

**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	)	
Jeremy Renschler, individually and as	)	
Executor of the Estate of Abby Renschler,	)	
deceased; and Jason Renschler and Sandra	)	<b>Supreme Court No. 20200211</b>
Renschler on behalf of the heirs and next of	)	
kin of Abby Renschler, deceased; and	)	
Shayna Monson,	)	<b>Civil No. 08-2016-CV-02137</b>
	)	
Plaintiffs and Appellees,	)	
	)	
v.	)	
	)	
Jordan Morsette,	)	
	)	
Defendant and Appellant.	)	

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

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**BRIEF OF AMICUS CURIAE MOTHERS AGAINST DRUNK DRIVING  
IN SUPPORT OF PLAINTIFFS AND APPELLEES**

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## IDENTITY OF AMICUS CURIAE

[1] The amicus curiae filing this brief is Mothers Against Drunk Driving (“MADD”). MADD’s mission is to end drunk driving, help fight drugged driving, support the victims and survivors of these violent crimes, and prevent underage drinking. In pursuit of these objectives, MADD participates actively in public and private studies, legislative initiatives, and law-enforcement programs aimed at reducing the incidence of alcohol-related roadway tragedies.

[2] MADD is one of the largest victim-services organizations in the United States. In 2015, for example, MADD provided a service to victims and survivors of drunk-and-drugged-driving incidents every four minutes on average. Through its outreach to victims, MADD understands the emotional distress and mental anguish that victims and survivors endure following a drunk-driving crash.

**STATEMENT OF AUTHORSHIP AND FUNDING**

[3] No party's counsel authored any part of this brief, and no party, party's counsel, person, or entity other than the amicus curiae, its members, or its counsel contributed moneys toward the authorship or production of this brief.

## INTRODUCTION

[4] On May 3, 1980, 13-year-old Cari Lightner was killed while walking with a friend to a church carnival. She was struck from behind by a drunk driver with such force that she was thrown out of her shoes 125 feet. Her mother, Candace Lightner, carried Cari’s photo with her as she began a fight to change drunk driving laws in California. Candace found her anguish was not unique. Within a few months, a grieving group of mothers held their first national press conference in Washington, D.C. They called themselves Mothers Against Drunk Driving.

[5] Undoubtedly, the death of a loved one is a source of grief. However, there is a difference between “Cari Lightner died in a car accident” and “Cari Lightner was killed by a drunk driver.” While both are tragedies, any suggestion that Candace Lightner did not appreciate the difference—as she crossed the United States carrying a photo of Cari to advocate for a change in drunk driving laws—is wishful thinking.

[6] For that reason, MADD urges this Court to reject a bright-line test in drunk driving cases that would create an artificial limitation on a parent’s ability to testify regarding the source of his or her pain, grief, distress, or anguish, and to affirm the trial court’s decision to allow the jury to make its own determination regarding the nature and extent of the non-economic damages suffered by Plaintiffs in this case.

## LAW AND ARGUMENT

[7] This Court should reject creating a bright-line test that would sanitize the destruction and suffering left in a drunk driver's wake. For these reasons, MADD respectfully requests that the Court affirm the trial judge's decision to let the jury hear the full story of the Plaintiffs' anguish.

### I. Drunk driving is a burden on society.

[8] "The carnage caused by drunk drivers is well documented" and "occurs with tragic frequency on our Nation's highways." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). "No one can seriously dispute the magnitude of the drunken driving problem." *MI. Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("Media reports of alcohol-related death and mutilation on the Nation's roads are legion."); *see also, e.g., Perez v. Campbell*, 402 U.S. 637 (1971) (Blackmun, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars."); *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (acknowledging "the problems of traffic irresponsibility and the frightful carnage it spews upon our highways"); *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.").

[9] In 2018, 10,511 people died in crashes involving drunk driving on American roadways. National Highway Traffic Safety Administration (NHTSA), *Traffic Safety Facts*, 2018 Data (No. 812864, Dec. 2019),



<https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812864.pdf>.

Indeed, drunk driving deaths remain a significant portion of total vehicle fatalities—nearly one third of all 2018 traffic deaths. *See* NHTSA, *Traffic Safety Facts*, at 1. In that year alone, an American died in a drunk driving crash at least every hour. *See id.* Fifteen percent of those fatalities were innocent occupants of other vehicles. *See id.*, at 2. The rate of drunk driving fatalities was 3.4 times higher at night than during the day, and slightly over two-thirds involved a driver with a BAC twice the legal limit or higher. *See id.*

[10] Regrettably, drunk driving plagues North Dakota’s roadways just as bad, if not worse, than the rest of America. Exceeding the average for the nation as a whole, “[a]lcohol is a factor in about 42% of fatal crashes in North Dakota annually.” North Dakota Department of Transportation (NDDOT), *2019 North Dakota Crash Summary*, [https://visionzero.nd.gov/uploads/71/NDDOT\\_2019\\_Crash\\_Summary\\_hires\\_nobleed.pdf](https://visionzero.nd.gov/uploads/71/NDDOT_2019_Crash_Summary_hires_nobleed.pdf) at 10. In North Dakota, drunk driving fatalities have increased every year but one since 2015. NDDOT, *2019 North Dakota Crash Summary* at 10.

[11] The economic harm caused by drunk driving crashes in 2018 was a staggering \$44 billion. *Id.* at 3. Yet, the “societal harm” caused by those crashes dwarfs that figure.<sup>1</sup> “[I]n cases of serious injury or death, medical care

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<sup>1</sup> “Societal harm . . . includes both economic impacts and *valuation for lost quality-of-life*.” L. J. Blincoe, T. R. Miller, E. Zaloshnja, & B. A. Lawrence, *The Economic and Societal Impact of Motor Vehicle Crashes, (2010) (Revised)* (May 2015), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812013.pdf> at 9 (emphasis added).

cannot fully restore victims to their pre-crash status and human capital costs fail to capture the relatively intangible value of lost quality-of-life that results from these injuries.” Blincoe, *The Economic and Societal Impact of Motor Vehicle Crashes, (2010) (Revised)*, at 113. When quality-of-life valuations are considered, “alcohol involved crashes cost \$236 billion in comprehensive societal costs in 2010, with 85 percent of this or \$201 billion, occurring in crashes where the highest BAC was  $\geq .08$ .” Blincoe, at 163.

II. The circumstances surrounding the manner of death are relevant to damages in a wrongful death action.

[12] Morsette attempts to minimize the relevance of his intoxication, arguing that driving the wrong way with a BAC of .295 was just a “vehicle accident.” Brief, ¶ 73. However, generally speaking, “the evidence of the circumstances and manner of death is relevant to the damages Plaintiff seeks under the Wrongful Death Act, particularly because it is probative of the grief, sorrow, and mental suffering resulting from the death.” *Hammond v. Sys. Transp., Inc.*, No. 11-cv-1295, 2013 WL 12374878, at \*1 (C.D. Ill. Aug. 16, 2013). The Arizona Court of Appeals recognized that the foregoing standard follows the majority position:

Thus, insofar as the manner of a decedent’s death may have added to a wrongful death plaintiff’s anguish resulting from the death, as opposed to anguish caused by knowledge of premortem pain suffered by the decedent, it is highly relevant to the plaintiff’s claim for damages. Our conclusion is supported by decisions from other jurisdictions which, like Arizona, have construed their wrongful death statutes for the ‘injury resulting from death’ to permit an award of emotional distress of the statutory beneficiary. Those courts have permitted evidence

relating to the manner of death to the extent that the manner of death increased the emotional distress of the statutory plaintiff. *See Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996, 1005 (5th Cir. 1998) (facts that decedent was decapitated and his body was burned were probative of survivors' mental anguish, applying V.T.C.A. Civ. Prac. & Rem. § 71.010); *St. Louis Southwestern Ry. Co. v. Pennington*, 553 S.W.2d 436, 450 (Ark. 1977) (under Ark. Code § 16-62-102, relating to injuries resulting from death, violence and suddenness of a death is a factor in evaluating mental anguish). *See also Martin v. United States*, 448 F. Supp. 855, 880 (D. Ark. 1977) ("Mental anguish will vary in every case with the nervous temperament of the individual, the ability to withstand shock, *circumstances of death*, and innumerable other factors."), *rev'd on other grounds*, 586 F.2d 1206 (8th Cir. 1978). Courts in jurisdictions applying common law principles or wrongful death statutes not expressly providing for damages "resulting from death" have similarly held that evidence of the nature of death may be admissible in the appropriate case. *E.g.*, *Wagner v. Islamic Rep. of Iran*, 172 F. Supp. 2d 128, 136–37 (D.D.C. 2001) (finding that federal common law permits evidence of 'unforeseen and horrific' nature of death in determining emotional distress damages suffered by family following death); *see also Jackson v. Cockill*, 138 S.E.2d 710, 717 (W. Va. 1964) (evidence concerning decedent's prior arrests for drunkenness not admissible hen there was no evidence survivor was aware of that conduct, which would have decreased her sorrow).

*Girouard v. Skyline Steel, Inc.*, 158 P.3d 255, 259–60 (Ariz. Ct. App. 2007); *see also Kerege v. Viscount Hotel Group, L.L.C*, No. 2 CA-CV 2010-0208, 2011 WL 4379343, at \*4 (Ariz. Ct. App. Sept. 16, 2011) ("Evidence about the manner of the decedent's death is 'highly relevant' to the plaintiffs' claim for damages to the extent the manner of death contributed to the plaintiff's mental anguish . . .").

[13] The emotional distress and mental anguish suffered by parents who have lost a child are personal and individual, and there are no hard and fast rules for determining the amount of damages. *See Hopkins v. McBane*, 427

N.W.2d 85, 92–94 (N.D. 1988) (“allowing damages for mental anguish in actions to recover damages for the wrongful death of a child”). Like those statutes cited in *Girouard*, North Dakota’s wrongful death statute also expressly awards damages to the statutory beneficiary for “injury resulting from the death” of the decedent. N.D.C.C. § 32-21-02. Accordingly, the circumstances and manner of a drunk-driving victim’s death are “highly relevant” to the surviving heirs claims for non-economic damages like emotional distress and mental anguish. *Girouard*, 158 P.3d at 260.

[14] In this context, a jury charged with weighing an emotional injury arising from an avoidable death should not be considered a source of “prejudice” to a defendant. Instead, it is our system of justice. *See, e.g., Barta v. Hinds*, 1998 ND 104, ¶ 9, 578 N.W.2d 553 (“We have generally stated a jury’s determination of noneconomic damages for pain, discomfort, and mental anguish mainly rests within its sound discretion because such determination is largely dependent upon the jury’s common knowledge, good sense, and practical judgment.”); *Hopkins*, 427 N.W.2d at 92–94 (holding that damage award for mental anguish arising out of wrongful death of child must be made by jury). There is no good reason a drunk driver should be insulated from the consequences of his actions.

III. In North Dakota, damages for emotional injuries are commonly evaluated in the context of the tortfeasor’s actions.

[15] In other tort actions, this Court has recognized that the nature of the act that causes a plaintiff’s non-economic damages—like emotional distress—is relevant to measuring the extent of those damages. *See, e.g., Weiss v.*

*Collection Ctr.*, 2003 ND 128, ¶ 21, 667 N.W.2d 567; *Muchow v. Lindblad*, 435 N.W.2d 918, 924 (N.D. 1989); *Smith v. Am. Family Mut. Ins. Co.*, 294 N.W.2d 751, 762 (N.D. 1980). For example, in negligent infliction of emotional distress cases, the *Muchow* Court recognized that under the “circumstances”, the nature of the defendant’s act can be expected to cause emotional injuries. *See* 435 N.W.2d at 922 (discussing “circumstances” of “negligent mishandling of a message concerning the death or serious illness of next-of-kin” and “negligent mishandling or the corpse of next-of-kin”).

[16] Similarly, in intentional infliction of emotional distress cases, a plaintiff must prove that the defendant’s act was so “atrocious and utterly intolerable” that it would lead members of the community to exclaim: “Outrageous!”. *Weiss*, 2003 ND 128, at ¶ 21 (quoting *Muchow*, 435 N.W.2d at 924). However, a defendant’s act also provides a measuring stick against which the injury itself is weighed because although “[s]evere distress must be proved; in many cases the extreme and outrageous character of the defendant’s conduct is in itself important evidence that the distress has existed.” Restatement (Second) Torts, § 46, cmt. j.; *see also, e.g., Zuger v. State*, 2004 ND 16, ¶ 15, 673 N.W.2d 615 (“However, with regard to the claim for intentional infliction of emotional distress, the degree of outrageousness of a defendant’s conduct may itself be important evidence of severe emotional distress . . . .”) (citation omitted); *Roth v. Weise*, 716 N.W.2d 419, 432–33 (Neb. 2006) (“Although outrageous conduct and severe emotional distress are separate elements of the tort of intentional

infliction of emotional distress, the two are related in that the extreme and outrageous character of the conduct is itself important evidence that severe emotional distress existed on account of the conduct.”). Finally, in insurance bad faith cases, testimony regarding the insurer’s threats to leave an insured without coverage was relevant to the insured’s “emotional condition and is admissible for that purpose.” *Smith*, 294 N.W.2d at 762.

[17] Thus, North Dakota has recognized in other contexts that the nature of a tortfeasor’s act is relevant to the nature and extent of emotional distress the victim suffers. In this case, the parents of testified how Morsette’s level of intoxication affected their anguish, grief, and distress. *See* Tr. of Oct. 31, 2019 Trial, 83:19–86:25 (Cindy Zander testifying about the effect of Morsette’s intoxication); 96:52–21 (Myles Melhoff testifying about his upbringing as the son of a Highway Patrolman and his beliefs about drinking and driving); 106:15–107:19 (Lee Zander testifying how Morsette’s intoxication affected his willingness to socialize). To argue that evidence of Morsette’s level of intoxication could somehow “inflamm” a jury—but not the parents of the children who were killed—is misplaced.

[18] This is the point. The law should not require a parent to sanitize the anguish or swallow its cause when testifying before a jury of his or her peers. It may surprise some people that the jury awarded millions of dollars because of the mental anguish and emotional distress arising from a death caused by a

drunk driver. It is no surprise to Candace Lightner and the members of MADD.

**CONCLUSION**

[19] For all the foregoing reasons, MADD respectfully requests that the Supreme Court AFFIRM the District Court's Order and Judgments in favor of the Plaintiffs and Appellees.

Dated this 7th day of January, 2021.

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**CERTIFICATE OF SERVICE**

[20] I hereby certify that, on the 7th day of January, 2021, I served the foregoing document on the following by electronic mail transmission pursuant to N.D.R.App.P. 25:

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**CERTIFICATE OF COMPLIANCE**

[21] The undersigned certifies pursuant to N.D. R. App. P. 32(e), that the above *Brief of Amicus Curiae Mothers Against Drunk Driving in Support of Plaintiffs and Appellees* complies with the page limitations set forth in Rules 29(a)(5) and 32(a)(8)(A), N.D.R.App.P. I further certify that the total number of pages herein, excluding the certificate of service, is 15 pages.

Dated this 7th day of January, 2021.

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