



# In the Missouri Court of Appeals Eastern District

SARAH BADAHMAN,	)	ED97516
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	0922-CC09062
	)	
CATERING ST. LOUIS, et al.,	)	Honorable Julian Bush
	)	
Appellants.	)	Filed: July 17, 2012

## Introduction

Catering St. Louis (CSL) and its president Mark Erker (together, “CSL”) appeal the trial court’s judgment granting Respondent Sarah Badahman’s Motion for Additur or in the Alternative for a New Trial on the Issue of Damages after a jury trial in her suit asserting disability discrimination. We reverse and remand for the trial court to reinstate the jury verdict.<sup>1</sup>

## Background Facts and Procedure

The record and transcript of the April 2011 trial reveal the following. In March 2008, CSL hired Badahman as a recruiter at a salary of \$45,000 per year. Her job duties included attending job fairs and other events to recruit employees, and attending events catered by CSL. CSL primarily caters events in Forest Park, at the Missouri Botanical Gardens, and on Washington University’s campus; but also caters events throughout the

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<sup>1</sup> Respondent’s pending motion for attorney’s fees is denied as moot, as she is not the prevailing party. Section 213.111.2, RSMo. (2000).

St. Louis metropolitan area. During the hiring season, Badahman performed interviews at the main office, performed group orientations at the Boathouse in Forest Park, and met with new employees on their first day at their place of work (“on-boardings”). The hiring season ended by the end of July.

In July 2008, Badahman, who suffers from epilepsy, learned that her neurologist was going to suspend her driver’s license for at least six months. For two weeks, she worked at CSL without a driver’s license, during which time she attended three on-boardings at catering sites. During that two-week period she took the Metrolink to Forest Park, got rides with co-workers, family members, and the catering van, and took one taxi. After two weeks, Badahman met with Erker to discuss how she could perform the duties of her job for the next six months without a driver’s license; they discussed the feasibility of getting rides with the catering van or co-workers, taxi cabs, public transportation, or a private driver. At the end of the meeting, Erker terminated Badahman. Her last day was August 1, 2008, and she received severance pay equal to one week of her annual salary.

After her termination, she was unemployed for a period of approximately three months. In October 2008, she obtained a job at Gateway Healthcare, earning an annual salary of \$27,000, and after eight months left that position to become an officer manager for Dr. Rashid Dalal, M.D., in Illinois earning an annual salary of \$33,000. Badahman was still employed with Dr. Dalal at the time of trial.

Badahman filed a petition for damages against CSL,<sup>2</sup> asserting, as relevant for this appeal, that she was terminated for her disability, epilepsy, in violation of the Missouri Human Rights Act (MHRA). At trial, Badahman requested \$44,979.72 in lost wages,

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<sup>2</sup> The petition included claims against Joan Vosholler, director of human resources for CSL, that were later voluntarily dismissed.

and requested compensation for the emotional harm she suffered as a result of her termination. She testified that her actual damages were the difference between what her salary would have been at CSL based on her salary of \$45,000 per year, and the actual amount of salaries she received between the date of her termination and the date of trial. She submitted pay stubs, tax documents, and a spreadsheet containing her calculation of the alleged actual damages. CSL objected to the spreadsheet as not relevant, lacking in foundation, and prepared solely for the purpose of litigation, but the trial court overruled the objection and admitted the spreadsheet.

CSL did not challenge that Badahman had been out of work for approximately three months or that she later accepted employment at a reduced salary of \$27,000 and \$33,000, respectively, but argued that had she been retained she would have been unable to perform her job duties. Badahman testified to the following on direct and cross-examination. Once the hiring season was over, she was expected to attend catering events in different places in St. Louis and the surrounding areas, and to attend recruiting events around the city. In the two weeks she worked at CSL without a license, she did not attend any catering or recruiting events. As for transportation, the catering vans have only two seats, and both were usually occupied. Badahman described her one taxi ride home as “expensive,” and stated that she knew she could not rely on co-workers for transportation. Badahman did not get her driver’s license back until January 2010.

In addition, Joan Vosholler, the director of human resources, testified that CSL had hired Badahman because she had experience working outside the office, which is what they wanted for the position, and that during the meeting with Erker before her termination, Badahman suggested that she could work at one location for a full day rather

than travel. After Badahman was terminated, CSL did not replace her, but rather divided her responsibilities among other employees, due to the economic downturn.

Moreover, CSL argued that Badahman failed to properly mitigate her damages. She contacted a former employer, Kelly Services, for work, and although they did not have any openings, they directed her to a competitor agency, Manpower; however, Manpower did not hire her because she failed to secure a written release from her noncompete agreement from her former employer. The trial court did not allow CSL to submit a mitigation instruction to the jury, ruling that there was insufficient evidence in the record to support a finding of a failure to mitigate.

A jury returned a verdict against CSL and Erker, and awarded Badahman \$11,250 in actual damages, which was the equivalent to three months of Badahman's salary at CSL ( $\$45,000/12 \text{ months} = \$3,750 \times 3 \text{ months} = \$11,250$ ). This amount corresponded to the amount of time Badahman was out of work between her termination from CSL and her gaining employment with Gateway Healthcare. The jury found that Erker was not liable for punitive damages, but that CSL was liable. In a bifurcated proceeding, the jury awarded Badahman \$2,000 in punitive damages. The trial court entered judgment in accordance with the jury's verdict on May 12, 2011 (May 12 judgment).

Badahman filed a Motion for Additur or, in the Alternative, for a New Trial on the Issue of Damages (Additur Motion) pursuant to Section 537.068, RSMo. (2000) and Rules 78.01 and 78.02.<sup>3</sup> In the Additur Motion, she asserted that she had presented uncontroverted evidence at trial that her actual damages were \$44,979.72, and that because there was no basis for the jury to award her approximately 25% of her proven

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<sup>3</sup> All rule references are to Mo. R. Civ. P. 2012, unless otherwise indicated.

losses, the award was against the weight of the evidence. She requested that the trial court increase the jury award to \$44,979.72 or grant a new trial on the issue of damages.

The trial court sustained Badahman's Additur Motion, finding:

Though the evidence for liability was far from overwhelming, the evidence that Ms. Badahman suffered lost wages of \$44,979.12 [sic] was quite strong. Indeed it was uncontradicted. The jury's award of \$11,250, then, is inadequate because it is less than fair and reasonable compensation. It is surely against the weight of the evidence. The court cannot find that its inadequacy is the result of passion or prejudice because Ms. Badahman has pointed to no trial error or misconduct that prejudiced the jury. See Morgan Publishing Inc. v. Squire Publishers, Inc., 26 S.W.3d 164, 176 (Mo. App. 2000); the inference, then, must be that the jury made an honest error. Id.

The court granted the parties 14 days, later amended to 30, to accept a higher amount of damages or elect a new trial on the issue of damages only. CSL elected a new trial on damages, and the trial court ordered the May 12 judgment set aside and ordered a new trial on the issue of damages only. The order was later denominated a judgment. This appeal follows.<sup>4</sup> We address only Point II, where CSL argues that the trial court abused its discretion in granting additur because the jury's award was supported by the weight of the evidence, as Point II is dispositive.

#### Discussion

In its second point on appeal, CSL contends that the trial court abused its discretion in granting additur, because the jury's award of damages was not against the weight of the evidence, but rather the evidence supported the jury's determination of \$11,250 in actual damages. We agree.

The additur statute authorizes a trial court, in its discretion, to increase the jury's verdict if the court finds the verdict was less than fair and reasonable compensation for

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<sup>4</sup> Appellants initially appealed to the Missouri Supreme Court, but the Supreme Court transferred the case to the Missouri Court of Appeals, Eastern District.

the injured party's damages. Section 537.068; Bishop v. Cummines, 870 S.W.2d 922, 923-24 (Mo. App. W.D. 1994). To grant additur, the trial court must find that circumstances warrant a new trial on damages for "good cause shown" or because the verdict was "against the weight of the evidence." Tucci v. Moore, 875 S.W.2d 115, 116 (Mo. banc 1994); Massman Constr. Co. v. Mo. Hwy. & Transp. Comm'n, 914 S.W.2d 801, 803 (Mo. banc 1996). Once additur is granted there are two possible outcomes: a consensual increase in the amount of the verdict or a new trial. Additur requires that the party against whom the new trial would be granted have the opportunity to consent to an increase in the judgment or request a new trial. Tucci, 875 S.W.2d at 116 (citing Rules 78.01 and 78.02). The purpose of additur is "to correct a jury's honest mistake in fixing damages." Massman, 914 S.W.2d at 803.

This court reviews a trial court's grant of additur for abuse of discretion. Bishop, 870 S.W.2d at 923. In our review, we consider the evidence in a light supporting the jury verdict. Hatch v. V.P. Fair Found, Inc., 990 S.W.2d 126, 141 (Mo. App. E.D. 1999) ("In reviewing whether a verdict is excessive, our review is limited to the evidence supporting the verdict."); see also Crawford v. Shop 'n Save Warehouse Foods, Inc., 91 S.W.3d 646, 653 (Mo. App. E.D. 2002) (finding trial court abused its discretion in granting remittitur when there was sufficient evidence supporting jury verdict).<sup>5</sup> An abuse of discretion can occur when the trial court overturns a properly supported jury verdict. Wiley v. Homfeld, 307 S.W.3d 145, 148 (Mo. App. W.D. 2009) ("when reviewing a trial court's grant of remittitur, an appellate court must first review whether the trial court had the statutory authority under § 537.068 to remit the jury's verdict").

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<sup>5</sup> "The doctrine of additur is a corollary of remittitur, and encompasses the same principles, therefore it may be analyzed in the same way." Norris v. Barnes, 957 S.W.2d 524, 528 n.3 (Mo. App. W.D. 1997).

Although the trial court has discretion to review the award for excessiveness or inadequacy, in general the assessment of damages lies within the purview of the jury. Hatch, 990 S.W.2d at 141. Additur is most often used in cases involving damages that are based on a simple mathematical calculation. Bishop, 870 S.W.2d at 923. Additur is appropriate where the evidence of damages at trial is uncontested or both parties agree on the amount of actual or compensatory damages. See Norris v. Barnes, 957 S.W.2d 524, 529 (Mo. App. W.D. 1997) (when defendant conceded amount of medical bills in closing statement, amount of damages was uncontested). However, when the amount of damages is disputed at trial and involves determinations of weight and credibility, such decisions fall to the jury. See Tomlin v. Guempel, 54 S.W.3d 658, 660 (Mo. App. E.D. 2001). A jury is free to believe all, part, or none of a party's claimed damages, even if the evidence is uncontroverted. Id.; Bishop, 870 S.W.2d at 926; see also Redel v. Capital Region Medical Ctr., 165 S.W.3d 168, 178 (Mo. App. E.D. 2005) (if amount of jury award is within range of evidence, that verdict is not erroneous even if it does not conform precisely to evidence of either party).

Unlike in cases where damages are susceptible to definite calculation, the amount of lost wages can vary. Here, Badahman claimed a total of \$44,979.72 in lost wages based on three months without pay and several years' salary at jobs paying less than what she received at CSL. While CSL did not contest that Badahman was out of work for nearly three months or that she later obtained a job making a lower salary, CSL suggested that Badahman would have been terminated for cause long before the date of trial, and thus that it would not be just and reasonable to award Badahman damages for the entire period between her August 2008 termination and the 2011 trial. For support, CSL

presented testimony that in the two weeks Badahman was working without a driver's license, she did not attend any catering functions or recruiting events, both of which were a regular part of her employment. CSL attacked the feasibility of all modes of transportation other than driving herself, and Badahman agreed that she could not rely on co-workers for transportation and that the one taxi ride she took was "expensive." Badahman did not have her driving privileges returned until January 2010.

In addition, CSL contended that Badahman was partially responsible for failing to obtain employment during that three month period because she failed to secure a written release of her noncompete agreement from a former employer. Further, the evidence showed that Badahman, who lived in Illinois, originally applied at CSL, which is located in central St. Louis, because she wanted a job closer to home. Her current position is located in Illinois. Last, representatives of CSL testified that because of the bad economy, Badahman had not been replaced and her job duties had been divided between existing employees. The jury was free to consider and make inferences from these facts in determining the proper amount of damages. See Vaughan v. Taft Broadcasting Co., 708 S.W.2d 656, 661 (Mo. banc 1986) (jury may infer facts from evidence); see also Hatch, 990 S.W.2d at 141 (jury determines damages, and we review in light favorable to jury verdict).

Looking at the record, we find that CSL presented evidence contesting the amount of lost wages. Cf. Norris, 957 S.W.2d at 529 (additur proper when damages at issue were medical bills, regarding which defendant presented no evidence suggesting bills were anything other than reasonable and necessary). Thus, the trial court here abused its



discretion in substituting its judgment regarding the weight and credibility of evidence for that of the jury. See Wiley, 307 S.W.3d at 148.

Moreover, a verdict is based on the evidence presented and the instructions given, and there are no grounds for additur when the jury verdict conformed to the instructions given. See Ralph v. Lewis Bros. Bakeries, Inc., 979 S.W.2d 509, 517 (Mo. App. S.D. 1998) (when defendant did not object to instruction that failed to direct jury to exclude certain damages, additur not proper when jury assessed damages based on that instruction). The instructions here, as submitted by Badahman, did not instruct the jury to find lost wages for the entire period that she was out of work and the period that she received reduced wages. Rather, it instructed the jury to “award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained as a direct result of the occurrence mentioned in the evidence.” Further, during closing argument, Badahman’s counsel stated, “The amount is up to you, but I’m going to suggest that you fully compensate Ms. Badahman for her lost wages in the amount of \$44,979.72, that you award her an additional \$150,000 to compensate her for the emotional distress she has suffered.” In light of the instruction to the jury allowing them to determine the appropriate amount of damages, the jury did not err by awarding damages only for the time Badahman was unemployed. See Ralph, 979 S.W.2d at 517 (amount of damages that conformed to jury instruction was not simple mistake in weighing evidence).<sup>6</sup>

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<sup>6</sup> Here, Badahman requested \$44,979.72 in actual damages for lost wages, \$150,000 in compensatory damages for her emotional distress, and \$100,000 in punitive damages. The jury returned a verdict for \$11,250 in actual damages, zero in compensatory damages, and \$2,000 in punitive damages. Both parties conceded during oral argument that this verdict was likely the result of a jury compromise.

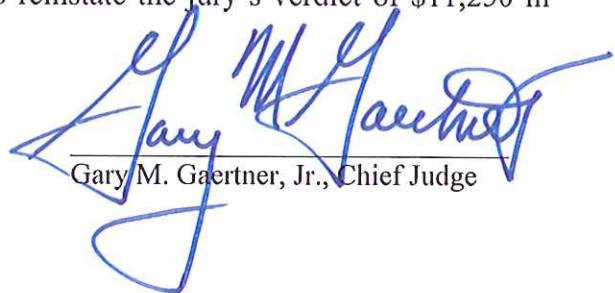
Based on the foregoing, the trial court abused its discretion here in granting additur. See Wiley, 307 S.W.3d at 148, 150-52 (reversing trial court’s grant of remittitur; finding that when reasonable minds could differ on evidence and there was evidence supporting jury verdict, verdict was not against weight of evidence and thus trial court abused its discretion in remitting jury verdict); Crawford, 91 S.W.3d at 653-54 (reversing for abuse of discretion trial court’s grant of remittitur when there was sufficient evidence supporting jury verdict). The amount of damages here was not uncontested, and thus the jury’s verdict was not an honest mistake but was based on the jury’s evaluation of the evidence of damages. See Massman, 914 S.W.2d at 803 (purpose of additur is “to correct a jury’s honest mistake in fixing damages”). After weighing the evidence and arguments before it and receiving instructions to come to a fair and just amount of compensation, the jury determined that the amount of \$11,250 was fair and reasonable. This amount was not against the weight of the evidence and thus a new trial was not warranted. Without grounds for a new trial, the trial court was without authority to grant additur. See Tucci, 875 S.W.2d at 116.

Point granted.

Conclusion

We reverse the trial court’s grant of additur and a new trial on the issue of damages, and we remand for the trial court to reinstate the jury’s verdict of \$11,250 in damages.

Clifford H. Ahrens, P.J., concurs.  
Roy L. Richter, J., concurs.

  
Gary M. Gaertner, Jr., Chief Judge