MISSOURI COURT OF APPEALS
WESTERN DISTRICT

SHAHIDAH HAZZIEZ,	)	
	)	**WD82336,**
Appellant-Respondent,	)	**WD82363,**
v.	)	**WD83200, and**
	)	**WD83227**
CITY OF KANSAS CITY, MISSOURI, ET AL.,	)	**ORDER FILED:**
	)	
Respondent-Appellants.	)	**April 7, 2020**
	)	

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Susan Margene Burnett, Judge

Before Division Two:
Cynthia L. Martin, P.J., Thomas H. Newton, and Gary D. Witt, JJ.

ORDER

Per Curiam:

The City of Kansas City appeals a Jackson County Circuit Court judgment entered on a jury verdict awarding Ms. Shahidah Hazziez damages for discrimination. Ms. Hazziez files a cross-appeal. For reasons stated in the

memorandum provided to the parties, we affirm. Rule 84.16(b). We remand for the trial court to rule on the motion for attorney fees and costs on appeal.[1]

[1] Before oral argument, Ms. Hazziez filed a motion for attorney fees and costs on appeal, and the motion was taken with the case. Section 213.111.2 allows a court to award reasonable attorney fees to a prevailing plaintiff in an MHRA case and to a plaintiff who successfully defends that favorable judgment on appeal. *Jones v. City of Kansas City*, 569 S.W.3d 42, 62 (Mo. App. W.D. 2019). While we have the authority to grant the motion, we have decided to remand the matter to the trial court for its consideration. *Ferguson v. Curators of Lincoln Univ.*, 498 S.W.3d 481, 498 n.11 (Mo. App. W.D. 2016) (foregoing making decision on motion in MHRA case involving appeal and cross-appeal, where employee prevailed on appeal but not on cross-appeal, which this Court determined was moot; remanding for trial court to consider the motion).

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v.	)	**WD83200, and**
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MEMORANDUM PROVIDING REASONS FOR ORDER AFFIRMING JUDGMENT UNDER RULE 84.16(B)[2]

The City of Kansas City appeals a Jackson County Circuit Court judgment entered on a jury verdict awarding Ms. Shahidah Hazziez damages for discrimination. The City claims error in the court's denial of its motion to amend the judgment to merge two separate verdicts and to reduce the verdict by the amount of settlements Ms. Hazziez entered with co-defendants, and in awarding Ms. Hazziez attorney fees and costs. Ms. Hazziez files a cross-appeal

[2] This informal, unpublished memorandum is provided to the parties to explain the rationale for the order affirming judgment. This memorandum is not a formal opinion and is not uniformly available. It shall not be reported, cited, or used in unrelated cases before this court or any other court. A copy of this memorandum shall be attached to any motion filed for rehearing or for transfer to the Supreme Court.

challenging the circuit court's directed verdict for the City on a retaliation count and an evidentiary ruling. We affirm but remand for the trial court to consider Ms. Hazziez's motion for attorney fees and costs on appeal.

Ms. Hazziez had worked for the City as an event coordinator in its Aim4Peace program for about one year when she was told to undergo a random drug screen in May 2014. She had a urinary tract or bladder infection, so she was unable to produce the volume of urine required after two attempts. Ms. Hazziez left the testing site to visit her heath-care provider over concerns about blood in her urine, although she was told by clinic employees that this would constitute a refusal to submit. She made a second visit to her health-care provider later in the day when advised to do so and had a urine screen for illegal substances that was negative. The City terminated her employment for a violation of the City's drug-testing policy and then contested her claim for unemployment compensation, including taking an appeal from the Appeals Tribunal's award which the Labor and Industrial Relations Commission affirmed.[3]

Ms. Hazziez filed a petition in September 2015 against the City and two groups of defendants: one involving entities and individuals connected to the

[3] Based on documents submitted, but not admitted, as part of her offer of proof, Ms. Hazziez apparently filed for unemployment compensation on May 21, 2014. According to these documents, the City initially contested the claim for benefits on June 2, 2014. A Division of Employment Security deputy found that Ms. Hazziez was disqualified from receiving benefits on June 12, 2014, for misconduct connected with work. She filed an appeal from that decision on June 19, 2014. Her charges of discrimination against the City were not filed with the U.S. Equal Employment Opportunity Commission and the Missouri Commission on Human Rights until June 26, 2014.

clinic where she was tested (Concentra Defendants) and the other involving the entities that developed and administered the testing protocol and selection process (eScreen Defendants). She amended the petition a second time in May 2016 and then settled her claims against the Concentra Defendants, filing a notice of dismissal with prejudice as to them. The City's answer to the second-amended petition pleaded as an affirmative defense that any damages award be reduced by the amounts of settlements under section 537.060.[4] The City filed a third-party petition in November 2016 against an entity distinct from the Concentra Defendants—Occupational Health Centers of the Southwest, PC d/b/a Concentra Medical Centers—which is allegedly obligated to indemnify the City under a contract to provide drug- and alcohol-testing services for the City. The trial court entered an order in September 2017 severing trial of the third-party claim from the original action between Ms. Hazziez and the City and eScreen Defendants.

The eScreen Defendants signed a memorandum of understanding with Ms. Hazziez as trial got underway in October 2017, offering to settle if she dismissed the claims against them with prejudice. A settlement agreement to this effect was executed several weeks after trial concluded. Although no order was entered reflecting this agreement, Ms. Hazziez did not pursue any claims against the eScreen Defendants during trial and did not submit any to the jury. The only remaining defendant at trial was the City, and the claims tried were counts I, II,

[4] The court later allowed the City to amend this pleading to include the amounts of the settlements Ms. Hazziez subsequently reached with the Concentra Defendants and the eScreen Defendants.

III, and V, all based on alleged violations of the Missouri Human Rights Act (MHRA) and all originally brought against all defendants jointly and severally.[5] Count I alleged that the City regarded Ms. Hazziez as illegally using a controlled substance ("regarded as" disability discrimination). Count II alleged sex discrimination. Count III alleged discrimination based on religion. Count V alleged that the City retaliated against Ms. Hazziez for engaging in MHRA-protected activity by opposing her claim for unemployment compensation. The trial court directed a verdict for the City on Count V, and the jury awarded Ms. Hazziez damages on her "regarded as" and sex discrimination claims only.

The trial court entered several "judgments" following the verdict and after considering post-trial motions and motions to amend, and after hearing evidence on the equitable remedies Ms. Hazziez had sought.[6] As to Ms. Hazziez's request for attorney fees and costs, the trial court awarded her $303,660 in fees and $10,130 in costs, with post-judgment interest at a rate of 6.92%. The City filed an appeal to this Court from an August 2018 "judgment" and Ms. Hazziez filed a cross-appeal, but concern over its finality as to all parties and issues led to the court issuing a second-amended judgment in September 2019 to comply with Rule 74.01(b) requirements. The only difference between the August 2018 and

[5] The second-amended petition also alleged negligence and strict products liability against the eScreen Defendants only. The trial court granted summary judgment for the eScreen Defendants on the strict products liability claim and for the parent company on all claims.

[6] In the second-amended petition, Ms. Hazziez asked the court to grant her "[d]eclaratory and injunctive relief, including but not limited to backpay [sic], frontpay [sic], deletion of negative personnel references, and adjustments for taxation of money awarded, as may be appropriate." The trial court denied all of these requests for relief, and they are not at issue in this appeal.

September 2019 judgments is the addition to the latter of the statement that "pursuant to Rule 74.01(b), the Court expressly finds that there is no just reason for delay and all claims and matters between Plaintiff Shahidah Hazziez and Defendant City of Kansas City are final for purposes of appeal." The parties similarly filed an appeal and cross-appeal from this judgment, which we consolidated with the earlier appeal. We have determined that the September 2019 judgment was the final judgment for purposes of this appeal. *See Southside Ventures, LLC v. La Crosse Lumber Co.*, 574 S.W.3d 771, 781-82 (Mo. App. W.D. 2019) (stating that, under current rules, "when a trial court enters an amended judgment, the original judgment is vacated in its entirety and becomes a nullity," and noting that party appealing amended judgment may either dismiss original appeal or seek permission from appellate court to consolidate the two appeals so court may "resolve any question regarding which of the judgments constitutes the final judgment for purposes of appellate jurisdiction."). All of the legal theories and factual issues, a "judicial unit" in Missouri Supreme Court parlance, have been decided as to Ms. Hazziez and the City and could be certified for immediate appeal under Rule 74.01(b). *Wilson v. City of St. Louis*, No. SC97544, 2020 WL 203137 *4 (Mo. banc Jan. 14, 2020). The remaining claims between the City and the third-party defendant involve indemnification claims under a contract to which Ms. Hazziez was not a party.

Legal Analysis

Verdict Merger

In the first point, the City argues that the trial court erred in failing to merge the damages in Verdicts A ("regarded as" discrimination) and C (sex discrimination), because they constitute a double recovery in that the jury instructions for these verdicts "identically described [Ms. Hazziez's] harm as 'defendant terminated plaintiff.'" The jury awarded Ms. Hazziez $100,000 for "regarded as" discrimination and $72,000 for sex discrimination. The City did not object to the submission of separate verdicts to the jury and first argued merger in a motion to amend the judgment and/or for remittitur. Because Missouri courts have deemed a double recovery manifestly unjust as a matter of plain error, the City contends that it had no obligation to raise the challenge during trial before the jury was discharged. Accordingly, it claims that the standard of review is for abuse of discretion under *Heckadon v. CFS Enterprises, Inc.*, 400 S.W.3d 372, 380 (Mo. App. W.D. 2013) (standard for reviewing ruling on motion to amend), or requires viewing the evidence in the light most favorable to the circuit court's order under *Stewart v. Partamian*, 465 S.W.3d 51, 59 (Mo. banc 2015) (standard for reviewing ruling on motion for remittitur).

We disagree that the City was not obligated to raise an objection or take action to avoid a double recovery at the earliest opportunity. *See McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 178 (Mo. App. W.D. 2012) (finding that double recovery constituted plain error, court nonetheless observes that "proper

packaging of the jury instructions could have prevented this error and [appellant] should have offered appropriate instructions to avoid such a result."). As well, not only did the City not object to separate verdict directors or separate verdict forms, it also submitted its own separate verdict directors and verdict forms for each of Ms. Hazziez's discrimination-based claims. We are not obligated to reach this issue because "one party cannot sustain a claim of prejudicial error where the alleged defect in the opposing party's instruction also exists in [its] own." *Spence v. BNSF Ry. Co.*, 547 S.W.3d 769, 779 (Mo. banc 2018) (citation omitted). In our discretion, however, we have decided to review this issue under plain error.

Under Rule 84.13(c), "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." "Rarely will we find plain error in a civil case." *Mansfield v. Horner*, 443 S.W.3d 627, 639 (Mo. App. W.D. 2014). Plain-error review involves a two-step process. *Hogan v. Bd. of Police Comm'rs of Kansas City*, 337 S.W.3d 124, 133 (Mo. App. W.D. 2011). We first determine "whether the trial court actually committed evident, obvious and clear error that affected substantial rights." *Id.* To be reversible, such error "must have prejudiced the appellant, except that such prejudice must constitute manifest injustice or a miscarriage of justice." *Id.* Accordingly, the second step requires that we

"determine whether the evident, obvious, and clear error found resulted in manifest injustice or a miscarriage of justice."

This Court has acknowledged that, under certain circumstances, "Double recovery constitutes plain error, which constitutes a manifest injustice." *McGuire*, 375 S.W.3d at 177. In *McGuire*, it was evident, obvious, and clear that a double recovery had been awarded because two $75,000 awards were made to each of two plaintiffs for nuisance. *Id.* The first award to each plaintiff was based on the defendant's direct negligence for the use of another party's hog facilities and the second award to each plaintiff was based on the defendant's liability for the other party's operation of the facility which was allegedly within the scope and course of the party's agency for the defendant. *Id.* at 176. Both the "utilization" and "agency" theories "were grounded in the same claim of nuisance on the same property against the same defendant." *Id.* at 177. "Whether by agency or utilization, the damage to the [Plaintiffs'] property by the nuisance of the operation of the CAFO [confined animal feeding operation] was the same damage." *Id.*

Citing *Echols v. City of Riverside*, 332 S.W.3d 207, 212 (Mo. App. W.D. 2010), the City argues that "[t]he principle underlying the merger doctrine ('one full recovery for the same harm') applies to MHRA actions." In *Echols*, we reversed a trial court's offset of an actual-damages award in a race-discrimination and retaliatory-discharge case by the amount of unemployment-compensation benefits the terminated employee had received. *Id.* at 213. We

did so because the employer had failed to plead the affirmative defense of credit or offset, and the trial court "on its own initiative" deducted the benefits from the backpay award. *Id.* at 212. Any statement this Court made in *Echols* about plaintiffs not generally being entitled to a double recovery of compensatory damages is dicta and not indicative of our application of this tort-law principle in an MHRA action, which Missouri courts have repeatedly distinguished from tort cases. *See, e.g., Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 170-71 (Mo. App. W.D. 1999) ("Constitutional rights are not adequately protected by tort damages because a civil rights claim is not analogous to a tort claim for intentional infliction of emotional distress. . . . In light of the 'broad remunerative purposes' of the MHRA and the inadequacy of the tort measure of damages, we conclude that the tort standard for actual damages for emotional distress does not apply to civil rights cases under the MHRA."), cited in *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 567-69 (Mo. banc 2006) (allowing proof of mental distress in private MHRA action without waiver of physician-client privilege and distinguishing such actions from tort cases).

Here, it is not clear that a jury's $100,000 award for "regarded as" discrimination encompassed the same harm as the $72,000 award for sex discrimination. The jury was instructed, as to both types of discrimination, that it had to believe the City terminated Ms. Hazziez for her to recover, but the jury also had to find that each type of discrimination "was a contributing factor in

plaintiff's termination" and that, if the jury found in her favor, then it must award the plaintiff such sum as "will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [or] is reasonably certain to sustain in the future. . . ." Ms. Hazziez sought damages for economic loss, including wages and fringe benefits and other actual damages such as emotional distress, for the City's (1) regarding her as a drug user thus barring her "from rehire," and (2) discriminating against her "because of a trait associated with her sex," that is, treating her differently because she had a condition associated with the female urinary and reproductive system when she was tested and terminated. Thus, the sources of damage do not appear to be coextensive.[7] We agree in this regard with the trial court, which stated, "The harm which occurs when a person is 'regarded as' a drug user is different than the harm which stems from gender discrimination. Each claim is a separate concept and the different damages assessed for each should not be merged." Barring Ms. Hazziez from rehire because the City regarded her as a drug user and treating her differently in testing and termination on the basis of her sex constitute two different wrongs resulting in different injury. Damages available under the MHRA in 2014 included equitable relief,

[7] The City also argues, as an additional basis for its claim that the trial court erred in refusing to merge the verdicts, that Ms. Hazziez's counsel stated in closing that damage awards inserted into the verdict forms would be merged after trial. Because the trial court submitted instructions to the jury that did not reflect this misstatement of the law, and because "'[t]he jury is bound to follow the trial court's instructions and we presume that it will even to the extent that doing so might require the jury to ignore specific argument of counsel in conflict,'" we find no error. *Minze v. Mo. Dep't of Pub. Safety*, 541 S.W.3d 575, 583 (Mo. App. W.D. 2017) (quoting *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850, 861 (Mo. App. W.D. 2013) ("Even if counsel misstates the law in closing argument, if the circuit court properly instructs the jury, then manifest injustice or a miscarriage of justice generally will not be found." (citation omitted)).

actual and punitive damages, court costs, and reasonable attorney fees. § 213.111.2, RSMo (2000). "Recoverable actual damages may include awards for emotional distress." *State ex rel. Dean,* 182 S.W.3d at 563. Ms. Hazziez testified to the economic consequences of her termination and the emotional distress she experienced when she received the termination letter, which informed her that she could not be rehired for three years; she also expressed her discomfort with revealing to others personal information about her medical history, particularly as to details concerning the female reproductive system. She experienced monetary damages and emotional harm attributable to two different types of discrimination. It is not evident, obvious, and clear that Verdicts A and C amounted to a double recovery and that the trial court erred in failing to merge them. Accordingly, plain error has not been shown. This point is denied.

Verdict Reduction

In the second and third points, which raise a matter of first impression, the City claims that the trial court erred in failing to reduce the jury verdict under section 537.060 by the amounts of Ms. Hazziez's settlements with the Concentra and eScreen defendants. It argues that the court "should have applied a presumption that the settlements were for the same injury," that it pleaded and proved the settlements, and that Ms. Hazziez pleaded joint and several liability. The City also argues that Ms. Hazziez settled with the Concentra and eScreen defendants for the same injury "in that she claimed indivisible injury throughout the trial court action and released such claims in settlement with co-defendants."

The City contends that we must review *de novo* the denial of a motion to amend requesting that verdicts be reduced by the amount of settlement agreements reached with other defendants. *McGuire*, 375 S.W.3d at 179. Ms. Hazziez, however, argues that this standard of review applies only when the matter involves no factual disputes "and the ruling purely is as a matter of law." *Heckadon*, 400 S.W.3d at 378 n.4 (noting that we have used the *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 2012), standard "when there are factual issues decided below regarding such factual matters as whether a certain payment was attributable to a settlement, or about the amount of a settlement payment," and citing caselaw applying the *Murphy v. Carron* standard where a dispute exists as to the predicate condition to application of section 537.060, i.e., "multiple tortfeasors being liable for the same injury." (citation omitted)). Because these points require that we determine if section 537.060 applies to MHRA defendants as a matter of law, we will apply the *de novo* standard. There is no dispute that the City pleaded section 537.060 and proved the amounts of the settlements between Ms. Hazziez and the Concentra Defendants and Ms. Hazziez and the eScreen Defendants. Nor is there a dispute that it preserved the matter for our review.

Section 537.060 states, in relevant part:

> When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one or two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; however such

> agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater.

The City claims that the rebuttable presumption of a section 537.060 reduction has been triggered and that Ms. Hazziez's claims constitute "tort" claims within the statute's meaning.[8] In its view, all of the defendants in an MHRA action are tortfeasors, and an MHRA action is brought "for the redress of a private wrong," thus making the defendants against whom a judgment has been entered "subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract." § 537.060.

We need not determine the issue of first impression the City has raised, i.e., whether section 537.060 applies to cases brought under the MHRA. The City not only opposed Ms. Hazziez's plea that the liability of all the defendants was joint and several, it also requested and received a jury instruction that stated, "Evidence has been presented concerning the acts of third-parties who are neither the Defendant nor Defendant's employees. You may not consider the acts of such third-parties to be the acts of Defendant." *See Sanders v. Ahmed*, 364 S.W.3d 195, 212 (Mo. banc 2012) (discussing *Stevenson v. Aquila Foreign*

[8] In *Sanders v. Ahmed*, 364 S.W.3d 195, 212-13 (Mo. banc 2012), the court discusses joint-and-several liability and the respective burdens on parties where a reduction is sought under section 537.060. "The burden of proof is on the party seeking reduction," but a rebuttable presumption of joint liability for a single injury "can arise from the plaintiff's pleadings and ensuing settlement." *Id.* at 213. Still, the burden of proving that the party seeking a reduction had joint liability with the settling tortfeasor "is not met by the fact that a plaintiff has merely claimed joint liability." *Id.* at 212 (citation omitted).

Qualifications Corp., 326 S.W.3d 920 (Mo. App. W.D. 2010), court states, "[u]nder the facts as pleaded a jury could not find both sets of defendants jointly liable, as the injuries for which the trial defendants were sued were divisible from those governed by the settlement. Because the plaintiff's pleadings could not establish joint liability, the burden of proving that element remained on the non-settling defendant."). Neither the Concentra Defendants nor the eScreen Defendants could terminate Ms. Hazziez, and the City disavowed their alleged acts, which led to the termination, in defending the claims against it. As the trial court noted, a close reading of the petition "establishes that at least two of Plaintiff's claims against [the eScreen defendants] were not founded on MHRA claims at all but, instead, were for negligence and strict products liability." Further, "[a]lthough Plaintiff's other claims against [the Concentra and eScreen defendants] were founded in the MHRA, these were under a conspiracy theory." Ms. Hazziez had also "included separate allegations that [the Concentra Defendants] evaded a valid subpoena which negatively affected [her] success in her unemployment hearing." We agree that the elements of Ms. Hazziez's claims against the defendants are not the same and that the injuries or damages covered by the settlements do not overlap with the injuries she sustained as a result of the City's actions. Accordingly, the trial court did not err in refusing to reduce the award against the City by the amounts Ms. Hazziez received in settlement with the Concentra and eScreen defendants. Points two and three are denied.

Attorney Fees and Costs

The City's fourth point argues that Ms. Hazziez cannot recover attorney fees and costs as a "prevailing party" under section 213.111.2, "in that the required merger of her damages in Verdicts A and C and Section 537.060 reduction by co-defendant settlements . . . eliminates any monetary damage award and renders her without judicial relief in the trial court." Because we have determined that the trial court did not err in refusing to merge the damages awarded in Verdicts A and C or to reduce the award by the amounts of the co-defendant settlements, we also find that Ms. Hazziez is the prevailing party; the trial court did not abuse its discretion in awarding her attorney fees and costs. This point is denied.

Cross-Appeal

In the first point on cross-appeal, Ms. Hazziez argues that the trial court erred in directing a verdict for the City on her retaliation claim because she presented a submissible case. As indicated above, Ms. Hazziez claimed in the second-amended petition that the retaliation took the form of the City opposing her claim for unemployment compensation after she engaged in MHRA-protected activity. She requests that we remand this matter for a new trial on retaliation. The second point on cross-appeal relates to the first in that Ms. Hazziez claims that the trial court misapplied section 288.215.1 in excluding any document or statement made concerning the unemployment-compensation proceedings; she argues that this evidence was probative to her retaliation claim.

According to Ms. Hazziez, the excluded evidence would have "further shown the City's retaliatory motive in deciding to oppose her benefits."[9]

We review these claims *de novo*, seeking to determine whether the plaintiff has made a submissible case based on legal and substantial evidence viewed in the light most favorable to the plaintiff:

> In reviewing the grant of a motion for directed verdict, this Court must determine whether the plaintiff made a submissible case. A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. An appellate court views the evidence in the light most favorable to the plaintiff to determine whether a submissible case was made. The plaintiff may prove essential facts by circumstantial evidence as long as the facts proved and the conclusions to be drawn are of such a nature and are so related to each other that the conclusions may be fairly inferred. Whether the plaintiff made a submissible case is a question of law subject to de novo review. Further, with respect to evidentiary rulings, the trial court enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its actions will not be grounds for reversal.

Reed v. Curators of the Univ. of Mo., 509 S.W.3d 816, 821 (Mo. App. W.D. 2016) (citations omitted) (quoting *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011)).

The City first opposed Ms. Hazziez's application for unemployment compensation on June 2, 2014, or twenty-four days *before* she filed formal charges under the MHRA. So she contends that the May 5, 2014, email explaining her inability to complete the drug screen and asking that she be

[9] Ms. Hazziez does not argue that the City's position in opposing her unemployment benefits was frivolous, particularly in light of the City's success in defeating the claim when it was before the Division of Employment Security deputy.

allowed to take the test again represents two of three acts she took that are protected under the MHRA and give rise to the retaliation count. First, she claims that this email requested an accommodation for her medical condition. Even if the email can be interpreted as a request for accommodation, the Missouri Supreme Court has just considered this argument and rejected it in *Li Lin v. Ellis*, No. SC 97641, 2020 WL 203145 *5 (Mo. banc Jan. 14, 2020), stating that "a mere request for an accommodation does not fall within the plain language of either the opposition or participation clause of section 213.070[(2)]."[10] Concluding that the employee had failed to submit a cognizable claim under the MHRA, our supreme court reversed the trial court's denial of the employer's request for judgment notwithstanding the verdict on the employee's retaliation claim. *Id.* Thus the trial court here did not err in granting on this basis the City's motion for a directed verdict on Ms. Hazziez's retaliation claim.

Ms. Hazziez also claims that the May 5, 2014, email constituted her opposition to discriminatory treatment due to a medical condition. This theory was not argued when the motion for directed verdict was considered during trial, and it was not included in the motion for new trial that Ms. Hazziez filed on retaliation. Nor was this theory argued to the trial court during the February 14, 2018, hearing on post-trial motions and on Ms. Hazziez's equitable claims.

[10] While this per curiam decision has not been released for publication and is not final as of this writing, Ms. Hazziez's counsel conceded during oral argument that if her claim were based on a request for accommodation only, the Missouri Supreme Court's ruling in *Lin* would bar relief.

Accordingly, this basis for the first point on cross-appeal has not been preserved for our review and we do not consider it further.[11] Rule 84.13(a).

The third protected act, Ms. Hazziez argues, was the June 26, 2014, filing of a formal MHRA charge to which the City allegedly retaliated by appearing during a two-day hearing before the Appeals Tribunal and "vigorously contest[ing] the application," and by filing an October 3, 2014, appeal to the Labor and Industrial Relations Commission from an adverse Appeals Tribunal compensation award. In her view, the City opposed her application for unemployment benefits "more strenuously *after* she filed her formal charge." She argues that the City could have dropped its opposition to the application after it received her formal discrimination charge, but instead "doubled down and contested the application in a two-day hearing" and then filed an appeal from the Appeals Tribunal's award. We would note that the Appeals Tribunal heard the matter only because Ms. Hazziez had appealed an adverse deputy determination.[12]

Section 213.070 states in relevant part that "[i]t shall be an unlawful discriminatory practice:

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[11] We do not believe, even if we were to consider the matter on the merits, that the email can fairly be construed as Ms. Hazziez's opposition to discriminatory treatment. After describing in great detail what occurred at the Concentra clinic on May 5, 2014, Ms. Hazziez writes,

> I would be more than willing to take the test again[.] I have submitted my urine at least 6 times over the year at the same place all with negative results. Please understand my condition and my worries with what happened today and in no way did I automatically refuse the test but did so after the second attempt due to health complications.

[12] See the timeline set forth in footnote 3 above.

> (2) To retaliate or discriminate 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; . . .

§ 213.070(2), RSMo. (2000). To make a submissible case for retaliation under the MHRA, Ms. Hazziez must establish that (1) she filed a complaint under the MHRA, (2) the City took adverse action against her, and (3) the adverse action was causally linked to the protected activity. *Shore v. Children's Mercy Hosp.*, 477 S.W.3d 727, 735 (Mo. App. W.D. 2015). We have stated that the second element requires some showing that the individual claiming retaliation sustained damage from the adverse action. *Walsh v. City of Kansas City*, 481 S.W.3d 97, 106 (Mo. App. W.D. 2016) (quoting *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 625 (Mo. banc 1995) ("retaliation includes any act done for the purpose of reprisal that results in damage to the plaintiff")). On this basis alone, no evidence would support Ms. Hazziez's contention that the City's opposition to her unemployment-compensation claim constituted retaliation under the MHRA because she prevailed on the claim and did not sustain damage from the adverse action. *See Kader v. Bd. of Regents of Harris-Stowe State Univ.*, 565 S.W.3d 182, 189-90 (Mo. banc 2019) (requiring adverse impact for actionable retaliation under MHRA). While we recognize that a delay in receiving benefits may result in damage to a plaintiff, Ms. Hazziez has not argued that she was damaged by a delay in receiving unemployment benefits.

Ms. Hazziez claims that federal and state case law recognizes that opposition to an unemployment-compensation application can constitute retaliation, but none of the cases she has cited involve the circumstances here, that is, a formal discrimination charge filed after the employer opposed the application but before the appeal proceedings initiated by the employee concluded. As well, the cases she cites involved more than one retaliatory allegation and not just the single act of continuing to oppose an application for unemployment benefits without any other evidence of retaliatory intent. *Berger v. Emerson Climate Techs.*, 508 S.W.3d 136, 146 (Mo. App. S.D. 2016) (overturning dismissal of retaliation claim where employee alleged employer failed to conduct investigation into employee's complaints of discrimination, failed to take appropriate remedial action in response to complaints, refused to allow him to return to work, refused to conduct testing to evaluate safety of work environment, opposed his application for unemployment benefits, and terminated his employment); *Steele v. Schafer*, 535 F.3d 689, 691 (D.C. Cir. 2008) (reversing grant of summary judgment, court identifies conduct that can support a retaliation claim as: employer denied employee a recognition award, issued her the lowest performance rating of her career along with lowest performance bonus in her branch, denied another award, and made a false report in contesting her unemployment benefits); *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1086, 1093 (10th Cir. 2007) (reversing judgment as a matter of law on employee's retaliation claim, finding evidence of threats to destroy employee's

reputation along with inconsistent and contradictory explanations for opposing unemployment benefits sufficient to submit claim to jury).

Ms. Hazziez had to show that the adverse action of the City continuing to oppose her application after she filed a formal discrimination charge is causally linked to the protected activity. Here, Ms. Hazziez had already put in motion an appeal from an adverse deputy decision on her application for unemployment benefits when she filed formal discrimination charges with the U.S. Equal Employment Opportunity Commission and the Missouri Commission on Human Rights. She had to prove that the City's decision to participate in the Appeals Tribunal proceeding, which her appeal necessitated after a deputy had ruled in the City's favor, and then to appeal the tribunal's ruling, which was adverse to the City, were causally linked to the MHRA charges she filed. Employers have many reasons to contest an unemployment application or to appeal an adverse Appeals Tribunal ruling to the Labor and Industrial Relations Commission. The City employee who purportedly wrote the City's appeal letter to this commission testified that each decision to oppose a claim is made on a case-by-case basis. Here, the Appeals Tribunal, according to documents submitted as part of Ms. Hazziez's offer of proof regarding the admission of the unemployment-claim file, determined that the City may have had a justifiable business reason for terminating Ms. Hazziez's employment, but ruled that her violation of the City's policy, in light of all the circumstances, "was not deliberate." While the author of the appeal letter testified that the City does not appeal every unemployment-

compensation claim to the Commission, we do not believe, as Ms. Hazziez argues, that without more evidence of retaliatory intent, this means that the City's appeal in her case was therefore "extraordinary." Ms. Hazziez seems to argue that the temporal proximity of the City's continuing opposition to her unemployment application and her filing of a formal discrimination charge alone constitutes substantial evidence of retaliatory action. Even viewing the evidence and all fair inferences in the light most favorable to Ms. Hazziez, we decline the invitation to establish the principle, not recognized by any other Missouri court, that once a formal charge of discrimination is made, an employer must cease opposing the employee's ongoing efforts to secure unemployment compensation or be found liable for retaliation, in the absence of any other evidence, just by continuing to contest the claim. This point is denied.

As to the second point, Ms. Hazziez argues that the trial court incorrectly applied section 288.215.1 in excluding evidence relating to the unemployment-benefits proceedings. Subsection 288.215.1, RSMo. (2016), states that,

> [a]ny finding of fact, conclusion of law, judgment or order made by an appeals tribunal, the labor and industrial relations commission or any person with the authority to make findings of fact or law in any proceeding under this chapter . . . shall not be used as evidence in any subsequent or separate action not brought under this chapter, . . .

Subsection 3 states that nothing in subsection 1 "shall be construed to prevent the use of evidence presented in any proceeding under this chapter in any other proceeding not brought under this chapter." § 288.215.3. The trial court refused

to allow the Division of Employment Security file from Ms. Hazziez's unemployment proceedings to be admitted into evidence. The court ruled that statements from the record used for impeachment or other limited purposes would be allowed. Ms. Hazziez specifically argues that the trial court erred in not allowing her to "introduce testimony of [Ms.] Torah Greenlaw [the employee who drafted and signed the City's appeal from the Appeals Tribunal decision] and materials introduced in her unemployment proceedings." She contends that the proscription on the evidentiary use of findings of fact, conclusions of law, judgments, or orders is strictly limited under rules of statutory construction, and that the trial court's broad exclusion of the entire unemployment file was therefore a misapplication of the law. We have been unable to find and the parties have not provided case law interpreting and applying sections 288.215.1 and 288.215.3.

Though we agree, under a plain reading of the statute, that evidence from an unemployment proceeding may be introduced, if relevant, in another proceeding not brought under our Employment Security Law, the only document that Ms. Hazziez sought to introduce in the offer of proof from that proceeding was the appeal document that Ms. Greenlaw signed.[13] That document included

[13] It is unclear what Ms. Hazziez means by referring to Ms. Torah Greenlaw's "testimony" as something she sought to introduce and the trial court excluded. It does not appear from the offer of proof that Ms. Greenlaw testified during the unemployment proceeding, and no transcript from the Appeals Tribunal proceeding was included in Exhibit 16, which was the unemployment file submitted for purposes of the offer of proof, but not admitted. Further, Ms. Greenlaw testified during the trial in this case. And Mr. Hazziez's counsel was permitted to question her about statements she had made in connection with the unemployment proceeding reflecting Ms. Greenlaw's view of Ms. Hazziez's

references to and information about the findings and conclusions of the Division of Employment Security deputy and the Appeals Tribunal, and for that reason, falls within section 288.215.1. The trial court did not err in excluding evidence encompassed by the proscription of section 288.215.1. This point is denied.

Attorney Fees and Costs on Appeal

Before oral argument, Ms. Hazziez filed a motion for attorney fees and costs on appeal, and the motion was taken with the case. Section 213.111.2 allows a court to award reasonable attorney fees to a prevailing plaintiff in an MHRA case and to a plaintiff who successfully defends that favorable judgment on appeal. *Jones v. City of Kansas City*, 569 S.W.3d 42, 62 (Mo. App. W.D. 2019). While we have the authority to grant the motion, we have decided to remand the matter to the trial court for its consideration. *Ferguson v. Curators of Lincoln Univ.*, 498 S.W.3d 481, 498 n.11 (Mo. App. W.D. 2016) (foregoing making decision on motion in MHRA case involving appeal and cross-appeal, where employee prevailed on appeal but not on cross-appeal, which this Court determined was moot; remanding for trial court to consider the motion).

Conclusion

Finding no trial court error in rulings on the City's motion to amend the judgment and to award Ms. Hazziez attorney fees and costs and no error in rulings on the motion for directed verdict or the exclusion of that part of the

credibility. These statements were the part of the City's unemployment-appeal letter on which Ms. Hazziez focused during the offer of proof.

unemployment-proceeding record raised in the cross-appeal, we affirm. We remand, however, for the trial court to consider and decide Ms. Hazziez's motion for attorney fees and costs on appeal.