STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO. 2017-CP-15-0423
	)	
Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios,	)	
	)	
Plaintiff,	)	**PLAINTIFF'S NOTICE OF MOTION AND MOTION TO RECONSIDER, ALTER, OR AMEND ORDER GRANTING NEW TRIAL ABSOLUTE**
	)	
vs.	)	
	)	
South Carolina Electric & Gas Company; PENSCO Trust Company LLC; and Edisto Sales & Rentals Realty, LLC,	)	
	)	
Defendants.	)	

A jury of twelve citizens of the United States of America recently delivered a $21 million verdict for the death of an undocumented Mexican immigrant. This did not happen in San Francisco, or Chicago, or even New York City. This happened here in the South, in Colleton County, South Carolina. Before the jury had deliberated and rendered their verdict, almost anyone worried that a jury from Colleton County might act with passion or prejudice likely expected it to be exacted against the immigrant Plaintiff. However, now that the jury found for the Plaintiff in spite of his status, the Court has decided that the jury "must have" acted with passion or prejudice in the plaintiff's favor, despite the fact that the Court is unable to point to a single inflammatory event or piece of evidence at trial which would have caused the jury to do so.

In deciding a motion for a new trial, the court must view the evidence and all reasonable inferences to be drawn from it in a light most favorable to the nonmoving party. *RRR, Inc. v. Toggas*, 378 S.C. 174, 182-83, 662 S.E.2d 438, 442 (Ct. App. 2008). The Court's decision to grant a new trial absolute misinterprets the proof requirement for survival and wrongful death, violates the standard of viewing the evidence in a light most favorable to Plaintiff, and fails to identify any

trial event or outside influence as a basis to vacate the verdict. The Court has simply substituted its own view of the case for that of the jury and thrown out the verdict, which is not the proper use for a new trial absolute. *Knoke v. S.C. Dept. of Parks, Rec. and Tourism*, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996) (holding that "[t]he jury's determination of damages is entitled to substantial deference").

Three years of litigation where the Defendant, South Carolina Electric & Gas Company ("SCE&G"), vigorously contested liability culminated in a week-long jury trial where both parties were given the opportunity to present their case. After the jury proved SCE&G wrong about its view of this case, the Court stripped the jury of their fact-finding authority and vacated the verdict because the Court took a different, defendant-friendly view of the evidence and damages. *But see* S.C. CONST., § 14 ("The right to a trial by jury shall be preserved inviolate."). The Court used the word "speculate" or some derivative thereof seven times throughout its Order granting new trial absolute but, with all due respect, the only speculation is the Court's conclusion that the jury's verdict "can only be explained upon the basis of sympathy, passion, caprice or some other consideration found outside the evidence that is presented in this case." Order at 2. Without specifically saying it, the Court speculated that the jury "must have" been so out to get SCE&G that they delivered a $21 million verdict for an undocumented immigrant. There is no evidence of that, however, and pursuant to Rule 59(e), SCRCP, Plaintiff respectfully moves the Court to reconsider, alter, or amend its decision, and reinstate the jury's thoughtfully delivered verdict.

As a brief reminder of the case presented to the jury, Jose Larios was shocked by a power line while standing twenty-five feet in the air on a ladder. He plunged to the ground and sustained more than a dozen broken bones, the laceration of multiple organs, and massive internal bleeding, before eventually suffering the ultimate injury—death. The Colleton County jury that was

extensively voir dired by the Court and selected to serve as the fact finders at this trial determined that, based on the evidence presented at trial in the year 2019, in the modern world we live in, the damages for that tragic injury and loss are worth $21 million. The jury also found Mr. Larios 10% at fault, reducing the verdict to $18.9 million, and declined to award punitive damages against SCE&G. These factors alone should alleviate any speculation by the Court that the jury was out to get SCE&G with this verdict.

The Court focuses on the lack of evidence of pecuniary damages such as medical bills, funeral expenses, and lost wages. Order pp. 6-7. In doing so, it appears to accept SCE&G's argument that an award of non-economic damages must be based on some specific evidence of monetary loss. Neither SCE&G nor the Court provides any law to support this assertion and it is legally incorrect. "Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." *Keene v. CNA Holdings, LLC*, 426 S.C. 357, 384, 827 S.E.2d 183, 198 (Ct. App. 2019) (internal quotation marks omitted). "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). These are the *recoverable* but not *required* damages. Plaintiff chose to present damages chiefly based on non-economic losses of conscious pain and suffering and mental distress of Mr. Larios, and the mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of his society to Mr. Larios' beneficiaries. There is no dispute that there is evidence of all of these elements of damages. The presence or amount of evidence of

any particular pecuniary loss does not affect the ability to recover non-economic damages, and the Court erred in interpreting the law and evidence to the contrary. The Court appears to disregard the compensability of intangible damages, giving short shrift to grief and shock as independently compensable elements of damage for wrongful death. Order at 7–8. The Court all but concludes that intangible damages are inherently speculative, not independently recoverable, and that a verdict for such damages is invalid without some sort of benchmark of itemized pecuniary loss. As argued at length in Plaintiff's memorandum in opposition, this is not the law.[1] (Also, as noted herein, the Court's analysis disregards its own charge on damages.) By way of analogy, if a person dies instantaneously and incurs no medical bills or makes only $30,000 per year as opposed to $1,000,000 per year, neither of those pecuniary damages amounts have any bearing on the intangible loss to their beneficiaries. The amount of damages is within the jury's province, and this Court should reconsider its decision to invade that province.

Disregarding critical facts that foreclose a finding of passion or prejudice, the Court has decided that the verdict "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." Order at 2. The Court fails to view the evidence in a light most favorable to Plaintiff. Before noting some specific evidence, two points are especially noteworthy. First, the Court overlooked the significant fact that SCE&G never challenged the damages testimony Plaintiff presented at trial, never raised a contemporaneous objection to Plaintiff's closing argument, and never objected to the Court's jury charges on damages. After Plaintiff mentioned

[1] As Plaintiff raised at the hearing on SCE&G's post-trial motions, the South Carolina General Assembly, in recently adopting a system of tort reform, elected not to place statutory caps on non-economic damages in this type of case. The Court's decision invades the province of the legislature in exacting tort reform from the bench.

a $20 million sum in closing argument, SCE&G did not even address that suggestion in its closing. The only reference SCE&G made to the issue of damages at trial was its agreement with Plaintiff, in SCE&G's own closing, that "the loss of Mr. Larios is tragic." Tr. Trans. at 669:9–670:2. Second, SCE&G chose not to cross-examine any of Plaintiff's damages witnesses. Apparently confident in its case on liability, SCE&G effectively ceded the issue of damages at trial to Plaintiff. Nevertheless, the Court granted a new trial absolute—predicated solely on the amount of damages—based on its conclusion that the evidence of damages was merely "speculative" or "guesswork." SCE&G waived this argument when it elected not to raise it at trial by way of cross-examination or argument to the jury. The Court cannot *sua sponte* raise an argument that effectively operates as a directed verdict ruling on damages when SCE&G failed to raise the argument either during or after trial. This is legal error.

The Court's *ex post facto* finding of "speculative" damages is not only procedurally and legally improper, but also plainly incorrect on the merits. The Court notes that "Mr. Larios was conscious during the initial shock and immediately after the fall." Order at 4. Therefore, the survival damages are not speculative. There was evidence of conscious pain and suffering which the jury lawfully valued in determining survival damages. *Knoke*, 324 S.C. at 142, 478 S.E.2d at 258–59 (holding that intangible damages such as pain and suffering are entirely compensable, on their own, despite the inability to calculate them "by any fixed measure"). However, rather than stopping when it found evidence of the damages awarded, the Court proceeded to incorrectly state that Plaintiff sought "medical damages" as part of the survival claim but failed to present evidence of the medical or funeral expenses, leaving the jury to speculate. Order at 3. Plaintiff did not even ask the jury to award "medical damages" for survival. Further, the Court minimized the testimony of the pathologist, Dr. Erin Presnell, who testified that as a result of his twenty-five-foot fall, Mr.

Larios sustained fourteen fractured ribs (seven on each side), four fractured vertebrae in his spine, and severe lacerations of multiple internal organs, including his liver and both kidneys, which caused massive internal bleeding. Tr. Trans. at 235:22–239:18; *see also* Pl.'s Tr. Ex. #3 (pathology report). The jury apparently found this testimony compelling, and drew the inference that these injuries caused significant pain and suffering. The Court, however, found the testimony less compelling and drew a much different inference, favorable to SCE&G, that "there is no testimony as to how those injuries would affect the person prior to succumbing to those injuries." Order at 3–4. If the Court viewed the evidence in a light most favorable to Plaintiff, as it is supposed to, then it would have found the jury's inference supported by the evidence presented.

The Court viewed additional evidence in a light most favorable to SCE&G. It minimized the fact that Mr. Larios experienced an electrical shock from a power line. It all but dismissed the pain and mental shock that Mr. Larios experienced from this event, finding "there is no expert to testify on the intensity of the shock," and "there is no medical expert testimony regarding the nature, level, and extent of pain." Order at 4. Rules 701 and 702, SCRE, do not require an expert to explain to a jury that being shocked by a power line while twenty-five feet above ground is likely to cause, at the very least, immense mental shock and fear, and likely significant physical pain. These are compensable elements of damage in a survival claim, and the Court incorrectly rejected the rational inferences that the jury permissibly drew from the evidence.

Likewise, the Court rejected the jury's valuation of the survival action on the capricious reasoning that Mr. Larios did not survive long enough, or suffer long enough, to support the verdict. Whether Mr. Larios lived in misery for fifteen minutes, thirty minutes, or two hours is arbitrary for purposes of the jury's valuation of survival damages. There is no bright line test for the amount of time a person must suffer and the Court did not tell the jury to calculate damages by

the minute or by the hour. Shock, pain, grief, and other intangible damages can be measured by intensity just as much as they can be measured by duration, and it is within the jury's discretion, not the Court's, to make this calculation. As the Court correctly charged the jury: "The amount of damages for mental suffering cannot be exactly measured but must be left to the sound discretion of you, the jury." Tr. Trans. at 713: 9–11. The jury followed the Court's charge and delivered a verdict on the survival action comprised of various elements of intangible damage, which the jury valued in their broad discretion. The Court is not supposed to vacate the verdict simply because it dislikes the evidence. The Court is supposed to give substantial deference to the jury. *Clark v. S.C. Dept. of Pub. Safety*, 353 S.C. 291, 309, 578 S.E.2d 16, 25 (Ct. App. 2002).

The jury also followed the Court's charge on wrongful death damages. Pursuant to *Mishoe v. Atlantic Coast Line R. Co.*, 186 S.C. 402, 197 S.E.2d 97, 106 (1938), the Court charged the jury that there is a presumption of pecuniary of loss "where the relationship of parent and child exists." Tr. Trans. at 709:24–710:4. SCE&G did not object to this charge. The Court charged that "[i]t is not necessary to show the exact amount of damages suffered by the beneficiaries." *Id.* at 710:13–14. This is also consistent with *Mishoe*, which provides: "Where the law presumes a pecuniary loss to the beneficiaries, substantial damages, it is said, may be recovered without proof of special pecuniary loss." 197 S.E.2d at 106 (quoting 17 Corpus Juris, § 258, pp. 1365–66). In such cases, "the plaintiff need not establish the decedent's "fortune, his earnings, his capacity to earn, his habits, or treatment of his family." *Id.* (citation omitted). Following that law, the Court charged the jury that, as to all types of damages, "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." Tr. Trans. at 710:13–17. Pursuant to this charge on the presumption of pecuniary

loss and recoverable damages—to which SCE&G did not object—the jury was allowed to award substantial damages for pecuniary loss regardless of whether there was specific proof of calculable pecuniary loss.[2] The wrongful death damages evidence was significant for pecuniary and non-pecuniary loss. *Compare* Order pp. 6-7 (incorrect finding "little, if any, evidence of pecuniary loss", "no testimony of how much or how often" Mr. Larios sent money to his parents, and "no evidence" that his parents depended on him for support) *with* Pl's Memo. in Opp. to Mot. for New Trial pp. 5-9, 18-19. During the testimony of Mr. Larios' brother, 8 of 12 of jurors, both men and women, cried as a result of the compelling evidence of Mr. Larios' relationship with his family, their grief and loss over his death, and the unimaginable pain of his parents for the loss of their son. Plaintiff planned to call Mr. Larios' niece (who was present in the courtroom) to testify as a witness but chose not to given the emotional impact of the evidence already presented. Now, weeks after the jury delivered its verdict, the Court has contravened its own charge and granted a new trial absolute in large part on the perceived absence of substantial, specific pecuniary loss to Mr. and Mrs. Larios. This is error.

Additionally, the Court did not identify a single trial event, an item of evidence, or anything else that would have caused the jury to base its award on passion, prejudice, or partiality. *Clark*, 284 S.C. 543, 568, 328 S.E.2d 91, 106 (Ct. App. 1985) (observing that the absence of such an event dictates against a finding of passion or prejudice) (citing *Lucht v. Youngblood*, 266 S.C. 127, 138, 221 S.E.2d 854, 860 (1976)). The reason is that there was no such outside influence on this jury, as set forth in the attached affidavits from numerous jurors themselves. *See* Rule 606(b),

[2] Plaintiff does not intend to rehash but does incorporate all arguments in her memorandum in opposition, including that Plaintiff presented evidence of pecuniary loss, pecuniary loss is not necessary to a verdict for wrongful death or survival, and intangible damaged for both actions are independently compensable.

SCRE (providing that "[u]pon an inquiry into the validity of a verdict or indictment…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"). These affidavits should resolve any doubt in the Court's mind as to the presence of outside influence on this verdict. The absence of outside influence, passion, or prejudice is further supported by the extensive *voir dire* conducted by the Court. It directly questioned jurors for bias and prejudice toward SCE&G and immigrants. The empaneled jury satisfied the parties and the Court with their answers. The Court's decision to vacate the verdict renders the *voir dire*, and the entire jury process, meaningless. The Court should reinstate the jury's verdict.[3]

With all due respect, the jury based its decision on the evidence presented at trial, and this Court erred in setting that decision aside based on evidence outside of the record. During *voir dire*, the Court made clear based on binding legal precedent that Mr. Larios' citizenship and legal status could not come into play. Now, however, the Court vacated the jury's verdict partly due to the alleged lack of visits by Mr. Larios to his parents in Mexico, or their visits to see him in the United States. In so doing, the Court directly injects the issue of Mr. Larios' legal status, which impeded such cross-border travel for family visits, into the verdict in this case. Implicit in the Court's finding is the notion that an undocumented immigrant, which the Court knew Mr. Larios to be, somehow has less of a relationship with his family because he cannot freely cross back and forth over the border for family visits. By comparison, a military wife who may not see her soldier

[3] In addition to seeking correction of the errors identified herein, Plaintiff requests that the Court reconsider and rule on all arguments raised in Plaintiff's memorandum in opposition to SCE&G's motion for new trial absolute or *nisi remittitur*, many of which the Court does not reference in its Order and has overlooked or improperly disregarded. Plaintiff incorporates each of those arguments here and asks that the Court rule on them.

husband for a year or more does not suffer any less of a loss in his death. Similarly, to the extent that a lack of frequent visitation was due to the inability of Mr. Larios and his parents to afford international travel, the notion that their familial bond was therefore "less than" is no less offensive or improper. Of critical importance is the fact that SCE&G chose not to cross-examine any of Plaintiff's damages witnesses regarding this issue of visitation. Indeed, SCE&G elected not to cross-examine any witness on any issue of damages. Instead, SCE&G raised these unfounded challenges to the Larios family bond for the first time in its post-trial motions, and therefore the Court's findings on this issue are not based on any actual evidence presented at trial. Moreover, the Court erroneously substituted its own factual inferences for those reasonably drawn by the twelve fact-finding jurors, who based their verdict not on SCE&G's post-trial attempts to sew doubt, but instead on the actual evidence at trial.

In conclusion, the Court's grant of new trial absolute is based on numerous errors of law, a view of the evidence favorable to the defendant instead of the plaintiff, and the failure to give the jury's verdict substantial deference as required by law. *See, e.g.*, *Knoke*, 324 S.C. at 141, 478 S.E.2d at 258 (holding that "[t]he jury's determination of damages is entitled to substantial deference"); *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964) (setting forth the standard that the Court must view the evidence in the light most favorable to the nonmoving party). The Court's Order fails to mention crucial facts that weigh against finding the verdict was a result of passion, prejudice, or some other outside influence, including the jury's assignment of 10% comparative fault to Mr. Larios and that, after asking a clarifying question, the jury declined to award punitive damages. These facts make it clear that while the jury may have valued the case higher than the Court would have valued it, the verdict was the product of the jury's "sober, reflective judgment," not passion or prejudice. *Lucht*, 266 S.C. at 137–38, 221

S.E.2d at 859. Plaintiff therefore requests that the Court vacate its Order and reinstate the jury's verdict.

Respectfully submitted,

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