

court alone has the power to reduce the verdict by granting the defendant's motion for a New Trial *Nisi Remittitur*. *Id.* at 531, 431 S.E.2d at 558. However, the trial court must "set aside a verdict only when it 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." *Welch v. Epstein*, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000). A New Trial Absolute should be granted only if the verdict is "so 'grossly excessive' as to clearly indicate the influence of an improper motive on the jury." *Id.* Ordinarily, the trial judge's decision to grant a new trial will not be disturbed on appeal unless the conclusions reached are controlled by an error of law. *Id.* In evaluating a motion for a new trial, the trial court must view the evidence in the light most favorable to the non-moving party. *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964).

This Court is convinced that verdicts for actual damages of \$10 million dollars on the survival action and \$11 million dollars on the wrongful death action, sustained by the beneficiaries of the Estate of Jose Refugio Licono Larios (Plaintiff), is 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.

I. SURVIVAL

In the survival action, the jury awarded \$10 million dollars to Plaintiff. Based on the evidence presented to this jury, this verdict is grossly excessive. Plaintiff did not submit any medical, surgical, hospital or funeral expenses and the evidence supporting conscious pain and suffering was, at best, minimal and left to guesswork and speculation. There is no evidence in the record as to the exact time the incident occurred and that Mr. Larios was conscious after EMS arrived prior to his death. As a matter of fact, the evidence presented showed that when Mr. Larios

fell, his co-worker, Mr. Abraham, immediately ran to him, found him conscious and injured and then had a passerby call 911. After asking the passerby to call 911, Mr. Abraham returned to Mr. Larios who, by that time according to the testimony, was unresponsive. There is no further evidence presented that Mr. Larios ever regained consciousness. Whether he did or not is never addressed by any witness or testimony.

"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). The burden of proof is on the plaintiff to show that the deceased was conscious after the accident and prior to her death. *Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 28 S.E.2d 683 (1944). If the plaintiff fails to meet her burden then the plaintiff will not be able to recover for conscious pain and suffering. *Stevens v. Allen*, 342 S.C. 47, 52, 536 S.E.2d 663, 665 (2000). Damages for subconscious pain and suffering, or for pre-impact fear is not recoverable. *See Brooks v. U.S.*, 273 F. Supp. 619 (D.S.C. 1967); *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 214, 734 S.E.2d 142, 144 (2012).

Here, 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.

In addition, there is little evidence of conscious pain and suffering and mental distress. The only medical expert testimony addressing Mr. Larios' injuries came from the pathologist, Dr. Erin Presnell. In her testimony she identified the injuries that Mr. Larios suffered as a result of this

incident; however, there is no testimony as to how those injuries would affect the person prior to succumbing to those injuries.

Based on the evidence presented, Mr. Larios was conscious during the initial shock and immediately after the fall. Mr. Larios was shocked after coming in contact with a seed pod that was in contact with the primary line and after the shock he decided to come down the ladder. After unbuckling himself and taking a few steps down he lost control of his body and fell around 25 feet, where he suffered serious injuries. Even though he said he was fine, his severe injuries from the fall suggested otherwise. Mr. Abraham immediately found someone to call 911. While there is conscious pain and suffering from being shocked, there is no expert to testify on the intensity of the shock. Moreover, there is no medical expert testimony regarding the nature, level, and extent of pain. While there was a burn mark the size of a quarter on Mr. Larios' abdomen, there were no exit wounds nor were there any internal injuries caused by electrocution.

As stated earlier, there is little evidence that Mr. Larios was conscious for very long after the incident. To the contrary, it appears Mr. Larios was unconscious for most of the time from the incident to his death. There is no evidence that Mr. Larios ever regained consciousness after Mr. Larios told Mr. Abraham he was fine within minutes of the fall. Mr. Abraham testified that Mr. Larios was unresponsive after he came back from finding someone on the pathway to call 911. There is no testimony as to what time the incident occurred. There is no evidence of how long Mr. Abraham was away from Mr. Larios while trying to find someone to call 911. Further, there is no testimony from any of the first responders to the condition of Mr. Larios upon arriving to the scene nor is there any testimony about his time in the ambulance. Plaintiffs argue in their submissions that Mr. Larios was pronounced dead some 2 hours after the fall; however, the record of the case is completely void of times as to when the fall occurred, how long EMS worked on Mr. Larios

before putting him into the ambulance, or how long after he actually died was he officially pronounced dead. Nor is there any evidence whatsoever if Mr. Larios EVER regained consciousness after Mr. Abraham found him unresponsive shortly after the fall. This was all left up to the jury to speculate as to how long Mr. Larios was actually conscious after the fall.

Giving the Plaintiff every benefit of the doubt, and more, and taking their own belief of 2 hours of conscious pain and suffering into consideration, the damages of \$10 million dollars for the survival action is grossly excessive. The jury was mostly left to guesswork and speculation regarding the damages suffered by Mr. Larios from the time of the incident to the time he passed away. Without any evidence of actual damages from medical, surgical, or hospital bills, the jury found there was \$10 million dollars in pain and suffering and mental distress despite the fact there was little evidence of actual pain and suffering. As such, this Court finds that the jury's verdict in this matter is grossly excessive and not supported by the evidence presented.

II. WRONGFUL DEATH

In the wrongful death action, the jury awarded \$11 million dollars to Plaintiff. 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.

Under S.C. Code Ann. § 15-51-20 (Supp. 1993), a personal representative may bring a wrongful death action for the benefit of statutory beneficiaries, including the parents of the deceased, where there is no surviving spouse or child, as in this case. Damages recoverable for wrongful death are the damages sustained by the statutory beneficiaries resulting from the death of the decedent, including pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship. *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993); *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972); *Zorn v. Crawford*, 252 S.C. 127, 165

S.E.2d 640 (1969). These damages are, as stated, suffered by the statutory beneficiaries as a result of the death — not by the value of a human life. *Zorn*, at 136-137, 165 S.E.2d at 645. The plaintiff has the burden to show evidence of pecuniary loss as an element of damages, but if there is no pecuniary loss the plaintiff can still recover other damages. *Mishoe v. Atlantic Coast Line R. Co.*, 186 S.C. 402, 197 S.E.2d 97 (1938).

Here, there is little, if any, evidence of pecuniary loss. Plaintiff did not submit any evidence of his earnings, holdings, or assets. Mr. Larios was a 41-year-old man who was unmarried and did not have any children. Since there is no evidence that Mr. Larios had a will, he is presumed to have died intestate, so his heirs or beneficiaries would be his mother and father who live in Mexico. There is evidence Mr. Larios sent some money to his parents in Mexico, but there is no testimony of how much or how often he sent money. There is evidence that he received a law degree while in Mexico prior to moving to the United States; however he was never licensed to practice law in Mexico or the United States and there is no evidence that he ever practiced law in Mexico or the United States. Mr. Larios' brother testified that Mr. Larios hoped to practice law but after living in the United States for 12 or more years, there is no evidence that he ever did anything to work toward making that goal a reality. The only evidence in this case regarding Mr. Larios' earning capacity is that he worked for a landscaping company maintaining yards and properties.

Mr. Larios' brother, Gaspar, testified that after learning of her son's death, his mother began taking medication, which costs about \$100 and she will likely have to take the medication the rest of her life. In addition, Gaspar testified that Mr. Larios' father was out of work for a period of time after the death of Mr. Larios, but that he was now working again. There is no evidence that Mr. Larios' parents depended on him for support or if the money he sent was just the kindness of a son toward his parents. Mr. Larios was an excellent soccer player and teams would pay him to play on

their team when he lived in Mexico. His skill was well known in his local community in Mexico, however, there is no evidence that Mr. Larios ever brought those skills to the United States or that he had any opportunity to play professionally in the U.S. It appeared that the testimony simply related to the things he enjoyed pursuing during his youth in Mexico.

Finally, there is no evidence that Mr. Larios had even seen his parents since he moved to the United States. Mr. Larios had been living in Edisto since 2003 or 2004, and prior to that he worked in both Florida and Georgia, but there is no testimony to how long he had lived in the United States. By the same token, there is no evidence that Mr. Larios had any intention to return to Mexico to see his parents or that he had ever seen them since he left Mexico.

In viewing the evidence in the light most favorable to Plaintiff, the award of \$11 million dollars for the wrongful death action is grossly excessive. The law sets forth the damages that are recoverable in a wrongful death action. These are damages which would inure to the legal and statutory beneficiaries of Mr. Larios, i.e. his mother and father. First, as to (1) pecuniary loss; there is little, if any, evidence of pecuniary loss. There is no evidence of Mr. Larios' earnings, holdings, investments, insurance, or assets. His brother, Gaspar, testified Mr. Larios sent money home to his parents, but there is no testimony as to how much or how often this was done. There is testimony that he did help his brother and his brother's family out financially and helped pay for half their house, but no evidence of how much was invested or the value of the house. It is important to note that the brother, Gaspar, and his family would not be considered statutory beneficiaries under the Wrongful Death statute. Any amount awarded for pecuniary loss would have to be completely based on conjecture, guesswork or speculation.

The remaining factors for the jury to consider are (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. All of these, again, relate to the damages suffered by the statutory heirs or beneficiaries of Mr. Larios' estate. There certainly is evidence in the record that his parents were shocked upon hearing of their son's death. The testimony is that their pain and grief was great at the loss of their son, as anyone would expect. However, Mr. Larios' parents are in poor health and could not travel to the United States to appear for Court. The only evidence of their reaction and effect came from the testimony of his brother, Gaspar.

While there is evidence of mental shock and suffering, wounded feelings, and grief and sorrow on behalf of the parents learning of the loss of their son, it is 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. While an amount for these type of damages could possibly be ascertained from the evidence in this record, it is beyond this Court's comprehension that the amount of damages under this evidence could even remotely approach \$11 million dollars.

III. CONCLUSION

In considering the Post-Trial Motions and responses, the oral arguments, and the trial transcript, this Court initially was leaning toward the decision of considering granting the Motion for New Trial *Nisi Remittitur*. After careful review of all the evidence in this case to support the amount of damages proven by Plaintiff, it is the opinion of this Court 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. Further, even if this Court wished to reduce the verdict, the evidence of damages in the record would make any reduction purely speculative.

THEREFORE, the Defendant's Motion for a New Trial Absolute is hereby **GRANTED**.

As to the Defendant's Motion for Sanctions, this Court finds that there was no basis or conduct on the part of Plaintiff that would support sanctions being awarded and would respectfully deny the Motion for Sanctions.

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.

NOW, IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

That the Defendant's Motion for Sanctions is **DENIED** and the Motion for a New Trial Absolute is hereby **GRANTED**. Accordingly, this Court hereby sets aside the jury's \$21 million dollar verdict against Defendant and orders a New Trial Absolute in this matter.

AND IT IS SO ORDERED.

Thomas A. Russo
Presiding Judge

The 1st day of November, 2019

Florence, South Carolina.



Colleton Common Pleas

Case Caption: Tiffany N. Provence, As Special Administrator For Estate Of Larios
VS South Carolina Electric & Gas Company , defendant, et al
Case Number: 2017CP1500423
Type: Order/Other

So Ordered

s/Thomas A. Russo #2141