

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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DANIELLE TARAN, A SINGLE WOMAN,  
*Plaintiff/Appellee,*

*v.*

OMNI HOTELS MANAGEMENT CORPORATION, A FOREIGN FOR-PROFIT  
CORPORATION DOING BUSINESS AS OMNI TUCSON NATIONAL RESORT,  
*Defendant/Appellant.*

No. 2 CA-CV 2022-0139  
Filed August 23, 2023

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).*

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Appeal from the Superior Court in Pima County  
No. C20205142  
The Honorable Gary J. Cohen, Judge

**AFFIRMED**

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COUNSEL

Jeffrey L. Victor, Scottsdale  
*Counsel for Plaintiff/Appellee*

Jones, Skelton & Hochuli P.L.C., Phoenix  
By Jefferson T. Collins and Jonathan P. Barnes Jr.  
*Counsel for Defendant/Appellant*

**MEMORANDUM DECISION**

Judge Gard authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

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G A R D, Judge:

¶1 In this negligence case arising from a trip-and-fall accident, Omni Hotels Management Corporation (“Omni”) appeals from the trial court’s final judgment in favor of Danielle Taran and its order denying Omni’s motion for a new trial. Omni argues that the court abused its discretion by instructing the jury that it could consider Taran’s projected life expectancy when assessing damages for any proven permanent injury, and by failing to grant a new trial or order remittitur based on the magnitude of the jury’s damages verdict. For the following reasons, we affirm.

**Factual and Procedural Background**

¶2 “We view the evidence in the light most favorable to upholding the jury’s verdict.” *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, ¶ 2 (App. 2014). On February 29, 2020, Taran attended a golf tournament at Omni’s property in Tucson. On her way to the golf course, Taran tripped on a misaligned section of a sidewalk. She “face-planted forward,” caught herself with her hands, and slid onto landscape gravel adjacent to the walkway. Immediately after falling, Taran lost consciousness twice. Her left hand and pinky finger were bleeding, and she had abrasions on her leg. Paramedics assessed Taran, bandaged her wounds, and offered to call an ambulance to take her to the hospital. Taran declined the offer and instead proceeded to the golf tournament. In addition to causing physical injuries, the accident was “embarrassing,” “frightening,” and “traumatic” for Taran.

¶3 For the next two days, Taran’s hand was sore and swollen. On March 2, she went to an urgent care center, where x-rays revealed a closed, displaced fracture of the fifth metacarpal bone in her left hand. The urgent care provider referred Taran to Tucson Orthopedic Institute, where a different provider evaluated her and confirmed the fracture. He placed a cast on Taran’s left arm.

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¶4 Taran wore the cast for approximately ten weeks. After the cast's removal, Taran complained that her pinky finger and wrist lacked flexibility. Her provider referred her to an occupational therapist for eight therapy sessions. After three sessions, Taran had regained mobility in her wrist and pinky finger, so she stopped attending therapy, electing instead to continue the recommended strengthening exercises at her home.

¶5 Taran had no further medical or therapy appointments until April 2021, when she attended an appointment at RAO Plastic & Hand Surgery to address some lingering pain and discomfort. There, a provider x-rayed her left hand and observed a "faint fracture line in the mid and distal fifth metacarpal," reflecting "possible incomplete healing." The provider recommended Taran undergo a CT scan, and discussed with her the possibility of surgery.

¶6 Taran sought a second opinion from Tucson Orthopedic Institute in June 2021. The provider there also recommended that Taran undergo a CT scan or an MRI, and also discussed with her the possibility of surgery. Taran declined the recommendations because she did not want to have surgery and she understood from her providers that her "hand had probably healed all it would heal" on its own.

¶7 Taran sued Omni alleging, among other things, that Omni had negligently failed to maintain the sidewalk or to warn her that it was uneven, and the matter proceeded to a three-day jury trial. After the close of evidence, the trial court instructed the jury that it was required to determine Taran's total damages, including for any future pain and suffering ("Jury Instruction 7"). The court further gave the jurors an estimate of Taran's life expectancy ("Jury Instruction 8"):

A person aged 27 years has a life expectancy of 52.9 years. This is merely an estimate of the probable average remaining length of life of all persons of this age.

This estimate may be considered by you in determining the amount of damages for any permanent injury proved by the evidence to have resulted from the fault of any Defendant or all Defendants.

¶8 In closing argument, Taran encouraged the jury to award her up to \$175,000 in damages, to redress her actual medical expenses and her

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ongoing and future impairment. The jury returned a verdict in Taran's favor, finding the full amount of her damages to be \$150,000. The jury apportioned seventy-five percent of the fault to Omni and twenty-five percent to Taran.

¶9 Omni moved for a new trial under Rule 59(a)(1)(E)–(G) and (d), Ariz. R. Civ. P., arguing, among other things, that the jury's damages verdict was excessive and resulted from passion and prejudice, requiring a new trial on all issues or, at a minimum, on damages. In the alternative, Omni asked the trial court to remit the award to an amount no greater than \$35,000. Omni also argued that the court erred by giving Jury Instruction 8. The court denied Omni's motion in a lengthy written ruling.

¶10 This appeal followed. We have jurisdiction under A.R.S. § 12-2101(A)(1) and (5)(a).

### Discussion

¶11 Omni contends that the trial court erred by giving Jury Instruction 8 and by denying Omni's motion for a new trial or remittitur. We review both decisions for an abuse of discretion. *See State v. Aragón*, 252 Ariz. 525, ¶ 6 (2022) ("We review a trial court's decision to give a jury instruction for an abuse of discretion."); *Desert Palm Surgical Grp., P.L.C. v. Petta*, 236 Ariz. 568, ¶ 37 (App. 2015) ("We review for an abuse of discretion the superior court's denial of a motion for new trial or remittitur."). "A trial court abuses its discretion when it commits an error of law, or when the record lacks substantial evidence to support the court's finding." *Varco, Inc. v. UNS Elec., Inc.*, 242 Ariz. 166, ¶ 12 (App. 2017). For the reasons set forth below, the court did not abuse its discretion here.

#### I. Jury Instruction

¶12 A trial court must instruct the jury on all legal theories supported by the evidence. *Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, ¶ 36 (App. 2009). "[W]hen a party challenges a . . . jury instruction, reversal is justified only if the instruction was both erroneous and 'prejudicial to the substantial rights of the appealing party.'" *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 504 (1996) (quoting *Walters v. First Fed. Sav. & Loan Ass'n of Phx.*, 131 Ariz. 321, 326 (1982)).

¶13 During the conference to settle jury instructions, the trial court initially declined to give Jury Instruction 8, opining that Taran had not offered evidence that her injury was permanent. The court reversed its

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ruling, over Omni's objection, after Taran cited *Charron v. Kernon*, 8 Ariz. App. 488, 490-91 (1968), in which we recognized that a plaintiff's subjective testimony as to an injury's permanency, with no supporting medical opinion, may warrant an instruction allowing the jury to find a permanent injury.

¶14 In its order denying Omni's motion for a new trial, the trial court clarified and reaffirmed its reasoning, again citing *Charron*, as well as *Hirsh v. Manley*, 81 Ariz. 94 (1956), and *City of Phoenix v. Mullen*, 65 Ariz. 83 (1946), on which *Charron* relied. See *Charron*, 8 Ariz. App. at 491 ("In certain situations the nature of [an] injury may warrant an instruction as to permanency of injuries based on the subjective testimony of the plaintiff alone."); see also *Hirsh*, 81 Ariz. at 102 ("[I]n certain situations the nature of the injuries may warrant an instruction as to their being permanent even in the absence of medical proof."); *Mullen*, 65 Ariz. at 89 (medical testimony unnecessary to prove permanent injury and jury not bound "by the testimony of a medical expert" if controverting testimony exists).

¶15 The trial court also cited the parties' stipulation to give Jury Instruction 7, which directed the jury to determine damages based in part on the "pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced and *reasonably probable to be experienced in the future* as a result of the injury." (Emphasis added.) And the court highlighted Taran's testimony about her medical treatment and how her injury had affected her ability to engage in various activities.

¶16 Omni contends that the trial court abused its discretion by giving Jury Instruction 8. Omni specifically argues that the evidence did not support a finding that Taran suffered a permanent injury, and therefore did not support the instruction. And Omni contends that the court erroneously evaluated Jury Instruction 8's propriety by referring to Jury Instruction 7. We disagree.

¶17 Omni acknowledges that, under *Charron*, a plaintiff's testimony may warrant an instruction akin to Jury Instruction 8 even in the absence of a medical opinion. But Omni contends that the evidence did not support a permanency finding here, where Taran testified that "[h]er only remaining symptoms were some tenderness and some pain," "admitted [the pain and tenderness] would go away with time," and conceded that "none of her medical providers ever said she [had] a permanent injury."

¶18 Omni reads Taran's testimony out of context. Taran's belief that her symptoms would go away with time related to those she

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experienced in June 2020, when she had reported some tenderness and pain that she expected would subside after performing exercises she had learned in occupational therapy. Even then, however, Taran's physical therapist had set a goal for Taran to have no more than nineteen percent impairment in "carrying, moving[,] and handling objects." At the time of trial, Taran continued to experience pain and discomfort that affected her work and her ability to engage in recreational activities. By then, Taran believed, based on her symptoms and her medical consultations, that this pain and impairment would continue absent surgical intervention. And her most recent x-rays showed a residual fracture line, potentially reflecting incomplete healing.

¶19 While Taran admitted that her doctors did not document a finding of permanency, the absence of a medical opinion of permanency is not dispositive under *Charron*. Taran's description of her continued impairment and plateaued healing were sufficient to warrant an instruction permitting the jurors to find her injury to be permanent. Omni's arguments on appeal go to the credibility of Taran's testimony, not to whether it was sufficient to warrant Jury Instruction 8.

¶20 Nor did the court err by analyzing Jury Instruction 8's propriety and effect in view of stipulated Jury Instruction 7. To the extent Omni suggests otherwise, the court did not apply a waiver or invited-error theory to reject Omni's challenge to Jury Instruction 8. Rather, the court appropriately considered the jury instructions as a whole, and noted that Omni had not objected to Jury Instruction 7. *See Centerpoint Mech. Lien Claims, LLC v. Commonwealth Land Title Ins. Co.*, \_\_\_ Ariz. \_\_\_, ¶ 66, 530 P.3d 1151, 1165 (App. 2023) ("We review jury instructions as a whole. . . ."). Jury Instructions 7 and 8 worked in tandem: Jury Instruction 7 directed the jurors to consider Taran's likely future pain and suffering in determining damages, and Jury Instruction 8 gave context to Jury Instruction 7 by providing an estimate of Taran's future life span to aid the jurors in calculating the amount of any future damages.<sup>1</sup> For these reasons, the court did not abuse its discretion by giving Jury Instruction 8.

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<sup>1</sup>Because we conclude that giving Jury Instruction 8 was within the trial court's discretion, we need not address Omni's arguments that the instruction was prejudicial. We note, however, that the instruction did not constitute a comment on the evidence or otherwise signal to the jurors that the court believed Taran to have been permanently injured, as Omni asserts. Rather, Jury Instruction 8 expressly permitted the jurors to consider Taran's

## II. Motion for a New Trial or Remittitur

¶21 A trial court may grant a new trial if it concludes that the jury awarded excessive damages, or if the verdict resulted from passion or prejudice. Ariz. R. Civ. P. 59(a)(G), (E). There is no specific formula a court should apply to decide whether damages are excessive. *Moorer v. Clayton Mfg. Corp.*, 128 Ariz. 565, 570 (App. 1981). But “[t]he test for whether the jury award is the result of passion or prejudice is whether the amount of the jury verdict is so unreasonable and outrageous as to shock the conscience.” *Mammo v. State*, 138 Ariz. 528, 533 (App. 1983).

¶22 In certain circumstances, a court may modify a jury verdict without awarding a new trial by ordering remittitur, which “is a device for reducing an excessive verdict to the realm of reason.” *Desert Palm*, 236 Ariz. 568, ¶ 38 (quoting *Muccilli v. Huff’s Boys’ Store, Inc.*, 12 Ariz. App. 584, 591 (1970)). But if a court finds that a jury’s damages award is “tainted by ‘passion or prejudice,’ or is ‘shockingly or flagrantly outrageous,’” it lacks discretion to order remittitur and must instead order a new trial. *Soto v. Sacco*, 242 Ariz. 474, ¶ 9 (2017) (quoting *In re Estate of Hanscome*, 227 Ariz. 158, ¶¶ 12, 13 (App. 2011)). A court may thus order remittitur if it concludes that the jury’s award is exaggerated and not supported by the evidence, but is not shockingly outrageous and did not result from passion or prejudice. *Id.* ¶¶ 9-10; see *Desert Palm*, 236 Ariz. 568, ¶ 38 (“Remittitur should be ordered only for the most cogent reasons, such as a lack of evidence supporting the damages awarded.”).

¶23 In reviewing a motion for a new trial or remittitur, a trial court sits as an additional juror. *Soto*, 242 Ariz. 474, ¶ 8. But “[b]ecause a jury plays a vital role in our civil justice system, a . . . court may not simply substitute its judgment for the jury’s,” and must exercise its discretion to grant a new trial or remittitur sparingly. *Id.* ¶¶ 7-8. A court “should not disturb a jury’s damage award unless the judge is firmly convinced it is inadequate or excessive and is contrary to the weight of the evidence.” *Id.* ¶ 8. Because a trial court occupies the “unique position” of having observed the parties and the presentation of evidence, we grant that court “significant latitude” in resolving a new-trial motion. *Id.*; see also *Reeves v.*

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life span to determine damages from “any permanent injury *proved by the evidence.*” (Emphasis added.) And the court separately instructed the jurors not to interpret anything it said during trial as “indicating any opinion about the facts.” See *Hudgins*, 221 Ariz. 472, ¶ 16 (appellate court presumes jury followed instructions).

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*Markle*, 119 Ariz. 159, 163 (1978) (observing that trial court “has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record”); *Creamer v. Troiano*, 108 Ariz. 573, 575 (1972) (noting that “one of the key factors in our decisions is to give the trial judge the benefit of the doubt,” and recognizing that trial court’s “ruling on additur, remittitur, and new trial, because of an inadequate or excessive verdict, will generally be affirmed, because it will nearly always be more soundly based than ours can be”). “[T]he burden is on the party seeking to overturn the trial court’s judgment” – here, Omni – to show that the court abused its discretion by denying the motion. *Sandretto*, 234 Ariz. 351, ¶ 8.

¶24 In its motion for a new trial, Omni argued that the jury’s damages verdict resulted from passion or prejudice and was excessive in relation to Taran’s actual medical costs, as well as in comparison to other civil verdicts. Omni asked the court for a new trial on all issues, but alternatively requested a new trial on damages or an order remitting the verdict to an amount no greater than \$35,000.

¶25 In denying the motion, the trial court found that the jury’s verdict was neither excessive nor the result of passion or prejudice, but was instead “within the range of reason.” The court summarized the evidence supporting the verdict, including Taran’s testimony regarding the emotional impact of the accident, which was “frightening,” “traumatic,” and “scary”; the physical impact of the accident, which caused Taran to lose consciousness twice and thereafter endure a broken hand and “continuous daily pain and problems”; and the injury’s negative impact on Taran’s life, including impeding her favorite activities of “physical exercise, playing violin, playing with her pet, and gardening.” The court also noted that the jurors had asked an extraordinary number of questions and had awarded a lesser sum of damages than Taran had requested. And the court concluded that the other civil verdicts Omni offered to establish the present verdict’s excessiveness were not “‘apples to apples’ comparison[s] to this case” but were instead “cherry picked snippets of other Arizona personal injury verdicts.”

¶26 Omni argues that the trial court abused its discretion by so ruling. Omni largely resurrects the arguments presented in its motion for a new trial, including that the magnitude of damages shocks the conscience and reflects the jury’s passion and prejudice, requiring a new trial. Omni cites the ratio of Taran’s medical expenses to the total amount awarded, and compares that ratio and the total verdict to the other personal-injury



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verdicts it cited in the trial court. Omni also opines that Taran's injuries were "relatively minor" and that she "swiftly recovered from the ordeal." In the alternative, Omni argues that the court should have remitted the jury's verdict to an amount no greater than \$45,000—\$10,000 more than Omni requested in its new-trial motion.

¶27 The trial court did not abuse its discretion by finding that the jury verdict did not result from passion or prejudice and was not excessive. *See Desert Palm*, 236 Ariz. 568, ¶ 38. Most notably, Omni points to no specific evidence of passion or prejudice. The size of the verdict—which Omni repeatedly emphasizes—does not alone establish passion or prejudice. *See, e.g., Estate of Hanscome*, 227 Ariz. 158, ¶ 13. Moreover, as the court noted, the jury's apportionment of some fault to Taran and its rejection of her proposed total amount of damages in favor of a lesser sum suggests that it did not act on its passions and ignore the evidence.

¶28 Further, the trial court carefully considered the evidence in rejecting Omni's arguments and finding the damage award reasonable, and we will not second-guess its assessment. *See Soto*, 242 Ariz. 474, ¶¶ 7-8; *Reeves*, 119 Ariz. at 163; *Creamer*, 108 Ariz. at 575. The court noted that Taran had suffered a fractured fifth metacarpal bone in her left hand. This injury caused Taran discomfort and pain, and disrupted her life for a significant period of time, continuing through the time of trial. Taran's fall was so severe that she twice lost consciousness immediately thereafter. And the accident caused her significant embarrassment and trauma. The court did not abuse its discretion by concluding that the foregoing evidence supported the jury's damages award.

¶29 Omni's comparable-verdict evidence does not compel a different result.<sup>2</sup> In general, this type of evidence is "only marginally relevant." *Soto*, 242 Ariz. 474, ¶ 22. And we agree with the trial court that none of the cases Omni cites is "an 'apples to apples' comparison to this case." *See id.* (cautioning courts, when considering comparable-verdict evidence, "that cases may be unique and turn on fact-intensive

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<sup>2</sup>Taran objects to our consideration of the cases Omni cites for its comparable-verdict argument, noting that they are not published and cannot readily be located. Omni presented this information to the trial court by appending to its motion for a new trial several pages of case summaries obtained from a secondary source. Because Omni's arguments fail even considering the challenged summaries, we need not resolve Taran's objection.

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determinations, and juries may view similar cases differently”). Further, even if the cases were factually aligned, that similarity alone would not show that the verdict here is excessive, particularly given the facts summarized above that support the jury’s decision. For the foregoing reasons, the court did not abuse its discretion by denying Omni’s motion for a new trial and remittitur.

**Attorney Fees, Costs, and Sanctions on Appeal**

¶30 Taran requests her attorney fees expended in this appeal and sanctions under A.R.S. §§ 12-349 and 12-350 as well as Rule 25, Ariz. R. Civ. App. P. She argues in particular that Omni has “materially misrepresented and/or understated the evidence.” In addition, she states that Omni’s actions in this matter “show a pattern of bad faith” and “violate the rules of court and longstanding Arizona law,” and that Omni’s appeal is frivolous. We do not agree that Omni has crossed the fine “line between a frivolous appeal and one which simply has no merit,” *Price v. Price*, 134 Ariz. 112, 114 (App. 1982), and therefore exercise our discretion to deny an award of attorney fees. However, as the successful party, Taran is entitled to her costs on appeal upon compliance with Rule 21(b), Ariz. R. Civ. App. P. See A.R.S. § 12-342(A); *Doherty v. Leon*, 249 Ariz. 515, ¶ 24 (App. 2020).

**Disposition**

¶31 For the foregoing reasons, we affirm the trial court’s entry of final judgment in favor of Taran and its denial of Omni’s motion for a new trial or remittitur.