Remittiturs and Additurs

by John Day

Remittiturs and additurs are unusual components of the law in that they allow (under certain constraints) a trial judge to substitute her value of the case for the value as determined by the jury. This article will summarize the law in this important area.

Remittitur Motions in the Trial Court

The end of a trial is not the end of the work for the trial judge or trial lawyer. First, a judgment must be entered reflecting the resolution of case by the judge or jury. Then, it is not uncommon for post-trial motions to be filed. Immediate post-trial motions often include a motion for a judgment notwithstanding the verdict, motion for a new trial, motion to alter or amend, and, depending on who won, a motion for a remittitur or an additur. Obviously, not every motion is filed in every case, and sometimes no post-trial motions are filed, but it is not uncommon for two or three of these motions to be filed after every jury trial.

A motion for a remittitur asks the trial judge to reduce the damages awarded by a jury. While the issue of damages in a jury trial is primarily for the jury,[1] a trial court has the statutory authority to adjust the jury's award when necessary to accomplish justice between the parties and to avoid the expense of a new trial.[2] The prerogative to reduce the amount of the judgment is codified in Tenn. Code Ann. § 20-10-102, which permits the trial judge, on a motion for new trial filed by a defendant, to "suggest" a lower judgment amount. The trial judge has the right to do so if the verdict is excessive, beyond the range of reasonableness, or is excessive as the result of passion, prejudice, or caprice.[3]

Case law also holds that the trial judge may recommend an adjustment to the jury's verdict, even if the verdict is within the range of reasonableness.[4] Indeed, trial judges are encouraged to cure excessive verdicts, when feasible, rather than forcing the parties to incur the expense and loss of time of a new trial.[5]

How does a trial judge make the determination as to whether a verdict is so large as to require a suggested reduction? Each case depends on its own facts. A judge may look at other verdicts in similar cases, applying the modern- day value of money to such cases.[6] It is therefore quite appropriate for lawyers arguing a motion for a remittitur to point to other verdicts and settlements, even in other states, in support of their position. At the end of the day, however, rarely are there two cases that are so similar that the verdict in one case bears much weight on the reasonableness of the verdict in another case.[7]

Thus, a trial judge, with knowledge of the evidence, armed with other information from the parties, and with a healthy respect for the right of the jury to make decisions about the amount of damages to be awarded, can make a judgment call on whether to remit a verdict and, if so, in what amount. A remittitur cannot be so substantial so as to destroy a jury verdict,[8] but there is no set percentage of reduction that is automatically deemed to have destroyed the verdict.[9] The judge may order a remittitur only if he or she finds that the evidence preponderates in favor of a lower amount of damages.[10] The trial judge must set forth in the order his or her reasons for suggesting a remittitur, especially where there is conflicting testimony (and thus credibility determinations) on damage issues.[11]

Recall that the trial judge suggests, not mandates, a reduction in the jury verdict. Thus, the order granting a remittitur will state the new suggested judgment amount, which the plaintiff can either accept, accept under protest, or reject and insist on a new trial. If the plaintiff accepts the remittitur, a judgment is entered for the lower amount. If the plaintiff rejects the remittitur, a new trial is ordered. Unless the trial judge indicates to the contrary, the new trial will be held only on damages. Why? Because the rejection of the defendant's general motion for a new trial indicates that the trial judge was satisfied with the verdict on liability, leaving a second trial on damages only.[12]

Yet another alternative is that the plaintiff can accept the remittitur under protest, and appeal the trial judge's decision to reduce the amount of the verdict. A defendant who loses a motion for a new trial or, in the alternative, a remittitur, can either pay the judgment or file an appeal alleging that that there were errors that took place at trial that require a new trial. The defendant can also request that the court of appeals reduce the amount of the jury verdict or even the verdict as reduced by the trial judge.

Remittitur Issues Before the Appellate Courts

Remittitur issues arise in the court of appeals in one of three ways. First, a Tennessee appellate court may rule on a remittitur issue following a plaintiff's acceptance of a remittitur under protest. In such a case, plaintiff requests the appellate court to either restore the original verdict or decrease the amount of the remittitur. Second, a defendant who loses a motion to remit before the trial judge may file an appeal and ask the court of appeals to reduce the judgment. Third, a defendant who won a motion to remit before the trial judge can ask the court of appeals for a further reduction.

The Tennessee Supreme Court recently announced new law governing an appellate court's review of a trial judge's remitted jury verdict. In *Borne v. Celadon Trucking Services, Inc.,* the court ruled:

continued to page 34

continued from page 33

> [U]nder section 20-10-102(b), the standard of appellate review for a trial court's suggestion of remittitur requires the appellate court to ascertain whether the trial judge's reduction of the jury award is supported by a preponderance of the evidence.
>
> In applying the preponderance of the evidence standard to its review of the trial court's suggested remittitur, we note that the appellate court must giv[e] due credit to the jury's decision on the credibility of the witnesses and that of the trial judge in his capacity as thirteenth juror. As discussed *infra,* this directive can prove to be a challenge in some cases.
>
> Applying this standard of review, in *Long v. Mattingly,* then-Judge Koch offered "a three-step review of a trial court's adjustment of a jury's damage award." The suggested framework consisted of the following:
>
> First, we examine the reasons for the trial court's action since adjustments are proper only when the court disagrees with the amount of the verdict. Second, we examine the amount of the suggested adjustment since adjustments that totally destroy the jury's verdict are impermissible. Third, we review the proof of damages to determine whether the evidence preponderates against the trial court's adjustment.
>
> We adopt the *Long v. Mattingly* three-prong framework for appellate review of a trial court's suggested remittitur.[13]
>
> The *Borne v. Celadon Trucking Service, Inc.* court went on to require an appellate court to conduct a review of the record, including the trial court's stated reasons for its suggestion of a remittitur, when it is asked to review a trial court's decision to reduce a jury verdict.[14]

As indicated above, a defendant who fails to persuade a trial court to grant a remittitur can ask the Court of Appeals to remit the verdict.[15] The Court of Appeals' authority to suggest a remittitur when the trial court has affirmed the verdict is far more circumscribed than that of the trial court.[16] The authority to suggest a remittitur is implied by law and is not granted by statute.[17] If the trial judge approves the verdict without suggesting a remittitur, the Court of Appeals must affirm the verdict if there is any material evidence to support it.[18] "The material evidence analysis is very deferential to the award by the jury and the judgment of the trial court when it affirms the verdict as the thirteenth juror."[19] "Any" material evidence truly means "any" and the presence of any material evidence to support the verdict requires that it be affirmed.[20] The same standard applies if an appellate court proposes to further reduce a verdict already remitted by the trial judge.[21] The Tennessee Supreme Court has summed up this aspect of remittitur law with these words:

> Thus, regardless of whether the trial court suggested a remittitur of the jury's verdict, the standard for the appellate court to suggest remittitur of a jury's verdict is extraordinarily high. The appellate court may suggest remittitur only if it finds that the award exceeds the uppermost boundary of the range of reasonableness under the evidence presented, *i.e.,* the amount beyond which there is no evidence, upon any reasonable view of the case, to support the verdict. Where the trial court has suggested a remittitur, the Court of Appeals (or, for that matter, this Court) cannot grant its own further remittitur unless the award, even as remitted by the trial court, is more than the upper limit of the range of reasonableness, *i.e.,* not supported by material evidence. In other words, if the amount as remitted by the trial court is supported by material evidence, the appellate court has no authority to grant a further remittitur.[22]

If the Court of Appeals does suggest a remittitur of a trial court-approved jury verdict, the Court of Appeals would be advised to review the evidence and state clearly how the material evidence does not support the jury's verdict.[23] If a verdict is remitted by the Court of Appeals, the plaintiff may (a) accept the remitted amount; (b) insist on a new trial; or (c) accept the new reduced amount under protest and apply to the Tennessee Supreme Court for permission to appeal.[24]

The Court of Appeals also has the right to increase the size of the remittitur (*i.e.* further reduce the verdict) granted by the trial court (*i.e.,* reduce the verdict even further)[25] assuming, of course, that it applies the proper standard to its consideration of the issue. All of these actions are reviewable by the Tennessee Supreme Court, if the court exercises its discretion to hear the case.

Finally, a motion for a remittitur cannot be used to ask the trial judge to re-allocate the fault percentages attributed to those parties and non-parties on the verdict form in a trial involving the law of comparative fault. Neither an appellate judge nor a trial judge who is dissatisfied with the fault percentages determined by a jury can adjust the percentage amounts decided by the jury.[26] The only alternative for those seeking a re-allocation of fault is to persuade the trial judge to grant a motion for a new trial.[27]

Additur Motions in the Trial Court

There is a statutory right to seek an increase in the amount of a jury verdict (an "additur") awarding either compensatory or punitive damages. The relevant statute is Tenn. Code Ann. § 20-10-101.

Our courts have declared that the "practice of using additur is in the interest of the sound administration of justice. ...This practice avoids the necessity of a new trial with its accompanying expense and delay."[28]

A request for an additur is raised in conjunction with a motion for new trial under Rule 59.07 of the Tennessee Rules of Civil Procedure. The motion must be filed within thirty days after the entry of judgment.[29] The proper way of raising the issue is to specifically ask the court in the motion for new trial

continued to page 35

continued from page 34

to exercise its statutory authority and increase the verdict because the amount awarded by the jury is inadequate given the evidence in the case.

The Trial Judge's Role When Faced With a Motion For an Addittur

When faced with a motion for new trial or an additur, the trial judge serves as the thirteenth juror in the case. As will be discussed in more detail below, the trial judge has tremendous power here, because the appellate courts have consistently declared that "[t]he amount of the verdict is primarily for the jury to determine, and next to the jury the most competent person is the judge who presided at trial and heard the evidence."[30]

The trial judge may grant adjustments in the amount of the jury verdict, even if the verdict is within the range of reasonableness, if the judge is of the opinion that the jury verdict is inadequate.[31] However, the trial judge cannot suggest an additur that is so great that it would "bear[ ] absolutely no relation to the jury's verdict" or which "totally destroys the jury's verdict."[32]

Evans v. Wilson[33] reminds us that under Tenn. Code Ann. § 20-10-101:

> [T]he trial court can only suggest an additur. It cannot order an additur. As the statute makes clear, once the defendant accepts the suggestion of additur (whether or not under protest), the trial court then enters an order making the prior jury verdict plus the additur the judgment of the court. That order should also deny the motion for new trial, an order appealable by the Plaintiff.
>
> In the event that the Defendant does not accept the additur, the trial court must enter a further order granting the motion for new trial. The order suggesting additur and granting a new trial is only provisional and is not self-executing. The order granting a new trial is not a final judgment and is not appealable as of right. Tenn. R. App. P. 3(a).[34]

Evans also gives us guidance about the proper procedure to be followed by the trial judge when suggesting an additur:

> [A] trial judge in suggesting an additur, must establish a time frame in which the defendant may accept the suggestion. If the defendant does not accept the suggestion within the allotted time, the suggestion will be deemed rejected. The defendant should be given a reasonable time in which to accept, determined by the sound discretion of the trial judge, but not to exceed 30 days. The 30 day limitation period does not preclude the trial court from enlarging the time under Rule 6.02, Tenn. R. Civ. P.[35]

It is advisable that a trial judge set forth in writing his or her reason(s) for suggesting an additur.[36]

Options Available to Defendant When an Addittur is Suggested

If an additur is suggested, a defendant has three options. First, the defendant can reject the additur (or simply not accept it within the time set by the trial judge) and the trial judge will enter an order granting the plaintiff a new trial.[37] Mere silence by a defendant to an additur suggested by the trial judge is not acceptance of the additur.[38] The most appropriate way for a defendant to reject an additur is to file an appropriate notice with the clerk of court.[39]

Second, the defendant can accept the suggestion of the additur and pay the judgment as increased by the trial judge. Once again, the most appropriate way to accept an additur is by filing a notice to that effect with the clerk.

Third, the defendant can accept the additur under protest and appeal the trial court's order.[40] This too should be accomplished by filing an appropriate notice.

Recourse Available to Plaintiff If Motion for Additur is Denied

If a request for additur is denied and the motion for new trial is also denied, plaintiff can file an appeal. However, a plaintiff seeking appellate review on the issue of inadequacy of damages alone must remember that an appellate court in Tennessee cannot grant an additur,[41] and cannot increase a trial court's additur.[42] Therefore, a plaintiff complaining only about an inadequate verdict will have to convince the appellate court that the trial judge erred in not granting the motion for new trial on that basis.

Role of Appellate Court When Additur Has Been Suggested

The appellate court will only address the issue of an addittur when (a) the trial judge has suggested an additur and (b) the additur has been accepted under protest.

The role of an appellate court in determining whether the trial judge appropriately granted an additur is the same standard used for determining whether a remittitur was appropriate:

> The role of the appellate courts is to determine whether the trial court's adjustments [to the jury's verdict] were justified, giving due credit to the jury's decision regarding the credibility of the witnesses and due deference to the trial court's prerogatives as thirteenth juror.
>
> First, we examine the reasons for the trial court's action since adjustments are proper only when the court disagrees with the amount of the verdict. Second, we examine the amount of the suggested adjustment since adjustments that "totally destroy" the jury's verdict are impermissible. Third, we review the proof of damages to determine whether the evidence preponderates against the trial court's adjustment.[43]

continued to page 36

continued from page 35

This analysis is conducted with the standard of review set forth in Tenn. R. App. P. 13(d), *i.e.,* "the review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise." *Evans v. Wilson*[44] tells us what happens next:

> If the Court of Appeals is of the opinion that the verdict of the jury should not have been increased or that the amount of the additur is improper, but that the judgment of the trial court is correct in all other respects, the case shall be reversed to that extent, and the Court of Appeals may order remitted all or any part of the additur.[45]

Why can an appellate court order a decrease in an additur but not grant an additur? Because the Court of Appeals has the implied authority to remit a judgment,[46] but not the authority to grant an additur. The courts have indicated time and again that there is no numerical standard for reviewing additurs or remittiturs.[47]

Finally, as indicated in the discussion about remittiturs, a trial court cannot alter comparative fault percentages as determined by a jury to either increase (or decrease) the damages awarded to a plaintiff.[48]

ABOUT THE AUTHOR

John A. Day, a TTLA Past President and Fellow of the American College of Trial Lawyers, practices plaintiff's personal injury and wrongful death across Tennessee. This article is a revision and update of two chapters of his 2014 book, Tennessee Law of Civil Trial.

1 *Bates v. Jackson,* 639 S.W.2d 925, 927 (Tenn. 1982).
2 *Long v. Mattingly,* 797 S.W.2d 889, 896 (Tenn. Ct. App. 1990).
3 *Poole v. Kroger Co.,* 604 S.W.2d 52, 54 (Tenn.1980).
4 *Foster v. Amcon Intern, Inc.,* 621 S.W.2d 142, 147 (Tenn. 1981). This holding was essentially affirmed in *Borne v. Celadon Trucking Services, Inc.,* ---S.W.3d ---, 2017 WL 4773354, *24 (Oct. 20, 2017).
5 *Thrailkill v. Patterson,* 879 S.W.2d 836, 840 (Tenn. 1994).
6 *Palanki v. Vanderbilt University,* 215 S.W.3d 380, 386 (Tenn. Ct. App. 2006).
7 The Tennessee Supreme Court is well aware (a) of the absence of jury verdicts in published opinions; (b) that many cases are resolved outside the courtroom and the absence of those cases can skew the results; (c) that the requirement of "similar" plaintiffs with "similar" injuries presents a challenge. *Meals ex rel Meals v. Ford Motor Co.,* 417 S.W.3d 414, 425-426 (Tenn. 2013).
8 *Foster v. Amcon Int'l, Inc.,* 621 S.W.2d 142, 148 (Tenn. 1981).
9 *Compare Webb v. Canada,* No. E2006-01701-COA-R3-CV, 2007 WL 1519536, at *4 (Tenn. Ct. App. May 25, 2007) (citing cases in which remittiturs ranging from 40% to 59% were found to not destroy the jury's verdict), *with Guess v. Maury,* 726 S.W.2d 906, 913 (Tenn. Ct. App.1986) (holding that 75% remittitur destroyed the verdict), *overruled on other grounds by Elliott,* 320 S.W.3d at 252, *and Myers v. Myers,* No. E2004-02135-COA-R3-CV, 2005 WL 1521952, at *1 (Tenn. Ct. App. June 27, 2005) (holding that 70% remittitur destroyed the verdict). *See also West v. Epiphany Salon & Day Spa, LLC,* No. E2016-01860-COA-R3-CV (Tenn. Ct. App. April 25, 2017) (affirming a 61.8% remittitur in a negligence case claiming damages from a facial salon procedure, where the evidence showed that plaintiff had approximately $8,000 in economic damages but the jury returned a verdict of $125,000; testimony showed that plaintiff's only lifestyle changes were that it took her 30 minutes each morning to do her makeup, and that she had to wear a hat, sunglasses, and a stronger sunscreen when spending time in the sun).
10 *Borne v. Celadon Trucking Services, Inc.,* ---S.W.3d ---, 2017 WL 4773354, *24 (Oct. 20, 2017).
11 *Id.* at *25-27 (Oct. 20, 2017). "The trial court's explanation need not be exhaustive, but it should indicate the areas in which it disagreed with the jury, including disagreement with any factual findings underlying the jury's verdict or with testimony apparently credited by the jury." *Id.* at 30.
12 *Myers v. Myers,* No. E2004-02135-COA-R3-CV, 2005 WL 1521952 (Tenn. Ct. App. June 27, 2005).
13 ---S.W.3d ---, 2017 WL 4773354, *24-5 (Oct. 20, 2017) (citations and internal quotation marks omitted).
14 *Id.* at *31.
15 Tenn. Code Ann. §20-10-103.
16 *Coffey v. Fayette Tubular Prods.,* 929 S.W.2d 326, 331 & n. 2 (Tenn. 1996), cited with approval in *Meals ex rel Meals v. Ford Motor Co.,* 417 S.W.3d 414, 422 (Tenn. 2013).
17 *Borne v. Celadon Trucking Services, Inc.,* ---S.W.3d ---, 2017 WL 4773354, *19 (Oct. 20, 2017).
18 *Id.*
19 *Id.* at *20.
20 *Id.*
21 *Id.*("We see no reason why the Meals material evidence standard would not remain applicable where the trial court has suggested a remittitur because, in such a case, the trial judge has in fact approved the jury's verdict up to the remitted amount.")
22 *Id.* at *21 (citations and internal quotation marks omitted).
23 *Id.* at 22 (appellate court remittitur of loss of enjoyment of life portion of verdict reversed because of no finding that the jury's award, as remitted by the trial judge, was not supported by material evidence.) *Meals ex rel Meals v. Ford Motor Co.,* 417 S.W.3d 414, 423 (Tenn. 2013) (the Court noted that the Court of Appeals did not discuss the evidence when remitting a trial court-approved jury verdict; remittitur reversed).
24 *Meals ex rel Meals v. Ford Motor Co.,* 417 S.W.3d 414, 423 (Tenn. 2013).
25 *Id.*
26 *Turner v. Jordan,* 967 S.W.2d 815, 824 (Tenn. 1997).
27 *Id.*
28 *Foster v. Amcon Intern., Inc.,* 621 S.W.2d 142, 147 (Tenn. 1981), citing *Genzel v. Halvorson,* 248 Minn. 527, 80 N.W. 2d 854, 857 (1957).
29 Tenn. R. Civ. P. 59.02.
30 *Foster v. Amcon Intern., Inc.,* 621 S.W.2d 142, 147 (Tenn. 1981), citing *Smith v. Shelton,* 569 S.W.2d 421, 427 (Tenn. 1978).
31 *Id.* at 147.
32 *Id.* at 148.
33 *Evans v. Wilson,* 776 S.W.2d 939, 941 (Tenn. 1989).
34 *Evans,* at 941 (citation omitted).
35 *Id.*
36 A written statement of reasons for remittiturs was recently announced in *Borne v. Celadon Trucking Services, Inc.,* ---S.W.3d ---, 2017 WL 4773354, *24 (Oct. 20, 2017), and it is reasonable to assume that the Tennessee Supreme Court will mandate a similar requirement for a decision to suggest an additur.
37 Tenn. Code Ann. § 20-10-101(b).
38 *Evans,* at 941.
39 *Cf. Webb v. Canada,* 2007 WL 1519536, at *2 (Tenn. Ct. App. May 25, 2007) (remittitur case; plaintiff signed final judgment with remitted figure as judgment amount; court said that the better practice would be to file a separate written acceptance of the remittitur).
40 Tenn. Code Ann. § 20-10-101(b).
41 *Poole v. Kroger Co.,* 604 S.w.2d 52, 54 (Tenn. 1980); *Kinnard v. Taylor,* 39 S.W.3d 120, 121 n. 1(Tenn. Ct. App. 2000).
42 *Wilkerson v. Altizer,* 845 S.W.2d 744, 749-50 (Tenn. Ct. App. 1992).
43 *Long v. Mattingly,* 797 S.W.2d 889, 896 (Tenn. Ct. App. 1990). For a recent case discussing the rule, read *Bonner v. Deyo,* No. W2014-00763-COA-R3-CV (Tenn. Ct. App. Dec. 5, 2014). Plaintiff brought suit related to a car accident, and defendant conceded liability. Jury awarded plaintiff $3,577.00 for medical expenses but declined to award any compensation for non-economic damages including pain of suffering, loss of enjoyment, and loss of consortium. Trial court suggested a $10,000 additur, and the Court of Appeals affirmed. Court of Appeals found that (1) trial judge had disagreed with the amount of the verdict; (2) amount of additur did not totally destroy the jury verdict, despite defendant's argument that adding non-economic damages where the jury had refused to award them would destroy the verdict; and (3) that the evidence did not preponderate against the additur. The Tennessee Supreme Court recently reaffirmed *Long v. Mattingly in Borne v. Celadon Trucking Services, Inc.,* ---S.W.3d ---, 2017 WL 4773354, *24-25 (Oct. 20, 2017).
44 *Evans v. Wilson,* 776 S.W.2d 939 (Tenn. 1989).
45 *Id.* at 940.
46 *Borne v. Celadon Trucking Services, Inc.,* ---S.W.3d ---, 2017 WL 4773354, *18-19 (Oct. 20, 2017).
47 *Meals ex rel Meals v. Ford Motor Co.,* 417 SW.3d 414, 420 fn. 8 (Tenn. 2013).
48 *Turner v. Jordan,* 957 S.W.2d 815, 823-24 (Tenn. 1997).