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Apr 04 2023

SC Court of Appeals

April 4, 2023

Via E-mail Only

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
ctappfilings@sccourts.org

Re: *Tiffany Provence v. Dominion Energy*
Appellate Case No. 2020-000071

Dear Mrs. Kitchings:

Appellant submits this letter under Rule 208(b)(7), SCACR, to advise the Court of pertinent supplemental citations prior to the April 6, 2023 oral argument in this case. The below citations pertain to sections II and III of Appellant's Argument.

1. *Morga v. FedEx Ground Package Sys.*, 512 P.3d 774 (N.M. 2022)
2. *Coogan v. Borg-Warner Morse Tec Inc.*, 2021 WL 2835358 (Wash. 2021)
3. Broillet, Bruce, *Quiet Reflections on Profound Loss*, Advocate (Jan. 2020)
4. Verdict Forms/ Form 4 Judgments in: (1) *Garvin v. AGCO Corp.*, 2012-CP-40-6675 (Richland County 2013); (2) *Keene v. Celanese*, 2013-CP-42-03915 (Spartanburg County 2015); (3) *Glenn v. Fisher Controls*, 2015-CP-04-01607 (Anderson County 2018); *Plant v. Whittaker Clark & Daniels*, 2022-CP-40-1265 (Richland County 2023).

By copy of this letter, I am serving all counsel of record via email only. Thank you.

With kind regards, I am,

s/Kathleen C. Barnes

Enclosures

cc: William E. Applegate, IV (*via email*)
Liam D. Duffy (*via email*)
Perry M. Buckner, IV (*via email*)
Shanon N. Peake (*via email*)
G. Murrell Smith, Jr. (*via email*)
Steven J. Pugh (*via email*)
Megan C. White (*via email*)
Tracey C. Green (*via email*)



Neutral

As of: March 30, 2023 4:17 PM Z

Morga v. FedEx Ground Package Sys.

Supreme Court of New Mexico

May 19, 2022, Filed

No. S-1-SC-36918

Reporter

2022-NMSC-013 *; 512 P.3d 774 **; 2022 N.M. LEXIS 19 ***

ALFREDO MORGA, Individually and on behalf of the Estate of YLAIRAM MORGA, Deceased, and as Next Friend of YAHIR MORGA, Minor Child; and RENE VENEGAS LOPEZ, Individually and as the Administrator of the Estate of MARIALY RUBY VENEGAS MORGA, Deceased, and GEORGINA LETICIA VENEGAS, Individually, Plaintiffs-Respondents, v. FEDEX GROUND PACKAGE SYSTEM, INC., RUBEN'S TRUCKING, LLC a/k/a RUBEN REYES a/k/a SHOOTER'S EXPRESS TRUCKING, INC., the Estate of ELIZABETH SENA QUINTANA, and M&K'S TRUCKING, INC., Defendants-Petitioners.

Subsequent History: Released for Publication July 12, 2022.

Prior History: [***1] ORIGINAL PROCEEDING ON CERTIORARI. Francis J. Mathew, District Judge.

Morga v. FedEx Ground Package Sys., 2018-NMCA-039, 420 P.3d 586, 2018 N.M. App. LEXIS 8, 2018 WL 797539 (N.M. Ct. App., Feb. 6, 2018)

Counsel: Edward R. Ricco, Jeffrey M. Croasdel, Jocelyn C. Drennan, Brenda M. Saiz, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, NM; William M. Jay, Goodwin Procter LLP, Washington, DC, for Petitioners.

K. Joseph Cervantes, Cervantes Law Firm, P.C., Las Cruces, NM; James Franklin Scherr, Sam Jackson Legate, Scherr & Legate, PLLC, El Paso, TX; Linda Helen Bennett, L. Helen Bennett, P.C., Albuquerque, NM; Daniel Anchondo, El Paso, TX, for Respondents.

Mark Standridge, Jarmie & Rogers, P.C., Las Cruces, NM, for Amicus Curiae, New Mexico Defense Lawyers Association.

Monica R. Garcia, Rheba Rutkowski, Butt, Thornton & Baehr, P.C., Albuquerque, NM, for Amicus Curiae, Trucking Industry Defense Association.

Judges: JULIE J. VARGAS, Justice. WE CONCUR: C. SHANNON BACON, Chief Justice, DAVID K. THOMSON, Justice, ERIN B. O'CONNELL, Judge, Sitting by designation.

Opinion by: JULIE J. VARGAS

Opinion

[**779] VARGAS, Justice.

[*1] This case highlights the respective roles that the district court judge and the jury each serve in the inherently difficult task of awarding monetary damages for nonmonetary injuries. The jury awarded four Plaintiffs a total of more than \$165 million [***2] in damages to compensate them for a tragic accident that claimed half of a young family in a single instant and left surviving family members physically and emotionally injured. Defendants appealed the verdict as excessive, contending it was not supported by substantial evidence and was tainted by passion or prejudice. The Court of Appeals affirmed the verdict. *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, ¶ 1, 420 P.3d 586. We granted certiorari to consider whether the Court of Appeals erred by (1) applying an abuse of discretion standard to review the district court's denial of Defendants' motion for a new trial because the ruling was made by a successor judge who did not oversee the trial, and (2) affirming the district court's denial of Defendants' motion for a new trial on grounds that the verdict was excessive. We conclude that the Court of Appeals did not err in either respect. First, because we review claims of excessive verdicts de novo, we need not adopt a new standard of review for decisions of successor judges assigned under the circumstances of this case, as requested by Defendants, and we decline to do so. Next, we conclude under our current law that substantial evidence supported the verdict and the record does not reflect that [***3] the verdict was tainted by passion or prejudice. We therefore affirm the Court of Appeals.

I. BACKGROUND

[*2] The facts of this case are nothing short of tragic. In the predawn hours of June 22, 2011, a semi-truck hauling double

trailers crashed at high-speed into the back of a small pickup truck driven by Marialy Morga. The semi-truck was operated by FedEx Ground Package System, Inc. (FedEx) and driven by Elizabeth Quintana, who was employed by independent contractors of FedEx (collectively, Defendants).

[*3] At the time of the accident, Marialy had her flashers on and was either stopped or moving very slowly traveling west in the right-hand lane. A witness to the accident testified that he watched as the FedEx semi-truck came upon Marialy's pickup truck without slowing down or taking any evasive action. He explained that

[i]t seemed that the driver of the FedEx truck never saw the [pickup] truck. It just overtook it. On impact . . . the double trailers in the back, the back trailer bucked, moved up, and they buckled and folded forward. The cab of the FedEx truck collapsed in on itself on top of the small truck,

demolishing the pickup truck and creating a black cloud that enveloped the entire **[***4]** scene. **[**780]** The FedEx semi-truck was traveling at sixty-five-miles per hour when it hit the pickup truck. The record indicates Elizabeth Quintana was distracted when she hit the pickup truck, did not attempt to brake prior to the collision, and simply ran right over the pickup truck, causing an "extremely severe impact" that "absolutely destroyed" it.

[*4] The impact claimed the lives of Elizabeth Quintana, twenty-two-year-old Marialy, and her four-year-old daughter Ylairam. Marialy's toddler son Yahir survived but was critically injured.

A. District Court Proceedings

[*5] Alfredo Morga, individually, as personal representative of Ylairam, and as next friend of Yahir, filed suit against Defendants seeking damages including those for Ylairam's wrongful death, Yahir's physical injuries, and Mr. Morga's own emotional and physical injuries and loss of consortium of his wife and daughter. Marialy's father, Rene Venegas Lopez, brought suit for Marialy's wrongful death as personal representative of her estate.¹ Plaintiffs sought compensatory damages, including noneconomic damages, and punitive damages for their injuries and Marialy's and Ylairam's wrongful deaths.

[*6] At the close of the evidence, the jury **[***5]** was instructed to consider economic damages in the form of

funeral and burial costs, lost value of household services and earning capacity considering their respective "health, habits, and life expectanc[ies]" for the loss of Ylarim and Marialy, as well as noneconomic damages for the value of their lives "apart from . . . earning capacity" and the loss of parental guidance and counseling from Marialy to her son, Yahir. With respect to damages to Alfredo and Yahir, the jury was instructed to consider economic damages for "medical care, treatment and services received and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future[, t]he nature, extent and duration of the injury," and any exacerbation of a prior injury. In awarding noneconomic damages, the jury was also instructed to consider the past and future pain and suffering,² loss of enjoyment of life, and emotional distress suffered as a result of the accident.

[*7] The district court directed the jury that in determining the amount awarded, there was no fixed method of valuing noneconomic damages including pain and suffering or loss of enjoyment of life, **[***6]** and that jurors were to use "the enlightened conscience of impartial jurors acting under the sanctity of [their] oath to compensate the beneficiaries with fairness to all parties to this action." The jury was further cautioned in multiple instructions that the verdict must be based on the evidence presented and that "sympathy or prejudice for or against a party should not affect [the] verdict and [was] not a proper basis for determining damages."

[*8] The jury entered its verdict, awarding damages totaling \$61,000,000 for the wrongful death of Ylairam Morga, \$32,000,000 for the wrongful death of Marialy Morga, \$32,000,000 for the personal injury to Yahir Morga, \$40,125,000 for the personal injury to Alfredo Morga, \$208,000 for the damages suffered by Rene Venegas, and \$200,000 for the damages suffered by Georgina Venegas.³

[*9] Following the entry of the verdict, the district court judge recused herself after participating in an ex-parte communication with Plaintiffs' counsel. A successor judge was appointed pursuant to Rule 1-063 NMRA.

²Pain and suffering as an element of noneconomic damages was limited to the claims raised by Alfredo and Yahir. Because Defendants' expert testified that death for both Marialy and Ylairam was instantaneous and Plaintiffs did not present evidence that there was a period of pain and suffering between the time of impact and death, the district court dismissed Plaintiffs' claims for pain and suffering for Marialy and Ylairam.

³The claims of Mr. Venegas and Ms. Venegas, the parents of Marialy Morga, were settled while this case was pending before the Court of Appeals and are not at issue here.

¹Alfredo Morga and Rene Venegas Lopez are referred to collectively as "Plaintiffs."

[*10] Defendants timely filed a motion for a new trial or remittitur⁴ on the ground [**781] that the verdict was excessive, arguing that it was not supported by substantial evidence [***7] and was tainted by passion or prejudice. The successor judge heard argument on this motion and ultimately denied the motion, finding that substantial evidence supported the verdict and that the verdict was not tainted by passion or prejudice. Defendants appealed to the Court of Appeals.

B. The Decision of the Court of Appeals

[*11] Applying an abuse of discretion standard, the Court of Appeals affirmed the verdict and the successor judge's denial of a new trial or remittitur, concluding that the verdict was supported by substantial evidence and was not tainted by passion or prejudice. *Morga*, 2018-NMCA-039, ¶¶ 1, 25, 37, 52. The Court of Appeals rejected Defendants' invitation to apply a de novo standard of review to the successor judge's decision and emphasized the value New Mexico's judiciary places on juries and district courts to determine the value of human life. *See id.* ¶¶ 10, 25. While the Court of Appeals applied an abuse of discretion standard of review to the successor judge's decision to deny Defendants' motion for a new trial or remittitur, it acknowledged that "even when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo." *Id.* ¶ 8.

[*12] The Court of Appeals set forth all [***8] of the compensatory damage evidence individually for each Plaintiff and held that substantial evidence supported the verdict, *id.* ¶¶ 14-23, concluding that Defendants did not "identif[y] any of Plaintiffs' evidence deemed insufficient to support the jury's award of non-economic damages" or explain the "type of additional evidence . . . necessary to support such an award." *Id.* ¶ 29. The Court of Appeals also found that Defendants failed to meet their burden to show that passion, prejudice, sympathy, or mistake affected the verdict, concluding that none of the instances Defendants pointed to were sufficient to make such an inference. *Id.* ¶¶ 32, 46. Upon petition by Defendants, this Court granted certiorari.

II. DISCUSSION

A. Defendants Are Not Entitled To a De Novo Standard of Review on Their Motion for a New Trial

[*13] Under the circumstances of this case, Defendants encourage us to deviate from our long-standing practice of reviewing denials of motions for a new trial under an abuse of discretion standard. Defendants instead contend that because the successor judge did not oversee the trial, his denial of their motion for a new trial should be reviewed de novo. Defendants argue that the decision of a successor judge is [***9] not entitled to the deference incorporated into a review for an abuse of discretion. Rather, Defendants reason, such deference should be reserved for the judge who participated in the trial and had the opportunity to observe the witnesses and the jury. Defendants ask us to instead adopt a de novo standard of review for decisions of a successor judge, and contend that under this standard the verdict here is excessive. We disagree, and decline to adopt a different standard of review here.

[*14] Defendants' standard of review argument misunderstands the application of the existing standards to this case. "The district court has broad discretion in granting or denying a motion for new trial, and such an order will not be reversed absent clear and manifest abuse of that discretion." *Estate of Saenz v. Ranack Constructors, Inc.*, 2018-NMSC-032, ¶ 19, 420 P.3d 576 (internal quotation marks and citation omitted); *see also Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 13, 146 N.M. 853, 215 P.3d 791 ("[T]he denial of a motion for a new trial or remittitur is [reviewed for an] abuse of discretion."). An abuse of discretion occurs when the lower court's decision is contrary to law, logic, or [**782] reason. *See Perkins v. Dep't of Hum. Servs.*, 1987-NMCA-148, ¶ 19, 106 N.M. 651, 748 P.2d 24 (providing that the district court abuses its discretion if its decision "has not proceeded in the manner required by law" or "is contrary to logic [***10] and reason") (internal quotation marks and citation omitted). And, in the context of a motion for a new trial based on an excessive verdict, a district court abuses its discretion when it fails to exercise its discretion in the first instance "despite the predicate findings and the court's conviction that the award should be reduced," *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶ 12, 125 N.M. 292, 960 P.2d 834, or when it "misapprehends the law or if the decision is not supported by substantial evidence." *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 7, 136 N.M. 599, 103 P.3d 39. "[W]here it is shown . . . that the verdict of the jury on the question of damages is clearly not supported by substantial evidence

⁴ Defendants did not request the relief of remittitur on appeal, nor did they rebut Plaintiffs' claim of abandonment in their reply brief or request it of this Court at oral argument. Therefore, we conclude that Defendants' remittitur argument has been abandoned, and we will not address it. *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, ¶ 81, 134 N.M. 243, 75 P.3d 843 (explaining that arguments raised below but not on appeal are deemed abandoned); *State v. Aragon*, 1990-NMCA-001, ¶ 2, 109 N.M. 632, 788 P.2d 932 (providing that issues not briefed on appeal are deemed abandoned).

adduced at the trial of the case, a motion for a new trial should be granted, and not to do so is an abuse of discretion." *Jones v. Pollock*, 1963-NMSC-116, ¶ 12, 72 N.M. 315, 383 P.2d 271. In other words, it is an abuse of discretion to deny a motion for a new trial when the district court finds that substantial evidence does not support the verdict. See *Chrysler Corp.*, 1998-NMCA-085, ¶¶ 1, 11-12 (holding that the district court "abused its discretion in failing to act upon its findings regarding an excessive verdict" when the judge "repeatedly stated that the jury's award of damages shocked the conscious of the court" but denied a motion for remittitur or new trial).

[*15] While we review the denial of a motion for a new trial for [***11] an abuse of discretion, whether a verdict is excessive is reviewed as a matter of law, *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 49, 127 N.M. 47, 976 P.2d 999, and we review matters of law de novo, "without deference to the district court's legal conclusions." *Primetime Hosp., Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 10, 146 N.M. 1, 206 P.3d 112. Only after we have conducted our de novo review and determined whether the jury's verdict was excessive do we consider whether the district court abused its discretion by denying Defendants' motion for a new trial. See *Chrysler Corp.*, 1998-NMCA-085, ¶¶ 11-12 (holding that the district court abused its discretion when it concluded that insufficient evidence supported the damage award but denied the defendant's motion for a new trial). Under the circumstances, we see no reason to deviate from our traditional standard of review for a denial of a motion for a new trial, as our review of the size of the jury's verdict to determine whether it was excessive is de novo.

B. The Verdict Is Not Excessive As a Matter of Law

[*16] Defendants do not contest liability or the economic damages awarded to Plaintiffs in this case. Rather, they claim it is the award of noneconomic damages—those most difficult to assess—that render the verdict excessive and mandate a new trial. See *Chrysler Corp.*, 1998-NMCA-085, ¶ 13 (noting the difficulty in calculating noneconomic damages).

[*17] A new trial [***12] is appropriate when "the jury's award of damages is so grossly out of proportion to the injury received as to shock the conscience." *Id.* ¶ 9 (brackets, internal quotation marks, and citation omitted). As we review whether an award shocks the conscience, we do not weigh the evidence but determine whether the verdict is excessive as a matter of law. See *Coates*, 1999-NMSC-013, ¶ 49. The jury's award is excessive if (1) "the evidence, viewed in the light most favorable to [the] plaintiff, [does not] substantially support[] the award," or (2) "there is an indication of passion,

prejudice, partiality, sympathy, undue influence[,] or a mistaken measure of damages on the part of the fact finder."⁵*Gonzales v. Gen. Motors Corp.*, 1976-NMCA-065, ¶ 30, 89 N.M. 474, 553 P.2d 1281; see also *Chrysler Corp.*, 1998-NMCA-085, ¶ 9 (same).

[*18] As we conduct our de novo review to determine whether the verdict was [***783] excessive, we remain mindful of both the inherently difficult task of assigning monetary value to nonmonetary losses and the proper roles that the jury and the district court judge play in making this determination. The valuation of noneconomic damages is an "inexact undertaking at best," and "there can be no standard fixed by law for measuring the value of [noneconomic damages]." *Chrysler Corp.*, 1998-NMCA-085, ¶ 13 (internal quotation marks and citation omitted). Given the [***13] difficulty, as well as the lack of a fixed standard, in assessing noneconomic loss, it is well settled that this valuation is left to the jury. See Herbert M. Kritzer et al., *An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 Wm. & Mary L. Rev. 971, 980 (2014) (explaining that placing monetary value on noneconomic harm "requires human judgment to convert the injury into a monetary sum, typically determined by a jury"); *Baxter v. Gannaway*, 1991-NMCA-120, ¶ 15, 113 N.M. 45, 822 P.2d 1128 (acknowledging that given the lack of a fixed standard the amount awarded "is left to the fact finder's judgment"); *Dimick v. Schiedt*, 293 U.S. 474, 480, 55 S. Ct. 296, 79 L. Ed. 603 (1935) ("[I]n cases where the amount of damages [is] uncertain their assessment [is] a matter so peculiarly within the province of the jury that the Court should not alter it." (internal quotation marks and citation omitted)).

[*19] While it is the jury's role to determine the amount of damages, our case law makes clear that the district court judge and the jury each serve a distinct role in trial proceedings. "It is a fundamental function of a jury to determine damages," and "its verdict is presumed to be correct." *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 16, 127 N.M. 1, 976 P.2d 1 (internal quotation marks and citation omitted). At the same time, a district court judge "is empowered to, with discretion, provide stability and order during the proceedings," [***14] keeping in mind that "the judge is a very potent figure, who must not use the position to exert power or influence over the jury." *Id.* The district court judge's "experience with juries in the community provides an indispensable safeguard built into our American civil jury system." *Chrysler Corp.*, 1998-NMCA-085, ¶ 14.

[T]he best way to arrive at a reasonable award of

⁵For brevity, we refer to this second test simply as "passion or prejudice."

damages is for the [district court] judge and the jury to work together, each diligently performing its respective duty to arrive at a decision that is as fair as humanly possible under the facts and circumstances of a given case.

Id. ¶ 16. "When the jury makes a determination and the [district] court approves, the amount awarded in dollars stands in the strongest position known in the law." *Id.* ¶ 14 (internal quotation marks and citation omitted). "The jury must be the exclusive evaluator of the evidence and the credibility of witnesses, with the [district] court only intervening when the jury's verdict is so against the weight of evidence that it would be a grave injustice to allow the verdict to stand." *Rhein v. ADT Auto., Inc.*, 1996-NMSC-066, ¶ 24, 122 N.M. 646, 930 P.2d 783. Taking the respective roles of the judge and jury into consideration, this Court will not disturb a jury's verdict except "in extreme cases." *Martinez v. Teague*, 1981-NMCA-043, ¶ 14, 96 N.M. 446, 631 P.2d 1314.

[*20] We recognize that [***15] under the circumstances of this case, the collaborative relationship between the district court judge and jury was disrupted by the recusal of the district court judge after the verdict was entered, preventing her from considering Defendants' motion for a new trial. However, Defendants received a thorough review of the record by the successor judge pursuant to Rule 1-063, which allows a successor judge to proceed "upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties." Here, the record reflects the successor judge took more than five months to review the extensive record in this matter. The successor judge explained at the hearing and certified in his order denying Defendants' motion for a new trial, that he had reviewed the pleadings, testimony, and the record. His review was evident from his extensive knowledge of the record and is reflected in his reasoned discussion of the close relationship Marialy shared with her parents, familiarity with objections sustained [**784] at trial, and the jurors' responses on the special verdict form. Defendants also received the benefit of the successor judge's experience with [***16] juries in the community, *see Chrysler Corp.*, 1998-NMCA-085, ¶ 14 (recognizing a judge's experience with juries in the community as an "indispensable safeguard"), allowing for a complete review of Defendants' motion.

1. The verdict is supported by substantial evidence

[*21] To determine if a verdict is supported by substantial evidence, "[t]he proper approach is to examine [the p]laintiff's evidence related to damages and determine whether that

evidence could justify the amount of the verdict." *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 22, 146 N.M. 853, 215 P.3d 791 We compare the amount awarded to the injury received and consider whether "the amount awarded is so grossly out of proportion . . . as to shock the conscience." *Lujan v. Reed*, 1967-NMSC-262, ¶ 32, 78 N.M. 556, 434 P.2d 378 (internal quotation marks and citation omitted). We will not disturb the jury's verdict unless "[t]he weight of evidence [is] clearly and palpably contrary to the verdict, and a new trial will only be granted where it is manifest to a reasonable certainty that justice has not been done." *Ruhe v. Abren*, 1857-NMSC-013, ¶ 10, 1 N.M. 247.

[*22] Defendants contend that the \$165 million verdict "far exceeds the sum the evidence can support," directing our attention to two circumstances of the verdict to prove their point. First, Defendants claim that the verdict is excessive in comparison to other verdicts, exceeding any prior [***17] wrongful death verdict. Second, Defendants argue that the excessive nature of the verdict is evident from the significant disparity between Plaintiffs' proven economic damages and the total award. We are not persuaded.

a. We are skeptical of the value of comparing verdicts and reject Defendants' comparisons

[*23] Arguing that "none of the relevant testimony revealed the existence of non-economic injuries that would be out of the ordinary for a case of this type," Defendants contend that the verdict's "excessiveness is confirmed by the fact that the award exceeds any prior wrongful-death verdict in this state." To support their point, Defendants invite us to compare the jury's award to other verdicts, contending that comparison is helpful to analyze whether a verdict is "supported by the evidence."

[*24] To be sure, this Court has previously acknowledged that because "value[s] of all things are arrived at on a relative basis," a comparison of verdicts along with the facts and circumstances of a case is sometimes helpful. *Vivian v. Atchison, Topeka & Santa Fe Ry. Co.*, 1961-NMSC-093, ¶ 11, 69 N.M. 6, 363 P.2d 620. However, our Court of Appeals has cautioned about the usefulness of such comparisons, noting that they "are not a proper basis for determining either excessiveness or inadequacy [***18] of damages . . . because the propriety of the amount of the damages awarded must be determined from the evidence in the case under consideration." *Schrib v. Seidenberg*, 1969-NMCA-078, ¶ 20, 80 N.M. 573, 458 P.2d 825. Indeed, as we noted in *Hanberry v. Fitzgerald*, "there can be no true comparison drawn between this and any other case which has been brought to our attention." 1963-NMSC-100, ¶ 35, 72 N.M. 383, 384 P.2d

256; see also *Maisel v. Wholesome Dairy, Inc.*, 1968-NMCA-038, ¶ 9, 79 N.M. 310, 442 P.2d 800 ("What this court may have done in other cases, or what courts of other jurisdictions may have decided in cases involving similar injuries, is of no consequence." (internal quotation marks and citation omitted)). Because each case must be decided on its own facts and circumstances, judges are not bound by those comparisons. *Vivian*, 1961-NMSC-093, ¶ 11.

[*25] In this case, Defendants did not provide the district court or the Court of Appeals with any comparable verdicts and instead relied solely on their assertion that the verdict was the largest in the history of the State "for wrongful death or comparable loss." However, on appeal to this Court, Defendants did provide some verdicts for comparison and at oral argument urged us to compare the verdict in this case to that of [*785] *Wachocki v. Bernalillo Cnty. Sheriff's Dep't*, 2010-NMCA-021, 147 N.M. 720, 228 P.3d 504. A comparison of this case to the *Wachocki* case only highlights why we hesitate to make such comparisons and why each case must be decided [***19] on its own facts and circumstances. See *Vivian*, 1961-NMSC-093, ¶ 11 (explaining each case must be decided on its own facts and circumstances). *Wachocki* was not decided by a jury, and the only similarity between this case and the *Wachocki* case is the fact that the decedent there and Marialy Morga were both twenty-two years old at the time of their deaths. *Wachocki*, 2010-NMCA-021, ¶ 3. The *Wachocki* decedent was a single man who lived with his brother and had no dependents. *Id.* ¶ 14. The district court in that case assessed the decedent's damages at \$3.7 million, *id.* ¶ 13, as compared to \$32 million awarded to the estate of Marialy Morga for her wrongful death. The difficulty in comparing the two cases becomes obvious when one considers that the award to Marialy Morga's estate for her wrongful death included, among other things, the loss of her opportunity to provide parental guidance and counseling to her children and build the life she had planned with her husband, damages that the *Wachocki* decedent did not appear to suffer. This is not to say that the *Wachocki* decedent's life was any less important or valuable. Instead, these differences serve to show the difficulty of comparing verdicts in cases where plaintiffs come to the court in very different circumstances, despite some similarities. [***20] The comparison becomes even more problematic when it is extended to the damages awarded to additional Plaintiffs in this case who each suffered their own independent injuries and who share no apparent similarities with the *Wachocki* decedent.

[*26] While the combined verdict for the four Plaintiffs in this case may exceed other wrongful death verdicts rendered by New Mexico Courts, we note that at least one New Mexico jury has issued a verdict comparable to the individual verdicts

rendered for Plaintiffs. *Hein v. Utility Trailer Mfg. Co.*, D-101-CV-2016-01541, is a wrongful death case involving the death of sixteen-year-old Riley Hein, who, like Marialy and Ylairam Morga, was killed in a trucking accident. *Id.*, Complaint for Wrongful Death and Loss of Consortium (1st Jud. Dist. Ct. June 22, 2016). The *Hein* jury concluded that the damages for Riley's death were \$38 million.⁶ *Id.*, Special Verdict Form (1st Jud. Dist. Ct. Aug. 23, 2019). That award was more than this jury awarded for the death of Marialy but less than it awarded for the death of Ylairam.⁷ Taking all of this into account, we are not convinced that any of the cases Defendants point to offer a meaningful comparison to the case at hand. [***21] And Defendants' comparison of the award in this case with the award in *Wachocki* illustrates why we remain "skeptical about the usefulness of comparing awards for [noneconomic damages] in other cases." *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 18, 215 P.3d 791. Rather, the "amount of awards necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and in the final analysis, each case must be decided on its own facts and circumstances." *Id.* (brackets, internal quotation marks, and citation omitted).

b. We reject Defendants' invitation to compare economic and noneconomic damages to determine whether the verdict is excessive

[*27] Defendants also point to the disparity between the economic and noneconomic damages awarded to support their claim that the jury's award was excessive. The Court of Appeals rejected Defendants' argument to establish excessive jury verdicts by comparing economic and noneconomic damages, referring to such a comparison as a "fixed mathematical formula[]" which is not "the proper basis for reversing a jury's non-economic [*786] damage award." *Morga*, 2018-NMCA-039, ¶ 31, 420 P.3d 586. Because there is frequently no readily identifiable relationship between economic damages and noneconomic damages, [***22] we agree with the Court of Appeals that placing noneconomic damages in a ratio with economic damages is not a proper method for determining whether the verdict is supported by substantial evidence. Doing so fails to account for severe harm that results even absent pecuniary loss.

⁶The jury then apportioned fault between the defendant and a third party.

⁷Following the entry of the verdict but before a judgment was entered in the *Hein* matter, the parties resolved all disputes and claims between them and dismissed the case. *Id.*, Stipulated Order of Dismissal with Prejudice (1st Jud. Dist. Ct. Mar. 23, 2020).

[*28] "Noneconomic damages include pain and suffering, future pain and discomfort, disfigurement, loss of enjoyment of life, mental anguish, and loss of consortium." 63B Am. Jur. 2d *Products Liability* § 1754 (2010) (footnotes omitted). Noneconomic damages also include the value of life itself. See *Romero v. Byers*, 1994-NMSC-031, ¶¶ 4, 25, 117 N.M. 422, 872 P.2d 840 (holding that the value of life itself is a compensable element of noneconomic damages). "By their very nature noneconomic damages are conceptually a contradiction in terms: they provide monetary compensation for an injury that is intangible in monetary terms." Kritzer et al., *supra*, at 975. A person can suffer severe injuries and even lose his or her own life without incurring significant economic loss. *Id.* at 980. "[T]he important substantive and methodological consequence of this observation is that using economic loss as the denominator for assessing noneconomic losses can be very misleading because economic loss does not **[***23]** always capture the severity of the injury in terms of the noneconomic consequences of that injury." *Id.*

[*29] Defendants acknowledged that "[t]here is no way to calculate [noneconomic] damage. This should be left up to the trier of fact." Defense counsel stated to the jury in closing argument, "I am not going to submit to you a number, because I agree the value of life—I don't want to insult anybody about the value of life in this case. But you have to rely on your own consciousness [sic] when you're looking at value of life," and "I have a lot of faith in the [j]ury system. I recommend to clients to go to a [j]ury, rely on a [j]ury. And I trust that all of you will look at this evidence and do the right thing."

[*30] We recognize that some elements of a plaintiff's economic damages may bear a relationship to a plaintiff's noneconomic harm, but most do not. An award of significant past and future medical expenses to treat a plaintiff's severe injuries may support an equally significant award of noneconomic damages for the plaintiff's pain and suffering. However, in a case such as this one where Marialy Morga and Ylairim Morga did not survive the impact of the accident and therefore did not **[***24]** incur any medical expenses but were deprived of life itself, including all the joys and benefits that accompany it, the relationship becomes more difficult to quantify. The correlation becomes even more problematic when evaluating noneconomic damages for a plaintiff with significant future earning capacity versus one with limited earning capacity. To allow such a relationship would unfairly benefit wealthier plaintiffs and place less value on the pain and suffering, and even on the lives, of those of less wealth. Tethering noneconomic harm to economic damages places a thumb on the scale for wealthier plaintiffs when pecuniary loss is merely one aspect of total injury and does not account for severe nonmonetary harm a plaintiff may suffer.

[*31] Indeed, this Court has long held that "recovery [for wrongful death] may be had even though there is no pecuniary injury." *Stang v. Hertz Corp.*, 1970-NMSC-048, ¶ 7, 81 N.M. 348, 467 P.2d 14. While some courts have held that the existence or lack of pecuniary damages is a factor to be considered in placing a dollar amount on a human life, see *Martinez v. Cont'l Tire Americas, LLC*, 476 F. Supp. 3d 1137, 1142 (D.N.M. 2020) ("The presence or absence of pecuniary damages is a factor to be considered in arriving at a monetary figure for the value of the deceased's life." (internal quotation marks **[***25]** and citation omitted)), this Court made clear that "the [Wrongful Death] Act goes beyond the loss of decedent's wages, and encompasses all damages that are fair and just." *Romero*, 1994-NMSC-031, ¶ 19. Thus, "the jury in a wrongful death action [must] determine fair and just compensation for the reasonably expected nonpecuniary rewards the deceased **[**787]** would have reaped from life as demonstrated by his or her health and habits." *Id.* ¶ 17.

[*32] New Mexico law specifically instructs juries to consider noneconomic damages apart from economic losses. See UJI 13-1830(4) NMRA (providing a separate line for a jury to award damages "apart from . . . decedent[s] earning capacity"); see also *Gutierrez v. Kent Nowlin Const. Co.*, 1981-NMCA-107, ¶ 16, 99 N.M. 394, 658 P.2d 1121 (citing the jury instruction listing earning capacity as a separate element of damages as support for upholding an award greater than the proven economic damages), *rev'd on other grounds*, *Kent Nowlin Const. Co. v. Gutierrez*, 1982-NMSC-123, ¶ 2, 99 N.M. 389, 658 P.2d 1116. And, "[i]rrespective of exemplary damages," *Folz v. State*, 1990-NMSC-075, ¶ 26, 110 N.M. 457, 797 P.2d 246, "substantial" noneconomic damages are permissible under our Wrongful Death Act (Act) because, in addition to compensation, the Act is also intended "to promote safety of life and limb by making negligence that causes death costly to the wrongdoer." *Stang*, 1970-NMSC-048, ¶¶ 9, 11. In sum, to tie an award of noneconomic damages to Plaintiffs' economic damages, as **[***26]** Defendants propose, is contrary to our existing law and would establish a dangerous policy of, in part, valuing human life based on a person's net worth.

[*33] Reviewing this verdict for excessiveness de novo, as we must, we conclude that substantial evidence supports the verdict. Considering all of the evidence in the light most favorable to the verdict, our deference to juries, and our hesitancy to make comparisons between verdicts and between economic and noneconomic damages, this Court cannot say that the weight of the evidence is clearly and palpably against the verdict and that it would be an injustice to let the verdict stand. See *Ruhe*, 1857-NMSC-013, ¶ 10 ("The weight of evidence must be clearly and palpably contrary to the verdict, and a new trial will only be granted where it is manifest to a

reasonable certainty that justice has not been done.").

[*34] To support their damages claim, Plaintiffs presented evidence of the deaths of Marialy and Ylairam Morga, as well as the physical and psychological injuries suffered by Alfredo and Yahir Morga resulting from the accident. The evidence showed that Alfredo's epilepsy, which had previously been controlled with medication, was exacerbated and that since the **[***27]** accident he has suffered from PTSD and major depressive disorder and would require psychiatric care. Alfredo testified that after the accident, he could not work for a period of three months and when he did return to work, the effects of the accident interfered with his ability to do his job properly such that he had to leave his job and find another occupation. The evidence presented also showed that Yahir suffered damage to his lungs, a head injury, a lacerated liver, multiple abrasions and contusions, and a broken leg, all requiring future medical treatment.

[*35] In addition to these losses, Plaintiffs also presented evidence of noneconomic losses through photographs and the testimony of Marialy's parents and sister and Alfredo, each of whom described Marialy and Ylairam, the close relationships Alfredo and Yahir had with them, the life they had together, their plans for the future, and the personal loss suffered as a result of their deaths. Alfredo testified about the night of the accident, explaining that when he arrived on the scene, he was warned against approaching the pickup truck where his wife and daughter remained. He testified about going to the hospital in El Paso where **[***28]** his son had been taken after the accident and staying there with his son for several days. Alfredo recounted how he was unable to participate in the planning of Marialy's and Ylairam's funeral services because he was with his son at the hospital.

[*36] Regarding Yahir's mental state, Plaintiffs presented testimony that Yahir may suffer "increased risk for psychological difficulties" in the future as a result of the early loss of his mother and sister. Plaintiffs also presented testimony that Yahir stopped talking after the accident and began waking at night crying for his mother and father.

[*37] Of note, Defendants do not attempt to explain why the award for each of the individual Plaintiffs is excessive, but instead argue **[**788]** that the cumulative verdict is excessive. To be sure, the cumulative verdict in favor of the four Plaintiffs is large. However, we cannot say that, viewing the evidence in the light most favorable to Plaintiffs, the individual damages awarded for the deaths of Marialy and Ylairam and the injuries incurred by Alfredo and Yahir are so excessive that "it is manifest to a reasonable certainty that justice has not been done." *Ruhe*, 1857-NMSC-013, ¶ 10. Accordingly, the conscience of this Court is **[***29]** not

shocked by the jury's award of damages for the lives of these four Plaintiffs. However, a verdict can be excessive notwithstanding a finding of substantial evidence if it was tainted by passion or prejudice.

2. Defendants have not shown that the verdict is a product of passion or prejudice

[*38] Defendants also argue that the verdict was tainted by passion or prejudice, entitling them to a new trial. While Defendants argue that it is "the plaintiffs' burden to submit record evidence sufficient to sustain a verdict," our law is clear that a party appealing the denial of a motion for new trial or remittitur "bears the burden of showing that the record supports its contention that there was error in the verdict." *Coates*, 1999-NMSC-013, ¶ 51. That is to say, it is Defendants who "must show that the verdict (i.e., damage awards) was infected with passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive." *Id.* (internal quotation marks and citation omitted).

[*39] Defendants raise four issues to support their claim that the jury's verdict was infected with passion or prejudice. Defendants first point to the size of the verdict as an indication that passion or prejudice tainted the jury's **[***30]** award. Defendants also point to three aspects of the trial to support their claim. Specifically, they contend that the emotional testimony of Alfredo Morga, an unredacted photograph of the accident scene, and allegedly inflammatory statements made by Plaintiffs' counsel during closing argument "explain the prejudice that motivated the jury's verdict." After reviewing Defendants' claims, we conclude Defendants did not meet their burden to show that the verdict was tainted by passion or prejudice, as we explain next.

a. The size of the verdict alone is insufficient to infer passion or prejudice

[*40] Initially we note that, while the verdict here is undeniably large, the size of a verdict alone is insufficient to infer it was affected by passion or prejudice unless it is "outrageously excessive and beyond all reason." *Henderson v. Dreyfus*, 1919-NMSC-023, ¶ 36, 26 N.M. 541, 191 P. 442; *see also Bodimer v. Ryan's Fam. Steakhouses, Inc.*, 978 S.W.2d 4, 9 (Mo. Ct. App. 1998) ("[T]he amount of verdict by itself is not enough to establish that verdict was result of bias, passion and prejudice."); *Mather v. Griffin Hosp.*, 207 Conn. 125, 540 A.2d 666, 673 (Conn. 1988) ("The size of the verdict alone does not determine whether it is excessive."). In *Henderson*, this Court declined to infer passion and prejudice where the only circumstances relied upon by the defendant

were "the size of the verdict" and the fact that *****31** in many other similar cases "much smaller verdicts have been returned." 1919-NMSC-023, ¶¶ 49-50. That the court may have awarded a smaller amount than the jury awarded is also insufficient to support disturbing the jury's verdict. *See Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 17 ("[T]he mere fact that a jury's award is possibly larger than the court would have given is not sufficient to disturb a verdict." (internal quotation marks and citation omitted)). "In the absence of an unmistakable indication of passion or prejudice, a reviewing court will not set aside a jury's award of damages unless the amount of the verdict in light of the evidence indicates the jury was influenced by prejudice, passion, or other improper considerations." *Id.* ¶ 20 (internal quotation marks and citation omitted).

[*41] Defendants also contend that we should infer that passion or prejudice affected the jury's award because its verdict was greater than the combined amount of punitive and compensatory damages Plaintiffs' counsel suggested during closing argument. ****789** In support of its argument, Defendants first assert that because the combined total compensatory damages awarded to all four Plaintiffs, \$165 million, exceeds the \$140 million in punitive damages suggested by Plaintiffs⁸ we can *****32** infer that the award was based on a desire to punish Defendants.

[*42] Defendants rely on *Jackson v. Southwestern Public Service Co.* for the proposition that counsel's suggested amount of damages "might have contributed" to a mistaken award when the verdict "was so close to that figure." 1960-NMSC-027, ¶ 69, 66 N.M. 458, 349 P.2d 1029. In *Jackson*, after counsel for the plaintiff suggested the plaintiff's damages for the loss of his leg was \$100,000, the jury returned a verdict for \$95,000. *Id.* ¶¶ 68-69. To the extent Defendants have argued, quoting *Jackson*, that the verdict here "was so close to" Plaintiffs' suggested punitive award evidencing a mistaken award, we note that here the difference in the suggested punitive damage award and the amount awarded is \$25 million, not \$5,000. As Plaintiffs pointed out to the successor judge at the post-trial motions hearing, this would have required a \$25 million mathematical mistake by the jury.

[*43] In concluding that the verdict was not "returned as a result of passion, sympathy, or prejudice on the part of the verdict—or the jury," the successor judge reasoned, "[t]he special verdict form indicates clearly the jur[ors] understood that they were returning a verdict for compensatory damages." Indeed, the *****33** special verdict form makes clear that the jury considered the claims of each Plaintiff individually and awarded each Plaintiff a distinct amount ranging from

\$200,000 to Marialy Morga's mother Georgina Venegas for her loss of consortium claim to \$61 million for the wrongful death claim of the Estate of Ylairam Morga. Additionally, after the jury returned its verdict the district court judge carefully polled the jury to ensure its award was correct. Considering the disparity between the amount of suggested punitive damages and the amount awarded, the clear explanation of the individual amounts awarded to each Plaintiff on the jury's special verdict forms, and the poll of the jury confirming its award was for compensatory damages, we conclude that Defendants have failed to carry their burden to show an unmistakable indication of passion or prejudice, and we decline to infer passion or prejudice affected the verdict based on Plaintiffs' suggested punitive damage award. *See Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 20 (requiring "an unmistakable indication of passion or prejudice" to infer that passion or prejudice affected the verdict (internal quotation marks and citation omitted)).

[*44] Defendants next assert that the amount awarded *****34** shows prejudice and sympathy because it is greater than what Plaintiffs' counsel suggested for compensatory damages. Defendants contend that Plaintiffs' suggested metric for valuing human life, \$500 a day, calculated to about \$12 million as Plaintiffs' requested amount of damages for the Estate of Marialy Morga. The Court of Appeals called this a "hypothetical suggestion" offered as "guidance to the jury" and not "a specific amount of monetary damages" requested by Plaintiffs. *Morga*, 2018-NMCA-039, ¶ 33, 420 P.3d 586. Even if Plaintiffs' suggested valuation method was their requested amount of damages, our case law is clear that this type of request does not place a limit on the amount of damages a jury may award. *See Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 18, 136 N.M. 647, 103 P.3d 571 (explaining that a plaintiff's requested damages is not "a ceiling on a jury's award").

[*45] Defendants concede that a plaintiff's request of damages does not act as a legal estoppel or place a cap on the jury's award. However, Defendants assert that it is "a relevant consideration" in determining whether passion or prejudice tainted the verdict. Defendants rely on *Nava, id.*, for the proposition that a jury's award of damages in an amount exceeding the sum requested by a plaintiff "indicates that passion or *****35** prejudice affected the verdict." *Nava* recognizes that the plaintiff is "in the best position to evaluate the true extent of his or her damages" but also acknowledges that "a plaintiff's request ****790** for damages certainly does not create a ceiling on a jury's award." *Id.* We do not find *Nava* particularly helpful, as it was a sexual harassment case involving nonphysical injury to a single plaintiff; it did not ask a jury to calculate noneconomic damages for multiple deaths and serious bodily injury within a single family. *See id.*

⁸ The jury declined to award punitive damages to Plaintiffs.

¶ 2 (describing plaintiff's allegations of sexual harassment by supervisor and jury's award of \$285,000 in damages). While the *Nava* Court held that the amount of the "award in th[at] case was so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice," *id.* ¶ 20 (internal quotation marks and citation omitted), here it is difficult to say the same in light of the deaths of Marialy and Ylairam Morga, the serious injuries to Yahir Morga, and the impact the accident had on the lives of Yahir and Alfredo Morga.

[*46] In *Rhein*, this Court explained that a new trial may be granted "only when there is evidence of jury tampering or other [***36] contamination of the process . . . or when the weight of evidence is clearly and palpably contrary to the jury's verdict." 1996-NMSC-066, ¶ 23. The fact that the jury awarded a greater amount than Plaintiffs requested is a far cry from jury tampering or other contamination of the process. Considering the special verdict forms indicating the jurors' understanding of the allocation of the award and considering the lack of any evidence of tampering with the process, the fact that the jury chose to award more than what Plaintiffs may have suggested is insufficient to infer passion or prejudice.

b. None of the three aspects of trial Defendants point to support their claim that the verdict was affected by passion or prejudice

[*47] Defendants also point to three aspects of the trial that they argue invoked passion or prejudice in the jury. Defendants assert that the testimony of Alfredo Morga, an unredacted photograph of the accident shown to the jury, and purportedly improper statements made by Plaintiffs' counsel during closing argument "inflamed the jury and produced an excessive damages award." Plaintiffs counter that Defendants did not preserve these arguments. Assuming without deciding that the arguments [***37] were preserved, we conclude that these three incidents, whether considered on their own or cumulatively, are insufficient to show that the jury's award was the result of passion or prejudice.

i. The testimony of Alfredo Morga did not invoke passion or prejudice in the jury that affected the verdict

[*48] Defendants contend that Alfredo Morga's emotional testimony—crying when looking at photographs of his wife and daughter, discussing his bond with them and the loss he felt—even if an unavoidable aspect of the trial, would naturally have affected any person with a sense of compassion." A witness's genuine emotional testimony, alone,

however, is insufficient to show passion or prejudice in the jury. *See Caldwell v. Ohio Power Co.*, 710 F. Supp. 194, 199-200 (N.D. Ohio 1989) (noting that involuntary manifestation of emotion is not uncommon in personal injury cases and holding that mother's genuine emotional testimony was not prejudicial). Generally,

[an] involuntary manifestation of seemingly genuine emotion by weeping, crying, or similar conduct, during a civil trial, is not ground for a mistrial, reversal, or new trial, in the absence of a resulting prejudicial effect upon the jury, and the decision of the [district] court denying a mistrial or new trial on [***38] such grounds will not be disturbed by the appellate court in the absence of an abuse of discretion on the part of the [district] judge.

L. S. Tellier, *Manifestation of Emotion by Party During Civil Trial as Ground for Mistrial, Reversal, or New Trial*, 69 A.L.R.2d 954, § 3[a] (1960).

[*49] The record does indicate that Alfredo Morga became tearful multiple times during his testimony on direct examination including while looking at photographs of his family, discussing their close relationship and their plans for a third child, describing arriving at the scene of the accident, and learning his wife and daughter had died and his son had been transported to a hospital in El Paso. [**791] The record also reflects that the district court called for two breaks during this testimony and called a bench conference to direct counsel to lead Alfredo Morga through testimony concerning the accident scene to facilitate that examination.

[*50] Defendants contend that after the second break, "Mr. Morga was so emotional that he could not continue." However, the record reflects that after the second break, Alfredo Morga retook the stand, and while not devoid of emotion, he was able to complete his testimony, including cross-examination and [***39] redirect, without further incident.

[*51] While the record indicates Alfredo Morga cried during his testimony, there is no indication here, and Defendants point this Court to none, of a resulting prejudicial impact on the jury. The record does not reflect that his testimony moved anyone else in the courtroom to tears. Furthermore, the district court acted to curtail the emotional testimony by calling for breaks and directing Plaintiffs' counsel to lead Alfredo Morga through his testimony. Importantly, there is no explanation of the jury's reaction to Alfredo Morga's testimony from which we can conclude undue emotion and sympathy affected its decision. Nothing in the record indicates that Alfredo Morga's testimony tainted the jury's verdict with passion or prejudice. As Defendants admit, this testimony was "honest," "sincere," and necessary. It is

difficult to imagine another way for Alfredo Morga to establish his damages outside of offering his testimony as to how he was injured. Likewise, it is predictable and reasonable that a person who lost his wife and young daughter and whose son suffered critical injury all in one accident would be emotional. Alfredo Morga's testimony was the result [***40] of genuine emotional response, and nothing in the record indicates any prejudicial reaction from the jury. The testimony appears to fall squarely within the general rule that such genuine emotion is not grounds for a new trial. *See* Tellier, 69 A.L.R.2d 954, § 3[a] (explaining that a display of genuine emotion during a trial is not grounds for a new trial absent "a resulting prejudicial effect upon the jury").

[*52] Defendants concede that there was nothing improper about Alfredo Morga's testimony and rather assert that it was just the emotional nature of his testimony that invoked passion or prejudice in the jury. Defendants rely on *Hanberry*, 1963-NMSC-100, ¶ 33, to support this proposition. *Hanberry*, however, is distinguishable. The *Hanberry* Court did hold that properly admitted evidence may have "the principal effect of unduly stressing the pain and suffering endured by the plaintiff." *Id.* However, the Court was referring to cumulative evidence, specifically pointing to twenty-one photographs of the same injury and reasoning that "[s]uch over-emphasis in proving relatively minor details could very possibly have resulted in causing the jury to ignore the proper measure of damages." *Id.* ¶¶ 12, 33. The *Hanberry* Court did not address the impact of necessary emotional testimony, and [***41] we note that Defendants cite no authority that this type of emotional testimony entitles them to a new trial, so we assume none exists. *See State v. Garnenez*, 2015-NMCA-022, ¶¶ 25-26, 344 P.3d 1054 (declining to find that an emotional outburst by a member of the audience in the courtroom tainted the verdict where defendants cited no authority that the emotional outburst required a mistrial); *State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (providing that where no authority is cited we may assume none exists).

[*53] On the other hand, there is authority rejecting the argument that necessary emotional testimony entitles Defendants to a new trial. Our Court of Appeals rejected similar arguments made by the defendants in *Maisel*, 1968-NMCA-038, ¶ 11. The *Maisel* defendants argued that passion and prejudice were "obvious" because the plaintiff was divorced and disabled and cared for her disabled daughter. *Id.* The Court reasoned that "[i]nstead of being 'obvious,' there is no indication that these facts caused a verdict based on sympathy" and noted that "the jury was specifically instructed (a) that sympathy for an injured person was not a proper basis for determining damages and (b) that neither sympathy nor prejudice should influence the jury's verdict." *Id.*

[*54] [**792] Similarly here, the nature of the case does not make it obvious [***42] that passion or prejudice affected the jury's verdict. Furthermore, as in *Maisel*, the jury here was specifically instructed with regard to each Plaintiff that it must not allow "sympathy or prejudice" to influence its verdict. Each instruction delineated that "your verdict must be based upon proof and not upon speculation, guess or conjecture." Concerning the Estates of Ylairam and Marialy Morga, the jury was instructed for each that "[y]ou must not permit the amount of damages to be influenced by sympathy or prejudice, or by the grief or sorrow of the family, or the loss of the deceased's society to family"; that "the property or wealth of the beneficiaries or of . . . [D]efendant[s] is not a legitimate factor for your consideration"; and that "the guide for you to follow in determining fair and just damages is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the beneficiaries with fairness to all parties to this action." Defendants acknowledged the significance of these instructions during closing argument, stating that the "instruction is so important, it shows up seven times in the packet of instructions. What it says is that sympathy [***43] cannot affect your decision in this case." We assume the jury followed these instructions. *Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 59 ("[W]e presume jurors abide by the court's instructions.").

[*55] Moreover, if this Court were to adopt Defendants' suggested inference of passion or prejudice, then in all wrongful death and personal injury claims in New Mexico where a plaintiff exhibiting genuine emotion testifies as to the injury suffered, passion or prejudice would always be inferred in the jury's verdict. Considering the ubiquity and frequently the necessity of this type of testimony, adopting Defendants' proposed inference here would create an unwanted, consistent invasion of the province of the jury in New Mexico. Therefore, we decline to hold that Alfredo Morga's emotional testimony tainted the verdict.

ii. The unredacted photograph was not so graphic as to arouse the prejudice or passion of the jury

[*56] The district court entered an order excluding "any graphic photographs of the bodies of Marialy Morga, Ylairam Morga, and Elizabeth Quintana." During closing arguments, Plaintiffs' counsel displayed a photograph to the jury showing the wreckage. The image is clearly of a badly wrecked vehicle. A severely damaged seat and [***44] car door are identifiable. Upon close examination, some orange fabric and what appears to be an arm from the shoulder to just below the elbow is visible between the car door and seat. Several scratches and bruises are visible on the arm. The district court ruled that Plaintiffs were permitted to use the photograph but

that the portion of the photograph showing the arm should be masked. The masking, however, apparently fell off prior to the presentation of the photograph to the jury. Defendants contend that the photograph likely invoked passion or prejudice and that "[t]his graphic view of [Marialy's] body in the mangled remains of her vehicle likely colored the jury's deliberations" and that we "should conclude . . . that Plaintiffs' use of th[e] prohibited image . . . contributed to the passion and prejudice that invalidate the jury's verdict."

[*57] When Defendants first raised the matter on the last day of the trial following the completion of Plaintiffs' closing argument, the district court acknowledged that the photograph should have been redacted and ordered that the photograph be withheld from the jury for deliberations. At the same time, the district court judge stated that she **[***45]** "seriously doubt[ed]" the jury would recognize the image in the photograph as an arm and that she would not have recognized it as such had it not been pointed out to her. Defendants acknowledge that the district court considered the photograph harmless.

[*58] We agree with the district court's assessment. In reviewing the photograph at issue, we see nothing obviously graphic about the image. The photograph focuses on an extremely damaged vehicle and predominately depicts bent and mangled metal, broken glass, a torn car seat, and damaged plastic **[**793]** from the interior of the vehicle. The portion of the photograph showing the arm is small in comparison to the rest of the photograph, and there is nothing gruesome about that section of the photograph. While, upon close examination, some bruises and scrapes are visible, the photograph does not show blood or other physical damage to the arm.

[*59] "The [district] court ought to exclude photographs which are calculated to arouse the prejudices and passions of the jury and which are not reasonably relevant to the issues of the case." *State v. Boeglin*, 1987-NMSC-002, ¶ 21, 105 N.M. 247, 731 P.2d 943. However, the photograph that is the subject of Defendants' argument is not so graphic as to fit into the category of **[***46]** photographs that should be excluded as contemplated by this Court's decision in *Boeglin*. Indeed, while Defendants cite no case law supporting their claim that a photograph of the nature of the one at issue invokes the jury's passion or prejudice, we note that we have affirmed the admissibility of photographs significantly more graphic than the photograph at issue here. *See State v. Galindo*, 2018-NMSC-021, ¶ 39, 415 P.3d 494 (upholding the district court's admission of photographs of a deceased infant, notwithstanding that they were "graphic, heartbreaking, and difficult to view"); *State v. Saiz*, 2008-NMSC-048, ¶¶ 52, 54, 144 N.M. 663, 191 P.3d 521 (affirming the admission of

graphic photographs of the victim's decomposed body), *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 n.1, 146 N.M. 357, 210 P.3d 783; *State v. Mora*, 1997-NMSC-060, ¶¶ 54-55, 124 N.M. 346, 950 P.2d 789 (affirming admission of autopsy photographs of a child victim), *abrogated on other grounds by State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120, 164 P.3d 1. Because the photograph here was not obviously graphic and the district court limited the jury's ability to review it, we conclude upon de novo review that the jury's limited viewing of the photograph is insufficient to infer that the jury's verdict was the result of passion or prejudice.

iii. Statements in closing argument were not so flagrant as to leave all bounds of ethical conduct and any potential prejudice was rectified by the jury instructions

[*60] During **[***47]** closing argument, Plaintiffs' counsel argued that Defendant FedEx placed blame on its contractors and "took no responsibility, just like they haven't in this entire trial." Defendants contend that Plaintiffs' counsel's statements in closing arguments suggesting FedEx was trying to pass responsibility to its contractors were "inaccurate and irrelevant." These purportedly improper statements, Defendants contend, prejudiced the jury such that a new trial is required. Defendants concede that they "did not object to Plaintiffs' improper argument" but contend that objection was not necessary because the conduct of Plaintiffs' counsel was egregious. *See Griego v. Conwell*, 1950-NMSC-047, ¶ 17, 54 N.M. 287, 222 P.2d 606 (providing an exception for unpreserved objections to conduct of opposing counsel where counsel goes "outside the record, or . . . attempt[s] to inflame the minds of the jurors against the opposing litigant"). We do not find Plaintiffs' counsel's statements sufficiently egregious to infer that passion or prejudice affected the jury's verdict under the heightened standard of egregiousness set out in *Griego*.

[*61] Defendants contend Plaintiffs' argument was improper because Defendant FedEx had agreed to accept responsibility collectively for all Defendants **[***48]** for all damages awarded, including punitive damages. Plaintiffs respond that it was not clear that Defendant FedEx agreed to accept liability, including punitive damages, for all Defendants prior to trial because Defendants' only support for this contention occurred after trial began.

[*62] Prior to trial, the district court did grant partial summary judgment for Plaintiffs, finding that Defendant FedEx was liable for the actions of its subcontractor driver, Elizabeth Quintana, under the statutory employee doctrine. Although the record reflects some confusion around when

Defendant FedEx stipulated to its responsibility for all damages awarded against any Defendants, **[**794]** including punitive damages, the record indicates that on the second day of trial Defendant FedEx agreed to accept this responsibility. While it is not clear why Plaintiffs brought this up again in closing, Defendants themselves brought this issue up again after Plaintiffs rested, asking the district court to find no vicarious liability for punitive damages:

THE COURT: I'm sorry, but Ms. Saiz already agreed. If punitive damages are awarded, [FedEx] would be liable. You're not getting out of that one. You're not going to be allowed **[***49]** to go back on it.

MR. CROASDELL: I was—I was referring to punitive damages for the conduct—the alleged conduct of Elizabeth Quintana.

THE COURT: I don't care who it's of. She already agreed that—

MR. CROASDELL: I understand.

[*63] Plaintiffs also point to the special verdict form that required the jury to allocate fault to each Defendant. Defense counsel argued, "when you get to the Special Verdict Form . . . you're going to be asked to decide whether or not FedEx, [its contractors], or Ms. Quintana was negligent in this collision." Plaintiffs' counsel in rebuttal stated, "[p]ut it on the little guy. Do you think they have anything? No. 'Put it on them. It's not our fault. It's just our name, just looks like us.' But that's what they're used to, that's been their whole strategy in this case." Clearly, both parties lacked certainty throughout the trial about the degree of liability Defendant FedEx agreed to assume, and this uncertainty supports a conclusion that the statements made by Plaintiffs' counsel were neither inflammatory nor so egregious as to "leave the bounds of ethical conduct." *Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 57 (internal quotation marks and citation omitted).

[*64] Generally, absent objection at trial, we will **[***50]** not grant a new trial based on improper statements of counsel "unless we are satisfied that the argument presented to the jury was so flagrant and glaring in fault and wrongdoing as to leave the bounds of ethical conduct, such as going outside the record." *Id.* (internal quotation marks and citation omitted).

[*65] Here, the statements made, while unnecessary given the stipulation from Defendants, were not "so flagrant and glaring" as to leave all bounds of ethical conduct. *Id.* We conclude that the statements here were not inflammatory and that any potential prejudicial effect the closing argument here may have had on the jury was offset by the district court's instruction to the jury that closing arguments of counsel are not evidence. See UJI 13-2007 NMRA (providing that neither

closing arguments "nor any other remarks or arguments of the attorneys made during the course of the trial are to be considered by you as evidence"); *Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 59 ("[W]e presume jurors abide by the court's instructions."). Therefore, we decline to hold that Plaintiffs' closing argument affected the verdict by inflaming the passion or prejudice of the jury.

iv. The cumulative impact of the three aspects of trial did not taint the jury's verdict **[*51]****

[*66] In reviewing the cumulative effect of these three aspects of trial, we conclude the effect is insufficient to infer that passion or prejudice tainted the jury's verdict. Before the district court, Defendants conceded, "[o]n the big picture, we can't find an error that would justify in its own terms a new trial." The district court maintained tight control of these proceedings. The district court limited evidence offered by Plaintiffs, including certain hospital bills and portions of Alfredo and Yahir Morga's life plans. It also carefully controlled emotional testimony by removing from the jury's view photographs that provoked emotional responses from witnesses, taking breaks during emotional testimony, instructing Plaintiffs' counsel to lead Alfredo Morga through his direct examination, and directing counsel to move on from emotion-provoking testimony. The jury was repeatedly instructed not to allow sympathy to play a part in the determination of its award, and we presume that a jury follows the instructions given by the district **[**795]** court. *Id.* Indeed, the jury's careful allocation of fault to each Defendant, as well as its allocation of five percent fault to Marialy Morga, after Plaintiffs' **[***52]** closing argument urging the jury to allocate no fault to her, indicates a deliberate, thoughtful, and even-keeled verdict.

[*67] We conclude that the careful manner in which the district court judge conducted the trial, in addition to the jury instructions, alleviated any cumulative prejudicial impact of Alfredo Morga's emotional testimony, the inadvertently disclosed photograph, and Plaintiffs' counsel's statements about Defendants' intent to shift the blame. See *United States v. Evans*, 542 F.2d 805, 816 (10th Cir. 1976) (refusing to conclude that three disruptive aspects of trial warranted mistrial when "the [district] court did all that was possible to see that these outside matters did not influence the jury"); *Allsup's Convenience Stores, Inc.*, 1999-NMSC-006, ¶ 16, 127 N.M. 1, 976 P.2d 1 ("The [district court] judge . . . is empowered to, with discretion, provide stability and order during the proceedings."); *Chrysler Corp.*, 1998-NMCA-085, ¶ 16 ("[T]he best way to arrive at a reasonable award of damages is for the [district court] judge and the jury to work together, each diligently performing its respective duty to

arrive at a decision that is as fair as humanly possible under the facts and circumstances of a given case."); *cf. Archuleta v. N.M. State Police*, 1989-NMCA-012, ¶¶ 3-4, 108 N.M. 543, 775 P.2d 745 (finding that passion or prejudice tainted the jury's verdict—where a juror overheard that the judge tentatively granted [***53] the defendants' motion for a directed verdict, after which the judge reconsidered allowing trial to proceed, and the jury then ruled for the defendants—reasoning that the jury may have found it futile to carefully consider the plaintiff's case).

III. CONCLUSION

[*68] Reviewing excessiveness of the verdict de novo, as we must, we conclude that substantial evidence supported the verdict and that the jury's award was not the result of passion or prejudice. Therefore, it was not an abuse of discretion for the successor judge to deny Defendants' motion for a new trial. Where there is no error below, we will not substitute our judgment for that of the jury. *Lujan*, 1967-NMSC-262, ¶¶ 25, 32. Accordingly, we affirm the Court of Appeals.

[*69] IT IS SO ORDERED.

JULIE J. VARGAS, Justice

WE CONCUR:

C. SHANNON BACON, Chief Justice

DAVID K. THOMSON, Justice

ERIN B. O'CONNELL, Judge

Sitting by designation

Coogan v. Borg-Warner Morse Tec Inc.

Supreme Court of Washington

November 10, 2020, Argued.; July 8, 2021, Filed

No. 98296-1

Reporter

197 Wn.2d 790 *; 490 P.3d 200 **; 2021 Wash. LEXIS 383 ***; 2021 WL 2835358

GERRI S. COOGAN ET AL., *Petitioners*, v. BORG-WARNER MORSE TEC INC., ET AL., *Defendants*, GENUINE PARTS COMPANY ET AL., *Respondents*.

Prior History: [***1] Appeal from Pierce County Superior Court. 15-2-09504-3. Honorable Stanley J. Rumbaugh.

Coogan v. Borg-Warner Morse Tec, Inc., 12 Wn. App. 2d 1021, 2020 Wash. App. LEXIS 421 (Feb. 19, 2020)

Counsel: Brian D. Weinstein and Alexandra B. Caggiano (of *Weinstein Caggiano PLLC*); and William J. Rutzick (of *Schroeter Goldmark & Bender*) (Lisa W. Shirley and Jessica Dean, *of counsel*), for petitioners.

Michael B. King, Timothy K. Thorson, and Jason W. Anderson (of *Carney Badley Spellman PS*); Jeanne F. Loftis (of *Bullivant Houser Bailey PC*); Brendan P. Hanrahan (of *Zones, LLC*); and Philip A. Talmadge (of *Talmadge/Fitzpatrick*), for respondents.

[***2] Matthew P. Bergman and *Justin Olson* on behalf of Violent Crime Victim Services and Child USA, amici curiae.

Weston Dunn, Evan S. Nadel, and Aaron R. Fenton on behalf of Coalition for Litigation Justice Inc., amicus curiae.

Daniel E. Huntington and Valerie D. McOmie on behalf of Washington State Association for Justice Foundation, amicus curiae.

Noah Jaffe on behalf of Washington Defense Trial Lawyers, amicus curiae.

Judges: AUTHOR: Justice Debra L. Stephens. WE CONCUR: Chief Justice Steven C. González, Justice Charles W. Johnson, Justice Barbara A. Madsen, Justice Susan Owens, Justice Sheryl Gordon McCloud, Justice Mary I. Yu, Justice Raquel Montoya-Lewis, Justice G. Helen Whitener.

Opinion by: DEBRA L. STEPHENS

Opinion

EN BANC

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¶1 STEPHENS, J. — Doy Coogan died of peritoneal mesothelioma after years of asbestos exposure through his automotive repair work and excavation business. A jury unanimously found Genuine Parts Company (GPC) and National Automotive Parts Association (NAPA) liable for Coogan’s wrongful death and entered an \$81.5 million verdict for his family and estate. GPC and NAPA moved for a new trial or alternatively a remittitur of damages, which the trial court denied.

¶2 The Court of Appeals reversed the trial court in part and vacated the jury’s damages award. Though it rejected claims for a new trial premised on alleged misconduct [***3] by plaintiff’s counsel, it concluded that the trial court erred by excluding one of GPC and NAPA’s expert witnesses and that the jury’s award was excessive. Specifically, the Court of Appeals rejected the jury’s award of noneconomic damages in favor of its own “necessarily ... subjective” determination that the amount of damages was “so excessive that it [**207] shock[ed] the court’s conscience.” *Coogan v. Borg-Warner Morse Tec Inc.*, No. 51253-0-II, slip op. at 26, 25 (Wash.Ct. App. Feb. 19, 2020) (unpublished), <https://www.courts.wa.gov/opinions/pdf/D2%2051253-0-II%20Unpublished%20Opinion.pdf>.

¶3 We granted review to address the appropriate standards for reviewing posttrial motions to set aside jury verdicts. While appellate review serves an essential purpose in safeguarding the integrity of the jury process, it must remain limited. Here, the Court of Appeals overstepped its limited role and inappropriately substituted its own judgment for that of the trial court and, most importantly, the jury. Accordingly, we reverse the Court of Appeals and reinstate the jury’s verdict in

full.

FACTS AND PROCEDURAL HISTORY

¶4 Coogan spent decades working on cars and repairing the industrial equipment used in his excavation business. [*797] Throughout that time, Coogan purchased brakes, clutches, and other asbestos-containing parts distributed by GPC and sold in local NAPA stores. In 2015, as a result of cumulative [***4] exposure to asbestos, Coogan fell gravely ill.

¶5 Coogan was soon diagnosed with malignant mesothelioma in his peritoneum that metastasized to other parts of his body. Tumors developed in his abdomen, diaphragm, and both lungs. The tumors caused fluid to build up in ascites, putting painful pressuring on Coogan's internal organs and making it difficult for him to breathe. To relieve that pressure, doctors had to drain fluid out of Coogan's abdomen every week. Eventually, they had to place a catheter in Coogan's chest to drain fluid from his lungs even more frequently. Coogan's tumors also obstructed his bowels, leading to anorexia and malnutrition. Coogan's body began to deteriorate from a lack of nutrients. He developed open wounds on his body. His lungs collapsed. His kidneys failed. Unable to eat, drink, or breathe without pain, Coogan died six months after he first sought medical attention. He was 67 years old.

¶6 Coogan's widow, daughters, and estate sued GPC, NAPA, and several other entities for their role in causing Coogan's premature death. Every defendant except GPC and NAPA was dismissed by the trial court or settled the claims against them. After a 12 week trial, the jury unanimously [***5] found GPC and NAPA were liable for Coogan's death and entered an \$81.5 million verdict against them. That damages verdict is made up of four parts: \$30 million for Coogan's pain and suffering, \$30 million to compensate Coogan's widow for her loss of consortium, \$20 million to compensate Coogan's daughters for their loss of consortium, and \$1.5 million for the loss of services Coogan would have provided to his family had he survived.

¶7 GPC and NAPA moved for the trial court to set aside the jury's verdict and grant a new trial on liability and damages under CR 59(a) or, alternatively, to enter a remittitur of damages under RCW 4.76.030. They argued that the [*798] trial court erroneously excluded the testimony of a medical expert and that the sizable verdict was excessive and the result of passion or prejudice brought on by Coogan's attorney's alleged misconduct. The trial court denied that motion, finding GPC and NAPA effectively went "through [the] record and pull[ed] out this question and that one and str[un]g together an argument that looks like there was some prejudice" where none existed. Verbatim Tr. of Proceedings (VTP) (Dec. 1, 2017) at 56. The trial court also found GPC

and NAPA's arguments that the damages award was [***6] excessive contradicted this court's precedent and "the enormous deference our Appellate Courts and our constitution give[] to the weight of the jury's verdict." VTP (Dec. 1, 2017) at 58-59.

¶8 GPC and NAPA timely appealed from the denial of their new trial motion.¹ While their appeal was pending, GPC and NAPA moved for relief from judgment under CR 60 on the basis that the Coogan family misrepresented the quality of Coogan's relationship with his widow and daughters. The trial court [**208] denied that motion, so GPC and NAPA amended their appeal to challenge that ruling as well.

¶9 In an unpublished opinion, the Court of Appeals affirmed the jury's verdict on liability but set aside the damages award. The court first determined the trial court abused its discretion by excluding the expert testimony of Dr. Gary Schuster, who would have testified that Coogan had a history of heavy alcohol use and the state of his liver suggested he may have had advanced cirrhosis that could have reduced his life expectancy to only 5 years. Because the jury's damages award to Coogan's widow and daughters for their loss of consortium and services was based in part on actuarial evidence that Coogan would have likely lived for [***7] 15 more years but for his mesothelioma, the Court of Appeals reversed that award. Next, the Court of Appeals considered the jury's award for Coogan's pain and suffering and determined, "[A]t first blush, that the pain and suffering [*799] verdict [rendered by the jury] here is 'beyond all measure, unreasonable and outrageous.'" *Coogan*, slip op. at 26 (internal quotation marks omitted) (quoting *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005)). Finally, the court considered GPC and NAPA's argument that alleged misconduct by Coogan's counsel prejudiced the jury in its assessment of both liability and damages. Agreeing with the trial court that no reversible error was shown, the court declined to set aside the jury's finding of liability. However, in light of its reversal of key parts of the damages award, the Court of Appeals ordered a new trial on damages.

¶10 Coogan's widow and estate petitioned this court for review, which we granted. We also granted review of conditional issues raised by GPC and NAPA in their answer to the petition for review. *Coogan v. Borg-Warner Morse Tec Inc.*, 195 Wn.2d 1024 (2020).

ANALYSIS

[1] ¶11 Trial by jury is the bedrock of our justice system. We

¹GPC and NAPA did not appeal the trial court's denial of their alternative motion for remittitur under RCW 4.76.030.

trust juries to render verdicts based on their assessment of the evidence according to the law as instructed by the trial court. Appellate review is appropriately [***8] limited, serving as a backstop to ensure trials are conducted fairly, the law is applied correctly, and the verdict is within the bounds of justice. Apart from answering questions of law and reviewing the trial court's discretionary rulings for any manifest abuse of discretion, appellate courts will not substitute their own judgment for that of the trial court or jury. Most relevant here, we will not set aside a jury's verdict unless circumstances clearly show it is the product of an unfair process or improper considerations, such that no reasonable person could believe the verdict is just. *Gilmore v. Jefferson County Pub. Transp. Benefit Area*, 190 Wn.2d 483, 494, 415 P.3d 212 (2018).

¶12 The principal issue in this case is how an appellate court evaluates a posttrial claim that the jury's verdict is [*800] excessive or the result of passion and prejudice. In reviewing the jury's verdict, the Court of Appeals rejected GPC and NAPA's claims to set it aside, in whole or as to damages, due to alleged misconduct of Coogan's counsel. However, the appellate court reversed the jury's damages verdict because it disagreed with one of the trial court's evidentiary rulings relevant to damages for loss of consortium and services, and because it believed the size of the verdict for Coogan's pain and [***9] suffering was "flagrantly outrageous and extravagant" on its face." *Coogan*, slip op. at 25 (quoting *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 837, 699 P.2d 1230 (1985)).

¶13 We first address the Court of Appeals' holding that the trial court abused its discretion by excluding the testimony of defense expert, Dr. Gary Schuster. Though the Court of Appeals believed the trial court should have "simply preclud[ed] any reference to alcohol in that testimony," *Id.* at 21, we hold the trial court acted well within its discretion. Next we consider the trial court's refusal to set aside the jury's verdict, in whole or in part, based on alleged instances of misconduct by Coogan's counsel. We agree with both the trial court and the Court of Appeals that a new trial is not warranted on this basis.

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¶14 We next examine the Court of Appeals' determination that, notwithstanding substantial evidence in the record, the jury's \$30 million award for Coogan's pain and suffering during his final months was "beyond all measure, unreasonable and outrageous." *Id.* at 23 (internal quotation marks omitted) (quoting *Bunch*, 155 Wn.2d at 179). We conclude that the Court of Appeals overstepped the limited role appellate courts are supposed to play in our civil justice system and substituted its own subjective judgment for that of the jury and the trial court [***10] based on nothing more

than the size of the verdict. Because the verdict is supported by substantial evidence and the record does not clearly indicate that the verdict resulted from passion or prejudice, or was so beyond the bounds of [*801] justice that no reasonable person could believe it is correct, we reverse the Court of Appeals and reinstate the jury's verdict in full.

¶15 Finally, we address GPC and NAPA's argument for relief from judgment under CR 60(b). They claim Coogan's family and attorney intentionally hid evidence of family discord until after trial. We conclude the trial court did not abuse its discretion by denying the CR 60(b) motion because GPC and NAPA were aware of evidence of family discord in ongoing probate proceedings and chose not to pursue that evidence until they lost this trial.

I. The Trial Court Properly Applied ER 403 To Exclude Speculative Expert Testimony That Posed a Significant Risk of Unfair Prejudice

¶16 The Court of Appeals concluded the trial court erred by excluding the expert testimony of Dr. Schuster, an internal medicine specialist who would have suggested that Coogan may have suffered from late stage liver cirrhosis that significantly reduced his life expectancy. The Court of Appeals [***11] reasoned that even if Dr. Schuster's "testimony had minimal probative value," it should have been admitted because it was "probative of a central issue in the case": Coogan's life expectancy but for the mesothelioma. *Id.* at 21.

[2] ¶17 That reasoning is inconsistent with our precedent. Before admitting expert testimony regarding "scientific, technical, or other specialized knowledge," trial courts must ensure that testimony "will assist the trier of fact." ER 702. To assist the trier of fact, "[t]he expert's opinion must be based on fact and cannot simply be a conclusion or based on an assumption." *Volk v. DeMeerleer*, 187 Wn.2d 241, 277, 386 P.3d 254 (2016) (citing *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990)). "When an expert fails to ground [their] opinions on facts in the record, courts have consistently found that the testimony is overly speculative and inadmissible." *Id.* (citing *Moore v. Hagge*, 158 Wn. App. 137, [*802] 241 P.3d 787 (2010); *State v. Johnson*, 150 Wn. App. 663, 208 P.3d 1265 (2009); *State v. Lewis*, 141 Wn. App. 367, 166 P.3d 786 (2007); *Doyle v. Nor-W. Pac. Co.*, 23 Wn. App. 1, 5-6, 594 P.2d 938 (1979)).

¶18 The trial court's decision to exclude Dr. Schuster's testimony as overly speculative is sound. Dr. Schuster would have testified that Coogan stood to live only 5 more years, not the 15 years predicted by actuarial evidence. Dr. Schuster based that opinion on his belief that Coogan "had a stage 3 level of liver disease or cirrhosis." 26 Verbatim Report of

Proceedings (VRP) (Mar. 6, 2017) at 145. That belief, in turn, was based [***12] on the fact that Coogan had ascites, or fluid buildup, around his liver and spleen. *See* 26 VRP (Mar. 6, 2017) at 151 (“If you do not have the ascites, then you are stage 2.”). But cirrhosis is not the only cause of ascites; Coogan’s physicians “ascribe[d] the ascites to the mesothelioma.” 26 VRP (Mar. 6, 2017) at 155.

¶19 Dr. Schuster “admitted that a significant source of the fluid build up for the patient that we’re talking about, Doy Coogan, was his cancer.” 26 VRP (Mar. 6, 2017) at 160. Critically, when asked if there was “[a]ny[] way to figure ... out” “whether zero percent, one percent, 12 percent,” or any percent of Coogan’s ascites could be conclusively ascribed to cirrhosis and not mesothelioma, Dr. Schuster’s response was clear: “You can’t.” 26 VRP (Mar. 6, 2017) at 160. Even so, Dr. Schuster opined that it was possible Coogan had a shortened life expectancy [**210] because “we know he has large portal veins, the varices,” and “an enlarged spleen,” all of which suggests “someone has cirrhosis.” 26 VRP (Mar. 6, 2017) at 163. But when pressed, Dr. Schuster confirmed that “no one, based on those things alone, would stage someone, in the absence of ascites, as a stage 3 cirrhosis patient.” 26 VRP (Mar. 6, 2017) [***13] at 164 (emphasis added).

¶20 Dr. Schuster’s opinion that Coogan had only five years to live absent mesothelioma was based entirely on death rate statistics for stage 3 cirrhosis patients: “20 percent per year mortality, over a five year time frame. In other words, 20 [*803] percent per year, or a lifespan of a maximum of approximately five years.” 26 VRP (Mar. 6, 2017) at 145; *see also* 26 VRP (Mar. 6, 2017) at 161 (“[T]he sole basis ... of understanding that Doy Coogan would have died in five years from cirrhosis is directly related to the staging, finding it to be stage 3.”). But Dr. Schuster admitted he could not say if any of Coogan’s ascites—“the definition of stage 3”—were caused by cirrhosis. 26 VRP (Mar. 6, 2017) at 161, 164.

¶21 Accordingly, there is no basis for the opinion that Coogan’s life expectancy was only five years. As the trial court explained when granting Coogan’s motion to exclude Dr. Schuster’s testimony, “Even if one accepts that there is stage 2 cirrhosis, then the death rate is 3.5 percent per year. ... 3.5 percent for stage 2 would take Mr. Doy Coogan to the end of his normal life expectancy.” 26 VRP (Mar. 6, 2017) at 166-67. The trial court appropriately excluded Dr. Schuster’s [***14] testimony “that Mr. Coogan’s life expectancy was between one and five years ... [as] too attenuated and in many respects speculative.” 26 VRP (Mar. 6, 2017) at 166.

[3] ¶22 Such speculative evidence is of little help to the jury. “The problem with ‘speculative testimony is that the trier of

fact will be forced to speculate as to causation without an adequate factual basis.” *Gerlach v. Cove Apts., LLC*, 196 Wn.2d 111, 123, 471 P.3d 181 (2020) (quoting *Volk*, 187 Wn.2d at 277). Dr. Schuster’s testimony would have suggested Coogan *might have* had only five years to live because he *might have* had stage 3 cirrhosis. “Such speculative testimony is not rendered less speculative or of more consequence to the jury’s determination simply because it comes from an expert.” *Id.* (quoting *Lewis*, 141 Wn. App. at 389). The trial court’s decision to exclude Dr. Schuster’s speculative testimony was proper under ER 702.

[4-10] ¶23 Trial courts also have discretion to exclude evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. The probative value of speculative evidence is minimal and thus easily [*804] outweighed by the danger of unfair prejudice. “[T]rial courts enjoy wide discretion in balancing the probative value of evidence against its potentially prejudicial impact.” *Gerlach*, 196 Wn.2d at 120 (alteration in original) (internal [***15] quotation marks omitted) (quoting *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583 (2010)). Accordingly, appellate courts review decisions to exclude evidence “for abuse of discretion, deferring to the trial court’s judgment unless we are ‘convinced that *no reasonable person* would take the view adopted by the trial court.’” *Id.* at 119 (internal quotation marks omitted) (quoting *Gilmore*, 190 Wn.2d at 494).

¶24 A danger of unfair prejudice exists when “‘evidence is likely to stimulate an emotional response rather than a rational decision.’” *Id.* at 120 (quoting *Salas*, 168 Wn.2d at 671). As the Court of Appeals acknowledged, “Evidence of prior alcohol abuse has the potential to be very prejudicial.” *Coogan*, slip op. at 20; *see also Gerlach*, 196 Wn.2d at 123-24. Given the minimal probative value of Dr. Schuster’s speculative testimony, the trial court reasonably determined “the prejudicial effect of characterizing Mr. Coogan as an alcoholic, a chronic, heavy drinker, is something that I think is unduly prejudicial. And on an ER 401, 402, 403 balancing test, I’m going to grant the motion to exclude.” 2 VTP (Jan. 19, 2017) at 97; *see also* 26 VRP (Mar. 6, 2017) at 167 (trial court explaining after the offer of proof that it would “stand by my earlier ruling [that] Dr. Schuster’s [**211] testimony will be declined”). That determination was well within the trial court’s discretion [***16] under ER 403.

¶25 The Court of Appeals would have preferred a different approach, reasoning Dr. Schuster’s testimony was admissible under ER 702 and concluding “the trial court abused its discretion by excluding Dr. Schuster’s ... testimony under ER 403 rather than simply precluding any reference to alcohol in that testimony.” *Coogan*, slip op. at 21. But, as explained

above, the trial court's exclusion of Dr. Schuster's speculative testimony was proper under ER 702. And even if Dr. Schuster's testimony were admissible, an **[*805]** appellate court cannot hold that a trial court abused its discretion "simply because it would have decided the case differently." *Gilmore*, 190 Wn.2d at 494 (quoting *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017)). Instead, the appellate court "must be convinced that no reasonable person would take the view adopted by the trial court." *Id.* (internal quotation marks omitted) (quoting *Salgado-Mendoza*, 189 Wn.2d at 427). And "[i]f the basis for admission [or exclusion] of the evidence is fairly debatable," the appellate court "will not disturb the trial court's ruling." *Id.* (alterations in original) (internal quotation marks omitted) (quoting *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014)).

¶26 We conclude that the Court of Appeals erred by failing to give sufficient deference to the trial court's decision to exclude Dr. Schuster's testimony. We therefore reverse the **[***17]** Court of Appeals' decision to set aside the jury's award of damages for loss of consortium and loss of services damages in light of that evidentiary ruling.

II. The Trial Court Properly Denied GPC and NAPA's CR 59(a) Motion for a New Trial Premised on Alleged Irregularity or Misconduct by Plaintiffs' Counsel

¶27 GPC and NAPA challenge the trial court's denial of their motion for a new trial under CR 59(a)(1) and (2), arguing that Coogan's attorney repeatedly engaged in misconduct that undermined the fairness of the trial and prejudiced the jury against them. In denying that motion, the trial court observed:

[I]n a three-month long trial, it is impossible not to be able to go through a record and pull out this question and that one and string together an argument that looks like there was some prejudice when the great mass of the evidence is what the jury is supposed to consider and what I have to assume they did consider.

VTP (Dec. 1, 2017) at 56.

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¶28 The Court of Appeals, with one judge dissenting, affirmed the trial court's decision to deny a new trial on this basis. The majority concluded the record did not clearly show the alleged misconduct had a prejudicial effect on the jury or otherwise undermined the verdict. We **[***18]** agree and affirm this portion of the Court of Appeals opinion.

[11, 12] ¶29 New trials premised on misconduct are appropriate when "misconduct of [the] prevailing party" "materially affect[s] the substantial rights of [the aggrieved] parties." CR 59(a)(2). A party seeking a new trial for misconduct must establish that (1) the challenged conduct was

actually misconduct, (2) the misconduct was prejudicial, (3) the misconduct was objected to at trial, and (4) the misconduct was not cured by the trial court's instructions. *Teter v. Deck*, 174 Wn.2d 207, 226, 274 P.3d 336 (2012). The key question is whether "such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial." *Alum. Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (internal quotation marks omitted) (quoting *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)).

[13] ¶30 Appellate courts review a trial court's denial of a motion for a new trial for abuse of discretion. *Id.* "[I]t is in this area of the new-trial field that the favored position of the trial judge and his sound discretion should be accorded the greatest deference." *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 440, 397 P.2d 857 (1964). *See also State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991) ("The trial court is in the best position to most effectively determine if [counsel's] **[**212]** misconduct prejudiced a [party's] right to a fair trial."), *abrogated on other grounds by State v. Schierman*, 192 Wn.2d 577, 438 P.3d 1063 (2018) (plurality opinion). Accordingly, appellate courts will defer **[***19]** to the reasoned judgment of the trial court "[u]nless some prejudicial effect is clear from the record." *Gilmore*, 190 Wn.2d at 503.

[14] ¶31 Here, the Court of Appeals reviewed the record and properly determined that none of the alleged misconduct **[*807]** highlighted by GPC and NAPA had a clear prejudicial effect on the jury. GPC and NAPA first argue that Coogan's attorney engaged in misconduct by asking a question implying that workers at GPC facilities had died from asbestos-related diseases. We agree that question was improper, as it violated the parties' pretrial stipulation against presenting such evidence. However, the trial court provided the jury with a curative instruction: "There will be no evidence of deaths and the [GPC] facility related to asbestos exposure in this case. You may not consider such fact in your deliberations of this case, and you may not discuss that in your deliberations of the case." 23 VTP (Feb. 28, 2017) at 55. GPC and NAPA argue this instruction was insufficient, but "jurors are presumed to follow the court's instructions." *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). The Court of Appeals acknowledged that "the trial court's instruction could have been worded better" but concluded that this incident "does not rise to the level of misconduct **[***20]** that requires a reversal of the liability verdict" because it was only "one isolated question in a complex trial." *Coogan*, slip op. at 30. Like the Court of Appeals, we cannot find any evidence in the record showing Coogan's attorney's question had a clear prejudicial effect on the jury.

¶32 GPC and NAPA next contend that Coogan’s attorney engaged in misconduct by asking questions implying that GPC’s corporate representative was not prepared to answer questions and so should not have been selected to testify on GPC’s behalf. But, as the Court of Appeals noted, GPC and NAPA cannot show prejudice resulted from these questions because the corporate representative’s “lack of preparedness was apparent” to the jury. *Id.* at 31. Before Coogan’s attorney even asked the questions at issue, a juror submitted this question for the trial court to ask: “As GPC’s corporate representative, is there a reason you have not reviewed materials for this case to better answer questions?” Clerk’s Papers (CP) at 9077; 17 VRP (Feb. 15, 2017) at 142. We therefore agree that GPC and NAPA have failed to demonstrate [*808] Coogan’s attorney’s questions about the corporate representative had a prejudicial effect on the jury.

¶33 GPC and NAPA also claim Coogan’s [***21] attorney committed misconduct by asking a question that elicited an outburst from Jay Coogan that defense counsel had accused him of killing his brother, Doy Coogan. On cross-examination, defense counsel asked Jay questions about his relationship with Coogan’s counsel and walks that Jay took with her during his deposition. On redirect, to rebut any implication that there was anything inappropriate going on between them, Coogan’s attorney asked Jay about their relationship and why he “needed to pretty regularly blow off steam” while being deposed by defense counsel. 16 VRP (Feb. 14, 2017) at 159. Jay replied, “Some of the questions that were asked of me in the deposition were very offensive.” 16 VRP (Feb. 14, 2017) at 159. Unprompted, Jay then added, “At one point she [defense counsel] accused me of killing my brother.” 16 VRP (Feb. 14, 2017) at 160. The trial court immediately struck the statement and instructed the jury that the remark was irrelevant and should be completely removed from their consideration. Because “jurors are presumed to follow the court’s instructions,” *Emery*, 174 Wn.2d at 766, and GPC and NAPA do not point to other evidence in the record showing Jay Coogan’s outburst had a prejudicial [***22] effect on the jury, we agree the trial court did not abuse its discretion by denying the motion for a new trial on this basis.

[15] ¶34 Finally, GPC and NAPA allege a number of statements Coogan’s attorney made during closing argument constituted misconduct. But GPC and NAPA did not object to those statements, even after the trial court invited all parties to place any [**213] objections on the record at the end of closing. A timely objection is one of the requirements for a new trial based on attorney misconduct because it prevents parties from gambling on a favorable verdict before claiming error. *Teter*, 174 Wn.2d at 225. The sole exception to the preservation of error requirement is “for misconduct [*809]

so flagrant that no instruction can cure it.” *Id.* (citing *Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873 (1967)). We need not belabor every belated accusation of misconduct. We agree with the Court of Appeals that GPC and NAPA failed to demonstrate any prejudice caused by Coogan’s attorney’s closing argument that was so flagrant it could not have been cured by an instruction from the trial court had GPC and NAPA timely objected.

¶35 In sum, GPC and NAPA have failed to demonstrate that any alleged misconduct by Coogan’s attorney had a clear prejudicial effect on the jury such that GPC [***23] and NAPA did not receive a fair trial on liability. On this issue, we affirm the Court of Appeals.

¶36 Unfortunately, despite its majority holding that no irregularity or misconduct invalidated the jury’s verdict, a different majority of the Court of Appeals vacated the jury’s award of noneconomic damages and ordered a new trial.² It did so based on its own “necessarily ... subjective” determination that the amount of damages was “so excessive that it shock[ed] the court’s conscience.” *Coogan*, slip op. at 26, 25. As discussed next, this was error. Reversal of a jury’s damages award on grounds of excessiveness requires a more substantive assessment, grounded in a thorough consideration of all the evidence and any circumstances suggesting passion or prejudice.

III. Nothing in the Record Demonstrates the Jury’s Damages Verdict Was the Result of Passion, Prejudice, or Any Other Improper Consideration That Should Shock the Court’s Conscience

¶37 As noted, the Court of Appeals agreed with the trial court that GPC and NAPA’s allegations of attorney misconduct [*810] did not demonstrate the clear prejudice needed to overturn the jury’s verdict under CR 59(a)(1) and (2). It separately considered the defendants’ argument for a new trial under CR 59(a)(5), which asserted [***24] the jury’s verdict was “so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice.” CR 59(a)(5); *see Coogan*, slip op. at 22. In the course of its brief analysis, the court pivoted away from the language of the court rule and relevant precedent to rely on a somewhat free-floating determination that “the \$30 million pain and suffering verdict shocks this

²Notably, of the two Court of Appeals judges comprising the majority that ordered a new trial on the issue of damages, one would have ordered a new trial on both liability and damages under CR 59(a)(1) and (2), agreeing with GPC and NAPA that Coogan’s attorney’s misconduct prejudiced the jury and infected the entire verdict. *Coogan*, slip op. at 46 (Lee, J., dissenting in part).

court's conscience." *Coogan*, slip op. at 24. But because the jury's damages verdict was supported by substantial evidence, it was error for the Court of Appeals to set it aside without identifying something in the record demonstrating that the jury rendered an excessive verdict because of passion, prejudice, or any other improper consideration.

A. Courts Have a Limited Role in Reviewing Juries' Damages Verdicts

[16, 17] ¶38 Respect for the jury's role in our civil justice system is rooted in Washington's constitution, which grants juries "the ultimate power to weigh the evidence and determine the facts—and the amount of damages in a particular case is an ultimate fact." *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971) (citing WASH. CONST. art. I, § 21). Because the "determination of the amount of damages ... is primarily and peculiarly within the province of the jury ... courts should be and are reluctant to [***25] interfere with the conclusion of the jury when fairly made." *Bingaman*, 103 Wn.2d at 835 (citing *Baxter*, 65 Wn.2d at 438). "We strongly presume the jury's verdict is correct." *Bunch*, 155 Wn.2d at 179 (citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711 (1989)).

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[18] ¶39 In narrow circumstances, that strong presumption can be overcome. Courts have long recognized their common law responsibility to ensure that the jury's verdict [**811] achieves substantial justice. See *Bond v. Owens*, 20 Wn.2d 354, 357, 147 P.2d 514 (1944) ("[T]he right to trial by jury and the right of the trial judge to set a jury verdict aside and grant a new trial, on the ground that substantial justice has not been done, have existed side by side for centuries in the English courts, and in our state courts since their creation, and, in fact, in all other systems of judicature founded upon the English common law."); *Coppo v. Van Wieringen*, 36 Wn.2d 120, 123-24, 217 P.2d 294 (1950) ("[W]e have always upheld the right of the trial judge to grant a new trial when he is convinced that substantial justice has not been done, on the theory that it is an exercise of the trial court's inherent power." (citing *Sylvester v. Olson*, 63 Wash. 285, 115 P. 175 (1911))). However, when the trial court denies a new trial, the jury's verdict is strengthened and appellate courts owe even greater deference to the judgment of the jury. See *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 271, 840 P.2d 860 (1992) ("The verdict is strengthened by denial of a new trial by the trial court." (citing *Seaboard Coast Line R.R. Co. v. Gillis*, 294 Ala. 726, 733, 321 So. 2d 202 (1975))).

[19, 20] ¶40 Washington law recognizes [***26] two primary reasons a jury's damages verdict may not achieve substantial justice, which are now codified in court rules. First, the jury's damages verdict might not be supported by

the evidence admitted at trial. See CR 59(a)(7) (new trial may be granted when "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law"). In common law terms, courts may set aside a jury's damages verdict if that verdict "'is outside the range of substantial evidence in the record.'" *Bunch*, 155 Wn.2d at 179 (quoting *Bingaman*, 103 Wn.2d at 835). "The requirement of substantial evidence necessitates that the evidence be such that it would convince an unprejudiced, thinking mind." *Id.* (internal quotation marks omitted) (quoting *Indus. Indem. Co. of Nw. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990)). "Where the proponent [**812] of a new trial argues the verdict was not based upon the evidence, appellate courts will look to the record to determine whether there was sufficient evidence to support the verdict." *Palmer v. Jensen*, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997) (citing *McUne v. Fuqua*, 45 Wn.2d 650, 652, 277 P.2d 324 (1954); *Ide v. Stoltenow*, 47 Wn.2d 847, 848, 289 P.2d 1007 (1955); Philip A. Trautman, *Motions Testing the Sufficiency of Evidence*, 42 WASH. L. REV. 787, 811 (1967)).

¶41 This analysis is akin to the inquiry courts make in considering a motion for judgment as a matter of law under CR 50, where the court is required to view the evidence and reasonable inferences [***27] in the light most favorable to the verdict, without regard to contrary evidence or inferences. Compare CR 59(a)(7) (providing new trials may be granted when "there is no evidence or reasonable inference from the evidence to justify the verdict"), with CR 50(a)(1) (allowing judgment as a matter of law where "there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue"). See also *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 176-77, 422 P.2d 515 (1967) (noting substantial evidence review respects the jury's prerogative to evaluate and weigh evidence).

¶42 Appellate and trial courts are equally competent to review the record for legal sufficiency, so appellate courts owe no deference to trial courts' conclusions. Cf. *Paetsch v. Spokane Dermatology Clinic, PS*, 182 Wn.2d 842, 848, 348 P.3d 389 (2015) ("We review judgments as a matter of law de novo." (citing *Faust v. Albertson*, 167 Wn.2d 531, 539 n.2, 222 P.3d 1208 (2009))). But both appellate and trial courts must show appropriate deference to the jury's constitutional role as the ultimate finder of fact. *James*, 79 Wn.2d at 869; see also *Zorich v. Billingsley*, 55 Wn.2d 865, 869, 350 P.2d 1010 (1960) ("[W]e will not disturb an award of damages made by the jury if it is within the range of substantial evidence in the record which the jury is [**215] entitled to believe."). This deference requires courts to presume that the jury resolved every conflict and drew every reasonable inference in [**813]

favor of [***28] the prevailing party. See CR 59(a)(7) (new trials may be granted when “there is no evidence or reasonable inference from the evidence to justify the verdict”).

[21] ¶43 In addition to reviewing for substantial evidence, appellate courts appropriately ask if the jury’s damages verdict might be based on some improper consideration outside the evidence admitted at trial. See CR 59(a)(5) (new trial may be granted when the damages awarded are “so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice”). In common law terms, this occurs when the record “manifestly show[s] the jury to have been actuated by passion, partiality, prejudice, or corruption,” or “disclose[s] circumstances foreign to proper jury deliberations ... [that] shock the sense of justice and sound judgment.” *Kramer v. Portland-Seattle Auto Freight, Inc.*, 43 Wn.2d 386, 395-96, 261 P.2d 692 (1953) (quoting *Coleman v. Southwick*, 9 Johns. 45 (N.Y. Sup. Ct. 1812)); see also *Bunch*, 155 Wn.2d at 179 (“An appellate court will not disturb an award of damages made by a jury unless it ... shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.” (quoting *Bingaman*, 103 Wn.2d at 835)). Though sometimes articulated in distinct terms, the passion or prejudice inquiry and the shocks the conscience inquiry ask essentially the same question: Did the [***29] jury base its verdict on some malign influence or egregious impropriety at trial rather than the properly admitted evidence? Both inquiries reflect different facets of the common law power of courts to ensure substantial justice has been done and are best considered two sides of the same coin. *Coppo*, 36 Wn.2d at 123-24.

[22] ¶44 The size of the verdict alone cannot be proof that it was based on passion, prejudice, or any other improper consideration. *Bunch*, 155 Wn.2d at 183 (“The verdict of a jury does not carry its own death warrant solely by reason of its size.” (quoting *Bingaman*, 103 Wn.2d at 838)). That is particularly true where the verdict is supported by substantial [*814] evidence in the record but is challenged for being shockingly large. As we explained 40 years ago:

In those instances where the verdict is reasonably within the range of proven damages ... , then it cannot be found as a matter of law that the verdict was unmistakably so excessive or inadequate as to show that the jury had been motivated by passion or prejudice solely because of the amount.

James, 79 Wn.2d at 870-71.³

³This court has recognized that the substantial evidence inquiry is the threshold question, before turning to the question of

¶45 Instead, there must be something in the record showing that the jury’s verdict was improperly influenced by “untoward incidents of such extreme and inflammatory nature that the court’s admonitions and [***30] instructions could not cure or neutralize them.”⁴ *Id.* at 871. “Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable.” *Bingaman*, 103 Wn.2d at 836 (citing *James*, 79 Wn.2d at 870). Said another way, when a jury’s damages verdict is within the range of substantial evidence in the record, courts can order a new trial only if something in the record unmistakably indicates that the verdict is not [***216] actually based on that substantial evidence but instead on some improper consideration that gives rise to passion or prejudice, or that otherwise shocks the court’s conscience.

[23] ¶46 Given “our declared reluctance to interfere with the decision of a jury, it should be and indeed is the rare case where [courts] should substitute our judgment for that of the jury.” *Washburn*, 120 Wn.2d at 278. This is particularly [*815] true for appellate courts, which “can review only the written record, while the factfinder and the trial judge [a]re in the favored position of being able to evaluate the full range of evidence submitted.” *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 33, 864 P.2d 921 (1993) (citing *Washburn*, 120 Wn.2d at 268). We once explained why appellate courts defer to the conclusions of trial courts in this way:

“The judge before whom the cause was tried heard the testimony, observed the appearance and bearing [***31] of the witnesses and their manner of testifying, and was much better qualified to pass upon the credibility and weight of their testimony than this court can be. *There are many comparatively trifling appearances and incidents, lights and shadows, which are not preserved in the record, which may well have affected the mind of the judge as well as the jury in forming opinions of the weight of the evidence, the character and credibility of*

excessiveness. See *James*, 79 Wn.2d at 866 (“Our first inquiry is whether the record sustains a verdict of \$17,000, for if there is not substantial evidence to support the verdict, the issue of excessive damages becomes moot and ought not stand at all.”); *Palmer*, 132 Wn.2d at 197-98 (criticizing Court of Appeals for “limit[ing] its analysis to whether the verdict was so inadequate as to indicate passion or prejudice ... [without first addressing] whether there was evidence to support the verdict”).

⁴This requirement is even more demanding than the factors required to show a new trial on liability is warranted. See *Teter*, 174 Wn.2d at 226 (“a court properly grants a new trial where ... (2) the misconduct is prejudicial ... and (4) the misconduct was not cured by the court’s instructions”).

the witnesses, and of the very right and justice of the case. These considerations cannot be ignored in determining whether the judge exercised a reasonable discretion or abused his discretion in granting or refusing a motion for a new trial.”

Coppo, 36 Wn.2d at 124 (quoting *McLimans v. City of Lancaster*, 57 Wis. 297, 299, 15 N.W. 194 (1883)).

[24] ¶47 Accordingly, appellate courts review trial courts’ decisions in this area for a manifest abuse of discretion, while still deferring to the jury’s constitutional role as ultimate fact finder. See *Washburn*, 120 Wn.2d at 271 (“The verdict is strengthened by denial of a new trial by the trial court.” (citing *Seaboard Coast Line*, 294 Ala. at 733)). We will not disturb the trial court’s ruling and the jury’s verdict unless we are convinced that “‘no reasonable person would take the view adopted by the trial court.’” *Gilmore*, 190 Wn.2d at 494 (internal quotation marks omitted) (quoting *Salgado-Mendoza*, 189 Wn.2d at 427).

¶48 These [***32] compounding layers of deference effectively limit the ability of an appellate court to overturn a verdict supported by substantial evidence to one scenario: when the [*816] only reasonable view is that something other than the evidence at trial unmistakably caused the jury’s verdict. More intrusive appellate review risks encroaching on the jury’s prerogative to weigh the evidence and decide the facts, including the award of damages. See *Washburn*, 120 Wn.2d at 269 (“Given the foregoing constitutional principle ... [that the jury is the ultimate fact finder], appellate review is most narrow and restrained—the appellate court ‘rarely exercises this power.’” (quoting *Bingaman*, 103 Wn.2d at 835)).

B. The Court of Appeals Erred by Reversing the Jury’s Damages Verdict Because of Its Size and Based on Reweighing the Evidence That Supports It

¶49 Recognizing the substantial evidence in the record, GPC and NAPA’s CR 59(a) motion advanced only one argument for why a new trial on damages was necessary: the jury’s verdict was the result of passion or prejudice caused by the alleged misconduct of COOGAN’s attorney. CP at 16362 (“This section explains *why* the jury rendered a verdict based on passion and prejudice. The trial was saturated with misconduct by Plaintiffs’ [***33] counsel from start to finish, as counsel used improper questioning and argument at every turn to inflame the jury into returning an excessive verdict.”). That motion did not argue the jury’s verdict was outside the range of substantial evidence. CP at 16359 (citing CR 59(a)(1), (2), and (5)—but not CR 59(a)(7)—as the bases for a new trial). Having acknowledged the jury’s verdict was within the range of substantial evidence, GPC and NAPA can

prevail only if there is [**217] something in the record showing that the jury’s verdict was improperly influenced by “untoward incidents of such extreme and inflammatory nature that the court’s admonitions and instructions could not cure or neutralize them.” *James*, 79 Wn.2d at 871.

¶50 [*817] They cannot make this showing. In rejecting GPC and NAPA’s passion or prejudice argument, the trial court noted:

[I]n a three-month long trial, it is impossible not to be able to go through a record and pull out this question and that one and string together an argument that looks like there was some prejudice when the great mass of the evidence is what the jury is supposed to consider and what I have to assume they did consider.

VTP (Dec. 1, 2017) at 56. After the benefit of briefing, oral argument, and a front-row seat at trial, [***34] the trial court concluded the alleged incidents of misconduct by COOGAN’s attorney were not so egregious as to unmistakably indicate the jury was inflamed by passion or prejudiced against GPC and NAPA.

¶51 On appeal, GPC and NAPA tried to buttress their argument that the verdict was the result of passion or prejudice by weaving “shocks the conscience” language into their claims for the first time. Opening Br. of Appellant GPC (Wash. Ct. App. No. 51253-0-II (2018)) at 55 (citing VTP (Dec. 1, 2017) at 52, 57). But the substance of GPC and NAPA’s argument for a new trial—on both liability and damages—remains focused on the alleged incidents of misconduct they believe inflamed the jury with passion or prejudice and undermined its verdict.

¶52 We review the trial court’s denial of the new trial motion for abuse of discretion, conscious that the jury’s “verdict is strengthened by denial of a new trial by the trial court.” *Washburn*, 120 Wn.2d at 271 (citing *Seaboard Coast Line*, 294 Ala. at 733). We will not disturb the trial court’s ruling and the jury’s verdict unless we are convinced that “‘no reasonable person would take the view adopted by the trial court.’” *Gilmore*, 190 Wn.2d at 494 (internal quotation marks omitted) (quoting *Salgado-Mendoza*, 189 Wn.2d at 427). Unfortunately, the Court of Appeals exceeded these [***35] limitations on appellate review and effectively substituted its judgment for that of the trial court and the jury.

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¶53 First, it is important to recognize that the Court of Appeals’ decision to overturn the damages verdict as shockingly excessive is undercut by its decision to uphold the liability verdict. The Court of Appeals appropriately rejected GPC and NAPA’s challenge to the liability verdict premised on instances of attorney misconduct alleged to have

prejudiced the jury against GPC and NAPA. Common sense suggests that if those incidents did not prejudice the jury's verdict on liability, they did not prejudice the jury's verdict on damages either. Nothing in the record demonstrates that the jury's verdict was the result of "passion or prejudice ... [that was] of such manifest clarity as to make it unmistakable." *Bingaman*, 103 Wn.2d at 836 (citing *James*, 79 Wn.2d at 870).

¶54 Second, the Court of Appeals failed to defer to the jury's assessment of the evidence presented and essentially reweighed the evidence of COOGAN's suffering in the months before he died. *Coogan*, slip op. at 25 ("Given the short time that [COOGAN] was sick, the jury's \$30 million award was 'flagrantly outrageous and extravagant' on its face." (quoting *Bingaman*, 103 Wn.2d at 837)). That reasonable minds might ***36 differ on the economic "value" of COOGAN's suffering is evident from Judge MELNICK's dissent. *Coogan*, slip op. at 54 (MELNICK, J., dissenting in part) ("The verdict for these noneconomic damages does not shock my conscience. No amount of money could ever compensate [COOGAN] for the suffering he endured as a result of peritoneal mesothelioma.").

¶55 There is no legal standard for determining the length of suffering needed to support significant damages, especially where that suffering is severe and involves an awareness of impending death. In *Bingaman*, where a new mother died of eclampsia caused by medical malpractice, the Court of Appeals ordered a new trial on damages because it believed the jury's pain and suffering **218 award was excessive given the "period of sporadic suffering lasting less *819 than 1 day." *Bingaman v. Grays Harbor Cmty. Hosp.*, 37 Wn. App. 825, 833, 685 P.2d 1090 (1984). We reversed, explaining:

Although the decedent was unconscious during some part of her last 35 hours of life, due to her condition or sedation or both, *substantial evidence was presented from which the jury could find that during much of that period of time she not only suffered extreme conscious pain, fear and despair at not being helped, but also had the conscious realization her life and everything fine that ***37 it encompassed was prematurely ending.* ... It is admittedly difficult to assess in monetary terms the damages for such pain and suffering, but although the damages for the decedent's pain and suffering awarded by the jury were very substantial, that award does not under the facts and circumstances established by the evidence shock our sense of justice and sound judgment.

Bingaman 103 Wn.2d 837-38 (emphasis added).

¶56 In this case, the evidence showed that COOGAN suffered

for months from an ever-growing array of symptoms that robbed him of the ability to eat, drink, or breathe without pain. His body deteriorated with alarming speed, while fluid built up in and around his internal organs. He knew death was fast approaching. Given the severity of COOGAN's suffering, the jury's verdict does not shock the conscience or offend notions of justice. "Our conscience is apparently more resilient than the Court of Appeals to shocks." *Bunch*, 155 Wn.2d at 182.

¶57 In setting aside the damages verdict, the Court of Appeals intruded on the jury's constitutional prerogative and impermissibly based its decision on the size of the verdict and its own subjective reweighing of the evidence. There was no challenge to the sufficiency of the evidence to support ***38 the verdict. There was nothing in the record unmistakably showing the jury's verdict was based on some improper consideration instead of the legally sufficient evidence. All the Court of Appeals had left to consider was the verdict's size, which it found "'flagrantly outrageous and extravagant' on its face." *Coogan*, slip op. at 25 [*820] (quoting *Bingaman*, 103 Wn.2d at 837). But "[t]he verdict of a jury does not carry its own death warrant solely by reason of its size." *Bunch*, 155 Wn.2d at 183 (quoting *Bingaman*, 103 Wn.2d at 838). Because the verdict is supported by substantial evidence and the record does not clearly indicate that the verdict resulted from passion or prejudice or was so beyond the bounds of justice that no reasonable person could believe it is correct, we reverse the Court of Appeals and reinstate the jury's verdict in full.

IV. The Trial Court Properly Denied GPC and NAPA's CR 60 Motion for Relief from Judgment

[25] ¶58 Having vacated the jury's damages verdict on other grounds, the Court of Appeals did not address GPC and NAPA's argument that the trial court abused its discretion by denying their motion for relief from judgment under CR 60(b). We address that argument here because GPC and NAPA conditionally raised it in their answer to the petition for review.⁵ "A trial court's denial of a motion ***39 to vacate under CR 60(b) will not be overturned on appeal unless the court manifestly abused its discretion." *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000) (citing *In re Guardianship of Adamec*, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983)). "In our review for abuse of discretion, we may affirm the trial court on any basis that the record supports." *State v. Arndt*, 194 Wn.2d 784, 799, 453 P.3d 696 (2019)

⁵The other issues conditionally raised by GPC and NAPA—whether the alleged misconduct by COOGAN's attorney warrants a new trial on liability and whether the entire verdict was shockingly excessive—are resolved by our analysis above.

(citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989)).

¶59 GPC and NAPA accuse COOGAN's family and attorney of misrepresenting the nature of COOGAN's relationship with his widow by intentionally withholding evidence that contradicted the image presented to the jury. That accusation stems from declarations filed [**219] in a separate dispute in probate court between COOGAN's widow and daughters over [*821] the interpretation of COOGAN's will. In February 2018, two months after the trial court in this case denied GPC and NAPA's motion for a new trial, COOGAN's widow moved for partial summary judgment in probate court. That motion argued she was entitled to half of the property acquired during her relationship with COOGAN prior to their marriage in 2011. CP at 21001. Because the claim encompassed property COOGAN ostensibly left to his daughters in his will, the daughters opposed the motion and filed declarations challenging the widow's account of the nature and quality of her early relationship with COOGAN. CP at 21081-86.

¶60 GPC [***40] and NAPA monitored the Coogan family's probate dispute throughout trial and discovered these new filings during a routine docket check. GPC and NAPA moved for relief from judgment under CR 60(b)(3) and (4), arguing that the declarations constituted newly discovered evidence and that COOGAN's family and attorney had intentionally misrepresented the quality and nature of COOGAN's relationship with his widow in order to trick the jury into returning a larger damages award for loss of consortium.

[26, 27] ¶61 Courts will grant a motion to vacate the judgment under CR 60(b)(3) when newly discovered evidence "(1) would probably change the result if a new trial were granted, (2) was discovered since trial, (3) could not have been discovered before the trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching." *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). Relief under CR 60(b)(4) is appropriate when the party challenging the judgment "establish[es] ... by clear and convincing evidence" that it "was prevented from fully and fairly presenting its case or defense" due to "fraud, misrepresentation, or other misconduct of an adverse party." *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990) (citing *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989)).

¶62 The trial court denied the motion for relief from judgment after reviewing the "1078 pages of documentation [***41] [*822] submitted by [GPC and NAPA] in support of their motion" and the "881 pages of documentation submitted by [Coogan] in opposition to the motion." CP at 22555. The trial court's order notes its

familiarity with the parties' prior motions on the issue of allegedly conflicting probate and trial evidence. CP at 22556. For example, the trial court had previously denied a motion to admit an unredacted probate declaration from Coogan's widow because

[t]his probate document was in existence. And everybody knew about it from the get-go. That's been a common knowledge among the Defendants in this case.

So if that was something that everybody wanted to explore, there was a simple method by which they could have done so. ...

. ...

I think that everybody had an opportunity to require that the widow be here. Nobody chose to do that. *Everybody knew about the probate action and that there was some kind of discord.* Everybody has these probate documents well in sufficient time to have sent a Notice to Adverse Party to Attend Trial, and nobody did it.

. ...

The question was: Up to the time of death, what was the relationship like? And if you believe that there is some reason that Ms. Coogan should have been [***42] present, it was just a simple matter to send out the notice. VTP (Mar. 14, 2017) at 9-10, 13. GPC and NAPA failed to timely pursue relevant evidence from the probate matter, only to turn around and demand it be admitted later.⁶ That continued in their motion for relief from judgment.

¶63 The central premise of GPC and NAPA's argument for relief from judgment is that Coogan's family and attorney deliberately kept any disputes about the quality and [*823] nature of Coogan's relationship with his widow hidden from the jury by waiting until [**220] after trial concluded to make those arguments in probate court. But a review of the record shows that is simply not the case: Coogan's widow and daughters made substantially similar arguments in probate court before trial in this case even began.

¶64 In probate motions filed in March 2016, Coogan's widow argued she was entitled to half the property acquired during her relationship with Coogan prior to their marriage in 2011. CP at 20799 ("This Petition seeks a determination and direction from the [Probate] Court as to whether or not Gerri Sue is entitled to all of the jointly titled property and one half (1/2) of the non-jointly titled property which had been jointly [***43] accumulated by [Coogan] and Gerri Sue as

⁶This failure appears to be a consequence of GPC and NAPA's trial strategy, which was to focus exclusively on denying liability and to not argue the appropriate amount of damages.

community property during their twenty (20) year ‘marital like’ and marital relationship.” (emphasis omitted)).

¶165 In a May 2016 motion to remove Coogan’s widow as personal representative of Coogan’s estate, Coogan’s daughters disputed the notion that the nature and quality of the widow’s relationship with Coogan prior to their marriage entitled her to that property. CP at 20897 (“Not satisfied with her community property interest in assets since her marriage in 2011, she seeks a further determination from this Court that she and Jerry Coogan had an equity relationship so she can add 16 more years from which to claim a ‘community like’ interest in Jerry Coogan’s business, residential real property, business real property, equipment, improvements, and collector vehicles. ... In fact, she is requesting that this Court declare that she and Jerry Coogan were in an equitable relationship for two years before his divorce from Caren Coogan was finalized in 1997.” (emphasis omitted)). While the daughters did not file the same supporting declarations in 2016 as they did in 2018, they clearly disagreed with the widow’s representations regarding her early [***44] relationship with Coogan.

¶166 Contrary to GPC and NAPA’s claims, the quality and nature of Coogan’s relationship with his widow was made [*824] an issue in the probate proceedings before trial in this case even began. As the trial court noted, GPC and NAPA were monitoring those proceedings and could have recognized that issue’s relevance to loss of consortium damages. But GPC and NAPA did not make any arguments regarding the appropriate amount of damages until after the jury returned its verdict. Instead, their strategy at trial focused overwhelmingly on denying liability. Coogan’s family and attorney are not responsible for GPC and NAPA’s liability-focused trial strategy or their resulting lack of diligence in pursuing probate evidence that could have challenged Coogan’s claimed damages. Under these circumstances, we hold the trial court did not abuse its discretion by denying GPC and NAPA’s CR 60 motion for relief from judgment.

CONCLUSION

¶167 At the end of a 12 week trial, a unanimous jury rendered a verdict that is supported by substantial evidence. Though that verdict is undeniably large, nothing in the record unmistakably indicates it was the result of passion or prejudice or lies so beyond the bounds [***45] of justice that no reasonable person could believe it is correct. The trial court did not abuse its discretion by denying posttrial motions to set that verdict aside as excessive. Nor did the trial court abuse its discretion by excluding Dr. Schuster’s testimony or by denying the motion for relief from judgment based on newly discovered evidence. Accordingly, we reverse the Court of Appeals in part and reinstate the jury’s verdict in

full.

GONZÁLEZ, C.J., and JOHNSON, MADSEN, OWENS, GORDON MCCLOUD, YU, MONTOYA-LEWIS, and WHITENER, JJ., concur.

References

LexisNexis Practice Guide: Washington Torts and Personal Injury

Robert H. Aronson & Maureen A. Howard, *The Law of Evidence in Washington* (5th ed.)

LexisNexis Practice Guide: Washington Trial and Post-Trial Civil Procedure

Washington Rules of Court Annotated (LexisNexis ed.)

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Bruce Broillet

GREENE, BROILLET & WHEELER, LLP

Quiet reflections on profound loss

HELPING THE JURY DO JUSTICE FOR THE WRONGFUL DEATH OF A CHILD

You sit down and look across your desk to meet two people. The look on their faces is reserved for those who are experiencing the unthinkable. Not long ago, they received a phone call telling them their child had been killed and asking them to please come and identify the body.

The body? This is their child, not just a body. This is a child whose life was inextricably intertwined with the lives of the two people who are now sitting in your office. This is a child who was guided, nurtured, and supported by the parents who sit before you and with whom the sharing of love is not easily measured.

As the parents sit before you, still waiting to awaken from this nightmare, you know that they wish they never had to meet you. If only the hands of the clock could be turned back to twenty seconds before the negligent party took the life of their beloved child. If only they could have sat with the party who was about to act negligently and had the chance to plead with that party not to be negligent – the chance to plead with that party to spare the life of their child. If only they could have warned their child, protected their child as they had done countless times in the past. If only....

It has been said that having a child is like having your heart walking around outside your body. Our children are our hopes and dreams for the future. We have spent our child's lifetime protecting, teaching, and loving them. We have basked in the joy of their love of us. We have comforted their pain, accepted their weaknesses, rejoiced in their successes, and helped them through adversity. And, now, at their moment of greatest need, we could do nothing for them.

Closing argument in a wrongful death case is built, of course, on the evidence. Nothing new about that. The whole trial is built on the evidence. But to plan to adequately convey to a jury the

enormity of the loss, one must sit quietly. One must consider. One must find the universal chords that resonate with everyone about this most profound of losses. One must become less a lawyer and more a human being. One must ponder those shared values and experiences that cut across society, that make us all the same no matter our station in life.

The one thing we all share

The one thing we all share – from the CEO to the carpenter, from the doctor to the parking attendant, from the movie star to the auto mechanic – is the love of our children. It is those universal realities about which one must stop, sit quietly, and consider in formulating the closing argument in a wrongful death case. The argument is rooted in the evidence, but it blossoms when the jury is reminded of these universal principles that we try to capture in the word “love.”

This article does not address economic damages in a wrongful death case. Loss of financial support is certainly a significant element of damage in many wrongful death cases, but that evidence typically comes from financial witnesses, documents, and/or expert testimony. This article, instead, deals with non-economic damages – the loss of love and all of its related but distinct losses as listed in the CACI jury instruction. And while that instruction contains a list that is useful to the jury in evaluating damages, the simple words themselves hardly reach to the core of what the non-economic damages are about. So, this article asks you to ask yourself, in the quiet moment, what such a loss truly means. If you ask yourself, if you look into yourself, if you understand what the loss means as a human being, you will know what to tell the jury in closing.

I am using the example of the death of a child to illustrate the point. But many of the same ideas are transferable to the death of a spouse or the death of a parent. There are no cookie-cutter approaches to developing a closing

argument in a wrongful death case. There is no checklist. And I do not claim that all the ideas in this article are mine. Some are ideas I picked up from other trial lawyers and some are my own. But, in the end, it is all about understanding deeply the particular loss in your case and communicating that to the jury.

Ask yourself: Is it true that the worst thing you can do to a human being is to cause them to walk in the funeral procession of their own child? And, if so, why? It has often been said that a parent would throw himself or herself in front of a bus to save the life of their child. A potential juror years ago was asked during voir dire how important his children were to him. This big, burly construction worker responded that his kids were the best thing that he had done in his whole life. Our children, after all, are our hopes and dreams going into the future. We want them to find joy and fulfillment, to grow and prosper. We cannot imagine walking in that funeral procession. The mind simply cannot go there.

Ask yourself: Can we actually place a monetary value on the loss of a child? We would all agree that accountability for wrongdoing that took the life of someone's child is required. But why do we put that loss into monetary terms in the civil justice system? For those who say that the money will not bring the child back, they miss the point. Accountability is just a word until the consequence of wrongdoing is translated into money damages – until the wrongdoer is made to pay. The negligent parties are not asked to give up their own child. But they are commanded by the law to pay money damages for the debt that is due and owing, a debt that they created by their conduct. Indeed, money is the only means we have of forcing the wrongdoer to be held accountable. And, without full accountability for the wrong, society would descend into chaos. A monetary

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award is the best way ever devised to resolve these disputes peacefully.

We do not hesitate to make meaningful monetary awards in other circumstances. If the negligent party were to drop and shatter a priceless vase, would we hesitate to award the owner of the vase the full value? Of course not. If a corporate truck were to careen into a building and destroy it, would we hesitate to award the building owner the full value of the building – the full value of the loss? Of course not. So, when it comes to a loss far worse than either of those, we should not flinch from making a full award for the loss of the child.

Ask yourself: How do you place a value on the loss? Nothing is more challenging for a juror than to assess the loss of a loved one in monetary terms. It is not easy, but if it were easy, we would not need a jury of human beings. We could just input the data into a computer and it would spit out an answer. But would it? Could it? How would a computer ever understand why we would give up our lives to save the life of our child?

But we acknowledge the fact of that value all the time in society. When we send a test pilot up in a heretofore untested multimillion-dollar airplane, we instruct the pilot to bail out if anything goes wrong and not to try to save the plane. The life of one pilot is worth more than the ultra-high dollar value of the plane. Likewise, if someone were in a burning building and, down the hall, they see a \$20 million painting hanging on the wall and, below it, an unconscious human being on the floor, and if only one could be saved, which one would be saved? Of course, the human being would be saved. These examples are but two of many that show how much we value human life and how we put that value into monetary terms every day.

Award is for loss, not grief and sorrow

Ask yourself: What does it mean when the jury instruction says that the award shall be for the loss but not for grief and sorrow? After all, doesn't that sound inconsistent? In fact, it is not

inconsistent. Grief and sorrow are different and far less profound than the loss.

Example: If a man were to lose his leg in an industrial accident, he would go through a period of grief and sorrow. It is a period, usually of limited duration, often described as the grieving process. Initially, the man cannot believe this has really happened. He wakes up thinking, hoping, that it was just a nightmare and that he is fine. But then he reaches down to where his leg was and finds that it is missing. He goes through the day almost in a state of denial. He wakes up the next morning and goes through the same emotions until finally, one day, he comes to grips with the reality that the leg is gone and it is not going to change.

Some people say this process takes a few months. But, once it is over, the *loss* begins. He has come to realize the fact that every day for the rest of his life will be lived without the leg – that so much of his life the way it used to be has changed. The loss is so much greater than the process of grief and sorrow. The grief and sorrow period, while difficult, does not remotely match the lifetime of loss and all the changes in life that will be with him until the day he dies.

Such it is with the loss of a child. Initially, the grief and sorrow are overwhelming. The parents wake up every morning hoping, praying, that it was just a nightmare. They live in a state of near denial. They do not understand. But once they get through this grieving process, the loss of the love of the child sinks in. How is my child doing now? Where would she be sitting at the Thanksgiving table? What dreams were snuffed out by the negligent party? Where is the joy? Where is the love?

Gone. Lost. Loss.

Ask yourself: What will the jurors think the parents will do with the money? We cannot answer that question, but we can explain that the choice about what to do with the money is not ours, but theirs. After all, the loss is not ours, but theirs. If a juror during deliberations were to ask what the parents will do with the money, the rest of the jurors should turn to that juror and politely say that that

question is not part of the jury instructions, not part of the verdict form, and should not be part of deliberations or the verdict.

The same could be said if a juror were to say, "I would never sue for the death of my child." It is hard to say what one would do until they are placed in the situation themselves of seeing a negligent party take the life of their child. Here, it is the parents' situation, not ours. It is their loss, not ours. It is their choice to seek to hold the person who negligently took the life of their child accountable. The law permits it and the jurors must follow the law.

Likewise, if a juror were to say, "no amount of money will bring the child back," the other jurors should say that bringing the child back is not what this is all about. If we could bring the child back, we would. And the parents would gladly accept that as their verdict. But we cannot. All we can do is to provide compensation for the loss caused by the negligent party.

In fact, if you were to pile millions of dollars on the table in front of the parents and offer one of two things – that they could have the money *or* that their child would walk into the courtroom for just five minutes so that they could hug, say "I love you," say "good-bye," and say "I'll see you again" – we all know which one the parents would take.

Ask yourself: And what about the monetary sacrifices the parents have made in raising the child? The parents certainly make sacrifices in order to provide the best for their children. In my own case, my parents sacrificed buying things for themselves so that my sister and I could get the best possible education. In some cases, parents pass up opportunities to advance in their careers – advancements that would give them more income – because they want to spend more time with their children. Or parents choose not to move to a different city for a higher paying job because they know that it would be best for their children to stay where they are in the schools they love with the friends they've made. Parents make these monetary sacrifices

See Broillet, Next Page

all the time out of love. They put teeth into the phrase “family values” by putting money on the line for those values.

Ask yourself: How long? The court will give, if requested, an instruction on life expectancy. The life expectancy appropriate to the case is the shorter of the parents or the child. Typically, in a child death case, the parents’ life expectancy is the measure. So, the jury will not be making an award just for the day of the death, not just for the first holiday season without the child, not just for the first birthday without the child, not just for the first anniversary of the death.

No, the jury will be making an award for every minute of every hour of every day of every month of every year for the rest of the parents’ lives. Every holiday dinner with an empty seat at the table.

Every family event with the child missing. Graduation Day. Every Mother’s Day. Every Father’s Day. Grandchildren. All the moments and memories that were to be made but never occurred. All of it. Fully accounted for. Fully recognized by the verdict.

Recognizing the enormity of the loss

Someone once proposed a method of avoiding nuclear holocaust between the major superpowers: Have the leader of each superpower place one of their own children to live in the other superpower’s capital city. No leader would ever drop the bomb on a city knowing that he or she would be taking the life of his or her own child in the process. That is because the love between parent and child is as valuable a thing as a person could possess. And that value is what you

will help a jury, once you sit quietly and ponder, to understand. And then the jurors will proudly return a verdict that recognizes the enormity of the loss. And you will have helped them to do justice.

Bruce A. Broillet is a partner at Greene, Broillet & Wheeler, LLP. Mr. Broillet is a plaintiff’s trial lawyer. He is a member of the Inner Circle of Advocates, American College of Trial Lawyers, International Academy of Trial Lawyers, International Society of Barristers, and ABOTA. He served as President of CAALA and received its Trial Lawyer of the Year Award. He served as President of CAOC and received its Consumer Attorney of the Year Award. Mr. Broillet received his B.A. from the University of Notre Dame and his J.D. from the University of Texas School of Law. bbroillet@gbw.law.

STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 12 CP- 6675

Lloyd Strom Garvin: Velda Garvin

AGCO Corp. et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Parties HAVE 10 days to file post-trial motion

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Man / in
Circuit Court Judge

2138
Judge Code

9/11/13
Date

For Clerk of Court Office Use Only

This judgment was entered on the 17 day of Sept 20 13 and a copy mailed first class or placed in the appropriate attorney's box on this 17 day of Sept, 20 13 to attorneys of record or to parties (when appearing pro se) as follows:

Jessica Dean
Darren McDowell
Phoebe McVey
ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert Marinetti, James Glavin
David Jusco, Medina Axelrod
Tim Bauch, Yancey McLeod
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter:

CLERK OF COURT

Jennifer Techman

Jeannette W. McBride

) IN THE COURT OF COMMON

1) PLEAS

)

FOR THE FIFTH JUDICIAL CIRCUIT

)

) C/A No.: 2012-CP-40-6675

)

)

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VERDICT FORM.

2013 SEP 17 AM 8:59
JEANNETTE W. MCBRIDE
C.C.P. & G.S.
we

RICHLAND COUNTY
FILED

1. As to Plaintiff Lloyd Garvin's claims against Defendant Crane Co., we, the judges of the Court, by unanimous consent, find:

for Defendant Crane Co

✓ for Plaintiff Lloyd Garvin

2. As to Plaintiff Lloyd Garvin's claims against Defendant Durco, we, the jury, by unanimous consent, find:

for Defendant Durco

✓ for Plaintiff Lloyd Garvin

3. As to Plaintiff Lloyd Garvin's claims against Defendant Byron Jackson, we, the jury, by unanimous consent, find:

_____ for Defendant Byron Jackson

✓ for Plaintiff Lloyd Garvin

4. If the answer is yes to one or more of the Defendants, please state the amount of actual damages that have been proven by the greater weight of the evidence:

(ten) 10 million dollars Lloyd Garvin's actual damages

(one) 1 million dollars Velda Garvin's loss of consortium damages

5. We, the jury, by unanimous consent find by clear and convincing evidence that the following Defendant or Defendants were willful, wanton or reckless:

a. Crane Co.

Yes ☒ Yes ☐ No

b. Durco

Yes ☒ Yes ☐ No

c. Byron Jackson

Yes ☒ Yes ☐ No

Ingold McLawin
Foreperson

September 11, 2013

Columbia, SC

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Lloyd Strom Garvin and Velda Garvin,

Plaintiffs,

v.

AGCO CORPORATION f/k/a ALLIS
CHALMERS COMPANY, ET AL.,

Defendants.

) IN THE COURT OF COMMON

) PLEAS

)

FOR THE FIFTH JUDICIAL CIRCUIT

)

) C/A No.: 2012-CP-40-6675

)

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VERDICT FORM

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RICHLAND COUNTY
FILED
2013 SEP 17 AM 8:59
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

1. As to Plaintiff Lloyd Garvin's claims against Defendant Crane Co. for punitive damages, we, the jury, by unanimous consent, find:

Eleven million dollars

☒ for Plaintiff Lloyd Garvin in the amount of \$ _____ punitive damages

2. As to Plaintiff Lloyd Garvin's claims against Defendant Durco for punitive damages, we, the jury, by unanimous consent, find:

Eleven million dollars

☒ for Plaintiff Lloyd Garvin in the amount of \$ _____ punitive damages

3. As to Plaintiff Lloyd Garvin's claims against Defendant Byron Jackson for punitive damages, we, the jury, by unanimous consent, find:

FIVE million dollars

☒ for Plaintiff Lloyd Garvin in the amount of \$ _____ punitive damages

10-8-15
Date

10-8-15
Date

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) CIVIL ACTION NO. 2015-CP-04-01607
Rita Joyce Glenn, Individually and as)
Personal Representative of the Estate of)
Thomas Harold Glenn, deceased,)
Plaintiff,) **VERDICT FORM**
vs.)
Fisher Controls, Crosby Valves and)
Carboline Company)
Defendants.)

NEGLIGENCE

1. We the jury find that Defendant Fisher Controls International LLC was negligent, and its negligence was a proximate cause of the Plaintiff's injuries

☒ Yes

☐ No

2. We the jury find that Crosby Valve, LLC was negligent, and its negligence was a proximate cause of Plaintiff's injuries

☐ Yes

☒ No

3. We the jury find that Carboline Company was negligent, and its negligence was a proximate cause of the Plaintiff's injuries.

☐ Yes

☒ No

STRICT LIABILITY

4. We the Jury find the Defendant Fisher Controls International LLC is strictly liable for selling products that proximately caused injury to Plaintiff.

☒ Yes

☒ No

CA

5. We the Jury find the Defendant Crosby Valves, LLC is strictly liable for selling products that proximately caused injury to Plaintiff.

☐ Yes

☒ No

6. We the Jury find the Defendant Carboline Company is strictly liable for selling products that proximately caused injury to Plaintiff.

☐ Yes

☒ No

IMPLIED WARRANTY

7. We the Jury find the Defendant Fisher Controls International LLC breached the Implied Warranty in selling its products and its breach was a proximate cause of Plaintiff's injury and damages.

☒ Yes

☐ No

8. We the Jury find the Defendant Crosby Valve, LLC breached the implied Warranty in selling its products and its breach was a proximate cause of Plaintiff's injury and damages.

☐ Yes

☒ No

9. We the Jury find that Carboline Company breached the Implied Warranty in selling its products and its breach was a proximate cause of Plaintiff's injury and damages.

 Yes

 ✓ No

10. If you answered Yes to any of Questions 1-9, please state the amount of actual damages that have been proven by the greater weight of the evidence.

\$ 1 million Tommy Glenn's Survival Damages

\$ 1 million Wrongful Death Damages

\$ 1 million Rita Glenn's Loss of Consortium Damages

11. If you answered YES to Questions 1, 2, or 3, please answer Question 11. We, the jury, find by clear and convincing evidence that the conduct of the following Defendants were willful, wanton or reckless:

a. Fisher Controls International, LLC

 ✓ Yes No

b. Crosby Valves, LLC

 Yes ✓ No

c. Carboline Company

 Yes ✓ No

Craig Shug
Foreperson

1/24/18
Date

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) CIVIL ACTION NO. 2015-CP-04-01607

Rita Joyce Glenn, Individually and as)
Personal Representative of the Estate of)
Thomas Harold Glenn, deceased,)
Plaintiff,)
vs.)
Fisher Controls, et al.,)
Defendants.)

PUNITIVE DAMAGE VERDICT FORM

12. As to the Plaintiffs' claims against the Defendant, Fisher Controls International LLC, for punitive damages, we the jury, by unanimous consent, find:

a) ☒ for the Estate of Thomas Harold Glenn, deceased, in the amount of \$ 2,125,000.00 punitive damages,

OR

b) ☐ no punitive damages are awarded.

Craig [Signature]
Juror Foreperson
1/25/17

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

SARAH J. PLANT and PARKER
PLANT,

Plaintiffs,

v.

WHITTAKER CLARK & DANIELS
AND IMI FABI et al.

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C/A NO. 2022-CP-40-1265

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

JEANETTE W. MCGRIDG
Clerk, C.S., & F.C.

2023 MAR -7 PM 3:32

RICHLAND COUNTY
FILED

VERDICT FORM

NEGLIGENCE

1. We, the jury, find that Defendant Whittaker, Clark & Daniels, Inc. was negligent and its negligence was a proximate cause of Plaintiff Sarah Plant's injuries:

☒ Yes

☐ No

2. We, the jury, find that Defendant IMI Fabi (Diana), LLC, was negligent, and its negligence was a proximate cause of Plaintiff Sarah Plant's injuries:

☐ Yes

☒ No

3. We, the jury, find that Defendant IMI Fabi, LLC, was negligent, and its negligence was a proximate cause of Plaintiff Sarah Plant's injuries:

☐ Yes

☒ No

STRICT LIABILITY

4. We, the jury, find that Defendant Whittaker, Clark & Daniels, Inc., is strictly liable for selling defective products that was a proximate cause of Plaintiff Sarah Plant's injuries:

☒ Yes

☐ No

5. We, the jury, find that Defendant IMI Fabi (Diana), LLC, is strictly liable for selling defective products that was a proximate cause of Plaintiff Sarah Plant's injuries:

☐ Yes

☒ No

6. We, the jury, find that Defendant IMI Fabi, LLC, is strictly liable for selling defective products that was a proximate cause of Plaintiff Sarah Plant's injuries:

☐ Yes

☒ No

IMPLIED WARRANTY

7. We, the jury, find that Defendant Whittaker, Clark & Daniels, Inc. breached an implied warranty in selling its products, and its breach was a proximate cause of Plaintiff Sarah Plant's injuries:

☒ Yes

☐ No

8. We, the jury, find that Defendant IMI Fabi (Diana), LLC, breached an implied warranty in selling its products, and its breach was a proximate cause of Plaintiff Sarah Plant's injuries:

☐ Yes

☒ No

9. We, the jury, find that Defendant IMI Fabi, LLC, breached an implied warranty in selling its products, and its breach was a proximate cause of Plaintiff Sarah Plant's injuries:

☐ Yes

☒ No

DAMAGES

10. If you answered "Yes" to any of Questions 1-9, please state the amount of actual damages that have been proven by the greater weight of the evidence:

\$ #871,356 Sarah Plant's past Medical Expenses

\$ 3,268,336 Sarah Plant's future Medical Expenses/out of pocket expenses

\$ 20,000,000 Sarah Plant's other damages (past & future)

\$ 5,000,000 Parker Plant's loss of consortium damages (past & future)

WILLFUL, WANTON OR RECKLESS CONDUCT

11. If you answered "Yes" to Questions 1, 2, or 3, please answer this question as to any Defendant for which you answered "Yes." We, the jury, find by clear and convincing evidence that the conduct of the following Defendants was willful, wanton, or reckless:

a. Whittaker, Clark & Daniels, Inc.

 Yes
✓ No

b. IMI Fabi (Diana), LLC

☐ Yes
☒ No

c. IMI Fabi, LLC

 Yes
✓ No

foreperson

3-3-2023

Date _____