



Summer 2023

**The Outer Limits: Jury Discretion, District Court Deference, &
Excessive Damages in *Morga v. FedEx Ground Package Sys., Inc.***

Aaron Sharratt

Recommended Citation

Aaron Sharratt, *The Outer Limits: Jury Discretion, District Court Deference, & Excessive Damages in Morga v. FedEx Ground Package Sys., Inc.*, 53 N.M. L. Rev. 521 (2023).

Available at: <https://digitalrepository.unm.edu/nmlr/vol53/iss2/8>

THE OUTER LIMITS: JURY DISCRETION, DISTRICT COURT DEFERENCE, & EXCESSIVE DAMAGES IN *MORGA V. FEDEX GROUND PACKAGE SYS., INC.*

Aaron Sharratt*

ABSTRACT

*What is the value of life? Courts and commentators have long debated the question of the inherent value of life in relation to the awarding of compensatory damages. The New Mexico Supreme Court's recent decision affirming a record \$165 million civil award in *Morga v. FedEx* again brings this debate into public view. The decision effectively shuts the door to the prospect of higher State courts overturning a jury's noneconomic compensatory damages award based on an excessive verdict claim. The case highlights the district court's power and discretion in awarding monetary damages for nonmonetary injuries and the implications of defense trial strategies and tactics in wrongful death cases. The case raises important questions about the outer limits of a jury's discretion to award hedonic damages, deference given to decisions of the district court and a successor judge, and the use of mathematical formulas and comparison cases as guidance in establishing the value of life. The New Mexico Supreme Court follows long-standing practice and precedent in affirming the Court of Appeals. In doing so, the *Morga* decision is likely to usher in higher wrongful death case settlements as defendants seek to avoid potentially significant compensatory damage awards in New Mexico.*

INTRODUCTION

In *Morga v. FedEx Ground Package Systems, Inc.*, the New Mexico Supreme Court affirmed a record \$165 million wrongful death verdict against FedEx.¹ With the decision, the court ventured into the controversial arena of

* J.D. Candidate, University of New Mexico School of Law, Class of 2024. I would like to thank Prof. Carol Suzuki and Prof. Ben Osborn for their invaluable writing seminar guidance. I also extend special appreciation to my law review working group members, peer review editors, and those who have helped at points in the process, including Griffin Arellano, Holly Gallegos, Emilee Greenhouse, Sundesh Khalsa, Jackie Munro-Vahey, Alexis Salas, Holly Watson, Prof. Desiderio and Prof. Occhialino.

1. *Morga v. FedEx Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d 774. The New Mexico Supreme Court granted certiorari of Defendants' petition to consider whether the New Mexico Court of Appeals erred by (1) reviewing the district court's denial of Defendants' motion for a new trial for an abuse of discretion, rather than reviewing de novo, because the denial was made by a successor judge who did not

noneconomic compensatory damage calculations in wrongful death actions.² The case highlights the respective roles that a district court judge and jury play in the inherently difficult task of awarding monetary damages for nonmonetary injuries in wrongful death cases.³ Although the Court follows long-standing practices and precedent in affirming the Court of Appeals,⁴ the decision will likely lead to a reconsideration of litigation strategies and usher in higher settlement offers as defendants seek to avoid very significant jury verdicts. Additionally, in upholding the \$165 million *Morga* verdict, the New Mexico Supreme Court affirms that it will not overturn district court decisions related to excessive damages claims absent a clear abuse of discretion.⁵ The decision raises questions about the outer limits of a jury's discretion in determining the value of life, the deference paid to the district court and decisions of a successor trial court judge who did not oversee trial proceedings, and the use of fixed ratios or comparison cases as an acceptable basis to calculate damage awards and determine excessiveness. This Note explores the legal basis informing current value of life determinations, analyzes the court's rationale in affirming the lower court determinations, and discusses possible implications.

Part I offers foundational background for understanding the New Mexico Supreme Court's decision and rationale. The section begins with a brief synthesis of salient case facts before discussing New Mexico's Wrongful Death Act ("WDA"),⁶ focused on the court's broadening interpretation of "fair and just" compensation. The section then examines judicial approaches to value of life calculations in framing the inherently difficult task juries face in arriving at such determinations.⁷ Part I concludes with a review of the standard New Mexico's higher courts apply to review excessive damage award claims.

oversee the trial, and (2) affirming the district court's denial of the motion on grounds that the noneconomic compensatory damages award was excessive. *Id.* ¶ 1, 512 P.3d at 774. The case received significant press and public attention as the largest civil award in state history. *See, e.g.,* Diana A. Soular, *Family Will Receive \$165M-plus for I-10 Crash That Killed Three El Pasoans*, EL PASO TIMES (Feb. 9, 2018, 6:00 PM), <https://www.elpasotimes.com/story/news/local/2018/02/10/family-receive-165-m-plus-10-crash-killed-three-el-pasoans/323790002/> [<https://perma.cc/T2LL-WB59>]; Justin Garcia, *New Mexico Supreme Court Upholds \$165 Million Settlement A Decade After Deadly Crash*, LAS CRUCES SUN-NEWS (May 19, 2022, 2:27 PM), <https://www.lcsun-news.com/story/news/crime/2022/05/19/new-mexico-supreme-court-upholds-165-million-settlement-decade-after-deadly-10-crash-near-las-cruces/9840740002/> [<https://perma.cc/DU7W-3PPC>]; Associated Press, *Court Upholds \$165M Damage Awards in FedEx Crash*, AP NEWS (May 19, 2022), <https://apnews.com/article/politics-new-mexico-lawsuits-el-paso-ff519f9ea9e52ff4192b6ea2a21a93df> [<https://perma.cc/RAN4-TT2W>].

2. *See Morga*, 2022-NMSC-013, ¶ 1, 512 P.3d at 779.

3. *Id.*

4. *Id.*

5. *Id.* ¶ 14, 512 P.3d at 781–82.

6. *See* N.M. STAT. ANN. §§ 41-2-1 to -4 (2001).

7. *See, e.g.,* Frederick Levin, *Pain and Suffering Guidelines: A Cure for Damages Movement "Anomie,"* 22 U. MICH. J.L. REFORM 303 (1989) (suggesting descriptive guidelines rather than hard and fast limits); Shari S. Diamond, Michael J. Saks & Stephan Landsman, *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301 (1998) (suggesting guidance to jurors in the form of "comparables" based on awards rendered in other cases); Joseph H. King, *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163 (2004).

Part II presents the court's rationale in affirming the *Morga* verdict, drawing from lower court reasoning, case pleadings, and precedent cases to understand the legal framework employed by the State's highest court. The court declined to deviate from long-standing practice in reviewing motions for a new trial under an abuse of discretion standard, rejecting Defendants' argument that *de novo* review is appropriate as decisions of a successor judge should not be given the same deference as the trial judge who oversaw the proceedings.⁸ The court rejected Defendant's invitation to tether economic and noneconomic damages, asserting there is often no readily identifiable relationship between the two and entertaining the invitation "would establish a dangerous policy of . . . valuing human life based on a person's net worth."⁹ The court was also skeptical of comparing verdicts, stating that such comparisons can sometimes be helpful but are not the proper basis for determining award excessiveness since every case is decided on its own facts and circumstances.¹⁰ Because the court found substantial evidence to support the verdict and that it was not arrived at through passion or prejudice, the court held the verdict was not legally excessive.¹¹

Part III analyzes the soundness of the court's reasoning in holding to long-standing practice. First, the court's rejection of fixed calculations and skepticism of comparison cases ensures value-of-life determinations are fair and equitable. Although it is possible juries may be swayed by emotion or lack the competence to assess damages without fixed calculations or comparison cases,¹² district courts are well versed in mitigating the effects of potential prejudice through courtroom control, jury instruction, and special verdict forms. Second, the value of an individual's life to the community is best left as a determination made by a jury of the community. While assuredly injecting randomness and unpredictability into noneconomic damage calculations, it is a fundamental function of a jury to determine damages in our adversarial system—and such awards are presumed to be correct.¹³ Because such determinations are left to the jury, even where a verdict may be thought to push the outer limits of discretion, such awards do not "shock the conscience" of the court unless there is substantial evidence that the award was grossly out of proportion to the injury.¹⁴ Although the outer limits of jury discretion are expansive,

8. See *Morga*, 2022-NMSC-013, ¶ 14, 512 P.3d at 782 ("Defendants' standard of review argument misunderstands the application of the existing standards to this case . . . [I]n the context of a motion for a new trial based on an excessive verdict, a district court abuses its discretion when it fails to exercise its discretion in the first instance 'despite the predicate findings and the court's conviction that the award should be reduced,' *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶ 12, 125 N.M. 292, 960 P.2d 834, or when it 'misapprehends the law or if the decision is not supported by substantial evidence.' *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 7, 136 N.M. 599, 103 P.3d 39.").

9. *Id.* ¶ 32, 512 P.3d at 787.

10. *Id.* ¶¶ 23–24, 512 P.3d at 784; see also *Vivian v. Atchison, Topeka, & Santa Fe Ry. Co.*, 1961-NMSC-093, ¶ 11, 69 N.M. 6, 363 P.2d 620.

11. *Morga*, 2022-NMSC-13, ¶ 68, 512 P.3d at 795.

12. See generally Herbert M. Kritzer, Guangya Liu, & Neil Vidmar, *An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 976–980 (2014) (discussing some challenges inherent in assessing the appropriate level of noneconomic damages).

13. *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 16, 127 N.M. 1, 976 P.2d 1.

14. *Morga*, 2022-NMSC-013, ¶ 17, 512 P.3d at 782.

the courts could avoid claims of mistaken measure or duplication of damages by scrapping lump sum verdict forms where a jury is asked to determine noneconomic damages. Finally, the court's decision highlights the result of trial strategies and tactics in presenting statistical value of life calculations, expert opinion, and other guidance to assist a jury. Contrary to arguments that juries awarding of noneconomic damages to punish or deter behavior "twists" the purposes of such awards,¹⁵ the deterrence and restorative purpose served by such awards is squarely aligned with the purpose of tort law in both "making the plaintiff whole" and ensuring defendants do not benefit financially from egregious conduct.

Lastly, Part IV explores the potential implications of *Morga*, including the likelihood a verdict may be found excessive and of much larger jury verdicts in wrongful death and personal injury cases. The *Morga* decision effectively closes the door to the State's appellate courts finding a wrongful death jury verdict excessive as the deference paid to district court decisions is near absolute. This result will mean reconsideration of trial litigation strategies and tactics, higher settlement offers, and significant jury verdicts at trial.

I. BACKGROUND

A. *Morga v. FedEx* case facts

Morga v. FedEx was brought as the result of a collision in the early morning hours of June 22, 2011, along I-10 West in Las Cruces, New Mexico, involving a semi-truck with dual trailers, operated by a FedEx Ground Package System contractor, and a small GMC pickup truck driven by Marialy Morga.¹⁶ The GMC pickup was traveling slowly or stopped in the right-hand lane when the FedEx truck ran into it at nearly 65 miles per hour without slowing.¹⁷ The collision instantly claimed the lives of Marialy, her four-year-old daughter Ylairam, and the semi-truck driver.¹⁸ Marialy's two-year-old son, Yahir, survived the accident but suffered traumatic injuries as a result.¹⁹ Marialy's husband, Alfredo Morga, brought action individually and on behalf of the children, Ylairam and Yahir.²⁰

15. See, e.g., Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment,"* 54 S.C. L. REV. 47 (2002).

16. Pretrial Order at 10–11, *Morga v. FedEx Ground Package Sys.*, No. D-101-CV-2012-01906, 2014 WL 7912966, at *5 (N.M. Dist. 2014). The semi-truck driver, Elizabeth Quintana, was an independent contractor employed by M&K Trucking, Inc., driving a truck owned by Ruben's Trucking, LLC, and hauling shipments for FedEx Ground Package Systems, Inc. (collectively "Defendants"). *Id.*

17. *Morga v. FedEx Ground Package System, Inc.*, 2018-NMCA-039, ¶ 2, 420 P.3d 586, 590. The GMC pickup truck was perhaps partially on the shoulder, allegedly with its brake lights and emergency flashers engaged. During trial, a witness testified the pickup may have been having trouble and that he had to move to the left-hand lane to evade the pickup truck. The witness testified that he put his vehicle in reverse with the emergency flashers on to warn the oncoming FedEx truck to slow or steer clear of the GMC pickup. Verdict and Settlement Summary, *Morga v. FedEx Ground Package Sys.*, No. D-101-CV-2012-01906, 2015 WL 1508690, at *3 (N.M. Dist. 2015).

18. Verdict and Settlement Summary, *Morga v. FedEx Ground Package Sys.*, No. D-101-CV-2012-01906, 2015 WL 1508690, at *3 (N.M. Dist. 2015).

19. *Id.*

20. See *Morga*, 2018-NMCA-039, ¶ 3, 420 P.3d at 590. Marialy's parents intervened in the case and were also captioned as plaintiffs, seeking damages individually and on behalf of their daughter's estate.

Prior to trial, FedEx stipulated it would pay for any damages attributed to the named defendants.²¹ The jury found Defendant FedEx 65 percent liable; Defendants M&K Trucking, Ruben’s Trucking, and Elizabeth Quintana each 10 percent liable; and Marialy Morga 5 percent liable. The jury awarded \$165 million in compensatory damages along with pre-judgment interest at a rate of five percent but did not award any punitive damages sought.²²

For the wrongful death of Ylairam Morga	\$61,000,000
For the wrongful death of Marialy Morga	\$32,000,000
For personal injury and the loss of consortium for his mother, to Yahir Morga	\$32,000,000
For emotional distress, resulting from physical and psychological injury, and the loss of consortium for his spouse and child, to Alfredo Morga	\$40,125,000
For the loss of consortium of his daughter, to Mr. Rene Lopez	\$208,000
For the loss of consortium for her daughter, to Ms. Georgina Venegas	\$200,000

Upon entry of the verdict but prior to trial conclusion a successor district court judge was appointed after the trial judge recused herself at Defendants’ request for engaging in an *ex parte* communication with Plaintiffs’ counsel.²³ The successor judge denied Defendants’ pending motion for a new trial or remittitur on excessive damages.²⁴ FedEx appealed, challenging the successor judge’s denial of its motions and arguing “(1) the verdict was not supported by substantial evidence; and (2) the jury’s verdict was tainted by passion, prejudice, partiality, sympathy, undue influence, or a mistaken measure of damages.”²⁵ The New Mexico Court of Appeals affirmed the district court decisions in 2018.²⁶

However, they settled their loss of consortium claims with FedEx prior to the New Mexico Court of Appeals decision. *See id.*

21. *Id.* Plaintiffs alleged FedEx was vicariously liable for the driver’s actions and that they violated several Federal Motor Carrier Safety Act provisions, including “allowing [Elizabeth] Quintana on the road without determining if she was fit to drive and allowing her to operate a tractor-trailer when she should have been disqualified under FedEx’s own requirements due to alleged multiple moving violations.” Verdict and Settlement Summary, *Morga v. FedEx Ground Package Sys.*, No. D-101-CV-2012-01906, 2015 WL 1508690, at *4 (N.M. Dist. 2015). Plaintiffs further alleged that the contracted FedEx driver was negligent per se and violated New Mexico motor vehicle statutes by following too closely and driving too fast. *Id.*

22. Answer Brief of Alfredo Morga at 3, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395180, at *4. The trial court entered judgement against FedEx in the amount of \$157,256,350 for Defendants proportionate responsibility (95 percent). *Id.*

23. *Morga*, 2018-NMCA-039, ¶ 5, 420 P.3d at 591. The conversation included discussion of potential appellate counsel on appeal. *Id.* District Court Judge Mathews took over post-trial proceedings after an extensive five-month review of the record. *Morga v. FedEx Package Sys., Inc.*, 2022-NMSC-013, ¶ 20, 512 P.3d 774.

24. *Morga*, 2022-NMSC-013, ¶ 10, 512 P.3d at 780–81.

25. *Morga*, 2018-NMCA-039, ¶ 1, 420 P.3d at 589. FedEx also challenged the awarding of prejudgment interest. *Id.*

26. *See id.*

B. Noneconomic damage determinations and jury discretion

The awarding of noneconomic damages²⁷ has long been “one of the tort beast’s uglier heads”²⁸ and “among the most contentious issues related to the American civil jury.”²⁹ Noneconomic damages have been the focus of extensive efforts to cap medical malpractice awards, targets of tort reform, and the basis of exaggerated distortions about the costs of the tort liability system.³⁰ They have also been the subject of voluminous legal commentary about the goals of tort law—and whether noneconomic damages serve the underlying goal to place an injured party “in a position substantially equivalent in a pecuniary way to that which [they] would have occupied had no tort been committed,”³¹ thus making the plaintiff whole.³²

As commentators have noted, noneconomic damages are, by their very nature, a conceptual contradiction in terms: they provide monetary compensation for injuries that can be difficult to perceive and measure, problematic to mathematically quantify, and are often viewed as intangible in monetary terms.³³ In the context of a wrongful death action this contradiction presents juries with the unique challenge of rationally calculating the intrinsic value of a human life. The result can be randomness, unpredictability, and unfairness injected into the tort system.³⁴ For this reason, it has been claimed that juries “do not have the competence to assess these damages because jurors are too often swayed by emotions and . . . do not have the perspective of comparable cases.”³⁵ Despite the challenge, value of life determinations are left to the jury.³⁶

27. Often referred to broadly and incorrectly as “pain and suffering,” noneconomic losses more accurately include physiological pain and suffering, mental anguish, emotional distress, loss of consortium, loss of enjoyment of life, loss of society and companionship, loss of parental guidance, and disfigurement, among other losses. See King, *supra* note 7, at 164 n.2. Loss of enjoyment of life and the intangible value of life damages are commonly referred to as hedonic damages. See 3 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCT LIABILITY § 25:4 (4th ed. 2022).

28. Steven Croley & Jon Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1789 (1995).

29. Kritzer et al., *supra* note 12, at 974.

30. See, e.g., WILLIAM HALTOM & MICHAEL McCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004); F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437 (2006); Amanda Edwards, *Medical Malpractice Non-Economic Damages Caps*, 43 HARV. J. ON LEGIS. 213 (2006); Tom Baker, Herbert M. Kritzer, & Neil Vidmar, *Jackpot Justice and the American Tort System: Thinking Beyond Junk Science*, FACULTY SCHOLARSHIP AT PENN LAW 2758 (2008), https://scholarship.law.upenn.edu/faculty_scholarship/2758; David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903 (2014).

31. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (AM. L. INST. 1979).

32. Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 160 (1958).

33. See Kritzer et al., *supra* note 12, at 974.

34. See *id.*

35. *Id.* at 975.

36. See *Morga v. FedEx Package Sys., Inc.*, 2022-NMSC-013, ¶ 18, 512 P.3d 774; 3 RECOVERY FOR WRONGFUL DEATH: ASSESSMENT OF DAMAGES—DISCRETION OF JURY AS TRIER OF FACT § 17:2 (James E. Rooks, Jr., 5th ed., 2020).

i. The scope of just and fair compensation under New Mexico's Wrongful Death Act

New Mexico's Wrongful Death Act ("WDA") statute³⁷ was originally enacted in 1882, having been adopted from Missouri.³⁸ Following the rule that a statute adopted from another state is presumed to include its prior construction by the courts of that state, the New Mexico Supreme Court followed the views of the Missouri Supreme Court in its interpretations of the WDA for nearly a century.³⁹ The statute has long been construed to have "some degree an objective of public punishment . . . designed in part at least to act as a deterrent to the negligent conduct of others," thus promoting public safety and welfare.⁴⁰ This is reflected in the damages available under the Act:

[T]he jury in every such action may give such damages, compensatory and exemplary, as they deem fair and just, taking into consideration the pecuniary injury resulting from the death to the surviving party entitled to the judgment, or any interest in the judgment, recovered in such action and also having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default.⁴¹

While the WDA has long been construed to make negligence causing death costly to the wrongdoer,⁴² the scope of compensatory damages available under the Act has broadened considerably.⁴³

The New Mexico Supreme Court has recognized the availability of economic damages under the WDA since its enactment.⁴⁴ However, the court first recognized the availability of noneconomic damages in 1970 decision *Stang v. Hertz*.⁴⁵ In *Stang*, the court held that, even though the decedent nun had suffered no pecuniary injury, her estate could recover for pain and suffering under the WDA.⁴⁶ While the *Stang* decision addressed the availability of ante-mortem pain and suffering,⁴⁷ the New Mexico Supreme Court left unanswered the availability of post-

37. See N.M. STAT. ANN. §§ 41-2-1 to -4 (2001).

38. See 1882, N.M. Laws, ch. 61, § 2; *White v. Montoya*, 1942-NMSC-031, 46 N.M. 241, 126 P.2d 471, 472.

39. *White*, 1942-NMSC-031, 126 P.2d 471, 473; see also *Langham v. Beech Aircraft Corp.*, 1975-NMSC-064, ¶ 19, 88 N.M. 664, 543 P.2d 484, 488.

40. *Trujillo v. Prince*, 1938-NMSC-024, ¶ 17, 42 N.M. 337, 78 P.2d 145, 150; see also N.M. STAT. ANN. § 41-2-1 (1953).

41. N.M. STAT. ANN. § 41-2-3 (2001).

42. See *Trujillo*, 1938-NMSC-024, ¶ 17, 78 P.2d at 150; *Tauch v. Ferguson-Steere Motor Co.*, 1957-NMSC-039, ¶ 18, 62 N.M. 429, 312 P.2d 83, 87.

43. See *Cindy Domingue-Hendrickson, Wrongful Death: New Mexico Adopts Hedonic Damages in The Context of Wrongful Death Actions: Sears v. Nissan (Romero v. Byers)*, 25 N.M. L. REV. 385, 392-97. This occurred over several decades as the court clarified residual tension between whether the WDA is a survival statute, making available only ante-mortem damages, or a wrongful death statute, making available post-mortem damages for the value of the decedent's life, or a hybrid statute. *Id.*

44. See *Mares v. N.M. Pub. Serv. Co.*, 1938-NMSC-032, 42 N.M. 473, 82 P.2d 257, 271; *Duncan v. Madrid*, 1940-NMSC-029, 44 N.M. 249, 101 P.2d 382, 388; *Hall v. Stiles*, 1953-NMSC-041, 57 N.M. 281, 258 P.2d 386, 389. Considering factors such as age, occupation, earning capacity, and probable duration of life, among other factors.

45. See *Stang v. Hertz Corp.*, 1970-NMSC-048, ¶¶ 4-13, 81 N.M. 348, 467 P.2d 14, 16-17.

46. See *id.* ¶¶ 7-13, 467 P.2d at 16-17.

47. See *id.* ¶¶ 14-17, 467 P.2d at 17-18. "Since the passage of the Act in 1882, the New Mexico Supreme Court has struggled to determine whether the Act is a survival statute or a wrongful death statute,

mortem noneconomic damages, including hedonic damages.⁴⁸ In 1994, the court addressed this question in *Sears v. Nissan*, holding hedonic damages to be a compensable aspect of the value of life under the WDA's fair and just compensation clause.⁴⁹ A year later the court recognized recovery of hedonic damages in personal injury cases generally.⁵⁰ While *Sears* broadened considerably the damages deemed available in wrongful death actions, courts since have struggled with the scope of value of life losses and the appropriateness of guidance to aid a jury's determination.

ii. *Value of life and noneconomic damage determinations*

The phrase "value of life" has been used to broadly describe damages for all noneconomic losses outside of pain and suffering generally⁵¹ and damages for the loss of enjoyment of life more specifically.⁵² In *Sears*, the New Mexico Supreme Court asserted that value of life is the nonpecuniary reward the deceased would have been reasonably expected to reap from life, demonstrated by health and habits.⁵³ The valuing of life and noneconomic damages calculations are exceedingly controversial given there can be no standard fixed by law for measuring such damages⁵⁴ because placing monetary value on noneconomic harms requires subjective judgment in converting the injury into dollars.⁵⁵ Courts have struggled with the appropriateness and admissibility of guidance to assist a jury in such determinations—and in evaluating excessiveness once a jury has rendered its verdict.

The New Mexico Supreme Court has recognized that a comparison of verdicts can be helpful.⁵⁶ However, the utility of such a comparison is limited by the

and to define the scope of wrongful death damages under the Act." Domingue-Hendrickson, *supra* note 43, at 392. "The availability of hedonic damages under a state wrongful death statute depends on what type of statute the state has. In general, there are three types of wrongful death statutes: 'survival' statutes, 'wrongful death' statutes, and 'hybrid' statutes." *Id.* at 387.

48. See discussion *supra* note 27. The concept of hedonic damages encompasses the value of the loss of life and pleasure to the deceased. The term was used first by economist Stanley Smith during expert testimony in *Sherrod v. Berry*, 827 F.2d 195 (7th Cir. 1987), *reh'g granted and opinion vacated*, *Sherrod v. Berry*, 835 F.2d 1222 (7th Cir. 1988), *on reh'g en banc*, *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988). Tina M. Tabacchi, *Hedonic Damages: A New Trend in Compensation*, 52 OHIO ST. L.J. 331 (1991).

49. *Romero v. Byers*, 1994-NMSC-031, ¶ 4, 117 N.M. 422, 872 P.2d 840, 842. *Sears v. Nissan* was consolidated in *Romero*. *Id.* ¶ 1, 872 P.2d at 842. In *Romero*, the Court held that "the time has come for New Mexico to recognize" loss of spousal consortium as a cause of action. *Id.* ¶ 2, 872 P.2d at 842. In *Sears*, the court held that "loss of guidance and counseling by a minor child is a pecuniary injury." *Id.* ¶ 5, 872 P.2d at 842.

50. See *Sena v. New Mexico State Police*, 1995-NMCA-003, ¶ 29, 119 N.M. 471, 892 P.2d 604, 611 ("Consistent with the rule in *Romero*, we think it is clear that New Mexico permits proof of nonpecuniary damages resulting from the loss of enjoyment of life in tort actions involving permanent injuries.").

51. See *Romero*, 1994-NMSC-031, ¶ 19, 872 P.2d at 846.

52. See *Branstetter v. Lorenzo*, No. 20-00573 HG-WRP (D. Haw. Nov. 29, 2021), 2022 WL 3045579 at *7.

53. *Romero*, 1994-NMSC-031, ¶ 17, 872 P.2d at 846.

54. See *Mathis v. Atchison, Topeka & Santa Fe Ry. Co.*, 1956-NMSC-074, ¶ 8, 61 N.M. 330, 300 P.2d 482, 487 ("There can be no standard fixed by law for measuring the value of human pain and suffering.").

55. See Herbert M. Kritzer & Neil Vidmar, *The Civil Jury as a Political Institution Symposium: An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 980 (2014).

56. See *Vivian v. Atchison, Topeka, & Santa Fe Ry. Co.*, 1961-NMSC-093, ¶ 11, 69 N.M. 6, 363 P.2d 620.

unique facts and circumstances of a given case,⁵⁷ leading the New Mexico Court of Appeals to conclude that the use of comparison cases is “not a proper basis for determining either excessiveness or inadequacy of damages.”⁵⁸ New Mexico courts have further declined the use of fixed mathematical calculations to tether economic and noneconomic damages.⁵⁹ In fact, New Mexico law specifically instructs juries to consider noneconomic damages apart from economic loss.⁶⁰ New Mexico courts may, however, admit expert testimony to help aid the jury.⁶¹

Until 2002, the admission of expert economic testimony quantifying hedonic damages was left solely to the district court’s discretion.⁶² At that time, the New Mexico Court of Appeals defined the permissible scope of expert testimony on loss of enjoyment of life damages to include testimony based on published economic research on the value of a statistical life (“VSL”).⁶³ VSL is a purported economic measure of “what we, as a society, are willing to pay for a life” and used by many federal and state government agencies for placing dollar values on the prevention of loss of human life.⁶⁴ The standard for admissibility was set forth in Rule 11-702 NMRA and *State v. Alberico*,⁶⁵ similar to the federal *Daubert* standard.⁶⁶ However, whereas federal courts apply the *Daubert* standard to scientific and technical knowledge, New Mexico courts limit its applicability to scientific knowledge only.⁶⁷

57. *Schrib v. Seidenberg*, 1969-NMCA-078, ¶ 20, 80 N.M. 573, 458 P.2d 825. *See also Vivian*, 1961-NMSC-093, ¶ 11, 363 P.2d at 624.

58. *Schrib*, 1969 NMCA 078, ¶ 20, 458 P.2d at 829.

59. *See Sandoval*, 1998-NMCA-085, ¶ 13, 960 P.2d at 837–38.

60. *See* UJI 13-1830(4) NMRA.

61. *See* M. Brian McDonald, *The Value of Life and Loss of Enjoyment of Life Damages from an Economist’s Perspective*, 35 N.M. L. REV. 419, 420 (2005).

62. M. Brian McDonald, *Loss of Enjoyment of Life Damages in New Mexico*, 20 J. FORENSIC ECON. 171, 173 (2007).

63. *See Couch v. Astec Indus., Inc.*, 2002-NMCA-084, ¶¶ 17-20, 132 N.M. 631, 53 P.3d 398, 403 (A wrongful death product defect case in which the Court admitted expert testimony quantifying for the jury an amount of hedonic damages suffered. The expert testified to a reasonable range for the value of a statistical life based upon published research and without reference to a specific plaintiff.).

64. McDonald, *supra* note 61, at 422.

65. *See State v. Alberico*, 1991-NMCA-112, ¶¶ 19–24, 116 N.M. 178, 861 P.2d 219, 224–25.

66. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151, 119 S. Ct. 1167, 1175–76 (1999); *State v. Torres*, 1999-NMSC-010, ¶ 43, 127 N.M. 20, 976 P.2d 20, 33–34.

67. *Compare General Electric Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 518–519 (1997) (“Conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”), and *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1245 (10th Cir. 2000) (“Attempts to quantify the value of human life have met considerable criticism in the literature of economics as well as in the federal court system. Troubled by the disparity of results reached in published value-of-life studies and skeptical of their underlying methodology, the federal courts which have considered expert testimony on hedonic damages in the wake of *Daubert* have unanimously held quantifications of such damages inadmissible.”), with *State v. Rael-Gallegos*, 2013-NMCA-092, ¶ 10, 308 P.3d 1016, 1021–22 (“Our Supreme Court has recognized a distinction between the standards applicable to admitting scientific testimony and admitting testimony that is based on specialized knowledge. Unlike scientific testimony, which must be grounded in valid, objective science and reliable enough to prove what it purports to prove, in determining whether to admit non-scientific expert testimony, the court must evaluate the expert’s personal knowledge and experience to determine whether the expert’s conclusions on a given subject may

Thus, where federal courts have concluded that the analytic gap between economic data about the statistical value of life and conclusions drawn from that data is too great and unreliable, New Mexico courts admit economic expert testimony quantifying hedonic losses at the district court's discretion.⁶⁸ As the New Mexico Supreme Court explained in *Acosta v. Shell Western Exploration & Production, Inc.*, "New Mexico has never adopted the *Joiner* rule that a judge may reject expert testimony where the 'analytical gap' between the underlying evidence and the expert's conclusions is 'too great,'" because "*Joiner* is inconsistent with longstanding New Mexico law that leaves credibility determinations and weighing of the evidence to the trier of fact."⁶⁹ Because such testimony is permissible under New Mexico law, the burden is on the party opposing its introduction to seek exclusion or object to its introduction. New Mexico judges are generally willing to exclude such testimony as unreliable or unhelpful to the trier of fact.⁷⁰

C. Jury verdicts that shock the court's conscience are excessive as a matter of law

In New Mexico's judicial system, the jury's determination of noneconomic compensatory damages is presumed to be correct⁷¹ and the fact that a jury's award may be larger than the court would give is not sufficient reason to disturb a verdict.⁷² When a district court has approved of the jury's determination, the amount stands in the strongest position in law⁷³ and higher courts are loathe to disturb the verdict. New Mexico courts will not disturb the jury's valuation unless the damages award is so grossly out of proportion to the injury received as to "shock the conscience" of the

be trusted.") (internal citations and quotation marks omitted), and *Walker v. Spina*, 359 F. Supp. 3d 1054, 1081 (D.N.M. 2019) ("The Supreme Court of New Mexico Court has refused to extend the *Daubert* analysis to experts testifying based on specialized—but not on scientific—knowledge. . . . The Supreme Court of New Mexico has not spoken to whether an expert may testify to hedonic damages. The Court, therefore, must predict whether the Supreme Court of New Mexico would admit testimony on hedonic damages. The Court predicts that the Supreme Court of New Mexico would allow an expert to quantify hedonic damages. The Court of Appeals of New Mexico has stated that it is not improper for the trial court to permit an economist to testify regarding his or her opinion concerning the economic value of a plaintiff's loss of enjoyment of life. . . . The Court of Appeals of New Mexico has allowed an economist to testify to hedonic damages' meaning, to methods for calculating hedonic damages, and to quantify a party's hedonic damages.") (internal citations and quotation marks omitted).

68. See McDonald, *supra* note 62, at 173; see also discussion *supra* note 67.

69. *Acosta v. Shell W. Exploration & Prod.*, 2016-NMSC-012, ¶¶ 26-28, 370 P.3d 761, 767 (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512 (1997)).

70. See e.g., Order on Defendants' Motion to Exclude Testimony from Plaintiff's Economist, *Fish v. Dodd*, No. D-101-CV-201002806 (N.M. 1st Jud. Dist. Ct. 2011); Order Granting Defendants' Motion to Exclude Testimony of Brian McDonald as to Hedonic Damages, *Morga v. FedEx Ground Package Sys., Inc.*, No. D-101-CV-2012-01906, 2015 WL 1508690 (N.M. Dist. 2015); *Walker v. Spina*, 359 F. Supp. 3d 1054 (D.N.M. 2019) (discussing differences between New Mexico law and federal law on the admissibility of expert economic testimony related to hedonic damages).

71. *Ennis v. Kmart Corp.*, 2001-NMCA-068, ¶ 27, 131 N.M. 32, 33 P.3d 32.

72. See *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 16-18, 127 N.M. 1, 976 P.2d 1.

73. See *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶ 14, 125 N.M. 292, 960 P.2d 834 (internal citation omitted).

court.⁷⁴ A verdict that shocks the conscience is legally excessive.⁷⁵ In determining whether an award shocks the conscience, New Mexico case law provides for two separate tests: “(1) whether the evidence, viewed in the light most favorable to plaintiff, substantially supports the award and (2) whether there is an indication of passion, prejudice, partiality, sympathy, undue influence or a mistaken measure of damages on the part of the fact finder.”⁷⁶ A verdict is excessive if either test is met.⁷⁷ New Mexico courts have recognized an obligation to grant relief from excessive verdicts since before statehood.⁷⁸ However, a verdict will be set aside only in extreme cases,⁷⁹ as assessment of noneconomic damages is a matter “so peculiarly within the province of the jury that the Court should not alter it.”⁸⁰ While excessive damages claims are reviewed *de novo*, as a matter of law,⁸¹ and without deference to the district court’s legal conclusions,⁸² motions for a new trial are reviewed under an abuse of discretion standard.⁸³

New Mexico’s district courts have “broad discretion in granting or denying motions for a new trial.”⁸⁴ New Mexico’s higher courts have a long-standing practice of reviewing denials of motions for a new trial under an abuse of discretion standard.⁸⁵ Under this standard, deference is paid to the decisions of the district court judge who oversaw trial proceedings. The district court judge is “empowered to . . . provide stability and order during the proceedings”⁸⁶ because their “experience with juries in the community provides an indispensable safeguard built into our American civil jury system.”⁸⁷ Only when the district court’s decision is contrary to law, logic, or reason does an abuse of discretion occur.⁸⁸ However, *Morga* offered New Mexico’s highest court its first opportunity to address the proper standard of review

74. *Id.* ¶ 9, 960 P.2d at 837 (internal citation and quotation marks omitted).

75. *Id.*

76. *Id.* (internal quotations and citations omitted).

77. *Id.*

78. See *Schofield v. Territory ex. rel. Am. Valley Co.*, 1899-NMSC-004, 9 N.M. 526, 56 P. 306, 313; *Massey v. Beacon Supply Co.*, 1962-NMSC-069, ¶ 20, 70 N.M. 149, 371 P.2d 798; *Henderson v. Dreyfus*, 1919-NMSC-023, ¶ 9, 26 N.M. 541, 191 P. 442; *Asbury v. Yellow-Checker Cab Co.*, 1958-NMSC-100, ¶ 3, 64 N.M. 372, 328 P.2d 941.

79. *Salopek v. Freidman*, 2013-NMCA-087, ¶ 30, 308 P.3d 139, 149–50.

80. *Dimick v. Schiedt*, 293 U.S. 474, 480, 55 S. Ct. 296 (1935) (internal quotation marks omitted).

81. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 49, 127 N.M. 47, 976 P.2d 999.

82. *Primetime Hosp., Inc., v. City of Albuquerque*, 2009-NMSC-011, ¶ 10, 146 N.M. 1, 206 P.3d 112.

83. *Estate of Saenz v. Ranack Constructors, Inc.*, 2018-NMSC-032, ¶ 19, 420 P.3d 576; see also *Sandoval*, 2009-NMCA-095, ¶ 13, 215 P.3d 791 (“[T]he denial of a motion for a new trial or remittitur is [reviewed for an] abuse of discretion.”).

84. *Ranack Constructors, Inc.*, 2018-NMSC-032, ¶ 19, 420 P.3d at 581; see also *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 13, 146 N.M. 853, 215 P.3d 791, 795.

85. *Ranack Constructors, Inc.*, 2018 NMSC 032, ¶ 19, 420 P.3d at 581; see also *Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 13, 215 P.3d at 795.

86. *Allsup’s Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 16, 127 N.M. 1, 976 P.2d 1.

87. *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶ 14, 125 N.M. 292, 960 P.2d 834.

88. See *Perkins v. Dep’t. of Hum. Servs.*, 1987-NMCA-148, ¶ 19, 106 N.M. 651, 748 P.2d 24; *Brooks v. Norwest Corp.*, 2004-NMCA-134, 136 N.M. 599, 103 P.3d 39.

applied to decisions of a successor district court judge appointed under Rule 1-063 NMRA.⁸⁹

The district court abuses its discretion when it finds that substantial evidence does not support the verdict yet denies a motion for a new trial or remittitur.⁹⁰ As a result, only in those cases where the district court judge himself has found the jury's verdict excessive has a new trial or remittitur been granted.⁹¹ In *Sandoval v. Chrysler Corporation*, the New Mexico Court of Appeals examined the duty of a trial judge who found the jury's verdict shocked the conscience of the court but denied the defense motion for a new trial or remittitur based on a lack of guidance from the state's higher courts.⁹² Consistent with long-standing practice, the Court of Appeals remanded the case, holding the district court judge abused discretion by failing to exercise his discretion to grant the motion in the first place.⁹³ The Court of Appeals reasoned that it was being asked to make the same legal determination the trial judge should have made but without being in the unique position to work with the jury.⁹⁴

II. RATIONALE

In *Morga*, the New Mexico Supreme Court affirmed a record \$165 million jury verdict—including individual \$32 million and \$61 million wrongful death damage awards, a \$32 million personal injury and loss of consortium damages award, and a \$40 million emotional distress and loss of consortium damages award.⁹⁵ The court declined to tether noneconomic damages to economic loss, rejected the use of mathematical formulas to measure the value of life, and expressed skepticism about the use of comparison verdicts as a basis for determining award excessiveness.⁹⁶ The court declined to depart from long-standing practice of applying an abuse of discretion standard to review district court decisions, including those of a successor trial judge.⁹⁷ The court held the individual and collective verdicts were not excessive as a matter of law, finding substantial evidence to support the awards and determining neither passion nor prejudice informed the verdicts.⁹⁸ In doing so, the court reiterated its commitment to jury discretion and district court deference in

89. See Rule 1-063 NMRA (“If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. The successor judge may recall any witness.”).

90. See *Jones v. Pollock*, 1963-NMSC-116, ¶ 12, 72 N.M. 315, 383 P.2d 271; *Chrysler Corp.*, 1998-NMCA-085, ¶¶ 1, 11–12, 960 P.2d at 835, 837; *Brooks*, 2004-NMCA-134, 103 P.3d 39.

91. See, e.g., *Chrysler Corp.*, 1998-NMCA-085, ¶ 12–18, 960 P.2d at 838–39.

92. *Id.* ¶ 1, 960 P.2d at 835.

93. *Id.* ¶ 12, 960 P.2d at 837.

94. *Id.* ¶ 14–18, 960 P.2d at 837–39. The New Mexico Court of Appeals also reasoned that as a matter of judicial efficiency the parties may decide to find a solution themselves and that a ruling would essentially usurp the trial court's power and weaken public confidence in the judiciary. *Id.* ¶ 15, 960 P.2d at 838.

95. See *Morga v. FedEx Package Sys., Inc.*, 2022-NMSC-013, ¶¶ 1, 8, 512 P.3d 774.

96. *Id.* ¶ 27, 512 P.3d at 785.

97. *Id.* ¶ 13, 512 P.3d at 781.

98. *Id.* ¶¶ 33, 39, 512 P.3d at 787–88.

value of life and noneconomic damages determinations while pushing the outer limits of when an award may shock the court's conscience.

A. The New Mexico Supreme Court rejected tethering economic losses to noneconomic damages

The *Morga* court rejected Defendants' invitation to tether economic and noneconomic damages.⁹⁹ The court relied on *Sears*¹⁰⁰ to assert not only the availability of noneconomic damages separate from pecuniary loss but that the WDA encompasses all damages deemed fair and just, including the value of life itself.¹⁰¹ In concluding that the value of life is a compensable injury separate from "pain and suffering, future pain and discomfort, disfigurement, loss of enjoyment of life, mental anguish, and loss of consortium,"¹⁰² the court reasoned that because there is frequently no readily identifiable relationship between economic and noneconomic damages, fixing a relationship between the two would be contrary to established law.¹⁰³ While the court conceded that economic damages *may* bear a relationship to noneconomic harm, such as the relationship between medical expenses and pain and suffering, a person can also suffer catastrophic injuries and loss of life without incurring *any* economic loss.¹⁰⁴ The court asserted that analyzing excessiveness through a disparity between economic and noneconomic damages awarded fails to account for the severity of nonpecuniary injury absent any pecuniary loss.¹⁰⁵ Thus, such comparison cannot offer a proper method for determining whether the *Morga* verdict is excessive.¹⁰⁶ The court further asserted that entertaining Defendants' invitation to allow such a relationship would establish a dangerous policy of valuing human life based on individual net worth that would "unfairly benefit wealthier plaintiffs and place less value on the pain and suffering, and even on the lives, of those of less wealth."¹⁰⁷

B. The New Mexico Supreme Court found verdict comparisons to be improper for determining excessiveness

The court is skeptical of comparing verdicts. Defendants had argued that the individual awards "are tens of millions of dollars greater than any awards in similar cases and far exceed any previous awards in this state for wrongful death or comparable loss."¹⁰⁸ The court reiterated that case comparisons can sometimes be

99. *Id.* ¶ 27, 512 P.3d at 785–86.

100. *See Romero*, 1994-NMSC-031, ¶¶ 4, 25, 872 P.2d at 842, 847 (holding that the value of life itself is a compensable element of noneconomic damages).

101. *Morga*, 2022-NMSC-013, ¶ 28, 31, 512 P.3d at 786–87.

102. *Id.* ¶ 28, 512 P.3d at 786 (internal quotation marks omitted).

103. *Id.* ¶ 27, 512 P.3d at 785–786. *See* UJI 13-1830(4) NMRA.

104. *See Morga*, 2022-NMSC-013, ¶¶ 28, 30, 512 P.3d at 786.

105. *Id.* ¶ 28, 512 P.3d at 786.

106. *Id.* ¶ 27–28, 512 P.3d at 785–86.

107. *Id.* ¶ 30, 512 P.3d 786–787.

108. Brief in Chief at 19, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395182, at *11. Defendants offered a selection of wrongful death verdicts from Court of Appeals published opinions, including *Wirth v. Sun Healthcare Group, Inc.*, 2017-

helpful but are not the proper basis for determining the excessiveness of an award as each case must be decided on its own facts and circumstances.¹⁰⁹ The court illustrated the difficulty in comparing cases by distinguishing the *Morga* case circumstances from the facts of a case offered by Defendants for comparison.¹¹⁰ Defendants argued the *Morga* verdicts must be excessive given they far exceed the \$3.7 million wrongful death award in *Wachocki v. Bernalillo County Sherriff's Department*, in which a speeding corrections officer was found to have caused the death of a 22-year-old after running a stop sign in 2004.¹¹¹ The *Morga* Court highlighted that *Wachocki* was decided by a judge rather than a jury and that it involved a single young man who had no children, rather than the familial circumstances present in *Morga*—including decedent Marialy's loss of opportunity to provide parental guidance to her son Yahir and to build the family life the Morgas envisioned.¹¹² The court also cited a second case, *Hein v. Utility Trailer Mfg. Co.*,¹¹³ to demonstrate the existence of another verdict comparable in size to the individual *Morga* verdicts. In that case, a jury awarded \$38 million in the wrongful death of a 16-year-old resulting from a trucking accident.¹¹⁴ The court concluded that these cases highlight the difficulty in using comparison cases to argue the excessiveness of a verdict.¹¹⁵

C. The \$165 million *Mora* verdict is not excessive

Upon entry of the verdict but prior to conclusion of the trial, the district court judge overseeing the trial engaged in an *ex parte* communication with Plaintiff's counsel.¹¹⁶ The judge disclosed the conversation and recused herself at

NMCA-007, 389 P.3d 295 (\$2.5 million compensatory); *Morrissey v. Krystopowicz*, 2016-NMCA-011, 365 P.3d 20 (\$4.8 million court-awarded compensatory damages following default); *Estate of Lajeunesse v. Bd. of Regents*, 2013-NMCA-004, 292 P.3d 485 (\$750,000 compensatory prior to Tort Claims Act reduction); *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, 150 N.M. 283, 258 P.3d 1075 (\$1.99 million compensatory); *Keith v. ManorCare, Inc.*, 2009-NMCA-119, 147 N.M. 209, 218 P.3d 1257 (\$3.2 million compensatory); *Jolley v. Energen Res. Corp.*, 2008-NMCA-164, 145 N.M. 350, 198 P.3d 376 (\$2.96 million compensatory). Appellate Brief at 31 n.8, *Morga v. FedEx Ground Package Sys.*, 2022-NMSC-013, 512 P.3d 774 (2018) (No. 36,918), 2018 WL 11433568, at *19–20.

109. *Morga*, 2022-NMSC-013, ¶¶ 23–25, 512 P.3d at 784–785; see *Vivian v. Atchison, Topeka, & Santa Fe Ry. Co.*, 1961-NMSC-093, ¶ 11, 69 N.M. 6, 363 P.2d 620.

110. *Morga*, 2022-NMSC-013, ¶ 25, 512 P.3d at 784–785.

111. *Id.* ¶ 26, 512 P.3d at 785 (comparing verdicts and material facts with *Hein v. Utility Trailer Mfg. Co.*, 2010-NMCA-021, 147 N.M. 720, 228 P.3d 504, to illustrate the difficulty of case comparisons).

112. *Morga*, 2022-NMSC-013, ¶ 25, 512 P.3d at 784–785.

113. No. D-101-CV-2016-01541 (N.M. 1st Jud. Dist. Ct. 2019).

114. *Morga*, 2022-NMSC-013, ¶ 26, 512 P.3d at 785 (citing Special Verdict Form, *Hein v. Utility Trailer Mfg. Co.*, No. D-101-CV-2016-01541 (N.M. 1st Jud. Dist. Ct. 2019) 2019 WL 4573596). The jury in *Hein* returned a total verdict of \$42 million, \$38 million in compensatory damages to the estate and \$4 million in loss of consortium damages to the parents, assigning liability at 45 percent to Defendant Utility Trailer Mfg., Co. and 55 percent to other defendants who settled for an undisclosed amount prior to trial. See Special Verdict Form, *Hein v. Utility Trailer Mfg. Co.*, No. D-101-CV-2016-01541 (N.M. 1st Jud. Dist. Ct. 2019) 2019 WL 4573596.

115. *Morga*, 2022-NMSC-013, ¶ 26, 512 P.3d at 785.

116. *Id.* ¶ 9, 512 P.3d at 780. The day after the verdict was returned the trial judge engaged in an *ex parte* phone conversation with Plaintiffs' counsel about potential appellate counsel and possible legal theories that could be advanced should the verdict be appealed. Brief in Chief at 9–10, 15–16, *Morga v.*

Defendants' request.¹¹⁷ A successor district court judge was appointed to complete post-verdict proceedings.¹¹⁸ The successor judge reviewed the case for five months before certifying familiarity with the record under Rule 1-063 NMRA.¹¹⁹ The successor judge denied Defendants' motion for a new trial or remittitur on excessive damages and Defendants appealed, challenging denial of their motion.¹²⁰ Defendants argued the sheer size of the verdicts create an inference the awards are excessive, individually and collectively.¹²¹ The Court of Appeals affirmed the district court's decisions, after which the Supreme Court granted certiorari to consider whether the Court of Appeals erred.¹²² In affirming the record verdict, the New Mexico Supreme Court refused to depart from long-standing precedent of reviewing denials of motions for a new trial for an abuse of discretion.¹²³ The court found the evidentiary record sufficient to support the verdicts and that the record did not reflect the verdict was tainted by passion or prejudice.¹²⁴

i. The New Mexico Supreme Court affirmed the use of an abuse of discretion standard to review motions for a new trial.

The New Mexico Supreme Court made clear that motions for a new trial are reviewed for a clear and manifest abuse of discretion to determine whether the

FedEx Ground Package Sys., 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395182, at *6, 9.

117. Brief in Chief at 9–10, 15–16, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395182, at *6, 9.

118. *Morga*, 2022-NMSC-013, ¶¶ 9–10, 512 P.3d at 780–81.

119. *Id.* ¶ 20, 512 P.3d at 783. *See* Rule 1-063 NMRA (“If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. The successor judge may recall any witness.”).

120. *Morga*, 2018-NMCA-039, ¶ 1, 420 P.3d at 589.

121. Brief in Chief at 18, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395182, at *8.

122. *Morga*, 2022-NMSC-013, ¶ 1, 512 P.3d at 779.

123. *Id.* ¶¶ 1, 15, 512 P.3d at 779, 782. Defendants asserted that although such motions for a new trial or remittitur are usually reviewed under an abuse of discretion standard, the District Court was entitled to no deference in this case because the successor judge who ruled on Defendants' post-trial motions did not preside at trial. Brief in Chief at 9–10, 15–16, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395182, at *6, 9. Plaintiffs argued that throughout the post-trial motion process Defendants conceded that the successor judge was empowered and competent to rule on their motion. Answer Brief of Alfredo Morga at 6–9, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395180, at *5–7. Anticipating situations wherein a trial judge cannot continue presiding over proceedings, New Mexico law provides a statutory remedy which states a successor judge will be named who may proceed “upon certifying familiarity with the record” and “the proceedings may be completed without prejudice to the parties.” Rule 1-063 NMRA. Plaintiffs argued that Defendants waived any objection the successor judge when they failed to challenge his certification and then invited him to rule on their motion. Answer Brief of Alfredo Morga at 6–9, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395180, at *5–7. Plaintiffs further argued that Defendants made the choice to demand the trial judge's recusal and appointment of a successor judge. *Id.* Finally, Plaintiffs argued the doctrine of judicial estoppel foreclosed Defendant's argument by preventing a party who had successfully assumed a certain position in judicial proceedings from assuming an inconsistent position. *Id.*

124. *Morga*, 2022-NMSC-013, ¶ 1, 512 P.3d at 779.

district court “misapprehends the law or if the decision is not supported by substantial evidence.”¹²⁵ The court refused to depart from this long-standing practice in its review of the *Morga* decision.¹²⁶ The court declined Defendants’ invitation to apply *de novo* review despite a successor district court judge stepping in who did not oversee the trial.¹²⁷ Defendants argued that since New Mexico courts have long recognized that “the best way to arrive at a reasonable award of damages is for the district court judge and the jury to work together,”¹²⁸ and that the successor judge did not work with the jury in this case, the record should be reviewed *de novo* and without any deference paid to his decisions.¹²⁹ The court reasoned that the successor judge spent five months reviewing the case file and certified his familiarity with the case as provided under Rule 1-063 NMRA, providing sufficient grounds for maintaining the court’s long-standing abuse of discretion review standard.¹³⁰ The court acknowledged the disruption that the initial judge’s recusal caused while concluding the successor judge had extensive knowledge of the record “reflected in his reasoned discussion of the close relationship Marialy shared with her parents, familiarity with objections sustained at trial, and the jurors’ responses on the special verdict form,” and the judge’s experience with juries in the community.¹³¹ The court further asserted that because the question of verdict excessiveness is reviewed without deference to the district court’s legal conclusions anyway,¹³² there is no need to adopt a new review standard.¹³³

ii. The sheer size of a \$165 million verdict is insufficient to shock the court’s conscience

The court found that the \$165 million verdict does not “shock the conscience” and is therefore not excessive as it is supported by sufficient evidence and not the product of passion or prejudice.¹³⁴ The court asserted that “[c]onsidering all the evidence in the light most favorable to the verdict, our deference to juries, and

125. *Id.* ¶ 14, 512 P.3d at 782 (internal quotation marks omitted).

126. *Id.* ¶ 15, 512 P.3d at 782.

127. *Id.* ¶ 1, 512 P.3d at 779.

128. *Id.* ¶ 19, 512 P.3d at 783 (quoting *Chrysler Corp.*, 1998-NMCA-085, ¶ 16, 960 P.2d at 838).

129. Brief in Chief at 15–16, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11433568, at *9. Defendants argued that Rule 1-063 NMRA was not applicable because they did not contest that the successor judge lacked the authority or ability to rule. *Id.* at *11. Rather, since the successor judge did not preside at trial, he lacked direct knowledge of the case that would allow him to determine a meaningful remittitur, so a new trial was the appropriate remedy. *Id.* Since, they argued, direct knowledge is the basis for deference to the judge who presided at trial, the ordinary, deferential aspect of abuse of discretion review does not apply to the successor judge who did not oversee the trial proceedings. Brief in Chief at 19–24, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11433568, at *10–11.

130. *Morga*, 2022-NMSC-013, ¶ 20, 512 P.3d at 783–784.

131. *Id.* ¶ 20, 512 P.3d at 783–784.

132. *Id.* ¶ 15, 512 P.3d at 782 (quoting *Primetime Hosp. Inc.*, 2009-NMSC-011, ¶ 10, 206 P.3d at 116).

133. *Morga*, 2022-NMSC-013, ¶¶ 1, 13, 512 P.3d at 779, 781.

134. *Id.* ¶ 1, 512 P.3d at 779. Defendants argued that none of the testimony revealed any injuries that would be atypical or extraordinary for a case of this type, the Plaintiffs sought \$12–\$13 million in compensatory damages, and the total \$165 million compensatory damages verdict exceeds the \$140 million in punitive damages sought by Plaintiffs. Brief in Chief at 27–30, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11433568, at *12–13.

our hesitancy to make comparisons between verdicts and between economic and noneconomic damages, [it] cannot say that the weight of the evidence is clearly and palpably against the verdict.”¹³⁵ The court further concluded that “Defendants did not meet their burden to show that the verdict was tainted by passion or prejudice.”¹³⁶

Defendants raised four issues supporting their claim that the verdict was infected with passion or prejudice.¹³⁷ They argued that the sheer size of the cumulative verdict alone indicate the jury’s award was tainted.¹³⁸ They also pointed to three aspects of the trial to support their claim—the emotional testimony of Alfredo Morga, an unredacted photo of the collision scene, and allegedly inflammatory statements made by Plaintiffs during closing arguments.¹³⁹ The court recognized that the verdict was undeniably large but asserted that the size alone is an insufficient justification to disturb a jury verdict.¹⁴⁰ The court found compelling Plaintiffs’ assertion that to infer the jury wished to punish Defendants by awarding more in compensatory damages than were requested in compensatory and punitive

135. *Morga*, 2022-NMSC-013, ¶ 33, 512 P.3d at 787. Plaintiffs provided testimony and other evidence relevant to Ylairam’s life to help the jury “understand and fully appreciate both her loss of enjoyment of life and the enormous value of the loving family life of which she was deprived.” Answer Brief at 31, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11436083, at *13–14. The Plaintiffs alleged that Defendants failed to point to proof in the record that Ylairam’s life did not warrant the verdict, other than arguing the verdict was too high. *Id.* The jury heard that Alfredo suffered from epilepsy which intensified after the death of his wife and daughter and received a psychological diagnosis of posttraumatic stress disorder and major depressive disorder requiring a year of intensive psychotherapy and psychiatric care. *Id.* at *12. The jury also heard about Alfredo and Marialy’s relationship throughout high school, the birth of Ylairam, Marialy’s indispensable role caring for their family and tending to the home, purchasing their first home, and plans for their future. *Id.* at *12–14. Alfredo also testified about arriving to the accident scene, being told it was too gruesome for him to go near, seeing his son in the El Paso hospital, and being too distraught to help plan his wife and daughter’s funerals. *Id.* at *12. He was unable to return to work for months and ended up leaving his job. *Id.* Yahir suffered traumatic physical injuries and Plaintiffs’ expert testified that he was at an “increased risk for psychological difficulties” and that although he had begun to speak words prior to the accident, after the accident he did not try to speak at all. *Id.* at *13. Alfredo also testified that Yahir had started to wake up in the middle of night scared, crying, and shaking. *Id.*

136. *Morga*, 2022-NMSC-013, ¶ 39, 512 P.3d at 788.

137. *Id.* ¶ 39, 512 P.3d at 788.

138. *Id.* ¶ 40, 512 P.3d at 788. Defendants argued that the cumulative size of the verdict alone and that the individual verdicts far outstrip previous wrongful death awards in the state requires an inference it resulted from passion or prejudice. Brief in Chief at 19–21, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395182, at *11. They asserted that economic damages proved at trial for each of the four individual awards comprise “from less than three percent to less than one percent of the damages awarded,” so the cumulative verdict “should be shocking to any judicial conscience” and “do[es] not in any sense reflect community norms for providing just compensation.” *Id.* at *11. Defendants also argued the trial record indicated the jury applied a mistaken measure of damages. *Id.* at *14–15. During closing arguments and rebuttal, Plaintiffs’ counsel suggested the jury should award two percent of the \$7 billion net worth of FedEx, or \$140 million, as punitive damages to send a message about safety. *Id.* at *15. Because Plaintiffs had sought compensatory damages of \$12–\$13 million and the total jury award of \$165 million was higher than Plaintiffs’ punitive damages request, Defendants argued this indicated the jury was confused about the proper measure of damages. *Id.* at *14–15.

139. *Morga*, 2022-NMSC-013, ¶ 39, 512 P.3d at 788.

140. *Id.* ¶ 40, 512 P.3d at 780.

damages combined would have required a \$25 million mistake by the jury.¹⁴¹ The court concluded that the jury instructions, special verdict form, and jury poll make clear the jury considered each award individually, returning verdicts for compensatory damages ranging from \$200,000 to \$61 million.¹⁴² The Court further asserted that the Plaintiffs' "hypothetical suggestion" for valuing human life at \$500 a day, or \$12 million for the life of Marialy, was not a ceiling on the amount awarded by the jury and is a "far cry from jury tampering or other contamination" needed to grant a new trial.¹⁴³

Defendants argued that the same three aspects of the proceedings noted above provoked an impassioned or prejudicial response—the dramatic scenes surrounding Alfredo Morga's testimony, the unredacted photograph of the accident, and Plaintiffs' provocative closing argument and rebuttal.¹⁴⁴ In concluding that "these three incidents, whether considered on their own or cumulatively, are insufficient" to show passion or prejudice,¹⁴⁵ the court reiterated that aversion and grief are a natural part of a difficult and emotional wrongful death case.¹⁴⁶ The court held that "[a] witness's genuine emotional testimony, alone, . . . is insufficient to show passion or prejudice in a jury."¹⁴⁷ The court reasoned that adopting Defendants' argument would mean that passion or prejudice would always be inferred in any wrongful death case where a plaintiff exhibits genuine emotion.¹⁴⁸ The court noted that while the scenes were dramatic, the district court acted to curtail any impact of the emotional testimony by calling for breaks and having Plaintiffs' counsel lead Alfredo through testimony.¹⁴⁹ The court also found convincing the trial record

141. *Id.* ¶ 41–42, 512 P.3d at 788–789. Plaintiffs noted that the jury did not award any punitive damages, as requested. Answer Brief of Alfredo Morga at 34, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395180, at *16. Record proof from a post-verdict jury poll demonstrated that some jurors indicated that they wanted to award additional punitive damages. *Id.*

142. *Morga*, 2022-NMSC-013, ¶ 43, 512 P.3d at 789. The special verdict form provided a separate section for the awarding of punitive damages should the jury have found FedEx acted with wanton or reckless conduct and in polling the jury following the verdict, some jurors noted that they would have awarded punitive damages in addition to compensatory damages. *Id.*

143. *Id.* ¶¶ 44, 46, 512 P.3d at 789–790.

144. *Morga*, 2022-NMSC-013, ¶ 39, 512 P.3d at 788.

145. *Id.* ¶ 47, 512 P.3d at 790.

146. *See id.* ¶ 55, 512 P.3d at 792.

147. *Id.* ¶ 48, 512 P.3d at 790 (citing *Caldwell v. Ohio Power Co.*, 710 F. Supp 194, 199-200 (N.D. Ohio 1989)).

148. *Morga*, 2022-NMSC-013, ¶ 55, 512 P.3d at 792.

149. Brief in Chief at 36, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11433568, at *15 ("Even the written transcript reflects a dramatic courtroom scene"). Alfredo's emotional testimony described the sequence of events in which he was informed about the accident in the middle of the night, arrived at the location, and was stopped from approaching the pickup truck because, he was told, what he would see was too gruesome. The court called a recess after he became increasingly distraught. Brief in Chief at 9–10, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11433568, at *6. A few minutes after his testimony resumed, the court called a bench conference and commented that the examination was unfair to Alfredo as his counsel thought he may be experiencing seizures related to reliving the emotional trauma. *Id.* at *15. A second recess was called, and Alfredo's counsel was instructed to change topics. *Id.* at *6. However, Alfredo was so emotional at this point he could not continue. *Id.* Defendants alleged that such emotions, even if unavoidable, naturally impact the jury such that they cannot put it out of their minds

reflecting Defendants' admission that the testimony was "honest" and "sincere."¹⁵⁰ The court reasoned that it would be difficult to grant a new trial for such a genuine display of emotion from a party that has lost most of his young family, especially given that the jury was instructed seven times in their instruction packet to not let sympathy or prejudice influence the verdict.¹⁵¹

Defendants next argued that the graphic nature of an unredacted photograph shown to the jury during closing arguments provoked passion or prejudice.¹⁵² The court referred to the trial record in concluding that, while it was agreed that the portion of the photograph showing "what appears to be an arm" should have been masked, the district court judge adequately addressed this on the last day of trial—acknowledging it should have been redacted and holding it from jury deliberations.¹⁵³ The judge considered the incident harmless, stating she would not have been able to tell there was an arm in the photo unless it had been pointed out.¹⁵⁴ The New Mexico Supreme Court agreed, noting that the "portion of the photograph showing the arm is small in comparison to the rest of the photograph."¹⁵⁵ Again, the court concluded the incident was insufficient to infer the verdict was the result of passion or prejudice.¹⁵⁶

Lastly, Defendants argued that improper statements during Plaintiff's closing argument prejudiced the jury, even though they did not object.¹⁵⁷ Plaintiffs' counsel began their closing by stating that the case involved what "may be the most devastating motor vehicle collision involving a truck and tractor that's ever been tried to a jury in the state of New Mexico."¹⁵⁸ Plaintiffs also stated that FedEx was trying to skirt responsibility by blaming its contractors and asked the jury to imagine

despite an instruction that sympathy should not factor in their verdict. *Id.* at *15. Plaintiffs argued that Mr. Morga's testimony was permissible, expected, and Defendants never objected or sought a curative instruction at trial, even conceding Mr. Morga's testimony "was honest, it was sincere." Answer Brief at 40–42, 32–34, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11436083, at *17. Plaintiffs further argued that the trial court was aware of how difficult this testimony would be, carefully monitoring the proceedings and exercising its discretion. *Id.*

150. *Morga*, 2022-NMSC-013, ¶ 51, 512 P.3d at 791.

151. *Id.* ¶ 54, 512 P.3d at 792.

152. *Id.* ¶ 56, 512 P.3d at 792. To begin the closing argument, Plaintiffs' counsel showed the jury some photographs of the scene, including one in which Marialy's body was partially visible. Brief in Chief at 27–28, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395182, at *12–13. The photograph had been admitted with the condition that her body be masked out. *Id.* at *13. Defendants argued the photograph, even if displayed for a short time, was "quickly comprehensible to the eye: the driver's seat is readily identifiable and Ms. Morga's orange sleeveless top draws attention to her shoulder and bloodied arm and to the place where her head would be." *Id.* Plaintiffs claimed that a "yellow sticky" used to cover the photograph apparently fell off before closing argument and Defendants made no objection. Answer Brief at 44–45, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11436083, at *18.

153. *Morga*, 2022-NMSC-013, ¶ 56–57, 512 P.3d at 792.

154. Answer Brief at 44–45, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11436083, at *18 ("I seriously doubt they recognized that as an arm. If you hadn't told me it was an arm when we first discussed it, I don't think I would have known that.")

155. *Morga*, 2022-NMSC-013, ¶ 58, 512 P.3d at 792–793.

156. *Id.* ¶ 59, 512 P.3d at 793.

157. *Id.* ¶ 60, 512 P.3d at 793.

158. Brief in Chief at 25, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395182, at *12.

Marialy trying to start her pickup as the FedEx semi barreled down on her.¹⁵⁹ Defendants' failed to object at trial, claiming in their appeal that the statements were so egregious that no objection was necessary.¹⁶⁰ The court found that the statements made were not "so flagrant and glaring" to leave the bounds of ethical conduct and prejudice the jury, reasoning that any potential prejudicial effect the closing argument may have had "was offset by the district court's instruction to the jury that closing arguments of counsel are not evidence."¹⁶¹ Finally, the Court concluded that the cumulative effect of these incidents was insufficient to infer passion or prejudice given the district court's tight control over the proceedings, the repeated jury instructions, and a presumption the jury followed the instructions.¹⁶² Because the court found there was substantial evidence to support the verdict and a lack of jury passion or prejudice informing the verdict, the sheer size of the awards was insufficient to shock the court's conscience.¹⁶³ Thus, the court held the verdict was not excessive as a matter of law.¹⁶⁴

III. ANALYSIS

In *Morga*, the New Mexico Supreme Court relies on long-standing precedent and practice to affirm the record wrongful death award. The case highlights the impact each party's litigation tactics and choices have on the admittance of expert opinion and other jury guidance informing value of life determinations. The court's rejection of fixed calculations and skepticism of comparison cases is based on sound policy, ensuring value of life determinations are arrived at independent of a party's wealth. However, the extent to which the *Morga* jury actually measured or determined the "value of life" as a distinct damages category applied to each wrongful death verdict is unknown because the jury form gave the jury no option to apportion the noneconomic damages into loss categories.¹⁶⁵ The special verdict form instructed the jury to enter only "the total

159. *Id.* at *13. During rebuttal, Plaintiffs' counsel allegedly defied a motion *in limine* ruling related to other accidents by stating to the jury that "it's happened before" and that FedEx was trying to shift responsibility to its contractors to avoid responsibility even though FedEx had assumed any liability assigned to all defendants. *Id.* Defendants argued that Plaintiffs departed from the evidence by asking the jury to imagine Ms. Morga desperately trying to start her pickup as the FedEx truck barreled down. *Id.* Finally, Defendants argued that Plaintiffs' counsel encouraged the jury to follow their passion by stating, "[T]hey don't want to show the pictures to inflame the Jury. Well, sometimes justice needs to be ignited. You guys are going to have that role today." *Id.* at *13–14. Plaintiffs contended that since punitive damages were considered, statements noting the gravity of the accident, the fact that similar accidents have happened before, and statements such as "sometimes justice needs to be ignited" are acceptable rhetorical devices in closing arguments. Answer Brief at 47–48, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11436083, at *19. Plaintiffs argued the fact that the jury did not award punitive damages indicated that counsel's statements did not inflame the jury with improper passion or prejudice. *Id.*

160. *Morga*, 2022-NMSC-013, ¶ 60, 512 P.3d at 793.

161. *Id.* ¶ 65, 512 P.3d at 794.

162. *Id.* ¶ 66, 512 P.3d at 794–795.

163. *Id.* ¶ 43, 512 P.3d at 789.

164. *Id.* ¶¶ 16, 37, 512 P.3d at 782, 787–88.

165. See Special Verdict Form, *Morga v. FedEx Ground Package Sys., Inc.*, No. D-101-CV-2012-01906, 2015 WL 773966 (N.M. Dist. 2015).

amount of damages suffered by” each plaintiff.¹⁶⁶ The court could avoid any appearance of mistaken measure or duplication of damage claims by scrapping such lump sum verdict forms altogether when a jury is asked to determine noneconomic compensatory damages, given the unclear distinction and potential overlap between noneconomic loss categories.

A. The use of fixed calculations and comparison cases

The *Morga* jury was tasked with determining the value of life for Ylairam and Marialy apart from their earning capacity.¹⁶⁷ The jury was instructed that in valuing noneconomic damages there is no fixed method.¹⁶⁸ Rather, the jury is to use “the enlightened conscience of impartial jurors . . . to compensate the beneficiaries with fairness to all parties.”¹⁶⁹ The court made clear that the WDA goes well beyond recovery of pecuniary loss to encompass *all* damages a jury deems “fair and just.”¹⁷⁰ The court was explicit that accepting Defendants’ argument of a relationship between economic and noneconomic damages would “establish a dangerous policy of, in part, valuing human life based on a person’s net worth.”¹⁷¹ The court’s rationale is sound as limiting noneconomic damages to a fixed percentage of a plaintiff’s proved economic damages values noneconomic injury based on a person’s net worth and earnings. Fixing a relationship would also act as a noneconomic damages cap by limiting a plaintiff’s ability to recoup for losses where negligence has caused little economic impact but substantial pain and suffering or interference with the daily

166. *Id.*

167. *See Morga*, 2022-NMSC-013, ¶ 6, 512 P.3d at 780. In compensating the Estate of Ylairam \$61 million for her wrongful death, the jury was instructed to “fix the amount of money which you deem fair and just for the life of Ylairam Morga.” Answer Brief of Alfredo Morga at 14–15, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395180, at *9. Plaintiffs’ economic expert testified the value of Ylairam’s *economic* damages (including lost earning capacity and loss of household services) exceeded \$1.1 million and calculated Marialy’s lost future earnings and household services at \$651,931. Answer Brief at 32, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11436083, at *14.

168. *Morga*, 2022-NMSC-013, ¶ 6, 512 P.3d at 780. The jury was further directed “to consider economic damages in the form of funeral and burial costs, lost value of household services and earning capacity considering their respective ‘health, habits, and life expectancies’ for the loss of Ylairam and Marialy, as well as noneconomic damages for the value of their lives ‘apart from earning capacity’ and the loss of parental guidance and counseling from Marialy to her son, Yahir. With respect to damages to Alfredo and Yahir, the jury was instructed to consider economic damages for ‘medical care, treatment and services received and the present cash value of the reasonable expenses of medical care, treatment of services reasonably certain to be received in the future, the nature, extent and duration of the injury,’ and any exacerbation of the injury. In awarding noneconomic damages, the jury was also instructed to consider the past and future pain and suffering, loss of enjoyment of life, and emotional distress suffered as a result of the accident.” *Id.*

169. *Id.* ¶ 7, 512 P.3d at 780 (quoting Answer Brief of Alfredo Morga at 15, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395180, at *9 (“The guide for you to follow in determining fair and just damages is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the beneficiaries with fairness to all parties to this action. Your verdict must be based on evidence, not speculations, guess or conjecture. You must not permit the amount of damages to be influenced by sympathy or prejudice, or by the grief or sorrow of the family, or the loss of the deceased’s society to the family.”)).

170. *Morga*, 2022-NMSC-013, ¶ 31, 512 P.3d at 786.

171. *Id.* ¶ 32, 512 P.3d at 787.

enjoyment of life.¹⁷² The jury instructions further reinforce that “the property or wealth of the beneficiaries or of the Defendants is not a legitimate factor for [jury] consideration.”¹⁷³ While such instruction aligns with the court’s policy rationale, it takes little imagination to conclude that FedEx’s net worth, or that of any corporate defendant, factors in the determination of a \$165 million verdict.¹⁷⁴

The court also expressed skepticism about the use of comparison cases to assess verdict excessiveness.¹⁷⁵ The two cases compared in the court’s opinion illustrate the troublesome nature of such comparisons. In comparing *Wachocki* and *Morga*, the court relied on marriage and family difference to support its conclusion about the complicated and fact-specific nature of such determinations.¹⁷⁶ The court seems to hinge its distinction on the fact that the *Wachocki* plaintiff did not have a family of his own while acknowledging he died at a young age.¹⁷⁷ The apparent way in which marriage and a family creates “value” in a life helps account for the disparity between the \$3.7 million wrongful death verdict in that case and the \$32 million and \$60 million wrongful death verdicts in *Morga*. The court’s analysis raises the question of whether the life of a young person who has not yet started a family is worth \$28 million less than the life of a person of the same age who has. The illustration is, however, effective in reiterating why such comparisons are so troublesome—because one cannot know the particular facts and circumstances that weighed heavily in juror’s minds and the verdict determination.

The court cited to a second comparison case to demonstrate the existence of at least one wrongful death verdict comparable in size to the *Morga* verdicts.¹⁷⁸ In that case, the jury returned a \$38 million wrongful death verdict for a trucking accident that claimed the life of a 16-year-old.¹⁷⁹ The court failed to note that the accident occurred four years after the *Morga* collision and the verdict was rendered in the same district court as the *Morga* verdict more than a year after the New Mexico Court of Appeals affirmed *Morga*.¹⁸⁰ The court’s comparisons to *Wachocki* and *Hein* highlight the difficulty in finding New Mexico cases from which comparisons can

172. See, e.g., Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 EMORY L.J. 1263 (2004) (discussing how California medical malpractice caps unfairly disadvantage children, women, elderly persons, and minority groups because these plaintiffs were likely to have relatively low economic losses but major noneconomic damages).

173. *Morga*, 2022-NMSC-013, ¶ 54, 512 P.3d at 792.

174. Although beyond the scope of this Note, the jury instruction raises an important question concerning fairness and equity in the context of testimony about corporate defendants’ net worth and assets.

175. See *Morga*, 2022-NMSC-013, ¶ 21, 512 P.3d at 784.

176. See *id.* ¶ 25, 512 P.3d at 784–85.

177. See *id.* ¶ 25, 512 P.3d at 784–85.

178. See *id.* ¶ 26, 512 P.3d at 785 (citing *Hein v. Utility Trailer Mfg. Co.*, No. D-101-CV-2016-01541 (N.M. 1st Jud. Dist. Ct. 2019)).

179. See *Morga*, 2022-NMSC-013, ¶ 26, 512 P.3d at 785 (citing Special Verdict Form, *Hein v. Utility Trailer Mfg. Co.*, No. D-101-CV-2016-01541 (N.M. 1st Jud. Dist. Ct. 2019), 2019 WL 4573596).

180. The *Hein* verdict was rendered on August 23, 2019. See Special Verdict Form, *Hein v. Utility Trailer Mfg. Co.*, D-101-CV-2016-01541 (N.M. 1st Jud. Dist. Ct. 2019), 2019 WL 4573596. The *Morga* verdict was affirmed on February 6, 2018. See *Morga*, 2018-NMCA-039, 420 P.3d 586. The likelihood that *Hein* jurors were aware of the *Morga* verdict before making their determination cannot be overlooked.

be made and the troublesome nature of using comparison cases to evaluate fact-sensitive verdict determinations.

i. Defense tactics and expert testimony

At trial, Defendants made the strategic decision to bar the Plaintiffs economic expert from testifying about the statistical value of life or attributing a monetary value to life while choosing not to offer their own valuation.¹⁸¹ Instead, Defendants entrusted the jury with valuing life based on the evidence presented at trial and the jury's "enlightened conscience."¹⁸² The result was a record \$61 million wrongful death verdict and \$165 million cumulative verdict.

Morga demonstrates the risk inherent in a common defense strategy to exclude plaintiff expert opinion offering a benchmark for the value of life. In *Morga*, the Defendants sought to bar such testimony arguing, "[p]lainly, economists have no 'specialized' expertise in reckoning the value of life."¹⁸³ They pointed to the federal courts' exclusion of such testimony under *Daubert* to argue that in New Mexico it is within the district court judge's discretion to admit such evidence only "in the absence of a proper *Daubert/Alberico*/Rule 11-072 challenge."¹⁸⁴ The consequence, as conceded by Defendants during the post-trial motion hearing with the successor judge, is that "the jury is not given guidance . . . and we are required to rely on the juror's enlightened conscience as the Instruction instructs them."¹⁸⁵

The Defendants' decision to seek exclusion of expert testimony quantifying the value of life was further compounded by a failure to offer their own guidance.

181. See Order Granting Defendants' Motion to Exclude Testimony of Brian McDonald as to Hedonic Damages, *Morga v. FedEx Ground Package Sys., Inc.*, No. D-101-CV-2012-01906 (N.M. Dist. 2015), 2015 WL 1508690; *Morga*, 2018-NMCA-039, ¶ 25, 420 P.3d at 596 ("Defendant's counsel specifically told the jury, 'I am not going to submit to you a number, because I agree the value of life—I don't want to insult anybody about the value of life in this case. But you have to rely on you[r] own conscious [sic] when you're looking at [the] value of life.'").

182. *Morga*, 2018-NMCA-039, ¶ 14, 420 P.3d at 593–94. ("The jury was instructed as follows: 'The guide for you to follow in determining fair and just damages is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the beneficiaries with fairness to all parties to this action. Your verdict must be based on evidence, not on speculation, guess or conjecture. You must not permit the amount of damages to be influenced by sympathy or prejudice, or by the grief or sorrow of the family, or the loss of the deceased's society to the family.'").

183. Defendants' Motion to Exclude Testimony of Brian McDonald as to Hedonic Damages, *Morga v. FedEx Ground Package Sys., Inc.*, No. D-101-CV-2012-01906 (N.M. Dist. 2015), 2013 WL 10198057, at 3 (citing *Mercado v. Ahmed*, 974 F.2d 863, 871 (7th Cir. 1992) (stating that an economist is "no more expert in valuing life than the average person")).

184. Defendants' Motion to Exclude Testimony of Brian McDonald as to Hedonic Damages, *Morga v. FedEx Ground Package Sys., Inc.*, No. D-101-CV-2012-01906 (N.M. Dist. 2015), 2013 WL 10198057, at *5 (citing W. Kip Viscusi & Joseph E. Aldy, *The Value of a Statistical Life: A critical Review of Market Estimates Throughout the World*, 27 J. RISK & UNCERTAINTY 5 (2003) (applying the *Daubert* test to value of life studies, Defendants demonstrate they are unreliable because they cannot be tested, cannot yield a known rate of error, and are not generally accepted. First, there is no way to test a theory about the value of life. Second, a 2003 'study of studies' revealed a wide disparity in the literature assessing statistical value of life ranges, varying from \$500,000 to \$20.8 million in the U.S. (and from \$200,000 to \$74.1 million internationally). Third, these studies have been uniformly rejected by the federal courts and "have met considerable criticism in the literature of economics." (internal citations omitted)).

185. Answer Brief at 34, *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, 512 P.3d at 774 (2018), 2018 WL 11436083, at *14.

Defendants, afforded an opportunity to present evidence or testimony to guide the jury in their determination, specifically chose not to.¹⁸⁶ The jury was left with little to guide its determination. The admittance of economic expert testimony would have likely resulted in a lower verdict as Plaintiffs expert was set to opine that the reasonable value of a statistical life was between \$5 million and \$6 million.¹⁸⁷ Had such guidance been offered, it would have provided support for the Defendants' excessive verdict claims—though it is unclear the weight that such testimony would be given on appeal. While a lack of jury guidance can inject randomness and unpredictability into noneconomic damage calculations,¹⁸⁸ the adversarial system is built around the function of a jury to determine damages based on the credibility and weight of evidence.¹⁸⁹ When such determinations are left to a jury with little guidance, the value attributed life and other noneconomic damages may well push the outer limits of discretion.

B. The district court's award determination will not be disturbed

The views and guidance of the trial judge are indispensable in determining whether and to what degree remittitur may or may not be appropriate. Higher courts give deference to district court judge decisions as to whether and to what degree remittitur is appropriate based on the judge's observations and knowledge of trial proceedings. For these reasons, Defendants in this case argued that the court should not have given the same deference to decisions of a successor judge who did not oversee the trial.¹⁹⁰ The Court of Appeals offered four reasons, endorsed by the Supreme Court, for not deviating from the long-standing practice of reviewing such decisions for an abuse of discretion—the Defendants had offered no authority to support their contention that de novo review was appropriate, the court was bound by precedent, the successive judge had “experience with juries in the community,”¹⁹¹ and Defendants made no objection regarding the successor judge's “capacity or ability to fully preside over the hearing for remittitur or a new trial.”¹⁹²

The New Mexico Supreme Court opted to maintain its longstanding practice in reviewing the lower court decisions for an abuse of discretion. However,

186. See *Morga*, 2018-NMCA-039, ¶ 25, 420 P.3d at 596.

187. See Report or Affidavit of M. Brian McDonald, Ph.D., *Morga v. FedEx Ground Package Sys., Inc.*, No. D-101-CV-2012-01906 (N.M. Dist. 2015), 2013 WL 10846889, at *3. Plaintiffs' economic expert stated he would “provide testimony as assistance to the trier of fact concerning the specialized knowledge of economists” regarding three things: (1) an economist's interpretation of the concept and meaning of hedonic damages, (2) identifying broad areas of human experience which should be considered in determining hedonic damages, and (3) the value of a statistical life in the United States, based on “well accepted, peer-reviewed economic research.” *Id.*

188. See, e.g., Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87 (2006); Timothy D. Lytton, Robert L. Rabin & Peter H. Schuck, *Tort as a Litigation Lottery: A Misconceived Metaphor*, 52 B.C. L. REV. 267 (2011).

189. *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 16, 127 N.M. 1, 976 P.2d 1.

190. See *Morga v. FedEx Package Sys., Inc.*, 2022-NMSC-013, ¶ 13, 512 P.3d 774.

191. See *Morga*, 2018-NMCA-039, ¶ 10, 420 P.3d at 592; *Morga*, 2022-NMSC-013, ¶ 1, 512 P.3d at 779.

192. *Morga*, 2018-NMCA-039, ¶ 10, 420 P.3d at 592.

the rationale underpinning an abuse of discretion review is that deference should be paid to decisions of the judge who presided over the trial, observed the proceedings, and worked hand in hand with a jury of the community. This judge has intimate familiarity with and direct knowledge of the case upon which to make reasoned judgments. In *Morga*, the trial judge recused herself, and a successor judge was appointed to hear the post-trial motions, after the trial judge's work with the jury had concluded and verdicts had been rendered. Because the successor judge had not overseen the proceedings or worked with the jury but had stepped in only to hear post-trial motions, the Supreme Court would have arguably been justified in reviewing the successor judge's decisions *de novo*, without any deference paid to that judge's legal conclusions. However, the court chose to affirm its longstanding practice of applying abuse of discretion review. By doing so, the court effectively foreclosed the possibility of reviewing a successor judge's decisions as a matter of law, even when a successor judge does not oversee the proceedings. While the court's decision may greatly impact the outcome of an appeal, it had no impact on the *Morga* outcome since, as the court notes, the issue of verdict excessiveness is reviewed *de novo* anyway.¹⁹³ There are compelling policy rationales for following long-standing precedent in giving deference to district courts and successor judge determinations under Rule 1-036 NMRA. As a matter of judicial efficiency, already burdened courts would be retrying and reviewing cases frequently, anytime there are judicial retirements and turnover as the result of elections. Such considerations form part of the intent behind Rule 1-036 NMRA and are the basis for safeguards contained in the statute, like the certification process and ability of the successor judge to recall witnesses.¹⁹⁴

C. The value of life as a compensable loss category under the Wrongful Death Act

While the *Morga* Court made clear that wrongful death jury award determinations approved by the district courts will not be found excessive, the decision creates ambiguity as to whether the value of life is a separate compensable category of noneconomic damage or a description of fair and just hedonic damages generally. In *Sears*, the New Mexico Supreme Court asserted that the WDA allows for consideration of all that is just and fair in assessing the value of life—including pain and suffering, loss of consortium, loss of enjoyment of life, and other damage categories.¹⁹⁵ However, in *Morga*, the court asserted that the value of life itself was a separate compensable category of nonpecuniary loss: “noneconomic damages include pain and suffering, future pain and discomfort, disfigurement, loss of enjoyment of life, mental anguish, and loss of consortium. . . . Noneconomic damages *also* include the value of life itself.”¹⁹⁶ Recognizing a new loss category raises the possibility of jury confusion and duplicative damages. The *Morga* opinion raises the question of how “the value of life itself” is distinct from other noneconomic

193. See *Morga*, 2022-NMSC-013, ¶ 15, 512 P.3d at 782.

194. See Rule 1-063 NMRA.

195. See *Romero*, 1994-NMSC-031, 872 P.2d 840, 842.

196. *Morga*, 2022-NMSC-013, ¶ 28, 512 P.3d at 786 (internal citation and quotation marks omitted) (emphasis added).

loss categories, if at all.¹⁹⁷ That the value of life is a compensable injury in wrongful death actions suggests a close affinity to the loss of enjoyment of life, loss of consortium, and other hedonic damage categories. However, based on the court's rationale the value of life may also be said to broadly encompass *all* values a jury ascribes to a life lost, including and beyond those defined by any recognized loss category.

IV. IMPLICATIONS

Following *Morga*, it is clear that New Mexico higher courts will not disturb noneconomic compensatory damages awarded by district courts absent a clear abuse of discretion in wrongful death cases. Noneconomic damages appear to escape traditional rules and bounds of damages. The lines between what constitutes a noneconomic damage and what constitutes an exemplary or punitive damage may well be thin. However, contrary to arguments that the use by juries of noneconomic damages to punish or deter behavior twists the purposes of such awards,¹⁹⁸ the deterrence and restorative purpose served by such awards is squarely aligned with the purpose of tort law in making the plaintiff whole and ensuring defendants do not benefit financially from their egregious conduct.¹⁹⁹ In *Morga*, the court affirmed that substantial economic damages are permissible under the WDA because, in addition to compensation, the Act is intended "to promote safety of life and limb by making negligence that causes death costly to the wrongdoer."²⁰⁰ The court explicitly noted that this is "irrespective of exemplary damages,"²⁰¹ or punitive damages which a jury could award separately if deemed appropriate. Because of New Mexico's higher courts' aversion to departing from long-standing practice and precedent, *Morga*'s impact will perhaps endure as a testament to the court's absolute deference to district court decisions related to excessive damage claims.

The jury has broad discretion to determine an amount deemed fair and just under the WDA. Without the admittance of expert or other guidance, a jury must base this determination on its own enlightened conscience. In rejecting fixed calculations and the use of comparison cases in affirming the *Morga* verdict, the case will likely impact the size of future wrongful death verdicts, settlement offers, and

197. One major barrier to the effective analysis of compensatory damage awards is the use of lump sum categorization in jury verdict forms, lumping losses as either economic or noneconomic. *See generally* Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCHOL. PUB. POL'Y & L. 743, 759–61 (2000). The special verdict form employed in *Morga* did not require the jury to allocate specific amounts to noneconomic loss categories. *See* Special Verdict Form, *Morga v. FedEx Ground Package Sys., Inc.*, No. D-101-CV-2012-01906, 2015 WL 773966 (N.M. Dist. 2015). Modifying the special verdict form to require specific allocation could help ensure awards are not duplicative nor the result of a mistaken measure of damages, especially given the ambiguity surrounding the value of life.

198. *See, e.g.*, Schwartz & Lorber, *supra* note 15.

199. A post-verdict *Morga* jury poll demonstrated that some jurors indicated that they wanted to award punitive damages in addition to compensatory damages. Answer Brief of Alfredo Morga at 34, *Morga v. FedEx Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586 (2016) (No. 35,001), 2016 WL 11395180, at *16.

200. *Morga*, 2022-NMSC-013, ¶ 32, 512 P.3d at 787 (quoting *Stang*, 1970-NMSC-048, ¶ 11, 467 P.2d at 17).

201. *Id.* ¶ 32, 512 P.3d at 787 (quoting *Folz v. State*, 1990-NMSC-075, ¶ 26, 797 P.2d at 256).

trial litigation strategies and tactics.²⁰² *Morga* also demonstrates that aversion or grief alone are not sufficient for a finding of passion or prejudice and are therefore not sufficient to shock the court's conscience. Significantly more is needed to establish passion or prejudice in a wrongful death case. The implication is that in wrongful death actions and cases involving severe trauma jury instruction and judicial discretion are sufficient to offset the potential effects of raw emotion on the jury. An amount of drama, from which some jury sympathy may be inferred, is tolerated as a natural part of the testimonial process.

CONCLUSION

The *Morga* case highlights the respective roles that a district court judge and jury play in the inherently challenging task of awarding monetary damages for nonmonetary injuries in wrongful death cases. In affirming the \$165 million *Morga* verdict, the New Mexico Supreme Court held that it will not overturn district court decisions related to excessive damages claims absent a clear abuse of discretion. The decision raises important considerations about the outer limits of a jury's discretion in determining the value of life, deference paid to district court decisions, and the use of fixed ratios or comparison cases as an acceptable basis to calculate damage awards and determine excessiveness. Although the court follows long-standing practices and precedent, the case will likely lead to a reassessment of litigation strategies in wrongful death actions, higher settlement offers, and significantly higher compensatory damage verdicts at trial.

202. I recognize that any increase in verdict and settlement amounts generally is also informed by factors like the general state of the economy, inflation, societal perspectives on the value of life, and jurors' life experiences.