compliant restrooms. Ex. 13. This retaliation affected all the judges in the St. Louis office. Ex. 13 at 2. Vacca was humiliated and cast in a negative light to his fellow judges. Ex. 13 at 2. This marked the beginning of DOLIR's systematic retaliation against Vacca due to his requests for equal treatment. Ex. 13.

ACCOMMODATIONS

Prior discussions between DOLIR and Vacca regarding his disability resulted in the approval of his request for a parking accommodation in 2007. Ex. 14, 15, 16; Tr. 140-

[5] The restroom repairs were not completed for over fourteen months, despite Vacca's complaints. Ex. 24. HR Manager Tammy Cavender apologized in March of 2009 that the request was not completed. *Id.* The total cost for retrofitting the bathroom to properly intall grab bars and a higher toilet was less than $1,000. Tr. 179-181; Ex. 24.

46. Kohner also modified Vacca's docket assignments due to his disability so that he did not perform the role of duty judge. Tr. 137-138, 562. No one in DOLIR management questioned the accommodations. Tr. 146-47. Judge Vacca was by all accounts an active member of the bench carrying his share of the caseload and performing the duties of his position. Tr. 137-138; Ex. 3, 4, 5, 6, 7, 8, 9 & 10 (All prior performance reviews rate Judge Vacca at the highest available rating).

In 2008 Kathleen Hart replaced Kohner as chief judge. Tr. 135. Based upon Vacca's continued mobility issues Chief Judge Hart collaborated with DOLIR management and implemented one more accommodation: Vacca would be allowed to work from home three days per week and would come into the office two days a week to conduct trials. Tr. 939-45; Ex. 39 at 4. Vacca would be assigned more trials than other judges and be exempt from daily dockets due to increased trial load. Ex. 22; Tr. 940. She discussed Vacca's condition with Director Buker, who approved the reasonable accommodation after DOLIR management review. Tr. 408, 940-947; Ex. 39 at 4. DOLIR had recently been provided extensive documentation of Vacca's medical condition in conjunction with the request for parking accommodation. Ex. 14. Hart also shared the proposed reasonable accommodation with her colleagues and solicited their input and comments. Tr. 948. None of the judges objected, and some said they preferred this arrangement. Tr. 948, 956. Vacca continued to manage a full trial docket, conducting more trials than any other St. Louis ALJ while Chief Judge Hart oversaw the trial

assignments. Tr. 954. Hart would assign more complicated cases to Vacca because he was working from home and had time to concentrate on them. Tr. 955-56.[6]

CHALLENGES TO ACCOMMODATIONS

The accommodation would prove to be the last time DOLIR would assist Vacca to keep him working. Management became increasingly more hostile to Vacca and his work accommodation after a change in leadership and set upon a course of conduct to retaliate against him for his disability-related complaints. Tr. 413-414, 979. The shift in attitude began on February 3, 2009, when DOLIR management appointed Karla Boresi to replace Hart as chief judge. Tr. 413-14, 979. Within an hour of assuming office, Boresi confronted Vacca and demanded that he produce medical records supporting his reasonable accommodation. Tr. 202-205, 979. Boresi told Vacca that she wanted to revisit his reasonable accommodation. Tr. 204. Vacca testified that Boresi went "out of her way to see that I didn't get trials on Tuesdays and Thursdays" which he viewed as a violation of his reasonable accommodation. Tr. 206-207.

Boresi was openly hostile to Vacca's reasonable accommodation in conversations with judges in the St. Louis office. Tr. 984-985. She was also overheard on the telephone criticizing the accommodation on several occasions. Tr. 980. To Boresi, Vacca was "using his disability to get something he's not entitled to." Tr. 983. She felt he was

[6] In addition, DOLIR had outfitted a home office for Vacca, setting up a work computer, providing him dictation software and a separate fax number allowing him to fully function at home. Tr. 280-81.

"trying to cram five days of work into two or three days" and was using the reasonable accommodation to work part time. Tr. 982. Boresi thought the accommodation was "crafted wrong" and expressed that DOLIR supported her efforts to revisit the accommodation. Tr. 983.

DOLIR management targeted Vacca in the ALJ review process. Tr. 284. The chief judges are required to review the judges in their respective offices. Tr. 228. The review period was for August 2008 to June 30, 2010. Ex. 12. Boresi was the first chief judge to lower Vacca's rating based in part on his disability and reasonable accommodation. Tr. 135-36; Ex. 12. On the DOLIR Performance Management Plan form the rating categories listed from highest to lowest are as follows: outstanding, highly successful, successful, improvement expected, and unsatisfactory. Ex. 12. Judge Boresi rated Vacca as "successful." Ex. 12. Judge Vacca viewed the review as "mediocre" and "pretty poor." Tr. 228, 234. Boresi's review did not comport with any previous chief judges' reviews of Vacca. Tr. 136; Exs. 3, 4, 5, 6, 7, 8 & 9. The only thing that changed since his other reviews was that he had been granted a reasonable accommodation allowing him to work from home part time. Tr. 234. Vacca believed that he was artificially being held back because Boresi would not assign him more trials as required by the accommodation. Tr. 228.

After reviewing his Performance Management Plan, Vacca expressed to Boresi that the review was unfair and discriminatory for not taking into consideration his reasonable accommodation. Tr. 229. He asserted that it was unfair to judge him for not meeting certain criteria that was inapplicable to him due to his reasonable

accommodation. Tr. 229; Ex. 27. In response Boresi told Vacca that "a disabled person under a reasonable accommodation could never be highly successful by definition." Tr. 230. Vacca complained that her ratings were "highly discriminatory" because she believed that a disabled person with a reasonable accommodation could never be rated highly successful. Tr. 231-32; Ex. 27. Boresi told Vacca that "you people all use your disabilities to get things you don't deserve." Tr. 267. Vacca regarded her comments as "outrageous" and he "couldn't believe a lawyer in the modern day would believe such a thing to have that attitude." Tr. 231. Vacca felt like he was being singled out based upon his disability, and that he was viewed as "not contributing" and not a "normal worker", but "just the disabled person we've got to have." Tr. 233-234.

INITIATE DISABILITY APPLICATION PROCESS

In response to the poor review and on the same day it was submitted to DOLIR, Vacca wrote Dot Pfeiffer in DOLIR's human resources department to begin the process of making a claim for long-term disability. Tr. 235-36. He stated in his letter to DOLIR, "I am making this claim now out of an abundance of caution…I plan to continue working as best I can under my Reasonable Accommodation pursuant to the ADA." Ex. 28; Tr. 237. Vacca reserved the right to withdraw his disability application as appropriate in this letter. *Id.*

He feared that DOLIR was "setting me up to come into work Monday through Friday and ignore the reasonable accommodation." Tr. 237-38. Vacca felt pressured to submit the disability application because the "pretext is being gathered to get rid of me, to fire me." Tr. 238. This is the only reason he began the disability application process in

August 2010 even though he wanted to continue to work. Tr. 239. Vacca explained that it was not a coincidence that he filed his initial application for disability on the same day his review was submitted; he knew if he had to come into work five days per week "he would need disability…he wanted to continue to work and intended to continue to work…and his obligations were such that he could not just wait to get fired." Tr. 237-38. He also explained that he had been advised by the human resource department that the disability process took some time and he did not want to risk economic ruin. Tr. 238. Vacca explained "I saw the writing on the wall, what it looked like to me they were trying to do." Tr. 238.

INTERNAL DISABILITY COMPLAINTS

Vacca complained to DOLIR Director Lyskowski about the disability discrimination and retaliation in his review and his follow up discussions with Boresi. Tr. 242. His first complaint was made on August 17, 2010 to Director Lyskowski. Tr. 243; Ex. 29. In the complaint Vacca stated: "This is to inform you that administrative law judge Karla Boresi is discriminat[ing] against me based on a disability" and "retaliating against me for prior claims of disability discrimination I made to the EEOC." Ex. 29 at 1-2. He further stated that Boresi "is using the ALJ evaluations to take adverse job actions against me and not honoring a reasonable accommodation which I work under, all because I am disabled." Ex. 29 at 2. Vacca explained why he made the complaint:

> Nobody is listening to me. Karla [Boresi] is not listening to me. So I'm going over her head. I'm [sic] got no choice. My job is on the line here.

Tr. 243. Vacca pleaded that "the situation is causing me inordinate stress and physical illness to the point I may have to stop working and seek disability." Ex. 29. Lyskowski ignored the complaint. Ex. 29.

On August 20, 2010, Vacca sent another email, pleading again to Director Lyskowski and DOLIR Director Rebman "to meet with me and put an end to this harassment before it costs me my ability to continue working." Ex. 29. He explained that "[t]he hostility and harassment has been so bad, I have filed preliminary papers for disability." Ex. 29. Vacca testified that he was "drowning" and "want[ed] some help." Tr. 245. The retaliatory actions were taking a toll on him physically, he was "not eating", "losing weight" and "definitely not sleeping at night." Tr. 244. He was "worrying about it…getting nauseous…it was literally making me physically sick." Tr. 248. He started getting ulcers and threw up every time he ate. Tr. 269-70. He also believed that DOLIR management was "cooking the books" to make it appear that some of other higher rated judges had issued awards in a timely manner when they had not. Tr. 249-51; Ex. 29. Around the same time, Vacca found hand-written notes posted on his office door to "highlight the fact that [he] wasn't there" every day. Tr. 269. Vacca made several more complaints to DOLIR related to retaliation in September 2010. Tr. 260; Exs. 30, 31, 32. Vacca's discrimination and retaliation complaints to DOLIR were disregarded. Tr. 256-257; Ex. 56 at 4-8.

DOLIR'S "INVESTIGATION"

Lyskowski asked Cornell Dillard, an investigator for DOLIR, to investigate Vacca's August complaints. Tr. 819-20; Ex. 68.[7] Rather than investigate Vacca's complaints, Dillard investigated Vacca's work accommodation and ignored Vacca's charges of discrimination and retaliation. Tr. 256-57. When Dillard interviewed Vacca, he made no inquiry regarding his discrimination complaints. *Id*. Dillard asserted that Vacca did not have a work accommodation because he could not find a form requesting a reasonable accommodation in Vacca's personnel file. Ex. 70; Tr. 880-81.

Dillard issued a written report adopting a false narrative that Vacca's work accommodation was granted because of the extended shutdown of Highway 40 for construction. Ex. 70. Dillard attributed this explanation to Judge Hart. Ex. 70. Hart testified that Dillard made this up and that she had told him the accommodation was due to Vacca's disability and his mobility issues. Tr. 1010.[8] Hart attempted to correct the record by calling Dillard, but he never responded. Tr. 1049-50. She also discussed the mistake with DOLIR Director May, who promised to correct it but did nothing as well. Tr. 1081.

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[7] Dillard had previously criticized Vacca for "bypassing DOLIR" by filing the prior EEOC discrimination complaint. Tr. 274-76. Vacca testified Dillard showed animosity toward him, and even threatened Vacca in a prior meeting. Tr. 274-75.

[8] Dillard did not record Hart's interview in violation of his established protocol of recording all interviews conducted during an investigation. Tr. 838-40, 846-47, 869-871.

On cross-examination Dillard was shown two performance evaluations, one prepared by Chief Judge Boresi and one prepared by former Chief Judge Hart,[9] both indicating that Judge Vacca was working under a reasonable accommodation; Dillard was also shown other DOLIR documents that explained all the reasonable accommodations afforded Vacca and demonstrated DOLIR's knowledge and consent to such accommodations. Tr. 851-860. Dillard denied knowledge of any accommodations DOLIR had granted Vacca (parking, restroom modification, and change in judge assignments) and claimed he had not seen any documents regarding these accommodations. Tr. 872-873. Dillard's testimony was controverted by both Hart and Vacca. Hart testified that she informed Dillard about the restroom accommodation when he interviewed her. Tr. 1011.[10] Vacca testified that Dillard told him during his interview that he "didn't have a reasonable accommodation, because they didn't have a form requesting a reasonable accommodation in Jefferson City." Tr. 256-57. Dillard admitted he was focused on a form. Tr. 880-81. When he "didn't see anything [Vacca] had written" asking to reduce "the number of days he worked in the office" he concluded

[9] Hart completed an evaluation of Vacca for the period when she supervised him, and her evaluation was shared with Vacca and DOLIR personnel. Ex. 85. Dillard acknowledged he read it. Tr. 853.

[10] Hart kept handwritten notes regarding conversations related to the Vacca matter, including her discussion with Dillard, and the notes corroborate her testimony. Tr. 1007-12; Ex. 82 at 8.

there was no reasonable accommodation. Tr. 880-81. In Vacca's view "the whole process was a sham." Tr. 454.

Dillard's false narrative was adopted by DOLIR management, including Director Lyskowski. Ex. 32; Tr. 256-58. It served as the basis for DOLIR's denial of Vacca's claims of discrimination and retaliation and for DOLIR's newly adopted position that Vacca did not have a reasonable accommodation allowing him to work from home three days a week. Ex. 32; Tr. 256-258. Director Lyskowski advised Vacca on October 8, 2010, that Dillard found no evidence of discrimination by Boresi against him. Ex. 32. In the same note, Director Lyskowski points out that "[w]hile you do have modified job duties, it does not appear that this was the result of a request for an accommodation." Ex. 32. Lyskowski acknowledged Vacca's prior complaint that Boresi was retaliating against him in the trial assignment process and directed Vacca to restart the investigative process by filing a "formal grievance" with Dillard to start the investigation process over again. Ex. 32. All DOLIR management was involved in Director Lyskowski's denial, including Director Rebman and several DOLIR staff attorneys. *Id.*

CONTINUED COMPLAINTS

Vacca filed a second grievance complaining that Boresi was using the case assignment process to retaliate against him by avoiding assigning him cases when he was available. Ex. 30-31. Dillard was again dispatched to investigate, without interviewing anyone other than the complaining witness, Dillard summarily denied Vacca's grievance and concluded there was no retaliation. Ex. 34. Dillard notably did not interview Boresi. Ex. 34.

Vacca filed a Charge of Discrimination with the Missouri Commission on Human Rights on October 25, 2010. Ex. 35. The underlying action is based upon this charge, as amended, which asserted claims of disability discrimination and retaliation. Ex. 35. In his charge Vacca stated that "the stress from the work situation has caused me to heal slowly and experience weight loss, nausea, anxiety, sleeplessness and fatigue to such an extent I do not know if I can continue, even under my RA [reasonable accommodation]." Ex. 35 at 7; Tr. 269-70. Vacca stated that the continued harassment forced him to file for disability because the harassment "may constitute the last straw that prevents me from continuing working." Ex. 35 at 7.

Vacca continually objected to starting over in the reasonable accommodation process because he feared reprisal and refusal of the accommodation which allowed him to work. Tr. 281-82.

DISABILITY APPLICATION

On January 3, 2011, knowing the ALJ Review Committee was about to meet, Vacca sent his "Employee Statement" for long-term disability on the Standard Insurance form with another cover letter. Ex. 36. Vacca testified that he wanted to keep working under his reasonable accommodation but felt pressured to take this step:

> I didn't want disability. I wanted to continue working. When I first filed or initiated the process, I knew it took a while…. I wanted to continue working under the reasonable accommodation, but the state made it very clear that, one, I didn't have one, two, if I had one, they weren't going to honor it. They weren't going to provide me with sufficient trials to meet the

> evaluations in a satisfactory manner…. I just knew I was going to get a vote of no confidence.
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> * * *
>
> I had made several complaints inside state government to do the best I could to hang on to the one job I could do. I wasn't having any luck with any steps, so I filed for disability, because I had to have some kind of income. I have a family. I have a mortgage. I have obligations. It was clear they didn't want me around there anymore. They were going to do whatever they could to get me out.

Tr. 282-84.

ALJ REVIEW COMMITTEE—JANUARY 5, 2011

The ALJ Review Committee convened two days later. Tr. 283. Former Chief Judge Jennifer Schwendemann had been a member of the committee since its inception in 2006 and attended the January 5, 2011 meeting. Tr. 1130. According to Schwendemann, much of what transpired behind closed doors was unprecedented and inappropriate. Tr. 1155, 1157. She "didn't think anything about that meeting was appropriate." Tr. 1155. In reviewing Judge Vacca and Judge Dinwiddie, both of whom were disabled, Director May urged the Committee to accept evidence never before considered in prior review sessions. Tr. 1157.[11] For example, although Chief Judge Gorman had completed a performance

[11] DOLIR management targeted Dinwiddie by subjecting him to extraordinary scrutiny in the ALJ review process as well. Tr. 544-45.

review rating Dinwiddie "successful," despite this rating, Director May asked Gorman to present live testimony to the Committee on Dinwiddie's medical condition. Tr. 1153-58. Schwendemann and other committee members were uncomfortable with the presentation of live witnesses to alter Dinwiddie's already submitted performance review. Tr. 1157-58. After Gorman's appearance, the Committee did not allow further live testimony. Tr. 1158.

Director May had summoned Boresi to testify live before the Committee and she was waiting in the hallway. Tr. 541-42, 1159. She was "apprehensive," and "under a lot of pressure." Tr. 545-547, 557-558. After the Committee voted to prohibit live testimony, Director May and Director Lyskowski instructed Boresi to prepare a written supplement to her performance review of Vacca addressing: a separate lawsuit Vacca filed against Boresi, Vacca's work hours and accessibility, and Vacca's professionalism. Tr. 548-49, 552-54, 559-60. Boresi didn't mention the charge of discrimination and the lawsuit information in her original performance review. Tr. 538-40; Ex. 12. She thought it would have been "ludicrous" to do so. Tr. 539. Despite her own opinion, Boresi felt compelled to prepare the supplemental review demanded by May. Tr. 559-60; Ex. 39. Boresi regarded that this action as "unprecedented." Tr. 558. Boresi did not change Vacca's rating, even with the supplemental information. Tr. 540. No other judges were subject to this additional scrutiny and no additional materials should have been considered in evaluating Vacca. Tr. 558, 1188.

Director May told the Committee that Boresi volunteered to supplement her performance review of Vacca to provide important information concerning a lawsuit

Vacca had filed against her that DOLIR and May found "offensive." Tr. 1160-62. Director May expressed animus toward Vacca before the ALJ Review Committee. Tr. 1162-63. Schwendemann described Director May's demeanor as "angry." Tr. 1163. She testified that it was Director May's idea and not the request of the Committee to have Boresi supplement her performance review. *Id*. Schwendemann regarded any additional information as unreasonable, inappropriate, and unfair. Tr. 1152-65. Schwendemann believed only the record then before the Committee should be considered to ensure the same criteria be applied to all ALJs reviewed. *Id.*

ALJ REVIEW COMMITTEE—JANUARY 12, 2011

The Committee reconvened a week later to vote on Vacca. Ex. 56 at 4-8; Tr. 590-91, 1167. The minutes from the January 12 meeting indicate that Director May made the presentation to the Committee regarding Vacca. Tr. 1165-88; Ex. 56 at 4-8. Schwendemann described Director May's attitude at the meeting:

> [T]here was some type of directive that had been given to Mr. May. He was very vocal, very adamant, very aggressive in the conversations about Judge Vacca and Judge Dinwiddie.
>
> * * *
>
> These two judges were singled out. He made it very clear these two judges required discussion. The demeanor in which he was leading the discussion I found to be very aggressive and just almost like this was Brian's – his new job. This is what his marching orders were. I don't know that it was Brian

that wanted to do it as much as somebody telling Brian to do it. It was certainly the impression I received that this was going to happen.

Tr. 1177-78.

Director May represented to the Committee that DOLIR had not granted Vacca a reasonable accommodation based on his disability. Instead he offered the false narrative that Vacca's schedule was modified due to the Highway 40 construction. Tr. 1179; Ex. 56 at 4.[12] Director May discussed Vacca's disability in the Committee meeting, questioning his medical condition as well. Tr. 1179-84; Ex. 56. He told the Committee that Vacca had applied for long-term disability and filed a charge of discrimination alleging discrimination and retaliation. Tr. 1185; Ex. 56 at 6. Schwendemann objected to consideration of any of these subjects because they were all beyond the scope of an employee review. Tr. 1204-05. She pointed out that "According to the evaluation Judge Vacca was doing his job." Tr. 1188.

The Committee voted "no confidence" on Vacca by a margin of four to one, with Schwendemann voting "confidence." Ex. 56 at 8; Tr. 778. Director May prepared a letter dated January 13, 2011 advising Vacca of the no confidence vote. Ex. 41 (App. A24). Vacca was "devastated" when he read the letter. Tr. 311. He testified:

[12] Hart testified that prior to the meeting she had told Director May in no uncertain terms that Vacca's accommodation was based on his disability. Tr. 1079-81; Ex. 83.

> I knew that's the end of my job. I'm going to be fired. It was just a matter of time. The way they went about this, obtaining the vote of no confidence, I had no possibility of avoiding the inevitable.

Tr. 311.

At trial Director May offered a much different account of the ALJ Review Committee. His account directly contradicted the minutes taken at the meetings. Ex. 56. Director May denied the following facts:

- That he presented the case against the two disabled judges, Vacca and Dinwiddie, and advocated that the Committee should vote no confidence. Tr. 728, 794-95, Ex. 56 at 2-4.
- That he told the Committee Vacca only worked two days a week and he doesn't know how Vacca passed his prior review. Tr. 712, Ex. 56 at 4.
- That he summoned Boresi to present live testimony then instructed her to supplement Vacca's performance review. Tr. 548-49, 552-54, 559; Ex. 56 at 4.
- That he presented information that should not have been considered by the ALJ Committee, including medical records and information related to medical treatment, disabilities, and false information denying Vacca's reasonable accommodation. Tr. 722, 728-729, 789-90; Ex. 56 at 4-7.
- That he discussed Vacca's long-term disability application with the Committee. Tr. 721-22, 732, 793-95; Ex. 56 at 5-6.

- That he discussed claims of discrimination/retaliation Vacca filed in the EEOC and DOLIR. Tr. 793-95; Ex. 56 at 5-6.

On cross examination Director May admitted that "[e]veryone was aware" that Vacca was working two days in the office and three days at home. Tr. 717-718. Director May also admitted that he only asked for a supplemental performance review for Vacca. Tr. 674-75, 680. Director May acknowledged that the EEOC Complaint took place outside the review period. Tr. 683. Director May admitted that Hart explained in detail the reasonable accommodation to him. Tr. 716.

DENIAL OF EXISTING REASONABLE ACCOMMODATION

On January 21, 2011, Director May hand-delivered a letter to Vacca stating Chief Judge Hart had determined that Vacca's request: "to work from home up to three days a week, handle fewer daily dockets and other duties and focus more on trials and writing awards…was made because the Highway 40/64 construction was making your commute longer and more time consuming which in turn was exacerbating your health problems." Tr. 736-37; Ex. 42. May questioned whether the accommodation was "still reasonable and necessary" since "the highway construction project was completed." Tr. 737; Ex. 42. Director May asked Vacca to fill out forms requesting a reasonable accommodation. Tr. 313-14; Ex. 42.

Vacca told Director May that he was concerned that filling out forms after the fact would suggest he agreed with DOLIR's misstatements that he "did not have a reasonable accommodation and the Highway 40 closing was the reason for my accommodation." Tr. 313-15. Vacca thought "once again they were just building a case against me." Tr. 314.

Director May requested a form despite the fact that HR Manager Cavender admitted that DOLIR did not have a routine procedure for approving reasonable accommodations. Tr. 1231-32. According to Cavender, sometimes reasonable accommodations were handled and approved by Human Resources and other times they were handled by division directors like Buker and May. *Id.*

On January 27, 2011, Director May sent an email to Vacca to "recap my understanding of our January 21, 2011, meeting." Ex. 43 at 1. It stated:

> You expressed reluctance to complete the [Request for Accommodation] form, indicating that you believe that you currently have an RA (working three [3] days from home)….
>
> I explained to you that the Department of Labor and the Division of Workers' Compensation respectfully disagrees that you currently have an RA. I have carefully reviewed all files related to your employment and have not seen anything indicating that you requested an RA or that an RA was provided.
>
> As we discussed, it appears from what I have seen that in 2008 you made a request of Judge Hart about altering your work hours. The judge spoke with the then-Division director who, in essence, delegating [sic] authority to Judge Hart to make a decision in this regard as she saw fit.
>
> Judge Hart has indicated that the basis for the work hours alteration was the 40/60 [sic] construction.

> I clearly understand that you disagree with this-you allege that your request has nothing to do with the highway construction (you indicated that you take Interstate 55).

Ex. 43 at 1.

The email confirmed DOLIR's formal adoption of Dillard's false narrative to deny Vacca's reasonable accommodation. Ex. 43. At trial Director May was shown many DOLIR records referencing Vacca accommodations and describing his disability, yet he insisted that DOLIR had no records to support the accommodation. Tr. 739-42. May testified: "I think it's safe to say we didn't have any information about Matt Vacca regarding an accommodation, what his condition was…" Tr. 740. HR Manager Cavender testified she knew Vacca was working from home three days per week and in the office two days per week because her office processed the disability application information. Tr. 1233. She acknowledged she was aware of Vacca's disability because she was the DOLIR official who made sure the restroom accommodation was finally completed. Tr. 1228; Ex. 20, 21 and 25.

Vacca responded to May's letter by providing the requested information and explaining his disability once again to DOLIR. Ex. 44. On February 14, 2011, Vacca filled out the form to request an accommodation. Ex. 45. Thereafter DOLIR acknowledged receipt of medical information from Vacca's physician and demanded additional information from his physician to evaluate the "request for accommodation." Ex. 46. Vacca authorized his provider to respond. Tr. 317. In a letter dated April 26,

2011, Dr. Taylor of the Mayo Clinic opined Vacca could perform his job with reasonable accommodations:

> It is my understanding that at present, Mr. Vacca, under his current regime, is performing his duties adequately and that he wishes to continue to do so as long as possible. It is my feeling that his present level of functioning could be maintained but would require some accommodations.

Ex. 47 at 3.[13] Dr. Taylor's opinion is consistent with Vacca's continual assertions that he was performing his job and could continue to perform his job with reasonable accommodation. Tr. 91-92, 326-327, 470. Vacca's efforts to preserve his reasonable accommodations were completely disregarded. Tr. 1225.

RETALITORY OFFICE REASSIGNMENT

In Spring 2011 Director May moved Vacca from his larger office he had worked in for eighteen years and assigned that office to Boresi. Tr. 277-79, 1037. No DOLIR director had been involved in office assignments before. Tr. 1037. Hart told Director May, "it was insulting." Tr. 1037. Vacca described his new office:

> [I]t really wasn't even part of the division offices. It was back behind some clerks…. They kind of knocked a hole in the wall and made a doorway…. I think a court reporter had an office back there, little cubicle. There was all

[13] The letter is stamped "received" by Human Resources Central Office nearly a month after it is dated, and on the same day that office received confirmation that Vacca was approved for disability benefits. Ex. 47, 49; Tr. 317-318.

> kinds of excess furniture stored there, partitioned walls they were storing, electrical plugs, and old computer equipment. It was kind of a storage unit.

Tr. 277-278. Vacca was now physically isolated from the other judges. Tr. 1035-36. To get to his office "[y]ou have to go past the rest-rooms through the file room past the court reporters all the way to the back of the office." Tr. 1035. Vacca saw the office reassignment as part of DOLIR's effort to force him out:

> I knew he was being kicked to the curb. That was just another kick in the teeth on the way down. I was obviously not valued. I was like the old used up computer equipment thrown in the back. I knew it was just a short time before they were completely successful and just fired me.

Tr. 279. Hart voiced safety concerns to Director May because of the distance from the restrooms or co-workers. Tr. 1036-37. She testified that May didn't seem "too concerned that Judge Vacca was all the way in the back." Tr. 1036.

VACCA APPROVAL FOR DISABILITY BENEFITS

On May 16, 2011, Standard Insurance granted Vacca's application for disability benefits. Ex. LLLL (Resp't App. A34); Ex. 48. Because Vacca was disabled and working, Standard Insurance determined that he was entitled to a long-term disability benefit known as a return to work incentive, which is offered as an incentive to keep otherwise qualified but disabled persons working. Ex. 71; Tr. 321-323, 1273; Smith Dep.

127-132.[14] Vacca began receiving $738.22 per month as the return to work incentive benefit. Ex. LLLL (Resp't App. A34); Ex. 48; Tr. 321-323. The parties stipulated at trial that the disability benefits Vacca had received were the return to work incentive, and not full disability benefits. Tr. 1277.

HR Manager Cavender received a copy of Standard Insurance's letter approving Vacca's benefits on May 16, 2011. Tr. 1221-22. Vacca called her the next day. Tr. 1222. Cavender recalled having conversations by phone and email with Vacca in which he expressed "his desire to continue to work even though he had been approved" for disability benefits. Tr. 1224. She testified:

> Judge Vacca and I had conversations on the phone about his desire to work. I expressed to him that that is not the normal process human resources had experienced in the past. Typically those are considered voluntary resignations. After he expressed his desire, I went and had additional conversations to determine what the appropriate action was to handle.

Tr. 1225.

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[14] Based on its determination that Vacca became disabled within the meaning of the policy on August 1, 2008, Standard Insurance made a retroactive payment of $20,954.84, which represented the return to work incentive payments Vacca was entitled to between October 30, 2008, and April 30, 2011. Ex. LLLL; Ex. 48. Standard Insurance noted that deductible income was subtracted from the retroactive payment, which explains why it is slightly less than 30 monthly installments of the return to work incentive. *Id*.

Cavender contacted Director May to determine how DOLIR should respond to Vacca's request to continue working. Tr. 1225. Director May knew that Vacca was disabled and working as an ALJ under a reasonable accommodation. Tr. 764-766. Director May decided that Vacca's acceptance of long-term disability benefits constituted a voluntary resignation. He prepared a termination letter to Vacca explaining that his approval "for long-term disability that was considered a resignation, voluntary resignation." Ex. 50 (App. A26). In the letter, Director May claimed that the decision was compelled by Section 287.855:

> Under § 287.855, long-term disability benefits may only be awarded based on the total disability 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.

Ex. 50 (App. A26). In closing his letter, Director May made it clear to Vacca that his job was over: "The Department accepts your resignation, effective immediately. We thank you for your years of service to the Department and to the people of the state of Missouri." Ex. 50 (App. A26); Tr. 787.

On June 7, 2011, Director May and Cavender met Vacca in his office. Tr. 1225. May handed Vacca the termination letter and told Vacca that he could not "keep job and receive long-term disability benefits." Tr. 322, 1225-26. Vacca objected to the basis for

his termination and pleaded to keep his job. Tr. 322-323. He informed Director May and Cavender that he could work and that he was not receiving full disability benefits. Tr. 322-323. He explained that he was working under a reasonable accommodation and that the disability benefits he had been granted was "an incentive to help [him] working under that reasonable accommodation." Tr. 322-323.[15] He expressed his desire to keep working "[e]mphatically 30 times." Tr. 323. Director May said "absolutely not" and ordered a security guard to remove Vacca from the premises. Tr. 325.

Before Vacca was terminated, Cavender understood that the long-term disability benefits included a right to work incentive to assist disabled employees continue to work but acknowledge that she didn't know "the specifics" or "all the rules." Tr. 1262, 1268. She also knew that the long-term disability benefits were subject to periodic review by Standard Insurance and are not necessarily permanent. Tr. 1261. Director May claimed he had no idea whether long-term disability benefits included a return to work incentive or whether Vacca's disability benefits were permanent. Tr. 765. He made no effort to find out whether Vacca was receiving full disability benefits before or after he fired him. When he testified at trial he still knew nothing about the return to work incentive in the disability policy. May testified:

[15] Vacca had confirmed with Standard Insurance that he was entitled to receive that benefit and continue to work: "It wasn't the long-term full disability benefit. It was a minimum benefit incentive to continue to work under a reasonable accommodation. That's why they gave it to me." Tr. 323.

Q. I think you told me before you said you don't know anything about the return to work benefit that is part of the long-term disability policy. Did I understand you correctly?

A. I think you did, yeah.

Q. You have no idea what that return to work benefit under that policy is, right?

A. I said I didn't know anything about it.

Tr. 795-796.

ABILITY TO WORK

Up to the day he was terminated, Vacca had competently performed his job as an ALJ. Tr. 91-92, 469-470; Ex. 40 at 3-4. According to Boresi between 2008 and 2010 "[a]ll his awards were issued within 90 days of the last day of the hearing, and 100% of his hearings were conducted within 30 days." Ex. 12 at 2. She stated that Vacca "treated employees, employers, and their representatives in accordance with the Code of Professional Conduct and the ALJ Judicial Code" and that he "is sought out by attorneys for special settings, questions, or information regarding procedures." Ex. 12 at 5. Boresi admitted to the jury that Vacca was absolutely an effective judge. Tr. 589.

Hart testified that she regarded Vacca as one of the better trial judges because he could handle complex cases better than most of the judges. Tr. 1046. Hart testified that Vacca was "more than capable" of performing his job and that he was a "contributing member to the bench." Tr. 1047. In her letter to the ALJ Review Committee, Hart elaborated on these sentiments:

> He has fewer changes of judge than the rest of us, he is well liked by the attorneys, he has served the people of Missouri for 19 years. He writes more awards than the rest of us, and he writes them faster than the rest of us. His institutional knowledge and knowledge of the law are unsurpassed. This is not a judge who is simply not coming to work. He works full time.
>
> * * *
>
> I am confident in Judge Vacca's performance and his ability to work…. He continues to work and conducts every trial he is assigned. He continues to ask for more trials. His RA is simple to manage with our current docketing system and the volume of cases we have in St. Louis.

Ex. 40 at 3-4.

Director May admitted that Vacca was working full time when he was terminated. Tr. 732, 765. He "didn't have a question about [Vacca's] productivity" and "consistent with working with him I assumed he was productive at home." Tr. 732.

EFFECT OF TERMINATION

When Vacca was fired, his annual salary was over $98,000. Tr. 331-332.[16] Vacca testified that he had intended to keep working as an ALJ and retire at the age of seventy-five. Tr. 326-327, 331, 469-70.[17] He got great satisfaction from his job and it gave him a sense of purpose. Tr. 327-28, 469-470. Vacca attempted to seek out other ALJ positions

[16] When the case was tried, the salary of an ALJ increased to $120,000. Tr. 331.

[17] ALJs do not have mandatory retirement. Tr. 326.

after he was fired. Tr. 329. He obtained a "Schedule A" to try to gain an advantage as a disabled applicant for federal ALJ positions. Tr. 467. None of his applications were successful. Tr. 329, 467. Vacca testified that his firing took away all his dignity. Tr. 327. He was defeated, entered a deep depression, and became suicidal. Tr. 327, 329.

On January 12, 2012, Vacca filed his amended counter-petition in his divorce and testified in the divorce hearing four months later. Tr. 327-29; Ex. RRRRRR (App. A28-29); Ex. SSSSSS (App. A32-34). His physical and mental condition had changed over the months since he was fired. Tr. 327-29. The divorce petition averred that Vacca was "permanently and completely disabled" and "no longer capable of being employed." Ex. SSSSSS (App. A33).[18] He was unemployed at the time and had been unable to secure any employment since his termination. Tr. 329, 466-467. He regarded his former ALJ position as the only type of employment he could perform, testifying:

> I needed that reasonable accommodation to work. [DOLIR] took that away. I could not do the work without the reasonable accommodation. I could not work. No other jobs that I can do. It's a unique job.

Tr. 329.

Vacca explained that the severity of his symptoms varied based on the availability of new therapies and symptom management. Tr. 88-91, 107. Appellants' retaliatory actions caused him to suffer severe emotional distress which worsened his mental and

[18] Vacca's divorce petition was amended before this matter was tried to reflect that he had been fired from the one job he could perform. Tr. 328.

physical condition. Tr. 327-29, 468. He testified: "They broke me…. The bathroom. The ALJ Review Committee. Saying there was no accommodation when there clearly was. All I wanted to do was work." Tr. 468. Vacca testified that he could have performed his duties as an ALJ with reasonable accommodations indefinitely had he not been terminated. Tr. 91-92, 326-27, 469-70.

RESPONDENT'S ARGUMENT IN RESPONSE TO APPELLANTS' ISSUES ON APPEAL

I. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE ISSUE OF JUDICIAL ESTOPPEL IS NOT PRESERVED AND, EVEN IF IT IS PRESERVED, APPELLANTS FAILED TO PROVE THE ELEMENTS REQUIRED TO INVOKE JUDICIAL ESTOPPEL TO BAR VACCA'S RETALIATION CLAIM.

A. STANDARD OF REVIEW

The ruling challenged in this point relied on is the denial of Appellants' motion for JNOV based on judicial estoppel. Because judicial estoppel is an affirmative defense, *Imler v. First Bank of Mo.*, 451 S.W.3d 282, 291 (Mo.App. W.D.2014), this Court must determine whether Appellants proved Vacca's claim was barred by judicial estoppel as a matter of law. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 95 (Mo. 2010). If Appellants failed to prove that defense, the trial court cannot be convicted of error for denying their motion for judgment notwithstanding the verdict. *Spalding v. Stewart Title Guar. Co.*, 463 S.W.3d 770, 775 (Mo. banc 2015). In reviewing the denial of JNOV, this Court views the evidence "in the light most favorable to the jury's verdict" and grants the plaintiff the benefit of "all reasonable inferences and disregards all conflicting evidence and inferences." *Fleshner*, 304 S.W.3d at 95.

Vacca disagrees with Appellants that the *de novo* standard of review governs appellate review of the trial court's decision whether to invoke judicial estoppel. The sole

authority Appellants offer for this contention applied a deferential standard of review. *See In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 142 (Mo.App. W.D.2011) (affirming trial court's finding that party had taken contradictory positions in separate lawsuits "[b]ased on the deference we owe the trial court pursuant to our standard of review"). Based on *Fletcher* and other decisions of the Missouri Court of Appeals concluding that the decision to invoke judicial estoppel is discretionary, the proper standard of review is abuse of discretion. *See, e.g., In re J.D.S.*, 482 S.W.3d 431, 441-42 (Mo.App. W.D.2016) (stating that judicial estoppel is "invoked by the court at its discretion"); *Loth v. Union Pac. R.R. Co.*, 354 S.W.3d 635, 643 (Mo.App. E.D.2011) (stating that judicial estoppel is an "equitable doctrine" subject to "discretionary application").

Courts in the vast majority of other jurisdictions have concluded that appellate review of the trial court's decision to invoke judicial estoppel is governed by the abuse of discretion standard. *See, e.g., Bentley Funding Grp., L.L.C. v. SK & R Grp., L.L.C.*, 609 S.E.2d 49, 52 (Va. 2005). All but one federal circuit court of appeals applies the abuse of discretion standard of review. *Clark v. AII Acquisition, LLC*, 886 F.3d 261, 265 & 265 n.11 (2d Cir. 2018). "Even the one holdout—the Sixth Circuit—has recently 'questioned the continuing viability' of de novo review." *Id*. at 265-66 (quoting *Javery v. Lucent Tech., Inc.*, 741 F.3d 686, 697 (6th Cir. 2014)).

A deferential standard of review is warranted in light of the equitable nature of the doctrine of judicial estoppel and the varied circumstances in which it may be invoked.

The four rationales the United States Court of Appeals for the First Circuit articulated for adopting the abuse of discretion standard of review have been widely accepted:

> First, the Supreme Court has explained that judicial estoppel is an equitable doctrine invoked by a court at its discretion. On that basis, the abuse of discretion standard seems a natural fit. Second, deferential review often is appropriate for matters in which the trial court is better positioned ... to decide the issue in question. Judicial estoppel is such a matter. Determining whether a litigant is playing fast and loose with the courts has a subjective element. Its resolution draws upon the trier's intimate knowledge of the case at bar and his or her first-hand observations of the lawyers and their litigation strategies. Third, abuse of discretion is a flexible standard, and the amorphous nature of judicial estoppel, places a high premium on such flexibility. Last—but far from least—the other courts of appeals to have addressed this question have settled unanimously on abuse of discretion review.

Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 30–31 (1st Cir. 2004) (internal quotations marks and citations omitted; alteration in original). The D.C. Circuit recently expressed an additional rationale for applying the abuse of discretion standard of review: "*De novo* review would displace the discretion of the district court to apply judicial estoppel with the discretion of the appellate court to do so. We see no sense in this." *Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 928 (D.C. Cir. 2016).

Under the abuse of discretion standard, the trial court's ruling should be affirmed unless it "is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991).

B. PRESERVATION / WAIVER

Appellants argue that the trial court erred in not directing a verdict in their favor because Vacca was judicially estopped "from asserting his continued ability to work." Appellants' Substitute Br. 22. This point should be denied because this issue has not been preserved for appellate review.

1. The Alleged Error Was Not Timely Asserted

It is axiomatic that the trial court cannot be convicted of error "for failing to take action which was never requested." *Gambrell v. Kansas City Chiefs Football Club*, 621 S.W.2d 382, 385 (Mo.App. W.D.1981). "[I]t has long been stated that this Court will not, on review, convict a lower court of error on an issue which was not put before it to decide." *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. banc 1982); *see Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002) ("The trial court cannot have erred in denying a claim for set-off that was never presented to it.").

The waiver rule applies because Appellants failed to assert the issue of judicial estoppel at any point during trial. They did not object to the admission of any evidence on the basis of judicial estoppel. Counsel for Appellants sat mute as Vacca testified that he was capably performing his job when Director May fired him and that he could have

continued working as an ALJ if his reasonable accommodation remained in place. Tr. 326-333. Appellants failed to raise judicial estoppel in their motions for directed verdict after Vacca rested and at the close of all evidence. Tr. 1275-77, 1285. The trial transcript contains not a single reference to judicial estoppel.

Appellants first argued that Vacca's retaliation claim was barred by judicial estoppel after the jury returned its verdict. In their motion for JNOV Appellants claimed that the trial court erred in not directing a verdict in their favor because "Vacca should have been judicially estopped from submitting evidence that he was able to perform his job" based on his statements in his divorce case and application for disability benefits. LF 601-02.

The issue raised in this point is not preserved because Appellants did not move for a directed verdict on Vacca's retaliation claim on the basis of judicial estoppel. A party seeking to preserve the issue of submissibility must raise that issue in its motion for directed verdict and then assert in its after-trial motion that the trial court erred in failing to direct such a verdict. *City of Harrisonville v. McCall Serv. Stations*, 495 S.W.3d 738, 751 n.6 (Mo. banc 2016). If submissibility is not raised in a motion for directed verdict, the issue is not preserved for appeal. *Id.; see also Howard v. City of Kansas City*, 332 S.W.3d 772, 790 (Mo. banc 2011) ("Where an insufficient motion for directed verdict has been made, a subsequent post-verdict motion is without basis and preserves nothing for review."); *Marquis Fin. Servs. of Indiana, Inc. v. Peet*, 365 S.W.3d 256, 259-60 (Mo.App. E.D.2012) (holding that affirmative defenses of res judicata and

collateral estoppel were not preserved by motion for JNOV because they were not asserted in the motion for directed verdict).

Appellants' failure to seek a directed verdict on the basis that Vacca's retaliation claim was barred by judicial estoppel precludes appellate review of this point. *See Barkley v. McKeever Enter, Inc.*, 456 S.W.3d 829, 839 (Mo. banc 2015) (stating that "it is not the role of the court of appeals or this Court to grant relief on arguments that were not presented to or decided by the trial court").

To the extent Appellants may claim that the issue has been preserved because they raised judicial estoppel in their motion for summary judgment,[19] the argument should be rejected. It is well established that an order denying summary judgment is not appealable. *Dhyne v. State Farm Fire & Cas. Co*., 188 S.W.3d 454, 456 n.1 (Mo. banc 2006); *Parker v. Wallace*, 431 S.W.2d 136, 137 (Mo. 1968). In any event, the issue would not be preserved because Appellants raised different issues in their motions for summary judgment and JNOV. In their motion for summary judgment Appellants asserted that Vacca's ***disability discrimination*** claim was barred because Vacca was judicially estopped from proving he was "disabled" under the MHRA, and "thus he cannot meet the first element of a prima facie case of disability discrimination/discharge." LF 208-09. The motion for summary judgment could not have preserved the issue asserted in this point—whether judicial estoppel barred Vacca's ***retaliation*** claim. *Blanks v. Fluor Corp*., 450

[19] Judge Dierker heard and denied the motion for summary judgment. LF 332-42.

S.W.3d 308, 384 (Mo.App. E.D.2014) (stating that "a party on appeal must base its claim of error on the same grounds raised in its trial objection").[20]

2. Appellants Invited The Alleged Error

Appellants waived appellate review of the judicial estoppel issue because their decision not to assert it at trial constituted invited or acquiesced-in error. The rationale for the invited error doctrine is that a party "cannot complain on appeal about an alleged error in which that party joined or acquiesced at trial." *Bowers v. Bowers*, 543 S.W.3d 608, 615 (Mo. banc 2018) (quoting *Sutton v. McCollum*, 421 S.W.3d 477, 481 (Mo.App. S.D.2013)); *Wilson v. P.B. Patel, M.D., P.C.*, 517 S.W.3d 520, 525 (Mo. banc 2017) ("It is axiomatic that a defendant may not take advantage of self-invited error or error of his own making.") (quoting *State v. Bolden*, 371 S.W.3d 802, 806 (Mo. banc 2012)).

Appellants knew of the purported inconsistencies in Vacca's positions before trial. Appellants filed a motion in limine to exclude evidence regarding Vacca's ability to work after January 12, 2012, the filing date of Vacca's divorce pleading in which he alleged he was no longer capable of working. LF 415; Ex. SSSSSS (App. A33). The pretrial motion

[20] Claims for discrimination, unlike claims for retaliation, do not require proof that the plaintiff is a member of a protected class. *Compare Gamber v. Mo. Dep't of Health & Senior Servs.*, 225 S.W.3d 470, 475 (Mo.App. W.D.2007) (identifying elements of a discrimination claim), *with Kerr v. Curators of the Univ. of Mo.*, 512 S.W.3d 798, 814 (Mo.App. W.D.2016) (identifying elements of a retaliation claim). Only Vacca's claim for retaliation was submitted to the jury. LF 510.

did not seek to exclude evidence that Vacca was capable of working as an ALJ between his termination on June 7, 2011, and before January 12, 2012, or that Vacca lost income during that interval due to his wrongful termination. Appellants' did not request a ruling on the motion in limine and failed to object when Vacca testified that he could have continued working as an ALJ for years if he had not been fired. Under these circumstances, Appellants decision not to raise judicial estoppel cannot be viewed as anything other than a wholesale and intentional abandonment of the issue. Appellants should be deemed to have acquiesced in the alleged error of which they now complain, and the point should be denied. *Bolden*, 371 S.W.3d at 806 (declining to impose a *sua sponte* duty on the trial court to correct invited error).

3. The Point Relied On Violates Rule 84.04(d)

Appellants have failed to preserve the issue of judicial estoppel because the point relied on fails to comply with the mandatory briefing requirements of Rule 84.04(d). *Storey v. State*, 175 S.W.3d 116, 126 (Mo. banc 2005). The point relied on states:

> 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.

Appellants' Substitute Br. 2, 19.

The point violates Rule 84.04(d) by failing to explain why, in the context of this case, the stated legal reason supports the claim of reversible error. It does not identify Vacca's allegedly conflicting positions and explain why they justify the invocation of

judicial estoppel. "It is not enough for a point relied on to simply state that the trial court was wrong without alluding to some evidence or testimony that gives support to such a conclusion." *Gillham v. LaRue*, 136 S.W.3d 852, 860 (Mo.App. S.D.2004); *see also Storey*, 175 S.W.3d at 126 ("A point relied on which does not state 'wherein and why' the trial court erred does not comply with Rule 84.04(d) and preserves nothing for appellate review."). The point relied on is an abstract statement of law and preserves nothing for review. *Stevens v. Cato*, 2017 WL 4675002, at *2 (Mo.App. S.D. Oct. 18, 2017) (stating that a point relied on that omits the necessary context "constitute[s] nothing more than an abstract statement of law incapable of satisfying the requirements of Rule 84.04"). A point relied on that violates Rule 84.04(d)(1) "preserves nothing for review" and the "allegations of error 'shall not be considered in any civil appeal.'" *Hink v. Helfrich*, 2018 WL2016136, at *6 (Mo. banc May 1, 2018) (Fischer, C.J., concurring) (quoting Rule 84.13(a)).

C. ARGUMENT

In the event this Court finds the issue has been preserved, this point should be denied. The trial court did not abuse its discretion in denying Appellants' motion for JNOV because Appellants failed to prove the elements required to warrant the invocation of judicial estoppel.

Judicial estoppel is an equitable doctrine that the trial court may invoke in its discretion. "The doctrine of judicial estoppel provides that '[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position,

especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *Taylor v. State*, 254 S.W.3d 856, 858 (Mo. banc 2008) (quoting *Zedner v. United States*, 547 U.S. 489, 504 (2006)). *Zedner* observed that these considerations have been reduced to three factors to consider in deciding whether to apply the doctrine of judicial estoppel:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position .... A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

547 U.S. at 504 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). "When present, these three factors 'firmly tip the balance of equities in favor of barring' the subsequent action." *Strable v. Union Pac. R. Co*., 396 S.W.3d 417, 421-22 (Mo.App. E.D.2013) (quoting *New Hampshire*, 532 U.S. at 750-51).

This Court has stated that the doctrine of judicial estoppel applies when the prior position was taken under oath in a judicial proceeding. *State Bd. of Accountancy v. Integrated Fin. Sols., L.L.C.*, 256 S.W.3d 48, 54 (Mo. 2008) ("Judicial estoppel will lie to prevent litigants from taking a position, under oath, 'in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits ... at that time.'") (quoting *Shockley v. Dir., Div. of Child Support Enforcement*, 980 S.W.2d 173, 175 (Mo.App. E.D.1998)).

This is in accordance with decisions of the Missouri Court of Appeals which have declared these considerations applicable when examining judicial estoppel. *See, e.g.*, *Collins v. Mo. Bar Plan*, 157 S.W.3d 726, 733 (Mo.App. W.D.2005); *Egan v. Craig*, 967 S.W.2d 120 (Mo.App. E.D.1998); *Bellinger v. Boatmen's Nat'l Bank of St. Louis*, 779 S.W.2d 647 (Mo.App. E.D.1989); *Lillo v. Thee*, 676 S.W.2d 77, 81 (Mo.App. S.D.1984).

Judicial estoppel should be invoked cautiously and narrowly due its harsh consequences. It should be reserved for egregious circumstances because it "can impinge on the truth-seeking function of the court." *Minish v. Hanuman Fellowship*, 214 Cal. App. 4th 437, 449, 154 Cal. Rptr. 3d 87, 96 (2013); *see Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc.*, 767 F.3d 987, 993 (10th Cir. 2014) (stating that "judicial estoppel is a powerful weapon to employ against a party seeking to vindicate its rights, and there are often lesser weapons that can keep alleged inconsistent statements in check while preserving a party's option to have its day in court").

Missouri courts have expressed similar reticence to invoking the related doctrine of equitable estoppel. This doctrine, like judicial estoppel, requires proof that a party's present claim is inconsistent with a prior act, statement, or admission. *Peerless Supply Co. v. Indus. Plumbing & Heating Co.*, 460 S.W.2d 651, 666-67 (Mo. 1970). Missouri jurisprudence makes clear that equitable estoppel "is not a favorite of the law and will not be lightly invoked" and "should be applied with care and caution and only when all elements constituting estoppel clearly appear." *Jackson v. City of Blue Springs*, 904 S.W.2d 322, 336 (Mo.App. W.D.1995)**.** Liberal application of the doctrine of equitable

estoppel is not favored." *Lake Saint Louis Cmty. Ass'n v. Ravenwood Properties, Ltd.*, 746 S.W.2d 642, 646 (Mo.App. E.D.1988).

Based on these considerations, there was no basis for invoking judicial estoppel.

1. Clearly Inconsistent Positions

Proof that Vacca has taken "clearly inconsistent" positions in separate judicial proceedings is an essential element of Appellants' judicial estoppel defense. In applying the doctrine of judicial estoppel, courts must "carefully consider the contexts in which apparently contradictory statements are made to determine if there is, in fact, direct and irreconcilable contradiction." *Rodal v. Anesthesia Group, P.C.*, 369 F.3d 113, 119 (2d Cir. 2004). For positions to be clearly inconsistent, they must be based on the same facts, relate to the same legal standard, and involve the same legal issues. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-807 (1999); *see Berger v. Emerson Climate Techs.*, 508 S.W.3d 136, 143-145 (Mo.App. S.D.2016). Where a plausible explanation is offered for inconsistent statements, "doubts about inconsistency often should be resolved by assuming there is no disabling inconsistency so that the second matter may be resolved on the merits." 18B Wright & Miller, Fed. Prac. & Proc. § 4477 (2d ed. 2002); *see Adelsberger v. Sheehy*, 59 S.W.2d 644, 647 (Mo. 1933) (stating that where "conflicting and contradictory statements of the witness are reasonably explained, or if there are other facts and circumstances in the case tending to show which story of the witness is true, and from a fair consideration of all the facts and circumstances in evidence a jury could reasonably determine which statement of the witness should be accepted as true, then the credibility of the witness and the weight to be given to his testimony are questions for the

jury.") *Brickner v. Normandy Osteopathic Hosp., Inc.*, 746 S.W.2d 108, 116 (Mo.App. E.D.1988) ("If contradictory statements can be reasonably explained and if from a fair consideration of all the circumstances a jury could reasonably determine what should be accepted as true, then the credibility of the witnesses and the weight to be given their testimony are questions for the jury.").

Vacca's position in this case is not inconsistent with a position he has taken in his divorce case. Vacca filed his first amended counter-petition in his divorce case on January 12, 2012, seven months after he had been terminated as an ALJ. That pleading alleged Vacca "is permanently and completely disabled" and is "no longer capable of being employed." Ex. SSSSSS (App. A33). Four months later Vacca testified in the divorce trial that he could not concentrate on any type of employment. Ex. RRRRRR (App. A29).

There is no clear conflict between these statements and Vacca's position in this case that he was capable of performing his job when he was wrongfully terminated on June 7, 2011, and could have continued working had Appellants not fired him. Vacca provided a reasonable explanation for his position in this case regarding his present and future ability to work as an ALJ. He testified that the ALJ position was "unique" and it was the only type of job he could perform given the limitations of his disability. Tr. 329. He testified that he tried unsuccessfully to obtain a comparable job that would offer him the accommodations he needed to work. Tr. 329, 467.

Vacca further testified that Appellants' retaliatory actions caused the emotional problems that he alluded to in his divorce testimony as the reason he could no longer

work. Tr. 327-29. Appellants' brief conveniently omits this evidence. Vacca testified that Appellants' retaliatory conduct "broke" him emotionally and psychologically. Tr. 327-39, 467-469. Vacca loved his job as an ALJ and got "great satisfaction from the work." Tr. 85, 326-327, 468. He felt he had "found [his] calling." Tr. 85. His abrupt and unceremonious termination by Director May robbed him of dignity. Tr. 327. He no longer had "a reason to get up every day." Tr. 468. He lost focus, descended into a deep depression, and contemplated suicide. Tr. 327-329, 468. He testified: "[A]ll I could think about was renting a hotel room, going to sleep, never waking up." Tr. 468. This evidence supports a reasonable inference that Appellants' retaliatory conduct caused Vacca to be unable to work as an ALJ. It was no abuse of discretion to refuse to invoke judicial estoppel under these circumstances due to the inequity of allowing Appellants to profit from their unlawful conduct. *See Salitros v. Chrysler Corp*. 306 F.3d 562, 572 (8th Cir. 2002) (rejecting employer's argument that plaintiff "cannot receive front pay for any period in which he was unable to work" when evidence supported a finding that "it was [employer's] retaliatory acts which drove plaintiff to sick leave").

To the extent Appellants' argue that judicial estoppel is warranted based on purportedly inconsistent statements in Vacca's disability benefits application, that argument has been waived because it is not included in the point relied on. "Rule 84.04(e) limits the argument under each point to those asserted in the point relied on." *Stacy v. Dep't of Soc. Servs., Div. of Med. Servs.*, 147 S.W.3d 846, 854 (Mo.App. S.D.2004). "[A]n argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d)

and the point is considered abandoned in this Court." *Brizendine*, 71 S.W.3d at 593. The point relied on asserts that judicial estoppel should have been invoked due to inconsistent statements Vacca made under oath in separate proceedings. Because the alleged inconsistent statements in the disability benefits application were neither sworn nor made in a judicial proceeding and, therefore, are beyond the scope of the point relied on.

In any event, statements in the disability benefits application do not support the application of judicial estoppel because they were unsworn and were not offered in a judicial proceeding. *State Bd. of Accountancy*, 256 S.W.3d at 54; *Egan*, 967 S.W.2d at 126 (concluding that plaintiff's statements in SSA disability report did not provide a basis for invoking judicial estoppel because "the statements were likewise not made under oath in a judicial proceeding" even though plaintiff signed the report under penalty of perjury); *Bellinger*, 779 S.W.2d at 651 (holding that "tax returns do not serve as judicial estoppel because, while they are signed under penalty of perjury, they were not given under oath during the course of a trial"). Even if statements in Vacca's disability application could be properly considered in the judicial estoppel analysis, no statement in the application is inconsistent with a position Vacca took in this case. When he submitted his application in January 2011, Vacca had been told by DOLIR that he had no reasonable accommodation. Tr. 256-258; Ex. 32. Vacca would be unable to perform his job if DOLIR pulled his reasonable accommodation as threatened. Tr. 281-284.

2. Judicial Acceptance

Judicial acceptance occurs when a litigant "succeeds in maintaining" a contrary position taken in a prior proceeding. *Taylor*, 254 S.W.3d at 858. Appellants have failed to

prove this element. During the pendency of this case, the judgment entered in Vacca's divorce proceedings was vacated and the case was remanded for a new trial. *Vacca v. Vacca*, 450 S.W.3d 490, 493 (Mo.App. E.D.2014). The vacation of the judgment restored the parties to their original positions as though the judgment had never been entered and left the matters in controversy open to future determination. *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n of Mo.*, 266 S.W.3d 842, 843 (Mo. banc 2008); *Century Fire Sprinklers, Inc. v. CNA/Transportation Ins. Co.*, 87 S.W.3d 408, 423 (Mo.App. W.D.2002). Since the divorce judgment was vacated prior to the trial of this case, Vacca has not succeeded in maintaining any position he took in that case. *Berger v. Copeland Corp.*, 505 S.W.3d 337, 338 n.2 (Mo.App. S.D.2016).

Nor is there a basis for finding that Standard Insurance accepted Vacca's statements regarding his ability to work when it approved his application for disability benefits. The disability policy permits an employee with a disability to work and also receive a long-term disability benefit called a return to work incentive. Smith Dep. at 129-130. Vacca's receipt of that minimal benefit precludes a finding that Standard Insurance accepted Vacca's purported representation that he was unable to perform any duties of his job. The opposite is the case. Vacca was eligible for the return to work incentive ***because he was working***. Ex. 71; Tr. 127-133. The return to work incentive is not available to employees who are unable to perform any job duties. Ex. 71.

3. Unfair Advantage Or Detriment.

There was no evidence that Vacca's purported inconsistent position in the divorce proceeding unfairly benefited Vacca or unfairly prejudiced Appellants. Vacca did not

receive an unfair advantage from his position in the divorce proceeding. No evidence was presented that Vacca received any maintenance from his ex-wife pursuant to the divorce judgment and that judgment was vacated before this case was tried. On remand Vacca amended his counter-petition to clarify that he is no longer capable of being employed other than as an administrative law judge. Tr. 469. The third factor is not satisfied. *Middleton v. Caterpillar Indus., Inc.*, 979 So.2d 53, 63 (Ala. 2007) (stating that "because Middleton's bankruptcy plan may be amended at any time, Middleton did not derive an unfair advantage").

Vacca statements in his application for disability benefits did not afford him an unfair advantage either. When the application was approved, Vacca received a return to work incentive. This does not qualify as an unfair benefit. Vacca was eligible for the return to work incentive because he was disabled and was working.

Appellants' suggestion that Vacca set out to "game the system" and had netted a "triple recovery" by obtaining full disability benefits while receiving his full ALJ salary and by securing maintenance from his former wife. This is an egregious mischaracterization of the record. At no time did Vacca receive full disability benefits while he was working as an ALJ. Appellants offered no evidence that Vacca received any maintenance from his former wife. Appellants' claim that Vacca obtained an unfair benefit by taking inconsistent positions is unsustainable.

For the reasons set forth above, Point I should be denied.

II. THE TRIAL COURT DID NOT ERR IN SUBMITTING VACCA'S RETALIATION CLAIM BECAUSE (1) SECTION 287.855 DOES NOT COMPEL THE RESIGNATION OF EMPLOYEES WHO RECEIVE DISABILITY BENEFITS, AND (2) THE RETURN TO WORK INCENTIVE VACCA RECEIVED IS NOT A BENEFIT AVAILABLE TO AN EMPLOYEE WHO IS TOTALLY INCAPABLE OF PERFORMING ANY DUTIES OF HIS OR HER JOB, AND THUS IS NOT WITHIN THE SCOPE OF SECTION 287.855.

A. STANDARD OF REVIEW

Appellate review of the denial of a motion for judgment notwithstanding the verdict is *de novo*. *Walsh v. City of Kansas City*, 481 S.W.3d 97, 111 (Mo.App. W.D.2016). In reviewing the denial of JNOV, this Court views the evidence "in the light most favorable to the jury's verdict" and grants Mr. Vacca the benefit of "all reasonable inferences and disregards all conflicting evidence and inferences." *Fleshner*, 304 S.W.3d at 95. The jury's verdict should not be disturbed unless "there is a complete absence of probative fact to support the jury's conclusion." *Dhyne*, 188 S.W.3d at 457.

B. ARGUMENT

Appellants contend that Vacca could not prove his termination was due to their retaliatory actions because Vacca's application for and receipt of disability benefits constituted a voluntary resignation. Appellants insist this outcome is dictated by Section 287.855, which states:

> Any administrative law judge or legal advisor who, while so employed, 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 (Resp't App. A18). According to Appellants, only employees totally incapable of performing their duties are eligible for disability benefits under the statute. Appellants' Substitute Br. 35-36. Appellants maintain that Vacca's receipt of disability benefits therefore necessarily meant he was incapable of performing any of his duties and thus constituted a voluntary resignation of his employment. Appellants' Substitute Br. 35-36.

Appellants' position is untenable under the rules of statutory interpretation. The primary rule of statutory interpretation is "to give effect to legislative intent as reflected in the plain language of the statute at issue." *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). "Construction of statutes should avoid unreasonable or absurd results." *Murray v. Mo. Highway & Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2001). "[A] statute will not be interpreted so as to directly conflict with another applicable statute or otherwise lead to an absurd result." *Mercy Hosp. E. Cmtys. v. Mo. Health Facilities Review Comm.*, 362 S.W.3d 415, 419-420 (Mo. banc 2012). Section 287.855 was adopted as part of 1984 Mo. H.B. 1106, which established the Administrative Law Judges and Legal Advisors Retirement System. § 287.812 RSMo (Resp't App. A16). The legislature's clear purpose in enacting Section 287.855 was to make disability benefits available to ALJs.

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. The statute, however, contains no such limitation. While the statute requires the state to provide disability benefits to such employees, it does not prohibit the state from offering benefits to employees who become disabled and could work or return to work with or without a reasonable accommodation. The facts in this case demonstrate that Vacca was capable of performing the essential functions of his job, and that he was performing his job duties up to the day of his termination. Tr. 91-92, 470; Ex. 40 at 3-4. Both his most recent chief judges rated him "successful" and "outstanding," highlighting his capabilities in rendering quick decisions and in conducting trials. Ex. 12 at 2-5; Ex. 85. Director May even admitted Vacca was working full-time. Tr. 732, 765. His most recent physician's opinion concluded he was performing his job duties and he could continue to do so with accommodation. Ex. 47 at 3. Vacca insisted over and over that he could perform his job and was doing so up to the date of termination. Tr. 91-92, 469-470, 1047; Ex. 12 at 2-5; Ex. 40 at 3-4; Ex. 85. There are no facts which support the notion Vacca was "totally incapable of performing any duties of his office contrary to Appellants' assertion."

Moreover, the interpretation urged by Appellants would produce absurd and unintended results. An employee who is diagnosed with cancer and unable to work for six months while undergoing chemotherapy would be deemed to have voluntarily resigned if she sought disability benefits. The plain language of Section 287.855 provides absolutely no support for concluding that the legislature intended to force covered

employees who become disabled through injury or illness to choose between retiring and receiving disability benefits. Had the legislature desired such a bizarre outcome, it could have easily expressed that intent by adding the following sentence to the statute: "The receipt of disability benefits by any administrative law judge or legal advisor shall constitute a voluntary resignation of his or her employment."

As public officers, ALJs may only be removed on grounds provided by law. Mo. Const., Art. VII, §4. Appellants' interpretation of Section 287.855 directly conflicts with Section 287.610, which sets forth the procedure for removing ALJs. When Section 287.855 was adopted, Section 287.610.1 provided that the "exclusive" method for the removal of an ALJ was by action of the governor after a recommendation of removal from the ALJ Review Committee. In 2005, the legislature amended Section 287.610 to allow the withdrawal of an ALJ's appointment after two consecutive "no confidence" votes. § 287.610 RSMo (Resp't App. A15-16). Even after this amendment, the grounds for removal remained wholly contained within Section 287.610. *Herschel v. Nixon*, 332 S.W.3d 129,137 (Mo.App. W.D.2010). Where express powers are granted and are limited in scope, an appellate court should view the omission of a power as intentional and should decline to expand such express powers by implication. *See, e.g., State ex rel. Brokaw v. Bd. of Educ. of St. Louis*, 171 S.W.2d 75, 83 (Mo.App. St.L.D.1943).

Appellants' interpretation of Section 287.855 also conflicts with Sections 104.500 and 104.518 RSMo under which MOSERS (and its designee the Standard Insurance) established a comprehensive scheme for the provision of disability benefits to disabled state employees, including the provision of a return-to-work incentive. The "automatic

resignation upon receipt of disability benefits" argument touted by Appellants is inconsistent with Section 104.518.1(4) which expressly grants to state employees the right to waive the disability income benefit and to return to work at any time. § 104.518.1(4) RSMo (Resp't App. A11).

Assuming *arguendo* that Section 287.855 mandates "resignation by operation of law" upon receipt of long-term disability benefits, the statute is unenforceable because it violates the Americans with Disabilities Act. In authorizing the ADA Congress found:

> "historically, society has tended to isolate and segregate individuals with disabilities, and … such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem….It is the purpose of this Act to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

42 U.S.C. § 12101(a)(2) and (b)(1). Any policy requiring termination by operation of law without considering a disabled employee's ability to continue to work with reasonable accommodations is discriminatory and constitutes an unlawful employment practice unenforceable as a matter of law. 42 U.S.C. §§ 12111, 12112(a). Under the ADA, no employer may discriminate against a qualified individual with a disability, because of his disability, in regard to the discharge of employees, and other terms, conditions, and privileges of employment. *See Bizelli v. Amchem*, 981 F. Supp. 1254 (E.D. Mo. 1997).

The trial court properly rejected Appellants' illogical and absurd construction of Section 287.855 as mandating termination of a disabled judge as a matter of law. Accordingly, this point should be denied.

III. THE TRIAL COURT DID NOT ERR IN DENYING REMITTITUR OF THE COMPENSATORY DAMAGES AWARD BECAUSE THE JURY'S VERDICT IS NOT EXCESSIVE.

A. STANDARD OF REVIEW

Appellate courts review the denial of a motion for remittitur for abuse of discretion. *Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 439 (Mo. banc 2016). An appellate court should not "interfere with a verdict unless it is manifestly unjust." *Id.* In determining whether the verdict is manifestly unjust, the appellate court views the evidence in a light most favorable to the verdict. *Id.* An abuse of discretion occurs "when the trial court's ruling is clearly against the logic of the circumstances and is so unreasonable and arbitrary that it shocks one's sense of justice and indicates a lack of careful consideration." *Stewart v. Partamian*, 465 S.W.3d 51, 56 (Mo. banc 2015).

B. ARGUMENT

Appellants' brief disregards the standard of review by relying on evidence favorable to their position and wholly ignoring evidence supporting the verdict. Appellants failed to present the evidence in the light most favorable to the judgment, brazenly disregarding evidence favorable to Vacca which supports the judgment. For example, Appellants maintain that "[a]side from [Vacca's] self-serving testimony, little to no evidence suggests he could have worked full time for twenty more years." Appellants'

Substitute Br. 39.[21] The notion that Vacca's testimony is robbed of probative value due to his interest in the lawsuit is outrageous. The jury had the right to credit his testimony and determine its appropriate weight. *Moore v. Ford Motor Co*., 332 S.W.3d 749, 763 (Mo. banc 2011) (stating that jury was free to credit plaintiff's self-serving testimony); *Aluminum Prod. Enters., Inc. v. Fuhrmann Tooling & Mfg. Co*., 758 S.W.2d 119, 122 (Mo.App. E.D.1988) (holding that "the weight to be accorded to the testimony of an interested witness is a matter to be determined by the jury"). Appellants turn the standard of review on its head in urging this Court to disregard evidence favorable to the verdict. Appellants' blatant violation of the standard of review warrants the denial of this point. *Bare v. Carroll Elec. Coop. Corp*., 2018 WL 1281114, at *12 (Mo.App. S.D. Mar. 13, 2018) (dismissing point relied on challenging denial of remittitur because the point and supporting argument did not address evidence favorable to the verdict, thereby stripping appellant's argument "of any analytical value or persuasiveness") (quoting *Houston v. Crider*, 317 S.W.3d 178, 189 (Mo.App. S.D.2010)); *see also J.A.R. v. D.G.R.*, 426 S.W.3d 624, 631-32 (Mo. banc 2014).

In the event this Court elects to consider the merits of Appellants' argument, this point should be denied because Appellants have failed to demonstrate the verdict is excessive.

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[21] *See also* Appellants' Substitute Br. 40 ("But setting aside Vacca's own self-serving testimony, the rest of the testimony Vacca presented *at best* only suggests Vacca could have continued working in 2011.") (emphasis in original).

"Appellate review of a jury's verdict begins with the recognition that the jury retains virtually unfettered discretion in reaching its decision because there is a large range between the damage extremes of inadequacy and excessiveness." *Stewart*, 465 S.W.3d at 57 (internal quotation marks omitted). Statutory remittitur is designed to correct a jury's "honest mistake in fixing damages," and not to correct jury bias and prejudice. *Id*. A prerequisite to remittitur is that the moving party establish that good cause warrants a new trial on damages or the verdict is against the weight of the evidence. *Id*.

There is no precise formula or mathematical calculation for determining whether a verdict is grossly excessive. *Knifong v. Caterpillar, Inc.*, 199 S.W.3d 922, 928 (Mo.App. W.D.2006), *overruled on other grounds by Badahman v. Catering St. Louis*, 395 S.W.3d 29, 39 (Mo. banc 2013). Each case must be evaluated on its own facts. *Id.* Courts generally consider the following factors: (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 in comparable cases, and (7) the trial court's and jury's superior opportunity to evaluate plaintiff's injuries and other damages. *Id.*

Non-economic damages such as emotional distress, humiliation, and suffering are recoverable under the MHRA. *Wilkins v. Bd. of Regents of Harris–Stowe State Univ.*, 519 S.W.3d 526, 538 (Mo.App. E.D.2017). In reviewing non-economic damages, courts have recognized that there is "no bright-line rule" or "arbitrary mathematical formula" for awarding such damages. *Knifong*, 199 S.W.3d at 930. "Damages need not be proven with exact certainty, but rather it is the fact of damages, not the amount, that must be proven

with reasonable certainty." *A.R.B. v. Elkin*, 98 S.W.3d 99, 104-105 (Mo.App. W.D.2003). "Intangible damages, such as pain, suffering, embarrassment, emotional distress, and humiliation do not lend themselves to precise calculation" and "may be established by testimony or inferred from the circumstances." *State ex rel. Sir v. Gateway Taxi Mgmt. Co.*, 400 S.W.3d 478, 491 (Mo.App. E.D.2013); *see also Wilkins*, 519 S.W.3d at 538.

Vacca presented substantial evidence that he sustained considerable economic and non-economic damages due to Appellants' retaliatory actions. The jury is free to reach its own conclusions based upon the evidence presented, and there was ample evidence supporting the harm caused to Vacca.

When he was fired, Vacca was able to perform his duties as an ALJ under the previously approved reasonable accommodations. Tr. 91-92, 234-235, 469-470, 1047; Ex. 12 at 2-5; Ex. 40 at 3-4. Vacca testified that his medical condition "hasn't changed much" and has "gotten a little better." Tr. 326-27. Vacca testified that with the existing reasonable accommodations he intended to keep working for twenty more years. Tr. 234-235, 326-337. Dr. Taylor, a neurologist at the Mayo Clinic, supplied a statement to Appellants several weeks *before* Vacca's termination. In his April 26, 2011 statement, Dr. Taylor opined that Vacca could manage the symptoms of his illness and could continue to perform his job with reasonable accommodations. Ex. 47.[22] In contrast,

[22] Dr. Taylor's letter contradicts Appellants' assertion that "[t]here was no new medical evidence" regarding Vacca's disability after February 2011. Appellants' Substitute Br. 40. Glaringly, Appellants do not mention Dr. Taylor's letter in their brief. Ex. 47.

Appellants offered no medical testimony whatsoever concerning Vacca's inability to continue working and failed to cross examine Vacca regarding his ability to work.

The wrongful termination caused Vacca to sustain loss of wages, fringe benefits, and out-of-pocket medical expenses. Tr. 330-333. He was earning $98,000 per year when he was terminated. Tr. 331. By the time of trial, ALJ salaries had risen to $120,000 per year. Tr. 331. Vacca's counsel used demonstrative evidence showing the calculation of economic damages. Ex. 87. Vacca's medical expenses were $40,203. Tr. 333; Ex. 87. Vacca provided a range of future pay damages based on ten years and twenty years of continued employment but acknowledged that "[n]one of us know the future." Tr. 333. Vacca presented substantial evidence supporting an award of over $2.8 million in back and front pay. Tr. 331-332; Ex. 87. This evidence provided a sufficient basis from which the jury could reasonably estimate the economic damages suffered by Vacca. *See Wilkins*, 519 S.W.3d at 542 (finding that the jury "reasonably could have credited [plaintiff's] testimony that she desired to work into her late seventies" in calculating award of actual damages).

Vacca presented substantial evidence of non-economic damages, including emotional distress, deprivation of civil rights, humiliation, and embarrassment. Appellants' continued non-responsiveness to Vacca's complaints of discrimination and pattern of retaliation caused him to lose his appetite, he explained to the jury that "he started getting ulcers" and "every time I ate I threw up." Tr. 269-70. He suffered sleeplessness "all night long I couldn't fall asleep thinking about what I would face the next day and what they were going to do…" Tr. 269-70; Ex. 28, 29. Vacca believed that

there was a concerted effort to force him out of his job. Tr. 269-270, 282-284; Ex. 35 at 7. Vacca worried continually about his ability to support himself and his family if he lost his job. Tr. 281-282, 284. Vacca described the events leading up to termination as being "incredibly defeating, demoralizing, degrading." Tr. 327.

After orchestrating the elaborate scheme to procure the no confidence vote, Vacca testified he was "devastated" and "I knew that's the end of my job. I'm going to be fired." Tr. 311. Then DOLIR further insisted that Vacca fill out forms requesting his then current reasonable accommodations. Tr. 313-14; Ex. 42. Tr. 1231-32. The whole exercise over a form was a pretext to deny Judge Vacca's work accommodation, and he testified "once again they were just building a case against me." Tr. 314, 1231-32.

Vacca's reassignment to a storage-like office in the rear area, far away from other judges and persons within the offices affected him as well. Tr. 277-79. Vacca was demoralized by the office reassignment: "I knew I was being kicked to the curb. That was just another kick in the teeth on the way down. I was obviously not valued." Tr. 279. Vacca testified that Appellants' continued retaliatory actions caused him emotional distress which exacerbated the symptoms of his pre-existing condition. Tr. 327-329.

Despite his continued efforts, in the end Appellants terminated Vacca for receiving disability benefits, even though the minimal benefit he received was based upon his proven ability to work. Tr. 322, 325; Ex. 50 (App. A26). The loss of his job and his inability to find employment thereafter was physically and emotionally devastating. Tr. 327-329, 468. He suffered severe depression; he lost his purpose in life. Tr. 327. Vacca had gotten "great satisfaction from the work" and it had given him "a reason to get up

every day." Tr. 326, 468. His removal from office robbed him of his dignity. Tr. 327. Immediately after Director May fired him he considered suicide, "all [he] could think about was renting a hotel room, going to sleep, never waking up." Tr. 468. His termination caused him to suffer severe emotional distress which worsened his physical condition. Tr. 327-29, 468. The change in his ability to work was brought about by the retaliatory acts. He testified: "They broke me…. The bathroom. The ALJ Review Committee. Saying there was no accommodation when there clearly was." Tr. 468.

Appellants contend that the jury award of lost wages for a twenty-year period is pure speculation. It is impossible, however, to determine how the jury allocated damages between economic and non-economic damages because the jury was directed to award a single amount for actual damages. LF 518. A strict level of proof of future lost wages is not required under Missouri law. *Brenneke v. Dep't of Mo, Veterans of Foreign Wars of U.S. of Am.*, 984 S.W.2d 134, 142 (Mo.App. W.D.1998). Specific evidence of the exact amount of the future lost wages is not required. *Id.* The relative weakness or strength of the factual underpinning of the evidence supporting a claim for future lost wages goes to the weight of the evidence, not to its admissibility. *Id.* Appellants were "free to attack the grounds" on which the future wage loss was claimed. *Id.* Because Appellants chose not to contest Vacca's evidence of damages, the jury was entitled to rely on the evidence offered by Vacca in determining its award of damages.

In addition, Appellants also claim that the award of future pay should be limited to the period between his termination (June 7, 2011) and the filing of his first amended divorce counter-petition (January 12, 2012). Appellants waived this argument by not

objecting to Vacca's evidence regarding his ability to work or requesting a limiting instruction. *Ralph v. Lewis Bros. Bakeries, Inc.*, 979 S.W.2d 509, 516-517 (Mo.App. S.D.1998) (denying remittitur due to defendant's failure to request a limiting instruction). "A party should make any objection to the trial process at the earliest opportunity to allow the other party to correct the problem without undue expense or prejudice." *Sanders v. Ahmed*, 364 S.W.3d 195, 207 (Mo. banc 2012). "[I]f a party fails to make an objection when the concern can be corrected at the earliest and easiest opportunity, he or she will not be heard to complain later when the cost of correction may be far more onerous." *Id*.

There was sufficient evidence upon which the jury reasonably could have concluded that Appellants retaliatory conduct caused Vacca significant harm. There was ample proof that DOLIR's and May's conduct had a devastating effect on Vacca's physical and emotional health, both while he was fighting to keep his job and after his wrongful termination. The award of actual damages was reasonable and warranted by the evidence. The court agreed with the jury's assessment of actual damages and properly denied remittitur. Accordingly, this point should be denied.

IV. THE TRIAL COURT DID NOT ERR IN SUBMITTING PUNITIVE DAMAGES.

A. STANDARD OF REVIEW

The submissibility of punitive damages presents a question of law and is reviewed *de novo*. *Claus v. Intrigue Hotels, LLC*, 328 S.W.3d 777, 783 (Mo.App. W.D.2010). "In determining whether the evidence was sufficient to submit the claim for punitive damages, the evidence and all reasonable inferences are viewed in the light most favorable to submissibility." *Ellison v. O'Reilly Auto. Stores, Inc.*, 463 S.W.3d 426, 434 (Mo.App. W.D.2015). All adverse inferences must be disregarded. *Holmes v. Kansas City Mo. Bd. of Police Comm'rs*, 364 S.W.3d 615, 628 (Mo.App. W.D.2012).

B. PRESERVATION / WAIVER

1. The Issue Is Not Preserved Because It Was Not Asserted In Appellants' Motion For Directed Verdict

To preserve the question of the submissibility of a claim, the issue must be asserted in a motion for directed verdict. *Sanders*, 364 S.W.3d at 207. In their motion for directed verdict, Appellants did not argue that Vacca failed to make a submissible case for punitive damages. Tr. 1275-77, 1285. Although Appellants raised the issue during the instruction conference,[23] the objection was untimely. *Wilkins*, 519 S.W.3d at 545-46;

[23] Appellants' counsel did not object to Vacca's proposed punitive damages instruction patterned after MAI 10.01 and 10.03. Tr. 1290; L.F. 514-15. When the court inquired if there was an objection to the proposed verdict director, Appellants' counsel replied:

Walsh, 481 S.W.3d at 104, 112-13. In *Wilkins* the court held that an objection to the submissibility of punitive damages at the instruction conference is insufficient to preserve the issue for appellate review, stating:

> In *Walsh* [*v. City of Kansas City*], the defendant did not assert that the claimant lacked a submissible case for punitive damages in its motion for a directed verdict at the close of all the evidence. However, as here, the defendant objected to the punitive-damages jury instruction, arguing that the claimant did not present sufficient evidence warranting a submission of a punitive-damage instruction to the jury. Holding that the defendant waived its challenge to the submissibility of punitive damages, the *Walsh* court concluded that the exclusive procedure to attack the submissibility of punitive damages was through a motion for a directed verdict under the framework provided by Rule 72.01(a)-(b). The failure to raise and argue against the submissibility of punitive damages in the defendant's motion for directed verdict did not preserve the point for the appeal.
>
> Similarly, we find that the Board has failed to preserve for our review its assertion that Wilkins did not make a submissible claim for

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> I'm sorry. Obviously – I apologize. I should have already spoken up. We're objecting to the submissibility of punitive damages both in the instruction on punitive damages and punitive damages submitted in the verdict form.

Tr. 1291.

punitive damages. By not raising the issue in either of the Board's motion for directed verdicts, the Board failed to preserve this issue for appellate review.

519 S.W.3d at 545.

2. The Fourth Point Relied On Violates Rule 83.08(b)

Under Rule 83.08(b), Appellants are prohibited from "alter[ing] the basis of any claim that was raised in the court of appeals brief." Appellants' fourth point relied on violates this rule.

Appellants' court of appeals' brief asserted the following legal basis for their contention that the trial court erred in submitting punitive damages:

> [T]here was not substantial evidence that the Defendants acted with evil motive or reckless indifference, in that the uncontroverted evidence demonstrated that Defendants Brian May and the Division relied on legal advice in determining that Mr. Vacca had resigned by operation of law.

Appellants' Court of Appeals Br. 23.

In their substitute brief, Appellants changed the legal basis for their challenge to submissibility:

> [T]here 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.

Appellants' Substitute Br. 3.

These are new basis for their claim of reversible error. In their prior brief, Appellants did challenge the submissibility of punitive damages on the basis of Vacca's representations regarding his ability to work, their alleged efforts to accommodate Vacca's disability, or their general belief that they had "reasonable grounds" for believing Vacca had quit.[24] Pursuant to Rule 83.08(b), these arguments are barred and the point should be denied. *See Sun Aviation, Inc. v. L-3 Commc'n Avionics Sys., Inc.,* 553 S.W.3d 720, 730 n.8 (Mo. banc 2017)**;** *Lane v. Lensmeyer*, 158 S.W.3d 218, 228-229 (Mo. banc 2005)**.**

Because Appellants have failed to preserve the issue of submissibility of punitive damages, this point should be denied.

C. VACCA MADE A SUBMISSIBLE CASE FOR PUNITIVE DAMAGES

In the event this Court determines the claim of error has been preserved, Vacca adduced sufficient evidence to submit punitive damages and the denial of JNOV was proper.

Under the MHRA, an employer is liable for punitive damages based on its wanton, willful, or outrageous act or based on reckless disregard for an act's consequences such

[24] These claims were also waived because Appellants did not assert them in their motion for JNOV. LF 612-613. "Rule 84.13(a) unambiguously provides that 'allegations of error not presented to or expressly decided by the trial court shall not be considered in any civil appeal from a jury tried case.'" *Barkley*, 456 S.W.3d at 839 (quoting Rule 83.08).

that an evil motive may be inferred. *Hill v. City of St. Louis*, 371 S.W.3d 66, 71 (Mo.App. E.D.2012). Evidence supporting the underlying claim for retaliation will generally support a claim for punitive damages. *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 870-71 (Mo.App. E.D.2009); *McGhee v. Schreiber Foods*, 502 S.W.3d 658, 674 (Mo.App. W.D.2016). A wanton, willful, or outrageous act may be found where the proffered reason for terminating an employee is pretextual. *Turner v. Kansas City Public Sch.*, 488 S.W.3d 719, 725 (Mo.App. W.D.2016). Reckless disregard may be found where an employer has notice of retaliation and does not promptly and effectively investigate and remedy retaliation. *Diaz v. Autozoners, LLC*, 484 S.W.3d 64, 88-89 (Mo.App. W.D.2015). An evil motive can be inferred or implied from reckless disregard of another's employment rights and interests. *Williams*, 281 S.W.3d at 870.

Appellants' recitation of evidence supporting their argument constitutes another flagrant violation of the standard of review. They set forth only evidence favorable to their argument and disregard the overwhelming evidence and reasonable inferences demonstrating that they acted with evil motive and reckless indifference to Vacca's rights. Appellants' claim that DOLIR had "good-faith reasons to recognize Vacca's voluntary resignation" and exhibited an "ongoing willingness to accommodate Vacca's disability," Appellants' Substitute Br. 43, is a nonstarter in light of the standard of review. The evidence Appellants tout must be disregarded. Only evidence and inferences supporting submissibility is considered.

Viewed in the light most favorable to the submissibility, ample evidence of Appellants' evil motive supported submission of punitive damages. Vacca adduced

evidence that he repeatedly informed senior managers at DOLIR that he was being subjected to retaliation, and DOLIR failed to take prompt action to address the retaliation. Vacca filed his complaints related to accessibility of the restrooms to senior management and the complaints met with resistance, criticism and inaction. Even though his goal was only to be able to use the restroom at work. Tr. 158. He sent further complaints of discrimination and retaliation to DOLIR because he believed his chief judge was discriminating and retaliating against him for prior claims of discrimination, using his performance review as a tool to retaliate against him. Ex. 29.

Vacca presented evidence that DOLIR responded with a sham investigation into his claims, using the investigation to question Vacca's previously granted work accommodation. Tr. 256-57, 880-81. The investigative report ignored any discussion of discrimination or retaliation. Ex. 70. The false narrative adopted by DOLIR management was then used as the reason DOLIR denied Vacca's claims of discrimination and retaliation. Ex. 32; Tr. 256-258.

Thereafter, DOLIR used the performance review process to further retaliate against Vacca for making claims of discrimination and retaliation. The evidence established that this was the sole reason Vacca began the disability application process in August 2010. Tr. 238-39. Vacca testified that he filed his first application for disability benefits the day Boresi submitted his Performance Review to DOLIR. Tr. 238. Boresi's unfavorable review as DOLIR was questioning the existence of his reasonable accommodation led Vacca to conclude that the "pretext is being gathered to get rid of me, to fire me." Tr. 238; Ex. 32.

DOLIR and Director May demanded extraneous materials about Vacca that was then presented to the ALJ Review Committee. Tr. 541-42. Vacca's chief judge testified she was compelled to prepare a written supplemental review for Judge Vacca to put matters before the Committee that were not included in her performance review of Vacca. Tr. 548-49. No other judges were subject to this heightened scrutiny. Tr. 557-58, 1188.

There was evidence that Director May's demeanor toward Vacca at the ALJ meetings was "angry" and "very aggressive." Tr. 1177. Director May was described by a witness as following "marching orders," when he urged the Committee to take a vote of "no confidence" based on the supplemental review he had compelled. Tr. 1165-88; Ex. 56 at 4-8. Director May lied to the Committee when he represented that Vacca did not have a reasonable accommodation. Tr. 1179; Ex. 56 at 4. Director May specifically denied his role at the ALJ Review Committee and denied the records of the meeting. Tr. 712-13. Director May expressed animus toward Vacca at trial, describing him as "vindictive and spiteful." Tr. 693.

There was evidence that more offensive acts would follow, including Vacca's humiliating office reassignment, the January 2011 denial of Vacca's work accommodation and pretextual demand that Vacca file a form to obtain his existing reasonable accommodation. When Director May fired Vacca, Vacca adamantly maintained that he was performing his job and could continue to work with a reasonable accommodation. Tr. 91-92, 469-470, 1047. Vacca testifying "Absolutely. Emphatically 30 times I said that to him I want to continue to work." Tr. 323. The evidence included that Director May and DOLIR had devised a false reason to terminate Vacca, alleging

that the receipt of disability benefits to be a "voluntary resignation" contrary to the plain language of the statute. Ex. 50 (App. A26). Director May dismissed Vacca's pleas, and to add to Vacca's humiliation, DOLIR had a security guard remove Vacca from the building. Tr. 325.

Vacca presented evidence that he received the return to work benefit from Standard Insurance precisely because he was able to work when he was deemed to qualify for disability benefits. Appellants terminated Vacca because he received this minimum incentive to continue working from the disability insurer based on a nonsensical interpretation of Section 287.855 even though he only received the minimal benefit.

The breadth of case law in Missouri strongly supports the submission of punitive damages in this case. Indeed, many of the actions taken by Appellants were found to support punitive damage awards in previous cases.

- **Appellants repeatedly failed to take effective action to stop discriminatory conduct**. *See McGhee*, 502 S.W.3d at 674. In this case Vacca repeatedly implored DOLIR to address discriminatory conduct, yet no effort was made to protect him. Tr. 243-244, 851-60; Ex. 29, 70.

- **The proof that Appellants' offered explanation is false is evidence of retaliatory motive**. *See Turner*, 488 S.W.3d at 724-725. In this case, DOLIR used a false narrative to "explain away" Vacca's reasonable accommodation, while ignoring all written evidence and witnesses. Ex. 70; Tr. 851-860, 872-873, 880-881, 1010.

- **Appellants' failure to take proper remedial action, including improper or irregular investigation into claims.** *See Diaz* , 484 S.W.3d at 88-89; *Leeper v. Scorpio Supply IV*, 351 S.W.3d 784, 796-797 (Mo.App. S.D.2011); *Lynn v. TNT Logistics N. Am., Inc.*, 275 S.W.3d 304, 309-310 (Mo.App. W.D.2008). In this case DOLIR failed to take proper remedial action, and instead conducted a sham investigation into Vacca's complaints. Tr. 838-840, 851-860, 872-873, 880-881.

- **Participation by senior managers, awareness of disability, awareness of prohibitions on discrimination and retaliation, employee's ability to perform essential functions of job, and discussion of employee's disability in making decision to terminate employee**. *See Wilkins*, 519 S.W.3d at 532; *Ellison*, 463 S.W.3d at 435-436. In this case Director May falsely reported to the ALJ Review Committee that Vacca did not have a reasonable accommodation based on his disability, and thereafter discussed his disability. Tr. 1179; Ex. 56 at 4-8. May disseminated inappropriate information to the Committee including records of Vacca's medical condition and disability, that Vacca had applied for long-term disability benefits, and that Vacca had filed a charge of discrimination and retaliation. Tr. 1178-85; Ex. 56 at 4-8.

- **Rejection of physician's statement that the employee could continue to work**. *See Bowolak v. Mercy E. Cmtys*, 452 S.W.3d 688, 698 (Mo.App. E.D.2014). In this case, DOLIR ignored the letter submitted by Vacca's physician, Dr. Taylor, opining that Vacca was able to continue working with reasonable accommodation shortly before he was terminated. Ex. 47 at 3; Tr. 1236-37.

- **Adverse treatment in response to making claim of violation of rights**.

Hill v. Ford Motor Co., 277 S.W.3d 659, 667 (Mo. banc 1990). In this case, DOLIR and Director May devised an elaborate scheme to force Vacca from his job by denying the existence of his reasonable accommodations and orchestrating the vote of "no confidence" against him after Vacca made complaints of discrimination and retaliation. Tr. 1178-85; Ex. 56 at 4-8.

- **Disparate treatment – the only employee targeted for termination was the employee who complained about discrimination.** *Holmes v. Kansas City Mo. Bd. of Police*, 364 S.W.3d 615, 620-621 (Mo.App. W.D.2012). In this case, the evidence demonstrated that DOLIR, Director Lyskowski and Director May targeted Vacca for termination due to his complaints of discrimination and retaliation. Tr.1185; Ex. 56 at 6.

- **The only employee subject to a change in performance review complained of discrimination and retaliation**. *See Williams*, 281 S.W.3d at 871. In this case, after Vacca complained of disability discrimination and retaliation he was the only judge subjected to a written "supplemental performance review," which was a change in his more favorable performance review. Tr. 557.

- **Reassignment to an isolated office and differential treatment**. *See Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 109 (Mo.App. E.D.2006). In this case, Director May moved Vacca to a remote part of the office to punish him for his complaints of discrimination. Tr. 276-279. May also rewarded Boresi by placing her in his larger office. *Id.*

"Where the employer knows of abusive conduct, repeatedly fails to take effective action to stop the conduct, and defends or makes excuses for the conduct, the evidence is sufficient to support submission of punitive damages." *Diaz,* 484 S.W.3d at 88-89; *see also Hill v. City of St. Louis,* 371 S.W.3d at 70-71. Appellants knew of Vacca's complaints of retaliation and ignored them. Appellants also built a case to remove Vacca and ultimately terminated him for receiving a minimal benefit to keep him working. The trial court correctly applied the law and submitted the issue of punitive damages to the jury.

D. APPELLANTS' PURPORTED RELIANCE ON LEGAL ADVICE IS IRRELEVANT TO SUBMISSIBILITY OF PUNITIVE DAMAGES

Appellants offer no authority supporting their contention that "reliance on legal advice" is a defense to punitive damages. While a defendant who "acts in good faith and honestly believes his act is lawful" may not be held liable for punitive damages, the determination whether the defendant, in fact, acted in good faith is a question of fact for the jury. *See Tamko Asphalt Prods., Inc. v. Arch Assocs.*, 830 S.W.2d 434, 441 (Mo.App. E.D.1992); *Hinton v. State Farm Mut. Auto. Ins. Co.*, 741 S.W.2d 696, 700 (Mo.App. W.D.1987). It is for the jury to decide what weight, if any, to give such mitigating evidence. *Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 664 (Mo.App. W.D.1991)**;** *Hinton*, 741 S.W.2d at 700. Under the standard of review, this Court presumes that the jury did not credit Appellants' evidence. This Court has recognized that an entity may not shield itself from liability merely by claiming it relied upon legal advice, recognizing that such

reliance does not necessarily equate with good faith. *Hanch v. KFC Int'l Management Corp.*, 615 S.W.2d 28, 31-32 (Mo. banc 1981).

It is the province of the jury to determine the credibility and weight of all evidence. *Holmes*, 364 S.W.3d at 629. The jury reasonably could have concluded that any reliance Appellants placed on the advice of DOLIR's counsel "did not remove the taint of malice coloring their acts toward [the plaintiff]." *Crowe v. Lucas*, 595 F.2d 985, 992 (5th Cir. 1979). The jury also could have determined that the purported non-retaliatory reasons for dismissing Vacca were pretextual. The jury was free to disbelieve Director May's self-serving testimony that DOLIR's legal counsel advised him that Vacca's receipt of disability benefits constituted a voluntary resignation pursuant to Section 287.855.[25] *Turner*, 488 S.W.3d at 723-724 (stating that "the jury could have rejected [defendant's] proffered reasons for terminating [plaintiff] and inferred from that disbelief that [defendant] had a retaliatory motive"); *Lomax v. DaimlerChrysler Corp.*, 243 S.W.3d 474, 483 (Mo.App. E.D.2007)

[25] This is especially true since Director May is an attorney and he consulted the same attorney involved in the irregularities that occurred in the ALJ Review Committee. Tr. 652, 710 787; Ex. 56.

V. THE PUNITIVE DAMAGES AWARD AGAINST DOLIR DOES NOT VIOLATE DUE PROCESS.

A. STANDARD OF REVIEW

Appellate courts review the constitutionality of punitive damages awards *de novo*, while deferring to the trial court's findings of fact, unless they are clearly erroneous. *Bowolak*, 452 S.W.3d at 698-99; *see Cooper Indus., Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424, 436, 440 n.14 (2001).

B. ARGUMENT

Punitive damages are constitutionally justified because they further society's interests of punishing and deterring unlawful conduct. *Diaz*, 484 S.W.3d at 89. "With regard to whether a punitive award is grossly excessive, 'the relevant constitutional line is inherently imprecise, rather than one marked by a simple mathematical formula.'" *Krysa v. Payne*, 176 S.W.3d 150, 156 (Mo.App. W.D.2005) (quoting *Cooper Indus*, 532 U.S. at 434-35). A punitive damages award satisfies the requirements of due process unless it imposes "grossly excessive or arbitrary punishment." *Lewellen v. Franklin*, 441 S.W.3d 136, 145 (Mo. banc 2014) (quoting *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 409 (2003)).

In MHRA cases two guideposts are considered in determining whether a punitive damages award comports with due process: (1) the reprehensibility of the defendant's misconduct, and (2) the disparity between the harm and the punitive damages award. *Diaz*, 484 S.W.3d at 90. To determine reprehensibility, courts consider whether:

> [T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Lewellen, 441 S.W.3d at 146 (quoting *Campbell*, 538 U.S. at 419).

DOLIR's due process challenge should be denied because it fails to address all relevant factors in determining whether a punitive damages award is constitutionally excessive. DOLIR discusses only the first guidepost and the first two reprehensibility factors. It is DOLIR's obligation to raise and develop the arguments supporting its contentions. *Robert T. McLean Irrevocable Trust v. Ponder*, 418 S.W.3d 482, 500 (Mo.App. S.D.2013) ("It is not this Court's role to attempt to develop arguments not raised by the Trust, because to do so would be to become an advocate for the Trust by speculating on facts and arguments that have not been asserted."). Accordingly, the second guidepost and the reprehensibility factors not addressed by DOLIR should be presumed to support the constitutionality of the punitive damages award.

1. DOLIR'S Conduct Was Reprehensible

DOLIR's argument that "the reprehensibility factors are entirely absent" consists of five sentences with no citations to the record. It is undeveloped and lacks any merit. In evaluating the reprehensibility factors, appellate courts defer to the factual findings of the jury and the trial court and view the evidence and all reasonable inferences in the light

most favorable to the verdict and disregard all contrary evidence and inferences. *Krysa*, 176 S.W.3d at 157.

DOLIR's argument depends on evidence and inferences contrary to the verdict. It maintains that "[t]here was no evidence of physical harm to Vacca that was caused by Defendants." Appellants' Substitute Br. 46. DOLIR's contention that this case involves only economic harm is untenable. Courts recognize that "intentional discrimination is a different kind of harm" than purely economic harm because it is "a serious affront to personal liberty." *Zhang v. American Gem Seafoods, Inc*., 339 F.3d 1020, 1043-44 (9th Cir. 2003); *Diaz*, 484 S.W.3d at 90 (comparing emotional and psychological harm caused by harassment with physical harm under reprehensibility analysis); *Romano v. U-Haul Int'l, Inc*., 233 F.3d 655, 673 (1st Cir. 2000) (concluding that plaintiff's gender-based termination was "more reprehensible than would appear in a case involving economic harms only").

With respect to the first reprehensibility factor, DOLIR ignores the substantial evidence of physical harm to Vacca. Tr. 243, 245, 248, 269-270, 279; Ex. 29 & 35. Vacca testified that his health deteriorated due to the emotional distress caused by DOLIR's retaliatory actions and wrongful termination. Tr. 327, 329, 468-470. With regard to ongoing emotional distress while working, recall Vacca described the harm, it caused him to quit eating and when he did eat, he explained to the jury, "I started getting ulcers" and "every time I ate I threw up." Tr. 269-70. He suffered sleeplessness "all night long I couldn't fall asleep thinking about what I would face the next day and what they were going to do." Tr. 269-70; Ex. 28, 29. Vacca testified that after Director May fired him,

"all I could think about was renting a hotel room, going to sleep, never waking up." His termination caused him to suffer severe emotional distress which worsened his physical condition. Tr. 327-29, 468.

DOLIR claims that the second reprehensibility factor is not satisfied because there was no evidence it acted in reckless disregard for the health and safety of anyone other than Vacca. Appellants' Substitute Br. 46. However, proof of harm to someone other than Vacca is not required. *Diaz*, 484 S.W.3d at 90 (stating that the second reprehensibility factor focuses on whether the defendant's "conduct evinced indifference or reckless disregard to [plaintiff's] health and safety"); *Bailey v. Hawthorn Bank*, 382 S.W.3d 84, 103 (Mo.App. W.D.2012) (stating that "a jury can infer the defendant's evil motive when the defendant recklessly disregards the interests and rights of the plaintiff"). There was evidence that DOLIR's conduct posed a risk of harm to others, although DOLIR has omitted it from its brief. The jury heard evidence testimony from several other judges who believed that experienced discrimination and retaliation. Tr. 1082-85, 1153-58. The risk of harm DOLIR's conduct caused to Vacca and others strongly supports the second reprehensibility factor.

DOLIR's retaliatory actions were not isolated. Vacca was subjected to ongoing retaliation for reporting discrimination and retaliation based on his disability. DOLIR criticized him for filing complaints of discrimination and retaliation with the EEOC. Tr. 274-76. DOLIR refused to address accessibility issues raised by Vacca and instead criticized him for his ADA complaint. Tr. 159-60, 274-76; Ex. 13. DOLIR conducted a sham investigation to fabricate evidence casting doubt on the legitimacy of his reasonable

accommodation. Tr. 256-58; Ex. 32, 70. DOLIR orchestrated the "no confidence" vote against him, relying on his disability and his internal and EEOC complaints of discrimination. Ex. 56 at 4-8; Tr. 1177-78. DOLIR moved him out of his office of eighteen years and put him in a small office in the back, isolating him from his colleagues. Tr. 277-79, 1037. DOLIR denied his reasonable accommodation after being in place for nearly 3 years. Tr. 736-37; Ex. 42, 43. Finally, DOLIR fired Vacca for receiving a return to work incentive benefit that his disability insurer determined he was entitled to because he was working. Tr. 322, 325; Ex. LLLL (Resp't App. A34); Ex. 48; Ex. 50 (App. A26).

There was also substantial evidence of Vacca's financial vulnerability. Vacca testified that he and his family were dependent on his earnings as an ALJ. Tr. 189, 244-245, 284.

DOLIR recycles its claim that it did not engage in reprehensible conduct because its actions were "based on a reasonable interpretation of Missouri law." Appellants' Substitute Br. 46. This argument does not pass muster under the standard of review. The reasonableness and good faith of DOLIR's position are credibility issues, which the jury and trial court clearly resolved in Vacca's favor. *Hawthorn Bank & Hawthorn Real Estate, LLC v. F.A.L. Investments, LLC*, 449 S.W.3d 61, 65 (Mo.App. W.D.2014); *Doe Run Res. Corp. v. Certain Underwriters at Lloyd's London*, 400 S.W.3d 463, 471 (Mo.App. E.D.2013). It is evident that neither the jury nor the trial court credited DOLIR's claim it acted in good faith based on the verdict and the denial of remittitur.

DOLIR's professed reliance on Section 287.855 as the basis for firing Vacca actually supports a finding that it engaged in trickery and deceit, another reprehensibility factor. The jury reasonably could have concluded that DOLIR contrived the "reliance on legal advice" defense to provide cover for its preposterous interpretation of Section 287.855.

Similarly, the jury could have found that DOLIR commissioned Dillard's sham investigation to manufacture evidence to support its false claim that Vacca's work accommodations had been granted due to Highway 40 construction, and not his disability. The jury also could have found that DOLIR orchestrated the "no confidence" vote through highly deceptive and improper means when Director May demanded the production of a supplement to Vacca's performance review addressing matters outside the review period, thereby injecting highly inappropriate matters into the review process such as Vacca's medical condition and disability, his application for disability benefits, and his EEOC complaints alleging disability discrimination and retaliation. May's discussion of these topics in the employee review process was completely improper and evidence of retaliation against Vacca. The jury also could have concluded that Director May realized Vacca had a reasonable accommodation based on his disability and lied when he told the Committee that there was no reasonable accommodation and that Vacca was only working two days a week. The evidence clearly supports a finding that DOLIR engaged in an elaborate scheme to oust Vacca in retaliation for his complaints of discrimination.

2. <u>The Punitive-To-Compensatory-Damages Ratio Is Not Excessive</u>

The United States Supreme Court has "decline[d] … to impose a bright-line ratio which a punitive damage award cannot exceed." *Campbell*, 538 U.S. at 425. "[T]he Supreme Court has repeatedly intimated that a four-to-one ratio is likely to survive any due process challenges given the historic use of double, treble, and quadruple damages as a punitive remedy." *Trickey v. Kaman Indus. Techs. Corp.*, 705 F.3d 788, 803 (8th Cir. 2013).

Punitive damages are recognized by this Court as a necessary component of the regulatory scheme to advance societal interests of eliminating discrimination in employment. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 565-566 (Mo. banc 2006). Missouri courts routinely reject due process challenges where the punitive-to-compensatory ratio is far greater than 1:1. *See, e.g., Diaz,* 484 S.W.3d at 91(15:1 ratio); *Ellison*, 463 S.W.3d at 441 (10:1 ratio). There is no question that a 1:1 punitive-to-compensatory damages ratio comports with due process.

3. DOLIR Has Not Preserved Its Claim That The Punitive Damages Award Was Influenced By Improper Testimony

DOLIR claims that the punitive damages award resulted from prejudice and bias caused by Vacca's reference to the Missouri Tort Victim's Compensation Fund. This issue is without merit. First, the argument has been waived because it is not included in the point relied on. "To pursue a claim of evidentiary error on appeal, a party must…present this claim in a proper point relied on in the appellate brief." *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 452 n.4 (Mo. banc 2014); *see Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 860 (Mo. banc 1993) (stating that a challenge to the

admissibility of evidence may not be raised "under the guise of a sufficiency of evidence argument"). Errors "not included in the point relied on…are not reviewable." *Klinkerfuss v. Cronin*, 199 S.W.3d 831, 840 n.2 (Mo.App. E.D.2006); *State ex rel. Cravens v. Nixon*, 234 S.W.3d 442, 448 (Mo.App. W.D.2007).

DOLIR cannot demonstrate prejudice from the admission of Vacca's testimony. The court sustained the nonspecific objection and granted Appellants' request to strike the testimony. Tr. 83-84. Appellants did not request a mistrial or any additional relief. "Where defendant's objection was sustained and no additional relief sought, we assume the corrective action taken by the trial court was adequate." *State v. Nixon*, 858 S.W.2d 782, 788 (Mo.App. E.D.1993). DOLIR cannot now claim the trial court erred because it received the relief requested. *Id.*; *McNear v. Rhoades*, 992 S.W.2d 877, 883 (Mo.App. S.D.1999) ("A party is not entitled, in such a situation, to gamble on the verdict of the jury, and if he loses then assert in a motion for new trial or on appeal that prejudicial error resulted from the incident.").

Alleged errors that are non-meritorious "cannot serve as a predicate for a finding of excessiveness of the verdict." *Giddens v. Kansas City Ry. Co.*, 29 S.W.3d 813, 822 (Mo. banc 2000). DOLIR has failed to assert trial court error that incited the bias and prejudice of the jury and resulted in a grossly excessive verdict. In this case, the reference was innocently made on the first day of trial and was not mentioned again during the course of the two-week trial. Under these circumstances, there is no showing of "manifest injustice" warranting a reduction of the punitive damage award. *Henderson v. Fields*, 68 S.W.3d 455, 470 (Mo.App. W.D.2001).

The trial court properly denied DOLIR's motion for remittitur. This point should be denied.

VI. THE TRIAL COURT DID NOT ERR IN AWARDING POST-JUDGMENT INTEREST IN ITS MARCH 11, 2016 JUDGMENT BECAUSE THE PURPORTED JUDGMENT DATED NOVEMBER 2, 2015 IS NOT A "JUDGMENT" UNDER RULE 74.01 (B); ALTERNATIVELY, THE COURT DID NOT ERR IN AWARDING POST-JUDGMENT INTEREST IN ITS AMENDED JUDGMENT DATED APRIL 29, 2016 BECAUSE SECTION 408.040 AUTHORIZES POST-JUDGMENT INTEREST AWARDS ON ALL MONEY DUE UPON ANY JUDGMENT.

A. STANDARD OF REVIEW

Where "the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed de novo." *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 476 (Mo. banc 2009). A trial court's authority to enter an amended judgment presents a question of law that is reviewed de novo. *State ex rel. Mo. Parks Ass'n v. Mo. Dep't of Natural Res.*, 316 S.W.3d 375, 382 (Mo.App. W.D.2010).

The purported judgment dated November 2, 2015 did not include an award of post-judgment interest. LF 596-99 (App. A1-4).[26] Appellants maintain that this is the final judgment and, therefore, the trial court had no jurisdiction to enter the judgment

[26] On November 3, 2015, the trial court entered a nunc pro tunc judgment to correctly reflect the amount of the compensatory damages awarded by the jury. LF 598-599 (App. A3-4).

dated March 11, 2016, which included an award of post-judgment interest.[27] The issue presented is whether the purported judgment dated November 2, 2015 is a judgment within the meaning of Rule 74.01. Where, as here, the case involves multiple parties and issues, the judgment must adjudicate all issues and the rights and liabilities of all parties. Rule 74.01(b). Because the purported judgment does not satisfy these requirements, the trial court retained jurisdiction to award post-judgment interest in its judgment entered on March 11, 2016.

B. PROCEDURAL BACKGROUND

Vacca's second amended petition asserted claims for disability discrimination (Count 1), retaliation (Count 2), and hostile work environment (Count 3) against three defendants: DOLIR, Brian May, and Karla Boresi. LF 311. The only claim submitted was the retaliation claim against DOLIR and May. Tr. 1295-96. The jury returned a verdict in favor of Vacca and against DOLIR and May. LF 518. The verdict reads: "On the claim of plaintiff Matthew Vacca against Defendants Missouri Division of Workers Compensation, Department of Labor and Industrial Relations, and Brian May the undersigned jurors, find in favor of: Plaintiff Matthew Vacca." LF 518.

1. "Judgment" dated November 2, 2015

On November 2, 2015, the trial court entered a purported judgment that stated in pertinent part:

[27] This point relied on is limited to challenging the trial court's subject matter jurisdiction to award post-judgment interest. Appellants' Substitute Br. 47-48, 50.

> The jury returned its verdict in favor of plaintiff Matthew Vacca and against defendant Missouri Department of Labor and Industrial Relations, Division of Worker's Compensation and against defendant Brian May and assessing plaintiff's actual damages as [sic] $4,000,000, and assessing punitive damages against Missouri Department of Labor and Industrial Relations, Division of Worker's Compensation at $2,500,000, and assessing punitive damages against Brian May at $500,000.

LF 598 (App. A3). The purported judgment did not state the disposition of each of Vacca's three claims or the claims against Boresi. LF 598-99 (App. A3-4). It did not mention Defendant Boresi at all. LF 598-99 (App. A3-4).

2. Judgment dated March 11, 2016

On March 1, 2016, the trial court entered an order declaring that "the 'judgment' entered November 2, 2015 is not a judgment." LF 769-772 (App. A5-9). The court concluded that the purported judgment did not comply with Rule 74.01 because it failed to dispose of the claims against Boresi. *Id.* The court observed that requiring judgments to fully adjudicate all parties and claims serves the salutary purpose of "provid[ing] for a clearly understood disposition of each party" without having to "resort to a transcript that might be unavailable to determine what had happened to a party not explicitly dismissed." LF 772 (App. A9).

On March 11, 2016, the court entered a judgment disposing of all claims and parties. LF 788-89 (App. A10-11). The judgment stated in part:

> Plaintiff Matthew Vacca elected to abandon his claims against defendant Karla Boresi and to submit to the jury only his Missouri Human Rights Act retaliation claim against defendants Missouri Department of Labor and Industrial Relations Division of Workers' Compensation and Brian May.
>
> * * *
>
> The claims of plaintiff MATTHEW VACCA against defendant KARLA BORESI, having been voluntarily abandoned by plaintiff, are dismissed with prejudice for failure to prosecute.

LF 788-89 (App. A10-11). The March 11, 2016 judgment allowed post-judgment interest on the awards of compensatory damages, punitive damages, and attorney fees at the interest rate of 5.36%. LF 789 (App. A11).

Thereafter, on March 28, 2016, the trial court granted Appellants' Motion for New Trial on Damages or in the Alternative for a Remittitur as to the punitive damages award against May, but otherwise denied Appellants' post-trial motion. LF 741-744, 892 (Resp't App. A1-6). The order granted Vacca the option of accepting remittitur or a new trial on the issue of punitive damages against May. LF 892-893 (Resp't App. A6-7). Vacca elected remittitur. LF 905.

3. Amended Judgment dated April 29, 2016

The court entered an amended judgment on April 29, 2016 reciting the reduced punitive damages award against May and allowing post-judgment interest on that award at a rate of 5.36%. LF 905-07 (App. A12-14). Like the March 11 judgment, the amended

judgment awarded post-judgment interest on the compensatory damages, punitive damages, and attorney fees award. LF 788-89, 905-07 (App. A10-14).

C. THE PURPORTED JUDGMENT IS NOT A JUDGMENT UNDER RULE 74.01

The trial court correctly recognized that its November 2, 2015 ruling was not a judgment. An order or decision of the trial court qualifies as a judgment only if it satisfies the requirements of Rule 74.01. *State ex rel. Koster v. ConocoPhillips Co*., 493 S.W.3d 397, 401 (Mo. banc 2016). In cases involving multiple claims or multiple parties, Rule 74.01(b) provides:

> [A]ny order or other form of decision, however designated, 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, and the order or other form of decision is subject to revision at any time before the entry of judgment *adjudicating all the claims and the rights and liabilities of all the parties*.

Rule 74.01(b) (emphasis added) (Resp't App. A27).

Under the plain language of Rule 74.01(b),**Error! Bookmark not defined.** a judgment must "adjudicate" all claims and the rights and liabilities of all parties. The rule's use of the term "adjudicate" is significant. "The verb 'adjudicate' means 'to settle finally (the rights and duties of the parties to a court case) on the merits of issues raised: enter on the records of a court (a final judgment, order, or decree of sentence)." *In the*

Interest of T.A.S., 62 S.W.3d 650, 658 (Mo.App. W.D.2001) (quoting *Webster's Third New Int'l Dictionary* 27 (1971)).

The discussion of the claims and parties in the purported judgment is limited to reciting that the jury returned a verdict in favor of Vacca and against DOLIR and May on an unspecified claim. LF 598. The purported judgment does not adjudicate all of Vacca's claims and does not mention Defendant Boresi. The March 11, 2016 judgment, on the other hand, satisfies Rule 74.01(b) by stating the disposition of all claims and dismissing with prejudice all claims against Boresi. LF 788-89 (App. A11-12).

Appellants maintain that the purported judgment satisfied Rule 74.01 because it "disposed on all parties and claims that were submitted to the jury." Appellants' Substitute Br. 50. Appellant's position cannot be squared with the plain language of Rule 74.01 which provides no exception for abandoned claims. The rule's command is clear and unmistakable: A judgment must adjudicate the entire case.

The cases Appellants cite are distinguishable because they did not consider whether the underlying judgment complied with Rule 74.01(b). Most of the proffered cases rely on *Young by and through Young v. Davis*, 726 S.W.2d 836 (Mo.App. S.D.1987). The case concerned a judicially-created exception to the rule that a judgment is not final and appealable unless it disposes of all parties and all issues in the case. *Id*. at 837-38. Under this exception, a party is deemed to have abandoned "theories of liability or defense pleaded and proved but not submitted." *Id*. at 838. Relying on that exception, *Young* held that the third-party plaintiff and third-party defendant abandoned their claims

by failing to submit them to the jury and that "[t]here was a final judgment as to all issues remaining in the case." *Id*.

Young is inapposite because it predates Rule 74.01(b). Subpart (b) was added to Rule 74.01 in 1988, a year after *Young* was decided. This amendment to Rule 74.01 abrogated *Young's* implied finality exception. As several cases cited by Appellants demonstrate, courts have improperly relied on *Young* instead of Rule 74.01(b) in determining whether a judgment was final. Because these cases did not consider the current Rule 74.01(b), they are not controlling. *See Murray v. Ray*, 862 S.W.2d 931, 932 (Mo.App. S.D.1993) (relying on *Young*); *Unnerstall Contracting Co. v. City of Salem*, 962 S.W.2d 1, 6 (Mo.App. S.D.1997) (relying on *Young* and *Murray*); *Killion v. Bank Midwest, N.A.*, 987 S.W.2d 801, 808 (Mo.App. W.D.1998) (relying on *Murray*); *Heckadon v. CFS Enter., Inc.*, 400 S.W.3d 372, 377 (Mo.App. W.D.2013) (relying on *Young, Murray, and Unnerstall*); *Steelhead Townhomes, L.L.C. v. Clearwater 2008 Note Program, LLC,* 504 S.W.3d 804, 806 (Mo.App. W.D.2016) (relying on *Murray* and *Unnerstall*).

Appellants contend that Boresi and the unsubmitted claims were effectively dismissed based on the court informing the jury that "Judge Boresi is no longer a party to this lawsuit." Tr. 1240; *see* Appellants' Substitute Br. 48. Appellants' argument ignores that a written order was required for Vacca to dismiss claims or parties during trial. Rule 67.02(b) provides that once the jury has been sworn for voir dire examination, "an action shall not be dismissed at the plaintiff's instance except upon order of the court upon such

terms and conditions as the court deems proper." Rule 67.02(b) (Resp't App. A23).[28] Like all orders, an order dismissing a party or claim must be in writing. Rule 74.02 (Resp't App. A28); *Sangamon Assocs., Ltd. v. Carpenter 1985 Family P'ship, Ltd.*, 112 S.W.3d 112, 117 (Mo.App. W.D.2003). The trial court did not enter an order dismissing Boresi or Vacca's discrimination and hostile work environment claims. Contrary to Appellants' argument, the remarks of the trial court and counsel for Appellants and Vacca do not satisfy the requirement that dismissal orders must be in writing. *Bonadonna v. Bonadonna*, 322 S.W.2d 925, 927 (Mo. 1959) (stating that oral comments "cannot be used as a substitute for" a record entry).

The identical issue was addressed in *Sangamon*. In that case the trial court and counsel for the parties agreed to dismiss Count II of the counterclaim, but no dismissal order was entered. *Sangamon*, 112 S.W.3d at 115-117. In considering its jurisdiction *sua sponte*, the Court of Appeals described the issue as "whether a trial judge's statement on the record indicating that a claim had been dismissed, after evidence had already been presented on other claims, is sufficient for the purpose of finality." *Id*. at 116-117. The Court concluded that the absence of a written order dismissing the counterclaim precluded entry of a final judgment:

[28] Rule 67.02 applies to the dismissal of less than all of the claims asserted in a multi-count petition. *Richter v. Union Pac. R. Co.*, 265 S.W.3d 294, 297-299 (Mo.App. E.D.2008).

> While all parties and the trial court may have agreed that Count II was to be dismissed and acted accordingly, there was no valid dismissal of that count in this case. Appellants have provided no basis upon which to support their assertion that an oral dismissal satisfies the requirements of Rule 67.02(b). This case … concerns whether an oral order satisfies the rules. As noted above, Rule 74.02 requires that orders be in writing. Without such a writing, there is no valid order. Since there was no valid dismissal of Count II, there are matters left to be resolved...

Id. at 117.

The same conclusion was reached in *Coleman v. Meritt*, 324 S.W.3d 456 (Mo.App. W.D.2010). In that case the plaintiff filed a wrongful death action against four defendants. The jury returned a verdict against two defendants. On April 26, 2007, the court entered an order denominated a "judgment" consistent with the verdict and amended the "judgment" four months later. Neither the "judgment" nor the "amended judgment" mentioned the two remaining defendants, John Doe Corporation I and Cape Radiology Group, Inc., or the claims brought against them, and no order indicated that these defendants had been dismissed. *Id*. at 457-458, 460. The Court concluded that the "the April 26, 2007 judgment was not a final judgment because it did not determine the claims against John Doe Corporation I and Cape Radiology Group, Inc." *Id.* at 460. It explained:

> Here, the record reflects that the claims against two of the defendants named in the suit, John Doe Corporation I and Cape Radiology Group, Inc.,

> had not been adjudicated and were still pending on April 26, 2007, the date the trial court held that post-judgment interest began to accrue…. As of that date, according to the trial court's record, Coleman's claims against these two parties were still pending because no written dismissal had been filed with the trial court nor had the trial court previously made any docket entry, order, or other type of notation reflecting their dismissal.... Thus, because the "judgment" on April 26, 2007, left unresolved the claims against John Doe Corporation I and Cape Radiology Group, Inc., it lacked the necessary finality to begin accruing post-judgment interest.

Id. at 460*; see also K.J.J. Ltd. v. Reinert & Duree, P.C.*, 260 S.W.3d 428 (Mo.App. E.D.2008).

Because neither the purported judgment nor a prior order disposed of defendant Boresi and the discrimination and hostile work environment claims, the purported judgment is not a judgment under Rule 74.01(b). Accordingly, the trial court had jurisdiction to award post-judgment interest in its March 11, 2016 judgment.

D. ALTERNATIVELY, THE TRIAL COURT WAS AUTHORIZED TO AWARD POST-JUDGMENT INTEREST IN ITS AMENDED JUDGMENT DATED APRIL 29, 2016

Assuming *arguendo* that the November 2, 2015 judgment qualifies as a judgment under Rule 74.01(b), it is not the final judgment. The final judgment is the amended judgment entered on April 29, 2016, incorporating the remittitur of the punitive damages

award against May. *Kiesel Co. v. J & B Properties, Inc*., 241 S.W.3d 868, 873 (Mo.App. E.D.2008).

The November 2, 2015 judgment could not be the final judgment because the court granted May's post-trial motion for remittitur which had the effect of reopening the amount of the punitive damages award against May for future determination. *Clark v. Ameristar Casino St. Charles, Inc.*, 133 S.W.3d 559, 560 (Mo.App. E.D.2004). Under Rule 78.10(b) Vacca elected to accept remittitur instead of a new trial on punitive damages. To finally dispose of the case, the trial court had to enter an amended judgment adjudicating the punitive damages claim against May. *See Green v. Study*, 250 S.W.3d 799, 802 (Mo.App. S.D.2008) ("Damages are an essential element of a claim and must be resolved for a judgment to be final and appealable.") (quoting *Gordon v. Babcock*, 149 S.W.3d 546, 547 (Mo.App. E.D.2004)).

Where, as here, the plaintiff accepts remittitur, the court was required to "promptly amend the judgment." Rule 78.10(b) (Resp't App. A32). The amended judgment replaced the November 2, 2015 judgment, and it is the final judgment in the case. *Lindquist v. Mid-America Orthopaedic Surgery, Inc.*, 325 S.W.3d 461, 464 (Mo.App. E.D.2010) ("If the trial court amends its judgment, the amended judgment becomes the new judgment for all purposes."); *Kiesel*, 241 S.W.3d at 873 (holding that an amended judgment entered after the plaintiff accepted remittitur "superseded" the initial judgment and the "initial judgment … no longer exist[ed]"); *see also Brand v. Kansas City Gastroenterology & Hepatology, LLC*, 414 S.W.3d 546, 550 (Mo.App. W.D.2013).

The trial court had subject matter jurisdiction to award post-judgment interest. Section 408.040.3 provides that "interest shall be allowed on all money due upon ***any judgment***." § 408.040.3 RSMo 2015 Supp. (emphasis added) (Resp't App. A19).[29] In awarding post-judgment interest in the amended judgment, the trial court was complying with the statute's directive. The judgment should be affirmed because the trial court had subject matter jurisdiction to enter the amended judgment and Appellants have not challenged the court's authority under Section 408.040.3 to award post-judgment interest in a judgment amended pursuant to Rule 78.10.

[29] Section 408.040**Error! Bookmark not defined.** was amended on July 8, 2014 and the amendments became effective on January 15, 2015. *See* 2014 Mo. Laws S.B. 621.

CROSS-APPELLANT'S POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT MAY'S MOTION FOR NEW TRIAL ON DAMAGES OR IN THE ALTERNATIVE REMITTITUR AND IN ENTERING AN AMENDED JUDGMENT REDUCING THE PUNITIVE DAMAGES AWARDED AGAINST MAY BECAUSE IT LACKED AUTHORITY TO GRANT STATUTORY REMITTITUR PURSUANT TO SECTION 510.263.6, IN THAT: (1) MAY DID NOT REQUEST STATUTORY REMITTITUR IN HIS POST-TRIAL MOTION; AND (2) THE AMENDED JUDGMENT WAS NOT ENTERED DURING THE THIRTY-DAY PERIOD IN WHICH THE COURT RETAINED CONTROL OVER THE JUDGMENT UNDER RULE 75.01.

McGraw v. Andes, 978 S.W.2d. 794, 801 (Mo.App. W.D.1998).

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT MAY'S MOTION FOR NEW TRIAL ON DAMAGES OR IN THE ALTERNATIVE REMITTITUR BECAUSE IT MISAPPLIED SECTION 510.263 RSMO AND CASE LAW CONSTRUING THAT STATUTE BY RELYING EXCLUSIVELY ON THE ABSENCE OF EVIDENCE OF MAY'S WEALTH AND ITS CONSEQUENT PRESUMPTION THAT MAY IS "NOT A RICH MAN," IN THAT: (1) SECTION 510.263 AUTHORIZES REMITTITUR OF PUNITIVE DAMAGES AWARDS BASED ON THE ASSESSMENT OF THE "TOTALITY OF THE CIRCUMSTANCES"; (2) EVIDENCE OF THE DEFENDANT'S FINANCIAL CONDITION IS NOT A PREREQUISITE TO AWARDING PUNITIVE DAMAGES; (3) EVEN WHEN EVIDENCE OF THE DEFENDANT'S FINANCIAL CONDITION IS INTRODUCED, THE JURY IS REQUIRED TO CONSIDER OR BELIEVE IT; AND (4) THE COURT FAILED TO CONSIDER ALL FACTORS RELEVANT TO THE DETERMINATION WHETHER A PUNITIVE DAMAGES AWARD IS EXCESSIVE.

Missouri-Nebraska Express, Inc., 892 S.W.2d 696, 714 (Mo.App. W.D.1994).

CROSS-APPELLANT'S ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT MAY'S MOTION FOR NEW TRIAL ON DAMAGES OR IN THE ALTERNATIVE REMITTITUR AND IN ENTERING AN AMENDED JUDGMENT REDUCING THE PUNITIVE DAMAGES AWARDED AGAINST MAY BECAUSE IT LACKED AUTHORITY TO GRANT STATUTORY REMITTITUR PURSUANT TO SECTION 510.263.6, IN THAT: (1) MAY DID NOT REQUEST STATUTORY REMITTITUR IN HIS POST-TRIAL MOTION; AND (2) THE AMENDED JUDGMENT WAS NOT ENTERED DURING THE THIRTY-DAY PERIOD IN WHICH THE COURT RETAINED CONTROL OVER THE JUDGMENT UNDER RULE 75.01.

A. STANDARD OF REVIEW

Whether the trial court has jurisdiction to amend or modify the judgment presents a question of law that is reviewed *de novo*. *McGuire v. Kenoma, LLC*, 447 S.W.3d 659, 661 (Mo. banc 2014); *In re Marriage of Jeffrey*, 53 S.W.3d 173, 175 (Mo.App. E.D.2001).

B. THE TRIAL COURT LACKED AUTHORITY TO GRANT STATUTORY REMITTITUR

When more than thirty days have passed since the entry of judgment, "the trial court's authority to grant a new trial is limited to grounds raised in timely-filed after-trial motions." *McGraw v. Andes*, 978 S.W.2d. 794, 801 (Mo.App. W.D.1998); *see* Rule 75.01 (Resp't App. A29). "This includes the discretionary ground that the verdict was against

the weight of the evidence." *Id*. Since remittitur did not become an issue until the jury returned its verdict, May was required to state the specific bases for error. *See* Rule 78.07(a) ("Allegations of error based on matters occurring or becoming known after final submission to the court or jury shall be stated specifically.") (Resp't App. A30).

In his post-trial motion, May did not: (1) request statutory remittitur pursuant to Section 510.263.6, (2) contend the punitive damages award was against the weight of the evidence, or (3) claim that the award was excessive due to his financial condition. LF 618-630.[30] Instead, May argued that the award was excessive on due process grounds. LF 628-629. He maintained that the award did not satisfy the guideposts considered in assessing the constitutionality of a punitive damages award and cited *Lewellen v. Franklin*, 441 S.W.3d 136, 146 (Mo. banc 2014), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 419 (2003), which involved due process challenges to punitive damages awards. LF 628-29.

The court granted May's post-trial motion more than thirty days after entering judgment.[31] Because May did not request remittitur of the punitive damages award as

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[30] May did argue that the ***compensatory*** damages award was against the weight of the evidence. LF 621 (stating that "the total compensatory award was grossly excessive, against the weight of the evidence"). By failing to argue that the amount of punitive damages was excessive, May waived that issue. *Cf. Walsh*, 481 S.W.3d at 113.

[31] This is true for both the purported judgment dated November 2, 2015, and the judgment dated March 11, 2016. LF 596, 740, 788, 892.

against the weight of the evidence or "based on the trial judge's assessment of the totality of the surrounding circumstances," the court had no authority under Section 510.263.6 to order statutory remittitur. *McGraw*, 978 S.W.2d at 801 ("The trial court had no jurisdiction to grant a new trial more than thirty days after it entered judgment on the jury's verdict based on the grounds that the verdict in favor of [plaintiff] was against the weight of the evidence because that claim was not presented in [defendant's] motion.") Accordingly, the amended judgment incorporating the order granting remittitur should be vacated and the original judgment should be given full force and effect.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT MAY'S MOTION FOR NEW TRIAL ON DAMAGES OR IN THE ALTERNATIVE REMITTITUR BECAUSE IT MISAPPLIED SECTION 510.263 RSMO AND CASE LAW CONSTRUING THAT STATUTE BY RELYING EXCLUSIVELY ON THE ABSENCE OF EVIDENCE OF MAY'S WEALTH AND ITS CONSEQUENT PRESUMPTION THAT MAY IS "NOT A RICH MAN," IN THAT: (1) SECTION 510.263.6 AUTHORIZES REMITTITUR OF PUNITIVE DAMAGES AWARDS BASED ON THE ASSESSMENT OF THE "TOTALITY OF THE CIRCUMSTANCES"; (2) EVIDENCE OF THE DEFENDANT'S FINANCIAL CONDITION IS NOT A PREREQUISITE TO AWARDING PUNITIVE DAMAGES; (3) EVEN WHEN EVIDENCE OF THE DEFENDANT'S FINANCIAL CONDITION IS INTRODUCED, THE JURY IS REQUIRED TO CONSIDER OR BELIEVE IT; AND (4) THE COURT FAILED TO CONSIDER ALL FACTORS RELEVANT TO THE DETERMINATION WHETHER A PUNITIVE DAMAGES AWARD IS EXCESSIVE.

A. STANDARD OF REVIEW

The trial court's decision to grant or deny remittitur is reviewed for abuse of discretion. *Badahman*, 395 S.W.3d at 39. The trial court abuses its discretion when it misapplies the law. *Elsea v. U.S. Eng'g Co.*, 463 S.W.3d 409, 415 (Mo.App. W.D.2015).

B. PROCEDURAL BACKGROUND

The court remitted the punitive damages award against May from $500,000 to $5,000. The court observed that Missouri jurisprudence has established "an indeterminate multifactor test" to determine the propriety of remittitur. LF 742 (Resp't App. A3). The court noted that one of these factors is the defendant's financial status. *Id*. Because no evidence was presented regarding May's wealth, the court "presumed that he is not a rich man." LF 743 (Resp't App. A4). Absolutely no testimony was presented at trial regarding Mr. May financial status. Relying on this presumption, the court found the award excessive:

> An award of $500,000 is a great deal of money to a person who is not rich, and a much more modest sum will ordinarily suffice to punish and deter such a person. Indeed, an award of that magnitude serves to destroy the wrongdoer, not just punish and deter, and destruction of the wrongdoer is not the goal of an award of punitive damages. Therefore the court finds that the amount of the award is against the greater weight of the evidence.

LF 743 (Resp't App. A4). The court determined that $5,000 "is sufficient to punish Mr. May and to deter others from such misconduct." LF 744 (Resp't App. A5).

C. MAY WAIVED CONSIDERATION OF HIS FINANCIAL STATUS TO MITIGATE AGAINST A PUNITIVE DAMAGES AWARD

Whether an award of punitive damages is excessive "is to be decided on a case by case basis, but there is a general standard by which the court must abide." *Moore v. Missouri-Nebraska Express, Inc*., 892 S.W.2d 696, 714 (Mo.App. W.D.1994). An award

of punitive damages should not be reduced unless it "is so disproportionate to the factors relevant to the size of the award that it reveals improper motives or a clear absence of the honest exercise of judgment." *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996) (internal quotation marks omitted). Missouri courts should consider a "nonexclusive list of factors" to determine whether a punitive damages award is excessive. *Id*. These factors include: (1) the degree of malice or outrageousness of the defendant's conduct; (2) aggravating and mitigating circumstances; (3) the defendant's financial status, as an indication of the amount of damages necessary to punish the defendant; (4) the character of both parties; (5) the injury suffered; (6) the defendant's standing or intelligence; (7) the age of the injured party; and (8) the relationship between the two parties. *Id*.; *see also Moore*, 892 S.W.2d at 714.

The court abused its discretion in reducing the punitive damages awarded against May. First, the decision was improper because May never argued that the award should be remitted due to his lack of wealth. No evidence of May's wealth (or lack of wealth) was presented. The court's presumption that May was "not a rich man" was based on nothing but speculation. Lack of wealth is a mitigating circumstance that jurors may consider in assessing punitive damages. *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 468 (Mo. banc 1995). It was May's obligation, however, to introduce such evidence if he wished to argue that his limited financial resources should be considered to mitigate against an award of punitive damages. *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 669 (Mo.App. W.D.1997), *overruled on other*

grounds by Badahman, 395 S.W.3d at 40. By failing to offer such evidence, May waived consideration of his financial condition as a mitigating factor. *Id.*[32]

Assuming *arguendo* that such a presumption can be indulged without evidentiary support, the trial court erred in focusing exclusively on May's financial condition to override the jury's decision that $500,000 was necessary to punish May and to deter others from retaliating based on disability. Missouri law is clear that Vacca was not required to prove May's financial condition. *Moore*, 892 S.W.2d at 714 (stating that "there is no requirement that net worth be shown"). And even if May had offered evidence of his financial condition, the jury would not have been required to believe it or consider it in assessing punitive damages. *Id*. ("Net worth is a discretionary factor which the jury may or may not choose to consider."); *Georgescu v. K Mart Corp*., 813 S.W.2d 298, 299 (Mo. banc 1991) ("The jury is the sole judge of the credibility of the witnesses

[32] In *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565 (8th Cir. 1998), the court rejected the defendant's argument that the trial court's post-verdict review must consider evidence of a defendant's net worth. *Id*. at 570; *Mullen v. Dayringer*, 705 S.W.2d 531, 536 (Mo.App. W.D.1985); *see also Kemezy v. Peters*, 79 F.3d 33, 34-36 (7th Cir. 1996) (holding it is the defendant's burden to introduce evidence of net worth and argue to the jury that he "cannot pay a large award of punitive damages"); *Smith v. Lightning Bolt Prods., Inc*., 861 F.2d 363, 373 (2d Cir. 1988) (same). It certainly was not within the discretion of the trial court to do this without actual evidence.

and the weight and value of their testimony and may believe or disbelieve any portion of that testimony.").

The court erred in relying on its belief that May was "not a rich man" as a means to substitute its judgment for the jury's. In determining whether a punitive damages award is excess, courts are required to weigh multiple factors. The failure to consider all relevant factors is an abuse of discretion. *See Buschardt v. Jones*, 998 S.W.2d 791, 800-801 (Mo.App. W.D.1998) (finding that the "decision on visitation is to be an exercise of the judge's discretion after properly weighing all the relevant facts, not a decision based on a predetermined policy"). The *Moore* court, in affirming the remittitur of a punitive damages award, noted that the "the trial judge conducted a post-verdict analysis pursuant to the factors listed in *Maugh*, 818 S.W.2d at 662" and "then put the punitive damage award through a 'totality of the circumstances' test as requested by [defendant] pursuant to §510.263.6 RSMo." *Moore*, 892 S.W.2d at 714-715. The court's exclusive reliance on the net worth factor cannot be squared with the rigorous post-verdict analysis required by Missouri law. The trial court erred by remitting the punitive damages award against Defendant May without considering the "totality of the circumstances" as required by Section 510.263.6. § 510.263.6 RSMo (Resp't App. A21).

CONCLUSION

The judgment should be reversed and remanded with instructions to vacate the grant of remittitur and to reinstate the full amount of punitive damages the jury assessed against Appellant May. In all other respects the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 26,005 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft Word 2016.

/s/ Joseph F. Yeckel

CERTIFICATE OF FILING AND SERVICE

This brief was submitted to the Court's electronic filing system on June 11, 2018, to be served by that system upon all counsel of record. The undersigned counsel is informed and believes that all counsel of record are registered users of the electronic filing system.

/s/ Joseph F. Yeckel