DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of: NOYES W. HANSCOME, Deceased.	1 CA-CV 12-0575 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
COLLEEN A. HANSCOME, Personal Representative of the ESTATE OF NOYES W. HANSCOME, on behalf of the ESTATE OF NOYES W. HANSCOME, and COLLEEN A. HANSCOME, individually and on behalf of NOYES W. HANSCOME'S statutory beneficiaries pursuant to A.R.S. § 12-612(A), Plaintiff/Appellee, v. EVERGREEN AT FOOTHILLS, L.L.C., a Washington limited liability company dba EVERGREEN FOOTHILLS HEALTH and REHABILITATION CENTER; EVERGREEN HEALTHCARE MANAGEMENT, L.L.C., a Washington limited liability company, Defendants/Appellants.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-005515

The Honorable Emmet J. Ronan, Judge
The Honorable Richard J. Trujillo, Judge (Retired)

AFFIRMED

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Attorneys for Defendants/Appellants

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By Melanie L. Bossie

And

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J O H N S E N, Judge

¶1 Evergreen at Foothills L.L.C., dba Evergreen Foothills Health and Rehabilitation Center and Evergreen Healthcare Management, L.L.C. (collectively, "Evergreen") appeal the superior court's denial of their motion for new trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Noyes Hanscome was undergoing cancer treatment when he was admitted to a hospital after a fall in December 2004.[1] He was transferred to Evergreen Foothills Health and Rehabilitation Center on January 28, 2005. At the time of his admission to Evergreen, he had two Stage II pressure sores. During his stay at the Evergreen facility, the pressure sores merged, worsened

[1] We view the facts in the light most favorable to upholding the jury's verdict. *Powers v. Taser Int'l Inc.*, 217 Ariz. 398, 399 n.1, ¶ 4, 174 P.3d 777, 778 n.1 (App. 2007).

to Stage IV, and became infected. On February 28, 2005, Noyes was returned to the hospital. He died on March 9, 2005 from respiratory failure resulting from septicemia caused by the infected pressure sore.

¶3 Colleen A. Hanscome brought a claim alleging elder abuse on behalf of Noyes' estate under the Adult Protective Services Act ("APSA"), Arizona Revised Statutes ("A.R.S.") sections 46-451 to -459 (2013).[2] She also asserted claims, individually and on behalf of the couple's minor child, Chandler, for negligence and wrongful death. After trial, the jury awarded Chandler $1.8 million in compensatory damages, awarded Colleen zero damages, and awarded Noyes's estate $200,000. The court entered judgment for those amounts, plus costs and attorneys' fees.

¶4 Ruling on Evergreen's motion for a new trial, the superior court found the jury's award to the estate was fair and reasonable, but reduced the award to Chandler from $1.8 million to $500,000. The court also awarded an additur of $200,000 to Colleen.[3] The court ordered that it would grant a new trial if

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[2] Absent material revision after the relevant date, we cite a statute's current version.

[3] This court later reversed the additur ruling, *In re Estate of Hanscome*, 227 Ariz. 158, 163, ¶ 17, 254 P.3d 397, 402 (App. 2011), which is not at issue in this appeal.

the parties did not accept the adjustments. Both sides rejected the court's adjustments and appealed.

¶5 On appeal, we explained that "although remittitur is a device for reducing an excessive verdict to the realm of reason, if the verdict is within the limits of the evidence, the trial court should not reduce the verdict." *In re Estate of Hanscome*, 227 Ariz. 158, 162, ¶ 14, 254 P.3d 397, 401 (App. 2011) (citation omitted). We were unable to determine from the court's comments on the record whether it had applied the proper standard in reviewing the verdict. *Id.* at 163, ¶ 16, 254 P.3d at 402. We therefore vacated the court's ruling and remanded for reconsideration, under the appropriate standard, of whether the motion for new trial should be granted and, if so, whether that order should be conditioned upon Chandler's rejection of a remittitur. *Id.*

¶6 On remand, the superior court concluded that in granting Evergreen's motion for new trial, the court had "improperly substituted its personal belief as to the value of the damages sustained by Chandler Hanscome arising out of the wrongful death of his father." It denied the motion for new trial, ruling that the jury had been properly instructed and finding that its award of $1.8 million in damages to Chandler was not unreasonable.

¶7 We have jurisdiction of Evergreen's timely appeal pursuant to A.R.S. § 12-2101(A)(1) and (4) (2013).

DISCUSSION

A. Punitive Damages.

¶8 Although the jury rejected the plaintiffs' request for punitive damages, Evergreen argues that the superior court erred by admitting evidence offered in support of the punitive damages claim and by instructing the jury on punitive damages. It argues that the evidence and the instruction prejudiced the jury's consideration of compensatory damages.

¶9 The court must submit the issue of punitive damages to the jury if any reasonable view of the evidence would support an award of punitive damages. *Quintero v. Rogers*, 221 Ariz. 536, 542, ¶ 24, 212 P.3d 874, 880 (App. 2009). We review the court's decision denying Evergreen's motion for summary judgment on punitive damages and motion for judgment as a matter of law on the issue *de novo*, viewing the evidence and all reasonable inferences therefrom in the light most favorable to Colleen. *Hudgins v. Southwest Airlines, Co.*, 221 Ariz. 472, 486, ¶ 37, 212 P.3d 810, 824 (App. 2009).

¶10 Evergreen contends there was no evidence from which a reasonable jury could conclude that Evergreen intended to cause Noyes's injury, was motivated by spite or ill will, or acted to

serve its own interests by consciously disregarding a substantial risk of harm to Noyes.

¶11 To recover punitive damages, a plaintiff must show more than the "mere commission of a tort"; among other things, it must establish that the defendant's conduct was aggravated and outrageous and guided by an "evil mind." *Rawlings v. Apodaca*, 151 Ariz. 149, 161, 726 P.2d 565, 577 (1986) (citation omitted); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986). Such proof may be found where the defendant intended to injure the plaintiff or "consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others." *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578. In determining whether a defendant acted with an evil mind, "a court examines factors such as the reprehensibility of the conduct, the severity of harm that was actually or potentially imposed and the defendant's awareness of it, the duration of the misconduct, and any concealment of the risk of harm." *Hudgins*, 221 Ariz. at 487, ¶ 40, 212 P.3d at 825. A plaintiff need not offer direct evidence of the defendant's state of mind, but may establish evil motive or conscious disregard through circumstantial evidence, including the defendant's expressions, conduct or objectives. *Id*.

¶12 Colleen offered evidence that Evergreen did not clean Noyes's wound, apply medication, and change the dressing as ordered; did not appropriately administer his pain medication; did not adequately monitor his nutrition, resulting in malnutrition and dehydration; and did not regularly reposition or clean him. She also offered evidence from which the jury could conclude that those omissions resulted from Evergreen's deliberate understaffing in order to increase its profit. For example, Evergreen's local administrator testified that Evergreen endeavored to increase its income by keeping its patient census high and holding its expenses – the largest of which was nursing staff – low. He also testified that Evergreen's corporate office established the facility budget and he did not have the authority to permanently increase staff to meet patient needs. This evidence, coupled with testimony that Evergreen's nursing staff had complained about understaffing and the testimony of Colleen's nursing-care expert that Evergreen's staffing was not adequate to meet the needs of its residents, could have allowed a reasonable jury to find that Evergreen acted to serve its own interests by consciously disregarding a substantial risk of harm to Noyes. *See Rawlings*, 151 Ariz. at 162, 726 P.2d at 578; *Hudgins*, 221 Ariz. at 487, ¶ 40, 212 P.3d at 825.

¶13 At oral argument, Evergreen asserted the superior court erred by admitting evidence that went solely to the issue of punitive damages, arguing the evidence prejudiced the jury's determination of compensatory damages. It conceded, however, that it did not move to exclude such evidence at trial. Moreover, Evergreen offers no analysis of why the evidence was not admissible on the statutory and wrongful-death claims for compensatory damages.

¶14 Even if the court had erred by allowing the punitive damages claim to go to the jury, the jury did not award any punitive damages. Evergreen speculates that the punitive damages instruction allowed the jury to punish it by inflating its award of compensatory damages to Chandler under the lower burden of proof that applies to those damages. We cannot accept Evergreen's contention that the jury disregarded its instructions in that fashion. *See Elliott v. Landon*, 89 Ariz. 355, 357, 362 P.2d 733, 735 (1961) (it must be presumed that jurors correctly apply the instructions of the court).

B. Other Jury Instructions.

1. Collateral source.

¶15 During trial, Evergreen's counsel asked Colleen whether she had life insurance for Noyes and, before her counsel objected, Colleen answered in the affirmative. The court sustained Colleen's counsel's objection made after Colleen's

answer and instructed the jury that it was not to consider the subject of insurance as part of its deliberations. The court later instructed the jury that it should not consider whether a party had insurance coverage and that any such coverage had no bearing on the issues of fault or damages.

¶16 Evergreen argues this instruction was erroneous because a jury in a medical malpractice case may consider insurance coverage. It also contends the court erred by refusing to give Revised Arizona Jury Instruction ("RAJI") Medical Malpractice Jury Instruction No. 3, which instructs the jury that it has discretion whether, and to what extent, it will consider evidence concerning a plaintiff's medical and disability benefits.[4]

¶17 In general, in a wrongful-death action under Arizona's common law, "payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability," even if they cover all or a part of the harm for which the tortfeasor is liable. *Taylor v. S. Pac. Transp. Co.,* 130 Ariz. 516, 519, 637 P.2d 726, 729 (1981). Such evidence is admissible, however, in a wrongful-death action

[4] We review jury instructions as a whole and will grant a new trial on the basis of an erroneous instruction "only if it was both harmful to the complaining party and directly contrary to the rule of law," and the court has substantial doubt that the jury was properly guided. *Hudgins*, 221 Ariz. at 480, ¶ 10, 212 P.3d at 818.

premised on medical malpractice, when offered to "establish that any cost, expense, or loss claimed by the plaintiff as a result of the . . . death is subject to reimbursement or indemnification" from a collateral source. A.R.S. § 12-565(A) and (B) (2013).

¶18 The only trial evidence regarding insurance coverage was Colleen's testimony concerning the life insurance policy and her testimony that Noyes was covered by the Arizona Health Care Cost Containment System. This evidence was not relevant to the jury's award of damages to Chandler because there was no evidence that he was the beneficiary of the life insurance policy and he was not seeking reimbursement for Noyes's medical expenses. Accordingly, with respect to Chandler's damage award, the court did not err by instructing the jury that it was to disregard insurance coverage and by refusing to instruct the jury pursuant to A.R.S. § 12-565. *See Hudgins*, 221 Ariz. at 480, ¶ 10, 212 P.3d at 818.

2. Spoliation.

¶19 Colleen alleged Evergreen did not appropriately administer Noyes's pain medication or give him regular showers. In pretrial discovery, Evergreen produced incomplete narcotics logs and no shower logs, claiming they were not customarily maintained as part of the patient's medical file and had been

destroyed in the ordinary course of business. As a result, Colleen requested a spoliation instruction.

¶20 The court instructed the jury that if it determined Evergreen lost, concealed, destroyed, or failed to preserve relevant evidence without an adequate explanation, it could infer that such evidence was adverse to Evergreen's interests. *See Smyser v. City of Peoria*, 215 Ariz. 428, 438-39, ¶ 32, n.11, 160 P.3d 1186, 1196-97 n.11 (App. 2007) (quoting Black's Law Dictionary 1257 (6th ed. 1990)); *Souza v. Fred Carries Contracts, Inc*., 191 Ariz. 247, 250, 955 P.2d 3, 6 (App. 1997). Evergreen argues the court erred by giving this spoliation instruction because it had no duty to preserve the shower logs. Because Evergreen failed to object to the instruction, however, it has waived the argument. *See* Ariz. R. Civ. P. 51(a); *Copeland v. City of Yuma*, 160 Ariz. 307, 308, 772 P.2d 1160, 1161 (App. 1989).[5]

C. Closing Argument.

1. "Golden Rule" argument.

¶21 Evergreen contends Colleen's counsel improperly made a "golden rule" argument during her closing remarks by asking the jury to base its damage award on the amount the jurors would want as compensation for a comparable loss.

[5] Although Evergreen contends it did object at trial to the spoliation instruction, it does not cite the record for that assertion, and we do not find any such objection in the record.

¶22 Evergreen moved to preclude such an argument prior to trial, and Colleen responded that she was "familiar with the law regarding asking a jury to place [itself] or family members in Plaintiff's position" and did not intend to violate that law. Nevertheless, during closing argument, Colleen's counsel asked the jury to compensate Colleen and Chandler for the loss they suffered as a result of Noyes's death and stated:

> And really the amount that will compensate Chandler and Colleen is what value Chandler and Colleen put on that, and we're asking you to assess that. **What would you pay to have another day with your spouse? Another month? Another anniversary? Another holiday? More photographs? What would you pay as a 3-year-old to have another day with your dad?** 5 million? 10 million? Those things are priceless, Ladies and Gentlemen; but we're asking you to put a price on it.

(Emphasis added).

¶23 Evergreen contends those statements improperly influenced the jury by appealing to the jurors' emotions and inflaming their passions.[6] At trial, however, Evergreen did not object to counsel's improper statements at the time, nor did it ask the court to strike the statements or give the jury a curative instruction. Under these circumstances, and given the

[6] The grant or denial of a motion for new trial on grounds of misconduct is a matter within the court's discretion and we will defer to the court's ruling unless it is clear that it abused its discretion. *Leavy v. Parsell*, 188 Ariz. 69, 72, 932 P.2d 1340, 1343 (1997); *Grant v. Ariz. Public Serv. Co.*, 133 Ariz. 434, 454-55, 652 P.2d 507, 527-28 (1982).

evidence in the record, we cannot conclude that Evergreen was prejudiced by the improper comments.

2. Argument did not exceed the scope of rebuttal.

¶24 Evergreen also asserts Colleen's counsel engaged in misconduct by exceeding the scope of rebuttal during her final argument.

¶25 As a general rule, plaintiff's rebuttal is limited to matters discussed in the defendant's closing because the defense attorney is not able to reply to the plaintiff's final argument. *Hubbard v. Matlock*, 24 Ariz. App. 554, 556, 540 P.2d 173, 175 (1975). In this case, Evergreen's counsel did not discuss compensatory damages in his closing. Thereafter, during her final closing remarks, Colleen's attorney stated:

> Now I want to talk about one thing. I want to talk about some issues here and what defendants didn't have a right to do. We talked about this in voir dire. I asked you a question: How many people think that we're all going to die and it doesn't matter how you're going to die? And no one raised their hand that they felt that way. Then I take it you guys don't feel that way. What gave the defendants the right to deny Colleen, to deny Chandler, an extra day?

¶26 Evergreen objected that those statements were beyond the scope of rebuttal because they concerned the issue of damages. The court overruled the objection.

¶27 Colleen's counsel then continued:

> Nothing gave them the right to do what they were supposed to do. Nothing gave them a right to take away something from a family, even if it was precious little time, even if it was a year, Dr. Lipson said. No one gave them the right to take that away and they did.
>
> And it was for that reason – talk about justice. Let's talk about justice. Justice is you follow the laws. Justice is you follow the statutes. Justice is you make promises to take care of someone, you do it. Justice is you run a business that's in the business of taking care of people, you provide people to do that. They didn't. Hold them accountable.

¶28 Because the challenged statements did not pertain to damages, but concerned liability, the court did not err.

D. Substantial Evidence Supports the Jury's Damage Award.

¶29 Finally, Evergreen argues that aside from the issues addressed above, the jury's damage award to Chandler was not supported by the evidence and was the result of passion or prejudice.

¶30 In ruling on a motion for new trial based on a claim of excessive damages or that the verdict resulted from passion or prejudice or was not justified by the evidence, the superior court asks whether the verdict is so "manifestly unfair, unreasonable and outrageous as to shock the conscience." *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 55, ¶ 23, 961 P.2d 449, 453 (1998) (citation omitted). We review the denial of a motion for new trial or remittitur for an abuse of discretion

and afford the superior court the "greatest possible discretion" when upholding the jury's assessment of damages because, like the jury, the court heard the witnesses and observed their demeanor. *Hyatt Regency v. Winston & Strawn*, 184 Ariz. 120, 136, 907 P.2d 506, 522 (App. 1995). We view the evidence in the light most favorable to upholding the jury's verdict. *Hutcherson*, 192 Ariz. at 56, ¶ 27, 961 P.2d at 454 (appellate court must not "take the case away from the jury" by combing the record for evidence supporting a different conclusion; "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.") (citation omitted).[7]

¶31 As discussed in our prior decision, because Chandler's loss was personal, non-economic, and not easily quantified, it is difficult to determine whether the jury's award exceeded the evidence. *In re Hanscome*, 227 Ariz. at 163, ¶ 15, 254 P.3d at 402. Both sides acknowledged that Noyes would have lived, at

[7] Evergreen asserts that the superior court erred by reversing an earlier determination that the jury awarded Chandler excessive compensatory damages in an effort to punish Evergreen. We see no error. As discussed, we vacated the superior court's order granting Evergreen's motion for new trial and remanded with instructions that the court reconsider the motion under the appropriate standard. *In re Hanscome*, 227 Ariz. at 163, ¶ 16, 254 P.3d at 402. On remand, the superior court stated that in its earlier ruling, it had improperly substituted its personal belief as to the value of Chandler's damages and, implicitly, that it had not applied the proper legal standard.

most, an additional 12 months absent Evergreen's alleged acts. Yet the jury may have regarded those months as a significant part of Chandler's short life to that point. Colleen testified that during the year after Noyes's death, Chandler became more aware of his surroundings and better able to communicate. She explained that Chandler had a close relationship with his father and frequently asks about Noyes and believes that when he finds a penny, Noyes has sent it from heaven because he remembers his father giving him pennies when he was alive. As Chandler's counsel argued to the jury, another year would have given Chandler more time to form memories and to celebrate holidays and special occasions with Noyes. *See Walsh v. Advanced Cardiac Specialists Chartered*, 229 Ariz. 193, 196, ¶ 8, 273 P.3d 645, 648 (2012) ("[W]rongful death damages are statutorily limited to injuries 'resulting from the death,' [A.R.S.] § 12–613, which may . . . include the loss of companionship, comfort, and guidance caused by the death; and the survivor's emotional suffering").

¶32 Given the evidence, we cannot say that the jury's award of $1.8 million in compensatory damages to Chandler was so manifestly unfair, unreasonable and outrageous that it shocks the conscience. *See Hutcherson*, 192 Ariz. at 55, ¶ 23, 961 P.2d at 453. The superior court did not abuse its discretion by

denying Evergreen's motion for new trial based on the grounds that the verdict was not supported by the evidence.

CONCLUSION

¶33 For the foregoing reasons, we affirm the jury's verdict and the superior court's denial of Evergreen's motion for new trial.

_____/S/_____
DIANE M. JOHNSEN, PRESIDING JUDGE

CONCURRING:

_____/S/_____
SAMUEL A. THUMMA, ACTING PRESIDING JUDGE

_____/S/_____
PATRICIA A. OROZCO, JUDGE