THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

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SC Court of Appeals

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.

FINAL BRIEF OF APPELLANT

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II. Whether the lower court committed an error of law by improperly considering economic damages in its decision to grant a new trial absolute when the Estate did not ask for economic damages.

III. Whether the lower court committed errors of law and reached a decision wholly unsupported by the evidence in finding the survival damages grossly excessive.

IV. Whether the lower court committed errors of law and reached a decision wholly unsupported by the evidence in finding the wrongful death damages grossly excessive.

V. Whether the lower court erred in finding the alleged excessiveness of the verdict could only be explained by the jury acting out of passion or a consideration outside of the evidence when a jury is presumed to follow the court's instructions and the court did not identify a trial event, evidence item, juror confusion, or disregard of the instructions.

STATEMENT OF THE CASE

This is an appeal from an order granting a new trial absolute where the jury returned an actual damages verdict with comparative fault attributable to the Plaintiff and found no basis for punitive damages. The case arises out of the death of forty-one-year-old Jose Larios on November 29, 2015, when a Dominion Energy power line shocked him while he was trimming a palm tree, and the shock caused him to fall twenty-five feet from a ladder.

On June 7, 2017, Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios, ("the Estate") filed a complaint against Dominion Energy South Carolina f/k/a South Carolina Electric & Gas Company ("Dominion Energy"),[1] and other defendants, asserting negligence/gross negligence, wrongful death, and survival causes of action. (R. pp. 23-30). On July 11, 2017, Dominion Energy filed an answer denying all of the allegations. (R. pp. 31-39).

[1] At trial, the parties referred to the Respondent as "SCE&G." In this case, SCE&G and Dominion Energy are the same entity and used interchangeably in the Record and briefs.

The trial occurred September 24-27, 2019, before the Honorable Thomas A. Russo. The jury returned a verdict for the Estate. It found Dominion Energy's breach of a duty of care to Jose proximately caused his injuries and death, and assigned 10% comparative fault to Jose. (R. pp. 98-99). The jury awarded $10,000,000.00 in survival damages and $11,000,000.00 in wrongful death damages. (R. p. 99). It found Dominion Energy's conduct did not warrant punitive damages. *Id.*

On October 7, 2019, Dominion Energy filed a motion for new trial *nisi remittitur* or, in the alternative, new trial absolute, and a motion for judgment notwithstanding the verdict and, in the alternative, a new trial. (R. pp. 100-80). On October 18, 2019, the Estate filed memoranda in opposition to Dominion Energy's motions. (R. pp. 181-244). The lower court held a hearing on the motions on October 24, 2019.

On November 1, 2019, the lower court filed an order granting the motion for a new trial absolute based on the amount of the verdict. (R. pp. 3-11). On November 12, 2019, the Estate filed a motion to reconsider, alter, or amend the order. (R. pp. 245-64). On November 22, 2019, Dominion Energy filed a memorandum in opposition to the motion. (R. p. 265). On December 19, 2019, the lower court filed a Form 4 order denying the motion to reconsider. (R. p. 13). On January 17, 2020, the Estate filed a Notice of Appeal. (R. p. 1).

FACTS

Jose Larios was born and raised in Mexico, a talented soccer player with a younger brother and two loving parents, Jose, Sr., and Anastacia. (R. pp. 621, 633, 635-36). Jose's parents lost two children earlier in life, leaving only Jose and his younger brother, Gaspar Larios. (R. p. 634). Jose was the first and only person in his family to finish high school and attend university. (R. pp. 621-22). He paid for university by working multiple jobs, including as a dishwasher and teaching assistant. (R. p. 635). Jose also earned money playing soccer because soccer teams in Mexico paid

him to play on their teams. (R. pp. 635-36). Jose "did a lot to try to make ends meet and to make sure that he was not [] a burden on his family, [and] was instead providing support to them." (R. p. 636). Gaspar also worked to help pay for Jose to finish school. (R. p. 621). Jose earned his law degree. (R. p. 622). Financial requirements for licensure prevented him from being able to practice law. *Id.* To earn money, he came to the United States of America to build a life for himself and provide for his family. "[H]e was always putting things on hold to help others." (R. p. 638).

As an immigrant, Jose worked his way through Florida and Georgia, picking oranges and tobacco despite his graduate education. (R. p. 623). Eventually Jose moved to Edisto Island to reunite with his brother. (R. pp. 622-23). Jose lived with Gaspar and Gaspar's wife and three children in a home that Jose helped purchase. (R. pp. 616, 623). Jose hoped to settle down and have a family and children of his own. (R. p. 573). He was especially close to his niece, Wendy, who was about nine-years-old when he died. (R. pp. 560, 617, 627, 959).

On Edisto Island, Jose worked for a landscaping company for almost ten years. (R. p. 560). He also worked a lot of side jobs to earn money to send to his family in Mexico. (R. pp. 562, 622-23, 633). Jose was "always happy working" and "worked tirelessly to support his family including his parents and his family here." (R. pp. 628, 633). At times, Jose sent his entire paycheck home to support his parents. (R. p. 635). "He was able to earn here and send the money so that they could provide for their needs, including medical needs." *Id.* His parents "were incredibly proud of him." *Id.*

I. JOSE SUFFERS AN ELECTRIC SHOCK THAT CAUSED HIM TO FALL FROM A LADDER, AND DIES FROM HIS INJURIES

On the morning of November 29, 2015, Jose and his friend, Pedro Abraham, picked up equipment from the landscaping company to do a palm tree trimming job at a residential vacation rental home on Edisto Island. (R. p. 524). Jose used a ladder to reach the top of the trees and tied

himself to each tree for safety. (R. p. 525). He used a chainsaw to trim the trees. Mr. Abraham's job was to pick up the cut palm fronds and take them to the road and to refill, oil, and tighten the chainsaw as needed. (R. p. 525). While Jose was on the ladder cutting a tree, Mr. Abraham saw a flash of light, heard "a loud scream," looked up and "saw a lot of smoke." (R. pp. 375, 527). He yelled up to Jose but got no response. (R. p. 527). He saw Jose trying to unbuckle himself and untie the rope attached to the tree but noticed that Jose's head "was kind of in a downward position" and he was "without strength." (R. p. 527). Mr. Abraham knew Jose "wasn't fine at that point." (R. p. 527). Jose "tried to go down to the next step of the ladder" but "he didn't have anymore strength in his body, [and] that's when he fell backwards" about twenty-five feet to the ground. (R. pp. 527, 542, 374-76). Mr. Abraham went to Jose and lifted his head. (R. p. 528). Jose was conscious and told Mr. Abraham he was fine. (R. p. 529). Mr. Abraham realized Jose was not fine and tried to call 9-1-1 with his phone but did not have a good signal. (R. pp. 528-29). He went to the road and stopped a lady exercising to ask her to call 9-1-1. (R. p. 528). When Mr. Abraham returned, Jose was unable to verbally respond. (R. p. 529). The ambulance arrived eight minutes later. (R. p. 528). When Gaspar first learned about Jose's fall, he went to the house where the incident occurred, and a fireman told him Jose "was well" but would not let Gaspar ride in the ambulance. (R. p. 625). Gaspar followed the ambulance to the hospital but was not allowed to see Jose until after he was pronounced dead at 11:49 a.m., about two hours after his fall. (R. pp. 625, 948). Jose was forty-one-years-old.

Gaspar called his parents to tell them about Jose's death. (R. pp. 625-26). His father started crying over the phone and the whole family knew that meant something serious happened. (R. p. 626). When his mother found out about Jose's death, she repeatedly called his cell phone hoping he would answer. (R. p. 626). Gaspar would answer Jose's phone and tell her "'No Mom. It's

me, Gaspar.' And she would start crying." (R. p. 626). As a result of Jose's death, his father stopped working and his mother became sick and grief-stricken. (R. p. 627).

After Jose's death, a friend put together a fundraiser to raise money to send his body back to his family in Mexico. (R. pp. 570, 626, 955). "Those that couldn't make it, they donated money. The stores donated food, groceries, whatever we needed. Drinks. Everybody kind of pitched in . . . . Everything was donated because everybody liked Jose. Jose was a good person." (R. pp. 570-71). A memorial concrete bench was also built in his honor on Edisto Island, and people still visit the site to pray for Jose. (R. pp. 575-76, 956-57).

Beverly O'Brien met Jose around 2007 and worked with him at the landscaping company. (R. pp. 559-60). She helped organize the fundraiser to send his body back to Mexico. Beverly testified about Jose's character and the loss of his life to his family and friends.

> He was a very good person. He was more concerned about other people than he was himself. He loved his family. He was a family man. . . . He would send his mother money in Mexico. He would usually give me the money, I would stop at a store in Ravenel in like a little Mexican store and wire his family money. . . . Sometimes it was every couple of weeks. Sometimes it was more often. He would do a lot of side jobs after work. He was a workaholic. If he would have extra money, he would want to sent it to his mother and his family in Mexico. . . . Sometimes it would [be] 200, 300, 400, it all depends on what he had to send.

(R. pp. 561-62). Ms. O'Brien knew Jose's family and said his "niece, Wendy, that was his pride and joy. He made sure she had anything she wanted. He loved children and especially Wendy." (R. p. 560).

Jose's body returned to Mexico and was buried about a week before Christmas 2015. (R. p. 637). Jose was "a local hero in the sense that he was so well-known for his soccer and for the care that he gave his family." (R. pp. 636-37). Gaspar likes to "say that my brother is in Mexico. That my brother is with my family in Mexico and he's enjoying life there with them." (R. p. 627).

II. INVESTIGATION OF JOSE'S INJURIES AND DEATH

The Colleton County coroner's office determined Jose fell from the ladder because he suffered an electric shock from the Dominion Energy power line running through the palm trees. Marion Whaley, the Deputy Coroner for Colleton County, went to the accident scene a few hours after Jose fell. (R. p. 372). During his initial 2-to-3-hour investigation of the accident site, Mr. Whaley did not notice any power lines near the palm tree. (R. pp. 373, 376). Two days later, Mr. Whaley learned that Mr. Abraham saw a flash and heard Jose scream. (R. p. 375). Mr. Whaley then returned to the scene and found the power lines. (R. p. 376). The discovery of the power lines led Mr. Whaley to find a burn mark on the chainsaw, burn marks on the palm fronds, and a seed pod that caught on fire. (R. pp. 375-76, 384).

Dr. Erin Presnell, an expert forensic pathologist at the Medical University of South Carolina, performed the autopsy of Jose and found extensive injuries. Jose suffered fourteen fractured ribs—seven on the left side and seven on the right side. (R. p. 435). He had over 150 milliliters of blood in the left chest cavity and 200 milliliters in the right chest cavity. (R. p. 435). His liver and kidneys were lacerated. *Id.* He suffered a broken back and had 150 milliliters of blood in his abdomen and soft tissue bleeding and hemorrhages from trauma. *Id.* Dr. Presnell also found a lesion over an inch-and-a-half long on Jose's abdomen that is a red area where the top layer of skin slipped off. (R. pp. 435, 953). This is where the electrical contact occurred. (R. p. 437). Medical staff attempted emergency resuscitation on Jose using an endotracheal tube and defibrillator. (R. pp. 440, 949). Based on the autopsy findings and Mr. Whaley's investigation, the Chief Deputy Coroner for Colleton County found blunt force trauma the cause of death and the electric shock contributory. (R. pp. 358, 949, 952).

III. TRIAL OF THE CASE ON LIABILITY AND NON-ECONOMIC DAMAGES

On June 7, 2017, the Estate filed a complaint against Dominion Energy; PENSCO Trust Company, LLC; Edisto Sales & Rentals Realty, LLC; DLL Operating Co., Inc.; Stevens Irrigation and Landscaping, LLC; and William J. Stevens. (R. p. 23). Prior to and during trial, the Estate voluntarily dismissed or settled with all defendants except Dominion Energy. The Estate tried causes of action for negligence/gross negligence, wrongful death, and survival. (R. pp. 27, 29-30).

The Estate tried this case on a non-economic, intangible damages theory. It did not try to prove or ask the jury to return an actual damages verdict for things such as medical expenses, lost income, or funeral costs. In opening statement, the Estate explained to the jury the theory of intangible, non-economic damages it intended to prove. (R. pp. 324-27).

> What are damages in this case? One of the damages is what we call a survival damage and the judge will explain this to you. But it's just a damage that's associated with that experience of being shocked, being sent to the ground, in that time period the fear, the anxiety, the thought process that's going through your head as you die. So whatever that two hours of period of time that he went through suffering, what is that worth?
>
> . . .
>
> The other damage is for the harms and losses to the family. You need to think about the impact on Jose's parents. How has this impacted them? The reality of the loss of Jose's society, of his companionship, the mental anguish for them to suffer on a daily basis knowing that with the simplest of acts, the simplest precautions, this could have been avoided.

(R. pp. 324-25). Dominion Energy did not discuss damages in its opening statement except to concede "[t]here is also ***no dispute*** that [Jose's] family no doubt feels a ***tremendous*** loss. And, frankly, I think everyone is sympathetic with that." (R. p. 330) (emphasis added). The verdict form specifically refers to only non-economic losses as the damages to be awarded for survival and wrongful death. (R. p. 99) (instructing the jury to state damages "for any conscious pain and suffering" and for "grief, sorrow, mental shock, suffering, and the loss of his companionship").

Dominion Energy focused exclusively on liability throughout trial. It defended liability by arguing the power line was openly visible and that it was not physically possible for Jose to get close enough to the power line to contact it. (R. pp. 642-45). Dominion Energy also argued Jose was comparatively negligent by working in close proximity to a power line in violation of applicable OSHA standards. (R. pp. 646-48). The Estate presented evidence that Jose fell from the ladder because of an electric shock from Dominion Energy's power line that was located too close to the adjacent palm trees and was not easily visible because of overgrown tree vegetation. Dominion Energy's policy and industry standards mandate that trees are to be trimmed a minimum of 10 feet back from nearby power lines. (R. p. 491). Dominion Energy's policies state it will conduct "mid-cycle" pruning near its power lines for vegetation that grows back in less than five years. (R. p. 593). Edward Brill, the Estate's expert in electric shock and electrocutions and the standard of care for electric utilities, testified the palm tree at issue did not meet Dominion Energy's guidelines for trimming trees a minimum of 10 feet back from a high voltage electricity line. (R. pp. 474-75, 491, 493-94). Mr. Brill testified Jose fell off the ladder because "he was exposed to an electrical shock and that this electrical shock caused him to basically fall back out of the tree." (R. p. 476).

At trial, numerous witnesses testified about Jose's character and the tremendous loss to his parents of a third child, of whom they were extremely proud and who supported them emotionally and financially. Gaspar testified that, after his brother's death, his mother called Jose's cell phone hoping he would answer. (R. p. 626). She is now medicated and his father stopped working and just sits around. (R. pp. 626-27). Gaspar testified about Jose's constant state of happiness. (R. p. 628). "[M]y brother was always happy. We had all kinds of goals. He had a dream he wanted to have his own family. He wanted to have his own children. He wanted to buy property in Mexico

so he could build a stadium for children, for the young people." (R. p. 628). Jose's parents could not attend the trial due to health conditions and the cost of travel. (R. p. 637). The Special Administrator testified Mr. and Mrs. Larios suffered a devastating emotional loss. (R. p. 638). Jose "was a dedicated family man" who "worked tirelessly to support his family including his parents and his family here." (R. p. 633). Dominion Energy deliberately chose not to cross-examine any witnesses on the issue of damages. (R. pp. 576-84, 629, 640).

Following the close of the Estate's case, Dominion Energy made a motion for a directed verdict arguing about only liability—that the Estate failed to prove Jose suffered an electric shock, Dominion Energy did not owe a duty to Jose, it did not proximately cause his injuries because they were caused by intervening negligence of Jose and/or his employer, and Jose was negligent and assumed the risk. (R. pp. 643-44). The lower court denied the motion. (R. pp. 654-55).

After the court denied the directed verdict motion, Dominion Energy called three witnesses—a liability expert, a Dominion Energy lineman, and an employee of the realty company that rents the house where the electric shock occurred. These witnesses testified about only liability and not damages.

Dominion Energy renewed its directed verdict motion at the close of its case in chief, arguing the same grounds as before and adding that the Estate did not present "credible evidence" of survival damages for conscious pain and suffering or any evidence of funeral and medical expenses. (R. p. 760). The Court denied the motion but agreed to not charge the jury on funeral and medical expenses. (R. p. 761). The Estate did not argue this point because it did not intend to ask the jury to award economic damages. *Id.*

The Estate's closing argument focused on liability and damages. (R. pp. 766-68). It specifically discussed the survival and wrongful death damages. (R. p. 785). As to survival, the Estate argued:

> What it was for Mr. Larios when he hit the ground. When he was struggling and grasping for the last moments of life in those two hours that he lived, the fear that went through his mind, the pain he felt in his body and you need to put a value on what this is worth.

(R. p. 785). As to wrongful death, the Estate asked "what is the loss of a son?" (R. p. 782). The Estate provided hypotheticals such as how much money Jose's parents would require to sacrifice their son or how much they would pay to bring him back. (R. pp. 785-86). Counsel for the Estate told the jury "at the end of the day after looking at all the evidence and thinking about the damages in this case, is the value $5,000,000? Is it $10,000,000? Is it $20,000,000? That is for you to decide. That's the province of the jury." (R. p. 787). Dominion Energy made no objection to the Estate's closing argument. (R. pp. 766-88, 841).

Dominion Energy did not mention damages once in its closing argument. (R. pp. 788-811). It did not make any argument to the jury about the amount or quality of evidence of damages. *Id.* Dominion Energy only conceded again that "the loss of Mr. Larios is tragic. And our sincere condolences go to this family." (R. p. 788).

The jury charges supported the recovery of non-economic damages. (R. pp. 828-32). The lower court instructed the jury that "[i]t is not necessary to show the money value of Mr. Larios' life since direct proof of the value of human life is not possible. What is reasonable compensation is left up to the sound discretion and judgement [sic] of you the jury." (R. p. 828). The court listed the elements of wrongful death damages, of which only one out of six is monetary loss, and explained "It is not necessary to show the exact amount of damages suffered by the beneficiaries or that the beneficiaries suffered a monetary loss. In addition, the person for whose benefit the

action is brought does not have to be dependent upon the deceased for support." (R. p. 829). As to survival, "[t]here is no definite standard by which to compensate the plaintiff for pain and suffering" and the jury has "the authority to determine the amount." (R. p. 830). Finally, the court instructed the jury that its "verdict cannot be based upon sympathy, passion, prejudice or some other consideration that's not found in the evidence." (R. p. 833 lns. 17-19, p. 834 lns. 15-19). Dominion Energy did not object to the jury charges on damages. (R. pp. 839-40, 757 ln. 25).

The jury deliberated for over three-and-a-half hours and sent the court three questions during that time. (R. pp. 841-42, 846-47, 859). The questions related to liability and punitive damages and not to actual damages. About an hour into deliberations, the jury asked for a copy of the Estate's liability expert's PowerPoint demonstrative aid and for a copy of Mr. Abraham's testimony about how Jose fell off of the ladder. (R. p. 841). The court could not give it the PowerPoint because it was not in evidence but did have the court reporter read back a portion of Mr. Abraham's testimony to the jury. (R. pp. 841, 844-46). After returning to deliberations, the jury later asked the court to explain the last question on the verdict form about punitive damages in different verbiage. (R. p. 847). The court reread to the jury the charge on punitive conduct and got the jury forelady to alter the language of the punitive damages question on the verdict form to reflect the appropriate clear-and-convincing standard. (R. pp. 856-58). In the end, the jury agreed in part with both parties. It found the Estate proved by a preponderance of the evidence that Dominion Energy breached its duty of care and proximately cause Jose's injuries and damages. (R. pp. 98-99). However, it found Jose 10% comparatively negligent and Dominion Energy 90% negligent, and found Dominion Energy's conduct did not warrant punitive damages. *Id.* The jury awarded $10,000,000.00 for survival damages and $11,000,000.00 for wrongful death damages. *Id.* Applying 10% comparative negligence, the verdict is for $18.9 million.

IV. POST-TRIAL MOTIONS AND ORDER GRANTING A NEW TRIAL ABSOLUTE

On October 7, 2019, Dominion Energy filed a motion for new trial *nisi remittitur* or, alternatively, a new trial absolute based on the amount of the verdict.[2] (R. p. 167). It argued the Estate did not present evidence of "verifiable monetary damages" such as lost wages, funeral bills, and medical bills. (R. p. 168). Without "verifiable" economic damages, Dominion Energy argued, "there was no monetary benchmark to establish any amount of damages or loss." *Id.* Dominion Energy argued the Estate presented no evidence of conscious pain and suffering and the amount of the survival damages exceeded that of allegedly comparable cases. (R. pp. 169-72). It argued the wrongful death damages were excessive as a result of the Estate's closing argument (to which it did not object) and that the Estate did not present evidence of economic damages to serve as a "benchmark" for the beneficiaries' non-economic damages. (R. pp. 172-74). Dominion Energy argued the Estate did not present evidence of Jose's involvement in his parents' lives while he was living in the United States or of the frequency of visits to Mexico. (R. pp. 175-76).

The Estate filed a memorandum in opposition to the motion. (R. p. 220). It detailed the extensive evidence of survival and wrongful death damages that Dominion Energy did not contest at trial. (R. pp. 221-28). The Estate argued that a court must give the same consideration to a damages award regardless of whether it is based on economic or non-economic damages and the law does not require an economic damages benchmark. (R. pp. 229-33). The Estate argued Dominion Energy did not identify a trial event that supposedly caused or contributed to the jury acting out of passion or prejudice. (R. pp. 233-39). The Estate also argued against Dominion

[2] Dominion Energy also filed a motion for JNOV or, alternatively, a new trial and for sanctions. The lower court denied the motion for sanctions and did not rule on the remainder of the motion. It is not at issue on appeal.

Energy's use of other verdicts as a "comparison" to the verdict in this case because each case is different and non-economic damages are not capable of comparison. (R. pp. 239-43).

On October 24, 2019, the lower court held a hearing on post-trial motions. Dominion Energy focused on its view of the evidence that Jose endured minimal conscious pain and suffering and the absence of evidence of economic loss. (R. pp. 909-12). The Estate pointed to evidence showing Jose's consciousness after the electric shock and fall, and that he lived for over two hours, all from which the jury could reasonably infer substantial conscious pain and suffering. (R. pp. 925-26). The Estate argued the jury reached a reflective decision after asking the court three questions and working through a comparative negligence verdict, the denial of punitive damages, and actual damages awards. (R. pp. 914-15). The Estate argued Dominion Energy waived contesting damages because it chose to defend solely on liability and failed to cross-examine any witnesses on damages or mention damages in opening or closing arguments. (R. p. 922). The Estate also argued that a large verdict is not necessarily an excessive verdict and the absence of pecuniary loss to beneficiaries does not negate the non-economic damages they suffer from a loved one's loss. (R. pp. 924-26).

On November 1, 2019, the lower court entered an order granting Dominion Energy's motion for a new trial absolute because it found the verdict grossly excessive. As to survival damages, the court found the jury speculated about the amount of time Jose was conscious between the fall and his death, the Estate did not present evidence of economic damages, and presented little evidence of pain and suffering. (R. pp. 4-6). The court stated no expert testified as to the intensity of the electric shock or the extent of pain from Jose's injuries. (R. p. 6). As to wrongful death damages, the court separated its analysis into evidence of (1) pecuniary loss and (2) the other five elements of wrongful death damages—mental shock and suffering, wounded feelings, grief

and sorrow, loss of companionship, and deprivation of the use and comfort of one's society. (R. pp. 9-10). As to pecuniary loss, the court found little to no evidence of it. (R. pp. 8-9). As to non-economic losses, the court acknowledged evidence of all of these elements of damages. (R. p. 10). The court then noted the evidence came from witnesses besides Jose's parents (who could not afford to travel to trial for health and financial reasons). (R. p. 10). The court accepted Dominion Energy's post-trial argument about an alleged absence of physical contact between Jose and his parents by finding "it hard to ignore the fact that Mr. Larios moved away from his parents to another country and that there is no evidence that he has seen them or been with them in over 12 years other than by way of telephone. The prolonged absence between Mr. Larios and his parents cannot help but affect an award based on loss of consortium, companionship or society." (R. p. 10). Neither party presented evidence at trial as to whether Jose saw his parents after he moved to the United States. The Court granted a new trial absolute, denied Dominion Energy's motion for sanctions, and found it unnecessary to address the remaining motions. (R. p. 11).

On November 12, 2019, the Estate filed a motion to reconsider. It attached to the motion the affidavits of nine jurors, each stating that the jury followed the court's instructions, did not consider anything outside of the evidence, evaluated and discussed the evidence, and did not base the verdict on emotion, sympathy, bias, or any outside factors.[3] (R. pp. 256-64). The Estate contested the court's focus on an absence of evidence of pecuniary losses. (R. p. 247). It "chose to present damages chiefly based on non-economic losses of conscious pain and suffering" and the

[3] *See* Rule 606(b), SCRE ("[A] juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."); *Shumpert v. State*, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008) ("Rule 606 thus draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter.").

mental suffering, grief, and emotional loss of Jose's parents. (R. p. 247). Pecuniary damages are neither required to recover nor needed as a benchmark for an award of non-economic damages. (R. p. 247). The Estate argued the court overlooked that Dominion Energy waived any argument about damages because it did not contest damages at trial. (R. pp. 248-49). The court viewed the evidence about how long Jose consciously survived in a light most favorable to Dominion Energy rather than the Estate. (R. pp. 249-51). The court minimized the evidence of Jose's deadly injuries because an expert did not testify about pain when expert testimony is not required. (R. p. 250-51). The court's analysis of the evidence contravened its own jury charges, and it did not identify a trial event or any evidence or occurrence that would have caused the jury to disregard the charges and act out of passion or prejudice. (R. pp. 251-52). Finally, the Estate argued the decision to vacate the wrongful death damages based on the alleged absence of evidence that Jose saw his parents after leaving Mexico is not based on any evidence presented and diminishes the value of their relationship. (R. pp. 253-54).

The lower court denied the motion to reconsider without a hearing in a Form 4 order. (R. p. 13). The Estate filed a timely notice of appeal. (R. p. 1).

STANDARD

"Motions for a new trial on the ground of either excessiveness or inadequacy of the verdict are addressed to the sound discretion of the trial judge, but such discretion is not absolute." *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 675-76 (1993). "The reviewing court has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law." *Id.* at 61, 427 S.E.2d at 676. The court may reverse an order granting a new trial when it "rests on a basis of fact wholly unsupported by the evidence or is controlled by an error of law." *Boozer v. Boozer*, 300 S.C. 282, 283, 387 S.E.2d 674, 675 (Ct. App. 1988).

ARGUMENT

The jury rendered a reasoned, thoughtful verdict for actual damages based on uncontested damages evidence, assessed liability against both parties, and denied punitive damages. The lower court abused its discretion in granting a new trial absolute by making conclusions wholly unsupported by the evidence or the Estate's theory of damages and committing legal errors in its analysis of the verdict. The court allowed Dominion Energy a second bite at the apple by letting it present two cases—one to the jury that contested only liability, and one to the court that also contested damages. This 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 SUFFICIENCY OF DAMAGES EVIDENCE

Dominion Energy ignored the issue of damages at trial in front of the jury. It did not question any witnesses about damages and did not make a single argument to the jury that the Estate failed to present evidence of any damages. Dominion Energy ***chose*** to provide the jury ***no guidance*** or counterargument as to its position about damages. (R. pp. 918, 922-23). "Waiver requires a party to have known of a right and known that right was being abandoned." *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496-97, 685 S.E.2d 600, 607 (2009). Dominion Energy knew it had a right to cross-examine witnesses and argue to the jury about damages but knowingly and purposely abandoned that right.[4]

A party cannot completely ignore an issue at trial in front of the jury and then complain to the court post-trial when the jury finds against it. Stated differently, Dominion Energy cannot choose one trial strategy—to focus solely on liability—and then choose a different strategy post-

[4] *See, e.g.*, *Morga v. FedEx Ground Package Sys.*, 420 P.3d 586, 596 (N.M. Ct. App. 2018) (affirming a $165 million verdict where "although Defendants were afforded an opportunity to present evidence or testimony at trial to guide the jury in their determination of the value of life and other non-economic damages, Defendants specifically chose not to do so").

trial—to dispute damages—when its trial strategy failed. *See, e.g.*, *Indigo Assocs. v. Ryan Inv. Co.*, 314 S.C. 519, 523, 431 S.E.2d 271, 274 (Ct. App. 1993) ("It is well settled that one cannot present and try his case on one theory and thereafter advocate another theory on appeal." (internal quotation marks omitted)). As the Estate argued to the lower court at the hearing on post-trial motions, "what they 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." (R. p. 923). The lower court's decision to allow Dominion Energy to contest the sufficiency of evidence it did not controvert at trial amounted to a post-trial by ambush.

This Court previously refused to review a judgment on the ground that the evidence was not sufficient to support the verdict amount because the defendant did not object to the sufficiency of the damages evidence at trial. *Peay v. Ross*, 292 S.C. 535, 357 S.E.2d 482 (Ct. App. 1987). In *Peay*, the defendant appealed from a jury verdict for the plaintiff, arguing the court erred in denying its motion for a new trial *nisi* or, alternatively, for a new trial absolute. *Id.* at 536, 357 S.E.2d at 483. The defendant "did not move at trial for a nonsuit or a directed verdict, but instead let the case go to the jury without objection to the sufficiency of the evidence." *Id.* On appeal, the defendant argued "there was no evidence of general or special damages to support the verdict." *Id.* This Court held "an objection to the sufficiency of the evidence cannot be raised for the first time in a motion for a new trial; a motion for a directed verdict is a prerequisite to a motion for a new trial on the ground that the evidence does not support the verdict." *Id.* at 537, 357 S.E.2d at 483. Because the defendant did not raise the insufficiency of the evidence at trial, this court could not review the judgment on that ground. *Id.* at 537, 357 S.E.2d at 484.

The same result is warranted in this case. Dominion Energy's initial motion for a directed verdict did not address the insufficiency of the evidence of survival or wrongful death damages.

(R. pp. 642-48, 76). Its renewed directed verdict motion made at the close of all evidence argued only that the Estate did not present "credible evidence" of conscious pain and suffering and presented "no evidence" of funeral and medical expenses but made no argument about non-economic wrongful death damages at all. (R. p. 760). Therefore, the only argument Dominion Energy made at trial about non-economic damages evidence is that the conscious pain and suffering evidence is not "credible." (R. p. 760). Dominion Energy made this argument to only the judge and not the jury. Significantly, the lower court denied the motion and allowed the claim for survival conscious pain and suffering damages to go to the jury. (R. p. 761).

Dominion Energy's story changed after trial. Dominion Energy argued for the first time post-trial in its motion for a new trial *nisi remittitur* or, alternatively, for a new trial absolute that the Estate did not present a monetary "benchmark" on which the jury could base a non-economic damages award. (R. pp. 168, 174-75, 178). It argued for the first time post-trial that the Estate presented "extremely minimal—essentially non-existent—evidence of actual damages" and "no evidence" to allow the jury to "assess" conscious pain and suffering or "inform" deliberations about Mr. and Mrs. Larios's emotional damages. (R. pp. 167, 169, 175). It argued for the first time post-trial that there was no evidence or testimony of pecuniary loss, of the nature and intensity of conscious pain and suffering, or of Jose's relationship with his parents after he moved to the United States. (R. pp. 168-75). Dominion Energy's motion for a new trial under the thirteenth juror doctrine asked the lower court to set aside the verdict because there was "virtually no credible 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." (R. p. 135). Despite this post-trial argument, Dominion Energy never contemporaneously objected to any damage witness's testimony or cross-examined any damage witness.

Dominion Energy never made these arguments at trial. In fact, in its opening statement Dominion Energy conceded Mr. and Mrs. Larios suffered substantial wrongful death damages: "There is also ***no dispute*** that his family ***no doubt*** feels a ***tremendous*** loss. And, frankly, I think everyone is sympathetic with that" and "this family has had a ***tremendous*** loss. There's ***no argument*** about that." (R. p. 330 lns. 13-15, p. 345 lns. 17-19) (emphasis added). Dominion Energy cannot represent to the jury that this is an undisputed, undoubtedly tremendous loss to Jose's family and then argue post-trial that there was little to no loss to his family. A defendant may not act sympathetic about the damages of a lost loved one in front of the jury and then attack a plaintiff about it in front of the court.

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. However, a directed verdict motion was a necessity in this case based on Dominion Energy's chosen trial strategy and post-trial arguments. Dominion Energy argued for the first time post-trial that no evidence existed or the evidence that did exist was insufficient to even allow the jury to assess an award of non-economic damages. (R. pp. 167-75, 178). Its entire argument is that damages evidence did not exist and, even if minimal evidence existed, it was legally insufficient for a jury to assess and deliberate upon any amount of damages. In this situation, "a motion for a directed verdict is a prerequisite to a motion for a new trial on the ground that the evidence does not support the verdict." *Peay*, 292 S.C. at 537, 357 S.E.2d at 483. Dominion Energy made strategic trial choices and now must live with them. (R. pp. 643-48, 760-61, 167).

The Court should reverse solely on the independent grounds that Dominion Energy waived its ability to contest the sufficiency of damages evidence based on its trial conduct and the issue is not reviewable by the lower court or this Court because an objection to the sufficiency of the

evidence cannot be raised for the first time in a motion for a new trial under the circumstances of this case.

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

This argument is an independent basis for reversal that applies to the lower court's analysis and conclusions as to wrongful death and survival damages. The lower court began its analysis of the excessiveness of wrongful death and survival damages with the conclusion that the Estate did not present evidence of economic damages. (R. pp. 4-5, 8-9). The Estate told the court it would not ask for economic damages. (R. pp. 296-97). It asked the jury for only non-economic damages. (R. pp. 781-87). When a plaintiff does not ask for economic damages, it is an error of law to analyze the verdict amount based on an absence of evidence of economic damages. This is especially true where the absence of economic damages has no effect on either the ability to recover non-economic wrongful death and survival damages or on the amount recoverable. The Court should reverse the lower court's order on this basis alone.

"[P]ecuniary loss is only one of six elements to be considered in awarding damages in a wrongful death action." *Clark v. S.C. Dep't of Pub. Safety*, 362 S.C. 377, 387, 608 S.E.2d 573, 579 (2005). Economic loss is recoverable in a wrongful death action but a plaintiff is not required to prove the beneficiaries' economic loss to recover non-economic wrongful death damages. *Mishoe v. Atlantic Coast Line R.R. Co.*, 186 S.C. 402, 426, 197 S.E. 97, 107-08 (1938). Even "***substantial damages*** may be recovered without proof of special pecuniary loss." *Id.* at 426, 197 S.E. at 108 (emphasis added). The loss of a wealthy person is not more valuable than the loss of a poor person. The lower court charged the jury that "it is not necessary to show . . . that the beneficiaries suffered a monetary loss" and "the person for whose benefit the action is brought does not have to be dependent upon the deceased for support." (R. p. 829).

"Appropriate damages in survival actions include those for medical, surgical, and hospital 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). Medical expenses are recoverable but not required to recover non-economic damages for the decedent's conscious pain and suffering and mental distress.

The lower court's analysis of economic damages when the Estate did not ask for them and the law does not require them shows that the court relied on Dominion Energy's post-trial argument that the absence of an economic damages benchmark or anchor should result in a decrease of the amount of non-economic damages. *See* R. pp. 168, 174-75. This is contrary to established law that there is no yardstick or measure for determining non-economic damages. *See Knoke v. S.C. Dep't of Parks, Rec. & Tourism*, 324 S.C. 136, 142, 478 S.E.2d 256, 258-59 (1996) (stating "intangible damages" "cannot be determined by any fixed measure"); *Lucht v. Youngblood*, 266 S.C. 127, 137, 221 S.E.2d 854, 859 (1976) (stating non-economic damages "are intangibles, the value of which cannot be determined by any fixed yardstick. Their loss to the beneficiaries must be estimated by the jury in the exercise of their sound judgment under all of the facts and circumstances of the case"). The value of a person's pain and suffering or the loss of a loved one to a family is not based on an amount of medical bills or lost wages.

The existence or nonexistence of economic damages has no effect on the amount of non-economic damages and is an irrelevant consideration when a plaintiff did not ask for economic damages. The error of lower court's focus on this point is apparent from the fact that it allowed the survival and wrongful death claims to proceed to the jury after the lower court acknowledged that the Estate did not present economic damages evidence and agreed with Dominion Energy to not charge the jury on economic damages. (R. pp. 760-61). The lower court's consideration of

evidence of economic damages at the post-trial stage is an error of law, and the Court should reverse on this basis alone.

III. THE SURVIVAL AND WRONGFUL DEATH DAMAGES ARE NOT GROSSLY EXCESSIVE

The lower court committed errors of law and reached factual conclusions wholly unsupported by the evidence in granting a new trial absolute, and its decision should be reversed. "The trial court and this court must give substantial deference to the jury's determination of damages." *Kelley v. Wren*, 415 S.C. 379, 393, 782 S.E.2d 406, 413 (Ct. App. 2016) (internal quotation marks omitted).

> One is entitled to the constitutional privilege of the fair judgment of a jury rather than that of the Court and this Court will not interfere with the verdict of a jury simply because it is greater than its own estimate; only where the verdict is so grossly excessive as to shock the conscience of the Court and clearly manifest that it was the result of caprice, passion, partiality, prejudice, corruption or other improper motives, will this Court intervene.

Brabham v. Southern Asphalt Haulers, Inc., 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953). The lower court failed to give substantial deference to the jury's determination of damages and, instead, interfered simply because it believed the verdict amount greater than its own estimate.

"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." *Lucht v. Youngblood*, 266 S.C. 127, 137-38, 221 S.E.2d 854, 859 (1976). "[I]f the amount of the verdict is grossly excessive, so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 309, 578 S.E.2d 16, 25 (Ct. App. 2002). 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).

A "grossly excessive" verdict is one "deemed the result of a disregard of the facts and of the court's instructions, and to be due to passion and prejudice rather than reason." *King v. Daniel Int'l Corp.*, 278 S.C. 350, 355, 296 S.E.2d 335, 338 (1982). "Where this is found to be the case, it is the verdict itself, rather than merely the amount of the verdict, which is inherently vicious . . . ." *Bowers v. Charleston & W. Carolina R.R. Co.*, 210 S.C. 267, 375, 42 S.E.2d 705, 708 (1947). "[A] verdict which may be supported by any rational view of the evidence, or as to which reasonable and disinterested men might draw different inferences, is not of this class" of excessive verdicts. *Mickle v. Blackmon*, 252 S.C. 202, 248, 166 S.E.2d 173, 194 (1969) (affirming the denial of a new trial absolute of "probably the highest verdict in a personal injury case in the history of this State"). The Estate presented evidence of the violent and painful death of a forty-one-year-old man who loved, and worked tirelessly to support, his family. The jury's reasoned verdict "is not of this class" of excessive verdicts.

The lower court did not explain any way in which the jury disregarded the facts or instructions of the court. The lower court did not dispute the existence of evidence of all of the non-economic damages the Estate sought. The court erred in finding the verdict for wrongful death and survival damages grossly excessive. For any one of the independent reasons argued below, the Court should reverse and reinstate the verdict.

A. The Evidence of Survival Damages Supports the Jury Verdict

The Estate presented ample evidence of Jose's conscious pain and suffering to support the jury's survival damages award. The lower court's decision to the contrary is based on facts wholly unsupported by the evidence and controlled by errors of law.

"Appropriate damages in survival actions include those for medical, surgical, and hospital 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). "An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself." *Boan v. Blackwell*, 343 S.C. 498, 501-02, 541 S.E.2d 242, 244 (2001). "Separate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence." *Id.* at 502, 541 S.E.2d at 244. "One cannot easily or with any mathematical certainty place a value on the amount of a person's pain and suffering." *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 218, 528 S.E.2d 682, 687 (Ct. App. 2000) (affirming conscious pain and suffering award where evidence conflicted as to whether decedent ever consciously suffered any pain).

The lower court's ruling on survival damages is based on two conclusions—(1) there is no evidence of economic damages, which is discussed above, and (2) the evidence of conscious pain and suffering is speculative and does not support the award. Focusing on the second conclusion, it is wholly unsupported by the evidence and controlled by an error of law. Viewing the facts "in the light most favorable to the plaintiff", as is required, there is nonspeculative evidence of Jose's conscious pain and suffering. *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964).

Jose experienced a series of painful burn and internal injuries over a period of two hours that culminated in his death.

- Jose suffered an electric shock through his body severe enough to leave a 1.6-inch burn mark on his stomach. (R. p. 359 lns. 1-3, pp. 435-36, 441, 948-53). Jose screamed and there was smoke around him. (R. p. 527).
- After being stunned by the electric shock from a high-voltage power line, Jose could not respond to Mr. Abraham yelling at him, but immediately attempted to remove himself from the situation by unbuckling his rope harness tied to the tree. (R. p. 527). His head was in a downward position, he "tried to go down to the next step of the ladder" but "he didn't

have anymore strength in his body, [and] that's when he fell backwards." (R. pp. 527, 542). Mr. Abraham knew Jose "wasn't fine at that point." (R. p. 527).

- Jose fell backwards at least twenty-five feet to the hard ground. (R. p. 527). He weighed approximately 200 pounds. (R. p. 949).

- Mr. Abraham went to Jose and asked if he was okay. (R. p. 528). Jose was conscious and speaking to Mr. Abraham at that point. *Id.* Mr. Abraham smelled "a burnt smell." (R. p. 527).

- The fall caused extreme internal injuries. Jose suffered fourteen broken ribs—seven on each side. (R. p. 435). He broke a lower back bone in the lumbar area. *Id.* His kidneys and liver tore. *Id.* Jose suffered massive internal bleeding. His left and right chest cavities filled with 150 and 200 milliliters of blood, respectively. *Id.* His abdomen filled with 150 milliliters of blood. *Id.* He had "a lot of soft tissue bleeding and hemorrhage from trauma" as well as scratches and bruises on his skin. (R. pp. 435, 948-52).

- Mr. Abraham tried to dial 9-1-1 from his phone but "didn't have a good signal." (R. p. 528). He left Jose and went to the road. He found a lady exercising, told her about the accident, and asked her to dial 9-1-1. *Id.*

- Mr. Abraham returned to Jose, "and at that point he wasn't responding anymore." (R. p. 529).

- Eight minutes later the ambulance arrived. (R. p. 528).

- Gaspar arrived while the ambulance was still there. (R. p. 625). He testified a fireman "approached me and said that my brother was well." *Id.* Gaspar followed the ambulance to the hospital. *Id.*

- Medical personnel put an endotracheal tube down Jose's throat and attempted emergency resuscitation with a defibrillator. (R. p. 949). Approximately two hours after Jose fell, he was pronounced dead.

This evidence undoubtedly shows conscious pain and suffering. Jose suffered an electric shock, a twenty-five-foot fall, and massive internal injuries. He spoke to his friend and then was left lying on the ground in conscious pain to consider his impending death while Mr. Abraham attempted to and then did call 9-1-1. *See Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000) (affirming denial of JNOV as to conscious pain and suffering where decedent child was hit by school bus, father found her unconscious and she never regained consciousness, but father testified child moved her fingers while he talked to her in the hospital). This evidence provides a

factual basis for the jury's survival damages verdict and the lower court's finding to the contrary is wholly unsupported by the evidence.

The lower court found the damages evidence speculative[5] because the exact time of the fall and exact period of consciousness is not in evidence and an expert did not testify about the exact intensity of the electric shock or level of Jose's pain. (R. pp. 4-7). These conclusions are controlled by two legal errors—(1) the lower court failed to view the evidence in a light most favorable to the Estate and (2) the lower court cited to no authority that requires evidence of the exact amount of time of consciousness or expert testimony of pain. (R. pp. 3-9).

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). A light most favorable to the plaintiff is that an electric shock, twenty-five-foot fall, fifteen broken bones, and massive internal bleeding are painful and terrifying. A light most favorable to the plaintiff is that Jose not "responding" to Mr. Abraham means he was merely not talking anymore, especially in conjunction with the fireman's subsequent statement to Gaspar that Jose "was well" and the fact that he did not die until more than two hours later. A light most favorable to the plaintiff is that Jose was conscious for a majority of the time from when he fell until when medical personal unsuccessfully attempted to resuscitate him. Viewing the evidence in a light most favorable to the Estate, the verdict "may be supported by any rational

[5] In its Order granting a new trial absolute, the lower court found the survival damages "speculative" even though it ***denied*** Dominion Energy's motion for a directed verdict on the same basis. At the close of all evidence, Dominion Energy moved for a directed verdict on survival damages because "there is no credible evidence with regard to the survival cause of action, conscious pain and suffering." (R. p. 760). The lower court denied the motion. (R. p. 761). The evidence of conscious pain and suffering did not change from the time when the court denied the directed verdict motion to when it granted a new trial absolute. It is inconsistent to deny a directed verdict motion as to conscious pain and suffering but find the same evidence so "speculative" that it warrants a new trial absolute and "would make any reduction purely speculative." (R. p. 10).

view of the evidence, or [one] as to which reasonable and disinterested men might draw different inferences" and, therefore, is not grossly excessive. *Mickle v. Blackmon*, 252 S.C. 202, 248, 166 S.E.2d 173, 194 (1969); *see also Garrison v. Target Corp.*, 838 S.E.2d 18, 45 (Ct. App. 2020) (affirming a $4.5 million punitive damages verdict in a personal injury case where the jury's likely damages "considerations are rational inferences from the evidence at trial, [and therefore] we conclude that the punitive damages award did not result from passion, caprice, or prejudice").

A plaintiff is not required to prove an exact amount of time that a decedent endured conscious pain and suffering, and there is no bright-line rule for how long a decedent must suffer to recover any set amount of damages. *See, e.g.*, *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 241-42, 734 S.E.2d 148, 159 (2012) (remanding survival action for plaintiff where evidence showed decedent was thrown from a car, yelled for his mother, two witnesses heard him moaning, and he died at the scene); *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000) (affirming denial of JNOV as to conscious pain and suffering where decedent child was hit by school bus, father found her unconscious and she never regained consciousness, but father testified child moved her fingers while he talked to her in the hospital). The lower court erred in focusing on its interpretation of the period of time rather than on the evidence of conscious pain and suffering viewed in a light most favorable to the Estate.

The Estate was not required to prove the intensity of the shock or the nature of Jose's pain with expert testimony. (R. p. 6). "[W]here a lay person can comprehend and determine an issue without the assistance of an expert, expert testimony is not required." *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013). The Estate presented Dr. Presnell's expert testimony about Jose's injuries, and a jury can draw its own inferences about the pain of those injuries. "Any fact in issue may be proved by circumstantial evidence as well as direct

evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts." *Graves v. CAS Med. Sys.*, 401 S.C. 63, 79-80, 735 S.E.2d 650, 658 (2012) (internal quotation marks omitted). A lay person is capable of determining an electric shock that leaves an inch-and-a-half inch mark on an abdomen, fifteen broken bones, massive internal bleeding in three places, and torn internal organs are all extremely painful. The lower court committed an error of law in discounting the damages evidence based on an alleged lack of expert testimony when none is required.

B. The Evidence of Wrongful Death Damages Supports the Jury Verdict

The Estate presented ample evidence of Mr. and Mrs. Larios's non-economic damages from the loss of Jose to support the jury's wrongful death award. The lower court's decision to the contrary is based on facts wholly unsupported by the evidence and controlled by errors of law.

"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, the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries." *Scott v. Porter*, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (internal quotation marks omitted). Damage elements 2 through 6 "are intangibles, the value of which cannot be determined by any fixed yardstick. Their loss to the beneficiaries must be estimated by the jury in the exercise of their sound judgment under all of the facts and circumstances of the case." *Lucht v. Youngblood*, 266 S.C. 127, 137, 221 S.E.2d 854, 859 (1976).

The damages are those "sustained by the beneficiaries from the death" and not "the value of the human life lost." *Lucht*, 266 S.C. at 136-37, 221 S.E.2d at 859.

> Since, however, direct proof of the value of human life is not possible, and what is reasonable compensation therefor must be left to the sound discretion and judgment

> of the jury, it is not necessary to show the precise money value of the deceased, or the exact amount of damages suffered by the beneficiaries, in order to sustain a recovery of ***substantial*** damages where a foundation for the recovery of damages has been laid by the introduction of evidence tending to show the earning capacity of the deceased, ***or*** the existence of persons who were dependent upon him for support.

Mishoe v. Atlantic Coast Line R.R. Co., 186 S.C. 402, 422, 197 S.E. 97, 106 (1938) (emphasis added) (internal quotation marks omitted). "It is quite impossible to fix with anything approaching mathematical certainty the damages which one may suffer from the wrongful death of a father or husband, or to place a measure upon the grief which accompanies it." *Norwood v. Atlantic Coast Line R.R. Co.*, 203 S.C. 456, 471, 27 S.E.2d 803, 809 (1943).

The lower court's ruling on wrongful death damages is based on three conclusions—(1) there is no evidence of economic damages, which is discussed above, (2) the evidence of Mr. and Mrs. Larios's loss and grief came from witnesses besides the beneficiaries themselves, and (3) there is no evidence Jose saw his parents after coming to the United States. Focusing on the second and third conclusions, they are wholly unsupported by the evidence and controlled by errors of law. Viewing the facts "in the light most favorable to the plaintiff", there is ample evidence of Mr. and Mrs. Larios's mental shock and suffering, wounded feelings, grief and sorrow, loss of Jose's companionship, and deprivation of the use and comfort of Jose's society. *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964).

As Dominion Energy conceded, Jose's parents suffered a "tremendous loss" of their son whom they greatly loved and of whose life and accomplishments they took great pride. (R. p. 330). Jose, Sr., and Anastacia Larios had four children. (R. p. 634). Jose was the third of their four children to die. *Id.* They live each day enduring the loss of three children. *See Clark v. Ross*, 284 S.C. 543, 567-68, 328 S.E.2d 91, 106 (Ct. App. 1985) (noting in a case where the decedent was the second child lost by the beneficiary parents that "[t]he damages [her] young parents sustained

in losing her, including the jolt of suffering the death of yet another child, no doubt will remain with them the rest of their lives"). It took Jose's family in Mexico two days to tell his mother that he died because they were so concerned about how she would react to the news of losing a third child. (R. pp. 626, 634). His parents waited weeks for the return of their son's body and buried him the week of Christmas. (R. p. 637). Not wanting to believe Jose was dead, his mother repeatedly called Jose's cell phone hoping to hear his voice. (R. p. 626). Gaspar had to answer and tell her over and over that his brother was dead. *Id.* Jose was his parents' "pride and joy." (R. pp. 633, 635). He finished college and got a law degree. (R. p. 635). Gaspar gave up school to work and help pay for Jose to go to school. (R. p. 621). Rather than pursuing his own dreams, Jose came to the United States to earn money to support his family. (R. pp. 635-36). He was a "local hero" in Mexico because of his devotion to his family and well-known soccer skills. (R. pp. 636-37). He worked manual labor for over ten years and always did it happily because he wanted to support his family. (R. pp. 623-24, 628). Jose had dreams of having his own family and children. (R. p. 628). Jose lost 37.39 years of his remaining life expectancy, including the years in which he planned to have a family and continue to care for his parents. (R. p. 830).

Based on the evidence of Jose's character and conduct, the jury could easily infer he was a loving son devoted to his parents. The Special Administrator, on behalf of the beneficiaries, testified "if any of you are lucky enough to have that kind of person in your life, when they're gone, I think everyone suddenly realizes the role that they played. And that's certainly how this family has been impacted." (R. p. 638). Jose's friend Beverly O'Brien testified "He was more concerned about other people than himself. He loved his family. He was a family man." (R. p. 561). Beverly testified about a community fundraiser to pay to send Jose's body to his parents and a memorial site erected on Edisto Island in his memory that is still visited today. (R. pp. 570-71,

575-76, 955-57). He did not come to the United States and forget about his family in Mexico. He came, and for at least ten years, worked seven days a week doing multiple jobs to continually send money home to his parents. (R. p. 562). The evidence of Jose's close relationship with Gaspar and his niece, Wendy, also support the inference that he was a devoted family man whose absence is felt by all who knew him. (R. pp. 618, 633, 560-61).

This evidence, viewed in a light most favorable to the Estate, shows a tremendous loss to Mr. and Mrs. Larios and satisfies every one of the non-economic damage elements for wrongful death damages. An $11 million verdict in 2019 for the wrongful death damages to two parents whose forty-one-year-old son who worked tirelessly to support them and died a violent and painful death is not excessive. *See, e.g.*, *Steinke v. Player*, 1998 U.S. App. LEXIS 9512, *5-6 (4th Cir. 1998) (affirming the district court's holding that a $12 million wrongful death verdict involving a minor child and no pecuniary loss "is not so grossly excessive as to shock the conscience of the court and require a new trial absolute" (internal quotation marks omitted)). The lower court acknowledged "evidence in the record" of Jose, Sr., and Anastacia's shock and grief but discounted it because "the only evidence of their reaction and effect came from the testimony of his brother, Gaspar" and Jose moved to the United States and had not seen them in 12 years. (R. p. 10). These are factual and legal errors.

As to the source of evidence of Jose, Sr., and Anastacia's damages, that evidence came not only from Gaspar, but also from Beverly O'Brien and the Special Administrator on behalf of the Estate. As detailed above, there is ample evidence to allow the jury to infer Jose was a loving family man who endured separation from his parents and difficult manual labor for over a decade to earn money to support them. That is a repeated act of love that speaks to the bond between Jose and his parents. That Mr. and Mrs. Larios did not testify at trial is not a legal basis to discount a

wrongful death damages award and is contrary to South Carolina statutory law on special administrators. Significantly, Dominion Energy did not contemporaneously object to the testimony of any of these witnesses. There are many instances in which a beneficiary may not be able to testify about their loss. For example, a minor child beneficiary may not be old enough to testify in court about the loss of a parent but a guardian or other parent may testify about the loss to the child. As the Special Administrator testified at trial, a special administrator may be appointed in "situations such as this where the beneficiaries can't be present." (R. p. 631); S.C. Code Ann. § 62-3-614 (providing for the appointment of a special administrator). The lower court's order discounts the testimony of the Special Administrator, who legally stands in the shoes of the beneficiaries, and of Gaspar and Ms. O'Brien because the beneficiaries could not physically attend trial to testify. It is also contrary to the jury charges. The lower court instructed the jurors they could "decide whether or not to believe a witness' testimony", and rely on direct and circumstantial evidence. (R. pp. 816-17, 820). Following those charges, it does not matter who testified to Mr. and Mrs. Larios's loss so long as it is in evidence. The plaintiff or beneficiary does not have to be the mouthpiece of the evidence of damages. The lower court erred in discounting the damages testimony because it did not come from the mouths of Jose, Sr., and Anastacia, and this Court should reverse.

The lower court's conclusion that Jose moving to the United States and not seeing his parents for years "cannot help but affect an award" of wrongful death damages is wholly unsupported by the evidence and an error of law. (R. p. 10). There is no evidence as to the last time Jose saw his parents in person. The only evidence is that he moved to the United States and continued to support and love his parents for over a decade until his death. The court knew about Jose's status as an undocumented immigrant and the resulting inability to go home to see his

parents but the jury did not. The jury knew only that Jose came to the United States to pursue a better life and support his family. The length of time between Jose's physical visits with his parents was never mentioned at trial. Dominion Energy did not argue this point it to the jury or ask a single witness about it. The lower court bought into Dominion Energy's argument, made for the first time in a post-trial motion, that the verdict is grossly excessive without evidence of the frequency of physical visits between Jose and his parents. This resulted in the court analyzing and relying on evidence of Jose's legal status that was outside of the evidence presented at trial. The court viewed the evidence in a light most favorable to Dominion Energy rather than the Estate.

Viewing the evidence in a light most favorable to the Estate, the jury could easily have inferred the regularity with which Jose continued to send money to his parents—almost every week—for over ten years after he left Mexico is evidence of the quality of his relationship with and unwavering devotion to them. Contrary to the lower court's conclusion that Jose "moved away from his parents to another country" and never saw them again, the jury could have concluded the opposite—that Jose and his parents endured the physical separation for the greater good of their family. (R. p. 10). The lower court's conclusion that a man who moved to the United States to support his family has less of a relationship with them because of the physical absence is not found anywhere in the record and is an inference unfavorable to the Estate, contrary to the requisite standard of review.

The harsh effect of the notion that prolonged physical absence between loved ones diminishes their relationship and the amount of wrongful death damages is apparent in this case and in considering examples of physical separation such as a spouse serving overseas in the military or a child attending college a plane ride away when the family cannot afford flights. It is also contrary to the law that the jury is entitled to determine the value of intangible losses. There

is no dispute that the Estate satisfied the burden to prove intangible wrongful death damages by a preponderance of the evidence. (R. p. 10). The lower court invaded the jury's province and discounted the damages based not on actual evidence but on its own view and inferences, and on alleged facts and arguments Dominion Energy never made at trial before the jury. However, "[t]he loss to parents from the untimely death of a devoted child is not to be minimized. These are intangibles, the value of which cannot be determined by any fixed yardstick." *Lucht v. Youngblood*, 266 S.C. 127, 137, 221 S.E.2d 854, 859 (1976). "Their loss to the beneficiaries must be estimated by the jury in the exercise of their sound judgment under all of the facts and circumstances of the case." *Id.* at 137, 221 S.E.2d at 859. Aside from the fact that no witness or lawyer ever mentioned physical visits to the jury, the effect of any alleged absence of them is within the jury's province. The lower court committed errors in its evidentiary conclusions and legal analysis, 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

Notably absent from the lower court's order is any explanation for the supposed excessiveness of the verdict aside from its amount. The lower court did not identify any evidence or argument that improperly influenced or inflamed the jury. The lower court did not find the jury instructions or questions asked by the jury indicated the jury was confused. The lower court did not find any event that occurred at trial influenced the verdict. The lower court did not find the jury disregarded the instructions. The court stated only that the verdict amounts 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." (R. p. 4). In other words, the verdict is too big based on the evidence. This explanation is insufficient without some identification of a basis for prejudice, passion, or consideration outside of the evidence. Otherwise, the Estate is left with the

conclusion that it could try the exact same case with the exact same evidence and rulings but must hope for a different verdict amount. The decision to grant a new trial absolute without any identifiable basis for the alleged excessiveness is error and should be reversed.

For at least 80 years, South Carolina Appellate Courts have relied on the presence or absence of a trial event, evidentiary error, disregard of the jury instructions, or jury confusion to grant or deny a motion for a new trial absolute. *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 242, 734 S.E.2d 148, 159 (2012) (remanding for a new trial absolute on a survival action based on the jury's question about damages and its subsequent award of zero damages despite evidence of pecuniary and nonpecuniary damages because "the jury was confused in rendering its damages award"); *Wachovia Bank N.A. v. Beane*, 397 S.C. 612, 617-18, 725 S.E.2d 715, 718 (Ct. App. 2012) (holding lower court should have granted new trial absolute where jury awarded relief not charged or in evidence and greater than actual damages evidence because "[t]he verdict demonstrates that the jury acted on some basis other than the evidence presented and that it did not follow the instructions given by the trial court"); *Dillon v. Frazer*, 383 S.C. 59, 64, 678 S.E.2d 251, 253 (2009) (holding lower court should have granted new trial absolute because, based on the jury's questions, the jury ignored lower court's instruction to disregard matters related to third party payment of medical bills); *Clark v. Ross*, 284 S.C. 543, 568, 328 S.E.2d 91, 106 (1985) (affirming denial of a motion for a new trial where "neither [defendant] 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) (affirming denial of new trial absolute where "[t]here 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"); *Mishoe v. Atlantic Coast Line R.R. Co.*, 186 S.C. 402, 425, 197 S.E. 97, 107 (1938)

(affirming denial of new trial absolute where "there is not the slightest suggestion of any fact that should have excited the passion or prejudice of the jury; nor is there any intimation of any other consideration not founded in the evidence which might have influenced the jury").

The lower court instructed the jury to not be influenced by outside opinions (R. pp. 303-04) and to not base its verdict on sympathy, passion, prejudice "or some other consideration that's not found in the evidence." (R. p. 833 lns. 17-19, p. 834 lns. 15-19). There is "a sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given." *Arnold v. State*, 309 S.C. 157, 166, 420 S.E.2d 834, 838 (1992). Nine jurors submitted an affidavit stating that the jury followed the court's instructions, did not consider anything outside of the evidence, evaluated and discussed the evidence, and did not base the verdict on emotion, sympathy, bias, or any outside factors. (R. pp. 256-64). The lower court's decision that the verdict amount alone indicates prejudice or passion is contrary to the law that juries are presumed to follow the court's instructions. This reversible legal error highlights the basis for a trial court to identify some trial event, evidence, or other occurrence that caused the jury to act with prejudice. *See, e.g.*, *Morga v. FedEx Ground Package Sys.*, 420 P.3d 586, 598 (N.M. Ct. App. 2018) ("Defendants argue that we may simply 'infer' that the jury was improperly influenced by passion or prejudice from the verdict itself and that it is 'not necessary to point to trial error as a cause.' However, we disagree that our case law allows us to infer improper passion or prejudice simply because the verdict is large and therefore 'speaks for itself as to the existence of passion or prejudice.'").

The lower court's analysis of the alleged minimal evidence of damages does not support a "a presumption that it was the result of passion and prejudice, and not of sober, reflective judgment." *Lucht*, 266 S.C. at 137-38, 221 S.E.2d at 859. The amount alone, with no finding of a trial event, impermissible evidentiary inference, juror confusion, or plain disregard for the jury

instructions cannot support a new trial absolute. *See, e.g.*, *Steinke v. Player*, 1998 U.S. App. LEXIS 9512, *6 (4th Cir. 1998) (noting the defendant seeking a new trial absolute "failed to point to any trial event or evidence that might have caused the jury to act out of passion or prejudice"). A "grossly excessive" verdict is one "deemed the result of a disregard of the facts and of the court's instructions, and to be due to passion and prejudice rather than reason." *King v. Daniel Int'l Corp.*, 278 S.C. 350, 355, 296 S.E.2d 335, 338 (1982). Here, the lower court did not find the jury disregarded facts or its instructions. The lower court did not point to any conduct of counsel to incite the jury's passion, prejudice, or sympathy, or to any evidence or argument regarding matters outside of the record. None exists. Rather, the jury and the lower court simply reached different conclusions as to the amount of damages. The identification of a basis for the jury supposedly acting out of passion, prejudice, caprice, or a consideration outside of the evidence serves to ensure that the decision to grant a new trial absolute is not based solely on the court's disagreement with the amount of the verdict. Here, the Court has not identified—and cannot identify—such a basis. As such, this Court should reverse the lower court's order granting a new trial absolute.

CONCLUSION

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

September 18, 2020

Respectfully submitted,

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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.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certify that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

September 18, 2020

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