DIVISION ONE
FILED: 11-30-2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN THE MATTER OF THE ESTATE OF: NOYES W. HANSCOME, Deceased.	1 CA-CV 10-0007 DEPARTMENT E Maricopa County Superior Court No. CV2006-005515
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. section 12-612(A), Plaintiff-Appellee-Appellant, 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, KIM BENJAMIN BANGERTER, executive director, Defendants-Appellants-Appellees.	MEMORANDUM DECISION (Not for Publication - Rule 28 – Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-005515

The Honorable Richard J. Trujillo, Judge (Ret.)

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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W E I S B E R G, Judge

¶1 Evergreen at Foothills, L.L.C., dba Evergreen Foothills Health and Rehabilitation Center; Evergreen Healthcare Management, L.L.C.; and Kim B. Bangerter, director of Evergreen Foothills Health and Rehabilitation Center (collectively "Defendants") appeal from the superior court's ruling awarding additur to a jury verdict that awarded zero damages to Colleen A. Hanscome, widow of Noyes W. Hanscome, as an alternative to its ordering a new trial on damages. Colleen appeals from the court's order remitting the jury's verdict in favor of her minor son, Chandler, again as alternative to a new trial on damages. Because both sides rejected the awards of additur and remittitur, the court ordered a new trial to determine the

amount of wrongful death damages. For reasons that follow, we affirm the award to Noyes' estate but reverse the additur, vacate the remittitur, and remand for further proceedings.

BACKGROUND

¶2 Due to the substandard care he received at Evergreen Foothills Health and Rehabilitation Center, Noyes suffered a premature and painful death. Colleen brought an action on behalf of his estate under the Adult Protective Services Act ("APSA"), Arizona Revised Statutes ("A.R.S.") sections 46-451 to 459 (Supp. 2009). She also alleged claims for negligence and wrongful death on behalf of herself and Chandler.

¶3 The case went to trial, and in closing argument, Plaintiffs' counsel suggested an award of $5 to 10 million to compensate Chandler for Noyes' wrongful death. Although the jury was instructed on punitive damages, it declined to award such damages. The jury awarded Chandler $1.8 million; awarded Colleen zero damages; and awarded Noyes' estate $200,000. The court entered judgment for $2 million in addition to costs and attorney's fees.

¶4 Defendants moved for a new trial. They asserted that by giving a punitive damage instruction, the court had "opened the door to the concept of punishment" and inflamed the jury to award the "outrageously excessive" amount of $1.8 million to

Chandler. They also asserted that "the jury found a way to punish Defendants and take care of Chandler by inflating his compensatory damages without having to comply with the clear and convincing standard that punitive damages require." Defendants additionally challenged instructions that barred consideration of insurance proceeds and that allowed the jury to draw a negative inference from loss of certain records. Lastly, they challenged the propriety of Plaintiff's closing argument and argued that counsel improperly had waited until rebuttal to address damages. In their reply, Defendants for the first time suggested that the court could apply remittitur to the verdict.

¶5 At oral argument, when the court asked what "a fair verdict" for Chandler might be, Defendants suggested "around the $500,000 mark." The court stated that "the ultimate test" was "what is fair and reasonable compensation given the damage sustained," and later said, "you didn't mention additur, . . . why wouldn't there be a request to add something" in light of the verdicts for the Plaintiffs. Plaintiffs responded that the test is whether the verdict shocks the trial court's conscience and that although an award to Colleen would have been desirable, "it's better to let our system work and let the jury verdict stand." The court denied a new trial but asked for supplemental briefing on the issue of remittitur.

¶6 In her brief, Colleen argued that an additur was more justified than a remittitur. She cited *Sedillo v. City of Flagsaff*, 153 Ariz. 478, 479, 737 P.2d 1377, 1378 (App. 1987), a wrongful death action in which the plaintiffs unsuccessfully moved for additur, and this court found that the trial court had abused its discretion because the "unimpeached evidence" showed close family relationships had existed between the deceased and his family and that "all suffered substantial emotional, and possibly financial, injuries." *Id.* at 482, 737 P.2d at 1381. Colleen stated that she did not expect the court to "take any action" but that "the law would favor an additur." Defendants asserted that the jury had failed to consider Noyes' short life expectancy and his inability to interact with Chandler and that Chandler should receive $200,000.

¶7 At a second oral argument, the court observed that "the jury was outraged" by Defendants' conduct and that punitive damages would have been proper. Plaintiffs argued that remittitur was proper in cases in which the jury misunderstood the instructions or had not been properly instructed but that "just what you think is reasonable" was not the standard applied in those cases. Counsel added that he was not asking the court to impose punitive damages when the jury had declined to do so, at which time the court said, "Yeah, but this isn't the bottom

line does the evidence support the verdict." The court also said that the jury "punished the Defendant. They didn't follow the instructions with respect to wrongful death." The court noted that "the person who lost the contact, the love and affection, the relationship" was Colleen. The court expressed doubt that Noyes could have participated in his son's life "other than to see him and maybe kiss him."

¶8 In its ruling, the court found the award to Noyes' estate "fair and reasonable" and that Defendant's outrageous conduct would have supported a punitive damage award of $1.8 million. It rejected the argument that the evidence had inflamed the jury, and because there was no punitive award, the court concluded that the verdicts were based on the jury's view of the evidence. But "[i]n good conscience," the court could not find that "adequate evidence" supported the award of $1.8 million to Chandler and reduced it the sum that the Defendants had suggested was "fair," i.e. $500,000. Furthermore, the court concluded that *Sedillo* required it "in good conscience" to award an additur to Colleen of $200,000 because "[t]he only reasonable explanation for a zero award is the jury's belief that she

received a substantial sum from [the] life insurance carrier."[1] The court gave both sides time to consider.[2]

¶9 Colleen notified the court that she would not accept the remittitur, and the Defendants timely rejected the additur. The court then issued a "final order" noting the rejection of its proposal and ordering a new trial to determine the amount of damages suffered by Colleen and Chandler.

¶10 Colleen and the estate appealed from the final order. Defendants filed a "Supplemental Notice of Appeal" challenging the additur. We have jurisdiction pursuant to A.R.S. § 12-2101(B), (F)(1)(2003).

DISCUSSION

¶11 Colleen contends that in offering a remittitur of Chandler's verdict, the court applied an incorrect legal

[1]The *Sedillo* court noted that despite "ample testimony" of the plaintiffs' losses, the jury improperly might have considered comparative negligence principles in arriving at the "extremely low damage awards" to some of the survivors. 153 Ariz. at 482, 737 P.2d at 1381. For those survivors who received no damages at all, however, "additur was not an available remedy," and they should have been granted a new trial. *Id*. at 482-83, 737 P.2d at 1381-82.

[2]Arizona Rule of Civil Procedure 59(i)(1) provides that if a party seeks a new trial because "the damages awarded are either excessive or insufficient, the court may grant the new trial conditionally upon the filing within a fixed period . . . a statement . . . accepting that amount of damages which the court shall designate." If the affected party accepts designated damages, a new trial is denied; if the party declines, a new trial is granted for damages only.

standard, *i.e.*, the court's own sense of fairness, and overlooked evidence supporting the $1.8 million verdict. In their appeal, Defendants argue that the court abused its discretion by offering the additur for Colleen. We first consider the verdict for Chandler.

Remittitur of Chandler's Award

¶12 It is "well settled in Arizona that the amount of an award for damages is a question peculiarly within the province of the jury, and such award will not be overturned or tampered with unless the verdict was the result of passion and prejudice."[3] *Larriva v. Widmer*, 101 Ariz. 1, 7, 415 P.2d 430, 437 (1966). Thus, when faced with 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 trial 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). Furthermore, neither an appellate court nor the trial court may "reweigh the evidence and set aside the jury verdict merely because the jury could

[3]A verdict may indicate passion or prejudice if it is "so excessive as to [seem], at first blush, . . . beyond all measure, unreasonable, and outrageous," and to suggest that the jury acted upon "passion, partiality, prejudice, or corruption." *Stallcup v. Rathbun*, 76 Ariz. 63, 66, 258 P.2d 821, 824 (1953) (citation omitted).

have drawn different inferences . . . or because . . . other results [were] more reasonable." *Id*. at 56, ¶ 27, 961 P.2d at 454; *see also Creamer v. Troiano*, 108 Ariz. 573, 576, 503 P.2d 794, 797 (1972) (if "case has been submitted on correct rulings and instructions, and the verdict is within the range of credible evidence," it was not the result of passion or prejudice and should be affirmed); *Ogden v. J.M. Steel Erecting, Inc.,* 201 Ariz. 32, 36, ¶ 15, 31 P.3d 806, 810 (App. 2001) (court should uphold verdict "[i]f any substantial evidence could lead reasonable persons to find the ultimate facts to support" it). The *Hutcherson* court observed that to assess whether sufficient evidence supports a verdict, we "look to the broad scope" of the trial and not for evidence to support a different conclusion or inference than that reached by the jury. *Id*., 192 at 56, ¶ 27, 961 P.2d at 454.

¶13 Although "verdict size alone does not signal passion or prejudice," *id*. at 57, ¶ 36, 961 P.2d at 455, if the trial court finds that a verdict is so tainted, remittitur is not a proper remedy; instead, the court should order a new trial. *Stallcup v. Rathbun*, 76 Ariz. 63, 65, 258 P.2d 821, 823 (1953). But if a verdict instead reflects "an exaggerated measurement of damages" in an area in which reasonable persons may differ, the trial court should not lightly conclude that it is tainted. *Id*.

(quoting *So. Pac. Co. v. Tomlinson*, 4 Ariz. 126, 33 P.710, 711 (1893)). In that event, the trial court may exercise its discretion if it finds that the verdict is large, yet not "shocking[ly] or flagrantly outrageous," to order remittitur. *Id*. at 67, 258 P.2d at 824. *Stallcup*, for example, affirmed a verdict the trial court had reduced from $45,000 to $30,000 and which the plaintiff had accepted as damages for lost earnings, medical expenses, and permanent injuries. *Id*. at 65, 258 P.2d at 823.

¶14 When a trial court orders remittitur, we accord that ruling "[t]he greatest possible discretion because, like the jury, [the trial court] has had the opportunity to hear the evidence and observe the demeanor of witnesses." *Mammo v. State*, 138 Ariz. 528, 533-34, 675 P.2d 1347, 1352-53 (App. 1983). Nonetheless, remittitur is proper only "for the most cogent reasons," *Young Candy & Tobacco Co. v. Montoya*, 91 Ariz. 363, 370, 372 P.2d 703, 707 (1962), such as lack of evidence to support the damages awarded or a clear indication that the jury misapplied the principles governing damages.[4] Thus, although

[4]*In Young Candy*, the defendant's vehicle hit a pedestrian who was in a crosswalk and appealed from the trial court's refusal to reduce the "excessive" verdict of $25,000. *Id*. at 365-66, 372 P.2d at 704. Our supreme court stated that if the verdict was "reasonably supported by the evidence, when the trial is free from error," the verdict should stand unless "the jury has mistakenly applied the wrong principles in estimating

"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. *Muccilli v. Huff's Boys' Store, Inc.*, 12 Ariz. App. 584, 590-91, 473 P.2d 786, 792-93 (1970) (reinstating $21,000 verdict for contract breach; mere uncertainty over calculation of injury did not support remittitur to $15,000 when one view of evidence showed loss exceeding verdict).

¶15 We acknowledge that determining whether Chandler's award was within the limits of the evidence is difficult because the losses he suffered were personal, non-economic, and not easily quantified. The parties also agreed that Noyes' life expectancy was short and that Chandler was very young when Noyes died. Nevertheless, the wrongful death statute, A.R.S. § 12-613 (2009), allows surviving spouses and even adult children to recover for loss of love, comfort, guidance, and companionship. *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, 136, ¶ 7, 163 P.3d 1083, 1086 (App. 2007). We cannot know what led the jury to allocate so much of the damages to Chandler, but he was nearly three when Noyes died; an additional year with his father

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the damages or was actuated by improper motives or bias indicating passion or prejudice." *Id*. at 370, 372 P.2d at 708. Because the trial court had upheld the jury's verdict and the supreme court found no reasonable basis to disagree, it affirmed the verdict. *Id*.

would have represented a large percentage of Chandler's life, and as Plaintiffs' counsel suggested, given him more time to form memories and to celebrate holidays and special occasions. It is not inconceivable that the jury considered these factors.

¶16 In conclusion, we cannot say as a matter of law that Chandler's award was the product of passion or prejudice. In considering the verdict, however, the trial court stated that the jury was outraged by the evidence, that punitive damages of $1.8 million would have been warranted, that the jury had improperly considered Colleen's receipt of insurance proceeds in failing to award her any damages, and thus that the court would have affirmed a $2 million judgment. The court nonetheless concluded that Chandler's award was excessive and adjusted the verdicts so that Chandler, Noyes' estate, and Colleen jointly received $900,000. The court's frequent references to using its "good conscience" and "fairness" suggest that it may have erred in concluding that it had discretion to review the jury's verdict based on its sense of what was fair and reasonable. On the other hand, the final minute entry suggests that the court may have concluded that Chandler's award was not within the range of the credible evidence and that the jury, although properly instructed, failed to follow the instructions. Given the uncertainty about whether the court applied the proper

standard in reviewing the verdict and in determining that remittitur was justified, we vacate its ruling and remand for reconsideration, under the appropriate standard, of whether a new trial should be granted and, if so, whether the order for a new trial will be conditioned upon Chandler's acceptance or rejection of a remittitur in an amount to be determined by the trial court.

Propriety of Additur

¶17 Defendants argue, and Colleen concedes, that the court erred as a matter of law in adding to her verdict when the jury had awarded her zero damages. In interpreting Rule 59(i), we have held that "the court can only grant an additur when the jury awards damages and these damages are insufficient. The court cannot grant an additur when the jury finds that the plaintiff was not damaged." *State v. Burton*, 20 Ariz. App. 491, 496, 514 P.2d 244, 249 (1973). Similarly, in *Sedillo*, some of the decedent's survivors received very small damage awards, and some received none. We held that "for those appellants who did not receive any damages, additur was not an available remedy because Arizona law clearly dictates that a court can grant additur only where the jury has awarded some damages." 153 Ariz. at 482, 737 P.2d at 1281. Those who received nothing were entitled to a new trial. *Id*. But in both *Sedillo* and *Burton*,

the plaintiffs had timely filed a motion for additur or in the alternative a motion for new trial. *Id*. at 479, 737 P.2d at 1378; *Burton*, 20 Ariz. App. at 492, 514 P.2d at 245.

¶18 Colleen argues that she should receive a new trial because, as in *Sedillo*, ample testimony demonstrated her emotional and financial loss but the jury awarded no damages. However, Colleen did not request a new trial within the time limits prescribed by Rule 59(d) ("not later than 15 days after entry of judgment"). *See Lopez-Hudson v. Schneider*, 188 Ariz. 407, 409, 937 P.2d 329, 311 (App. 1996) (time limit in Rule 59 are strictly construed and cannot be enlarged). And although Rule 59(g) allows the court to grant a new trial on its own initiative, the court must do so "[n]ot later than 15 days after entry of judgment." The court entered judgment on January 16, 2009 and ordered a new trial on November 16, 2009. *See Johnson v. Elliott*, 112 Ariz. 57, 61, 537 P.2d 927, 931-32 (1975) (trial court properly granted defendants' new trial motion but could not grant plaintiffs a new trial because they failed to file a written motion and court did not comply with Rule 59(g)). Because more than fifteen days passed from the entry of judgment to the granting of a new trial subject to the acceptance of the additur, that order must be reversed.

CONCLUSION

¶19 We reverse the order awarding Colleen a new trial conditioned upon her acceptance of an additur in the amount of $200,000 and vacate the order granting a new trial to Chandler conditioned upon his acceptance of a remittitur in the amount of $500,000. We remand for the trial court to reconsider Defendants' new trial motion and to apply the correct legal standard of whether substantial evidence supports the $1.8 million verdict. If the court concludes that substantial evidence supports the verdict in favor of Chandler, it may deny the motion. If the court concludes that substantial evidence does not support the verdict, it may order a new trial on the issue of damages only and, pursuant to Rule 59(i), may condition such new trial upon Chandler's acceptance of a remittitur in an amount determined by it to be supported by substantial evidence.

¶20 Defendants have requested an award of attorney's fees incurred in the appeal. They cite no authority in support, and thus we decline their request. *Bed Mart, Inc. v. Kelley*, 202 Ariz. 370, 375, ¶ 24, 45 P.3d 1219, 1224 (App. 2002). With respect to recovery of costs, because each party prevailed on the issue on which it was the appellant and neither has requested apportionment of costs, we award no costs to either party. *See Watson Const. Co. v. Amfac Mortg. Corp.*, 124 Ariz.

570, 585, 606 P.2d 421, 436 (App. 1979) (each party prevailed in part in case involving multiple claims and parties; no abuse of discretion to deny costs to both sides).

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
PHILIP HALL, Presiding Judge

/s/_____
PETER B. SWANN, Judge