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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2020-000071

Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios, ...Appellant,

v.

Dominion Energy South Carolina f/k/a South Carolina Electric & Gas Company, ...Respondent.

INITIAL BRIEF OF RESPONDENT

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Introduction

On November 29, 2015, Jose Refugio Licona Larios sadly fell about 26 feet from a ladder while trimming trees at a home near Edisto Beach. Mr. Larios was a foreman for his employer, Stevens Irrigation, and had worked at that property for several years. Electric lines were located in the right of way over a bike path behind the property, but were visible from the ground and had been present in the area for at least 40 years. Plaintiff alleged in her Complaint that Mr. Larios died as a result of coming into direct contact with an electric line operated by Dominion Energy South Carolina f/k/a South Carolina Electric & Gas Company (DESC), but it was undisputed by the time of trial that he did not in fact directly contact the power line. It also was undisputed that the cause of death was blunt force trauma from a fall. And there were no indications on the power line of any external contact with that line causing an electric arc. At trial, Plaintiff did not introduce any evidence of any amount of damages or pecuniary loss, such as Mr. Larios's actual or expected future earnings, financial condition, or medical expenses, and did not introduce any medical testimony supporting the level and intensity of his pain and suffering or mental distress. Plaintiff also did not introduce any evidence regarding the financial impact of Mr. Larios's death to his family, only one of whom testified. Mr. Larios was unmarried and had no children. After deliberating for a little more than three hours, the jury returned a total verdict against DESC for $21 million in actual damages—$10 million in survival damages and $11 million in wrongful death—and expressly found that DESC did not act in a willful, wanton, or reckless manner. By any standard, the verdict was "grossly excessive" because it was "shockingly disproportionate to the injuries suffered and thus [that] passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." The decision of the trial court to grant a new trial absolute should be affirmed.

Counter Statement of the Issues

1. Did Dominion Energy South Carolina f/k/a South Carolina Electric & Gas Company waive its right to seek a new trial absolute based on the excessiveness of damages where Appellant did not raise the objection advanced on appeal to the trial court for consideration of the issue, where there is no procedural prerequisite to seeking a new trial absolute based on an objection to a verdict as grossly excessive, and where DESC did not waive its right to challenge the verdict actually awarded as grossly excessive?

2. In determining that the jury's $21 million verdict was grossly excessive and shockingly disproportionate to the injuries actually suffered, did the trial court properly consider the evidence actually presented to the jury that could have supported the verdict?

3. Did the trial court properly exercise its discretion in determining that the awards of $10 million in damages on Appellant's survival action and $11 million for wrongful death were grossly excessive and, based on the evidence of record, were the product of caprice, passion, prejudice, partiality, corruption, or other improper motives?

4. Was the lower court required to find the existence of a trial event, evidence item, juror confusion, or disregard of instructions before granting a new trial absolute on the basis that the award was grossly excessive where neither the precedent of the Supreme Court or of this Court require any such finding as a predicate to granting a new trial absolute?

5. Should the trial court's decision to grant a new trial absolute be affirmed because it actually ordered the new trial absolute in its capacity as the thirteenth juror based on the findings rendered in its order granting a new trial and because the two-issue rule requires affirming the trial court's decision where Appellant did not raise the thirteenth juror doctrine as an issue on appeal or argue as to its application?

Counter Statement of the Case

Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios, filed the Complaint in this matter on June 7, 2017, against DESC and certain other defendants, seeking damages for negligence and gross negligence, wrongful death, and survival. **(R. pp.)** (Compl.). The basis for the Complaint was Mr. Larios's death after he fell off of a ladder while trimming trees at a house located at Edisto Beach. **(R. pp.)** (Compl.). DESC timely answered the Complaint on July 11, 2017, denying all allegations against it and asserting numerous, alternative defenses. **(R. pp.)** (Ans.). On July 29, 2019, Appellant voluntarily dismissed its claims against Stevens Irrigation and Landscaping, LLC and William J. Stevens pursuant to Rule 41(a)(1)(A), SCRCP.

Despite ongoing discovery and numerous case-specific discovery requests directly on point, DESC and the other Defendants learned from a third-party shortly before trial that Mr. Larios had been involved in another tree trimming incident about four months before the accident in question, which had resulted in a serious head injury that required hospitalization shortly before the fall at issue in this case. **(R. pp.)** (Motions Hrg. Tr. 5-6; Jt. Mot. Cont.). Appellant had incorrectly asserted that Mr. Larios was a healthy, 41-year old male with no significant medical history or tree-trimming related incidents or injuries. **(R. pp.)** (Jt. Mot. Cont.). DESC and the other defendants promptly moved for a continuance on September 13, 2019, contending that they needed time to evaluate the yet-to-be-produced medical records from the Medical University of South Carolina (MUSC) with an appropriate expert and to also gather additional medical records and depose the medical providers who treated Mr. Larios. **(R. pp.)** (Jt. Mot. Cont.). The Honorable Carmen T. Mullen, Chief Administrative Judge for the Fourteenth Judicial Circuit, thereafter ordered MUSC to produce Mr. Larios's medical records promptly. **(R. pp.)** (Jt. Mot. Cont.). On September 18, 2019, Defendants obtained information from MUSC, which confirmed that Mr.

Larios was "critically … injured" by a 3' diameter tree limb that fell approximately 40', fracturing his skull in at least two locations. **(R. pp.)** (Jt. Mot. Cont). The Defendants immediately filed a memorandum in support of the joint motion for continuance, arguing that they would be prejudiced by these late-disclosed relevant facts and inability to adequately explore that information; however, Judge Mullen denied the motion for continuance in a Form 4 Order containing no reasoning. **(R. pp.)** (Form 4 Order Den. Continuance). The motion for continuance was renewed at a hearing on the day before trial, but was denied by the Honorable Thomas A. Russo. **(R. pp.)** (Motions Hrg. Tr. 5-6).

The case thus proceeded to trial less than a week after the disclosure of the deceased's prior medical history before a jury in Colleton County from September 24-27, 2019, presided over by Judge Russo. When the trial started, there were three defendants: DESC, PENSCO Trust Company and Edisto Sales and Rental Realty, LLC. On the second day of trial, September 25, and well before closing arguments, PENSCO Trust Company and Edisto Sales and Rental Realty, LLC reached settlement agreements with Appellant and were dismissed from the action. (**R. pp.**) (Tr. 365). The jury was out for approximately three and a half hours on Friday, September 27, 2019, and returned at 5:13 p.m. with a total verdict of $21,000,000: $10,000,000 on Appellant's survival action and $11,000,000 on Appellant's wrongful death action. (**R. pp.**) (Verdict Form). The jury expressly found that DESC did not act in a willful, wanton, or reckless manner and, thus, did NOT return a verdict for punitive damages. (**R. pp.**) (Verdict Form). The jury also determined that Mr. Larios was 10% at fault. (**R. pp.**) (Verdict Form).

DESC filed several post-trial motions for relief. Pertinent to this action, DESC filed a Motion for New Trial *Nisi Remittitur* or, in the Alternative, New Trial Absolute under the thirteenth juror doctrine. (**R. pp.**) (Mot.). Appellant opposed the motion in a written memorandum.

(**R. pp.**) (Mem. in Opp'n). Judge Russo held a hearing on the motion on October 24, 2019. (**R. pp.**) (Post Trial Hrg. Tr. 1-49). On November 1, 2019, Judge Russo issued an order granting the motion for new trial absolute. (**R. pp.**) (New Trial Order). Appellant filed a motion to reconsider on November 12, 2019, and DESC filed an opposition to that motion on November 22, 2019. (**R. pp.**) (Pl.'s Mot.; Def.'s Mem. in Opp'n). Judge Russo denied Appellant's motion on December 19, 2019. (**R. pp.**) (Form 4 Order). Appellant timely appealed Judge Russo's order to this Court on January 17, 2020. (**R. pp.**) (Notice).

Counter Statement of the Facts

On November 29, 2015, while employed by Stevens and Stevens Irrigation (Stevens), Mr. Larios sadly fell approximately 26 feet from a ladder while using a chainsaw to trim a palm tree at a house located at 3402 Myrtle Street, on Edisto Beach that was owned by PENSCO Trust and managed by Edisto Sales. (**R. pp.**) (Tr. 86, 88, 289). This specific palm tree was the last of nine trees that Mr. Larios was going to trim that day. (**R. pp.**) (Tr. 320). Mr. Larios was a foreman and had worked for Stevens for approximately nine or ten years, during which time Stevens employees had worked at the Myrtle Street property every other week and had trimmed the palm trees each year. (**R. pp.**) (Tr. 403, 420). DESC overhead lines were properly located in the right-of-way behind the Myrtle Street property and had been present for at least 40 years, visible from the ground and located behind the tree. (**R. pp.**) (Tr. 319; Def.'s Ex. 1). Mr. Larios was 41 years old when he died and was unmarried with no children. (**R. pp.**) (Tr. 711; Pl.'s Ex. 3, p. 2/5).

It is undisputed that Mr. Larios's death was caused by falling off the ladder and suffering blunt trauma from hitting the ground. (**R. pp.**) (Tr. 237, 247); *see also* (**R. pp.**) (Tr. 186; Def.'s Ex. 5). It also is undisputed that, despite what was alleged in the Complaint, it was physically impossible for the chainsaw Mr. Larios was using to have made direct contact with the energized

DESC primary line.[1] (**R. pp.**) (Tr. 178, 556, 599). And there was no evidence in photographs of the palm tree that the palm fronds had come into contact with the DESC overhead lines. (**R. pp.**) (Tr. 558, 562). In fact, most of the fronds on the palm tree were well below the energized primary and even below the neutral. (**R. pp.**) (Tr. 560-61). The seed pods on the only portion of the palm tree that approached the height of the primary had not been trimmed or burned and were still standing straight up. (**R. pp.**) (Tr. 558). The Colleton County Deputy Coroner, Marion Whaley, testified that "[i]f you were looking for [the primary and neutral lines] you could see them," and the pertinent photographs introduced into evidence show that the lines were visible. (**R. pp.**) (Tr. pp. 176-77, 219: Def.'s Exs. 3 & 4).

Pedro Abraham was working with Mr. Larios that day and looked up from the ground toward him after he heard a yell. (**R. pp.**) (Tr. 385). Mr. Abraham watched as, even after he yelled, Mr. Larios set the running chainsaw in the tree, untied a rope tethering him to the tree, began climbing down the ladder, and then fell to the ground. (**R. pp.**) (Tr. 385). Mr. Abraham does not know why Mr. Larios yelled or why he fell. (**R. pp.**) (Tr. 384, 386). He ran over to ask Mr. Larios if he was okay. (**R. pp.**) (Tr. 371). Mr. Larios responded that he was fine, but Mr. Abraham believed otherwise and ran to find someone who could call 9-1-1. (**R. pp.**) (Tr. 371-72). He found a woman who was exercising, and asked her to call 9-1-1, which she did. (**R. pp.**) (Tr. 371). This woman did not testify at trial. When Mr. Abraham returned to Mr. Larios a short time later, he was no longer responsive and was not moving. (**R. pp.**) (Tr. 372). The police arrived approximately "five to eight minutes" after the call to 9-1-1. (**R. pp.**) (Tr. 371). Mr. Larios died on the way to the

[1] As to the overhead electric distribution lines behind the Myrtle Street residence, there is an upper and a lower line. The upper line is the primary, or "hot" line, through which electricity is distributed and has approximately 8,000 volts. The lower line is the system neutral, which is grounded and has zero volts. **(R. pp.)** (Tr. 547). Plaintiff's electrical expert agreed. **(R. pp.)** (Tr. 290-91).

hospital. (**R. pp.**) (Tr. 139). None of the first responders or EMS personnel were called as witnesses at trial.

An autopsy was performed the next day, November 30, 2015, following which the examining pathologist at the Medical University of South Carolina, Dr. Erin Presnell, concluded in her initial autopsy report that the cause of death was blunt force trauma due to a fall. (**R. pp.**) (Tr. 237). The initial autopsy report made no mention of electricity. (**R. pp.**) (Tr. 251-52). Mr. Larios in fact had no electricity entry or exit wounds on his body and, moreover, did not have any burns or charring discoloration on his clothing and "did not have the classic appearance of what is classically described as an electrocution." (**R. pp.**) (Tr. 249, 250, 267). Dr. Presnell thus concluded that the cause of death was trauma resulting from falling off the ladder. (**R. pp.**) (Tr. 237).

Subsequent to the autopsy, Dr. Presnell received a call from the Colleton County Coroner, Richard Carter, who advised her that the chainsaw had contacted an overhead power wire and that melted material from Mr. Larios's shoes was noted on a ladder rung. (**R. pp.**) (Tr. 254-55). Notably, Mr. Carter had never been to the scene of the incident, and he never saw the chainsaw or ladder. (**R. pp.**) (Tr. 139-40). The information Mr. Carter related to Dr. Presnell was provided to him by Mr. Whaley. (**R. pp.**) (Tr. 128-29). Based on this new information from the Coroner, Dr. Presnell in her final autopsy report determined that electricity was a contributing factor to Mr. Larios's fall. (**R. pp.**) (Tr. 259-60). Dr. Presnell did not, however, re-examine Mr. Larios's body, but simply reviewed and updated her report and looked at photographs from the autopsy. (**R. pp.**) (Tr. 261). Dr. Presnell acknowledged that Mr. Larios's body did not present signs of a "classic electrocution injury." (**R. pp.**) (Tr. 243). She did note that Mr. Larios had an injury to the abdomen that was "consistent with a contact with an electrocution burn." (**R. pp.**) (Tr. 242, 243). But that was the only unexplained injury to Mr. Larios's skin, and he did not otherwise have any electric

burn marks on his hands or feet, or anywhere else on his body. (**R. pp.**) (Tr. 245, 249-50). And although Mr. Larios had on two T-shirts, neither had any marks anywhere on them, including at or around the location of the mark on his abdomen, and his socks also had no marks. (**R. pp.**) (Tr. 250).

However, it was later determined that the information provided to Dr. Presnell was inaccurate in at least two material respects. First, Appellant's expert, Edward Brill, testified that there was no evidence that the mark on the aluminum ladder Mr. Larios was using indicated electrical activity. (**R. pp.**) (Tr. 322, 328-29). He in fact agreed that there was "no evidence that any noticeable amount of current was passed down through the ladder." (**R. pp.**) (Tr. 322-23). Notably, the ladder was never analyzed to evaluate or determine the origin of the mark. (**R. pp.**) (Tr.184-85). Mr. Brill agreed that Mr. Larios had "no classic entry or exit wounds" typical of an electric shock event. (**R. pp.**) (Tr. 325-26). He also agreed that the mark on Mr. Larios's abdomen was not "an electrical mark from a high voltage power line direct contact." (**R. pp.**) (Tr. 326-27).

Second, Appellant's expert Mr. Brill confirmed that the chainsaw did not make direct contact with the primary electric line. (**R. pp.**) (Tr. 328). Some pictures indicated some type of mark on the chainsaw, but neither the photographs taken by Mr. Whaley nor his report referenced any arc burn on the chainsaw. (**R. pp.**) (Tr. 180). Mr. Brill testified that the mark shown in the photograph did not indicate electric activity. (**R. pp.**) (Tr. 321). Mr. Whaley and Mr. Brill both confirmed that it was physically impossible for Mr. Larios to have made direct contact with the energized primary via the chainsaw he was using. Despite being a critical piece of evidence as the alleged contact point for the energized primary line, the chainsaw was not adequately secured, later

went missing, and was never found. (**R. pp.**) (Tr. 183).[2] The chainsaw was never analyzed to determine the origin of the mark. (**R. pp.**) (Tr. 184). Notably, the chainsaw also was tethered while Mr. Larios was working and continued to run even after he set in the tree before he fell notwithstanding it having, according to the Complaint, allegedly contacted the energized primary line. (**R. pp.**) (Tr. 152, 153, 196, 333). And there were no marks on and no damage to the primary after Mr. Larios's death that would have indicated an electric arc had occurred at that location. (**R. pp.**) (Tr. 613).

As to Mr. Larios's contributory negligence, DESC presented undisputed evidence that Mr. Larios and Mr. Abraham were working in an unsafe manner. Mr. Larios's employer, Stevens, was issued multiple serious citations by OSHA regarding the conditions that existed at the worksite on the day of Mr. Larios's death. (**R. pp.**) (Tr. 312). These citations including the failure to provide a safe workplace, failure to provide the proper personal protective equipment, allowing an employee to work too closely to an electric power line, and allowing an employee to work from an elevated position on a ladder. (**R. pp.**) (Tr. 312-13). Appellant's expert agreed that Mr. Larios was, under OSHA rules, an unqualified worker and prohibited from coming within ten feet of an energized overhead power line. (**R. pp.**) (Tr. 326-27).

It is also undisputed that DESC had complied with the requirements of its tree-trimming maintenance policy, approved by the Public Service Commission of South Carolina, in the area of the Myrtle Street house. As approved by the Commission, DESC trims trees on a five-year cycle,

[2] More to the point, the chainsaw was not secured as evidence by Mr. Whaley. After the chainsaw was taken down from where Mr. Larios had placed it in the tree, it was given to Stevens on the afternoon of November 29, 2015, who then gave it to Mr. Larios's brother, Gaspar Larios. **(R. pp.)** (Tr. 183). Mr. Whaley recovered the chainsaw from Gaspar two days later, on December 1, 2015, but testified he did not know if it had been used in the interim. **(R. pp.)** (Tr. 183). The chainsaw was subsequently tagged as evidence, but later was lost. **(R. pp.)** (Tr. 183-84). The chainsaw was not available at trial and no chain of custody was maintained on the chainsaw at any time.

but will perform mid-cycle work if there are indications that additional trimming is necessary. (**R. pp.**) (Tr. 440, 441). The trees near the right of way behind Myrtle Street had been trimmed on the regular five-year cycle in February 2013. (**R. pp.**) (Tr. 449). DESC had received no requests to perform mid-cycle trimming at that location. (**R. pp.**) (Tr. 472). There also had been no outage or service issues at the location. (**R. pp.**) (Tr. 472). In short, DESC had no information suggesting that there were any vegetation issues at the Myrtle Street location at any time since February 2013 and before the incident. Significantly, DESC never received any notice that Stevens would be conducting tree trimming activities around its electric lines. (**R. pp.**) (Tr. 338).

At trial, there was no medical or other testimony about Mr. Larios's level of consciousness or pain and suffering. Mr. Abraham's testimony is the sum total of the evidence presented by Appellant regarding pain and suffering. There was no testimony from any of the first responders or medical personnel who treated Mr. Larios. There also was no evidence of economic damages presented, such as testimony about Mr. Larios's earnings, his living expenses, or his support of others. Mr. Larios did not have a wife or children. (**R. pp.**) (Tr. 490). Mr. Larios's younger brother, Gaspar Larios, testified that Mr. Larios would send money to his parents in Mexico, who were "older than 60 years old" and "elderly," but there was no discussion of the amount, the total expenses that the parents had, their need for the money, or any financial problems they had experienced since Mr. Larios's death. (**R. pp.**) (Tr. 484-85). Mr. Larios had come to the United States approximately 12 years earlier, and there was no evidence that he had ever returned to Mexico. *See* (**R. pp.**) (Tr. 485). Gaspar testified that Mr. Larios had a law degree from Mexico, but that he never practiced law. (**R. pp.**) (Tr. 484). Mr. Larios's parents did not testify at the trial. (**R. pp.**) (Tr. 484). The only other testimony came from Plaintiff Tiffany Provence, the administrator for Mr. Larios's estate, who testified regarding what she had learned about Mr.

Larios in the course of administering the estate. (**R. pp.**) (Tr. 484). It is undisputed that Ms. Provence did not know Mr. Larios personally.

Standard of Review

The granting or refusing of a new trial absolute for excessiveness of verdict is a matter within the sound discretion of the trial court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Peay v. Ross*, 292 S.C. 535, 536, 357 S.E.2d 482, 483 (Ct. App. 1987) (citing *Bowden v. Powell,* 194 S.C. 482, 10 S.E.2d 8 (1940); *Mylin v. Allen-White Pontiac, Inc.,* 281 S.C. 174, 314 S.E.2d 354 (Ct. App. 1984)); *see also Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). Indeed, an appellate court has no power to review the ruling of a circuit judge on a new trial for excessiveness of verdict unless his ruling rested on a basis of fact wholly without evidence to support it or was manifestly controlled by an error of law. *Peay*, 292 S.C. at 536, 357 S.E.2d at 483 (citing *Mishoe v. Atl. Coast Line R.R.,* 186 S.C. 402, 197 S.E. 97 (1938); *De Shields v. Ins. Co. of N. America,* 125 S.C. 457, 118 S.E. 817 (1923); *Wilson v. S. Railway, Carolina Div.,* 123 S.C. 399, 115 S.E. 764 (1923)); *see also Albertini v. Veal*, 292 S.C. 561, 564–65, 357 S.E.2d 716, 719 (Ct. App. 1987). "[O]ur standard of review dictates that we must only look to see if there is evidence in the record to support the circuit court's decision to grant a new trial, and, only in the complete absence of such evidence, is it within our province to find the circuit court abused its discretion." *Brinkley*, 386 S.C. at 188, 687 S.E.2d at 57.

The trial court's discretion to grant or deny a new trial as the thirteenth juror is very broad, and an order granting or denying a new trial on this theory will hardly ever be reversed. *Burke v. AnMed Health*, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011). In an appeal of an order granting a new trial pursuant to the thirteenth juror doctrine, the appellant "bears the heavy burden of demonstrating to the court that it clearly appeared that the judge's exercise of discretion was

controlled by a manifest error of law." *Youmans ex rel. Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 271, 670 S.E.2d 1, 5 (Ct. App. 2008) (quoting *Todd v. Owen Indus. Prods., Inc.,* 315 S.C. 34, 431 S.E.2d 596 (Ct.App.1993)). Where the record shows that there are conflicts in the facts, a finding of the trial court has support in the evidence, and there is no abuse of discretion nor error of law committed in granting a new trial. *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 127, 226 S.E.2d 696, 698 (1976). If the testimony and evidence are in conflict, this court has consistently held that the trial court's granting of a new trial upon the facts has support and will not be disturbed. *Folkens v. Hunt*, 300 S.C. 251, 255, 387 S.E.2d 265, 268 (1990) (citation omitted).

Argument

At base, the issue presented by this appeal is whether the trial court's decision to grant a new trial absolute constitutes an abuse of discretion that is wholly unsupported by the evidence or controlled by an error of law. The record shows that the answer to this question is "no." Appellant's brief argues the jury's verdict in favor of Mr. Larios *would have been* supported by some evidence in the record had the trial court *not* exercised its discretion in granting a new trial absolute, and proceeds as if Appellant were the respondent and defending the jury's verdict. DESC disagrees with Appellant's characterization of the evidence, but that is ultimately beside the point because Appellant's efforts in that regard are irrelevant to the limited question before the Court: did the trial court abuse its discretion in ordering a new trial absolute because the verdicts were grossly excessive. Given the broad discretion afforded the trial court to grant a new trial absolute based on its evaluation of the evidence, this Court's inquiry does not permit it to substitute its judgment for that of the trial court on that ultimate question where there is any evidence in the record to support it. The trial court's decision should be affirmed.

1. DESC did not waive its ability to seek a new trial absolute based on the excessiveness of damages because Plaintiff did not object to the trial court's consideration of the issue, because an objection to a verdict as grossly excessive after it is returned is different than an objection to sending the case to the jury based on the sufficiency of the evidence, and because DESC never waived its right to challenge the verdict as grossly excessive based on general statements made in its opening presentation.

Contrary to Appellant's argument, any lack of a specific challenge to the admissibility of evidence proffered to support Appellant's claim of damages during the trial did not waive DESC's right to seek a new trial on the basis that the admitted evidence does not support the jury's award of damages. There are at least three reasons this is so. First, having failed to raise this argument in opposition to DESC's motion for a new trial absolute, Appellant's argument is unpreserved and she herself has waived any challenge to DESC's right to move for a new trial absolute on the basis that the damages are grossly excessive. Second, even assuming that DESC did not challenge damages in its motion for directed verdict, case law is clear that making a motion for a directed verdict or a motion for judgment notwithstanding the verdict is not a predicate for filing a motion for a new trial absolute on the basis that the verdict was grossly excessive. Third, DESC did not waive its right to challenge the verdict as grossly excessive based on general statements made during its opening presentation. In sum, Appellant's procedural argument regarding DESC's ability to seek a new trial absolute of the jury's verdict is incorrect on the facts and the law, but more fundamentally, it seeks to stand our State's longstanding appellate principles of waiver and error preservation on their head.

A. Appellant waived any argument that DESC waived its right at trial to move for a new trial absolute.

As an initial matter, Appellant waived her right to challenge the trial court's consideration of DESC's post-trial motions regarding a new trial. *Clarkson*, 267 S.C. at 127–28, 226 S.E.2d at 698 (holding that failure to object to trial court's consideration of motion for new trial because it was out of time "amounted to a consent or acquiescence in the procedure"). Preservation rules are

designed to provide an adequate platform for appellate review by ensuring the trial court has had the opportunity to rule on an issue prior to the appellate court considering the matter. *Allegro, Inc. v. Scully*, 418 S.C. 24, 33, 791 S.E.2d 140, 145 (2016). Thus, in *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995), on appeal from the grant of a new trial nisi additur, the defendant argued that the plaintiff had waived her right to move for a new trial based on a statement in closing arguments that "I will not argue with your verdict." However, although ultimately addressing the issue, this Court "question[ed] whether [defendant] properly preserved this issue [of the plaintiff's right to move for a new trial nisi additur]" because there was "no contemporaneous or post trial motion to limit [plaintiff]'s recovery based on closing argument." *Id.*. In fact, defendant did "not argue waiver until she file[d] a Rule 59(e) motion." *Id*. This Court further held that a "party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial." *Id*.

Appellant waived her argument that DESC waived its right to challenge damages in a motion for a new trial. First, at the risk of stating a concept that would seem to be self-evident, a party cannot challenge a jury's verdict as being excessive until the verdict has been rendered. DESC's motion was therefore made at the appropriate time and in the appropriate manner. By contrast, Appellant did not argue in opposition to DESC's motion that it had waived its right to challenge the jury's award of damages, instead raising the issue for the first time when she filed a motion for reconsideration after the trial court issued its Order granting a new trial absolute. (**R. pp.**) (Mem. in Opp'n to JNOV); *see Patterson*, 318 S.C. at 185, 456 S.E.2d at 437. Although Appellant did contend that DESC had not contested damages during trial in her response to DESC's motion for JNOV, she never actually argued that DESC had waived any of the arguments set forth in the motion itself. (**R. pp.**) (Mem. in Opp'n to JNOV); *see Patterson*, 318 S.C. at 185,

456 S.E.2d at 437; *see also Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (holding that an "issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge"). Rather, as Appellant characterized it in her response in opposition, DESC's motion for JNOV consisted of "a lengthy, nearly identical regurgitation of arguments which the trial court has rejected multiple times already, including at the summary judgment, motion in *limine*, directed verdict, and/or judgment as a matter of law stages of this case." (**R. pp.**) (Mem. in Opp'n to JNOV at 2). This admission by Appellant is directly contradictory to the waiver argument that she now advances on appeal. She also did not raise the waiver issue during the hearing on DESC's post-trial motions. (*See* **R. pp.**) (Post-Trial Motions Hrg. Tr.) (containing no argument by Appellant as to waiver). Rather, the waiver issue was raised for the first time in Appellant's motion for the trial court to reconsider the grant of a new trial absolute, (**R. pp.**) (Mot. for Reconsideration at 5). However, because it was raised for the first time in a Rule 59 motion, Appellant did not properly raise the issue to the trial court and preserve it for review by this Court. *E.g., Patterson*, 318 S.C. at 185, 456 S.E.2d at 437.

Appellant therefore did not timely present her waiver argument to the trial court; she has waived it; and it is unpreserved for this Court's review. *Patterson*, 318 S.C. at 185, 456 S.E.2d at 437; *Clarkson*, 267 S.C. at 127–28, 226 S.E.2d at 698. But even if Appellant had not waived this issue, the fact that the trial court ruled on the motion renders Appellant's argument irrelevant, even while the record reflects the fact that DESC raised sufficiently specific arguments in its motion for a directed verdict to challenge the alleged damages. In its motion for a directed verdict, DESC argued that Appellant, via her experts, failed to present sufficient evidence to show that Mr. Larios had been electrocuted or that DESC had otherwise caused Mr. Larios' injuries. (**R. pp.**) (Mem. in Supp. of Mot. for Dir. Verdict at 12-14; Tr.514-516, 640-42). It necessarily follows that if DESC

was not the cause of any of Mr. Larios' injuries, then none of the alleged damages stemming from those injuries can be attributed to DESC. *See Allegro, Inc.*, 418 S.C. at 34–35, 791 S.E.2d at 145–46 (where party contended there was no proof of a contract, "necessarily wedded to that assertion is the notion that no terms of the nonexistent contract have been proven either"). DESC maintained in its motion for directed verdict that the evidence was insufficient to establish that Mr. Larios was electrocuted or that his untimely death resulted from such an electrocution. DESC therefore did not waive its argument that the evidence presented at trial was insufficient to establish that it was liable for any of Appellant's alleged damages.[3]

But above and beyond the fact that Appellant did not preserve her waiver argument, she erroneously seeks to have this Court apply its waiver and error preservation principles in reverse. In concept, Appellant's first argument is one that she should have made to the trial court below in response to DESC's motion for a new trial absolute, as she seeks to restrict DESC's ability to make an argument on appeal. But Appellant did not make this argument. *See* discussion *supra*. DESC made its motion for a new trial absolute and the trial court granted it; therefore, the concepts of waiver and error preservation are inapplicable against DESC under these circumstances. *See*, *e.g.*, *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) ("The issue must have been (1) raised to and ruled upon by the trial court, (2) *raised by the appellant*, (3) raised in a timely manner, and (4) raised to the trial court with sufficient

[3] Moreover, this argument sorely misperceives the burden of proof regarding the existence of the actual damages in the case. It is well established that a defendant is not required to present evidence at trial, cross-examine plaintiff's witnesses, or make legal arguments. *See, e.g., Snow v. City of Columbia*, 305 S.C. 544, 555, 409 S.E.2d 797, 803 (Ct. App. 1991) ("The defendant is not required to present evidence to refute the plaintiff's allegations; he may elect to put the plaintiff to strict proof of all the elements of his cause of action.").

specificity.'") (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)) (emphasis added)).

Simply put, Appellant was the "losing" party below, and the concepts of waiver and error preservation are applied by this Court to *Appellant's* arguments on appeal, not DESC's arguments in response. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("[I]t is not always necessary for a *respondent*—as the winning party in the lower court—to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review.") (emphasis in original). "This approach is in keeping with the view, as expressed in Rule 220(c), SCACR, that an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal." *Id.*, 338 S.C. at 420-21, 526 S.E.2d at 723. Instead, this Court's standard of review, set forth above, judges the trial court's determination on the new trial motion on an abuse of discretion standard, viewing the record on appeal as a whole to determine whether the trial court's discretionary decision is supported by any evidence in the record, whether advanced by DESC or attributable in the absence to Appellant. Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). In short, "different preservation rules apply to an appellant-the losing party in the lower court." *I'On*, 338 S.C. at 421, 526 S.E.2d at 724.

B. Contrary to Appellant's arguments, challenging the sufficiency of the evidence for damages in a motion for a directed verdict or a motion for judgment notwithstanding the verdict is not a predicate for filing a motion for a new trial absolute on the basis that the verdict was grossly excessive.

Regardless, DESC was not required to directly challenge damages in front of the jury or raise trial objections to the sufficiency of the evidence for damages in order to file a motion for new trial challenging the verdict as being grossly excessive. *See Worrell v. S.C. Power Co.*, 186 S.C. 306, 195 S.E. 638, 641 (1938) ("Nor does it follow that because under the law the trial judge

is compelled to submit the issues to the jury, he cannot grant a new trial absolute."); *see also* discussion *infra* Part 1.C (explaining that statements made by DESC in its opening presentation to the jury were not a factual concession of damages). At bottom, Appellant misconceives the burden of proof applicable to the proceedings in the trial court. DESC had no obligation to "prove a negative" at trial—*i.e.,* that Plaintiff failed to establish damages—nor was it DESC's burden to exonerate itself, through "cross-examining witnesses . . . about damages," as Plaintiff suggests. *Cf. Offshore Logistics Services, Inc. v. Arkwright-Boston Mfrs. Mut. Ins. Co.,* 469 F. Supp. 1099, 1108 n.15 (E.D. La. 1979) ("Since plaintiff did not meet its burden of proof on the issue, defendants were under no obligation to introduce evidence to 'contradict' an unproven story."), *aff'd in part, modified in part on other grounds*, 639 F.2d 1142, 1145 (5th Cir. 1981).

Moreover, the Court's charge to the jury made it crystal clear that the burden of proof was on the Plaintiff. *See, e.g.,* (**R. pp.**) (Tr. 702) ("[T]he Plaintiff has the burden of proving each element of his claims in this case.") (Tr. 704) ("The plaintiff must also prove by a preponderance, or greater weight of the evidence, that he suffered damages . . .."). And in any event, what DESC allegedly "chose" to do in presenting or objecting to evidence, or in making or failing to make "counterarguments," is not at all germane to the ability of DESC to make its New Trial Motions because the issue is the excessiveness of the verdict rendered, not the evidence actually introduced.

The purpose of raising an objection to the sufficiency of the evidence in a motion for directed verdict is to argue that the evidence is not sufficient for a reasonable jury to rule in favor of the appellant. "In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." *Trivelas v. S.C. Dep't of Transp.*, 357 S.C. 545, 550, 593 S.E.2d 504, 507 (Ct. App. 2004). In contrast, the motion for a new trial absolute is to

argue not that the evidence is insufficient to present a jury question, but rather that the jury reached a verdict unsupported by that evidence in its deliberations. *Brinkley*, 386 S.C. at 187, 687 S.E.2d at 57 (question on new trial absolute is not whether there is *some* evidence to support the jury's verdict); *see also McEntire v. Mooregard Exterminating Servs., Inc*., 353 S.C. 629, 633, 578 S.E.2d 746, 748 (Ct. App. 2003) (holding that "the question of whether the evidence is legally sufficient to support a verdict—a question of law—is totally different from the question of whether the fair preponderance of the evidence supports a verdict—a question involving the exercise of discretion"). Juries are presumed to act reasonably. *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them."); *see* (**R. pp.**) (Tr. p.709) ("What is *reasonable* compensation is left up to the *sound discretion and judgment* of you the jury.") (emphasis added); (**R. pp.**) (Tr. p.711) ("Using *reasonable* judgment to ensure that damages are *just and reasonable* in light of the testimony and the evidence presented [in] this case.") (emphasis added); (**R. pp.**) (Tr. p.712) ("[T]he evidence must allow you to determine what amount of damages is *fair, just, and reasonable*.") (emphasis added).

Thus, a motion for a new trial absolute on the basis that the verdict was grossly excessive would not be implicated—i.e., indeed, it would not be ripe—until the jury has in fact returned a verdict. That is, the question of whether a verdict is the result of passion, caprice, prejudice, or other improper influence is totally different than the question of whether the evidence is legally sufficient to support a verdict. *McEntire*, 353 S.C. at 633, 578 S.E.2d at 748. A verdict is not known until it is announced after the jury's deliberations; therefore, it is impossible (or disingenuous) for a party to raise the excessiveness of the verdict in a motion for directed verdict at the close of a plaintiff's case, at which point no verdict has been rendered. By extension, it is equally impossible (or disingenuous) for a party to properly raise excessiveness of the verdict

argument in a motion for judgment notwithstanding the verdict, since such motions are limited to the grounds raised in the motion for a directed verdict.

Stated another way, DESC could not have known that the jury's deliberations regarding damages would be unbridled until the jury returned a verdict for $21 million and, thus, could not have addressed the amount of the verdict and its excessiveness in its directed verdict motion because, at that time, there was no verdict and no damages award to address. If the opposite situation had occurred—i.e., that the jury returned a very small verdict—Appellant could have moved for a new trial absolute or new trial nisi additur without having had to file some previous motion regarding the evidence because the motion would not have been ripe before that time. It would be inequitable to treat plaintiffs and defendants differently with respect to a motion for new trial absolute.

Indeed, the courts have properly recognized that "[t]he only vehicle by which questions of excessiveness or inadequacy of verdicts can be submitted to the trial court is a motion for new trial." *Hahn v. Becker,* 588 F.2d 768, 771 (7th Cir. 1979); *Flowers v. Dean*, 43 So.3d 1244, 1246 (Ala. Civ. App. 2009) (citing *State v. Long*, 344 So. 2d 754, 756 (Ala. 1977) ("The only way to get the question of an excessive or inadequate verdict before the trial court is on a motion for a new trial. There is no other way that a trial judge can rule on it, and such a ruling is necessary to preserve the question for appeal.")). If it were otherwise, as Appellant contends here, then all parties filing motions for directed verdict would need to include the excessiveness or inadequacy of the jury's verdict as one of the grounds advanced in their motions for directed verdict even though there would be no verdict to challenge at that stage of the proceedings. There is, of course, no such requirement, for obvious reasons:

> [I]t would be poor judicial husbandry to require counsel ritualistically to move for a directed verdict and judgment n.o.v., regardless of his lack of conviction in their

> merit, to preserve his right to appeal the denial of a new trial. To demand a litany of introductory motions is not only illogical but harks back to the age of writs and technical pleading.

Urti v. Transport Commercial Corp., 479 F.2d. 766, 769 (5th Cir. 1973).

The case Appellant relies upon for her argument, *Peay v. Ross*, *supra*, is not applicable and does not support a finding of waiver of DESC's motion for a new trial absolute. The *Peay* court noted that the decision of granting a motion for a new trial upon an insufficiency of evidence argument lies exclusively with the trial court. Indeed, the granting or refusing of a new trial absolute or a new trial nisi for excessiveness of verdict is a matter within the sound discretion of the trial court. *Id.*, 292 S.C. at 536, 357 S.E.2d at 483. But more to the point, although *Peay* discusses excessiveness, the Court actually was addressing a motion based on the insufficiency of the evidence that was cloaked as a motion for new trial absolute. *Id.,* 292 S.C. at 536, 357 S.E.2d at 483 ("On appeal, [defendants] argue there was *no evidence of general or special damages to support the verdict*.") (emphasis added). And then, after concluding the motion as argued by the defendants in that case was barred, the Court nevertheless noted that it would not sustain the objection in any event because there was "some evidence of damage." *Id.*, 292 S.C. at 537, 357 S.E.2d at 484. Those are the standards for adjudicating an argument that the evidence is insufficient to present a jury question, not a motion for new trial absolute based on the excessiveness of the verdict. The *Peay* court never used the terms "shockingly disproportionate to the injuries suffered" or "passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." *E.g., Welch v. Epstein*, 342 S.C. 279, 302, 536, S.E.2d 408, 420 (Ct. App. 2000). Thus, despite the overlapping concepts, *Peay* does not in fact support Appellant's argument.

C. Even assuming she has not waived the argument, Appellant incorrectly asserts that DESC conceded the issue of any amount of damages in its Opening Statement to the jury.

Although the argument is not entirely clear, Plaintiff erroneously contends that DESC "conceded Mr. and Mrs. Larios suffered substantial wrongful death damages," App.'s Br. at 19, when its attorney made the following statements during opening argument:

> "There is no dispute that this family no doubt feels a tremendous loss. And, frankly, I think everyone is sympathetic with that."
>
> "[T]his family has had a tremendous loss. There's no argument about that."

See id. A review of these statements as made fully demonstrates that they are by no means a concession of all amounts of damages or to a factual amount of damages. Yet Appellant appears to contend that DESC cannot "concede" a "tremendous loss" to the jury and to "then argue post-trial that there was little or no loss to [the] family." This is incorrect because the statements quoted by Plaintiff are not "concessions" or "admissions" because they are not a clear and unambiguous statement of fact. *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir. 2010) ("In order to qualify as judicial admissions, an attorney's statements must be deliberate, clear and unambiguous.").

Personal assessments or expressions of opinion are <u>not</u> treated as admissions of fact when made during opening or closing arguments. In *Robinson*, for example, the court held that a statement during closing argument by one of the attorneys for a drug manufacturer—that the manufacturer was "not blaming" the plaintiff for her injuries from ingesting a pain reliever—was not a judicial admission that the plaintiff was not contributorily negligent. The court noted that, "[w]hat he meant—for he was speaking to laypersons—was that [the drug manufacturer] was not contending that [the plaintiff] had been justly punished for being careless." *Id.* The court also reasoned that, because the statement was not a deliberate, clear, and unambiguous recognition that

the user was not negligent, it did not waive manufacturer's claim, argued throughout trial, that user was contributorily negligent:

> A judicial admission is a statement, normally in a pleading, that negates a factual claim that the party making the statement might have made or considered making. Were the plaintiff's conception of judicial admissions accepted, statements made by lawyers in opening and closing arguments, in making objections, at side bars, and in questioning witnesses would be treated as pleadings and searched for remarks that might be construed as admissions though neither intended nor understood as such. Trials would be turned into minefields. That is why "in order to qualify as judicial admissions, an attorney's statements must be deliberate, clear and unambiguous." *MacDonald v. General Motors Corp.,* 110 F.3d 337, 340 (6th Cir.1997); *see also Best v. District of Columbia,* 291 U.S. 411, 415–17, 54 S.Ct. 487, 78 L.Ed. 882 (1934); *Oscanyan v. Arms Co.,* 103 U.S. 261, 263–64, 26 L.Ed. 539 (1880); *McCaskill v. SCI Management Corp.,* 298 F.3d 677, 680 (7th Cir. 2002); *Butynski v. Springfield Terminal R.R.,* 592 F.3d 272, 277–78 (1st Cir. 2010). That standard has not been satisfied in this case.

Id. at 871-72.

While Plaintiff's argument that portions of opening or closing statements may constitute admissions is not commonly addressed in the case law, the reported cases that have addressed it in circumstances similar to those here are consistent with *Robinson* and hold that statements like those made by DESC are not judicial admissions. *See, e.g., Hayes v. Xerox Corp.,* 718 P.2d 929, 932 (Alaska 1986) (statement by defense counsel during closing argument that "I think [the plaintiff has] been significantly injured" and "has injury now" was not a judicial admission as "closing arguments are matters of opinions"); *Bales v. Shelton,* 399 S.E.2d 78, 80 (Ga. Ct. App. 1990) (holding that defense counsel's suggestion of $20,000 as a "fair figure" during closing arguments was not an admission of fact, but "merely counsel's opinion or conclusion in the nature of an assessment"). Here, the faulty premise of Plaintiff's position—that there were "concessions" of facts as to loss—is also confirmed by the context in which the statements were made and when they were made, immediately after the Court gave preliminary instructions to the jury. In the Court's preliminary instructions, it advised the jury that "[i]t is very important that you understand

what the attorneys share with you during their opening statements is not evidence." (**R. pp.**) (Tr. 61). In addition, Plaintiff's position is further belied by the fact the Court asked whether there were "any objections or exceptions to the Court's opening remarks" and the answer given by Plaintiff's counsel was "No, your Honor." (**R. pp.**) (Tr. 61, 63-64). By failing to object to the Court's preliminary instructions, Plaintiff thus agreed, on the record, that statements during opening arguments were "not evidence," and she cannot take a contrary position now on appeal. Even if she did not waive the argument, Plaintiff's contention should be rejected.

Finally, even if it is assumed, *arguendo*, that there were "concessions" of fact about "substantial wrongful death damages," conceding such facts before the jury in an opening statement would not bar a post-trial motion for a motion for new trial under Rule 59 or the thirteenth juror doctrine because the verdict is grossly excessive. *See* discussion *supra* Part 1.B. Simply put, DESC could not have known that it would be faced with an unconstrained jury that ignored the evidence and its instructions to award a grossly excessive amount of actual damages.

2. In determining whether the jury's verdict for $21 million was grossly excessive and shockingly disproportionate to the injuries actually suffered, the trial court properly considered the evidence before the jury.

Nothing in the trial court's order supports Appellant's argument that the trial court based the grant of a new trial absolute on the fact that no evidence of economic damages was introduced. The trial court, as it was required to do, evaluated whether the verdict was grossly excessive and against a fair preponderance of the evidence. Appropriately exercising its obligations, the court considered the evidence that was—and was not—introduced at trial for both the survival and wrongful damages claims. The trial court's decision should be affirmed. *See Bell v. Harrington Mfg. Co.,* 265 S.C. 468, 474, 219 S.E.2d 906, 909 (1975) ("Where a verdict is deemed excessive …, in the sense that it indicates merely undue liberality on the part of the jury, [the trial judge] alone has the power of setting it aside absolutely or reducing it by granting a new trial *Nisi*.");

Gray v. Davis, 247 S.C. 536, 543, 148 S.E.2d 682, 685 (1966) ("Ordinarily, the decision of the trial judge [to reduce a verdict he deems excessive] is not appealable and will not be disturbed . . . unless it clearly appears that the exercise of his discretion was controlled by manifest error of law.").

This Court previously has held that in evaluating a motion for a new trial nisi additur, the trial court acts properly in reviewing and characterizing the evidence presented to the jury. *Patterson*, 318 S.C. at 186-87, 456 S.E.2d at 438. In *Patterson*, the trial court noted as part of its analysis that although statements by some of her treating doctors were contained in records introduced into evidence, those witnesses did not testify at trial. *Id.*, 318 S.C. at 186-87, 456 S.E.2d at 438. The defendant in *Patterson* challenged the trial court's evaluation of the evidence presented at trial as part of its grant of a new trial nisi additur, contending that the trial court had determined that some evidence was not competent. *Id*. However, this Court rejected that argument, holding that the trial court's comments regarding the nature of the evidence "were appropriate during the analysis of the evidence, since the consideration of a motion for a new trial *nisi additur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented." *Id.*, 318 S.C. at 187, 456 S.E.2d at 438. Similarly, on DESC's motion for a new trial absolute, the trial court was required to evaluate the evidence before the jury to determine whether the verdict was grossly excessive.

Examining the record and the plain language of the Order in the context of the motion for new trial absolute shows that the trial court did not rule on the evidence or hold that a new trial was required because there was no evidence of economic damages. *Cf. Id.*, 318 S.C. at 186-87, 456 S.E.2d at 438. In conducting its required analysis, the trial court considered whether the record supports the $21 million verdict. Economic damages are appropriate in both survival and wrongful

death actions, and reviewing an award as grossly excessive and against the fair preponderance of the evidence necessarily requires the court to review all applicable elements of the damages. The trial court considered the absence of any economic damages along with the evidence of non-economic damages, all of which it determined was minimal—or non-existent—and wholly unsupportive of a $21 million verdict. (**R. pp.**) (New Trial Order at 2). Thus, the trial court, as it was required to do, evaluated whether the verdict was grossly excessive in light of the evidence presented and, like the trial court in *Patterson*, evaluated the evidence in the record.

A review of the elements for each of the causes of action supports the propriety of the trial court's determination and analysis. As Appellant agrees, appropriate damages in survival actions include medical bills, conscious pain, suffering, and mental distress of the deceased. *Scott v. Porter*, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000); *see also Keene v. CAN Holdings, LLC*, 426 S.C. 357, 384, 827 S.E.2d 183, 198 (Ct. App. 2019); *Welch*, 342 S.C. at 303, 536 S.E.2d at 420-21. The trial court noted this several times in its decision to grant a new trial absolute on the survival action. (**R. pp.**) (New Trial Order at. 3-5). The court properly went through each of these allowable factors and the evidence presented to support them in concluding that the award was grossly excessive "in light of the evidence presented." *Patterson*, 318 S.C. at 186-87, 456 S.E.2d at 438. The court did not focus solely on pecuniary damages or rule that they were required, but rather addressed each relevant factor in turn to determine whether the verdict was excessive in light of the evidence presented. (**R. pp.**) (New Trial Order at 3-5). Because pecuniary damages are an element of a survival award, the lack of pecuniary damages in the survival action, combined with the paucity of evidence as to conscious pain and suffering, is a proper factor for the court to consider in determining whether the damages awarded were grossly excessive.

The trial court engaged in the same analysis for the wrongful death verdict. Pecuniary damages are one element of damages in a wrongful death cause of action. "In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death." *Welch*, 342 S.C. at 304, 536 S.E.2d at 421. Damages recoverable in a wrongful death action include: (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. *Id*., 342 S.C. at 304, 536 S.E.2d at 421 (citing *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972)). Thus, the lack of any evidence of pecuniary damages sustained by the beneficiaries is one factor in determining whether the wrongful death verdict on the whole is grossly excessive "in light of the evidence presented." *Patterson*, 318 S.C. at 186-87, 456 S.E.2d at 438. The trial court therefore properly considered whether each of the wrongful death damages factors was proper. *See Haseldon v. Davis*, 341 S.C. 486, 496, 534 S.E.2d 295, 300-01 (considering both the lack of evidence as to pecuniary loss and the evidence of the survivors' shock and grief in determining that the award was not grossly excessive); *see also Knoke v. S.C. Dept. of Parks, Recreation & Tourism*, 324 S.C. 136, 142, 478 S.E.2d 256, 258 (1996) (considering lack of pecuniary damages in determining whether award was excessive); *Clark v. S.C. Dept. of Pub. Safety*, 353 S.C. 291, 310, 578 S.E.2d 15, 25-26 (Ct. App. 2002) (same). Here, the court considered each factor in assessing whether the wrongful death award was grossly excessive, ultimately determining that it was based on a review of the record in light of the evidence presented. (**R. pp.**) (New Trial Order at 6-8).

Recent case law confirms that the trial court did not err in considering the evidence of record, including economic damages, in determining whether the verdicts were grossly excessive. In *Nestler v. Fields*, 426 S.C. 34, 824 S.E.2d 461 (Ct. App. 2019), the Court of Appeals reviewed the trial court's decision to overrule plaintiff's objection to the admissibility of economic damages, presented by defendant, which objection was based on two primary factors: (1) a "trial strategy . . . to not seek specific recovery of his actual medical expenses but to focus on the extent of his pain and suffering and the permanency of his injuries" and (2) the argument that a small amount of economic damages was "irrelevant to the jury's determination of how much he should be compensated for his [non-economic] loss." *Id.,* 426 S.C. at 38, 40, 824 S.E.2d at 463, 465. After noting that there was no "authority in our state discussing the issue of whether a party seeking actual damages for personal injury may prevent the introduction of his actual medical bills by the other party," the Court of Appeals found that there was no error in the admission of the amount of plaintiff's economic damages, as presented by defendant. *Id.*, 426 S.C. at 38, 824 S.E.2d at 463-64. If there was no error in *Nestler*, where the amount of economic damages was presented to and considered by the jury over the plaintiff's objection, then plainly there is no error here, where the Court's Order noted that both economic and non-economic damages may be recovered in survival and wrongful death actions and referred to the evidence (or lack thereof) as to both. The trial court *never* once said, as Plaintiff erroneously suggests, that the absence of economic damages, standing alone, was the "basis" for the decision to grant a new trial absolute.

In sum, in ordering a new trial absolute, the trial court properly discharged its obligation to review a judgment that was "shockingly disproportionate" to the evidence that was presented to the jury and whether it comported with the evidence. The trial court's evaluation of pecuniary damages was merely one element of this analysis. In determining to grant the new trial, the trial

court correctly evaluated the nature of the verdict in light of the evidence presented at the trial. The trial court's comments regarding the evidence of economic damages do not reflect a determination that Appellant was required to present such evidence, but that there was no evidence of economic damages in the record to support the verdict. *Patterson*, 318 S.C. at 186-87, 456 S.E.2d at 438. As this Court previously has held, "[w]e must accord the trial court's decision "great deference," and respect its superior position to gauge credibility and the field of evidence." *Id.*, 426 S.C. at 41–42, 824 S.E.2d at 465 (citing *Rush v. Blanchard*, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993) ("[G]reat deference is given to the trial judge, especially in the area of intangible elements of damages.")). The trial court's order granting a new trial absolute therefore should be affirmed.

3. The trial court properly determined that the damages awarded by the jury were grossly excessive and, based on the evidence of record, were the product of caprice, passion, prejudice, partiality, corruption, or other improper motives.

The jury's verdict of $21 million in non-compensatory damages unquestionably was grossly excessive and the product of passion or prejudice, and the trial court properly granted a new trial based on this determination. It is well settled in this state that the trial court has the authority and responsibility to grant a new trial when, in its judgment, the verdict of the jury is contrary to the fair preponderance of the evidence. *Adams v. Duffie*, 244 S.C. 365, 366, 137 S.E.2d 276, 276 (1964); s*ee also Greenwood v. Anderson Truck Lines, Inc.*, 235 F.Supp. 1010, 1012 (E.D.S.C. 1964) ("[The Court] is mindful of the discretion, the responsibility, of the Court, on the question of the sufficiency, insufficiency, or excess of a jury's verdict."). The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Brinkley*, 386 S.C. at 185, 687 S.E.2d at 56. "[O]ur standard of review dictates that we must only look to see if there is evidence in the record to support the

circuit court's decision to grant a new trial, and, only in the complete absence of such evidence, is it within our province to find the circuit court abused its discretion." *Id*., 386 S.C. at 188, 687 S.E.2d at 57. As set forth below, there was significant evidence in the record to support the trial court's decision to grant a new trial absolute.

A trial court must grant a new trial based upon the excessiveness of a verdict where it "is so grossly excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives." *Rush*, 310 S.C. at 379–80, 426 S.E.2d at 805; *see also Cock–N–Bull Steak House, Inc. v. Generali Ins. Co*., 321 S.C. 1, 466 S.E.2d 727 (1996); *McCourt by & through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995); *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993); *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). Caprice is an arbitrary or unfounded motivation or the disposition to change one's mind impulsively. *Caprice*, BLACK'S LAW DICTIONARY (11th ed. 2019). Synonyms for it include whim, whimsy, vagary, fancy, and notion. A verdict may be "said to be capricious if it is against the overwhelming weight of the evidence." *Hutson v. Cummins Carolinas, Inc.,* 280 S.C. 552, 559, 314 S.E.2d 19, 24 (Ct. App. 1984) (citing *Watson v. Paschall,* 100 S.C. 281, 84 S.E. 531, 532 (1915); *Beasley v. Ford Motor Co.,* 237 S.C. 506, 117 S.E.2d 863 (1963)).

The test employed by the court in determining whether or not to set aside a verdict on the grounds of either excessiveness or inadequacy is whether the verdict is so shocking as to manifestly show the jury was moved by considerations not founded on the evidence or the instructions of the trial court. *Krepps by Krepps v. Ausen*, 324 S.C. 597, 608, 479 S.E.2d 290, 296 (Ct. App. 1996) (citing *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973)). It is "when the verdict is so grossly excessive as to indicate that the jury was moved by passion or prejudice or other considerations

not founded on the evidence and the instructions of the trial judge, that it becomes the duty of this Court, as well as the trial Court, to set it aside absolutely." *Bruno v. Pendleton Realty Co.*, 240 S.C. 46, 55, 124 S.E.2d 580, 584 (1962); *see also Bowers v. Charleston & W. C. Ry. Co.*, 210 S.C. 367, 375, 42 S.E.2d 705, 708 (1947) (A verdict is grossly excessive is if it is "deemed to be the result of a disregard of the facts and instructions of the Court, and to be due to passion and prejudice rather than reason.").

As fully examined by the trial court in the New Trial Order and as explained below, there was significant evidence in the record to support the trial court's decision to grant a new trial absolute. The trial court's grant of a new trial absolute should be affirmed.

A. The trial court properly granted a new trial absolute on Plaintiff's survival claim because the evidence did not support an award of $10 million in actual damages.

Based on the evidence supporting the survival action, the $10 million damages award was grossly excessive. As the trial court noted, Appellant did not present any medical, surgical, hospital or funeral expenses, and there was no evidence supporting conscious pain and suffering. The plaintiff has the burden to show consciousness, *Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 28 S.E.2d 683 (1944), and a plaintiff that fails to meet this burden will be unable to recover conscious pain and suffering. *Stevens v. Allen*, 342 S.C. 47, 52, 536 S.E.2d 663, 665 (2000). Facts showing a large verdict coupled with a short space of time which the decedent survived will properly give the court great concern. *Bowers*, 210 S.C. at 373, 42 S.E.2d at 707.

The only evidence presented as to Mr. Larios' conscious pain and suffering was that he was briefly conscious in the immediate aftermath of his fall. There was no evidence in the record as to the exact time the incident occurred or that Mr. Larios was conscious when the EMS arrived shortly thereafter. There was no evidence that Mr. Larios ever regained consciousness, and there was no testimony as to how Mr. Larios' injuries would affect a person prior to loss of

consciousness or death. There was no expert to testify as to the intensity of the shock Mr. Larios received, although there was testimony that Mr. Larios stated he was "fine" immediately after the fall. There also was testimony that this was not a situation where the electrical mark found on Mr. Larios' body came from direct contact with a high voltage power line, which would cause catastrophic injuries. (**R. pp.**) (Tr. 326-27). Indeed, there were no burn marks on Mr. Larios' clothing, indicating that the voltage was somewhere below 1,000 volts. (**R. pp.**) (Tr. 334).

As the trial court found, Appellant left a great deal of information for the jury to speculate as to Mr. Larios' conscious pain and suffering. None of the evidence actually presented supports a verdict of $10 million. While Mr. Larios' injuries were extensive, there was no evidence of Mr. Larios' conscious pain and suffering. Nor was there any evidence as to pecuniary damages. On the other hand, there is sufficient evidence in the record to support the trial court's determination that the verdict was grossly excessive and not supported by a fair presentation of the evidence. The trial court did not abuse its discretion in granting a new trial on Appellant's survival claim, and this Court should affirm its decision.

B. The trial court properly granted a new trial absolute on Plaintiff's wrongful death claim because the evidence did not support an award of $11 million in actual damages.

Much like the evidence on the survival claim, the evidence as to the damages in the wrongful death claim was also minimal. Too minimal to support an award of $11 million. This minimal evidence does, however, support the trial court's conclusion that the award is grossly excessive. The general elements of damages recoverable on a wrongful death claim are: (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. *Wells,* 258 S.C.at 319, 188 S.E.2d at 471. A plaintiff may recover only future and

prospective damages that, based on the evidence, will "of necessity result from the alleged injury." *Id.*

As the trial court correctly noted, there was no evidence of pecuniary loss presented at trial–nothing as to Mr. Larios' earning capacity or the actual extent of his support for his parents. The trial court noted that, while there was some testimony that Mr. Larios would occasionally send money to his parents in Mexico, there was no evidence that Mr. Larios' parents depended on him for support or if the money he sent was just the kindness of a son toward his parents. (**R. pp.**) (New Trial Order at 6). And while there was evidence that his parents suffered shock and grief due to the loss of their son, as any parent would, the parents did not testify and the evidence showed that Mr. Larios had moved away from his parents at a young age and had not seen them in over 12 years. The Supreme Court has recognized that, although the loss to parents from the untimely death of a devoted child is not to be minimized, it is appropriate to limit the amount awarded in such cases if the jury's determination of damages exceeds its warrant. *Zorn v. Crawford*, 252 S.C. 127, 137, 165 S.E.2d 640, 645 (1969). Further, the parents' loss may extend only over the lifetime of the two of them and the survivor. *Adams v. Hunter*, 343 F. Supp. 1284, 1290 (D.S.C. 1972), *aff'd*, 471 F.2d 648 (4th Cir. 1973). The question in assessing the damages award is "what is a reasonable, adequate amount under the circumstances." *Id.*

Given the evidence before it, the trial court correctly concluded that the prolonged absence between Mr. Larios and his parents could not help but affect an award based on loss of consortium, companionship, and society. (**R. pp.**) (New Trial Order at 8). While an award of some damages could possibly be ascertained from the record in this case, nothing in the record supports an amount of damages that could remotely approach $11 million. Regardless of the reason that Mr. Larios could not return to Mexico, the fact remains that there was a paucity of evidence in the record

regarding Mr. Larios' relationship with his parents to support an award of $11 million for wrongful death. Again, the question is not whether the evidence supported any award for any amount of damages for wrongful death, but whether an award of $11 million for wrongful death was grossly excessive in comparison to the actual evidence of record.

In this instance, the trial court relied on the correct law in reaching its decision that the verdicts for actual damages of $10 million dollars on the survival action and $11 million on the wrongful death action were not supported by the evidence and could only be explained upon the basis of sympathy, passion, caprice, or some other consideration found outside the evidence that was presented in the case. (**R. pp.**) (New Trial Order at 2). The trial court did not abuse its discretion in determining that the paucity of evidence in this matter could not justify the grossly excessive verdicts rendered and that the verdicts were contrary to a fair presentation of the evidence. This Court should affirm the trial court's grant of a new trial absolute.

4. Contrary to Appellant's arguments, a specific precipitating event is not a prerequisite for the trial court to grant a new trial absolute.

In an effort to manufacture an error of law that would warrant this Court setting aside the trial court's discretionary decision, Appellant asks this Court to read a new requirement into the longstanding standard for granting a new trial absolute for excessive damages. She argues that the correct test is whether or not there was a trial event, evidentiary error, disregard of the jury instructions, or jury confusion that led to the excessive verdict. App.'s Br. at 35. While there may be instances where a trial event has precipitated the granting of a new trial due to the excessiveness of a verdict, such an event is not required and is not part of the test for determining whether to grant a new trial. Rather in accord with South Carolina law, *see* discussion *supra*, the court, in its discretion, is asked to look to whether the verdict is so shocking as to manifestly show the jury

was moved by considerations not founded on the evidence or the instructions of the trial court. *Krepps by Krepps*, 324 S.C. at 608, 479 S.E.2d at 296.

Contrary to Appellant's assertion, the court's inquiry on a motion for a new trial absolute is not whether some event precipitated the verdict, but whether the verdict is so palpably excessive as to warrant the inference that it is the result of caprice, passion, prejudice or other considerations not founded on the evidence. *E.g., Nelson v. Charleston & W. C. Ry. Co.*, 231 S.C. 351, 358, 98 S.E.2d 798, 801 (1957). Ordinarily the only means of discovering the existence of passion and prejudice as influencing the verdict is by comparing the amount of the verdict with the evidence before the trial court. *Id.*, 231 S.C. at 358, 98 S.E.2d at 802. That is the inquiry that the trial court is required to conduct. In this case, the "passion, caprice, prejudice, or other considerations" that influenced the jury are indicated not by actual extraneous contacts or evidence, but by the mismatch between the evidence and the verdict, reflecting that the jurors themselves brought improper considerations into their evaluation of the evidence. Thus, the fact that the jurors submitted affidavits regarding external influences does not preclude the grant of a new trial absolute on the basis that the verdicts were grossly excessive because the question is whether the amount of the verdict itself in comparison to the evidence of record "indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive." *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 321, 628 S.E.2d 496, 519 (Ct. App. 2006).

DESC was not required to identify a basis for the grossly excessive verdict, and the cases cited by Appellant do not support the argument that a trial event is a *required* showing before the trial court may grant a new trial absolute based on a grossly excessive verdict. Each of these cases correctly recites that a new trial will be granted when it is grossly excessive as to warrant an

inference that it was the result of caprice, passion, prejudice, or other considerations not founded on the evidence. Importantly, none of these cases hold that a party must point to an identifiable basis for the grossly excessive verdict in order to succeed on a motion for new trial absolute. And, contrary to Appellant's assertion, App.'s Br at 35, none of their cited cases provide that a new trial absolute must be denied where the only basis is that the verdict is too big based on the evidence.

Thus, in *Carson v. CSX Transportation, Inc.*, involving an appeal from a denial of a new trial *nisi additur*, the court relied on the standard set forth in *O'Neal*, 314 S.C. 525, 431 S.E.2d 555, to determine that the jury's failure to award any survival damages was legally incorrect where there was evidence in the record that established decedent had experienced conscious pain and suffering. 400 S.C. 221, 241-42, 734 S.E.2d 148, 159 (2012). There was also evidence of funeral expenses. *Id.* While the court noted that the jury appeared confused as to its duty to allocate fault, it did not solely rely on this factor in reaching its conclusion. Rather, it determined that there was a clear showing of survival damages, making the award of zero dollars legally incorrect. *Id.*

Similarly, the court in *Wachovia Bank National Association v. Beane* relied on the *O'Neal* standard to determine whether a jury's damages award was grossly excessive and not supported by the evidence. 397 S.C. 612, 616, 725 S.E.2d 715, 717 (Ct. App. 2012). As part of its review, the court looked at the elements of the jury's verdict in relation to the evidence that was presented at trial. In reviewing the elements of the jury's verdict, the court neither held nor required the party seeking a new trial absolute to point to a basis or identifiable trial event in order to succeed. Instead, the court reviewed the evidence in the record to determine whether the three elements of damages awarded were adequately supported. Based on this review of the evidence, this Court held that the combination of the three elements of the jury's verdict demonstrated that "the jury awarded relief that was grossly excessive, based its decision on matters outside of the evidence, and did not follow

the jury instructions." *Id.* And after reviewing the evidence of record and the three elements of damage, the Court expressly held that "*[t]he verdict* demonstrates that the jury acted on some basis other than the evidence presented and that it did not follow the legal instructions given by the trial court." *Id.*, 397 S.C. at 617, 725 S.E.2d at 718 (emphasis added). In other words, the trial court's determination that the jury acted based on passion, caprice, prejudice, or another influence outside the evidence was properly based on a comparison of the verdict in relation to the evidence of record.

Appellant's reliance on *Dillon v. Frazer*, 383 S.C. 59, 64, 678 S.E.2d 251, 253 (2009), is similarly misplaced. There, the court determined that the jury verdict was grossly inadequate because there was unchallenged evidence of damages presented at trial. The court quoted *Vinson v. Hartley*, 324 S.C. 389, 404-05, 477 S.E.2d 715, 723 (Ct. App. 1996), in reaching this conclusion. The court cited to the jury's questions regarding damages as *additional* proof that the jury was motived by improper considerations. *Id.* However, it was the disparity between the award and the admitted damages that established the award as "beyond a mere[] conservative award and suggest[ed] that the jurors were motivated by improper considerations." *Id.* "The jury's award of $6,000 in the face of over $30,000 in undisputed damages is grossly inadequate and demonstrates that the verdict was actuated by improper motive." *Id*., 383 S.C. at 65, 678 S.E.2d at 253. At no point did the court hold that the appellant was required to identify a basis for the excessive amount, nor did it hold that the questions from the jury, on their own, constituted grounds for granting of the new trial. Indeed, the court specifically found that "[n]o plausible reason for the amount of the verdict has been advanced." *Id*.

In *Clark v. Ross*, 284 S.C. 543, 567-68, 328 S.E.2d 91, 106 (1985*), abrogated on other grounds by Sherer v. James*, 290 S.C. 404, 351 S.E.2d 148 (1986), the Supreme Court once again

looked to the record to determine that the evidence supported the amount the jury awarded. Like other courts faced with a request for a new trial, the court reviewed the evidence present in the record, noting that in addition to testimony as to pecuniary loss there was significant testimony from the beneficiaries as to their losses. "Although the verdict is admittedly a large one, we cannot say it is, to use some of the phrases frequently associated with the standard to be employed when testing a verdict for excessiveness, either 'monstrous', 'shocking to the judicial conscience', or 'plainly unjust.'" *Id.,* 284 S.C. at 568, 328 S.E.2d at 106 (citations omitted). Based on the evidence in that record, the court determined that the amount was not "so grossly excessive it would be a denial of justice to allow it to stand." *Id.* Although the Court noted that neither appellant had pointed to a trial event or other evidence that may lead it to believe the award was based on improper influences, it did so in the context of supporting its analysis of the verdict as compared to the evidence of record. It most certainly did not hold that a trial event is a requirement. *Id.*

The *Clark* court relied on *Lucht v. Youngblood*, 266 S.C. 127, 221 S.E.2d 854 (1976), in reaching its decision. Like *Clark*, the *Lucht* court was asked to assess the reasonableness of a damages award for the wrongful death of a minor where appellants argued that the verdict exceeded any amount previously awarded in similar cases. *Id*., 266 S.C. at 136, 221 S.E.2d at 858. The Court correctly stated the applicable standard:

> It is in the province of the jury to determine amounts to be allowed and a verdict should not be disturbed unless it is so flagrantly excessive as to *raise a presumption* that it was the result of passion and prejudice, and not of sober, reflective judgment.

Id., at 266 S.C. 137-38, 221 S.E.2d at 859 (emphasis added). The Court went on to clarify the standard as having been variously phrased "grossly excessive, inordinate, shocking to the judicial conscious, outrageously excessive, so large to shock the conscious of the court, and monstrous." *Id.,* 266 S.C. at 138, 221 S.E.2d at 859. (quoting *Grunenthal v. Long Island R.R. Co.*, 393 U.S.

156, 159 (1968)). The court found that the verdict awarded was none of those. *Id.* 266 S.C. at 138, 221 S.E.2d at 860. It then noted, in *dicta*, that there had also not been a single trial event or item which may have induced the jury to act out of passion or prejudice. *Id.* Again, however, the court did not state that such an event or item was a necessity, nor was this the focus of its decision. Rather, the court based its decision on the size of the damages award and the evidence presented in the record.

Finally, in *Mishoe v. Atlantic Coast Line Railroad Co.*, *supra*, the court addressed two questions regarding the jury's award of damages. First, the court was asked to determine whether, in view of the testimony as well as the court's charge as to damages, the verdict disclosed such a prejudice against the defendants as to indicate it was the result of such caprice, prejudice, or passion, thus depriving defendants of the consideration to which a litigant is entitled at the hands of a jury. *Id.*, 186 S.C. at 410, 197 S.E.2d at 101. Addressing this question, the court focused on whether the jury could presume pecuniary loss for the death of a spouse or parent in the absence of evidence of such loss. *Id.*, 186 S.C. at 426, 197 S.E.2d at 107-08. Second, the court was asked to determine that the amount awarded was a grossly excessive amount to be allowed for all of the injuries which could have been found from the testimony. *Id.*, 186 S.C. at 410, 197 S.E.2d at 101. As to this question, the court held that, while the award was concededly substantial, it was not "so large as to warrant the holding here that the facts are susceptible of no other reasonable *inference* than that the verdict was so excessive as to indicate that it was the result of prejudice, caprice, or passion, or other consideration not founded on the evidence[.]" *Id.*, 186 S.C. at 410, 197 S.E.2d at 108 (emphasis added). Nowhere did the court state that a defendant must point to an identifiable event as a basis for the excessive award.

A trial court must grant a new trial absolute upon a finding that the verdict "is so grossly excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives." *Rush*, 310 S.C. at 379–80, 426 S.E.2d at 805. If a verdict is grossly excessive in light of the evidence of record, that provides an *inference* and raises a *presumption* that it was the result of caprice, passion, prejudice, or other evidence not in the record. *Nelson*, 231 S.C. at 358, 98 S.E.2d at 801; *Lucht,* 266 S.C. at 137-38, 221 S.E.2d at 859. There is no additional requirement that the moving party show evidence of impropriety as the gross excessiveness of the verdict itself provides an inference and presumption of such. Thus, the proper analysis is whether the trial record—based on the trial court's evaluation of the evidence—demonstrates that the award is grossly excessive in comparison to the evidence of record and, thus, that the jury's action was the product of caprice, passion, prejudice, partiality, corruption, or other improper motives.

Viewed in this light, the trial court's grant of a new trial absolute should be affirmed. The properly looked at the record before it, viewed the scant evidence of actual damages in the light most favorable to Appellant, and determined that the amount awarded was so disproportionate to the evidence that the verdict was grossly excessive. At that point, the trial court properly exercised its duty to grant a new trial absolute. The trial court did not commit an error of law, and, as there is sufficient evidence in the record to support the trial court's conclusions, there was no abuse of discretion. The trial court properly granted DESC's motion for a new trial absolute based on the inescapable conclusion that the minimal evidence presented was insufficient to justify a $10 million survival verdict and an $11 million wrongful death verdict. The trial court's decision should be affirmed.

5. Because it is apparent that the trial court was acting as the thirteenth juror when it granted a new trial absolute, no prior motion was required, the trial court's grant of a new trial is effectively unreviewable, and the two-issue rule requires affirming the trial court's decision on this basis because Appellant did not raise the thirteenth juror doctrine as an issue or argue on appeal that the New Trial Order was flawed on this basis.

Based on the language used in the New Trial Order, it is evident that the trial court actually evaluated the motion in his capacity as the thirteenth juror. "South Carolina's thirteenth juror doctrine is well established as the standard for granting a new trial in state law actions." *Norton v. Norfolk S. Ry. Co*., 350 S.C. 473, 477, 567 S.E.2d 851, 854 (2002). The thirteenth juror doctrine allows the trial court to "grant a *new trial absolute* when [it] finds that *the evidence does not justify the verdict*." *Folkens*, 300 S.C. at 254, 387 S.E.2d at 267 (emphasis added). The doctrine arms the trial court with "the veto power to the Nth degree." *Ex parte Travelers Home & Marine Ins. Co. v. Stringfellow*, 427 S.C. 238, 244, 830 S.E.2d 718, 721 (Ct. App. 2019), *reh'g denied* (Aug. 5, 2019), *cert. denied* (Jan. 16, 2020) (quoting *Worrell v. S.C. Power Co.*, 186 S.C. 306, 313, 195 S.E. 638, 641 (1938)). Indeed, where conflicting evidence exists on the contested issues, a circuit court's decision to sit as a thirteenth juror and grant a new trial absolute is inviolable." *Trivelas*, 357 S.C. at 553, 593 S.E.2d at 508.

As the thirteenth juror, the trial court has broad discretion to, in effect, "hang the jury by refusing to agree to the jury's otherwise unanimous verdict." *Norton*, 350 S.C. at 478, 567 S.E.2d at 854. The trial court's discretion in this matter is broad:

> A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. When an order granting a new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court's order.

Folkens, 300 S.C. at 254–55, 387 S.E.2d at 267 (internal citations omitted). Moreover, a directed verdict motion based on insufficiency of the evidence is not a prerequisite to filing a motion for a

new trial upon the facts. *McEntire*, 353 S.C. at 632-33, 578 S.E.2d at 747-48. As shown below, the trial court was acting as the thirteenth juror in ordering a new trial absolute and Appellant failed to challenge this aspect of the trial court's order on appeal.

A. The trial court was acting as the thirteenth juror when it ordered a new trial absolute.

A review of the Order shows that the trial court granted a new trial absolute in its capacity as the thirteenth juror. This was entirely proper and, indeed, required because DESC moved for a new trial based on the thirteenth juror doctrine in addition to the motion for new trial absolute.

i. Appellant has conceded that the thirteenth juror issue was before the trial court and that the trial court was acting as the thirteenth juror in ordering a new trial absolute.

In its Motion for JNOV or, in the Alternative, for a New Trial ("JNOV Motion for New Trial"), and in its Memorandum in Support of the JNOV Motion for New Trial (the "JNOV Supporting Memo"), DESC requested a new trial absolute under Rule 59(a)(1). *See* **(R. pp.)** (JNOV Mot. for New Trial at 1); **(R. pp.)** (JNOV Supp. Mem. at 1, 31). In addition, DESC's JNOV Supporting Memo repeatedly referenced the thirteenth juror doctrine as another basis for its request for a new trial absolute. *See* **(R. pp.)** (JNOV Supp. Mem. at 31-34). The primary argument asserted in the JNOV Motion for New Trial, as specifically detailed in the JNOV Supporting Memo, was that "Plaintiff did not introduce evidence that would allow the finder of fact to find in favor of Plaintiff." *See* **(R. pp.)** (JNOV Mot. for New Trial at 1).[4]

In its separate Motion for New Trial *Nisi Remittitur* or, in the Alternative, for New Trial Absolute, and Incorporated Memorandum in Support ("Second Motion for New Trial"), DESC similarly requested a new trial absolute under Rule 59(a) and incorporated, by express reference,

[4] DESC's earlier Motion for Directed Verdict (made in open court on September 26, 2019). **(R. pp.)** (Tr. 514-516), and Memorandum in Support of same (filed on September 26, 2019) was made on the same grounds: "Plaintiff has failed to introduce evidence that would allow the finder of fact to find in favor of Plaintiff." **(R. pp.)** (Mem. in Supp. of Motion for Directed Verdict at 1).

the arguments contained in its contemporaneously filed JNOV Motion for New Trial. *See* **(R. pp.)** (Second Mot. for New Trial at 1). The primary arguments asserted in the Second Motion for New Trial were: (1) *nisi remittitur* was appropriate "because the jury's damage awards were excessive, especially in light of the extremely minimal—essentially non-existent—evidence of actual damages and (2) alternatively, a new trial absolute was required "because the jury's damage awards were grossly excessive in view of the actual evidence of damages, so much so that the awards are presumptively the result of passion, caprice, prejudice, or other improper influence." *See* **(R. pp.)** (*id.* at 1).

Appellant recognized the application of the thirteenth juror doctrine in her arguments to the trial court. Specifically, although her Memorandum in Opposition to DESC's JNOV Motion for New Trial never referenced Rule 59, Appellant did reference the thirteenth juror doctrine, arguing that "[t]he Court should decline SCE&G's invitation to 'hang' the jury as thirteenth juror because there is no legal or factual justification for doing so and the evidence supports the verdict." *See* **(R. pp.)** (Pl.'s Mem. in Opp. to DESC's JNOV Mot. for New Trial at 14). Likewise, Plaintiff's Memorandum in Opposition to DESC's Second Motion for New Trial never referenced Rule 59.

At the hearing on post-trial motions, including the JNOV Motion for New Trial and the Second Motion for New Trial, DESC's attorney argued that the verdict could not be sustained "for the multiple reasons outlined in our papers, our post-trial motions and accompanying memorandum," which motions and memoranda included requests for new trial absolute under both Rule 59(a)(1) and the thirteenth juror doctrine. **(R. pp.)** (Post-Trial Motions Hrg. Tr. 5). In response, Plaintiff's counsel again referenced the thirteenth juror doctrine during his argument, **(R. pp.)** (Post-Trial Motions Hrg. Tr. 30), but never mentioned Rule 59.

On appeal, Appellant does not mention Rule 59. However, her brief does reference the thirteenth juror doctrine, specifically noting that "Dominion Energy's Motion for New Trial under the thirteenth juror doctrine asked the court to set aside the verdict because there was 'virtually no credible evidence or admissible testimony to establish the nature and extent of any economic or non-economic damages that Mr. Larios' legal survivors and beneficiaries may have suffered.'" App.'s Br. at 18. Viewed in this light, Appellant has conceded that the trial court acted as the thirteenth juror when it granted a new trial absolute.

ii. The trial court acted as the thirteenth juror when it granted a new trial absolute.

A review of the Order demonstrates that the trial court was acting as the thirteenth juror when it granted the new trial absolute. To be sure, the trial court evaluated whether the verdicts were based on "sympathy, passion, caprice or some other consideration found outside the evidence that is presented in this case." **(R. pp.)** (New Trial Order at 2). But the trial court repeatedly evaluated whether the verdict was "supported by the evidence," which is the thirteenth juror analysis.

Specifically, the trial court found that the "verdicts … [are] not supported by the evidence." **(R. pp.)** (New Trial Order at 2). For the survival action, it fully reviewed the evidence and noted that there was "no evidence of what [medical and related] expenses were incurred," "no evidence setting forth what [funeral] expenses were," and that the "medical damages incurred by Plaintiff were left to the jury's speculation." **(R. pp.)** (New Trial Order at 3). The trial court noted the lack of evidence regarding "the nature, level, and extent of pain" suffered by Mr. Larios, that there was "little evidence [he] was conscious for very long after the incident," that the record "is completely void of times as to when the fall occurred, how long EMS worked on Mr. Larios before putting him into the ambulance, or how long after he actually died was he officially pronounced dead." **(R. pp.)** (New Trial Order at 4-5).

This analysis of the evidence continued for the wrongful death action. The trial court noted "the lack of evidence in the record of recoverable damages suffered by Plaintiff." **(R. pp.)** (New Trial Order at 5). The trial court noted that there was "little, if any, evidence of pecuniary loss," no "evidence of his earnings, holdings, or assets," and the "only evidence . . . regarding Mr. Larios's earning capacity is that he worked for a landscaping company maintaining yards and properties." **(R. pp.)** (New Trial Order at 6). The trial court also noted that there was "no evidence that Mr. Larios had even seen his parents since he moved to the United States" and "no evidence that Mr. Larios had any intention to return to Mexico to see his parents or that he had even seen them since he left Mexico." **(R. pp.)** (New Trial Order at 7). And the Court noted that, "[w]hile an amount for these types of damages could possibly be ascertained from the evidence in the record, it is beyond this Court's comprehension that the amount of damages under this evidence could even remotely approach $11 million." **(R. pp.)** (New Trial Order at 8).

In sum, throughout its analysis, the trial court focused on the question of whether the evidence supported the verdict as rendered. *See, e.g., McEntire*, 353 S.C. at 633, 578 S.E.2d at 748. Although the Order references the standard of whether the damages are grossly excessive and are the product of passion, a review of the Order demonstrates that the trial court made that analysis based on an assessment of whether the verdict was supported by the evidence; i.e., whether it was against a fair preponderance of the evidence. *Id*. And the fact that the trial court did not expressly address that standard or style the Order in that regard is not determinative; the question is the analysis that it used in adjudicating the issue. *See Sorin Equip. Co. v. Firm, Inc*., 323 S.C. 359, 363-64, 474 S.E.2d 819, 822 (Ct. App. 1996). The determinative factor in considering whether the trial court acted as the thirteenth juror is whether the language indicates that it thought that the evidence does not support the verdict. *See Trivelas*, 357 S.C. at 551-52, 593 S.E.2d at 507-08

(holding that language that "evidence did not justify the verdict" reflected application of the thirteenth juror doctrine). Moreover, as recognized by the *Trivelas* court, it is necessary to determine what the trial court did by reference to its action and by its reference to the order as a whole. *Id.*, 357 S.C. at 552, 593 S.E.2d at 508 (citing, *inter alia*, *State v. Evans*, 354 S.C. 579, 584, 582 S.E.2d 407, 410 (2003) ("holding an appellate court must view the circuit court's statements as a whole to determine its reasoning")).

Evaluating the trial court's order as a whole, as is required, leads to the conclusion that the trial court acted as the thirteenth juror in granting a new trial absolute. Moreover, it is well settled in this state that the trial court has the authority and responsibility to grant a new trial when, in his judgment, the verdict of the jury is contrary to the fair preponderance of the evidence. *Adams v. Duffie*, 244 S.C. 365, 366, 137 S.E.2d 276, 276 (1964); *see also Anderson Truck Lines, Inc.*, 235 F.Supp. at 1012 ("[The Court] is mindful of the discretion, the responsibility, of the Court, on the question of the sufficiency, insufficiency, or excess of a jury's verdict."). "In South Carolina the trial judge has, by reason of the common law, thirteenth-juror authority to see that justice is done in every case. For example: the court may order a new trial if the judge is not satisfied with the justice even after a jury verdict." *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992). The trial court, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. *Vinson*, 324 S.C. at 403, 477 S.E.2d at 722.

Because the trial court actually ordered a new trial absolute in its capacity as the thirteenth juror, this court should affirm the order. A review of the Order shows that the trial court evaluated the evidence presented to the jury, disagreed with the verdict because it was not supported by the evidence, and hung the jury as the thirteenth juror. *See Norton*, 350 S.C. at 478, 567 S.E.2d at 854.

As fully shown by a review of the Order and of the entire record, there is a conflict in the facts regarding the appropriate measure of damages. *See Clarkson*, 267 S.C. at 127, 226 S.E.2d at 698. That is, the trial court properly determined that, for the reasons fully explained in its order, the evidence did not support the return of a verdict totaling $21 million. *See, e.g.*, *Trivelas*, 357 S.C. at 550, 593 S.E.2d at 507 (affirming order of new trial as thirteenth juror because finding that motorist's negligence did not exceed 50% was not the only inference that could be drawn from the record). Because there is evidence to support the trial court's determination and it is not controlled by an error of law, the Order must be affirmed. *E.g.*, *Norton*, 350 S.C. at 478-79, 567 S.E.2d at 854 (noting that "[t]his Court's 'review is limited to consideration of whether evidence exists to support the trial court's order.'") (quoting *Folkens*, 300 S.C. at 255, 387 S.E.2d at 267).

B. By also failing to raise as an issue or argue on appeal that the trial court erred in granting a new trial as the thirteenth juror, the trial court's order granting a new trial absolute must be affirmed under the two-issue rule.

Appellant has not challenged the grant of a new trial absolute in the trial court's capacity as the thirteenth juror. As noted above, the thirteenth juror doctrine was part of DESC's post-trial motions, which Appellant acknowledged below based on her arguments to the Court. But she never raised any issue with respect to standards actually used by the trial court in her motion to reconsider and, thus, has failed to preserve that issue. *See Brinkley*, 386 S.C. at 186 n.1, 687 S.E.2d at 56 n.1 ("Brinkley also asserted in oral argument that the circuit court committed an error of law when it improperly melded the standards for granting a new trial based on the excessiveness of the verdict or the thirteenth juror doctrine. Because Brinkley neither filed a Rule 59(e), SCRCP, motion asking the circuit court to address the alleged error in the application of two legal remedies in its order, nor included this argument in its brief to this court, we find the argument is not preserved for our review.").

Before this Court, Appellant notes that DESC's post-trial motions included a motion for a new trial on the basis of the thirteenth juror doctrine. App.'s Br. at 18. Yet, she does not challenge the thirteenth juror doctrine as a separate issue before this Court. *See* App.'s Br. at 1; Rule 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of the issue on appeal."). She also fails to analyze the standards applicable to the thirteenth juror analysis and never argues that it was improper for the trial court to grant DESC's motion on that basis. Consequently, Appellant has abandoned any challenge to the trial court's grant of a new trial absolute in its capacity as the thirteenth juror. *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, n.3, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993) ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.").

Beyond abandoning her argument on appeal, Appellant's failure to challenge the grant of a new trial absolute with respect to the thirteenth juror doctrine requires affirming the decision below. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Significantly, the two-issue rule "is applicable under [] circumstances on appeal [other than general jury verdicts], including affirmance of orders of trial courts ... if the plaintiff failed to appeal [all] grounds or if one of the grounds required affirmance." *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420 n.1, 472 S.E.2d 253, 255

n.1 (1996). Because DESC moved for the grant of a new trial under the standards for a new trial absolute and under the thirteenth juror doctrine, but Appellant never challenges the trial court's order with respect to the doctrine, the decision below must be affirmed pursuant to the two-issue rule.

Conclusion

For the reasons set forth above, this Court should affirm the trial court's order granting a new trial absolute.

Respectfully submitted,

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