

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

SUBSTITUTE REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

**LAW OFFICE OF JOAN
M. SWARTZ**

Joan M. Swartz
8050 Watson Road,
Suite 355
St. Louis, MO 63119
314-471-2032
314-270-8103 (fax)

**THE McDONOUGH LAW
FIRM, LLC**

W. Christopher McDonough
16640 Chesterfield Grove Rd.
Suite 125
Chesterfield, MO 63005
636-530-1815
636-530-1816 (fax)

**SHAUGHNESSY LAW
FIRM**

Ryan S. Shaughnessy
1140 Boulder Creek Dr.,
Suite 200
O'Fallon, IL 62269
314-971-4381

**LAW OFFICE OF
JOSEPH F. YECKEL**

Joseph F. Yeckel
231 S. Bemiston Ave.
Suite 250
St. Louis, MO 63105
314-727-2430
866-873-5905 (fax)

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CROSS-APPELLANT’S REPLY 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. May did not seek statutory remittitur of the punitive damage award

Brian May’s contention that he requested statutory remittitur is untenable. Nothing in his post-trial motion hinted at such a claim. Instead, he raised a constitutional challenge to the punitive damages award. May argued that the award was “grossly excessive,” LF 628, which is the standard for determining whether a punitive damages award comports with due process. *See Lewellen v. Franklin*, 441 S.W.3d 136, 144 (Mo. 2014) (stating that “due process rights guaranteed by the United States Constitution ‘prohibit[] the imposition of grossly excessive or arbitrary punishments on a tortfeasor’”) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409 (2003)). May maintained that the punitive damages award should be reduced based on the three guideposts the United States Supreme Court identified for “determining if a punitive

damages award comports with due process.” LF 628-29 (quoting *Lewellen*, 441 S.W.3d at 146). May’s reliance on *Lewellen* and *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408, 419 (2003), confirms he was not requesting statutory remittitur because those cases involved only due process challenges. May’s motion did not address the statutory remittitur factors, which includes his financial status. *See, e.g., Call v. Heard*, 925 S.W.2d 840, 849-850 (Mo. banc 1996) (discussing the “variety of factors” Missouri courts may consider in determining the propriety of a punitive damages award).

May’s citation of Section 537.068 in his post-trial motion was insufficient to assert a request for statutory remittitur. Section 537.068 does not set forth “the remittitur standard” for punitive damages as May contends. The plain language of Section 537.068 demonstrates that it is limited to awards of compensatory damages. It authorizes remittitur when “the jury’s verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff’s injuries and damages.” § 537.068 RSMo. This standard clearly has no application to punitive damages awards since punitive damages “are not intended to compensate the injured party, but rather to punish the tortfeasor...and to deter him and others from similar extreme conduct.” *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *see also Call*, 925 S.W.2d at 849 (“The well-established purpose of punitive damages is to inflict punishment and to serve as an example and a deterrent to similar conduct.”). It is axiomatic that “awarding a plaintiff something in excess of just compensation constitutes an act falling outside the purpose of compensatory damages.” *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 386 (Mo. 1986).

The standard for remitting punitive damages awards is set forth in Section 510.263. *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 810 (Mo.App. W.D.2008) (stating that “[w]hen a jury awards punitive damages” the trial court “has the power of remittitur pursuant to section 510.263”). Under that standard, remittitur is appropriate when the trial court deems the punitive damages award excessive “based on [its] assessment of the totality of the surrounding circumstances.” § 510.263.6 RSMo.

B. The trial court granted statutory remittitur

Although the trial court lacked authority to grant statutory remittitur due to May’s failure to request it, there is no question that the court granted that relief. In its order the court observed that remittitur should be granted “if it believes that the amount awarded is against the weight of the evidence, and that it is against the weight of the evidence if the court is persuaded (see [*Badahman v. Catering St. Louis*, 395 S.W.3d 29, 40 (Mo. 2013)]) that the sum awarded exceeds that necessary to punish and deter.” LF 743.¹ Relying on the lack of evidence regarding May’s wealth, the court concluded that the amount awarded as punitive damages was “against the greater weight of the evidence.” LF 743.

The trial court’s recognition of the discretionary nature of remittitur (LF 741-42) and that appellate review would be for abuse of discretion (LF 742) demonstrates that statutory remittitur was granted. Statutory remittitur “is discretionary with the court,” whereas “a court has a mandatory duty to correct an unconstitutionally excessive verdict

¹ *Badahman* addressed statutory remittitur and did not involve a due process challenge to punitive damages. The post-trial order in this case does not mention due process considerations.

so that it conforms to the requirements of the due-process clause.” *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 412 n.71 (Mo.App. E.D.2014); *see also Diaz v. Autozoners, LLC*, 484 S.W.3d 64, 89 n.28 (Mo.App. W.D.2015); *Lynn*, 275 S.W.3d at 311.

Moreover, that Vacca was given the choice of accepting the reduced award or a new trial on punitive damages further demonstrates that the court awarded statutory remittitur. “The plaintiff’s consent to a constitutional reduction of a punitive damages award is ‘irrelevant’ because the court must decide this issue as a matter of law.” *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1050 (8th Cir. 2002) (citing *Johansen*, 170 F.3d at 1331). “A constitutional reduction...is a determination that the law does not permit the award.” *Blanks*, 450 S.W.3d at 412 n.71 (citing *Johansen v. Combustion Eng’g, Inc.*, 170 F.3d 1320, 1331 (11th Cir. 1999)). As the California Supreme Court observed, no purpose would be served by ordering a new trial when a punitive damages award is constitutionally excessive:

Once a maximum constitutional award has been determined, moreover, a new trial on punitive damages would be futile. “Giving a plaintiff the option of a new trial rather than accepting the constitutional maximum for this case would be of no value. If, on a new trial, the plaintiff was awarded punitive damages *less* than the constitutional maximum, he would have lost. If the plaintiff obtained *more* than the constitutional maximum, the award could not be sustained. Thus, a new trial provides only a ‘heads the defendant wins; tails the plaintiff loses’ option.”

Simon v. San Paolo U.S. Holding Co., 35 Cal. 4th 1159, 1188, 113 P.3d 63, 81 (2005) (quoting *Johansen*, 170 F.3d at 1332 n.19)).

Because the trial court lacked authority to grant statutory remittitur, this Court should reverse the remittitur order and reinstate the jury’s award of punitive damages.

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 NOT 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.

May does not dispute Vacca's contention that the trial court's finding that he was a person of modest means is unsupported by the record. Appellants' 2d Br. 50.² May acknowledges the speculation inherent in the court's conclusion that a smaller award would be sufficient to punish and deter him. *Id.* In an effort to avoid the consequences of

² In the court of appeals, May acknowledged that his "financial condition was not a consideration at trial." Appellants' 2d Br. 23 filed in *Vacca v. Mo. Dep't of Labor & Indus. Relations*, Case No. ED104100.

the court's unsubstantiated finding, May seeks to recast the basis for the remittitur ruling. According to May, the decision was not predicated on May's lack of wealth but on the fact that May's conduct was not criminal and resulted in no financial gain. Appellants' 2d Br. 51-52.

May's argument should be rejected. The court could not have been clearer in its order that May's supposed lack of wealth was indispensable to its decision. The court observed that appellate courts "employ an indeterminate multifactor test to determine when a trial court has abused its discretion in denying remittitur." LF 742. It stressed the importance of the defendant's net worth to that determination: "Significantly, one of those factors is 'defendant's financial status, as an indication of the amount of damages necessary to punish the defendant.'" LF 742 (quoting *Ellison v. O'Reilly Auto. Stores, Inc.*, 463 S.W.3d 426, 441 (Mo.App. W.D.2015)). In concluding that the award "exceeds that necessary to punish and deter," the court presumed May "is not a rich man" because "[n]either party presented any evidence of Mr. May's wealth." LF 743. In explaining its rationale for remittitur the court placed great significance on May's presumed lack of wealth. It noted that "[a]n award of \$500,000 is a great deal of money to a person who is not rich" and would "serve[] to destroy the wrongdoer, and not just punish and deter." LF 743. It concluded: "Therefore the court finds that the amount of the award is against the greater weight of the evidence." LF 743.

The court's decision to grant remittitur was not based on the fact that May did not commit a crime or profit from his conduct. The court considered these factors only after it had decided to grant remittitur and turned to the question of "[h]ow much remittitur?" LF

743. In deciding the amount that would punish and deter a person of modest means, the court noted that May's actions were not criminal and yielded no personal gain. LF 743. Had the court not erroneously presumed that May was "not a rich man," it would not have considered these factors.³ May's related argument that remittitur was appropriate because he "did little worthy of punishment or future deterrence" should be rejected. The trial court made no such finding in its post-trial order, and the jury clearly decided that May's conduct was outrageous and warranted a substantial award to punish him and to deter him and others from engaging in similar misconduct.

In granting remittitur, the court deviated from longstanding precedent by requiring Vacca to prove May was wealthy as a prerequisite to recovering a six-figure punitive damages award. By presuming May was not wealthy, the trial court erroneously shifted the burden of proving mitigating circumstances. Missouri jurisprudence is clear that it is the defendant's burden to prove the existence of mitigating circumstances, not the plaintiff's burden to prove their absence. In *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 224 (Mo.App. W.D.1988), the court reversed the remittitur of a punitive damage award where the trial court's ruling was based on the lack of evidence of the defendant's net worth:

There was no evidence of Alcolac net worth before the jury, nor was there any other reliable source for that fact available to the trial court. It is open to

³ Although it was not the basis for the trial court's order, the absence of criminality or financially motivation on the part of the defendant does not justify remittitur. Missouri courts have refused to remit punitive damages awarded against supervisors whose discriminatory and retaliatory conduct was neither criminal nor profitable. *See, e.g., Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 110-111 (Mo.App. E.D.2006) (affirming denial of remittitur of \$200,000 and \$100,000 punitive damages awards against plaintiff's supervisors in age discrimination and retaliation case where \$225,000 was awarded in actual damages).

a trial court to interfere with a punitive damage award where it plainly appears that the verdict was so out of all proper proportions as to reveal improper motives and an absence of honest exercise of judgment by the jury in its rendition. The order of the trial court, however couched, rests on the failure of the jury to exercise an honest judgment on evidence it never heard. The premise of the order—that the punitive damage awards in the aggregate exceed the Alcolac net worth by more than three times and so are confiscatory—is without basis in the evidence or record, and so is erroneous.

Id. at 223-24 (internal citation and quotation marks omitted).

If May believed his financial circumstances mitigated against a large punitive damage award, that evidence was readily available to him and it was his burden to present it at trial. *Elam*, 765 S.W.2d at 223-24; *Smith v. Lightning Bolt Prods.*, 861 F.2d 363, 373 (2d Cir. 1988) (“The incompleteness of the record as to [defendant’s] net worth is not a basis for reducing the punitive damages award against him, for it is the defendant’s burden to show that his financial circumstances warrant a limitation of the award.”); *Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978) (“A \$60,000 award may bankrupt one person and be a minor annoyance to another. But the decided cases and sound principle require that a defendant carry the burden of showing his modest means—facts peculiarly within his power—if he wants this considered in mitigation of damages.”).

This Court should reject a rule that presumes defendants are of modest means when they offers no evidence of their financial condition. Endorsing such a presumption would improperly supplant the jury’s function of assessing punitive damages and undermine the important role of punitive damages in punishing and deterring egregious misconduct.

CONCLUSION

For the reasons stated herein and in Respondent/Cross-Appellant's initial brief, 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/Cross-Respondent May. The judgment should be affirmed in all other respects.

Respectfully submitted,

LAW OFFICE OF JOAN M. SWARTZ

By: /s/ Joan M. Swartz
 Joan M. Swartz #37242
 8050 Watson Road, Suite 355
 St. Louis, MO 63119
 Telephone: 314-471-2032
 Facsimile: 314-270-8103
 Email: jms@jmsllc.com

LAW OFFICE OF JOSEPH F. YECKEL, LLC

By: /s/ Joseph F. Yeckel
 Joseph F. Yeckel #45992
 231 S. Bemiston Avenue, Suite 250
 St. Louis, MO 63105
 Telephone: 314-727-2430
 Facsimile: 866-873-5905
 Email: joe@yeckel-law.com

THE McDONOUGH LAW FIRM, LLC

By: /s/ W. Christopher McDonough
 W. Christopher McDonough, #49648
 16640 Chesterfield Grove Road, Suite 125
 Chesterfield, MO 63005
 Telephone: 636-530-1815
 Facsimile: 636-530-1816
 Email: wcm@mcdlawfirm.net

SHAUGHNESSY LAW FIRM

By: /s/ Ryan S. Shaughnessy
Ryan S. Shaughnessy #39922
1140 Boulder Creek Drive, Suite 200
O'Fallon, IL 62269
Telephone: 314-971-4381
Email: shaughnessylawfirm@gmail.com

*Attorneys for Respondent/Cross-Appellant
Matthew D. Vacca*

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 2,321 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 July 30, 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