In the
Missouri Court of Appeals
Western District

KATHLEEN LOUISE HICKS,	)	
	)	
Respondent,	)	**WD87598 consolidated with WD87627**
	)	
V.	)	**OPINION FILED:**
	)	**OCTOBER 28, 2025**
COMMERCIAL METALS	)	
COMPANY, ET AL.,	)	
	)	
Appellants.	)	

Appeal from the Circuit Court of Caldwell County, Missouri
The Honorable Ryan W. Horsman, Judge

Before Division One: Janet Sutton, Presiding Judge, Gary D. Witt, Judge and W. Douglas Thomson, Judge

Commercial Metals Company and CMC Steel Fabricators, collectively referred to as "CMC," appeal the judgment of the Circuit Court of Caldwell, County, Missouri ("trial court"), finding both companies liable for employment retaliation in violation of section 287.780.[1] Hicks also appealed and the appeals were consolidated. Hicks later dismissed her cross appeal, so we only address the issues raised in CMC's appeal. The matter was tried before a jury from May 30 until June 1, 2024.

[1] Revised Statutes of Missouri (2016) (as amended through August 28, 2017) in effect on the date of Hicks's termination.

On appeal, CMC claims that the trial court erred in: 1) denying CMC's motions for directed verdict and judgment notwithstanding the verdict because Hicks failed to present substantial evidence that her workers' compensation claim was the motivating factor in her discharge; 2) sanctioning CMC with an excessive award of attorney's fees; 3) denying CMC's motion for new trial or remittitur because Hicks's termination did not cause her lost wages; and 4) denying CMC's motion for new trial or remittitur because Hicks's non-economic damages were not directly caused by her termination. We affirm the decision of the trial court.

Factual and Procedural Background

The facts, in the light most favorable to the jury's verdict[2], are as follows. Kathleen Hicks began working for CMC as a rebar bender operator on January 17, 2017. She was one of the first five employees hired for the new Polo, Missouri plant. From the time Hicks started the job at CMC, one of the objectives of management was "no recordables and no lost time." Hicks's interpretation of that objective was "you don't want to get hurt, or, if you do, you suck it up and keep going." Her full-time duties included bending, stacking, and bundling fabricated reinforced metal bars, and regularly lifting 50-100 pounds. In 2017, Hicks worked over 528 hours of overtime and did not take a single sick day; she earned $44,000.00.

[2] We review the facts "in the light most favorable to the jury's verdict, giving plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." *Sanders v. Ahmed*, 364 S.W.3d 195, 208 (Mo. banc 2012).

Injury and Treatment

On January 15, 2018, Hicks was struck on the right shoulder and right side of her head and knocked unconscious while operating a new piece of equipment that was being tested at her workstation. When she regained consciousness, her ears were ringing, she had face pain, neck pain, pain along the right side of her body, and she was unable to move her right arm.

The Shop Superintendent[3] did not call an ambulance but put Hicks in the back seat of his truck and drove her to Liberty Hospital's emergency room. There her clothing was removed, she was evaluated, and was ultimately advised to "stay home for a few days." Although Hicks's husband was at the hospital, the male Shop Superintendent stayed in the exam room with Hicks for all of the medical evaluations including when the nurse removed Hicks's clothes to put on the hospital gown, in spite of being asked multiple times to leave the room. After leaving the emergency room, the Shop Superintendent took Hicks to the company clinic to be drug tested.

The next day the Shop Superintendent picked Hicks up from her home and took her back to the company clinic to be evaluated by a company workers' compensation doctor. The company doctor released Hicks to return to work with restrictions on no right arm use, no lifting, pushing, or pulling more than five pounds with her left arm, and restrictions on bright light and noise. The Shop Superintendent then drove Hicks to the Plant, placing her in a darkened room for her eight-hour shift. Although the Area Safety

[3] Pursuant to Missouri Supreme Court Operating Rule 2.02(c)(3), we do not include names of witnesses or other individuals who are not parties.

Manager testified that Hicks was charged with putting together and filing paperwork, Hicks testified that she did nothing but sit in a chair or lie on the floor in the room during her shift. On that same day, CMC notified its workers' compensation insurer of the injury but reflected that Hicks was not losing any time from work.

Hicks was seen again by a doctor on January 22, 2018, who noted her symptoms were overall "a lot worse." Her headache increased to a 9/10, and she became dizzy in the shower and fell. She was found on the floor of the shower by a relative. She also noted increased pain in her right shoulder and the right side of her neck. She had to lie down due to dizziness and the room spinning, and light increased her headache. She was referred to a neurologist.

For the next three weeks, until February 12, 2018, Hicks either sat alone in the darkened room, or she took vacation days, sick days, or previously earned PTO. Other than for breaks, she was not allowed to have access to her cell phone. Hicks testified that this work-around was created so that her time off would not count in the company records as "lost time and a recordable."

On February 8, 2018, a neurologist diagnosed Hicks with post-concussive syndrome. On February 12, 2018, Hicks stayed home. From that date forward her employment was logged as an "accident on the job." "Accident on the job" meant that CMC had to document "lost time and a recordable." According to the Shop Superintendent, once Hicks went on full medical leave, "she [also] went on short-term disability." Hicks, however, has no recollection of applying for or receiving short-term disability, long-term disability, or FMLA leave. CMC's Leave of Absence Coordinator

testified that Hicks never personally applied for any leave or disability other than workers' compensation. Further, there was conflicting testimony about whether a CMC employee *could* receive short-term disability while receiving workers' compensation benefits. Hicks testified that she was told she could not receive both benefits. In fact, although Hicks did not know it, CMC initiated an FMLA and short-term disability claim through Liberty Mutual on Hicks's behalf in March 2018.

Through Zurich North America, Hicks received workers' compensation benefits including neurology, orthopedic, and psychiatric treatment beginning January 15, 2018, until she received a termination letter from CMC on August 31, 2018.[4] Initially, the Shop Superintendent escorted Hicks to all of her doctors' appointments and remained in the room while she was evaluated and treated. In February 2018, Hicks was assigned a Nurse Case Manager by the workers' compensation insurer. Thereafter, the Nurse Case Manager, employed by the workers' compensation carrier, accompanied Hicks to all of her medical appointments and remained in the room during all evaluations and treatments. After each appointment, the Nurse Case Manager summarized the appointment including the patient's subjective complaints, the doctor's recommendations, and the work restrictions. Usually the Nurse Case Manager also met privately with the treating doctor after Hicks's medical appointment. Those summaries were sent by email

[4] It is unclear from the record if Hicks was receiving any benefits under the Workers' Compensation Law (Chapter 287) other than medical benefits. There is no evidence as to any payments for temporary disability under 287.170 or 287.180.

to CMC's workers' compensation insurance company (Zurich North America) and "most of the time" to CMC's Area Safety Coordinator.

According to Hicks, "I would ask [the Nurse Case Manager], at the end of every appointment, is there anything I need to do? Or do I need to send papers anywhere? And she said no, that was her job and she did all that." Hicks testified that she had no reason to suspect that her medical records were not being provided to CMC.

CMC's Area Safety Coordinator testified that he is the person responsible for opening and monitoring workers' compensation claims. In Hicks's case, because it was a more serious injury, the Area Safety Coordinator ultimately requested the Nurse Case Manager. At CMC, the Area Safety Coordinator then communicates *exclusively* with the Nurse Case Manager, not the employee or the medical providers. Further, at CMC, the Area Safety Coordinator handles *only* the workers' compensation "side of the claim." CMC's Human Resources department handles leaves of absence.

CMC's Area Safety Coordinator testified that he received updates on Hicks's treatment from the Nurse Case Manager from February 8, 2018, through July 9, 2018. Although the Nurse Case Manager testified that Hicks continued treatment in July and August, 2018, and the Nurse Case Manager attended those medical appointments, CMC's Area Safety Coordinator testified that he received no further reports from the Nurse Case Manager after July 9, 2018.

After Hicks's July 9, 2018 medical appointment, the Nurse Case Manager noted that the orthopedist thought Hicks would be at maximum medical improvement at her

next appointment scheduled on July 30, 2018. Ultimately, Hicks was released from all work restrictions on September 13, 2018.

CMC had no documentation that the Nurse Case Manager had closed Hicks's case, although the Nurse Case Manager testified that she usually sends an email to the insurance claims adjuster and the employer when she closes a case. Although Hicks was no longer employed at CMC by September of 2018, she testified that had she been offered her job back, she would have tried to do it.

CMC's Employee Handbook was revised in June 2018. CMC could not confirm that Hicks received the new handbook, although Hicks acknowledged that she received the earlier 2014 version. The main difference between the two versions was that the 2014 manual included a "maximum leave policy" while the medical leave policy in the new handbook required the employee and employer to engage in "an interactive process" to determine additional leave.[5]

CMC's Employment Decision

On August 7, 2018, CMC's Human Resources Manager emailed CMC's Area Safety Coordinator and CMC's Central Region Area Safety Manager asking for updates on the status of Hicks's workers' compensation claim and asking the Safety Manager to set up a meeting to discuss whether to extend Hicks's leave or terminate her employment. Because the CMC management personnel were not local, the meeting was held by Skype

[5] Both employee handbooks contained identical language, "An employee who has suffered an on-the-job injury or illness serious enough to require medical treatment by a physician must be released, in writing, by that physician before returning to work."

on August 10, 2018. CMC's Human Resources Manager (in Texas), CMC's Area Safety Coordinator (in Polo, Missouri), CMC's legal counsel (in Texas), CMC's Leave of Absence Supervisor (in Texas), CMC's Shop Superintendent (in Polo, Missouri), and other CMC corporate employees attended. At that meeting, CMC's Area Safety Coordinator told the attendees that Hicks was still "100% restricted." In fact, by that time Hicks had been released from physical restrictions and had limitations only on light and noise.

The meeting attendees agreed to have CMC's Human Resources Manager reach out again to Hicks to try to get updated information on her possible return to work date. On August 17, 2018, CMC's Human Resources Manager testified she sent a letter to Hicks stating that neither CMC nor Liberty Mutual (CMC's Short-Term Disability Administrator) had received any of the required documentation "to continue with the LTD benefit" or any communication of Hicks's "intentions to return to work or the need for additional time off." The letter went on to say that, "in order to consider extending your leave, you must contact us immediately to clarify your intentions to return to work and provide the required medical documentation no later than 8/27/2018." CMC received no response. On August 27, 2018, Hicks was terminated.

Hicks testified she did not receive any communications from CMC before the final termination letter she received on August 31, 2018. Although Hicks lived less than two miles from the Polo Plant, and the Shop Superintendent had picked her up from her home to take her to work following the accident, no one from the company tried to reach her at her home. Further, although Hicks had an email address with CMC, she was not allowed

to access it outside of the facility. CMC has no documentation of any emails sent to Hicks's personal email address and no recordings of any phone calls made to her.

CMC claimed the basis for Hicks's termination was "failure to communicate with us and to provide proof of disability." CMC's Area Human Resources employee testified that Hicks likely would have been terminated regardless of how much she communicated. Despite both CMC's Shop Superintendent and CMC's Safety Manager previously interacting socially with Hicks in her home, CMC admits that no one from the company spoke directly with Hicks once the Nurse Case Manager became involved in Hicks's care in February 2018. Through its Human Resources Manager and Leave of Absence Coordinator, CMC alleges that it attempted to contact Hicks by phone, email, and letter, but CMC could not provide documentation for any of the phone or email communication. Hicks testified she never received any communication until the termination letter.

Subsequent Employment & Emotional Distress

Other than sporadically working at the family's pawn and gun shop, Hicks was unemployed for the remainder of 2018 and 2019. Thereafter, starting in 2020, Hicks had multiple short-term jobs.

Hicks, Hicks's husband, and Hicks's son testified that, after Hicks's termination, Hicks became more reclusive, less social, standoffish, and no longer wanted to be around people. According to Hicks's husband, while Hicks's demeanor changed from the injury itself, "it got worse" after her termination; she was "devastated." Hicks added that, since her termination, she has lost her confidence and become withdrawn. She was and remains mad, upset, and embarrassed by her firing.

Trial and Post-Trial Allegations of Misconduct

After a three-day trial, the jury returned a verdict in favor of Hicks and against CMC. The jury awarded Hicks $90,000 for back pay and $300,000 for non-economic damages. CMC timely moved for judgment notwithstanding the verdict and directed verdict, or, in the alternative, a new trial or, in the alternative, modification of the judgment (remittitur). The trial court overruled all the motions.

Almost two months after the verdict, CMC again moved for a new trial, for the first-time alleging jury misconduct. CMC's trial counsel advised the trial court that he had learned of the alleged misconduct a few days after the conclusion of the trial but failed to explain why these issues were not addressed in the prior motion for new trial. In its new motion, CMC alleged that Hicks's legal counsel's father ("Father"), who attended the final day of trial, had spoken extensively to two of the jurors during trial while they were outside the courthouse. CMC attached sworn affidavits of two of CMC's employees (both of whom had been witnesses in the trial) stating that "the father of Plaintiff's lead attorney was seen approaching jurors outside the courthouse during a recess and speaking for a sustained period of time with at least two members of the jury." The two affidavits were nearly identical and went into great detail regarding the circumstances of the alleged contact between Father and two jurors.

Subsequently, at the request of Hicks's counsel, the Caldwell County Courthouse produced surveillance video of the alleged misconduct. That video evidence was provided to counsel for both parties. The video evidence contradicted the two CMC employee's allegations. Hicks moved for sanctions.

At the hearing on the motion for sanctions, the two CMC employees who previously provided affidavits testified that they "misremembered" *all* of the events sworn to in their affidavits. Importantly, neither witness came forward to acknowledge their "mistaken recollection" until the video surveillance surfaced. The witnesses' affidavits were identical in their descriptions of the events that, in fact, as shown on the surveillance video, never happened. In its order awarding sanctions, the trial court stated,

> After reviewing the video surveillance of the time period at issue and receiving the testimony of [the two witnesses], it is abundantly clear to the Court that the sworn statement of Defendants' employees were complete fabrications meant to mislead this Court and were a fraud upon the Court. Further, the Court finds that prior to filing such a motion questioning the integrity and/or motives of a family member of opposing counsel, and attacking the orderly administration and integrity of the judicial proceedings, counsel for Defendants had a duty to determine what evidence existed of the alleged improper conduct. At a minimum, counsel should have timely contacted [local] authorities . . . prior to filing the motion to obtain the relevant surveillance recordings.

The trial court sanctioned CMC pursuant to its inherent authority after finding that CMC "acted in bad faith" and "committed a fraud on the Court." As sanctions, the trial court awarded sanctions in the amount of $312,450, which equated to the full amount of Hicks's hourly attorney's fees for the trial. This appeal followed.

Analysis

I. Substantial Evidence Demonstrating That Hicks's Workers' Compensation Claim Was the Motivating Factor In Her Termination (Appellants' First Point On Appeal).

As a threshold matter, Hicks argues that CMC has not preserved its claim of error because the motivating-factor argument was not sufficiently raised in CMC's motion for directed verdict and judgment notwithstanding the verdict. Rule 72.01(a) requires that a

motion for directed verdict "state the specific grounds therefor." A defendant waives any argument that it raises for the first time on appeal. *Holmes v. Kansas City Pub. Sch. Dist.,* 571 S.W.3d 602, 612-13 (Mo. App. W.D. 2018). "The standard for compliance with Rule 72.01, however, is not 'demanding.'" *Piers v. Dep't of Corr.,* 688 S.W.3d 65, 71 (Mo. App. W.D. 2024) ("If the directed verdict motion identifies the specific element of a claim that the movant claims fails due to insufficient evidence and that same element is presented as the basis for error on appeal, it may satisfy Rule 72.01."). CMC's motion for directed verdict argued lack of causation. Specifically, CMC argued that Hicks failed to present substantial evidence that her receipt of workers' compensation benefits was the motivating factor in CMC's decision to terminate her employment. CMC's argument was preserved when they renewed their motion at the close of the evidence and again when they filed a motion for judgment notwithstanding the verdict when they argued that Hicks offered no evidence that her receipt of workers' compensation benefits was a motivating factor in her termination. *See, e.g. Sanders v. Ahmed,* 364 S.W.3d 195, 208 (Mo. banc 2012) (defendants' oral motion stating plaintiff failed to make a submissible case on "issues of negligent causation" sufficiently specific to preserve issue of failure of causation). We believe CMC's motions were sufficient to preserve its point of error for our review.

Standard of Review

CMC alleges the trial court erred in overruling CMC's motion for directed verdict and judgment notwithstanding the verdict because Hicks failed to present substantial evidence that her workers' compensation claim was the motivating factor in her

discharge. "The standards of review for a circuit court's overruling of a motion for directed verdict and JNOV are essentially the same." *Brock v. Dunne*, 637 S.W.3d 22, 26 (Mo. banc 2021). "This Court must determine whether the plaintiff presented a submissible case by offering evidence to support every element necessary for liability." *Id.* Submissibility requires each element be supported by "legal and substantial evidence." *Johnson v. Auto Handling Corp.*, 523 S.W.3d 452, 459-60 (Mo. banc 2017). Substantial evidence is competent evidence that has "probative force" from which the fact-finder "can reasonably decide the case." *Brock,* 637 S.W.3d at 26.

"Whether the plaintiff made a submissible case is a question of law that this Court reviews *de novo.*" *Id.* We view the evidence "in the light most favorable to the jury's verdict, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." *Sanders*, 364 S.W.3d at 208. "This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion." *Klotz v. St. Anthony's Med. Ctr.,* 311 S.W.3d 752, 769 (Mo. banc 2010).

Analysis

Section 287.780 prohibits employers from retaliating against an employee who files a workers' compensation claim. To prevail on her workers' compensation retaliation claim, Hicks needed to prove that: 1) she was employed by CMC before the injury; 2) she exercised her rights by filing a claim for workers' compensation; 3) CMC terminated Hicks, and 4) there was a causal relationship between Hicks filing her claim and her termination. Section 287.780; *King v. Missouri Am. Water Co.,* 703 S.W.3d 184,

200 (Mo. App. E.D. 2024). CMC's point of error alleges error only on the fourth element; that Hicks failed to prove a causal relationship between her workers' compensation claim and her termination.

A plaintiff proves a causal relationship by showing that her workers' compensation claim was a "motivating factor" in her discharge. *Id.* A workers' compensation claim is a motivating factor if it "actually played a role in the discharge or discrimination and had a determinative influence on the discharge or discrimination." Section 287.780. Proof of a motivating factor will usually be made by circumstantial evidence because "the employer is not likely to admit that retaliation was his motive." See *Coleman v. Winning*, 967 S.W.2d 644, 648 (Mo. App. E.D. 1998) (addressing a prior version of 287.780, which did not include the "motivating factor" provision). When "the facts are in dispute as to whether the discharge was or was not wrongful, the question is always one for the jury under proper instructions." *Wiedower v. ACF Indus., Inc.*, 715 S.W.2d 303, 307 (Mo. App. E.D. 1986).

CMC posits that it had a legitimate, non-discriminatory reason for terminating Hicks and that Hicks's evidence was insufficient to support the jury's verdict. CMC's evidence focused on Hicks's alleged lack of communication about her health status and timing for returning to work as the basis for her termination. Hicks presented evidence that CMC knew her health status and treatment because the Nurse Case Manager hired by CMC's workers' compensation insurer was documenting every one of Hicks's medical appointments and sending that documentation to CMC's Area Safety Coordinator. Although disputed by CMC, Hicks also testified that she did not receive any

communication from CMC or Liberty Mutual, the disability insurer. The evidence showed that CMC decided to terminate Hicks during the same month her short-term disability ended despite Hicks never applying for or knowing that she was receiving any short-term disability benefits. CMC terminated her while she was off of work recovering from an injury that she received while working for CMC. CMC argued to the jury that they terminated her because she failed to provide medical information regarding her need to be off of work, but the evidence was that the Nurse Case Manager was providing reports to the workers' compensation insurance company and CMC following every medical appointment. Further, CMC's Area Human Resources employee testified that Hicks likely would have been terminated regardless of how much she communicated with CMC.

It is for the jury to believe or reject the evidence that the plaintiff was fired in retaliation for exercising her workers' compensation rights and to "accept or discard as pretext" the evidence that the employer terminated the employee for a legitimate, non-discriminatory reason. *Hopkins v. Tip Top Plumbing & Heating Co.,* 805 S.W.2d 280, 284 (Mo. App. W.D. 1991) (affirming submission of plaintiff's retaliation claim to the jury); *see also Ashby v. Woodridge of Mo., Inc.,* 673 S.W.3d 537, 548 (Mo. App. S.D. 2023) (affirming summary judgment when uncontroverted evidence showed plaintiff was terminated based on a positive drug test and not on her subsequent workers' compensation claim). "Evidence that an employer's explanation for its decision is unworthy of credence is one factor that may well suffice to support liability." *Marcantonio v. Bd. of Curators of Lincoln Univ.,* 702 S.W.3d 153, 176 (Mo. App. W.D.

2024) (reversing trial court's grant of a directed verdict when evidence sufficient for jury to determine retaliation). Reviewing the evidence in the light most favorable to Hicks, there was sufficient evidence to submit Hicks's retaliatory discharge claim to the jury.

Point I is denied.

II. Sanctions Judgment Excessive Because CMC Ordered To Pay All Plaintiff's Attorney's Fees (Appellants' Second Point on Appeal).

Here again, Hicks argues that at least some of the claims of error raised in CMC's second point on appeal were not properly preserved. Specifically, Hicks argues that, to the extent Point II claims error based on a withdrawn post-trial motion, the error is not properly preserved. Hicks also argues that CMC failed to preserve their claim of constitutional error. Hicks acknowledges that the challenge to the amount of the sanction was properly preserved for review, and that is the basis on which we focus our analysis.

Standard of Review

"This Court will not overrule the trial court's decision to impose sanctions unless the decision constitutes an abuse of discretion." *Masters v. Dawson,* 711 S.W.3d 334, 338 (Mo. banc 2025). "A trial court abuses its discretion only when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Holm v. Wells Fargo Home Mortg., Inc.*, 514 S.W.3d 590, 596 (Mo. banc 2017). When reviewing whether the trial court's decision to use its inherent powers to sanction was an abuse of discretion, we view only those facts that were before the trial court when it

ruled, and the evidence will be viewed in a light favorable to the decision of the trial court. *Noble v. L.D. Enter., Inc.*, 687 S.W.3d 11, 14 n.2 (Mo. App. W.D. 2024).

Analysis

"A trial court has the inherent power to enforce compliance with its reasonable orders and may, at its discretion, impose sanctions when they are justified, considering the conduct of the parties and counsel." *Masters,* 711 S.W.3d at 338. Further, attorney's fees may be awarded as sanctions pursuant to the court's inherent authority. *Mitalovich v. Toomey*, 217 S.W.3d 338, 340 (Mo. App. E.D. 2007). These powers do not derive from statutory authority. *McLean v. First Horizon Home Loan, Corp.,* 369 S.W.3d 794, 801 (Mo. App. W.D. 2012) (the existence of statutory sanctioning schemes does not displace the inherent power of the court to impose sanctions for bad faith conduct).

"The purpose of allowing courts to impose sanctions based on their inherent authority is two-fold: one, to allow the court to vindicate judicial authority without resort to the more drastic sanctions like contempt of court; and two, to make a prevailing party whole for expenses caused by his opponent's obstinacy." *Davis v. Wieland,* 557 S.W.3d 340, 349 (Mo. App. W.D. 2018) (citation modified). "A court has the inherent power to sanction bad faith conduct, probably by way of awarding attorney's fees, on analogy to the power to award attorney's fees related to prosecuting a contemnor." *Francis v. Wieland*, 512 S.W.3d 71, 84 (Mo. App. W.D. 2017); *see also Davis*, 557 S.W.3d at 352-53 (the trial court's "inherent power to maintain respect and decorum grants courts the flexibility to equitably tailor punishments that appropriately fit the conduct"). Bad faith "embraces actual intent to mislead or deceive another, or imports a dishonest purpose,

moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud." *Hale v. Cottrell, Inc.*, 456 S.W.3d 481, 488 (Mo. App. W.D. 2014). "Misrepresentation to the court is an affront to the fundamental and indispensable principle that a lawyer must proceed with absolute candor towards the tribunal." *In re Carey*, 89 S.W.3d 477, 498 (Mo. banc 2002).

CMC relies on *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 108 (2017), for the proposition that ordering attorney's fees as a sanction is limited to the fees the innocent party would not have incurred but for the bad faith. But *Goodyear* recognized that "in exceptional cases, the but-for standard even permits a trial court to shift *all of a party's fees, from either the start* or some midpoint of a suit, in one fell swoop." 581 U.S. at 110 (emphasis added). Further, "the trial judge is considered an expert on the necessity, reasonableness, and value of an attorney's services." *Barth v. Barth*, 372 S.W.3d 496, 520 (Mo. App. W.D. 2012).

Here, there is no dispute that CMC attempted to perpetuate a fraud on the trial court when it moved for a new trial based on a false allegation of juror misconduct. CMC's counsel undertook no investigation after two defense witnesses, both long term employees of the company, informed them that Father allegedly had spoken extensively to jurors outside the courthouse during a recess. Instead, in CMC's motion for new trial, filed almost two months after trial concluded, CMC's counsel attached affidavits from the two CMC employees, who had testified in the trial, swearing under oath to witnessing the alleged encounter. One of the CMC witnesses that signed the affidavit was the "supervisor for the leave of absence department" for the company and the other was the

shop superintendent at the Polo facility during the time of Hicks's injury and subsequent termination.

Both affidavits stated that after the conclusion of the evidence at trial, but before the jury began its deliberations, the two CMC witnesses were leaving the courthouse at the same time and while standing and talking on the sidewalk outside of the courthouse, they observed five jurors from this trial, each wearing juror badges with their juror numbers, leave the courthouse and go over to the gazebo in the courthouse lawn. Each affidavit described in detail what Father was wearing and stated that Father approached two of the female jurors and engaged in conversation with the jurors for "at least five minutes." Further, both affidavits described Father and the jurors laughing, smiling, and "carrying on a conversation" and that Father and the jurors acted as though "they had known each other for a long period of time."

The surveillance video clearly showed that the two CMC witnesses did not leave the courthouse together, that they did not stop and talk to each other on the sidewalk, that there were no jurors from the trial near the gazebo, and that Father left the courthouse and walked straight to his vehicle, pausing only for approximately two seconds to speak to a woman who was not a juror in this trial.

Even though they alleged these bad acts occurred before the jury began deliberations, both affidavits inexplicably conclude by stating that the CMC witnesses each determined that they should not speak to trial counsel about what they observed "[i]n order to avoid appearances of impropriety or bias on these proceedings," until after the jury returned a verdict. The Shop Superintendent testified at the sanctions hearing

that on the day the misconduct allegedly occurred he did share his alleged observations with CMC's general counsel who was present for the trial. It is clear that the CMC witnesses waited to raise the allegation until after the jury returned its verdict in Hicks's favor and did so for the sole purpose of fraudulently obtaining a new trial for their employer.

CMC did not properly investigate the truthfulness of the allegations before filing the motion for a new trial based on the affidavits. As this court has previously stated, "groundless and flagrant accusations by disgruntled litigants should be carefully investigated by counsel for the alleged aggrieved party to determine their validity before being asserted." *In re Marriage of Barr*, 579 S.W.2d 833, 837 (Mo. App. W.D. 1979) (citation modified). These types of allegations require an additional responsibility of investigation before they are asserted because they relate directly to the integrity of our legal system. *Id.*

At the hearing on the motion for sanctions, the testimony of both witnesses was that those affidavits were lies. Ultimately, there was no dispute that the witnesses committed perjury when they signed the affidavits, in spite of their testimony at the sanctions hearing that they merely "misremembered" the events of that day. As the trial court noted during the hearing, if the video evidence had not surfaced, he "absolutely" would have granted the motion for new trial because the allegations of juror misconduct were so egregious. The trial court found the affidavits to be "complete fabrications" and were submitted in bad faith with the intent to defraud the court and obtain a new trial.

In Hicks's motion for sanctions, she asked for $100,000 for each false statement in the witness affidavits. Had the trial court adopted Hicks's request, the sanction amount would have been at least $900,000. Instead, the trial court sanctioned CMC in the amount of Hicks's attorney's fees totaling $312,450. In doing so, the trial court clearly denominated its order as sanctions pursuant to the Court's inherent powers because it found that CMC "acted in bad faith" and "committed a fraud on the Court." Under the exceptional circumstances before the trial court, we do not find the trial court's ruling was so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Furthermore, the amount of Hicks's attorney's fees is commensurate with the amount Hicks and her legal team *would* have expended if CWC's attempted fraud on the trial court had been successful and the trial court had ordered the case re-tried. We find no abuse of discretion in the amount of the sanctions imposed.

Point II is denied.

III. Economic Damages (Appellants' Point III) & Non-Economic Damages (Appellants' Point IV).

CMC's third and fourth points on appeal allege that the trial court should have granted CMC's motion for new trial or remittitur because Hicks's termination did not cause her lost wages (Point III) and because Hicks's non-economic damages were not directly caused by her termination (Point IV). Hicks argues that, to the extent CMC is arguing lack of submissibility of economic damages rather than causation, the error is not preserved. Hicks also argues that CMC's Point IV is multifarious. We find both points sufficiently preserved and will address the merits.

Standard of Review

This Court reviews a denial of a motion for new trial and a motion for remittitur for abuse of discretion. *Stewart v. Partamian*, 465 S.W.3d 51, 56 (Mo. banc 2015). 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." *Id.* at 57. "When the trial court approves a jury's verdict, its discretion is practically conclusive." *Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 36 (Mo. App. E.D. 2013). When a trial court overrules a motion for remittitur, this Court must view the evidence and inferences "in the light most favorable" to the trial court's order. *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 39-40 (Mo. banc 2013).

Analysis

If the trial court finds that the jury's verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages, the trial court may enter a remittitur order. Section 537.068. Thus, remittitur is appropriate "when the jury makes an honest mistake in weighing the evidence" and awards disproportionate damages. *McCormack v. Capital Elec. Const. Co., Inc.*, 159 S.W.3d 387, 395 (Mo. App. W.D. 2004). An honest mistake occurs when the verdict is simply disproportionate to the proof of injury and results from an honest mistake by the jury in assessment of the evidence. *Mayes v. UPS, Inc.*, 593 S.W.3d 604, 617 (Mo. App. E.D. 2019).

Back-Pay Award

A plaintiff generally is "entitled to back pay from the date of her discharge until the date of final judgment." *Pollock v. Wetterau Food Dist. Grp.*, 11 S.W.3d 754, 770 (Mo. App. E.D. 1999).

CMC argues that Hicks's damages were excessive because she conceded she was unable to physically perform her work for CMC. Hicks was released from all medical restrictions two weeks after her termination. At trial she testified that she would have tried to do the work if she had been allowed to return to her employment. She acknowledged that, as of September 2018, she continued to experience headaches, ringing in her ears, and light sensitivity. She also acknowledged that she could not do the rebar bender job in 2024, but she testified that, back in September of 2018, she would have tried. The jury had all this information when it reached its verdict. Hicks sought back pay of $121,207.27; the jury awarded her $90,000. We do not find this award to be disproportionate to the evidence of her damages.

CMC next argues that the award should be reduced because Hicks did not mitigate her damages. "A claim that the plaintiff failed to mitigate her damages is an affirmative defense; therefore, the burden of demonstrating that the plaintiff's damages were lessened or might have been lessened falls on the defendant employer." *Kauzlarich v. Atchison, Topeka, and Santa Fe R.R. Co.*, 910 S.W.2d 254, 256 (Mo. banc 1995) (citation modified). "Whether the conduct of a plaintiff constitutes a reasonable effort to mitigate damages is a question of fact for the jury under proper instruction." *Id.* Here, the jury

was instructed to "determine whether plaintiff used reasonable efforts" to mitigate damages. Ultimately, the jury did discount the back-pay award sought by Hicks.

CMC also claims that it was unreasonable for Hicks to leave the jobs she subsequently obtained. It is up to the jury to determine the reasonableness of Hicks's leaving those jobs. *Missouri Farmers Ass'n v. Kempker,* 726 S.W.2d 723, 725-26 (Mo. banc 1987) ("Any questions as to claimant's having taken reasonable steps to mitigate damages are for the jury.").

Point III is denied.

Non-Economic Damages Award

The jury awarded Hicks $300,000 in non-economic damages. To obtain either a new trial or remittitur, CMC must show the verdict is "disproportionate to the evidence" of injury and "results from an honest mistake by the jury in assessing damages." *Stewart,* 465 S.W.3d at 57. In determining the award, the jury is allowed to consider "the nature and extent of injury, diminished earning capacity, economic condition, plaintiff's age, and awards in comparable cases" along with "intangible or non-economic damages relating to past and future pain, suffering, effect on life-style, embarrassment, humiliation, and economic loss." *Id.* at 56-57.

CMC argues that Hicks provided no evidence of emotional damages arising from her termination. According to CMC, all Hicks's emotional distress damages arose from the injury itself. Hicks's husband testified that, after Hicks's termination, Hicks became more reclusive, less social, standoffish, and no longer wanted to be around people. According to Hicks's husband, while Hicks's demeanor changed from the injury, "it got

worse" after her termination; she was "devastated." Hicks added that, since her termination, she has lost her confidence and become withdrawn. She was and remains mad, upset, and embarrassed by her firing. Given the testimony, and given the jury's "virtually unfettered discretion in determining damages" (*Id.*), this portion of the verdict does not appear excessive or disproportionate.

Alternatively, CMC argues that the damages award is excessive compared to similar verdicts. In support of its proposition, CMC cites several pre-2020 unlawful termination cases from other jurisdictions where emotional distress damages awards were reduced.[6] Hicks relies primarily on this Court's 2016 decision affirming a $250,000 non-economic damages award for emotional distress and humiliation. *Soto v. Costco Wholesale Corp.,* 502 S.W.3d 38, 55 (Mo. App. W.D. 2016) (plaintiff and his wife testified that plaintiff suffered a loss of self-esteem and self-worth, was withdrawn, quiet, sad, humiliated, and devastated by his suspension and demotion). As we stated in *Soto*, damages for emotional distress and humiliation may be "established by testimony or inferred from the circumstances." *Id.* at 55. "Intangible damages, such as pain, suffering, embarrassment, emotional distress, and humiliation do not lend themselves to precise calculation." *Id.*

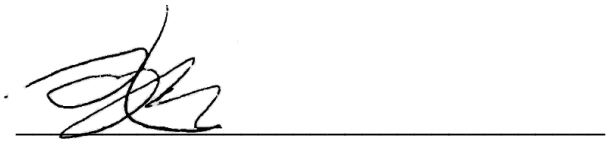
[6] *See, e.g. Shepard v. Wapello Cnty., Iowa,* 303 F. Supp. 2d 1004, 1024 (S.D. Iowa 2003) (holding new trial appropriate based on $250,000 emotional distress verdict); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.,* 130 F.3d 349, 358 (8th Cir. 1997) (reducing compensatory damages from $150,000 to $50,000 because emotional distress evidence was based on "vague and ill-defined" testimony); *Gray v. Tyson Foods, Inc.,* 46 F. Supp. 2d 948, 957 (W.D. Mo. 1999) (reducing award from $185,000 to $50,000 for plaintiff's "sustained emotional injury"); and *Fuler v. Fiber Glass Sys., LP,* 618 F.3d 858, 865 (8th Cir. 2010) (affirming an emotional distress award of $65,000 as "in line with other cases of employment discrimination").

When the evidence is viewed in the light most favorable to the trial court's judgment, we cannot say the jury's verdict was excessive nor that the trial court abused its discretion in denying CMC's motion for remittitur.

Point IV is denied.

Conclusion

We affirm the trial court's judgment.



Gary D. Witt, Judge

All concur