IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

GARY GENTRY,	)	
	)	
Respondent,	)	
	)	
v.	)	WD81069
	)	
ORKIN LLC AND DANNY BIRON,	)	Opinion filed: December 26, 2018
	)	
Appellants.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE JENNIFER M. PHILLIPS, JUDGE

Before Division One: Lisa White Hardwick, Presiding Judge,
Edward R. Ardini, Jr., Judge and Thomas N. Chapman, Judge

Gary Gentry filed a petition in the Circuit Court of Jackson County against Orkin, LLC and its employee Danny Biron alleging retaliation under the Missouri Human Rights Act (MHRA) for failing to interview or rehire him because he had previously filed a complaint with the Missouri Commission on Human Rights (Commission) against Orkin alleging age and disability discrimination. The jury found in favor of Gentry and awarded compensatory and punitive damages. On appeal, Orkin and Biron raise seven claims of error. We affirm.

Factual and Procedural Background[1]

Gentry began working for Orkin at the Independence branch[2] office in 2007 as a pest-control route manager. His job included spraying for pests at customers' homes, making new sales, and collecting overdue funds.

In January 2011, Biron transferred from California to Missouri and became manager of Orkin's Independence branch office. Biron supervised Gentry and the other employees in that office.

Gentry took leave beginning in early February 2012 due to a shoulder injury. In June 2012, one week before he was scheduled to return to work, Biron terminated Gentry for failing to return from a leave of absence, job abandonment, unsatisfactory performance, and misstatements on his application. The termination notice that Orkin provided to Gentry stated that he was eligible for rehire. Biron also provided Gentry with a positive letter of recommendation that stated, "[h]is spirited personality and positive attitude are great attributes that I would love to have on my team."

After he was terminated, Gentry filed a complaint of discrimination with the Commission alleging age[3] and disability discrimination. The Commission issued Gentry a right-to-sue letter, but he did not file a lawsuit.

On July 22, 2013, Gentry sent Biron an email seeking reemployment. Gentry indicated that he would accept any position, including part-time or on-call. Gentry's email stated that he had loved his job and hoped that there would be a position available for him based on the letter of recommendation that Biron had previously provided him. Biron replied, "Thank you for your

[1] The facts are presented in the light most favorable to the jury's verdict. *Holmes v. Kansas City, Mo. Bd. of Police Comm'rs ex rel. Its Members*, 364 S.W.3d 615, 621 (Mo. App. W.D. 2012).

[2] Although located in Lee's Summit, Missouri, this office was commonly referred to as the Independence branch office.

[3] Gentry was 61 years old when he was discharged from Orkin.

interest in employment. I currently do not have any positions open at this time. We will keep your resume on file." After receiving this email from Biron, Gentry believed that Biron would consider him for positions that came available. Gentry based this belief on the "glowing recommendation" that Biron had given.

In October 2013, Orkin had a job opening for a pest technician. The newspaper ad for the position stated, "experience preferred," and asked applicants to fax a resume to apply. Gentry was not contacted about the position. Gentry saw the job posting in the newspaper, but did not apply at that time. Orkin posted another job opening for a pest technician on December 4, 2013.

On December 30, 2013, Gentry faxed his resume to Orkin at the number listed in the newspaper ad. Gentry never heard from Orkin after faxing his resume. Two men were hired in January 2014 for pest technician jobs, and neither of those men had any prior experience in pest control. Gentry felt hurt and betrayed by Orkin and Biron's failure to interview or rehire him.

Gentry then filed another complaint with the Commission. In this complaint, Gentry alleged that Orkin and Biron refused to interview or hire him in retaliation for him previously filing the complaint of discrimination against them.

After receiving notice of the retaliation complaint, Orkin provided the Commission with documentation that contained multiple errors and inconsistencies. For example, the Notice of Termination form for Gentry stated that his termination date was March 24, 2012. Biron claimed that the date listed was a clerical error made by human resources, but the same date was repeated in Orkin's interrogatory responses. There were also inconsistencies contained in the documentation concerning the job openings available at Orkin. Orkin alleged that a March 13, 2013 opening was filled on July 1, 2013 by Michael Baldwin. But other documentation showed that Baldwin was hired on July 17, 2013 and August 1, 2013. The new hire form submitted to the

Commission by Orkin allegedly for Baldwin instead pertained to an individual named Jose Vargas, who was not hired to a pest control position.

There were also discrepancies in the hire date of one of the men hired for the December 2013 opening. Biron testified at trial that the December 4, 2013 opening had been filled on December 4th or 5th, but documentation provided to the Commission showed that one of the men hired had not applied for the position until December 16, 2013. The documentation also showed that reference checks for this applicant were not completed until January 20, 2014, and reference checks were required before an applicant could be hired.

Gentry again received a right-to-sue letter from the Commission. This time, Gentry filed suit against Orkin and Biron alleging retaliation under the MHRA and seeking both compensatory and punitive damages. Following a trial, the jury found in Gentry's favor and awarded him $120,892.00 in compensatory damages. The jury also awarded punitive damages of $10,000,000.00 against Orkin and $5,000.00 against Biron. The trial court entered judgment in favor of Gentry, awarding him a total of $621,873.83[4] in compensatory damages, attorneys' fees, and costs; $3,109,369.15[5] in punitive damages against Orkin; and $5,000.00 in punitive damages against Biron. Orkin and Biron appeal.[6]

[4] This amount included $120,892.00 in compensatory damages, $488.177.00 in attorneys' fees, and $12,804.83 in costs.

[5] The trial court reduced the amount of punitive damages to five times the amount of the net judgment based on "due process concerns, Missouri's statutory cap, Defendant Orkin LLC's conduct, and the totality of the circumstances[.]"

[6] Orkin and Biron are represented by the same counsel and filed one brief. Therefore, we will refer to both Orkin and Biron as Orkin throughout the rest of this opinion.

Compliance with Briefing Requirements

As an initial matter, we address Gentry's Motion to Dismiss and/or Strike Orkin's brief for violations of Rule 84.04.[7] Gentry alleges that Orkin's jurisdictional statement violates Rule 84.04(b) and that its Points Relied On do not comply with Rule 84.04(d) because they are multifarious, they do not state the legal reason for the alleged error, and they do not identify the evidence or testimony that shows the error. We agree that Orkin's brief violates Rule 84.04.

"Compliance with Rule 84.04 briefing requirements is mandatory in order to ensure that appellate courts do not become advocates by speculating on facts and on arguments that have not been made." *Summers v. Mo. Dep't of Corr.*, 459 S.W.3d 922, 923 (Mo. App. W.D. 2015) (citation omitted). "An appellant's failure to substantially comply with Rule 84.04 preserves nothing for our review and is grounds for dismissing the appeal." *Id*. (internal quotations and citations omitted). Despite the deficiencies, we prefer to resolve appeals on the merits. *Guthrie v. Mo. Dep't of Labor & Indus. Relations*, 503 S.W.3d 261, 265 (Mo. App. W.D. 2016). Because we are able to discern the gist of Orkin's allegations of error, we will exercise our discretion and review *ex gratia* the substance of Orkin's claims on appeal.[8] *Hoeper v. Liley*, 527 S.W.3d 151, 161 (Mo. App. W.D. 2017).

Discussion

Orkin raises seven points on appeal. In its first point, Orkin asserts the trial court erred in overruling its objections to Instructions No. 6 and No. 8, the verdict directors, because they failed to require the jury to find that Gentry filed his initial complaint with the Commission based upon a good faith, reasonable belief that Orkin had engaged in prohibited conduct. In its second point,

[7] All rule citations are to the Missouri Supreme Court Rules 2013.

[8] Gentry's Motion to Dismiss and/or Strike is overruled.

Orkin claims the trial court erred by refusing to give a business judgment instruction offered by Orkin. In its third point, Orkin alleges that the trial court erred in overruling various objections during the punitive damages phase of trial. In its fourth point, Orkin alleges that the trial court erred by overruling Orkin's objections to Gentry's argument during closing that the Commission told Gentry to file a complaint. Orkin also argues in this point that the trial court erred in overruling Orkin's motion for new trial because Gentry's counsel had made improper personal attacks against both Orkin's attorneys and Biron during closing argument. In its fifth point, Orkin argues it was entitled to a judgment as a matter of law on Gentry's claims for punitive damages based on pleading deficiencies. In its sixth point, Orkin claims that the trial court erred in overruling its objections to the verdict directors because failure to interview is not an actionable basis for a retaliation claim and there was insufficient evidence to support the jury's verdict for failure to interview. Finally, in its seventh point, Orkin alleges the trial court erred in denying its offer of proof and refusing to give its proffered instruction regarding Gentry's failure to mitigate damages and excluding evidence regarding a legal malpractice settlement Gentry had received.

Points I and VI: Instructional Error

Because Orkin's first and sixth points both allege error with the verdict directing instructions, we will address these points together. "Whether a jury is properly instructed is a matter of law subject to *de novo* review." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 90-91 (Mo. banc 2010) (citation omitted). We review claims of instructional error in the light most favorable to the submission of the challenged instruction. *Kline v. City of Kansas City*, 334 S.W.3d 632, 646 (Mo. App. W.D. 2011) (citation omitted). We will find the submission of an instruction is proper if it is supported by any theory. *Id.* "To reverse a jury verdict, the party claiming instructional error must show that: (1) the instruction as submitted misled, misdirected, or confused

the jury; and (2) prejudice resulted from the instruction." *Dodson v. Ferrara*, 491 S.W.3d 542, 552 (Mo. banc 2016) (citation omitted).

Point I

In Orkin's first point, it argues that the trial court erred by overruling Orkin's objections to Instruction No. 6 and Instruction No. 8, the verdict directing instructions, because they failed to require the jury to find that Gentry had a good faith, reasonable belief that Orkin and Biron had engaged in prohibited conduct when he filed his first complaint with the Commission.

The verdict directors stated as follows:

> Your verdict must be for Plaintiff and against Defendant Orkin, L.L.C.[9] on Plaintiff's claim of unlawful retaliation if you believe:
>
> First, either
>
> Defendant Orkin, L.L.C. did not interview Plaintiff, or
>
> Defendant Orkin, L.L.C. did not hire Plaintiff, and
>
> Second, Plaintiff's July 2012 Charge of Discrimination was a contributing factor in any such conduct in Paragraph First, and
>
> Third, as a direct result of any such conduct, Plaintiff sustained damage.

During the instructions conference, Orkin objected to the verdict directors because they did not include "the good faith reasonable belief language as required under [*McCrainey v. Kansas City Missouri School District*, 337 S.W.3d 746 (Mo. App. W.D. 2011)]." Gentry countered that the "good faith, reasonable belief" language was not necessary in this case because "Gentry's protected activity was under the participation clause of 213.070(2)[.]" The trial court found that the verdict directing instructions offered by Gentry were proper. We find no error.

[9] The only difference between Instruction No. 6 and Instruction No. 8 was the name of the defendant. Instruction No. 8 required the jury to find that Biron committed the retaliation.

The MHRA, under section 213.070(2), RSMo,[10] prohibits retaliation "in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter." The MHRA splits retaliation claims into two distinct categories: (1) retaliation based on an individual's opposition to a practice prohibited by the MHRA, and (2) retaliation based on an individual's participation in proceedings conducted under the MHRA.

The purpose of the MHRA is remedial: "it is designed to be conducive to public welfare and the public good." *State ex rel. Washington Univ. v. Richardson*, 396 S.W.3d 387, 392 (Mo. App. W.D. 2013) (citation omitted). In order to effectuate this purpose, courts interpret the MHRA "liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case." *Id*. at 392-93 (citation omitted). It is based on this approach that the court in *McCrainey* explained that the "prohibited conduct" requirement of the opposition clause was not limited only to conduct determined to be actually prohibited by the MHRA. Instead, "a plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim." *McCrainey*, 337 S.W.3d at 754.

The good faith, reasonable belief standard discussed in *McCrainey* did not erect a new hurdle for employees pursuing a retaliation claim as Orkin seems to argue, but instead interpreted the phrase "prohibited conduct" in a manner that provided protection under the MHRA to employees who oppose conduct by their employer that is later found not to be prohibited under the

[10] All statutory citations are to the Missouri Revised Statutes 2000, updated through the 2013 supplement. The 2017 amendments to the MHRA are not applicable to this case.

MHRA – provided the employee had a "good faith, reasonable belief" that the complained of conduct was actionable under the Act. *Id*. at 753-54 ("If an employee were required to be certain that the conduct was unlawful before making a report, an unsure employee will be less likely to oppose conduct that may in fact be prohibited under the MHRA.").

Here, Gentry's retaliation claim was not based on his opposition to conduct prohibited by the MHRA, so *McCrainey* and its "good faith, reasonable belief" standard do not apply. Instead, Gentry alleged that he was retaliated against by Orkin for filing a complaint with the Commission.[11] The filing of a complaint with the Commission is protected activity on its own under the participation clause of the MHRA.[12] We can find no basis under the language of section 213.070(2) to narrow that protection by grafting into that provision a good faith, reasonable belief requirement for filing a complaint or otherwise participating in an investigation, proceeding or hearing under the MHRA. *Newsome v. Kansas City, Mo. Sch. Dist.*, 520 S.W.3d 769, 781 (Mo. banc 2017) (stating that courts "cannot add statutory language where it does not exist."). Point I denied.

Point VI

In its sixth point, Orkin again claims that the submission of the verdict directors was error.[13] Orkin argues on appeal that the submission of Gentry's verdict directors was error because the failure to interview is not an actionable basis for a retaliation claim and there was insufficient evidence to support a jury verdict based on Orkin's failure to interview Gentry. Orkin objected to

[11] It deserves mention that, when a person files a complaint with the Commission, he or she is required to "swear or affirm that . . . the above charge is true to the best of my knowledge, information and belief."

[12] Gentry argues that Orkin's allegation of error should fail because Orkin stipulated at trial that filing a complaint with the Commission was protected activity. While counsel for Orkin did state "[t]hat the charge, yes, creates the protected activity," given the context in which the statement was made, we decline to view it as a binding stipulation.

[13] Orkin also complains about Instruction Nos. 7, 9, 11, 12, 13, and 14, which refer back to the verdict directors.

the submission of the verdict directors at trial but did not make these specific arguments. During the instructions conference, Orkin objected to Instruction No. 6 by arguing that "we think [it] is improper under 38.01. It is also prejudicial to the jury." Orkin objected to Instruction No. 8 by arguing that "two causes of harm is confusing and prejudicial."

Under Rule 70.03, counsel must "make specific objections to instructions considered erroneous[,] and "[n]o party may assign as error the giving or failure to give instructions unless that party objects thereto on the record during the instructions conference, stating distinctly the matter objected to and the grounds of the objection." The rule also requires that those objections "be raised in the motion for new trial[.]" Vague, general objections preserve nothing for review. *McCrainey*, 337 S.W.3d at 755 (citations omitted).

Because Orkin did not make specific objections on the same grounds at trial that it asserts on appeal, it has failed to preserve its claims. *See Mignone v. Mo. Dep't of Corr.*, 546 S.W.3d 23, 33 (Mo. App. W.D. 2018). When a claim is not preserved for review, appellate courts have discretion to review for plain error. Rule 84.13(c). "To succeed on plain error review, [Orkin] must demonstrate an obvious, evident, and clear error and a resulting manifest injustice or miscarriage of justice from the error." *Harrell v. Cochran*, 233 S.W.3d 254, 259 (Mo. App. W.D. 2007) (citation omitted). While we may review a claim for plain error in our discretion, plain error review is rarely granted in civil cases, and it "may not be invoked to cure the mere failure to make proper and timely objections." *Rouse v. Cuvelier*, 363 S.W.3d 406, 418 (Mo. App. W.D. 2012) (citation omitted). "We will reverse for plain error in civil cases only in those situations when the injustice of the error is so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case." *Id*. (citation omitted).

Even if we were to grant plain error review, Orkin's claim of error would not succeed.

As stated above, the verdict directors, offered by Gentry and submitted to the jury, required the jury to find that Orkin and Biron did not interview or did not hire Gentry, and Gentry suffered damages based on Orkin's failure to interview or failure to hire.

"[R]etaliation exists under section 213.070 when (1) a person files a complaint, testifies, assists or participates in an investigation, proceeding or hearing conducted pursuant to chapter 213 and (2), as a direct result, he or she suffers any damage due to an act of reprisal." *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 624 (Mo. banc 1995).

Orkin first argues that failure to interview is not an actionable claim of retaliation under the MHRA. The only case cited by Orkin to support this argument is *Medley v. Valentine Radford Communications, Inc.* In that case, this Court found that summary judgment was appropriate where the plaintiff failed to submit sufficient evidence to support a causal connection between her employer's failure to rehire her and her complaint of discrimination. 173 S.W.3d 315, 325 (Mo. App. W.D. 2005). Nothing in *Medley* relates to failure to interview, and the facts of that case are unlike those in the instant case. For example, in *Medley*, the plaintiff alleged failure to rehire but had not submitted her resume for consideration. *Id*. Here, Gentry faxed his resume to Orkin in response to an advertisement seeking experienced pest technicians. *Medley* is not on point and we do not find plain error based on this argument.

Orkin next argues that feeling hurt and betrayed is not sufficient evidence for an award of damages for emotional distress. This is incorrect. Under the MHRA, actual damages may be awarded for emotional distress, humiliation, and suffering. *Mignone*, 546 S.W.3d at 36. "Unlike in common-law tort actions, [Missouri law does] 'not limit recovery of damages for emotional distress to those situations in which the distress is medically diagnosable or of sufficient severity to be medically significant,' and such an award may be established by testimony—including the

testimony of the plaintiff—or inferred from the circumstances." *Id.* (quoting *State ex rel. Sir v. Gateway Taxi Mgmt. Co.*, 400 S.W.3d 478, 492-93 (Mo. App. E.D. 2013) (additional citations omitted).

The trial court did not plainly err in submitting verdict directors which listed the failure to interview Gentry as a potential basis for his retaliation claim.

Point VI denied.

Point II: Failure to Submit Business Judgment Instruction

In Orkin's second point, it argues that the trial court erred in refusing to submit its proffered business judgment instruction. During the instruction conference, Orkin offered the following instruction: "You may not return a verdict for Plaintiff just because you might disagree with Defendant's decision or believe it to be harsh or unreasonable." Orkin acknowledged that the offered instruction was not an MAI instruction, but argued that the instruction, a model jury instruction in the Eighth Circuit, should be submitted "in fairness to Orkin." Gentry objected and the trial court refused to submit the instruction to the jury.

When a party claims that the trial court erred in refusing to submit an instruction, "we review the trial court's refusal to submit the instruction for abuse of discretion." *McCullough v. Commerce Bank*, 349 S.W.3d 389, 396 (Mo. App. W.D. 2011) (citations omitted). We will find that the trial court abused its discretion when the ruling was "clearly against the logic of the circumstances then before the court" and was "so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* (citation omitted). Even if we find that the trial court abused its discretion, we will not reverse the verdict unless the error caused prejudice. *Id.* (citations omitted).

The only Missouri case addressing the use of a business judgment instruction is *McBryde v. Ritenour School Dist.*, 207 S.W.3d 162, 170-71 (Mo. App. E.D. 2006). In that case, the defendant offered a business judgment instruction identical to the one Orkin offered in this case. *Id*. at 170. The defendant in *McBryde* argued, like Orkin does here, that Missouri courts should adopt the Eighth Circuit's view that "in employment discrimination cases, a business judgment instruction is crucial to a fair presentation of the case, and the district court must offer it whenever it is proffered by the defendant." *Id*. (citing *Langlie v. Onan Corp.*, 192 F.3d 1137, 1141 (8th Cir. 1999)). The Eastern District of this Court disagreed, stating that "[i]f the Missouri Supreme Court had wished to adopt the language of the Eighth Circuit's model jury instruction regarding the business judgment instruction, it could have done so when it drafted and subsequently adopted MAI jury instructions specifically addressing the MHRA." *Id*. at 171. The court found that it was not error for the trial court to refuse the defendant's business judgment instruction. *Id*.

Orkin argues that *McBryde* was wrongly decided and that it should not be followed. Orkin further argues that the business judgment instruction was required because its theory of the case was that it did not interview or rehire Gentry because the positions he applied for were already filled and based on his previous unsatisfactory performance. Gentry counters that the business judgment instruction was not required because the lawful justification defense instruction,[14] an MAI instruction, was submitted and properly instructed the jury to consider Orkin's non-retaliatory reasons for not interviewing or hiring Gentry.

"[O]n appeal, discretionary rulings are presumed correct, and the appellant bears the burden of showing an abuse of discretion." *Anglim v. Mo. Pac. R. Co.*, 832 S.W.2d 298, 303 (Mo.

[14] Instructions No. 7 and No. 9 stated: "Your verdict must be for Defendant [ ] on Plaintiff's retaliation claim if you believe: First, Defendant [ ] did not interview and did not hire Plaintiff Gentry because Plaintiff Gentry's previous job performance at Orkin, L.L.C. was unacceptable; and Second, in doing so, Plaintiff's July 2012 Charge of Discrimination was not a contributing factor."

banc 1992). "There is no abuse of discretion if reasonable persons could differ about the propriety of the trial court's decision." *Stevens v. Craft*, 956 S.W.2d 351, 355 (Mo. App. S.D. 1997) (citation omitted). The lawful justification instruction accurately instructed the jury that it could not find for Gentry if it believed that Gentry was not interviewed or hired because of his unsatisfactory job performance and if his filing of a complaint with the Commission was not a contributing factor in Orkin's decisions. "Whenever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject." Rule 70.02(b). "To require the giving of a non-MAI, a party must prove that the MAI instructions submitted to the jury misstate the law." *McCullough*, 349 S.W.3d at 397 (citation omitted). The MAI justification instruction did not misstate the law, and the jury was not misled by the absence of an additional instruction informing it that it could not find for Gentry simply because it found Orkin's decision harsh or unreasonable. Further, Orkin could, and did, argue to the jury about the reasons for its decision not to interview or hire Gentry. Therefore, we find no abuse of discretion. Point II denied.

Point III: Error in Overruling Objections during the Punitive Damages Phase

In its Point III, Orkin argues that the trial court erred by overruling its objections to evidence about Orkin taking responsibility for wrongdoing during the punitive damages phase of the trial. Larry Black, a human resources manager for Orkin, was asked whether he, on behalf of Orkin, took responsibility for retaliating against Gentry:

> Q. What I want to ask you is this, sir: Do you admit, on behalf of Orkin, that your company considered Mr. Gentry's July 2012 Charge of Discrimination when it did not interview him? . . .
>
> A. I have no knowledge of that, sir.

> Q. How about with regard to the hiring of positions that were posted in 2013? Would you admit to these individuals, these folks here, that your company took into account Mr. Gentry's complaint with the State of Missouri in July of 2012?
>
> A. No, I can't admit that. I would not say that they took that complaint into any consideration.
>
> Q. All right. So you're unwilling to accept this judgment; is that fair?

At that point, Orkin's counsel objected and argued that the line of questioning was highly prejudicial because, based on the evidence, Black was not a decision maker. The trial court stated that the question had been asked and answered and suggested that Gentry's counsel move on. Gentry's counsel then asked, "I guess what I'm asking is: Do you accept responsibility? Do you accept responsibility for [harming] Mr. Gentry?" Black replied, "I don't believe we've harmed Mr. Gentry." Counsel for Orkin did not object to this question.

In its motion for new trial and on appeal, Orkin argues this questioning violated Orkin's right to a jury trial under Rule 69.01(a).[15] "To preserve evidentiary questions for appeal, there must be an objection giving the grounds at the time the evidence is sought to be introduced, and the same objection must be set out in the motion for new trial then carried forward in the appeal brief." *Day Advert. Inc. v. Devries and Assoc., P.C.*, 217 S.W.3d 362, 366 (Mo. App. W.D. 2007) (citation omitted). If an objection is untimely, it may be considered waived or abandoned. *Pollard v. Whitener*, 965 S.W.2d 281, 290 (Mo. App. W.D. 1998). Orkin's objection was made after Black answered the question and was thus untimely. Orkin then failed to object to a similar question asked of Black only moments later.[16] Therefore, Orkin has not preserved this issue and our review, if at all, is for plain error. *Id.*

[15] Rule 69.01(a) states that "[t]he right of trial by jury as declared by the Constitution or as given by a statute shall be preserved to the parties inviolate."

[16] Biron testified next, and counsel for Gentry asked similar questions:

As stated above, we will not find plain error unless we find "clear error and a resulting manifest injustice or miscarriage of justice from the error." *Harrell*, 233 S.W.3d at 259. Here, based on a review of the record, we do not find manifest injustice. *See Boshears v. Saint-Gobain Calmar, Inc.*, 272 S.W.3d 215, 226 (Mo. App. W.D. 2008) (declining plain error review of questions about whether the defendant had "learned its lesson"). Point III denied.

Point IV: Improper Closing Argument

In its fourth point, Orkin argues that the trial court erred in overruling Orkin's objections to Gentry's closing arguments both during the liability and punitive damages phases of trial.[17]

We review a trial court's ruling on objections made during closing argument for abuse of discretion. *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850, 856 (Mo. App. W.D. 2013) (citation omitted). Counsel is permitted substantial latitude during closing argument. *Id*. "[T]he permissible field of argument is broad, and so long as counsel does not go beyond the evidence and the issues drawn by the instructions, or urge prejudicial matters or a claim or defense which the evidence and issues drawn by the instructions do not justify, he is permitted wide latitude in his comments." *Id*. (quoting *Heshion Motors, Inc. v. W. Int'l Hotels*, 600 S.W.2d 526, 534 (Mo. App. W.D. 1980)).

> Q. Mr. Biron, would you agree that you took into account Mr. Gentry's Charge of Discrimination filed in July of 2012 when you did not offer him a position in 2013?
>
> A. I did not.
>
> Q. So you accept no responsibility?
>
> A. No. It was strictly performance-related.

Counsel for Orkin did not object.

[17] As we noted above, Orkin's brief contains multifarious points. This point is particularly multifarious, claiming that the trial court erred by overruling Orkin's objections and by refusing to give a limiting instruction. Orkin also argues that the trial court erred in overruling its motion for new trial wherein it asserted several unpreserved errors regarding Gentry's closing arguments. We have nevertheless attempted to address all of Orkin's arguments contained within this point.

When counsel fails to object to the opposing party's closing argument, however, any claims of error stemming from that argument are not preserved for appellate review. *Potter v. Kley*, 411 S.W.3d 388, 391 (Mo. App. E.D. 2013) (citation omitted). When claims are not preserved, we may review them, if at all, only for plain error. *Id*. "Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 84.13(c). We will rarely find that plain error has occurred during closing argument. *Morgan Publ'ns, Inc. v. Squire Publishers*, 26 S.W.3d 164, 170 (Mo. App. W.D. 2000) (citation omitted). "Plain error occurs in closing argument only if the 'closing argument contains reckless assertions, unwarranted by proof and intended to arouse prejudice, which, therefore, may be found to have caused a miscarriage of justice.'" *Id*. (quoting *Hensic v. Afshari Enters., Inc.*, 599 S.W.2d 522, 526 (Mo. App. E.D. 1980)).

Attacks on opposing counsel

Orkin complains that Gentry's counsel improperly directed attacks at defense counsel. First, Gentry argued that Orkin gave documents to the Commission that were false. Gentry explained to the jury that Orkin's excuse was that the incorrect information was simply a mistake, but then questioned whether "[a] law firm that has, I don't know, 25 different offices across the country and the world, hundreds if not thousands of lawyers carelessly makes mistakes of that nature."

Orkin objected, arguing that Gentry was attacking their law firm. Gentry's counsel stated that he would move on, and there was no further discussion. Orkin did not request any remedy from the trial court.

We find no error because Orkin did not seek any relief other than what was offered and received. "[F]ailure to make a timely request for further relief when an objection has been sustained may be deemed a waiver or abandonment of further remedial relief." *McMillin v. Union Elec. Co.*, 820 S.W.2d 352, 355 (Mo. App. W.D. 1991).

Next, Orkin complains about Gentry's argument that the case came down to the credibility of one person:

> You know, folks, I took some notes, too. At the beginning of this trial I took some notes from [Orkin's counsel] right there. He said, yeah, what we say, the lawyers, is not evidence. But we're here on behalf of our clients. I'm here for Gary Gentry. I'm speaking for him right now. [Orkin's counsel] just told you what Orkin thinks. How many times is he going to say: What difference does it make? We forged documents; we lied; we bring in here sham evidence, and what difference does it make? I'm sick and tired of hearing that all week long. It makes a difference because this case comes down to the credibility of one person. It's not Gary Gentry.
>
> You'll see no instruction in there that says, you know, what were his motives. It's going to say, what did Orkin do and what did Danny Biron do when it comes to the interview and hiring him. And that issue comes down to the credibility of one person and that's Danny Biron.

Orkin did not object during this argument and we find no error. Gentry's arguments did not attack Orkin's counsel, but instead attacked the credibility of Orkin and Biron. During closing argument, counsel "certainly [has] a right to assail the credibility of witnesses, their conduct upon the stand, and to draw proper illustrations[.]" *Joyce v. Biring*, 43 S.W.2d 845, 848 (Mo. App. E.D. 1931).

Orkin also complains about Gentry's comment about lawyers that were unable to attend the final day of trial:

> Now, this is – if you remember, in the gallery for a couple of days, until today, there were a number of additional lawyers from Rollins[18] and you were introduced to them in voir dire and I think in opening. Orkin lawyers. They didn't hear your verdict; they didn't stay. You need to make your verdict loud enough so that in Georgia they need to hear it. That's how juries make corporations behave responsibly: Punishment. And the lawyers are down there in Georgia, probably a

[18] Rollins is the parent company of Orkin.

> bit warmer but not enough of a good reason not to hear what you had to say. So when you speak through your verdict, you have to speak loudly, clearly, so that they understand, we can't do this.

Again, Orkin did not object to this argument. We find that these comments were neither inappropriate, nor did they result in manifest injustice. *See Mansfield v. Horner*, 443 S.W.3d 627, 659 (Mo. App. W.D. 2014) (finding no manifest injustice from argument that suggested putting the defendants "out of business" because the purpose of punitive damages is "to inflict punishment and to serve as an example and deterrent to similar conduct.").[19]

Arguments not supported by evidence

Orkin next complains about several arguments Gentry made during closing argument that Orkin alleges were not supported by evidence in the record.

First, Gentry argued during closing that Orkin was paying for Biron's attorneys: "And a Defendant like Mr. Biron, who I think you all know Orkin is probably footing the bill. I mean, how can you go to work for a company within a month, set aside a non-compete, get free lawyers --" Orkin objected, arguing that there was no evidence of who was paying for Biron's lawyers and that such argument was extremely prejudicial. The trial court initially agreed to sustain the objection, but then decided to overrule the objection and instructed Gentry's counsel to refrain from making that argument. Gentry agreed to move on.

Gentry again mentioned Biron's legal fees during his closing argument in the punitive damages phase of trial:

> There's absolutely no evidence in this case that any employees of Orkin will be harmed by a punitive damage judgment or that the (sic) Danny Biron himself will be harmed by a punitive damage judgment. None. There's no evidence of that.

[19] During Orkin's closing argument, Orkin's counsel responded by stating that the attorney that was not present for the final day of the trial was unavailable because his son was graduating from boot camp in Georgia.

> In fact, Mr. Biron didn't pay for his lawyers. And if you remember, he testified that he doesn't know whether or not they're going to pay a judgment against him. What do you think, based on your reasonable collective wisdom when you go back in that deliberation room is true? Of course they will pay for a judgment against him. Do you really think they let him out of a non-compete to go work for a competitor without some kind of agreement?

Orkin did not object to this argument.

Neither reference to the source of funding for Biron's attorneys was error. Biron testified, without objection, during trial that he was not paying for his attorneys. Biron also testified, without objection, that Orkin waived his non-compete agreement when he left the company to go work for another pest control company. It was a reasonable inference that Orkin was paying for Biron's defense given that both Orkin and Biron were represented by the same counsel at trial. We find no error, plain or otherwise.

Next, Orkin complains that Gentry improperly argued that the Commission instructed Gentry to file his complaint. During his rebuttal closing argument, Gentry's counsel made the following argument:

> If Exhibit 77[20] was the only reason Gary Gentry didn't get a second chance to come back to work and Danny Biron says, well, it was HR's fault, okay, that's fair. But you heard [Orkin's counsel] say about three times in his closing argument, the decision whether to let Gary come back was his.
>
> And if this was the only reason he didn't get a second chance the first time, why didn't he get a second when he reapplied? It's because Gary went to the State of Missouri; he called the Missouri Commission on Human Rights and told them what happened. They said, file a charge, which gets sent to Mr. Biron. . . .

Orkin did not object to this argument. A short time later, Gentry's counsel made a similar argument:

> I mean, come on. He's in a position, what's he supposed to do? He gets fired from his job that he loves; he loves helping people. You know, he goes in people's houses and it's infested sometimes and he's, you know, nice to them. You know, if I had someone show up to my house – I wouldn't mind Mr. Gentry showing up.

[20] Exhibit 77 was a note from Gentry's doctor.

> Seems like a nice guy, jokes, nice smile. And then he gets attacked for that in this courtroom. Because what's he to do? He called the State. They said, based on what you're telling me, let's file a charge. Circumstances change, he wants to go back. He gave Mr. Biron a second chance. He didn't get his.

After Gentry's counsel finished his argument, Orkin's counsel made an objection and asked for a limiting instruction, which was denied by the trial court:

> [Counsel for Orkin:] Plaintiff's counsel told the jury that the State of Missouri, based on what they heard, told him to file a charge. That is not in evidence anywhere and it's very prejudicial.
>
> [Counsel for Gentry:] No. I asked Mr. Gentry, and that's exactly what he said happened. He called them and told them what happened, they filed the charge, sent it to him and he signed it.
>
> [Trial Court:] So I guess what – what relief are you requesting, a limiting –
>
> [Counsel for Gentry:] A limiting instruction on that.
>
> [Trial Court:] The Court is going to deny that request.

Orkin did not propose a limiting instruction and did not seek any other remedy. Orkin mentioned the trial court's refusal to give the limiting instruction in its motion for new trial, but it did not make an argument on that point. In its brief, Orkin's entire argument is that "it was prejudicial error for the court to fail to give a limiting instruction regarding the argument that the [Commission] had told Plaintiff to file a charge of discrimination."[21]

First, this allegation of error is not preserved because Orkin failed to timely object to the argument. *Peterson*, 399 S.W.3d at 857 ("[W]hen a party fails to object to an allegedly erroneous argument *at the time it is made*, his claim of error is foreclosed from consideration") (emphasis in original).

[21] A limiting instruction is proper "[w]hen a trial court receives evidence admissible for one purpose but not for another" in order to limit "the extent and purpose for which the jury may consider the evidence." *Sapp v. Morrison Bros. Co.*, 295 S.W.3d 470, 483-84 (Mo. App. W.D. 2009) (citation omitted). Orkin has not explained for what purpose the evidence was not admissible or what limiting instruction should have been given.

Next, even if Orkin had made a timely objection, we would not find error here. Gentry testified, without objection, that he told the Commission the circumstances of his discharge and that they told him that, based on the information he had given, if he wanted to complain, he needed to fill out a form. Gentry testified that the Commission filled out the form and he signed it. This evidence was before the jury without objection, and it was not error for counsel to reference it in closing.

Orkin also claims that Gentry argued wrongly that Orkin did not have a discrimination policy:

> Maybe – maybe it will make for the next occasion when somebody complains, there will be training on retaliation. One of the things that we never saw in this case was any evidence that this Fortune 500 company had any policies . . . that prohibited the kind of conduct that you found to be more likely true than not true. None. No evidence was admitted that this company that employs thousands of employees like Gary Gentry are educated as to their rights and that employees like Mr. Biron are educated as to their responsibilities.

Orkin did not object to this argument.

Orkin argues on appeal that there was evidence that Orkin had anti-discrimination policies, so this argument was prejudicial.[22] Again Orkin failed to preserve this claim for review, and, after reviewing the record, we find no manifest injustice that would require a finding of plain error.

Comments on Biron's credibility

Orkin also claims that Gentry's counsel inappropriately argued during closing that Biron was a liar:

> If a person is willing to lie and forge documents when there are no consequences at all – they won't be punished if people don't show up to branch meetings – then will they be willing to lie when he comes into this courtroom, sits in this chair and talks to you, knowing that, if you don't believe him, you're going

[22] Orkin argues that Plaintiff's Exhibit 52, Orkin's position statement to the Commission, includes Orkin's antidiscrimination policies. This exhibit included a document signed by Gentry that referenced Orkin's policies regarding equal opportunity, diversity, and respect. Exhibit 52 did not include Orkin's actual policies and did not reference retaliation.

> to render a judgment against him; he's going to have to pay the piper; he's going to be punished. Of course. He's willing to lie for no apparent reason. We never heard an explanation for that. But he comes into this courtroom when things matter and he's this way, that way, which way, every way.

Orkin did not object to this argument. Gentry again mentioned Biron's credibility a short time later:

> They want to focus on was it open, was it filled, was it not filled, was it filled, who applied, this applied, this date, that date. No, folks. If Gary Gentry sucked that much at his job, why wouldn't they just say it in the first place? It would be a lot easier.
>
> It's because when you are trying to cover your tracks and you're backed into a corner, you start to think, well, okay. You get asked a question. What's the answer, what happened. And you are trying to remember how it happened. But what did I say happened the first time. Okay. Then you say – you get asked again and you're, like, okay. You get asked the question, you're like, okay, did this really happen. The first time I said this, second time I said that, what did I say, did I say the same thing both times. It gets harder to remember if you're lying over and over again.

Orkin did not object to this argument. Because Orkin failed to object to these arguments, neither is preserved. As stated above, counsel has the right to comment on the credibility of witnesses. We find no plain error.

Arguments about accepting responsibility

Finally, Orkin complains that Gentry argued that Orkin would not accept responsibility for retaliating against Gentry. Orkin provides citations to the transcript, but does not specifically state which arguments it alleges were error. Our review of the transcript makes clear that Orkin did not object to any of these arguments at trial, and we decline to review for plain error.

Point IV denied.

Point V: Deficiency of Pleading Seeking Punitive Damages

In its fifth point, Orkin alleges that it was entitled to a judgment as a matter of law on punitive damages because Gentry failed to state in his petition the amount of damages sought, which Orkin asserts is required by section 509.200, RSMo and Rules 55.05 and 55.19.[23]

Gentry's petition stated that "[t]he actions and conduct set forth herein were outrageous and showed an evil motive or reckless indifference or conscious disregard for the rights of Plaintiff and others, and therefore Plaintiff is entitled to punitive damages from Defendants, to punish Defendants and to deter Defendants and others from like conduct." In his prayer, Gentry sought "an award of compensatory and punitive damages[.]" Orkin did not object at any time to Gentry's pleading for punitive damages, including during the punitive damages phase of trial. Orkin argued for the first time in its motion for new trial that Gentry's pleading for punitive damages was deficient.

Gentry argues that Orkin's claim is not preserved for appeal and has been waived. Gentry alternatively argues that Rule 55.19 does not require a specific amount of punitive damages to be pleaded because claims under the MHRA should be treated similar to tort claims. We agree that Orkin's argument has been waived because it failed to raise this objection prior to the jury's verdict. *See Dygert v. Crouch*, 36 S.W.3d 1, 8 (Mo. App. W.D. 2001) (finding that the defendant

[23] Section 509.200, RSMo states, in relevant part: "When items of special damage are claimed, they shall be specifically stated. In actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered."

Rule 55.05 states, in relevant part: "If a recovery of money be demanded, the amount shall be stated, except that in actions for damages based upon an alleged tort, no dollar amount shall be included in the demand except to determine the proper jurisdictional authority, but the prayer shall be for such damages as are fair and reasonable. A party may argue at trial that a specific amount of damages should be awarded even though the prayer is for a fair and reasonable amount. Relief in the alternative or of several different types may be demanded."

Rule 55.19 states: "In actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered. In actions for such damages based upon an alleged tort, no dollar amount or figure shall be included in the demand, but the prayer shall be for such damages as are fair and reasonable."

waived her right to argue that attorneys' fees were not properly pleaded because she failed to timely object to evidence of the attorney fees or to the prayer); *see also Licare v. Hill*, 879 S.W.2d 777, 779 (Mo. App. E.D. 1994) (quoting *Edward L. Bakewell, Inc. v. Hall*, 767 S.W.2d 348, 350 (Mo. App. E.D. 1989) (stating, "[u]nder Rule 55.33(b) . . . where evidence is presented without objection leading to a different damage total than pleaded, that issue has been tried by implied consent and is treated in all respects as if it had been raised in the pleadings."). Point V denied.

Point VII: Refusal of Mitigation of Damages Defense

Finally, in its seventh point, Orkin argues that the trial court erred in denying its offer of proof on Gentry's failure to mitigate damages, in refusing the instruction Orkin offered on mitigation of damages, and in excluding evidence that Gentry received a legal malpractice settlement from his former attorney.[24]

In Orkin's Amended Answer, Orkin alleged that Gentry failed to mitigate his damages by "failing to actively seek and gain subsequent employment sufficient to offset any damages." Before trial, Gentry filed a motion *in limine* seeking to exclude evidence that he failed to mitigate his damages because Orkin failed to sufficiently plead this affirmative defense.[25] The trial court sustained Gentry's motion *in limine*.

[24] Orkin seems to conflate mitigation of damages with a set-off under section 537.060, RSMo. Orkin does not challenge the trial court's ruling that it was not entitled to a set-off. Instead, Orkin argues on appeal that evidence of Gentry's settlement with his prior attorney should have been admitted at trial. Orkin acknowledged in its response to Gentry's motion *in limine* that such evidence was "irrelevant and inadmissible" at trial. Orkin also never attempted to introduce evidence of the settlement at trial. Therefore, Orkin has waived any argument about the admission of this evidence. *See Boyer v. Grandview Manor Care Ctr., Inc.*, 793 S.W.2d 346, 347 (Mo. banc 1990).

[25] Failure to mitigate damages is an affirmative defense. *State v. Polley*, 2 S.W.3d 887, 892 (Mo. App. W.D. 1999). Under Rule 55.08, affirmative defenses must be raised in a responsive pleading along with "a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." If a party fails to include an affirmative defense in its responsive pleading, the affirmative defense is waived. *Wilmes v. Consumers Oil Co. of Maryville*, 473 S.W.3d 705, 716 (Mo. App. W.D. 2015).

On the first day of trial, before evidence was adduced, Orkin made an offer of proof regarding its evidence on Gentry's alleged failure to mitigate his damages. For its offer of proof, Orkin offered parts of Gentry's deposition, labor statistics from the Kansas City area, a listing for a job fair in Kansas City, and classified ads. The trial court reviewed the evidence and announced that it would maintain its ruling excluding this evidence. Orkin declined to make any additional record. During trial, Orkin did not attempt to offer evidence relating to the alleged failure to mitigate damages. At the instructions conference, Orkin offered an instruction for failure to mitigate damages, which was refused by the trial court.

On appeal, Orkin argues that the trial court erred in denying its offer of proof[26] and in refusing Orkin's mitigation of damages jury instruction.

Orkin's only preserved claim is one of instructional error. This complaint, however, is misdirected as it ignores the reason the evidence was excluded: Orkin's pleading deficiency. The trial court found that Orkin failed to properly plead this affirmative defense; a ruling Orkin does not challenge in this appeal. It was as a result of this finding that Orkin was precluded from offering evidence of Gentry's alleged failure to mitigate damages. *See Ditto, Inc. v. Davids*, 457 S.W.3d 1, 17 (Mo. App. W.D. 2014) (finding that because the affirmative defense of equitable estoppel was not properly pleaded, it was not an issue in the case). "It is an elementary rule of law that in the face of an objection, evidence *must* conform to the pleadings." *Int'l Div., Inc. v. DeWitt and Assoc., Inc.*, 425 S.W.3d 225, (Mo. App. S.D. 2014) (citations omitted) (emphasis in original). When objections are made to evidence that is outside of the scope of the pleadings, the trial court has no discretion but to refuse to admit the evidence. *Id*. Because the exclusion of the mitigation evidence

[26] Orkin argues that the trial court denied its offer of proof, but the trial court did not deny Orkin the opportunity to make an offer of proof regarding the mitigation of damages evidence. Rather, the trial court reviewed the evidence Orkin offered in its offer of proof and upheld its previous ruling excluding the evidence. Therefore, Orkin's argument that the trial court erred in denying its offer of proof is misplaced and denied.

was consistent with the trial court's (unchallenged) finding that Orkin had failed to properly plead the failure to mitigate damages affirmative defense, the trial court did not err in refusing to submit the proffered instruction on that issue. Point VII denied.

Motion for Attorneys' Fees on Appeal

Finally, Gentry filed a motion for attorneys' fees on appeal which we took with the case. Under section 213.111.2, RSMo, a court is allowed to award "reasonable attorney fees to the prevailing party." "A prevailing party is one that succeeds on any significant issue in the litigation which achieved some of the benefit the parties sought in bringing suit." *Soto*, 502 S.W.3d at 58. "Where a plaintiff has prevailed in an action under the MHRA, the court should award attorneys' fees unless special circumstances would render such an award unjust." *Id.* Such an award of attorneys' fees includes fees incurred on appeal. *Id*.

Because we are affirming the circuit court's judgment entered in his favor, Gentry is the prevailing party. Therefore, his motion for attorneys' fees is granted. "Although appellate courts have authority to allow and fix the amount of attorney's fees on appeal, we exercise this power with caution, believing in most cases that the trial court is better equipped to hear evidence and argument on this issue and determine the reasonableness of the fee requested." *Id.* (internal quotation marks omitted). Therefore, we remand this case to the trial court to conduct a hearing to determine the reasonableness of the fees requested by Gentry, and to enter an appropriate award. *Id*.

Conclusion

The trial court's judgment is affirmed. The case is remanded to the trial court for an award of reasonable attorneys' fees related to this appeal.

EDWARD R. ARDINI, JR., JUDGE

All concur.