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STATE OF NORTH DAKOTA

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In the Supreme Court
State of North Dakota

Lee Zander, individually and as Executor of the Estate of Taylor Goven, deceased; and Lee Zander, on behalf of the heirs and next of kin of Taylor Goven, deceased; and Jason Renschler, individually and as Executor of the Estate of Abby Renschler, deceased; and Jason Renschler and Sandra Renschler on behalf of the heirs and next of kin of Abby Renschler, deceased; and Shayna Monson,	Supreme Court No.: 20200211
Plaintiffs and Appellees,	District Court No.: 08-2016-CV-02137
vs.	
Jordan Morsette,	
Defendant and Appellant.	

Appeal from Judgment dated November 13, 2019 and as amended July 1, 2020 and from the Order Denying a New Trial dated June 19, 2020, by the Honorable Daniel J. Borgen in the South Central Judicial District, Burleigh County, North Dakota

BRIEF OF DEFENDANT – APPELLANT JORDAN MORSETTE

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

[¶1] Appellant/Defendant Jordan Morsette (Morsette), while intoxicated, operated his vehicle on the Bismarck Expressway from Bismarck to Mandan, North Dakota, where he collided head on with a vehicle driven by Appellee/Plaintiff Shayna Monson (Shayna). Her passengers were Abby Renschler (Abby) and Taylor Goven (Taylor). Abby and Taylor died at the scene. Shayna sustained severe bodily injuries. (Doc. 2; Appendix [A.] 13-14). As a result, Appellees brought this automobile negligence action against Morsette. (*Id.*; A. 14).

[¶2] Morsette admitted liability. (Doc. 6; A. 20; Doc. 110; A. 23). The sole trial issue was the Appellees' non-economic damages. (Trial Transcript – [T.] 20; Doc. 192, 193). The jury awarded Appellees collectively $242 million in non-economic compensatory damages at 6% interest (Doc. 192) and collectively $895 million in punitive damages (Doc. 251, 252; A. 40-43). On November 13, 2019, judgment was entered consistent with the jury's findings. (Doc. 251, 252; A. 39, 40). Notice of entry of judgment was served on November 14, 2019. (Doc. 258; A. 45).

[¶3] On March 27, 2020, the punitive damages were ordered reduced pursuant to N.D.C.C. § 32-03.2-11(4) and N.D.R. Civ. P. 59(j). (Doc. 253-256, 329; A. 47). Morsette's N.D.R. Civ. P. 59 and 60 motions for a new trial, remittitur and/or other relief were all denied by Order filed June 19, 2020. (Doc. 340; A. 60). An Amended Judgment was entered on July 1, 2020 amending the original Judgment entered on November 13, 2019. (Doc. 347 & 348; A. 73-74). Notice of Entry of Judgment was served on July 2, 2020. (Doc. 349). Morsette timely appealed. (Doc. 351; A. 80).

[¶4] This Court has jurisdiction pursuant to N.D. Const. Art. VI, §§ 2 and 6 and N.D.C.C. §§ 28-27-01 and 28-27-02. On appeal, Morsette challenges the judgment and as amended as well as the denial of a new trial.

STATEMENT OF THE ISSUES

[¶5] I. Did the district court abuse its discretion by allowing, during the compensatory portion of the trial, evidence of Appellant's intoxication and, even if relevant, did it abuse its discretion because any probative value was outweighed by prejudice, entitling Appellant to a new trial?

[¶6] II. Is Appellant entitled to a new trial because the non-economic compensatory damages awarded are excessive?

[¶7] III. Is Appellant entitled to a new trial because the trial court failed to instruct the jury, pursuant to Pattern Jury Instruction C-70.65, explaining punitive damages are not allowable in the compensatory phase?

[¶8] IV. Is the punitive damages submission and award contrary to law and otherwise excessive?

STATEMENT OF THE CASE AND FACTS

A. Morsette Admitted Liability for the Accident.

[¶9] Appellee/Plaintiff Shayna Monson (Shayna), Appellees/Plaintiffs Jason Renschler, individually and as executor of the Estate of Abby Renschler and Jason and Sandra Renschler, on behalf of the heirs and next of kin of Abby Renschler (collectively Renschler) and Lee Zander, individually and as executor of the Estate of Taylor Goven, on behalf of the heirs and next of kin of Taylor Goven (collectively Goven) brought this negligence action against Morsette. In their collective Complaint,[1] Plaintiffs allege that on June 27, 2015, Morsette negligently operated his vehicle, asserting Morsette failed to

[1] When Monson, Goven and Renschler are referred to collectively, they will be referred to as Plaintiffs.

maintain control of his vehicle, failed to maintain appropriate lane of traffic and operated his vehicle while heavily intoxicated. (Doc. 2; Complaint ¶¶ 4 & 5; A. 14-15).

[¶10] Morsette, in his Answer, admitted he was negligent, leaving the issue of Plaintiffs' damages for determination. (Doc. 6; Answer ¶ 4; A. 20). Morsette also filed an Admission of Liability, again admitting liability for the accident but not waiving any damage defenses available to him and on which Plaintiffs had the burden of proof. (Doc. 110; A. 23). His liability admission was repeated in his Pretrial Statement. (Doc. 84, ¶ 6). Plaintiffs acknowledged this admission. (T. 10/15/19, p. 6). There was no issue of comparative fault. The sole issue for trial was proof by Plaintiffs of their non-economic damages, if any, sustained due to Morsette's negligence. (Jury Trial Transcript 10/31/19–11/1/19 [T.] 12).

B. Punitive Damages Were Added by Amendment.

[¶11] Renschler, citing N.D.C.C. § 32-03.2-11(1), moved to amend the Complaint to add a claim for punitive damages, asserting Morsette's actions were malicious and oppressive. (Doc. 74, Ex. A). Punitive damages can be added only if a preponderance of the evidence supports a finding of oppression, fraud or actual malice. Presented with the motion was the toxicology report (Doc. 82), the crash report (Doc. 83) and the criminal judgment (Doc. 81). Renschler asserted oppression because "[o]ne must drink a long time to reach a BAC of .295%." (Doc. 76, ¶ 10). The "actual malice" standard was asserted because Morsette's conduct was criminal, having pled guilty to criminal vehicular homicide, N.D.C.C. § 39-08-01.2(1), and criminal vehicular injury, N.D.C.C. § 39-08-01.2(2), and Renschler asserted "[b]y definition this constitutes 'malicious' and 'oppressive' conduct." (*Id.*, ¶ 13) Goven and Monson joined in that motion. (Doc. 92, 98).

[¶12] Morsette opposed the motion, asserting actual malice played no part in the accident. There is no evidence Morsette possessed an actual intent to harm another. Any claim Morsette oppressed Plaintiffs was contrary to the statute's plain meaning as applied to the facts. (Doc. 100).

[¶13] The trial court granted amendment, concluding the threshold standard of "malice," was met stating if Morsette's "alleged conduct is proven . . . [Morsette] was reckless." (Doc. 113; A. 26).

C. Morsette Sought Bifurcation of the Compensatory and Punitive Damage Portions of the Trial and Preclusion of Evidence of Intoxication in the Compensatory Trial.

[¶14] In accord with N.D.C.C. § 32-03.2-11(2), Morsette sought bifurcation of the compensatory damages trial from the punitive damages trial, which was granted. (Doc. 121; T. 10/15/19, p. 9). Morsette, by motion in limine, sought to exclude from the compensatory damages trial Morsette's alcohol consumption, intoxication and/or driving under the influence as irrelevant. (Doc. 117, 118). And even if relevant, it was highly prejudicial. (*Id.*) Since Plaintiffs' amendment for punitive damages was based solely on Morsette' intoxication, his intoxication should not be at issue in the compensatory trial. (T. 10/15/19, p. 10).

[¶15] In response, Plaintiffs presented no evidence Morsette's intoxication was relevant to the compensatory trial. Plaintiffs only argued Morsette "does not know what is in the Plaintiffs' nightmares, what causes their panic attacks or what fears relating to alcohol creep into their daily activities." They argued Morsette "does not know if the surviving family members have changed their lives with respect to alcohol – or anything else – because Morsette was drunk that night." (Doc. 153, ¶ 6). And at the hearing, Plaintiffs

argued it was relevant because it is "hard on marriages" and "it makes a different (sic) if somebody gets killed in a wreck or if somebody gets killed needlessly on a highway because somebody chose to become three times the level of intoxication." (T. 10/15/19, pp. 11-12).

[¶16] The trial court initially took the matter under advisement (*Id.*, pp. 13-14). By Order dated October 17, 2019, it concluded Morsette's alcohol consumption was relevant to both compensatory and punitive damages, stating "Plaintiffs have shown they may have actual damages related to the alcohol-induced aspect of this case." (Doc. 160; A. 33, 35).

D. Plaintiffs Moved to Limit Morsette's Trial Testimony.

[¶17] In his deposition, Morsette did not recall the facts of the accident. Renschler moved in limine to preclude Morsette "from remembering anything differently" at trial. (Doc. 138, ¶ 6). Renschler acknowledged "[t]here is no issue as to Morsette's civil liability." (*Id.*, ¶ 3) Renschler argued Morsette should "be prohibited from making any statements of apology or remorse during the initial phase of trial." (*Id.*, ¶ 6) Any expression of remorse was "not relevant" to the compensatory phase. (T. 10/15/19, p. 16).

[¶18] The trial court denied Plaintiffs' motion, reasoning Morsette was subject to cross-examination. (Doc. 160; A. 34; *see also* T. 10/15/19, pp. 17-18).

E. The Trial Court Refused to Instruct the Jury That Punitive Damages Could Not Be Awarded in Compensatory Phase.

[¶19] On amendment to add punitive damages, Morsette then amended his requested jury instructions twice to request Civil Pattern Jury Instruction No. C-70.65. (Doc. 156, 189). It informs the jury that it cannot award damages to punish the defendant or make an

example of him by the compensatory damages award. Plaintiffs did not oppose this instruction. (T. 10/15/19, p. 3). The trial court did not so instruct the jury. (Doc. 193).

F. Morsette Did Not Attend the Trial and the Jury Was Informed Morsette Admitted Fault in Causing the Accident.

[¶20] Morsette chose not to attend the trial. The jury was instructed that "in a civil action the parties have a right to be present during the trial or right to have their attorneys appear on their behalf." (T. 12; Doc. 193). The jury was also informed "Mr. Morsette has admitted fault in causing the accident, so the only issue for you to decide are whether the accident caused the alleged injury or injuries or losses and, if so, what is the proper amount of compensation, if any, that should be paid for the alleged injury or injuries or losses." (*Id.*)

[¶21] At trial, the jury was presented with eyewitness testimony to the accident (T. 33-36) as well as video clips and a surveillance tape from that evening. (T. 37; Doc. 205; Ex. 15, 16, 17).

G. Abby's Father and Mother Testified as to Renschler's Claim for Damages.

[¶22] Abby's father and mother testified as to the Renschler claim for non-economic damages. Abby was 22 years old when she died and her parents were age 50. Abby's life expectancy was 59 years, while that of her parents were 28 and 32 years. (Doc. 193). Abby's father is employed by the Department of Defense. (T. 66). Abby's two younger siblings were ages 21 and 20 at the time of trial. (T. 55).

[¶23] Abby had a college degree in business and accounting. (T. 57). She was employed full-time. (T. 72). No evidence was presented that Abby had any dependents. No evidence was presented as to the likelihood of her contributing monetary support to her heirs.

[¶24] Abby's mother testified Abby "did not drink and drive." (T. 64). The jury was told that upon Abby's death a magnet was placed on Abby's vehicle stating "Save Lives Don't Drink and Drive." (T. 59).

H. Taylor Goven's Mother, Father and Stepfather Testified as to Their Claim for Damages.

[¶25] Taylor's mother, father and stepfather testified to the Goven claim for non-economic damages. Taylor was 21 years old on her death. Her life expectancy was 60.71 years. Lee Zander, her stepfather, was 46 years of age with a life expectancy of 33 years. (Doc. 193). No evidence was presented that Taylor had any dependents. No evidence was presented as to the likelihood of her contributing monetary support to her heirs.

[¶26] Taylor's mother, Cindy Zander, is married to Lee Zander. (T. 75). They have two minor children. (T. 76). Myles Mehloff is Taylor's father. (T. 76). He and his wife have three minor children. (T. 93).

1. Ms. Zander expressed her anger at Morsette.

[¶27] Taylor had completed her second year at UND and was home for the summer interning with her father's engineering firm. (T. 78). During the school year, Taylor lived in a Grand Forks apartment. (T. 80).

[¶28] Taylor's plan upon college graduation was uncertain. (T. 87). Taylor had a boyfriend and they had a dog together. (T. 87). Ms. Zander looked forward to Taylor obtaining a job, being married and having children. (T. 87).

[¶29] Ms. Zander, on occasion, has driven by the accident site. She does not avoid it. (T. 91-92). Ms. Zander was asked by her lawyer whether the way Taylor was killed "by a drunk driver" had an impact. (T. 83-84). Morsette's counsel objected, but Ms. Zander was allowed to testify. (*Id.*) Ms. Zander expressed her concern that others will drink and drive,

and she herself no longer drinks and drives. (T. 83-84). Morsette's intoxication also affected her, she stated, because "it just makes me mad. I mean, I'm mad at him. I can't forgive him. (T. 86).

[¶30] Ms. Zander was asked whether Morsette's blood alcohol level (BAC) had been disclosed at his criminal trial. Morsette's counsel again objected but was overruled. (T. 85). Ms. Zander responded she did recall, but when asked she replied:

> A. 2.4 or 2 point – I don't know.
>
> Q. Was it .295, do you recall that?
>
> A. Okay. Yep.

(T. 86).

Ms. Zander was then asked whether she understood "it's likely nearly four times the legal limit," to which she responded "Mm-hmm." (*Id.*)

[¶31] Even though prior to trial Plaintiffs asserted any expression of remorse by Morsette was irrelevant to the compensatory damage trial (Doc. 138), Ms. Zander was twice asked whether Morsette had sought her forgiveness, to which she responded: "He's never said he was sorry. He's never written a letter of remorse or anything." (*Id.*). And she had never received a message expressing remorse from his lawyers. (T. 92).

2. Lee Zander testified his decision not to consume alcohol has affected the Zanders' social life.

[¶32] Lee Zander met Taylor when she was age two. (T. 101). He thinks of Taylor when his children need homework help because "she was always good with that." (T. 106). He misses Taylor, explaining she "was getting to the age where they want to hang out with you." (T. 108).

[¶33] Mr. Zander testified that since Taylor's death, there are times where Ms. Zander "is up" at night. (T. 106). Mr. Zander equated the Zanders' present lack of socialization with others to the fact he no longer drinks alcohol. (T. 107). This has had "a little bit" of impact on the Zanders' relationship with each. (T. 106).

3. Myles Mehloff used to have family dinners when Taylor was in town.

[¶34] Myles Mehloff is Taylor's father. He has three children, ages 12, 11 and 5 at the time of trial, with his present wife. (T. 94). He testified his father was a highway patrolman for 29 years and it is "pretty important to stay away from the drinking and driving." (T. 96). When Taylor was in town, the Mehloffs would have a family dinner, which was "a special thing." They do not do that anymore. (T. 99). He asserted, but with no explanation, that he does not have many friends now. He also testified "[i]t's been hard on the kids." (*Id.*) His son was not yet two years old when Taylor died. (T. 99). His daughter, age 11, "doesn't like driving at night on a divided highway." (*Id.*)

I. Shayna's mother testified, as did Shayna, to her non-economic damages.

[¶35] Both Shayna and her mother testified at trial. Shayna at trial was 25 years old with a life expectancy of 56.83 years. (T. 111; Doc. 193). Shayna had been attending UND with 14 credits left to graduate. (T. 114). She was enrolled in a class preparing for the MCAT exam. (T. 115). Shayna hoped to be an anesthesiologist. (T. 112).

[¶36] After the accident, Shayna initially was unable to communicate or take care of bodily functions. (T. 120). After an extensive hospital stay, Shayna received rehabilitation care at a care facility. (T. 119). Shayna came home on April 16, 2016. (T. 120-121).

[¶37] Shayna presently lives at home. (T. 124). She can stay home by herself. (T. 125). She has been doing some cooking. (T. 125). She cannot drive. (T. 125). She needs help with some self-care like cutting her toenails. (T. 126).

[¶38] Shayna has learned to speak again. (T. 122). She struggles with hand/eye coordination and her right hand is impaired. (T. 123-124). Shayna, however, is back in college taking a class at Dickinson State University. (T. 127, 134). Her grade point average is presently a C. She received A's before the accident. (T. 128).

[¶39] Shayna testified she did not at present have trouble walking but cannot presently run. (T. 135). It is hard for her to socialize and many of her UND friends have moved on with their lives. (T. 135).

J. Plaintiffs in Closing Arguments Asked For Millions of Dollars in Compensatory Damages.

1. Shayna requested at least $65 million in damages.

[¶40] In closing argument, Shayna's counsel asked the jury to award Shayna at least $10 million for past non-economic damages and $55 million for future non-economic damages. (T. 146-147).

2. Taylor and Abby's heirs requested $18 million each.

[¶41] At the close of testimony, the trial court reiterated its ruling that Morsette's BAC was somehow relevant. The trial court stated:

> We had talked about it in the pretrial conference, and I'm overruling that on the same grounds that it is relevant to the case at hand of how alcohol has now affected these people's lives throughout. I know that you have noted your objection.

(T. 130-131).

Renschler's counsel's closing argument then highlighted Morsette's .295 BAC. (T. 149, 150). He told the jury "the girls that night they were driving down a gun barrel" and "Morsette is about to pull the trigger, and that's what happened that night." (*Id.*)

[¶42] The Renschlers had sustained the pain and suffering of losing a child and the mental anguish of identifying their child's body. (T. 153-154). They lost the right to be with Taylor, which relationship has value. (T. 155-156). And Morsette has "never shown any remorse, never shown any regret, never made any apology." (T. 149-150). Renschler's counsel told the jury it should send a message by its compensatory award, asserting Morsette is "not a very good listener. He doesn't much listen to the judges, he certainly doesn't listen to the lawyers. I don't know who he listens to. Maybe, let's see if Mr. Morsette listens to you." (T. 160). He emphatically asserted that because Morsette violated the law, he must "pay." (T. 170-171).

[¶43] Renschler's counsel told the jury Morsette could have attended trial in his own clothes.[2] By not appearing, counsel argued, Morsette "thumbed his nose" at the Plaintiffs and "ladies and gentlemen, last but not least he's thumbing his nose at you." (T. 150-151). "It's about time [Morsette] stood up and acted like a man," and by not attending trial he is a "coward." (*Id.* at 171). The jury was told they should award $14 million in future non-economic damages and $4 million for the last four years in past non-economic damages. (T. 157-158). And since "Morsette is too busy to come here today," interest should be awarded at six percent. (T. 158).

[¶44] Goven's counsel also asked for $18 million. (T. 161). He asserted anger at Morsette is a "loss" that Ms. Zander "carries around – It's like a cancer." (T. 163). While

[2] There were no facts admitted to support that statement.

Taylor's death had not torn the families apart, he argued "their lives will never be the same because of this drunk driver." (T. 164).

K. The Jury Awarded Double the Compensatory Damages Plaintiffs Had Requested.

[¶45] The jury awarded double the compensatory damages requested. (Doc. 252). It awarded Monson $170 million total with $20 million in past non-economic damages at 6% interest and $150 million in future non-economic damages. Renschler and Goven were each awarded $36 million total with $8 million in past non-economic damages at 6% interest and $28 million in future non-economic damages. (*Id.* at ¶ 2 & 3).

L. The Jury Awarded Plaintiffs Collectively $885 Million in Punitive Damages.

[¶46] After the jury's compensatory damages award, trial was held on punitive damages, premised on the fact Morsette's BAC was .295. (T. 190).

[¶47] Allowed into evidence was Morsette's petition to appear at trial in plain clothes (Doc. 238; T. Ex. 104), counsel's affidavit supporting that petition (Doc. 239; T. Ex. 105) and the order so granting (Doc. 240; T. Ex. 106). (T. 180). In ruling those exhibits admissible, the trial court states "I think that there was evidence from the compensatory on the first part of the trial here where the witnesses had testified to pain they had received by never having had any kind of accountability or apology, and I think that's relevant toward the punitive section as well . . . ." (T. 180-181).

[¶48] Also admitted was the toxicology report (Doc. 234; T. Ex. 100), the criminal complaint (Doc. 235; T. Ex. 101), the amended criminal judgment and commitment (Doc. 236; T. Ex. 102), recommended conditions for sentence (Doc. 237; T. Ex. 103), the plea agreement (Doc. 241; T. Ex. 109), a picture of a beer can at the accident scene (Doc. 242;

T. Ex. 110), and a 2009 citation for driving under the influence and leaving the accident scene. (Doc. 243-244; T. Ex. 111 & 112).

[¶49] Plaintiffs now argued Morsette was "acting with oppression" and it is on that basis that punitive damages should be awarded. (T. 194-195). Plaintiffs' counsel told the jury because Morsette's blood alcohol level was .295, they should send a message and award $295 million in punitive damages to each Plaintiff because Morsette "picked that number." (T. 186, 194). The jury so awarded. (Doc. 191, 252, ¶ 4; A. 42-43).

M. Morsette Sought Post-Trial Relief.

[¶50] Morsette moved for a new trial pursuant to N.D.R. Civ. P. 59, remittitur and/or relief from the judgment pursuant to N.D.R. Civ. P. 60. (Doc. 295). Grounds for a new trial or Rule 60 relief included: improper introduction of Morsette's intoxication in the compensatory trial; improper reference to Morsette's decision not to appear at trial; failure to instruct the jury in accord with Civil Pattern Jury Instruction No. C-70.65; and the jury's award of both compensatory and punitive damages as excessive and plainly evidenced damages awarded under the influence of passion or prejudice.

[¶51] Morsette also moved to reduce the Plaintiffs' punitive damage award pursuant to N.D.C.C. § 32-03.2-11(4). (Doc. 254).

N. The Trial Court Reduced Punitive Damage Award to Goven and Renschler in Accord With N.D.C.C. § 32-03.2-11(4), but Denied Morsette All Other Post-Trial Relief.

[¶52] In accord with N.D.C.C. § 32-03.2-11(4), the trial court reduced the punitive damage award to twice the compensatory award. (Doc. 329; A. 47). Accordingly, Goven and Renschler's punitive awards were reduced to $72 million each. Morsette was denied any additional post-trial relief. (Doc. 340; A. 60).

[¶53] The trial court viewed the fact the deaths and injuries were caused “by a drunk driver not a sober one” contributed to Plaintiffs’ “unique pain and mental anguish.” (*Id.* at A. 63). According to the trial court, “[t]heir emotional pain and grief were very different given the alcohol-induced aspect of this case because it simply was not an accident.” (*Id.*) “Morsette’s intoxication” was “the salt in the wound.” (A. 64). The trial court recognized evidence of Morsette’s intoxication was prejudicial, but it did not outweigh its probative value. While the amount awarded was “unprecedented,” the trial court nonetheless concluded it did not shock the conscience “given the testimony heard and the evidence received.” (*Id.* at A. 65-67).

[¶54] As to the jury instructions, the trial court recognized Morsette requested Pattern Instruction C-70.65 and the trial court was “not entirely clear” why it had not been included in the jury instructions. But because “Morsette did not clearly object” to the omission and the failure to give “was not plain error,” the objection was waived. (*Id.* at 68-70).

[¶55] Finally, the trial court held Morsette’s non-appearance at trial was relevant to punitive damages. It, according to the trial court, was evidence of “actual or presumed malice” on Morsette’s part. (*Id.* at A. 71-72).

REQUEST FOR ORAL ARGUMENT

[¶56] Oral argument will be helpful to the Court. Other jurisdictions have held that admission of intoxication where the defendant stipulates to liability is reversible error. The award of non-economic damages in this case is unprecedented and will have a lasting effect on future cases if not reversed.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING EVIDENCE OF MORSETTE'S INTOXICATION IN THE COMPENSATORY PORTION OF THE TRIAL.

[¶57] When a defendant admits liability in an automobile negligence case with the only remaining issue being the amount of compensatory damages, evidence regarding defendant's intoxication is irrelevant and prejudicial. The district court's ruling to the contrary entitles Morsette to a new trial.

A. The Standard of Review Is Abuse of Discretion.

[¶58] Relevant evidence is "evidence that would reasonably and actually tends to prove or disprove any fact that is of consequence to the determination of the action." *Ebach v. Ralston*, 510 N.W.2d 604, 607 (N.D. 1994), quoting *Williston Farm Equip. v. Steiger Tractor*, 504 N.W.2d 545, 548-49 (N.D. 1993). Under N.D.R. Ev. 401, 402 and 403, a district court has broad discretion over the presentation of evidence and the conduct of trial, but it "must exercise its discretion in a manner that best comports with substantial justice." *Flynn v. Hurley Enters., Inc.*, 2015 ND 58, ¶ 5, 860 N.W.2d 450 (quotation and citation omitted). Its decision on the admission of evidence will be reversed on appeal if it abused its discretion. *See id.* (quotation and citation omitted). Abuse occurs when the trial court "acts in an arbitrary, unreasonable or unconscionable manner, or when it misinterprets or misapplies the law or when its decision is not the product of a rational mental process leading to a reasoned determination." *In re Hehn*, 2015 ND 218, ¶ 25, 868 N.W.2d 551.

[¶59] The denial of a new trial is reviewed for a manifest abuse of discretion. *Stee v. "L" Monte Indus., Inc.*, 247 N.W.2d 641, 645 (N.D. 1976).

B. Morsette's Motion in Limine Seeking Preclusion Should Have Been Granted.

1. Plaintiffs presented nothing pretrial to support relevancy.

[¶60] If an issue has been removed from the case by an admission or concession of liability, it is error to receive evidence which is relevant solely to that settled issue. Morsette admitted he was negligent and the sole cause of the accident. There was no issue of comparative fault. The admission was unconditional. *Hanskett v. Broughton*, 195 N.W. 794, 794 (Minn. 1923). That left for jury resolution only the issue of compensatory non-economic damages, on which issue Plaintiffs had the burden of proof. When Morsette pretrial sought to exclude evidence of his intoxication, Plaintiffs presented nothing to support its relevance. Instead, they argued Morsette presented no evidence that his intoxication was irrelevant, even though it is Plaintiffs who have the burden of proof. According to the trial court, Plaintiffs'

> . . . emotional pain and grief were very different given the alcohol-induced aspect of this case because it simply was not an accident. Plaintiffs also asserted their lives and lifestyles changed with respect to alcohol, which impacted their own marriages and relationships with friends and other people.

(Doc. 340; A. 63-64).

[¶61] In fact, Plaintiffs had presented nothing in response to Morsette's motion in limine to show his intoxication was relevant, but instead only made unsupported arguments. Intoxication evidence should have been ruled irrelevant prior to trial. The trial court abused its discretion in denying its preclusion.

2. The cause of action was negligence.

[¶62] In denying a new trial, the trial court states that due to Morsette's intoxication, there was no accident. (Doc. 340; A. 63-64). But Plaintiffs' sole cause of action was

negligence. There was no assertion of an intentional tort. It is true that Morsette made the decision to drink and drive. But if the accident had occurred because the defendant had failed to properly maintain his vehicle or because he was driving at excessive speed, it is still an accident despite the driver's actions. The fact Morsette was intoxicated does not provide a basis to ignore his stipulation of negligence. The trial court abused its discretion when it premised its ruling on a basis contrary to law.

3. The record shows intoxication was not relevant.

[¶63] The irrelevancy of the intoxication to compensatory damages was borne out at trial. Shayna, who survived the accident, did not assert the fact that Morsette was intoxicated had any bearing on her non-economic damages. She, for example, did not assert any emotional trauma attached to the fact Morsette was later determined to be intoxicated. And there was no evidence in accord with North Dakota's wrongful death law that equated Morsette's intoxication, let alone the level of his blood alcohol content, with non-economic wrongful death damages sustained because of Taylor and Abby's death.

[¶64] The fact that Abby and Taylor died certainly has impacted the lives of their parents. But no evidence was presented, for example, of the need for psychiatric help because these women were killed by an intoxicated driver. The Zanders' purported changed view on alcoholic beverage consumption and on drinking and driving is not a "damage." The Zanders' assertion that due to Taylor's death they do not socialize because Mr. Zander has chosen not to drink alcohol does not make Morsette's intoxication relevant. The fact Morsette was intoxicated was not, as the record shows, a "substantial portion of the damages" claimed, as the trial court incorrectly states. (Doc. 340; A. 65).

4. The introduction of intoxication requires a new trial.

[¶65] The California, Minnesota and Virginia Supreme Courts have all considered whether the erroneous admission of intoxication evidence resulted in an improper damage award, requiring a new trial. *See Eubank v. Spencer*, 128 S.E.2d 299 (Va. 1962); *Fuentes v. Tucker*, 187 P.2d 752 (Cal. 1947); *Hanskett*, 195 N.W. at 794. In each case, the defendant, like Morsette, stipulated to liability for negligently causing a car accident, but the plaintiff was allowed to introduce inflammatory evidence of the defendant's intoxication. The only issue for the jury was compensatory damages. Each court held the admission of this liability evidence was error given the stipulation. *Eubank*, 128 S.E.2d at 301-02; *Fuentes*, 187 P.2d at 755; *Hanskett*, 195 N.W.2d at 794. And in deciding whether the error required reversal and a new trial, each court focused on whether "the amount [of damages] awarded plaintiffs . . . [was] disproportionate to the loss suffered." *Fuentes*, 187 P.2d at 757.

[¶66] *Fuentes* held that a $7,500 award for the wrongful death of a child was "not so large as to indicate that the jury was unduly influenced by the admission of the immaterial testimony in question." *Id.* The other two courts, however, determined the awards before them were disproportionate and should be reversed. The *Eubank* court concluded "[i]t is impossible to say that [the jury] did not consider the culpability of the defendant to enlarge the award of damages beyond what was full compensation for the injuries sustained." 128 S.E.2d at 302; *see also Hanskett*, 195 N.W. at 795.

[¶67] Reversal is required. Plaintiffs' closing which emphasized intoxication confirms its harmful nature. During trial, Plaintiffs not only made repeated references to Morsette's intoxication, but also to his BAC.

[¶68] The Court need only review the record as to how alcohol was actually used by the Plaintiffs at trial to see its lack of any probative value to Plaintiffs' claims for non-economic damages. Witnesses instead expounded how Morsette's intoxication made them angry, that he had not apologized, and how their children did not drink and drive. They introduced through the witnesses' testimony the evils of drinking and driving. And they emphasized Morsette's BAC. All was used, as the closing arguments reveal, with great effectiveness and as intended to inflame the jury and malign Morsette whenever possible. And its effect is shown by the jury awarding Plaintiffs double the compensatory damages requested.

[¶69] The sudden and violent deaths of Taylor and Abby was painful and grievous to their parents and without a doubt had they lived, their companionship would have added to their enjoyment and comfort. And Shayna was undoubtedly seriously injured. But as the Minnesota Supreme Court explained in *Hanskett*:

> The introduction of that proof [of driving while intoxicated] at the time and in the manner it was introduced was prejudicial error. There is such a general and righteously angry attitude of the public against drunken automobilists that the prejudice must be presumed. In consequence, the error requires reversal.

195 N.W. at 794; *see also Parker v. Artery*, 889 P.2d 520, 524 (Wyo. 1995) ("The introduction of evidence of intoxication would have unfairly prejudiced the jury to enhance compensatory damages as a means of punishing [defendant].").

[¶70] Once Morsette admitted negligence, only evidence relevant to damages should have been admitted. Instead, Plaintiffs were allowed to pile on extensive and irrelevant evidence that had only one purpose — improperly increasing the damage awards. The admission here was a prejudicial abuse of discretion, entitling Morsette to a new trial.

C. Even If Relevant, Evidence of Intoxication Should Have Been Excluded Because Its Probative Value Was Substantially Outweighed by the Danger of Unfair Prejudice, Confusion of the Issues or Misleading the Jury.

[¶71] Even if this Court concludes the evidence of intoxication was relevant, it should have been excluded because it unfairly prejudiced Morsette.

1. The standard of review is abuse of discretion.

[¶72] "Rule 403 recognizes that relevance does not ensure admissibility. There remains a question of whether its value is worth what it costs." *Patterson v. Hutchens*, 529 N.W.2d 561, 563-64 (N.D. 1995) (quotation and citation omitted). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. *Ebach*, 510 N.W.2d at 607, quoting *Williston Farm Equip.*, 504 N.W.2d at 548-49. A trial court has discretion to balance the probative value of the proffered evidence against the dangers enumerated in N.D.R. Ev. 403. This Court reviews that determination for abuse of discretion. *Id.*

2. The trial court abused its discretion.

[¶73] In denying Morsette a new trial, the trial court recognized "the evidence of Morsette's intoxication was certainly prejudicial to him at trial," but the trial court incorrectly concluded that someone suffers "emotional pain and grief" differently because when the driver is intoxicated "it simply was not an accident" and intoxication "was the salt in the wound." (Doc. 340; A. 63-65). The trial court recognized the prejudice flowing from its admission. The trial court stated if alcohol evidence had not been introduced "the jury would be led to believe the collision was simply a vehicular accident." (*Id.*) But that is what it was. This was a vehicle accident.

[¶74] The BAC was utilized to inflame the jury. Morsette admitted liability, but the jury was told he must pay because he "ignored the drunk driving laws," that his BAC was almost four times the legal limit, and that Plaintiffs' lives will never be the same "because of this drunk driver." (T. 164, 170).

[¶75] The jury was unquestionably inflamed, as Plaintiffs intended, and the result was a much greater compensatory damage award than even Plaintiffs requested. It is excessive. And by the time the jury got to the punitive damage portion of the trial, the jury had already heard the evidence of Morsette's level of intoxication. The jury then awarded each Plaintiff $295 million, which amount Plaintiffs requested to correspond with Morsette's .295 blood alcohol content.

[¶76] Granting a new trial will vindicate the strong public policy interests that favor stipulations, not punishing them. Stipulations are a valuable means of expediting litigation and conserving resources. When a party does admit responsibility for wrongdoing, common sense and justice suggests that its actions should be treated differently from a denial of fault. Here, the trial court did not do so. A new trial should be ordered.

II. A NEW TRIAL IS REQUIRED BECAUSE THE JURY'S VERDICT IN THE COMPENSATORY PORTION WAS EXCESSIVE AND UNDER THE INFLUENCE OF PASSION AND PREJUDICE.

[¶77] The trial court erred in refusing to grant a new trial or remittitur on the grounds that the jury's award was under the influence of passion or prejudice and excessive.

A. The Standard of Review Is Abuse of Discretion.

[¶78] The standard for review of an order denying a motion for new trial is, after viewing the evidence in a light most favorable to the verdict, whether there is sufficient

evidence to justify the verdict. *Usry v. Theusch*, 521 N.W.2d 918, 919 (N.D. 1994). A denial of a new trial is overturned when an abuse of discretion has been demonstrated. *See id.*

[¶79] On appeal, this Court considers whether the amount awarded in damages is so unreasonable and extreme as to indicate passion and prejudice on the part of the jury. *Schan v. Howard Sobar, Inc.*, 216 N.W.2d 793, 805 (N.D. 1974). The presumption that a damage verdict is proper is overcome when the verdict is so excessive it shocks the court's conscience. *Blessum v. Shelver*, 1997 ND 152, ¶ 37, 567 N.W.2d 844. "In determining on appeal whether a verdict is motivated by passion or prejudice, 'passion' means moved by feelings or emotions, or may include sympathy as moving influence without conscious violation of duty, 'prejudice' includes forming of opinion without due knowledge or examination." *Donor v. Nash Finch, Inc.*, 446 N.W.2d 747, 754 (N.D. 1989) (quotation and citation omitted).

B. The Verdict Is Not Within the Range of Reasonableness When Compared to Other Verdicts.

[¶80] The award here does shock the conscience. The award is unprecedented under North Dakota law or elsewhere. While Abby and Taylor's deaths are tragic, the evidence of record does not support $36 million in non-economic damages. Both died instantly at the scene. While the heirs' pain and suffering is real, it does not equate to $36 million. Neither Abby nor Taylor had dependents and there was no showing of a likelihood of contributing to their heirs. No heir testified to long term debilitating mental anguish or emotional distress. No evidence of or even a need for therapy was introduced. The family units remain intact despite the loss.

[¶81] As this Court has made clear, the court must test whether the award is supported by the evidence and whether it is within the range of reasonableness. This test is relatively easy to apply when it comes to economic damages, such as lost earnings, where there are objective metrics to measure loss. But when it comes to something as subjective as pain and suffering and other non-economic damages, there is no exact yardstick to determine when a damage award leaps beyond the range of reasonableness. That is precisely why courts often compare damage awards in similar cases to determine where their outer limits lie. *See Cook v. Stenslie*, 251 N.W.2d 393, 398 (N.D. 1977), citing *Holten v. Amsden*, 161 N.W.2d 478, 485-86 (N.D. 1968) (making comparison); *Johnson v. Washington Cty.*, 506 N.W.2d 632, 640 (Minn. Ct. App. 1993), *aff'd* 518 N.W.2d 594 (Minn. 1994). As this Court noted in *Cook*, while the amount of the verdict is basically within the province of the jury:

> [T]he amount of the verdict is not insulated from supervision of the court; were it otherwise, there would be no such thing as an appeal from a judgment entered on a jury's verdict. The jury's award must remain within reasonable limits in that it must be fair and reasonable, free from sentimental and fanciful standards, and based upon the facts disclosed.

251 N.W.2d at 397 (internal citations omitted). The trial court did not apply that standard in allowing the jury's award to stand.

[¶82] Renschler and Goven were awarded wrongful death non-economic damages in an amount vastly in excess of wrongful death recoveries across the nation. *See*, *e.g.*, *Tong-Summerford v. Abington Mem'l Hosp.*, 190 A.3d 631, 652 (Pa. Super. 2018) (holding that the jury's award of $1.5 million was consistent with other Pennsylvania verdicts or wrongful death claims); *Moody v. Ford Motor Co.*, 506 F. Supp. 2d 823, 847 (N.D. Okla. 2007) ("The largest verdict this Court has found for non-economic damages in a wrongful

death case reviewed by the Oklahoma Supreme Court is $5 million. . . . Most verdicts, even in wrongful death cases, are significantly less than $5 million, with verdicts for compensatory damages rarely exceeding $2 million."); *Sisk v. Manzanares*, 270 F. Supp. 2d 1265, 1276 n.39 (D. Kan. 2003) ("It is highly improbable that the $10 million verdict for purely non-economic loss could have withstood post-trial and/or appellate scrutiny."); *Glabman v. De La Cruz*, 954 So.2d 60, 62-63 (Fla.3d DCA 2007) (per curiam) (reversing as excessive $8 million award in non-economic damage to the parents of a teenage girl who died as a result of medical malpractice, reasoning it was so large it could only have been the product of passion and emotion). The Renschler and Goven awards are excessive.

[¶83] As to Shayna, there is no question she is enduring pain and has sustained life-altering injuries as a result of the accident. But an award of $20 million for past non-economic damages and $150 million for future is also excessive when compared to awards in other cases.

[¶84] In *Bravo v. United States*, 532 F.3d 1154 (11th Cir. 2008), for example, due to medical negligence an infant had severe brain injuries. He could not eat, speak, see, respond to stimuli; he screamed in pain when his body was moved and his life expectancy was 20 years. *Id.* at 1171-72 (Wilson, J. concurring in part and dissenting in part). More than $40 million was awarded for the infant and his parents, including $30 million in non-economic damages. *Id.* at 1161-68. The Eleventh Circuit observed that award — much smaller than the non-economic award here — was "the largest amount ever awarded to a single family for non-economic damages in the 60-year history" of the Federal Tort Claims Act. *Id.* at 1158. Although "recogniz[ing] the deep and abiding

tragedy of the loss [the parents] suffered" and observing that they "are obviously entitled to recover a substantial amount," the appellate court determined the award was excessive. *Id.* at 1161; *see also Meals v. Ford Motor Co.*, 417 S.W.3d 414, 428 (Tenn. 2013) (holding that $39.5 million in non-economic damages was not excessive for a six-year-old with a 55 year life expectancy who, because of a car accident, was paralyzed below the waist, his grades dropped and was receiving psychiatric treatment to assist with his emotional injuries but that it was at the high end of reasonableness); *Pouliot v. Paul Arpin Van Lines, Inc.*, 235 F.R.D. 537, 551 (D. Conn. 2006) (holding that $20 million for non-economic damages was not excessive where accident rendered plaintiff a paraplegic and he lost all voluntary control over his legs, bowel, bladder and sexual function, his wife divorced him and he struggled with depression and other mental anguish).

[¶85] Comparing the circumstances of the above cases with Shayna's situation, the verdict here of $20 million for past non-economic damages and $150 million for future is excessive.

C. The Verdict Exceeds Plaintiffs' Requests.

[¶86] Passion and prejudice is also shown by the fact the jury's award vastly exceeded Plaintiffs' own requests. Even though Plaintiffs' requests to the jury were not reasonable given the objective evidence at trial, the jury awarded far more in compensatory damages than requested. Shayna asked the jury to award her between $50–$60 million in total compensatory damages. The jury tripled that request and awarded her $170 million. Similarly, Renschler and Goven both asked for approximately $18 million in compensatory damages, and each were collectively awarded $36 million. There can be no

conclusion other than the jury was activated by passion or prejudice with Plaintiffs fanning these flames. The award is excessive and without support in the evidence.

D. Jury Was Inflamed by Plaintiffs' Arguments.

[¶87] Plaintiffs argued the jury should punish Morsette because he did not appear at trial and therefore was "thumbing his nose at you." (T. 150-151). It was argued Morsette "ignored every law and rule of human decency that exists in this world" and by your award "[m]aybe, let's see if Mr. Morsette listens to you." (T. 160). This argument of awarding damages by sending a message was a direct plea to include a punitive element in the compensatory damage award. Given the size of the non-economic damage award, there can be no conclusion but that the jury acted contrary to law and facts. A new trial must be ordered.

III. A NEW TRIAL IS REQUIRED BECAUSE THE JURY WAS NOT INSTRUCTED DAMAGES TO PUNISH MORSETTE CANNOT BE AWARDED IN THE COMPENSATORY PORTION OF THE CASE.

A. The Trial Court Abused Its Discretion in Denying a New Trial.

[¶88] Following the amendment to allow punitive damages, Morsette twice requested the jury be instructed pursuant to Civil Pattern Jury Instruction No. C-70.65, which tells the jury it may not include in compensatory damages "any exemplary damages . . . to punish the defendant or to make an example of the defendant for the public good or to prevent other wrongdoing. Those damages would be punitive rather than compensatory." Plaintiffs did not oppose that instruction. (T. 10/15/19, p. 3). The trial court did not give the requested instruction and Morsette raised this as ground for a new trial, which was denied. (Doc. 340; A. 68-70). Because the error affected Morsette's substantial rights, a new trial is required. *Gowin v. Trangsrud*, 1997 ND 226, ¶ 9, 571 N.W.2d 824.

[¶89] Jury instructions must correctly and adequately inform the jury of the applicable law. *State v. Barnes*, 551 N.W.2d 279, 281 (N.D. 1996). This Court reviews whether the jury instructions as a whole fairly and adequately advised the jury. *Gowin v. Trangsrud*, 1997 ND 226 at ¶ 9. A denial of a new trial is reviewed for abuse of discretion. *Larson v. Kubisiak*, 1997 ND 22, ¶ 6, 558 N.W.2d 852.

B. There Was No Waiver.

[¶90] The trial court denied a new trial, ruling instructional error was waived because Morsette did not object to the instruction's omission. (Doc. 340; A. 69). If the party "does not request an instruction or object to the omission of an instruction, [this Court] will not reverse unless the failure to give the instruction constitutes obvious error." *Barnes*, 551 N.W.2d at 281-82 (emphasis added); *Andrews v. O'Hearn*, 387 N.W.2d 716, 728 (N.D. 1986) ("[A]n 'automatic' exception is taken to all of plaintiff's instructions that were requested *but not given*."). Here, Morsette twice requested the instruction and therefore preserved the issue. The error was prejudicial, as evidenced by the Plaintiffs' closing arguments and the jury's award.

C. Failure to Instruct Was Plain Error.

[¶91] Furthermore, failure to so instruct constitutes plain error. "Under N.D. Civ. P. 51(d)(2), when a proper objection has not been made, '[a] court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1).'" *Taszarek v. Lakeview Excavating, Inc.*, 2016 ND 172, ¶ 15, 883 N.W.2d 880. The jury was not told in the compensatory portion of the trial they could not punish Morsette. The failure to so instruct prejudiced Morsette because Plaintiffs in their closing arguments asked the jury to punish Morsette because he had shown no remorse,

he had not listened to the judges or lawyers, but he may listen to the jury by its damage award. The jury was not told during the compensatory phase that punitive damages would separately be considered. The fact the jury compounded that error by awarding significant punitive damages does not somehow alleviate the error in the compensatory phase, as the trial court reasoned. (Doc. 340; A. 70).

IV. THE AWARD OF PUNITIVE DAMAGES IS CONTRARY TO LAW AND IS OTHERWISE EXCESSIVE.

A. Trial Court Erred In Allowing Punitive Damages.

[¶92] A motion to amend a complaint lies within the sound discretion of the trial court which will be reversed for an abuse of discretion. *Brandt v. Somerville*, 2005 ND 35, ¶ 27, 692 N.W.2d 144. Plaintiffs' motion to add punitive damages should have been denied because there was not a sufficient showing of conduct that met the punitive damage statutory standard.

B. The Actual Malice Standard Was Not Met.

[¶93] To amend there must be a showing of a "factual basis . . . that a preponderance of the evidence proves oppression, fraud or actual malice." N.D.C.C. § 32-03.2-11(1). Notably, N.D.C.C. § 32-03.2-11(9) allows for automatic consideration of punitive damages involving certain circumstances involving driving while intoxicated. It states

> if clear and convincing evidence indicates the accident was caused by a driver who, within the five years immediately preceding the accident, had been convicted for a violation of § 39-08-01 and who was operating or in physical control of a motor vehicle: a. with an alcohol concentration of at least eight one-hundredths of one percent by weight.

This condition is not satisfied in this case. (T. Ex. 102, 109).

[¶94] Nonetheless, Plaintiffs argued punitive damages were available in this motor vehicle negligence action because Morsette had a BAC of .295 and he subsequently pled

guilty to criminal vehicular homicide and injury. The trial court concluded the threshold of "malice" necessary to so amend was met, stating "if the alleged conduct is proven by the plaintiff, the defendant was reckless." (Doc. 113; A. 26). In so ruling the trial court applied the wrong standard and abused its discretion.

[¶95] The statutory standard is actual malice, not malice, actual or presumed. N.D.C.C. § 32-03.2-11(1). "Actual malice" is "actual state or condition of the mind of the person who did the act." *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 754 (N.D. 1989). In contrast, presumed malice is "that state of mind which is reckless of law and the legal rights of the citizen in a person's conduct toward that citizen." *Id.* (quotation and citation omitted). Presumed malice can be shown by demonstrating disregard for the rights of others. *Id.* at 756 n. 7.

[¶96] While the punitive damage statute at one time specifically included presumed malice, N.D.C.C. § 32-03-07, it has been repealed. *See id.* at 756 n. 6. Presently only "actual malice" can support a punitive damage award. N.D.C.C. § 32-03.2-11(1). Actual malice is "actual spite and ill will toward plaintiff." *Neidhardt v. Silverts*, 103 N.W.2d 97, 102 (N.D. 1960), quoting *Turner v. Emerson Elec. Mfg. Co.*, 280 S.W.2d 474, 479 (Mo. Ct. App. 1955). It requires more than mere reckless disregard of the circumstances. Applying a lesser standard of presumed malice or malice is error. *See*, *e.g.*, *Cudworth v. Midcontinent Commc'ns*, 2003 WL 1877984, at *3 (D.N.D. 2003).

[¶97] Driving while intoxicated is not clear and convincing evidence of actual malice. It is not in itself a positive desire and intent to injure activated by hatred or ill will toward others. And if the Legislature had intended to provide for punitive damages for driving while intoxicated outside the parameters stated in N.D.C.C. § 32-03.2-11(9), it would

have so provided. Morsette had no recollection of the accident. (Doc. 138). The record is devoid of actual malice evidence to allow submission of punitive damages and there was not clear and convincing evidence presented that supports such an award. *See*, *e.g.*, *Komornik v. Sparks*, 629 A.2d 721, 723-24 (Md. 1993) (driving while intoxicated legally insufficient to meet actual malice standard).

[¶98] Further, the trial court instructed the jury in the compensatory portion that Morsette had "the right to be present during the trial <u>or</u> a right to have [his] attorney appear on [his] behalf." (Doc. 193) (emphasis added). In the compensatory phase, Renschler in closing asked the jury to ignore that instruction, arguing Morsette disrespected the jury by not appearing. (T. 150-151, 171). He told the jury Morsette could have attended in his own clothes, even though no such fact was before the jury. (T. 150-151). The trial court then post trial stated Morsette's non-appearance at trial was somehow relevant to "establishing actual or presumed malice on the part of Morsette" for punitive damages purposes. (Doc. 340; A. 71-72). But Morsette's post-accident 2019 trial conduct lacks relevance. It too fails in any respect to support a factual finding of actual malice for Morsette's actions on June 27, 2015.

C. There is No Oppression.

[¶99] Oppression means "subjecting a person to cruel and unjust hardship in conscious disregard of his rights." *Harwood State Bank v. Charon*, 466 N.W.2d 601, 604 (N.D. 1991) (quotation and citation omitted). (Doc. 191). In *Harwood*, the defendant oppressed the plaintiff when he frustrated plaintiff's repeated efforts over months to recover their property. *Id.* There is no oppression where injuries occurred because a defendant drove while intoxicated. And the trial court had allowed punitive damages to go forward based on malice, not oppression.

D. Punitive Damages Awarded Are Excessive, Requiring a New Trial.

[¶100] The punitive damages awarded are excessive. The jury simply accepted Plaintiffs' argument that since Morsette's BAC was .295, it should award them each $295 million in damages. Such an award is not based on punishment and deterrence but was guided by passion or prejudice, which warrants judicial intervention.

[¶101] The purpose of punitive damages is to punish the wrongdoing defendant in order to deter him and others from repetition of the wrongful conduct. *Stoner*, 446 N.W.2d at 754. The law requires an effective punishment, not a draconian one. *See id.* The proper amount is only the amount necessary to serve those purposes; any greater amount is excessive. *See id.* The amount awarded is not in accord with N.D.C.C. § 32-03.2-11(5).

[¶102] Morsette is in prison and will be there for a long time. For some torts there is no effective criminal sanction available to punish the tortfeasor, such as manufacturers of dangerously defective products. Therefore, large dollar award of punitive damages is the only effective way to punish and deter manufacturers who might otherwise be inclined to deliberately risk the welfare of the consuming public for the lure of profit. Conversely, deterrence exists for drunk drivers other than punitive damages.

[¶103] It is inconceivable any drunk driver would think "I am not deterred by the possibility of being sentenced to years in jail; however, if I hurt someone else, in addition to being entitled to compensatory damages, that person might also be entitled to punitive damages, that scares me." N.D.C.C. § 32-03.2-11(5) specifically requires that criminal sanctions for the same conduct be taken into account in mitigation. Morsette argued for such mitigation. (T. 195-196). None was granted. Given the criminal sanctions imposed on Morsette, an award of millions of dollars in punitive damages is double punishment

for the same conduct. The trial court failed to take this or N.D.C.C. § 32-03.2-11(5) generally into account. *See Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806, 813 (Minn. Ct. App. 1992) (upholding reduction in punitive damage award because media attention had served same purpose as punitive damages).

[¶104] The fact the trial court was required to reduce the award to Renschler and Goven as N.D.C.C. § 32-03-11(4) mandates does not somehow relieve its excessiveness. The punitive damages awarded are excessive as is the compensatory award. If the compensatory damages are reversed, so too must the punitive damages. A new trial is necessary.

CONCLUSION

[¶105] The judgment and as amended should be reversed. A new trial should be ordered on compensatory damages. Punitive damages should be dismissed or alternatively a new trial granted.

LOMMEN ABDO, P.A.

Dated: November 5, 2020

BY *s/ Kay Nord Hunt*

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CERTIFICATE OF COMPLIANCE

[¶106] The undersigned attorney for Appellant certifies that the attached brief complies with the page limitation stated in North Dakota Appellate Court Rule 32(a)(8)(A). The page count of the filed electronic document states that the document contains 38 pages, exclusive of this Certificate of Compliance.

s/ Kay Nord Hunt
Kay Nord Hunt (*Pro Hac Vice* #P00253)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Shayna Monson; Jason Renschler, Individually and as Executor of the Estate of Abby Renschler, deceased; and Jason Renschler and Sandra Renschler, on behalf of the heirs and next of kin of Abby Renschler, deceased; and Lee Zander, Individually and as Executor of the Estate of Taylor Goven, deceased; and Lee Zander, on behalf of the heirs and next of kin of Taylor Goven, deceased, Plaintiffs – Appellees, vs. Jordan Morsette, Defendant – Appellant.	)	Supreme Court No.: 20200211 District Court No.: 08-2016-CV-02137

AFFIDAVIT OF SERVICE

[1] The undersigned, being first duly sworn, deposes and states that on November 5, 2020 the following documents:

Brief of Defendant – Appellant Jordan Morsette

Appendix to Brief of Defendant – Appellant Jordan Morsette

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[2] To the best of affiant's knowledge, the addresses above given are the actual addresses of the parties intended to be so served. The above document is served in accordance with the provisions of the North Dakota Rules of Civil Appellate Procedure.

Brittany Sharpe
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Toni Nicolson
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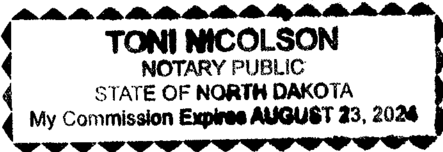
Notary Public



IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Zander, et. al. v. Morsette
Supreme Court No.: 20200211
Burleigh County No.: 2016-cv-02137

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