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STATE OF NORTH DAKOTA

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, Plaintiffs-Appellees, v. Jordan Morsette Defendant-Appellant.	Supreme Court Case No. 20200211 District Court Case No. 08-2016-CV-02137

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

BRIEF OF APPELLEES

(Oral Argument Requested)

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3. A new trial is not required because the jury was properly instructed on the law.

4. The award of punitive damages is not contrary to law nor was it excessive.

STATEMENT OF FACTS

¶1 Jordan Morsette (hereinafter "Morsette"), with a Blood Alcohol Level of .295, drove the wrong way on a divided highway, crashed his car head-on into a vehicle in which Taylor Goven (hereinafter "Taylor") and Abby Renschler (hereinafter "Abby") were passengers, and Shayna Monson (hereinafter "Shayna") was the driver. Taylor and Abby were killed and Shayna was seriously and permanently injured. In this case, those three young women and the decedents' heirs sought damages against Morsette.

¶2 The jury heard testimony and evidence of how the lives of these three (3) young ladies and the lives of their families were tragically forever impacted by the actions of Mr. Morsette. The following is a tiny fraction of the list of those impacts that stretch from June 27th, 2015 to the end of time:

i. Death of Taylor;

ii. Death of Abby;

iii. Brain injury of Shayna;

iv. The crash was so horrific, and the three (3) girls looked so similar that law enforcement could not tell which girl was which, so they needed parents to identify them so they could tell which one was the one that survived. (T. 47:8 – 24:15)

v. Law enforcement's nighttime visit to Abby's parents; (T. 22:8 - 23:11)

vi. Law enforcement calling Lee Zander to inform him Taylor was dead; (T. 101:19 – 104:2)

vii. Lee Zander telling Cindy that Taylor was dead; (T. 81:8 - 81:15)

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ix. Taylor's parents telling her little brother and sister (who was 6 years old) that Taylor was dead; (T. 88:14 – 89:16)

x. Myles Melhoff, Taylor's father, describing having lunch with his daughter and then how she was killed later that night; (T. 96:5 – 96:16)

xi. Myles Melhoff, being told by law enforcement that Taylor was killed; (T. 97:5 – 98:11)

xii. Myles Melhoff testified to pulling back the sheet that was covering Taylor's body at the St. Alexius morgue; (T. 98:14 – 98:21)

xiii. Myles Melhoff testified to the incredible loss the family has endured in losing Taylor in this way. The socialization lost, no family dinners, and Taylor's young siblings struggling with the fear associated with night driving on divided highways. (T. 98:22 – 99:19)

xiv. Lee Zander described the loss that he and Taylor's mother deal within the end of their socialization. They do not go out anymore. He does not drink socially because of how Taylor was killed. (T. 106:4 – 107:19)

xv. Abby's parents identifying her body at the hospital; (T. 23:12 – 24:15)

xvi. Sandy Renchler collapsing; (T. 51:22 – 21:24)

xvii. Jason Renchler shaking Abby's body at the St. Alexius morgue telling her to get up; (T. 51:22 – 21:24)

xviii. The St. Alexius security guard breaking down and crying while the Renchler's made this identification; (T. 52:10 – 52:13)

xix. The Renchler family photo now changed forever; (T. 56:13 – 57:3)

xx. Abby's college graduation photo – one month before her death; (T. 57:4 – 57:8)

xxi. Taylor's academic achievements in engineering: (T. 78:2 – 78:22)

xxii. Taylor's collegiate level figure skating achievements: (T. 79:8 – 79:25)

xxiii. Shayna's outstanding academic achievements; (T. 112:4 –115:7)

xxiv. Shayna was 14 credits from graduation and headed to medical school with plans to be an anesthesiologist; (Id.)

xxv. Connie Monson being awakened by law enforcement ringing her doorbell; (T. 116:11 –116:25)

xxvi. Connie Monson describing the scene in the ICU with tubes coming from Shayna's brain; (T. 117:18 – 117:25)

xxvii. Months of hospitalization for Shayna; (T. 119:1 – 120:7)

xxviii. Shayna not able to speak and move; (Id.)

xxix. Video of Shayna learning to speak again; (T. 1223 – 122:19)

xxx. Shayna learning to walk again; (T. 122:23 –123:17)

xxxi. Heard Shayna testify and struggle to speak and talk about her dreams then and now; (T. 133:12 –135:23)

xxxii. Watched the surveillance video of the crash; (T. 37:2 – 37:24)

xxxiii. Eyewitness description of the violence of the crash and the condition of the victims; (T. 40:21 – 40:05)

xxxiv. Cindy Zander testified that the fact that Taylor was killed by an intoxicated driver has dramatically altered the family's life socially. It has directly impact their social interaction with people when alcohol is being consumed; (T. 84:4-18)

ARGUMENT

The trial court did not abuse its discretion in allowing evidence of Morsette's intoxication in the compensatory phase of the trial.

¶3 In fact – there are two (2) definitive reasons why the inclusion of evidence of Morsette's intoxication was required to be included in the compensatory phase of the trial.

¶4 First, and of central importance is that Morsette did not provide an unqualified admission of liability. Rather than an unqualified admission, his specific wording required the jury to determine what injuries were caused by his actions

¶5 His admission of liability was a "qualified admission". He specifically stated:

> "Jordan Morsette does not admit to the nature and extent of the injuries and damages being claimed by the plaintiff or that the injuries claimed by the plaintiff were caused by the accident which occurred on June 27, 2015." (Doc. # 110)

¶6 Morsette by this qualification required the jury to determine if the following:

i. Whether the nature of the damages claimed by the plaintiffs were caused by the June 27th, 2015 collision; and

ii. Whether the extent of the damages claimed by the plaintiffs were caused by the June 27th, 2015 collision.

¶7 This is critical because Morsette's very request necessitates that action of which he now complains.

Evidentiary Issues are Discretionary

¶8 N.D.R.Evid. 103 states in part;

(a) **Preserving a Claim of Error**. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
(1) if the ruling admits evidence, a party, on the record:
(A) timely objects or moves to strike; and
(B) states the specific ground, unless it was apparent from the context;

¶9 Rule 103 requires the party to create a record which will permit informed appellate review. Wagner v. Peterson, 430 N.W.2d. 331 (ND 1988) The probative effect and admissibility of evidence is a matter for the trial court's discretion. Cass County Joint Water Resource District v. Erickson, 2018 ND 228, ¶8, 918 N.W.2d 371. That discretion will not be reversed on appeal unless it is abused. Nelson v. Nelson, 2018 ND 212, ¶10, 917 N.W.2d 479.

The Evidence of Morsette's BAC was Relevant

¶10 In his Motion in Limine, Morsette argued that the blood alcohol level was;

(1) Not relevant; and

(2) Unfairly prejudicial under N.D.R.Evid. 403.

¶11 First, how your child dies or is injured is relevant to the loss sustained by the parents. As a matter of public policy in North Dakota, this tragedy was "preventable". While Morsette's brief repeatedly refers to what happened when he killed two young women and permanently injured another young woman an "accident," the official position of the State of North Dakota rejects that notion. The official position of the North Dakota Department of Transportation appears to be the following:

Crashes are not accidents. The word "accident" promotes the perception that crashes are outside of human control when, in fact, crashes are predictable results of specific actions.

https://visionzero.nd.gov/uploads/71/NDDOT_2019_Crash_Summary_hires_nobleed.pdf at p. 3.

Morsette took specific actions that led to the "predictable results" here.

¶12 Morsette's admission of liability was a "qualified" admission and therefore, Morsette made the evidence relevant. Even had he made an "unqualified admission", it was still relevant. As recently stated by a Federal Court in Florida:

> Under Florida law, describing the details of an accident is clearly relevant and admissible to a pain and suffering analysis, even when a defendant has admitted liability, when evidence is proffered by a plaintiff. Poindexter v. Zachar Zewski, 2019 WL 1469537 (S.D. Fla. 2019)

¶13 The relevance of how your child is killed or injured to the surviving family members is now undeniable.

¶14 As stated in the trial court briefing and in a recent publication:

> **(1) LOSS OF A CHILD**
>
> The loss of a child is generally considered the worst possible grief, making it one of the leading causes of prolonged grief. In the natural order of life, children are supposed to outlive their parents.
>
> "The death of a child is like no other," says clinical social worker and grief counselor at the Children's Hospital and Clinics, Minneapolis, Minn., Theresa Huntley, in her book "When Your Child Dies." "Your life has been irrevocably changed. Life is different. You are different."

Parents universally say that when their child dies, a part of them dies. A child is a symbol of the future and losing that child represents a loss of hopes and dreams. While the experience of pain and loss is universal, transcending culture and class, the grieving process is still a very individual and personal experience.

(2) FACTORS AFFECTING GRIEVING

The circumstances surrounding the death of a child also greatly affect how parents and survivors grieve. Research has shown that when the death is traumatic or when the parents witness the death or find the body of their child, they are likely to be more traumatized by the experience, become obsessed with the death, and replay the events over and over in their heads.

If a child is sick for a period of time, the family has time to come to terms with the idea of losing the child. They experience anticipatory grief. Anticipatory grief is also seen in terminally ill patients. It is a time of mourning and preparing for a loss before it happens. When the loss is sudden or unexpected, parents are left in a state of shock and disbelief even greater than that which is normally expected. People regret they had no time for goodbyes. They are unprepared, although nothing could actually prepare them for the feelings they will experience. The naturalness of the death therefore also affects people's grief. Suicides, murders, and accidents are especially difficult for parents to process.

(3) THE GRIEVING FATHER

Similar to when a sibling loses a brother or sister, the father of a deceased child is sometimes referred to as a forgotten griever. A father's grieving often takes place at different times than the mother's, and both will experience recurring grief at varying times.

The nature of the parental bond affects the level and duration of the grief experienced. The maternal bond is established before childbirth, is more immediate, more physical, more intimate. Therefore, mothers are more susceptible to depression

> after the loss of an infant. Fathers often feel a sense of disappointment, failure, and resentment.
>
> Fathers must give themselves permission to grieve. In many cultures, society says that men are not supposed to cry. They must support the grieving mother and be strong for the surviving siblings and other family left behind. They attend to the practical matters of the death and the household. Men oftentimes have a determination not to grieve, which leads to emotional distress, anger, depression and eruptions years later. A grieving father could feel ignored, abandoned, isolated or overwhelmed. He must seek out comfort in friends, family, and co-workers - wherever he can find support.
>
> *www.allpsychologycareers.com/topics/loss-of-a-child.html*

¶15 The BAC evidence was clearly relevant to the Plaintiffs injuries.

The Evidence was Properly Admitted under N.D.R.Evid. 403

> RULE 403. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS
>
> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following:
>
> (a) unfair prejudice;
> (b) confusing the issues;
> (c) misleading the jury;
> (d) undue delay;
> (e) wasting time; or
> (f) needlessly presenting cumulative evidence.

¶16 Rule 403 is an adaption of Rule 403 of the Federal Rules of Evidence. The rule vests wide discretion in the trial court to control the introduction of evidence. N.D.R.Evid. 43, Explanatory Note.

¶17 A district court is accorded wide discretion in determining the admissibility of evidence under Rule 403. Ellicott v. Am. Capital Energy, Inc., 906 F.3d 164 (1st Cr. 2018)

¶18 Prejudice alone is not sufficient to warrant exclusion under Rule 403. Virtually all evidence is prejudicial to one party or another. When a defendant is "being prosecuted for exactly what [the evidence] depicts," courts consistently have rejected Rule 403 challenges, "To justify exclusion under Rule 403, the prejudice must be unfair."

¶19 Prejudice is unfair if the evidence was designed to elicit a response from the jurors that is not justified by the evidence. Weinstein's Federal Evidence § 403.04 [1][b] (2nd edition 2019)

> "Although images and videos depicting child pornography are by their very nature disturbing and viewing such depictions is highly likely to generate an emotional response .... admission of images and video clips of child pornography found on Defendant's media devices was not unfairly prejudicial, because the Defendant did not argue that images and video clips were not representative of materials found on his media devices or that number of files shown, or amount of time jury spent reviewing them was impermissibly excessive." See United States v. Evans, 802 F.3d 942 (8th Cir. 2015)
>
> The use and admission of photographs in criminal trials, like most evidence, rests largely within the discretion of the trial court, even when the photographs may have the additional effect of exciting the emotions of the jury. Even gruesome pictures are admissible for a proper proof of purpose. State v. Miller, 466 N.W.2d 128 (ND 1991)

¶20 Morsette's qualified and ambiguous admission of liability also does not support his argument. The cases cited by Morsette attempting to support that alcohol references should be excluded in the compensatory phase involved unqualified admissions of liability which by Morsette's own choosing did not exist here. These cases are from

another era when the plague of drunk driving was met with societal indifference. That era no longer exists.

¶21 Admission of Defendant's prior convictions for possession of heroin and other drug offenses was not unfairly prejudicial, in prosecution for possession with intent to distribute heroin, despite Defendant's willingness to stipulate to requisite intent if jury found that he possessed heroin. US v. Dorsey, 523 F.3d 878 (8th Cir. 2008)

¶22 No vivid autopsy photographs or accident photographs showing their mangled bodies in the wrecked vehicles were offered by Plaintiffs. Photographs that were available and photographs that have been introduced in similar cases.

¶23 In a wrongful death case, it was not error to admit photographs of the decedent's body as evidence of pain and suffering. Walker v. Norris, 917 F.2d 1449 (6th Cir. 1990)

¶24 Generally, doubts about the existence of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or waste of time should be resolved in favor of admitting the evidence, taking necessary precautions by way of contemporaneous instructions to the jury followed by additional admonition in the charge. The burden is on the objecting party to show that relevant evidence should be excluded under the rule. State v. Randall, 2002 ND 16, ¶15, 639 N.W.2d 439.

¶25 The use and admission of photographs in criminal trials, like most evidence, rests largely within the discretion of the trial court, even when the photographs may have the additional effect of exciting the emotions of the jury. Even gruesome pictures are admissible for a proper proof of purpose. State v. Miller, 466 N.W.2d 128 (ND 1991)

¶26 The simple truth is that in wrongful death cases some of the testimony is emotional. The loss of a child certainly qualifies as such.

¶27 It should be noted that Mr. Morsette voluntarily chose to drink himself blind-drunk, he voluntarily chose to get behind the steering wheel, and he voluntarily chose to race the wrong way on a one-way street. He now claims he was unfairly prejudiced by the truth.

A new trial is not required because the jury was properly instructed on the law.

¶28 In its instruction entitled *Statement of the Case,* the Court correctly informed the jury of the issues in the trial. In reliance upon Morsette's statement of the issues, the Court, without objection outlined the issues of the upcoming trial.

> **STATEMENT OF CASE**
>
> This is a civil action brought by the Plaintiffs against the Defendant, Jordan Morsette to recover damages for personal injuries and wrongful deaths sustained by the Plaintiffs as a result of the motor vehicle accident tin Morton County, North Dakota on June 27, 2015. In a civil action, the parties have a right to be present during the trial or a right to have their attorney appear on their behalf.
>
> 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.

¶29 The issues were the following -

> (1) Did Mr. Morsette's wrongful acts cause loss to the Plaintiffs, and if so;
>
> (2) What is the proper amount of compensation.

¶30 The three cases were tried together; without objection by Mr. Morsette. As stated by the Court.

MULTIPLE PLAINTIFFS

> Although there are three Plaintiffs in this action, it does not necessarily follow that if one is entitled to recover, all are entitled to recover. The Defendant is entitled to a fair consideration of the Defense as to each Plaintiff, just as each Plaintiff is entitled to a fair consideration of the Claim against the Defendant. Unless otherwise stated, all instructions given you govern the case as to each Plaintiff.

¶31 Mr. Morsette did not object to the joint trial. Mr. Morsette did not request any limiting instructions pertaining to damages.

¶32 Furthermore, the Court instructed the jury (without objection):\

JUDGING THE EVIDENCE

> In considering the evidence in this case, you are expected to use your own good common sense. Consider the evidence for only those purposes for which it is admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

¶33 Mr. Morsette voluntarily chose not to voir dire on any of the issues of which he now complains. In exercising their "common sense; losing a child in preventable accident would be within the "common knowledge" of jurors.

¶34 Morsette voluntarily chose not to present any witnesses at trial.

¶35 Morsette voluntarily chose not to present cross examine any of plaintiffs' witnesses at trial.

¶36 Morsette was given multiple opportunities to request additional jury instructions or suggest changes to the ones the Court gave and he did neither. We need to talk about this jury instruction claim made by Mr. Morsette. There were numerous instances in

which Morsette could have availed himself of these opportunities but did not. These instances include but are not limited to the following:

- Modifications to opening instructions discussed by Court and counsel (T 9:9 – 11:11)
- Court give parties additional time to look over instructions: (T 11:12 – 12:17)
- Opening instructions were read to jury at the top of p. 14 of the transcript. (Line 1).
- After going through the instructions, Court inquires of parties if there is anything else to address. (T 14:16-25)
- Following a break and outside of the presence of the jury the Court asked each attorney if they had anything else they wished to address to the court and counsel for Morsette advised he did not. (T 16:5-6).
- As day one (1) of trial was concluding, the Court talks about correcting issues in the closing jury instructions. (T 137:24 - 138:1).
- Immediately after discussing those corrections at the end of the first day of trial, each attorney, separately, including counsel for Morsette, was asked again if he had anything else to address to the court and the answer was in the negative. (T 138:9)

¶37 The law requires that Morsette avail himself of these opportunities if he has concerns about the jury instructions.

Motion for New Trial

¶38 The decision to grant or deny a new trial rests entirely within the discretion of the trial court. Bjorneby v. NoDak Mut. Ins. Co., 2016 ND 142, ¶ 13, 882 N.W.23 232. No error in admitting or excluding evidence is grounds for granting a new trial or otherwise disturbing a judgment or order, unless the refusal to take such action is inconsistent with substantial justice. Bartholomay v. St. Thomas Lumber Co., 148 N.W.2d. 278 (ND 1967).

¶39 The North Dakota Supreme Court will not reverse the trial court's order on that ground unless an abuse of discretion is clearly show. Scham v. Howard Sober, Inc., 216 N.W.2d 793 (ND 1974)

¶40 A motion for new trial on ground of excessive damages is addressed to the judicial discretion of trial court and an appellate court will not interfere with trial court's decision upon such motion unless a manifest abuse of discretion is shown.

¶41 A verdict will not be set aside solely on ground that it is excessive, unless the amount thereof is so excessive as to demonstrate that the jury was influenced by passion or prejudice. Anderson v. Schreiner, 94 N.W.2d 294 (ND 1958)

¶42 Abraham Lincoln must have had Jordan Morsette in mind when he said;

> *He is man .... who after murdering his parents, stands before the Court and pleads for mercy on the grounds that he is an orphan.*

¶43 A civil jury trial is a search for the truth. Rogen v. Monson, 609 N.W.2d 456 (S.D. 2002). If Mr. Morsette had a problem with the accuracy of the blood alcohol level; he certainly had plenty of opportunities to challenge or question it either in a pretrial hearing or at the trial. The actual blood test report was not even introduced in the compensatory phase of the trial.

¶44 If Mr. Morsette objected to the Plaintiffs' testimony, he certainly was free to make a hearsay objection.

¶45 The admission of the testimony during the compensatory phase of the trial was not an abuse of discretion.

Jury Instructions

¶46 On appeal, jury instructions are reviewed as a whole and if they correctly advise the jury of the law, they are sufficient although parts of them, standing along, may be erroneous and insufficient.

¶47 The jury instructions should fairly cover the claims made by both sides of the case; and only errors or defects which affect the substantial rights of parents warrant a new trial. Travelers Cas. Ins. Co. of America v. Williams Co. Const. Inc., 2014 ND 160, ¶12, 851 N.W.2d 164. A party must object to proposed jury instructions in order to preserve any alleged error in including or failing to include such instructions. Praus ex rel. Praus v. Mack, 2001 ND 80, ¶43, Fn. 1, 626 N.W.2d 239. Furthermore, when a party has an opportunity to argue a legal concept or theory to the jury and the instructions given allow for the jury to adopt that theory, there is no error. Rittenour v. Gibson, 2003 ND 14, ¶58, 656 N.W.2d 691 (citing Praus at ¶¶43-44, and State v. Olson, 356 N.W.2d 110, 114 (N.D. 1984)).

¶48 In the present case, Morsette was given the opportunity to ask the jury not to include any exemplary damages in the compensatory damages they would award. Furthermore, Morsette specifically argued in the exemplary damages phase that if the jury did, in fact, include punitive damages in their compensatory damages award, the jurors should take that into consideration in awarding the anticipated punitive damages.

(T. 196:12-16) The jury heard what Morsette said, but did neither. There is nothing about the compensatory damages award that appears to suggest it was intended to be punitive, and there is nothing about the punitive damages award that suggest the jury reduced it based upon Morsette's specific argument to the jury that it could and should.

A new trial is not required because the jury's verdict in the compensatory portion was not excessive nor was it under the influence of passion and prejudice.

The Compensatory Damages were Appropriate

¶49 It is shameful that Morsette would have the audacity to argue that the lives of these young ladies is not worth every single dollar of the jury's verdict. We as a society value the fleeting ability of a quarterback to toss a football for a five-year period in the hundreds of millions of dollars. It is the height of hypocrisy to value the permanent and lifelong loss of these young women and their families in anything less than many multiples of that type of numbers.

¶50 The transcript is filled with the information supporting the damages. The information produced above it is but a tiny fraction of the testimony and evidence provided by the plaintiffs in this case. That was echoed by the trial court in its order and reproduced in part below:

> "The testimony at trial established that these were three very successful young women who were very close with each of their respective families and with each other. Each of the Plaintiffs testified regarding the noneconomic damages they have suffered in nearly every single aspect of their lives. The Court will not detail all of the damages testified to as they would be too numerous to list. However, the testimony at trial established that the noneconomic damage was, and still is, significant for each of the

> Plaintiffs and/or their representatives." Order on Defendant's Motion for New Trial, Remittitur, and/or Relief from Judgment Pursuant to NDRCivP 59 and 60. (Index #340), at ¶24.

¶50 The pain and loss of the Renchler and Goven and Monson families was tremendous.

¶51 The jury watched a video of Shayna Monson learning to speak again. The power of that video is a window into the hell that will haunt these plaintiffs forever.

¶52 Morsette should be ashamed to even put into words the argument that the jury did not provide justice.

¶53 The award of compensatory damages was for non-economic damages. The evidence supporting these awards came from witnesses and exhibits. The jurors watched these parents and Shayna testify. Morsette made no objection to any of the testimony. Morsette made no objection to any of the exhibits. Morsette presented no evidence to contradict or impeach anything presented by the plaintiffs.

¶54 In determining credibility, it is proper to consider their appearance, conduct on the stand, demeanor, and matter of testifying such as candor or frankness of evasiveness of their story. Wellens v. Beck, 103 N.W.2d 281 (ND 1960)

¶55 As a matter of public policy in North Dakota, this tragedy was preventable.

¶56 It is presumed that a damage verdict is proper and this presumption is overcome only when the jury's verdict is so excessive that it shocks the conscience of the Court. Jalbert v. Eagle Rigid Spans, Inc., 2017 ND 50, ¶16, 891 N.W.2d 135

¶57 An award of damages is excessive and justifies granting of a new trial when amount is so unreasonable as to indicate passion or prejudice on part of jury; "passion"

means motivation by emotions while prejudice means formation of opinion without due knowledge. Wanner v. Getter Trucking, Inc., 466 N.W.2d 833 (ND 1991).

¶58 Public acceptance of drunk driving has evolved in the past 30 years. The grief suffered by the victims of drunk drivers has also became more recognized, acknowledged, and respected by the law. The grief caused by Morsette was real and it was immense.

¶59 Losing a child and having a child seriously and permanently injured under these circumstances causes grief beyond measure. But that is exactly what a jury does. They measure and determine the amount of damages.

¶60 In this case, the damages were not a reflection of passion or prejudice. They were a reflection of the truth.

The Case Law cited by Morsette is contradicted by the Record in the Court

¶61 Interestingly, Morsette cites a 1947 California case in support of his argument that the blood alcohol level was not relevant. In Fuentes v. Tucker, the 1947 Court states:

> One of the functions of the pleadings in an action is to limit the issues and narrow the proofs. If alleged facts are not controverted, they are not in issue, and no evidence needs to be offered as proof of their existence. Fuentes v. Tucker, 31 Cal2d 1, 187 P.2d 752, 754; 43 Am. Jur., Trial, § 105, p 93.
>
> **When an issue has been taken from a case by an unqualified admission of liability, it is error to receive evidence which is material solely to the excluded matter.** Fuentes v. Tucker, supra; Hanskett v. Broughton, 157 Minn. 83, 195 N.W. 794.[1]
>
> Morsette's Brief, Index # 297, p.8

[1] The 1947 California case also held that only the father could bring the wrongful death action because husbands solely had management and control of community property. The California Court also held that it was error to join the mother. Certainly 1947, was a long time ago.

¶62 However, the causation of the Plaintiffs injuries and the nature and extent of the injuries were at issue because Morsette put them in issue. His actual "Admission of Liability" stated in part:

> "Jordan Morsette does not admit to the nature and extent of the injuries and damages being claimed by the Plaintiffs or that the injuries claimed by the Plaintiffs were caused by the accident which occurred on June 27, 2015."

¶63 In this case, the blood alcohol testimony was clearly relevant to the Plaintiffs losses.

¶64 Interestingly, Morsette cites no North Dakota cases in support of his position. All of his cases require an "unqualified admission on liability ... meaning fault and causation. That is not the record before the Court. That was not the record before the jury.

¶65 Parker v. Artery, 889 P2d. 520 (Wyo 1995) was a personal injury case which held that the trial court did not abuse its discretion in precluding the evidence. *Gelinas v. Mackey*, *465 A.2d 498* (*N.H. 1983*) held that it was harmless error to admit the evidence in a personal injury case.

¶66 Morsette cites *Russell v. Wis. Mut. Ins. Co.*, *571 N.W.2d 924*. (*Wis. 1997*). Russell is an unpublished opinion which has no precedential value.

¶67 Nhep v. Roisen, 446 N.W.2d 425 (Minn Ct.App. 1989) was a personal injury case and the trial court's exclusion of evidence was not clearly erroneous. Once again, allowing the trial court discretion on the admission or exclusion of evidence.

¶68 Anderson v. Amundson, 354 N.W.2d 895 (Minn Ct.App. 1984) was a personal injury case and had an unqualified admission of liability.

¶69 *Eubank v. Spencer*, *128 S.E.2d 299* (Va *1962*) was another personal injury case. It also clearly said;

> "When an issue has been taken from a case by an unqualified admission it is error to receive evidence which is material solely to the excluded matter." Id.

¶70 However, Mr. Morsette's Admission of Liability was not an "unqualified admission". By his specific pleading he placed the nature, extent, and causation of these injuries in issue.

¶71 Mr. Morsette had the option of admitting causation. He voluntarily chose not to.

¶72 In Puent v. Dickens, 427 S.E.2d 340 (Va. 1993), the Virginia Supreme Court held,

> Such evidence is not relevant to the determination of the quantum of compensatory damages and should not be admitted when that is the only issue before the jury.

¶73 However, Mr. Morsette's own actions put the causation of damages in front of the jury.

Jordan Morsette voluntarily chose not to attend the trial.

¶74 Jordan Morsette filed a Motion seeking to attend the trial, to wear street clothes and to be without restraints. That Motion was granted without objection. Docket ID# 150.

¶75 Jordan Morsette voluntarily chose not to attend the trial.

¶76 In a pre-trial ruling, the Court also ruled that Morsette would be allowed to "express his remorse or apology during trial" Docket ID# 160.

¶77 Morsette chose not to do so.

¶78 Commenting on his absence was relevant, accurate, and it certainly does not warrant a new trial.

N.D.R.Civ.P. 60 is inapplicable to this case.

¶79 *N.D.R.Civ*.P. 60 does not nor ever was intended to provide the relief requested by Morsette in this case.

Exemplary Damages were appropriate

¶80 Morsette argues that mere drinking and driving is not actual malice. This argument is the purest of red herrings. Goven, Renschler and Monson did not assert that mere drinking and driving is the actual malice in this case. The judge in this case properly instructed the jury on the standard for exemplary damages. The jury watched a video of what Morsette did. The jury watched, in the video, as Morsette raced eastbound on the divided highway, veered left, crossing the ditch dividing the highway, crossed the westbound lane and then went into the ditch on the far side. They watched him, in the video, sit there, briefly, before he drove back up onto the highway, stomping on the gas pedal and then smashing, head-on, into the car the young women were in, killing two and permanently injuring the third. To say that Morsette's conduct was merely drinking and driving, ignores the horrific events leading up to the head-on crash that night.

CONCLUSION

¶81 The trial court did not abuse its discretion in allowing the blood alcohol evidence into the compensatory phase of the trial. The trial strategy of Morsette in not providing an

unqualified admission of fault squarely put that issue into the required purview of the jury. Additionally, the direct link between the plaintiffs' damages and the alcohol component of case resulted in an alcohol related damage (i.e. – surviving parents' disengagement from the social use of alcohol) separately and distinctly required the inclusion of blood alcohol evidence in the compensatory stage of the proceedings.

¶82 Morsette's trial strategy of not calling any witnesses nor crossing any of the plaintiffs' witnesses makes it extremely difficult for him to argue that the jury's damages numbers are too high. It is incumbent upon the parties to provide the jury with their position regarding damages. That is done through admission of evidence and arguments of counsel. The plaintiffs did so with very compelling evidence and argument and the jury listened.

¶83 Morsette's complete failure to do so may have been a trial strategy but it is not proper for Morsette to ask for a "re-do" when that trial strategy of not presenting any evidence or argument did not work.

¶84 This is clearly a punitive damages case and the Court's decision is correct and the jury's verdict is correct.

APPELLEES' REQUEST FOR ORAL ARGUMENT

¶85 Oral argument would be helpful to Court in this matter. Appellant has posited a wide variety of issues and theories in his brief. Appellee believes that oral argument will assist the Court in placing these issues and theories within the framework as viewed by the Trial Court and the jury. Additionally, the damages awarded by the jury were

commensurate with the massive degree of harm caused to the plaintiffs and the public. If the result is reversed, it will only reinforce a historically apathetic view toward drunk driving which is contrary to North Dakota law and disrespects the memory of Abby Renschler and Taylor Goven as well as the tremendous battle that Shayna Monson will experience for a lifetime.

CERTIFICATE OF COMPLIANCE

¶86 This brief complies with the limitations of N.D.R.Civ.P.32(a)(8)(A) because it contains 31 pages.

Respectfully submitted this 7th day of January 2021.

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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, Plaintiffs- Appellees, v. Jordan Morsette Defendant-Appellant.	Supreme Court Case No. 20200211 District Court Case No. 08-2016-CV-02137

Certificate of Service

¶1 The undersigned certifies, pursuant to Rule 5 (f) of the North Dakota Rules of Civil Procedure, that on January 7, 2021, a true and correct copy of the following document(s):

1) Brief of Appellees; and
2) Certificate of Service.

was filed and served electronically, via the Supreme Court filing portal, upon the following:

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STATE OF NORTH DAKOTA

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Certificate of Service

¶1 The undersigned certifies, pursuant to Rule 5 (f) of the North Dakota Rules of Civil Procedure, that on January 11, 2021, a true and correct copy of the following document(s):

1) Brief of Appellees (including statement for oral argument); and
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