

RECEIVED

Aug 03 2020

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 REPLY BRIEF OF APPELLANT

YARBOROUGH APPEL GATE LLC
William E. Applegate, IV
Liam D. Duffy
Perry M. Buckner, IV
291 East Bay Street, Floor 2
Charleston, SC 29401
843-972-0150

SMITH, ROBINSON, HOLLER, DUBOSE,
AND MORGAN, LLC
G. Murrell Smith, Jr.
Shannon N. Peake
Post Office Box 580
Sumter, SC 29151-0580
803-778-2471

BARNES LAW FIRM, LLC
Kathleen C. Barnes, SC Bar No. 78854
P.O. Box 897
Hampton, SC 29924
803-943-4529

Attorneys for Appellant

TABLE OF CONTENTS

FACTS 1

ARGUMENT 2

I. DOMINION ENERGY WAIVED THE ABILITY TO ARGUE OR REQUEST JUDICIAL REVIEW OF THE DAMAGES EVIDENCE..... 2

 A. The Estate’s Waiver Argument is Properly Preserved for this Court’s Review 3

 B. Under the Circumstances of This Case, the Lower Court Erred in Allowing Dominion Energy to Challenge Damages Evidence for the First Time in a Post-Trial Motion for a New Trial Absolute 4

II. THE LOWER COURT COMMITTED AN ERROR OF LAW BY IMPROPERLY CONSIDERING ECONOMIC DAMAGES..... 6

III. THE LOWER COURT’S FINDING THAT THE VERDICT IS GROSSLY EXCESSIVE IS UNSUPPORTED BY THE EVIDENCE AND BASED ON ERRORS OF LAW..... 10

 A. The Evidence of Survival Damages and the Reasonable Inferences that can be Drawn from the Evidence Support the Jury Verdict 10

 B. The Evidence of Wrongful Death Damages and the Reasonable Inferences that can be Drawn from the Evidence Support the Jury Verdict 12

IV. THE JURY COMPLIED WITH THE CHARGES GIVEN AND THE COURT FAILED TO IDENTIFY A TRIAL EVENT TO WARRANT A NEW TRIAL ABSOLUTE 15

V. THE LOWER COURT DID NOT GRANT A NEW TRIAL ACTING AS THE THIRTEENTH JUROR 19

CONCLUSION..... 24

TABLE OF AUTHORITIES

Cases

Bennett v. Fairfax Cnty., 432 F. Supp. 2d 596 (E.D. Va. 2006)..... 16

Bowers v. Charleston & W. Carolina R.R. Co., 210 S.C. 367, 42 S.E.2d 705
(1947) 11, 15, 16, 18

Burke v. AnMed Health, 393 S.C. 48, 710 S.E.2d 84 (Ct. App. 2011)..... 20

Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (Ct. App. 1985) 10, 14, 17

Cox v. Lund, 286 S.C. 410, 334 S.E.2d 116 (1985)..... 12

Dunn v. Hovic, 1 F.3d 1371 (3d Cir. 1993) 16

Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990)..... 20

Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011)..... 3

Holroyd v. Requa, 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004) 15

Howle v. PYA/Monarch, Inc., 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986) 2, 19

I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 10

Kazan v. Wolinski, 721 F.2d 911 (3d Cir. 1983)..... 17

King v. Daniel Int’l Corp., 278 S.C. 350, 296 S.E.2d 335 (1982)..... 15, 24

Lucht v. Youngblood, 266 S.C. 127, 221 S.E.2d 854 (1976) 17

McIntire v. Mooregard Exterminating Servs., 353 S.C. 629, 578 S.E.2d 746
(Ct. App. 2003)..... 6, 20

Mishoe v. Atlantic Coast Line R.R. Co., 186 S.C. 402, 197 S.E. 97 (1938) 19

Nestler v. Fields, 426 S.C. 34, 824 S.E.2d 461 (Ct. App. 2019) 8, 9

Peay v. Ross, 292 S.C. 535, 357 S.E.2d 482 (1987)..... 6

Smalls v. S.C. Dep’t of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000) 11

Sorin Equip. Co. v. Firm, Inc., 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996)..... 21

Watson v. Wilkinson Trucking Co., 244 S.C. 217, 136 S.E.2d 286 (1964) 11, 13, 20

Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969)..... 15

Zorn v. Crawford, 252 S.C. 127, 165 S.E.2d 640 (1969) 14

Other Authorities

James L. Ward, Jr., et al., *South Carolina Damages* § I.1.D (2017) 21

Appellant Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios, (“the Estate”) submits this Reply to the brief of Respondent Dominion Energy South Carolina f/k/a South Carolina Electric & Gas Company (“Dominion Energy”).

FACTS

Dominion Energy’s liability is not at issue in this appeal. The jury found that Jose Larios suffered an electric shock that caused him to fall and that Dominion Energy’s conduct caused the electric shock. (Verdict form). The lower court denied every one of the motions in which Dominion Energy argued it was not liable for the Estate’s damages. The lower court denied its pre-trial motion for summary judgment, trial motions for a directed verdict, and post-trial motions for judgment notwithstanding the verdict and for a new trial based on liability evidence and various alleged trial errors. (Form 4 Order; Tr. pp. 526-27, 642; Order p. 9).

Despite the fact that damages—not liability—is at issue on appeal, Dominion Energy devotes only one paragraph of its six-page facts section to damages. (Br. of App. pp. 5-11). The remainder is a repetition of Dominion Energy’s sole focus on liability evidence and disregard for damages evidence. *Id.*

Dominion Energy’s liability “facts” also mischaracterize the evidence admitted at trial. All of the independent witnesses—the Colleton County Coroner’s office and the pathologist who performed the autopsy of Jose’s body—concluded that Jose fell because of an electric shock and died from the blunt force trauma of the fall. (Tr. pp. 137, 239-40; Pl. Exh. 3 p. 5). The independent witnesses from the Colleton County Coroner’s office and Pedro Abraham, Jose’s co-worker, testified the power lines were not visible. (Tr. pp. 132, 135, 212, 369, 381). The Estate’s expert, Edward Brill, testified that Jose suffered an electric shock that caused him to fall and that the height of the palm tree he was cutting when he fell violated Dominion Energy’s policy and applicable

industry standards for vegetation height. (Tr. pp. 285-87, 302, 304-05). The jury found this evidence persuasive and based its damages awards on the evidence presented. (Verdict Form).

ARGUMENT

The focus of this appeal is the damages evidence presented and the damages actually awarded by the jury. Dominion Energy attempts to convince the Court that it is not liable for the Estate's injuries and focuses on the absence of evidence of economic damages when the jury did not award economic damages. These considerations are not relevant to the issue of whether the lower court erred in finding the verdict amount is grossly excessive, especially when, as here, it is undisputed that the Estate submitted sufficient evidence of damages to present the issue to the jury. "On appeal, this court presumes the jury awarded an amount of damages within its discretion and it views all the evidence and the inferences reasonably deducible therefrom in the light most favorable to sustaining the verdict." *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 601, 344 S.E.2d 157, 165 (Ct. App. 1986). Properly applying the law and presumption that the jury awarded damages within its discretion, and viewing the evidence and inferences in a light most favorable to sustaining the verdict, the Court should reverse and remand to reinstate the jury's verdict.

I. DOMINION ENERGY WAIVED THE ABILITY TO ARGUE OR REQUEST JUDICIAL REVIEW OF THE DAMAGES EVIDENCE

The lower court erred by allowing Dominion Energy to challenge the damages evidence for the first time post-trial. Dominion Energy strategically chose to dispute only liability at trial with actual knowledge that the Estate sought only non-economic damages. While a defendant is not required to put up any evidence, it is required to live with the trial choices it makes. In this case, Dominion Energy took a gamble on the jury's assessment of damages, and it lost. Dominion Energy argued post-trial that the Estate's damages evidence was "essentially non-existent" and so minimal that a jury could not "assess" damages or have an "informed" deliberation. (Mot. pp. 1,

3, 9). That is an argument it should have made in a directed verdict motion and, having failed to do so, it cannot make for the first time post-trial.

A. The Estate’s Waiver Argument is Properly Preserved for this Court’s Review

The Estate properly preserved the argument that Dominion Energy waived its ability to challenge the damages evidence. At the post-trial motions hearing, the Estate argued

. . . that [damages] evidence was one not countered, not objected to, and as we know, most of the damage witnesses were not crossed. So all of the damages testimony went in uncontroverted. The jury heard it, gave their consideration to the evidence presented, and anything related to arguments for survival damages or for wrongful death damages, the defense made none. No attempt at all to limit survival damages or limit the wrongful death damages.

. . .

[W]hat they [Dominion Energy] are essentially asking you to do is give them another bite at the apple, redo, let’s have a do-over again, and this time let us come post-trial and determine damages. ***I submit to you, Judge, that is not appropriate.***

(Post-trial Hearing Tr. pp. 29-30, 34) (emphasis added). This plainly raised to the lower court the issue that Dominion Energy failed to challenge damages at trial but inappropriately did so for the first time in its post-trial motions after its trial strategy failed.¹

To the extent Dominion Energy argues the absence of the word “waiver” at the hearing means the Estate did not preserve or waived the argument, it is incorrect. “[A] party is not required to use the exact name of a legal doctrine in order to preserve the issue.” *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). Rather, the only requirement is that the issue is “sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge,” which it was in this case. *Id.* at 466, 719 S.E.2d at 642.

¹ Dominion Energy quotes a sentence from the Estate’s response in opposition to its motion for JNOV as an “admission” by the Estate that is contrary to the waiver argument made on appeal. (Br. of Resp’t p. 15). This characterization is incorrect because the Estate referred to the fact that Dominion Energy repeated its *liability* arguments. The Estate’s characterization of Dominion Energy’s JNOV motion (which is not on appeal) is irrelevant to the *damages* issue on appeal.

Contrary to Dominion Energy’s assertion, the Estate’s argument does not apply waiver and preservation rules “in reverse.” (Br. of Resp’t pp. 16-17). The Estate argued to the lower court that Dominion Energy waived the ability to challenge the damages evidence for the first time post-trial. (Post-trial Hearing Tr. pp. 29-30, 34). The lower court ruled on that argument by allowing Dominion Energy’s challenge over the Estate’s objection and using the post-trial challenge as a basis to grant a new trial absolute. (Order). The Estate argues on appeal that the lower court’s decision is reversible error. (Br. of App. pp. 16-20). This is a proper application of waiver and issue preservation.

Dominion Energy’s argument that its challenge to causation encompasses a challenge to the sufficiency of damages evidence illustrates that it focused only on liability. (Br. of Resp’t pp. 15-16). An argument “that the evidence presented at trial was insufficient to establish that [Dominion Energy] was liable” (Br. of Resp’t p. 16) for the Estate’s damages is a separate legal and factual issue from an argument that the evidence of damages insufficient.

B. Under the Circumstances of This Case, the Lower Court Erred in Allowing Dominion Energy to Challenge Damages Evidence for the First Time in a Post-Trial Motion for a New Trial Absolute

Dominion Energy misunderstands the Estate’s argument on this issue. The Estate does not contend that a directed verdict motion is always a prerequisite to making a post-trial motion for a new trial *nisi* or absolute based on the alleged excessiveness of the verdict. Instead, under the particular circumstances of this case, specifically Dominion Energy’s trial choices and the nature of its post-trial arguments, it was required to challenge the alleged absence of evidence at trial to challenge it post-trial.

Dominion Energy argued post-trial that the Estate did not admit allegedly necessary damages evidence or, even if evidence existed, it was so minimal that the jury could not assess or

have an informed deliberation about the amount of damages.² This argument must first be made in a directed verdict motion at trial because it directly attacks whether the jury can even award damages based on the evidence presented. Dominion Energy cannot silently allow an issue to go to the jury and then argue post-trial that the evidence was so lacking that the jury could not deliberate on it or argue the jury should have considered things not in evidence, such as whether Jose saw his parents. The lower court erred in allowing Dominion Energy to make this post-trial attack and in using it as a basis for its decision to grant a new trial absolute. *See, e.g.*, Order p. 8 (stating the court cannot remit the verdict because “the evidence of damages in the record would make any reduction purely speculative”).

The Estate does not dispute that, in general terms, the standard for a directed verdict is different from the standard for a new trial absolute based on the excessiveness of a verdict. The Estate does not dispute that, generally, a directed verdict or similar motion is not a prerequisite to a motion for a new trial absolute based on the excessiveness of a verdict. However, the specific arguments Dominion Energy made post-trial dictate a different outcome in this case.

Dominion Energy argued the verdict is excessive because no evidence of damages existed or, if it did, it was so minimal that the jury could not assess or deliberate about damages. This is

² *See* Mot. for New Trial p. 3 (“There was ***no evidence*** presented to the jury that would allow it to assess Mr. Larios’ conscious pain and suffering” (emphasis added)); pp. 3-4 (“[T]here was ***no evidence*** or testimony that would ***allow the jury to assess*** the nature or intensity of Mr. Larios’ pain or level of consciousness.” (emphasis added)); p. 4 (“[T]here was ***no testimony*** regarding actual pain suffered by Mr. Larios” (emphasis added)); p. 5 (arguing “the absolute ***lack of evidence*** of conscious pain and suffering” and that the “award is grossly excessive, especially in view of all the ***necessary evidence that is lacking*** in this case” (emphasis added)); p. 7 (“[T]here was ***no evidence or testimony*** that would have ***informed the jury’s deliberations*** with respect to pecuniary loss.” (emphasis added)); p. 8 (“[T]here was ***no evidence by which the jury reasonably could assess*** a pecuniary loss” (emphasis added)); p. 9 (“[T]here was virtually ***no evidence or testimony*** that would have ***informed the jury’s deliberations*** with respect to the survivors’ mental shock and suffering”) (emphasis added)).

an argument that the jury could not determine damages because of the alleged absence of evidence and must be made in a motion for a directed verdict. *See McIntire v. Mooregard Exterminating Servs.*, 353 S.C. 629, 633, 578 S.E.2d 746, 748 (Ct. App. 2003) (describing a directed verdict motion as whether “a party’s evidence makes a case for the jury” (internal quotation marks omitted)). This is different from a post-trial argument that the verdict amount is excessive in light of the evidence presented. The issue of whether the jury could assess damages or whether any evidence of damages existed is ripe *before* the issue goes to the jury. (Br. of Resp’t p. 19). Under these circumstances, Dominion Energy was required to make a motion at trial. *See Peay v. Ross*, 292 S.C. 535, 537, 357 S.E.2d 482, 484 (1987) (“Since the insufficiency of the evidence [of general or special damages] was not properly raised at trial, we cannot review the judgment on that ground.”).

Finally, the Estate cited to Dominion Energy’s opening and closing arguments to demonstrate that it made the strategic choice throughout trial to acknowledge that Jose’s death resulted in damages to him and his family. (Tr. pp. 86, 101, 669-71). This is not a concession about any amount of damages but supports the Estate’s argument about Dominion Energy’s trial strategy and undoubtedly shows that Dominion Energy waited to contest damages until after the jury found against it.

The Court should reverse on the grounds that the specific arguments Dominion Energy made in seeking a new trial absolute should have first been made during trial and, therefore, the lower court erred when it considered and ruled on them.

II. THE LOWER COURT COMMITTED AN ERROR OF LAW BY IMPROPERLY CONSIDERING ECONOMIC DAMAGES

The jury awarded only non-economic damages. The lower court based its finding that the verdict is grossly excessive on the absence of economic damages evidence —something that the

Estate neither sought to prove at trial nor asked the jury to award, and that the court intentionally omitted from the verdict form. (Tr. pp. 9-10, 15, 662-68; Verdict Form). This is an error, and nothing in Dominion Energy's response supports the lower court's legally flawed analysis. The Court should reverse based solely on this legal error.

When reviewing whether an award of only non-economic damages is excessive, it is improper to consider whether the plaintiff proved economic damages. Dominion Energy does not respond to this argument but, instead, argues that the lower court's consideration of the absence of economic damages evidence is proper because economic damages are a recoverable element of damages in survival and wrongful death actions. This is illogical. Dominion Energy is asking this Court to rule that the absence of evidence of a recoverable damage weighs in favor of finding a verdict for other types of damages is excessive.

An example illustrates the error of Dominion Energy's argument. A man is consciously trapped in a burning vehicle and is burned to death. There are undoubtedly survival damages but no medical bills. At trial, his estate does not ask the jury to award damages for medical bills. Under Dominion Energy's logic, the defendant could argue that the verdict amount for survival damages is excessive because medical bills are a recoverable element of damages and the plaintiff presented no evidence of them at trial.

Dominion Energy's argument is also contrary to the verdict form it allowed the court to submit to the jury without objection. The lower court intentionally omitted economic damages as a recoverable element from the verdict form questions for wrongful death and survival damages. The survival action question states: "Please state the total amount of damages for the Estate of Jose Larios for *any conscious pain and suffering* he experienced prior to his death." (Verdict Form p. 2) (emphasis added). The wrongful death action question states: "Please state the amount of

damages for the wrongful death of Jose Larios including ***grief, sorrow, mental shock, suffering, and the loss of his companionship.***” *Id.* (emphasis added). The jury was asked to and did award only non-economic damages. The lower court committed an error of law when it used the absence of economic damages evidence to support its finding that the non-economic damages verdict is grossly excessive.

While there are numerous instances in the lower court’s order that refer to an absence of economic damages evidence, one particular instance illustrates the Estate’s argument. As to survival damages, the court held “there is no evidence of the amount of medical, surgical, or hospital bills charged to Plaintiff. While there were medical and related expenses, Plaintiff presented no evidence of what expenses were incurred and left it to the jury’s pure speculation. In addition, while there were funeral-related expenses, Plaintiff submitted no evidence setting forth what those expenses were. Therefore the medical damages incurred by Plaintiff were left to the jury’s speculation.” (Order p. 3). The court plainly penalized the Estate for not presenting evidence of damages it did not ask the jury to award. This is not the proper analysis for whether an award of non-economic damages is grossly excessive.

Dominion Energy cites to *Nestler v. Fields*, 426 S.C. 34, 824 S.E.2d 461 (Ct. App. 2019), to support its argument that the lower court properly considered the absence of economic damages when neither party presented evidence of them and the Estate did not ask the jury to award them. (Br. of Resp’t p. 28). *Nestler* is legally and factually distinguishable, and, in fact, supports the Estate’s, not Dominion Energy’s, position. In *Nestler*, the defendant admitted liability for causing a wreck and the plaintiff’s injuries, leaving only the issue of the damages amount for trial. 426 S.C. at 37, 824 S.E.2d at 463. The plaintiff presented evidence of only non-economic damages—pain and suffering, permanent impairment, and loss of enjoyment of life. *Id.* The defendant

introduced evidence of the plaintiff's medical bills over the plaintiff's objection. *Id.* The jury returned a verdict for \$7,117.50, the actual amount of the plaintiff's medical bills. *Id.* The plaintiff filed a post-trial motion arguing the court erred in admitting evidence of his medical bills. *Id.* This Court affirmed because it found no authority discussing "whether a party seeking actual damages for personal injury may prevent the introduction of his actual medical bills by the other party" and the Court saw "no error in the admission" of the medical bills. *Id.* at 38, 824 S.E.2d at 464. The plaintiff also filed a motion for a new trial arguing the jury erred in awarding him only the amount of his medical bills when he presented evidence of pain and suffering. *Id.* at 39-40, 824 S.E.2d at 464. This Court affirmed the denial of that motion ***because the defendant challenged the evidence*** of pain and suffering and permanency on cross-examination of the plaintiff and called his credibility into question. *Id.* at 40-41, 824 S.E.2d at 465.

This case is not comparable to *Nestler*. First, the defendant in *Nestler* actually and successfully challenged the plaintiff's damages evidence at trial. In this case, Dominion Energy did not contest damages evidence. Second, *Nestler* involved a motion for a new trial arguing the jury should have granted damages that the plaintiff asked for and of which he presented evidence. In this case, the Estate argues the lower court erred in considering the absence of evidence of economic damages—damages as to which no party presented any evidence, the Estate did not ask the jury to award, the court intentionally omitted from the verdict form, and the jury did not award. *Nestler* does not support Dominion Energy's argument that simply because an element of damages is recoverable, the absence of evidence of it is a basis for finding that the verdict for other types of damages is grossly excessive.

Finally, Dominion Energy abandons its argument that the Estate should have submitted an economic damages "benchmark" to support an award of non-economic damages. (Mot. for New

Trial pp. 2, 6, 8, 9, 12). While Dominion Energy argued this point in the post-trial proceedings and the lower court relied on this argument in its order, there is no mention of it in Dominion Energy's brief to this Court. *See, e.g., I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (“[A] respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief.”).

The lower court's consideration of the absence of economic damages evidence is legal error, and this Court should reverse.

III. THE LOWER COURT'S FINDING THAT THE VERDICT IS GROSSLY EXCESSIVE IS UNSUPPORTED BY THE EVIDENCE AND BASED ON ERRORS OF LAW

Dominion Energy's response on this issue fails to address the Estate's arguments that the court committed legal errors. In this appeal, the Court “must determine not whether we as appellate judges would have set aside the verdict had we presided at trial but whether the amount is so grossly excessive it would be a denial of justice to allow it to stand.” *Clark v. Ross*, 284 S.C. 543, 568, 328 S.E.2d 91, 106 (Ct. App. 1985). In this case, it would be a denial of justice to not allow the jury's awards to stand.

A. The Evidence of Survival Damages and the Reasonable Inferences that can be Drawn from the Evidence Support the Jury Verdict

Dominion Energy's response to the evidence of survival damages is that there is no evidence of economic damages and no evidence of Jose's conscious pain and suffering. It does not dispute the Estate's arguments that the lower court failed to view the evidence in a light most favorable to the Estate or that the law does not require evidence of the exact time of consciousness or expert testimony about the extent of pain. *Compare* Br. of App. pp. 26-28, *with* Br. of Resp't pp. 31-32. As to Dominion Energy's economic damages argument, it is addressed above. As to conscious pain and suffering, Dominion Energy fails, as did the lower court, to view the evidence

in a light most favorable to the Estate. *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964).

There is no legal requirement for a specified time period of conscious pain and suffering to warrant a particular verdict amount, and Dominion Energy does not cite to any law supporting such a requirement. It cites to *Bowers v. Charleston & W. Carolina R.R. Co.*, 210 S.C. 367, 42 S.E.2d 705 (1947), for the assertion that a “large verdict coupled with a short space of time” for the decedent’s survival “give[s] the court great concern.” (Br. of Resp’t p. 31). In *Bowers*, the evidence showed a boy hit by a train consciously survived for approximately twenty minutes, and, in 1945, the jury returned a \$10,000.00 actual damages verdict for his conscious pain and suffering. 210 S.C. at 370, 42 S.E.2d at 706. On appeal as to the excessiveness of the verdict amount, the Court said the “large amount of the verdict, especially considering the short space of time which the deceased survived the injury, has given the Court great concern” but affirmed the verdict. *Id.* at 373, 377, 42 S.E.2d at 707, 709. This decision does not support Dominion Energy’s argument because, in this case, the evidence viewed in a light most favorable to the Estate is that Jose endured conscious pain and suffering for over two hours before he was pronounced dead. The monetary value of those hours of pain from massive internal bleeding, at least fifteen broken bones, torn internal organs, an electrical burn, and a twenty-five-foot fall is a determination for the jury, and the evidence supports the verdict amount. *See Smalls v. S.C. Dep’t of Educ.*, 339 S.C. 208, 216-17, 528 S.E.2d 682, 686-87 (Ct. App. 2000) (affirming denial of JNOV on appeal from a verdict for conscious pain and suffering where the decedent child was hit by a school bus and the evidence of whether she was ever conscious was “somewhat contradictory”).

Dominion Energy argues the evidence shows Jose was “briefly conscious.” (Br. of Resp’t). The evidence viewed in a light most favorable to the Estate is that he experienced conscious pain

and suffering until he was pronounced dead approximately two hours after the fall. Jose was conscious after he fell and spoke to Mr. Abraham. (Tr. pp. 370-71). Mr. Abraham left Jose alone while he called 9-1-1 and, when he returned, Jose “wasn’t responding anymore.” (Tr. p. 372). That Jose was not responding anymore does not mean he was unconscious. In a light most favorable to the Estate, it means only that Jose did not speak to Mr. Abraham any more. This is further supported by the testimony of Gaspar, Jose’s brother, who testified that, when he arrived at the scene before the ambulance left for the hospital, a fireman told him that Jose “was well.” (Tr. p. 487).

Finally, Dominion Energy argues that there is no evidence, specifically expert testimony, as to the “intensity” of the pain and suffering from Jose’s injuries. However, they fail to address the Estate’s legal arguments that there is no requirement for expert testimony and, regardless, it is not necessary under the facts of this case because, under South Carolina law, the jury can reasonably infer that Jose experienced extensive physical pain and mental suffering from massive internal bleeding, at least fifteen broken bones, torn internal organs, and a burn injury that resulted in his death. *Compare* Br. of Resp’t p. 32, *with* Br. of App. p. 28; *See, e.g., Cox v. Lund*, 286 S.C. 410, 417, 334 S.E.2d 116, 120 (1985) (“In civil actions . . . proof of circumstances warranting a given inference is sufficient in such cases.”).

B. The Evidence of Wrongful Death Damages and the Reasonable Inferences that can be Drawn from the Evidence Support the Jury Verdict

Dominion Energy defends the lower court’s finding that the jury’s wrongful death award is grossly excessive on the grounds that the Estate did not present evidence of economic damages, Jose’s parents did not come to trial to testify, and Jose moved away from his parents. (Br. of Resp’t pp. 32-34). As to Dominion Energy’s economic damages argument, it is addressed above. As to evidence of Mr. and Mrs. Larios’s loss and whether Jose saw them after he came to the United

States, Dominion Energy fails, as did the lower court, to view the evidence in a light most favorable to the Estate. *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964).

Except for one passing remark that “the parents did not testify”, Dominion Energy does not address the Estate’s argument that the lower court erred in discounting the testimony of their damages because they did not appear to testify at trial. *Compare* Br. of Resp’t p. 33, *with* Br. of App. p. 32. The lower court erred in finding the wrongful death verdict grossly excessive based on the Larios’s absence from trial because there is no requirement that a beneficiary testify at trial and the jury was free to accept the unchallenged testimony of Ms. Provence, Gaspar, and Ms. O’Brien as to their loss. This Court should reverse on this legal issue because Dominion Energy failed to contest it.

As to the lower court’s finding that there is no evidence Jose saw his parents after coming to the United States and the alleged effect of that separation on the wrongful death damages award, Dominion Energy misstates the evidence, views it in a light most favorable to Dominion Energy, and cites no law to support the lower court’s decision. Dominion Energy represents (without citation to the record) that “the evidence showed that Mr. Larios moved away from his parents at a young age and had not seen them in over 12 years.” (Br. of Resp’t p. 33). This is incorrect. The evidence showed that Jose, an adult with a graduate degree, moved to the United States to earn money to support himself and his family. (Tr. pp. 405, 484-85, 495, 497, 500). There is no evidence as to when Jose last saw his parents in person. Dominion Energy chose not to address the issue on cross-examination of any of the Estate’s witnesses. In the absence of any evidence on the issue, the lower court (and Dominion Energy) make a legally impermissible inference that he had not seen them in over a decade and then, compounding the error, infer that separation means they did not have a loving and close relationship.

Dominion Energy, viewing the evidence in a light most favorable to itself, argues there is a “paucity of evidence” of Jose’s “relationship with his parents.” (Br. of Resp’t pp. 33-34). Evidence that a son endured separation from his family and worked multiple physical labor jobs seven days a week for over a decade to send money to support his family is not a “paucity” of evidence of their relationship.³ Viewed in the light most favorable to the Estate, it speaks volumes of the strength and depth of their relationship and supports the amount of the verdict.

Dominion Energy cites to *Zorn v. Crawford*, 252 S.C. 127, 165 S.E.2d 640 (1969), as support for limiting parents’ recovery for the wrongful death of a child. (Br. of Resp’t p. 33). *Zorn* does not support this argument for at least two reasons. First, *Zorn* involved the death of a fifteen-year-old minor child. In this case, Jose was a forty-one-year-old man with a graduate degree who provided emotional and monetary support to his parents. Second, in a subsequent case this Court declined to follow *Zorn*’s approach of discounting the value of a minor’s life to his or her parents when it affirmed the denial of a motion for a new trial absolute from a verdict for wrongful death damages in a case involving the death of a six-year-old child. *Clark v. Ross*, 284 S.C. 543, 567, 328 S.E.2d 91, 106 (Ct. App. 1985).

There is no legal basis to diminish the value of the Larios’s loss of Jose’s life on any of the grounds argued by Dominion Energy. The jury permissibly found the wrongful death damages compelling—8 jurors, men and women, cried during Gaspar’s testimony about Jose’s relationship with his family. (Mot. to Recon. p. 8). When the facts are viewed in a light most favorable to the

³ Gaspar testified Jose was the older sibling who worked every day to provide for their parents. (Tr. pp. 484-86). Mrs. Larios could not accept that Jose died and kept calling his cell phone hoping that he would answer it. (Tr. p. 488). The Special Administrator testified the Larios’s were “a tight close small family”, and “Jose was their pride and joy” who “worked tirelessly to support his family including his parents.” (Tr. p. 495-97). The loss of Jose “has been devastating to these parents.” (Tr. p. 500).

Estate, they support the jury’s wrongful death award. The lower court erred in granting a new trial absolute, and this Court should reverse.

IV. THE JURY COMPLIED WITH THE CHARGES GIVEN AND THE COURT FAILED TO IDENTIFY A TRIAL EVENT TO WARRANT A NEW TRIAL ABSOLUTE

When, as in this case, the lower court is faced with motions for a new trial *nisi remittitur* and new trial absolute, it first must determine if the verdict is excessive. “A verdict which may be supported by *any* rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained is not excessive.” *King v. Daniel Int’l Corp.*, 278 S.C. 350, 355, 296 S.E.2d 335, 338 (1982) (emphasis added). If the court finds the verdict excessive, it must determine whether it is merely excessive or grossly excessive. A merely excessive verdict is one that the court views as “not in accord with accepted judicial standards for measuring damages under the facts of the particular case.” *Bowers v. Charleston & W. Carolina R.R. Co.*, 210 S.C. 367, 375, 42 S.E.2d 705, 708 (1947). A grossly excessive verdict is one “deemed to be the result of a disregard of the facts and of the instructions of the Court, and to be due to passion and prejudice rather than reason.” *Id.* at 375, 42 S.E.2d at 708. A grossly excessive verdict is one in which “the verdict itself, not merely the amount of the verdict, [] is inherently vicious.” *Id.*⁴ “[T]o warrant a new trial absolute, the verdict reached must be so grossly excessive as to clearly indicate the influence of an improper motive on the jury.” *Holroyd v. Requa*, 361 S.C. 43, 66, 603 S.E.2d 417, 429 (Ct. App. 2004).

⁴ Some cases even indicate that a verdict must rise to a level of gross excessiveness to warrant a new trial absolute. *See Young v. Warr*, 252 S.C. 179, 187, 165 S.E.2d 797, 801 (1969) (“It is only when the verdict is *so* grossly excessive and the amount awarded *so* shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other consideration not found on the evidence that it becomes the duty of this court, as well as of the trial court, to set aside the verdict absolutely.” (emphasis added)).

The distinction between a merely excessive and a grossly excessive verdict is that the latter verdict itself (not only the amount) warrants reversal because the jury is determined to have acted improperly. In this case, the lower court did not find any way in which the jury acted improperly or any event that would have caused it to act contrary to the court's instructions. The verdict amount alone is not sufficient to grant a new trial absolute where nothing else indicates the jury acted based on a consideration outside of the evidence. *See, e.g., Bowers v. Charleston & W. Carolina R.R. Co.*, 210 S.C. 367, 375, 42 S.E.2d 705, 708 (1947) (stating a grossly excessive verdict is one in which “the verdict itself, **not merely the amount** of the verdict, [] is inherently vicious”) (emphasis added); *Bennett v. Fairfax Cnty.*, 432 F. Supp. 2d 596, 603 (E.D. Va. 2006) (“The Fourth Circuit has held that while a verdict may be excessive, without additional evidence of passion and prejudice by the jury, an excessive verdict alone is insufficient to require a new trial.”); *Dunn v. Hovic*, 1 F.3d 1371, 1383 (3d Cir. 1993) (refusing to accept the “argument that in this case the size of the award alone was enough to prove prejudice and passion”). Viewed in a light most favorable to the Estate, the jury accepted all of the evidence and inferences to be drawn from it in the Estate's favor and wanted to award the verdict amounts for survival and wrongful death. (Affs.).

Significantly, neither the lower court nor Dominion Energy identified a single trial event or item as a basis to find that the jury acted improperly out of passion, caprice, prejudice, or some other consideration outside of the evidence. The juror affidavits submitted state they “followed the court's instructions,” “did not consider or discuss anything outside of the evidence,” and did not base their verdict “in any way on [e]motion, sympathy, bias for or against either party, or any other outside factors that we were instructed not to consider.” (Affs.). Dominion Energy's response to this undisputed evidence is that the “mismatch between the evidence and the verdict”

shows the “jurors themselves brought improper considerations into their evaluation of the evidence” despite the jurors’ sworn statements to the contrary. (Br. of Resp’t p. 35). In the face of the jurors’ affidavits and the facts of this case involving the traumatic death of a forty-one-year-old man, the verdict amount alone cannot indicate an improper influence outside of the record and contrary to the court’s instructions. The affidavits distinguish this case from those cited by Dominion Energy.

Dominion Energy’s argument that a trial event or item is secondary to finding the verdict amount excessive misses the point that excessiveness alone may constitute a sufficient basis for a new trial *nisi remittitur* but not for a new trial absolute. It is only a “grossly excessive” verdict that necessitates a new trial absolute. A verdict rises to the level of gross excessiveness when the court identifies a basis to find the jury acted improperly. *See Clark v. Ross*, 284 S.C. 543, 568, 328 S.E.2d 91, 106 (Ct. App. 1985) (stating “that neither physician directed us to either any trial event or any item of evidence that might have caused the jury to base its award on either passion, prejudice, or partiality.”); *Lucht v. Youngblood*, 266 S.C. 127, 138, 221 S.E.2d 854, 860 (1976) (“There has not been a single trial event or evidentiary item, pointed out to us, which might have induced the jury to act out of passion or prejudice.”). Without some basis for the jury’s alleged improper motive, the explanation for the verdict is that the jury wanted to award the verdict amount based on the evidence presented. In that situation, the lower court could either grant a *nisi remittitur* if it disagreed with the amount⁵ or deny the motion based on the substantial deference owed to the jury’s determination of damages.

⁵ *See, e.g., Kazan v. Wolinski*, 721 F.2d 911, 914 (3d Cir. 1983) (stating that “where no clear judicial error or pernicious influence can be identified but where the verdict is so large as to shock the conscience of the court,” the appropriate action for the court is to “order[] plaintiff to remit the portion of the verdict in excess of the maximum amount supportable by the evidence or, if the remittitur [is] refused, to submit to a new trial.”).

Dominion Energy criticizes the cases the Estate cited in support of its argument. *Compare* Br. of Resp't pp. 36-39, *with* Br. of App. pp. 35-36. It argues that, in those cases, the court's identification of a basis for the jury acting out of passion, caprice, prejudice, or some other consideration outside of the evidence was secondary and addressed in passing only after the court found the verdict amount excessive. (Br. of Resp't pp. 36-39). As fully discussed in the Estate's brief, this is an incorrect characterization of those cases, all of which relied on and discussed the presence or absence of a trial event, evidentiary error, disregard of jury instructions, or jury confusion to grant or deny a motion for a new trial absolute. (Br. of App. pp. 35-36). South Carolina appellate courts reviewing decisions on a motion for a new trial absolute consistently rely not solely on the verdict amount but also on the identification of some basis for the jury to have acted improperly out of passion, caprice, prejudice, or some other consideration outside of the evidence or disregarded the court's instructions.

Granting a new trial absolute is a drastic ruling because it results in the total retrial of a case years after the injury. Something more than the verdict amount must justify such a ruling. *Bowers v. Charleston & W. Carolina R.R. Co.*, 210 S.C. 367, 375, 42 S.E.2d 705, 708 (1947) (stating a grossly excessive verdict is one in which "the verdict itself, *not merely the amount* of the verdict, [] is inherently vicious") (emphasis added). In this case, the lower court found everything about the trial, including the jury's liability and punitive damages determinations, proper except for the amount of the verdicts. According to the lower court's ruling in which it did not identify a trial event or error that caused the jury to act improperly in reaching its verdicts, the plaintiff, on retrial, could try the *exact same case* with the *exact same evidence* and *exact same liability determinations* but must hope to get a smaller verdict amount. The law does not require such a nonsensical procedure. The circumstances of this case illustrate why the court must identify

a basis for the jury acting improperly out of passion, caprice, prejudice, or some other consideration outside of the evidence to justify the drastic remedy of a new trial absolute. Its failure to do so in this case warrants reversal.

Our Supreme Court recognized that “the jury system is the most wonderful system that human ingenuity has ever devised for the settlement of disputes between members of organized society, and the composite judgment of twelve citizens, generally selected from as many different communities within a county, upon issues of fact, is more apt to approximate abstract justice than the individual judgment of any one man, no matter how good or learned he may be.” *Mishoe v. Atlantic Coast Line R.R. Co.*, 186 S.C. 402, 425, 197 S.E. 97, 107 (1938). In this case, the jury properly considered only the evidence presented and the court’s instructions. (Affs.). The jury’s assignment of comparative fault and refusal to find punitive conduct demonstrates the propriety of its motives and the depth of its deliberations. *See Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 602, 344 S.E.2d 157, 165 (Ct. App. 1986) (“We see nothing in the record that leads us to conclude that the jury was guided by anything other than a desire to compensate [plaintiff] fully for her serious personal injuries and resulting damages. Indeed, the jury’s refusal to award punitive damages strongly suggests that the jury was motivated by no other consideration.”). The lower court erred in granting a new trial absolute without identifying a basis to find the jury acted improperly, and this Court should reverse.

V. THE LOWER COURT DID NOT GRANT A NEW TRIAL ACTING AS THE THIRTEENTH JUROR

There is no thirteenth juror doctrine issue in this appeal because the lower court did not grant a new trial acting as the thirteenth juror. The lower court granted a new trial absolute because it found the verdict grossly excessive. In addition to a motion for a new trial absolute or *nisi remittitur*, Dominion Energy filed motions for alternative relief, including a motion for a JNOV

and a motion for a new trial under the thirteenth juror doctrine. (Mots.). After granting the motion for a new trial absolute, the lower court stated: “Although the Defendant raises several other Motions in the alternative, this Court believes that the granting of a New Trial Absolute is dispositive; therefore, it is unnecessary to address the remaining motions by the Defendant.” (Order p. 9). The Court should reject Dominion Energy’s entire thirteenth juror argument.

There are generally three grounds for a new trial—thirteenth juror doctrine, new trial absolute when a verdict is grossly excessive or inadequate, or a new trial *nisi remittitur* or *additur* when the verdict is merely excessive or inadequate. *Burke v. AnMed Health*, 393 S.C. 48, 55-57, 710 S.E.2d 84, 88-89 (Ct. App. 2011). A review of the basis for the first two grounds and the language of lower court’s order in this case demonstrates that it granted a new trial absolute.

Under the thirteenth juror doctrine, the court may grant a new trial if it “finds that the evidence does not justify the verdict.” *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). This is referred to as “granting a new trial upon the facts” with the effect that the judge, acting as the thirteenth juror, “hangs’ the jury.” *Id.* at 254, 387 S.E.2d at 267. The court is not required to give reasons for its decision. *Id.* The court takes its own view of the evidence and does not view it in the light most favorable to the opposing party. *McIntire v. Mooregard Exterminating Servs.*, 353 S.C. 629, 633, 578 S.E.2d 746, 748 (Ct. App. 2003).

On the other hand, the court may grant a new trial absolute “only when the verdict is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.” *Burke*, 393 S.C. at 56, 710 S.E.2d at 88 (internal quotation marks omitted). In determining whether a verdict amount is excessive, “the facts must be viewed in the light most favorable to the plaintiff,” *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964), and the “jury’s

determination of damages is entitled to substantial deference.” *Burke*, 393 S.C. at 56, 710 S.E.2d at 88 (internal quotation marks omitted). The court “must set out the reasons for granting or denying new trial motions based on inadequacy or excessiveness of the verdict.” *Sorin Equip. Co. v. Firm, Inc.*, 323 S.C. 359, 363, 474 S.E.2d 819, 822 (Ct. App. 1996).

The differences in these two bases and standards for granting a new trial are stark.

The doctrine of the thirteenth juror differs significantly from a new trial absolute where the judge finds the verdict was improperly motivated by passion or prejudice. South Carolina’s thirteenth juror doctrine allows the circuit court judge to grant a new trial when the judge finds the evidence put forth at trial does not justify the verdict.

James L. Ward, Jr., et al., *South Carolina Damages* § I.1.D (2017). “The thirteenth juror doctrine addresses a judge’s view of liability more than the amount of damages.” *Id.*

This Court addressed a disagreement about whether the lower court “granted a new trial absolute or a new trial under the thirteenth juror doctrine” in *Sorin Equip. Co. v. Firm, Inc.*, 323 S.C. 359, 363, 474 S.E.2d 819, 821 (Ct. App. 1996). The order on appeal stated only that “[t]he verdict is contrary to the weight of the evidence, is not supported by the evidence and is grossly excessive and unreasonable” and “contained no factual findings nor evidentiary conclusions.” *Id.* at 363, 474 S.E.2d at 821-22. This Court explained that, when deciding a new trial absolute motion, a “judge must set out the reasons for granting or denying new trial motions based on inadequacy or excessiveness of the verdict.” *Id.* at 363, 474 S.E.2d at 822. On the other hand, when ruling on a new trial motion under the thirteenth juror doctrine, “[i]t is not necessary to justify the ruling with factual findings.” *Id.* at 364, 474 S.E.2d at 822. This Court held, “in light of the trial judge’s express wording and the absence of facts on which his decision is based, we believe he intended to invoke the thirteenth juror doctrine.” *Id.*

The plain language of the lower court’s order in this case shows that it granted a new trial absolute and did not sit as a thirteenth juror. First, the conclusion paragraph in the order

unequivocally states the lower court granted a new trial absolute based on its finding of an excessive verdict. The court explained it “initially was leaning toward the decision of considering granting” a new trial *nisi remittitur* but, instead, decided “that to reduce the damages to the amount supported by the evidence would be such a small fraction of the \$21 million dollars awarded by the jury as to make the award by the jury ***grossly excessive*** by comparison; ***therefore***, the Defendant should be awarded a new trial.” (Order p. 8) (emphasis added).

Second, the court addressed the thirteenth juror motion by finding it unnecessary to rule on the motion. After the court granted the motion for a new trial absolute, it stated that decision “is dispositive” and made it “unnecessary to address the remaining [alternative] Motions” by Dominion Energy. (Order p. 9).

Third, the court wrote a nine-page order explaining its decision. (Order). No explanation is required when the court sits as the thirteenth juror.

Fourth, the order does not mention the thirteenth juror doctrine. (Order). None of the cases the lower court cited in its order mention the thirteenth juror doctrine. (Order pp. 1-6).

Fifth, the court explained and applied the new trial absolute standard. (Order pp. 1-2). Before separately addressing survival and wrongful death damages, the court held the verdicts are “not supported by the evidence and can only be explained upon the basis of sympathy, passion, caprice or some other consideration found outside the evidence that is presented in this case.” (Order p. 2). As to survival, the court held that: “Based on the evidence presented to this jury, this verdict is grossly excessive”; and “the jury’s verdict in this matter is grossly excessive and not supported by the evidence presented.” (Order pp. 2, 5). As to wrongful death, the court held that: “This verdict is grossly excessive because of the lack of evidence in the record of recoverable

damages suffered by plaintiff in a wrongful death action”; and “the award of \$11 million dollars for the wrongful death action is grossly excessive.” (Order pp. 5, 7).

Sixth, the court stated it viewed the evidence in a light most favorable to the plaintiff. (Order p. 5 (“Giving the Plaintiff every benefit of the doubt”)); (Order p. 7 (“In viewing the evidence in the light most favorable to Plaintiff”)). It did not take its own view of the evidence as the thirteenth juror.

The order demonstrates that the lower court granted a new trial absolute based on the excessiveness of the verdict and not under the thirteenth juror doctrine. The Estate did not, as Dominion Energy argues, “concede[] that the trial court acted as the thirteenth juror” simply because it referred to the doctrine in one sentence in its brief. (Br. of Resp’t p. 44; Br. of App. p. 18). The reference to the thirteenth juror doctrine is part of the procedural history of the case, and that is the only context in which it is relevant on appeal.

Dominion Energy concedes that the lower court granted a new trial absolute based on the excessiveness of the verdict. However, it argues that the lower court’s statements that verdict is not “supported by the evidence” and findings that there was no evidence of certain types of damages means it also ruled based on the thirteenth juror doctrine. (Br. of Resp’t pp. 44-45). This argument is wrong for multiple reasons. First, Dominion Energy does not cite to authority permitting a court to grant a new trial on two bases. The lower court specified that it ruled only on the motion for new trial absolute, believed that ruling “is dispositive”, and felt it “unnecessary” to rule on the remaining motions. (Order p. 9). Second, Dominion Energy acknowledges in its brief “the limited question before the Court [is]: did the trial court abuse its discretion in ordering a new trial absolute because the verdicts were grossly excessive.” (Br. of Resp’t p. 12). Third, the court’s language is consistent with a ruling on a motion for a new trial absolute because a “verdict

which may be supported by any rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained is not excessive.” *King v. Daniel Int’l Corp.*, 278 S.C. 350, 355, 296 S.E.2d 335, 338 (1982).

In this case, the lower court granted a new trial absolute (Order p. 1), and denied all motions as to Dominion Energy’s liability. (Order p. 9). There is no thirteenth juror issue to appeal.

CONCLUSION

The Court should reverse the lower court’s decision to grant a new trial absolute and remand to reinstate the jury’s verdict.

August 3, 2020

Respectfully submitted,

s/Kathleen C. Barnes

Kathleen Chewing Barnes, SC Bar No. 78854
BARNES LAW FIRM, LLC
P.O. Box 897
Hampton, SC 29924
803-943-4529

YARBOROUGH APPLGATE LLC
William E. Applegate, IV
Liam D. Duffy
Perry M. Buckner, IV
291 East Bay Street, Floor 2
Charleston, SC 29401
843-972-0150

SMITH, ROBINSON, HOLLER, DUBOSE, AND
MORGAN, LLC
G. Murrell Smith, Jr.
Shannon N. Peake
Post Office Box 580
Sumter, SC 29151-0580
803-778-2471

Attorneys for Appellant