

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: August 18, 2015

4 **NO. 32,373**

5 **ESTATE OF CHARLES ANTHONY SAENZ, by**
6 **and through his personal representative, VIRGINIA**
7 **SAENZ, individually and as Next Friend of ROBIN**
8 **BRANDY SAENZ, minor child, MARCUS ANTHONY**
9 **SAENZ, and JASON RAY SAENZ,**

10 Plaintiffs-Appellants,

11 v.

12 **RANACK CONSTRUCTORS, INC.,**

13 Defendant-Appellee.

14 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

15 **Manuel I. Arrieta, District Judge**

16 Law Office of Jane B. Yohalem

17 Jane B. Yohalem

18 Santa Fe, NM

19 Cervantes Law Firm, PC

20 Joseph Cervantes

21 Las Cruces, NM

1 Scherr & Legate PLLC
2 Maxey M. Scherr
3 El Paso, TX

4 for Appellants

5 Rodey, Dickason, Sloan, Akin & Robb, P.A.
6 Edward Ricco
7 Jocelyn Drennan
8 Albuquerque, NM

9 for Appellee

1 OPINION

2 **BUSTAMANTE, Judge.**

3 {1} Defendant Ranack Constructors, Inc., a general contractor, was hired to build
4 a multi-screen movie theater. Ranack hired Alamo General Contractors, Inc. as a
5 subcontractor to build the steel framework of the theater. Decedent Charles Saenz was
6 an ironworker employed by Alamo and its related entity T&T Staff Management
7 (T&T), a staffing agency. Saenz was working on the theater project at a height in
8 excess of twenty-five feet, without fall protection, when he fell and died. This appeal
9 follows a jury trial.

10 {2} The case raises two issues. First, whether the concept of joint and several
11 liability in *Saiz v. Belen School District*, 1992-NMSC-018, ¶¶ 18-21, 113 N.M. 387,
12 827 P.2d 102 should be applied in favor of employees of subcontractors. And,
13 second, whether a new trial on wrongful death damages for Saenz's estate is
14 appropriate. We conclude that *Saiz* is not applicable to claims made by employees
15 of subcontractors. We also conclude that a new trial addressing the estate's damages
16 only should be held. We thus affirm in part and reverse in part.

17 **BACKGROUND**

18 {3} Saenz fell as the Alamo crew was attempting to set a roof joist on the building.
19 Saenz's job was to receive one end of the joist as it was suspended by a crane and put

1 it in place. The joist was supposed to be placed on an intersecting beam. Saenz could
2 have accomplished this task by using a ladder to get on top of the beam that he
3 needed to reach and employing his fall-protection equipment. Instead, Saenz
4 approached the placement point by walking on the top edge of a concrete and
5 Styrofoam wall that was part of the unfinished structure and that was more than
6 twenty-five feet above the concrete floor. By one witness account, Saenz slipped as
7 he reached for the joist tag lines, and by another witness account, the roof joist struck
8 the wall and caused him to lose his balance. Whatever the cause of his loss of
9 balance, Saenz fell to the concrete below and died from the impact.

10 {4} In terms of personal fall-protection equipment, evidence at trial showed that
11 Saenz was wearing a harness equipped with a lanyard. In addition, a beamer—a
12 device that clamps to a beam and provides an anchor point for the lanyard—was on
13 the beam where the joist was to be placed. When a worker has hooked his fall-
14 protection equipment to a secure point he is “tied off.” Saenz was required to be tied
15 off when he was performing the task that led to his fall. Saenz was not tied off when
16 he fell.

17 {5} Testimony at trial also demonstrated that Ranack failed in a number of respects
18 to ensure the safety of the job site. Summarized, those failures included, among other
19 things: a failure to provide and enforce an adequate fall-protection safety plan; a

1 failure to ensure that subcontractors were adequately and safely performing their
2 work; a failure to ensure that workers were, in fact, protected from fall hazards; a
3 failure to staff the job with full-time safety personnel; and an emphasis on hurrying
4 to get the job done that caused subcontractors and workers to take shortcuts,
5 including shortcutting safety.

6 {6} Plaintiff Virginia Saenz, individually and as personal representative of her
7 husband's estate and as next friend of Saenz's children, Robin, Marcus, and Jason,
8 filed a wrongful death lawsuit against Ranack. Because Alamo and T&T were
9 Saenz's employers, workers' compensation provided the exclusive remedy against
10 them. As such, they were not named in the complaint, but were identified together as
11 a single potential tortfeasor in the jury instructions. The original complaint
12 specifically asserted premises liability and simple negligence causes of action against
13 Ranack. The complaint contains no mention of *Saiz*-type liability based on its
14 concepts of peculiar risk or inherent danger. *Id.* ¶¶ 18-21.

15 {7} After a ten-day trial, the case was submitted to the jury on ordinary care,
16 negligence, and premises liability theories. The "theory of the case" instruction
17 detailed the ways each party thought the other was negligent. The list in the
18 instruction echoed and expanded upon the summary provided above in Paragraph 5.
19 The special interrogatory instruction submitted did not ask the jury to specify which

1 asserted theories it credited. Given its verdict, it is obvious that the jury found a
2 degree of fault in all of the actors' acts or failures to act.

3 {8} Pursuant to a comparative fault instruction, the jury found Ranack forty-five
4 percent at fault, Alamo and T&T thirty percent at fault, and Saenz twenty-five percent
5 at fault for his death. The district court entered a judgment ordering Ranack to pay
6 forty-five percent of the wrongful death judgment in addition to jury-awarded
7 punitive damages.

8 {9} Ranack has not appealed, nor does it otherwise contest, the district court's legal
9 determination that it owed Saenz a duty of ordinary care. Interestingly, Ranack
10 requested that UJI 13-401 NMRA—defining independent contractors and limiting the
11 liability of employers for the wrongful acts of the independent contractors'
12 employees—be given to the jury, but then withdrew the request. Ranack also does not
13 refute the propriety of the jury's attribution to it for forty-five percent of the fault for
14 Saenz's death.

15 {10} The jury found the total amount of damages suffered by Plaintiff Virginia
16 Saenz, individually, to be \$482,000. Additionally, the jury found Robin's damages
17 to be \$50,000, and Marcus and Jason to each have suffered \$25,000 in damages.
18 Saenz's wife and children were also awarded \$10,000 each in punitive damages. As
19 to Saenz's estate, however, the jury awarded zero damages.

1 {11} In a post-trial motion, Plaintiff requested a mistrial on the basis of the zero
2 damages award to the estate. At the hearing on the motion, Plaintiff argued that the
3 jury's decision to award zero damages to Saenz's estate was the result of jury
4 confusion and, alternatively, that it was not supported by substantial evidence. The
5 district court denied Plaintiff's motion. The court concluded that based on the facts
6 at trial, in particular, Saenz's criminal history and his prior incarceration, the jury
7 could reasonably have found that the zero value was appropriate.

8 {12} With regard to whether the jury was confused by the instructions as to the
9 damages it should award to Saenz's estate, the district court apparently decided that
10 Plaintiff waived any objection on that ground because Plaintiff's counsel agreed to
11 the district court's proposed response to a jury question regarding estate damages.
12 During its deliberations, the jury sent the following question to the district court:
13 "Does 'total amount of damages to the Estate of Charles Saenz' include all amounts
14 awarded to Virginia, Rob[in], and sons[,], or is it meant to be a separate amount?"
15 After conferring with counsel, the district court suggested that it respond by saying
16 that "[t]he 'total amount of damages to the Estate of Charles Saenz' is separate." All
17 counsel agreed with that suggestion.

18 {13} As an alternative to a mistrial, Plaintiff requested in her post-trial motion that
19 the district court enter a judgment notwithstanding the verdict on the ground that

1 Saenz was engaged in inherently dangerous work and that, as a result, “Ranack
2 should be held strictly liable for the damages herein[.]” At the hearing, Plaintiff’s
3 counsel argued that there should be no reduction for comparative negligence.
4 Standing by an earlier ruling on this issue, the district court declined to hold that
5 Saenz was engaged in inherently dangerous work at the time of his death.

6 {14} On appeal, Plaintiff continues to argue that Saenz was engaged in an inherently
7 dangerous activity and that, accordingly, Ranack should be held jointly and severally
8 liable for his death. Plaintiff also contends that reversal and remand for a new trial is
9 required because jury confusion arising from conflicting instructions as to loss of
10 consortium may have led the jury to mistakenly award to Plaintiff and to Saenz’s
11 children damages that should have been awarded to the estate. Alternatively, Plaintiff
12 argues that the zero damages award to the estate was not supported by substantial
13 evidence.

14 **DISCUSSION**

15 **The Joint and Several Liability Issue**

16 {15} Plaintiff argues that Ranack should be held jointly and severally liable for all
17 damages found by the jury. Plaintiff recognizes that joint and several liability is not
18 generally available in New Mexico. This Court abolished joint and several liability
19 in toto in *Bartlett v. New Mexico Welding Supply, Inc.*, 1982-NMCA-048, ¶¶ 33-37,

1 98 N.M. 152, 646 P.2d 579, *superseded by statute as stated in Payne v. Hall*, 2006-
2 NMSC-029, 139 N.M. 659, 137 P.3d 599. The holding in *Bartlett* was seen as a
3 logical imperative flowing from our Supreme Court’s adoption of pure comparative
4 negligence in *Scott v. Rizzo*, 1981-NMSC-021, ¶ 30, 96 N.M. 682, 634 P.2d 1234
5 (adopting in full the Court of Appeals opinion in the same consolidated cases),
6 *superseded in part by statute as stated in Rodriguez v. Williams*, ____-NMCA-____,
7 ____ P.3d ____, 2015 WL 1412633 (Nos. 33,138 and 33,668) (Mar. 26, 2015). Six
8 years later, the Legislature addressed the subject. *See* NMSA 1978, § 41-3A-1 (1987).
9 Echoing *Bartlett*, the Legislature also abolished joint and several liability in cases
10 involving comparative fault. Unlike *Bartlett*, however, the Legislature provided four
11 exceptions to the general rule of abolition. Section 41-3A-1(C). Only one of the four
12 exceptions is directly relevant here. Section 41-3A-1(C)(4) provides that joint and
13 several liability shall apply “to situations . . . having a sound basis in public policy.”
14 {16} Our Supreme Court relied on Section 41-3A-1(C)(4) to impose joint and
15 several liability in cases involving work or endeavors which are “inherently
16 dangerous” or carry “peculiar risks.” *Saiz*, 1992-NMSC-018, ¶¶ 15-19 (relying on
17 Sections 413, 416, and 427 of the Restatement (Second) of Torts (1965)). The
18 Supreme Court held that engaging in such work created a nondelegable duty of care

1 that could only be effectively enforced through imposition of joint and several
2 liability. *Saiz*, 1992-NMSC-018, ¶¶ 35-36.

3 {17} Plaintiff also recognizes that *Saiz* by itself does not provide a basis for
4 imposing joint and several liability in this case. In an earlier opinion involving a
5 factual scenario much closer to this case, the Supreme Court held specifically that
6 Sections 413, 416, and 427 of the Restatement (Second) of Torts should not be
7 applied in favor of employees of independent contractors. *N.M. Elec. Serv. Co. v.*
8 *Montanez*, 1976-NMSC-028, ¶¶ 14-15, 89 N.M. 278, 551 P.2d 634. There are
9 material factual dissimilarities between *Saiz* and this case. We will detail the factual
10 distinctions in a later section of this Opinion. Nevertheless Plaintiff argues that
11 developments in New Mexico case law—including *Saiz* and this Court’s opinion in
12 *Enriquez v. Cochran*, 1998-NMCA-157, 126 N.M. 196, 967 P.2d 1136—support a
13 conclusion that *Montanez* should not control the outcome here. To the contrary, as we
14 will explain, we conclude that *Montanez* is still good law and is in keeping with the
15 vast majority of cases across the nation addressing the issue.

16 {18} Our discussion will start with a detailed review of the district court’s
17 consideration of Plaintiff’s request to impose *Saiz*-based liability on Ranack. We will
18 then analyze *Saiz* and *Enriquez*. Finally, we will review the case law across the
19 country and the Restatement Second and Third of Torts. Because we conclude that

1 *Saiz*-based joint and several liability is not applicable to the employees of
2 subcontractors on construction sites, we need not, and will not, consider whether
3 Saenz was engaged in inherently dangerous work.

4 **A. The District Court Decision**

5 {19} As we noted above, Plaintiff did not include a claim for nondelegable duty and
6 joint and several liability in her complaint. *Saiz* and its progeny were first mentioned
7 during argument on the parties' pretrial motions in limine about a week before trial
8 commenced. The first matter argued was Ranack's motion to exclude testimony
9 concerning delays on the project assertedly caused by improper steel design and
10 foundation work. Ranack couched its argument as a question of duty, asserting that
11 it had no duty of care to its subcontractor's employees and thus evidence as to delays
12 in construction was irrelevant. In partial response to Ranack's argument, Plaintiff
13 argued that Ranack could be found to have a duty under *Saiz* and *Enriquez*. *Enriquez*,
14 1998-NMCA-157, ¶ 98 (holding that felling of large trees was inherently dangerous).
15 The district court eventually denied Ranack's motion, noting specifically that it had
16 not "looked at the issue of inherently dangerous" and holding the issue for a later
17 time.

18 {20} A week later at the beginning of the trial, the parties discussed whether the idea
19 of "peculiar risk of danger" should be included in the pre-voir dire description of the

1 case to the jury. Ranack objected to its inclusion and the district court agreed, noting
2 that it was still thinking about the issue.

3 {21} The parties and the district court took the matter up in earnest as they started
4 work on the jury instructions. Referring to an apparently off-the-record discussion
5 from the previous day, the district court asked to reopen the issue in order “to
6 reconsider its ruling yesterday on inherently dangerous condition or peculiar risk.”

7 The district court articulated a number of reasons why it had decided not to impose
8 *Saiz*-based strict liability even though “both experts and a number of individuals [had
9 testified] that this is inherently dangerous work.” The district court’s rationale was

10 that to impose strict liability would (1) “ignore the contractual relationship between
11 [the] parties[;]” (2) “nullify all those OSHA standards and directives about
12 controlling contractors,” and (3) make every general contractor and every landowner

13 “strictly liable for any fall of any person from any building during construction.” In
14 addition, the district court noted that prior cases finding inherent danger involved
15 injured third parties rather than individuals who were directly involved in the

16 dangerous activity and who may have contributed to their own injury. The district
17 court decided to “submit this case to the jury on the basis of negligence and premises
18 liability.”

1 {22} Later that same day the matter was argued again, allowing Ranack to be heard
2 more fully. Ranack started its argument by citing *Montanez* and its holding that
3 general contractors do not owe a duty of care to the employees of its independent
4 contractors under Sections 413, 416, and 427 of the Restatement (Second) of Torts.
5 Ranack did not argue that the work Saenz was engaged in was not inherently
6 dangerous. Its arguments revolved around the type of duty Ranack owed as a general
7 contractor to employees of its subcontractors.

8 {23} In the end, the district court adhered to its prior ruling that it would not deem
9 the “steel erection being done in this case” to be an inherently dangerous activity.
10 When prompted by Plaintiff’s counsel, the district court confirmed that its decision
11 was based on the policy implications it had articulated earlier.

12 {24} The next day the district court held a more formal proceeding in which the
13 parties made their record with regard to specific jury instructions. Plaintiff had
14 requested that UJI 13-1634 NMRA—describing strict liability for nondelegable
15 duties—be given to the jury. The district court formally refused the instruction,
16 restating its prior rationale. The district court expanded its prior rulings by noting that
17 it did “not feel that a contractor/landowner should be strictly liable for any steel
18 erection on the premises when the majority of the control for the safety precautions

1 is within the independent contractor’s authority and within the control of the injured
2 individual.”

3 {25} The district court’s rationale was internally consistent, reflecting appropriate
4 policy concerns for the potentially far-reaching and largely unknown impact of
5 imposing *Saiz*-based strict liability on landowners and general contractors engaged
6 in construction projects. But the district court never conducted the analysis set out by
7 our Supreme Court in *Gabaldon v. Erisa Mortgage Co.*, 1999-NMSC-039, 128 N.M.
8 84, 990 P2d 197, to determine whether steel erection on relatively large projects is
9 inherently dangerous. Neither did it squarely decide whether—as argued by
10 Plaintiff—the Supreme Court’s clear holding in *Montanez* had been overtaken by its
11 opinion in *Saiz* and our opinion in *Enriquez*. We certainly do not fault the district
12 court for not undertaking these analyses. Counsel’s arguments were not well-focused,
13 coming as they did at the end of a long trial. It is left to us with the luxury of time to
14 more directly deal with the legal issues raised by this factual scenario.

15 **B. Nondelegable Duty Does Not Apply to Employees of Subcontractors**

16 **1. The *Montanez* Opinion**

17 {26} As the parties recognize, *Montanez* stands as a substantial impediment to the
18 application of *Saiz*-based joint and several liability to general contractors such as
19 Ranack. The plaintiff worker in *Montanez* was injured when he came into contact

1 with a live wire in the process of dismantling a secondary power line feeding an oil
2 well. 1976-NMSC-028, ¶ 3. The plaintiff worked for the independent contractor hired
3 to take down the secondary lines. The named defendants were Wolfson Oil Company,
4 Cass-Fitts Electric Company, and the New Mexico Electric Service Company.
5 Wolfson owned the oil well and hired Gary Electric, the plaintiff's employer, to
6 dismantle the secondary system. Cass-Fitts built the secondary system originally for
7 Wolfson. The utility supplied power through its primary system which occupied the
8 same poles as the secondary system. *Id.* ¶¶ 6-7.

9 {27} The district court entered summary judgment in favor of all the defendants,
10 though it is not clear on what ground. Each of the defendants argued that they had no
11 duty toward the plaintiff, and that he was in any event contributorily negligent as a
12 matter of law. *See Montanez v. Cass (Cass)*, 1975-NMCA-142, ¶¶ 3, 5, 89 N.M. 32,
13 546 P.2d 1189, *aff'd in part and rev'd in part by Montanez*, 1976-NMSC-028. The
14 plaintiff appealed.

15 {28} We will examine the Court of Appeals opinion in some detail because it
16 provides an elucidative backdrop to the Supreme Court's holding. The Court of
17 Appeals reversed as to all the defendants finding that each of them owed a duty of
18 ordinary care toward the plaintiff. *Cass*, 1975-NMCA-142, ¶ 28. Of particular
19 relevance to us is its discussion of Wolfson's duty. Wolfson hired the plaintiff's

1 employer to take down the secondary system. Wolfson argued that it had no duty to
2 the plaintiff because he was an employee of independent contractors—Cass-Fitts and
3 Gary Electric, the plaintiff’s employer. *Id.* ¶¶ 29-30. The Court of Appeals
4 recognized, “[t]he traditional rule is that the employer of an independent contractor
5 is not liable for physical harm caused to another by an act or omission of the
6 contractor or his servants.” *Id.* ¶ 31. The Court of Appeals also recognized that “[a]n
7 exception to this traditional rule arises when the independent contractor is engaged
8 in the performance of inherently dangerous work.” *Id.* In that circumstance, the
9 employer is liable to third persons for physical harm caused by its independent
10 contractor. *Id.* (citing Prosser, *Law of Torts*, at 472 (4th ed. 1971)).

11 {29} The Court of Appeals then embarked on what can be reasonably described as
12 an impassioned statement as to why [p]ublic policy demands that third persons . . . be
13 [so] protected and why the concept of third persons should include the employees of
14 subcontractors. *Cass*, 1975-NMCA-142, ¶¶ 33-36 (internal quotation marks omitted).
15 The Court of Appeals noted that New Mexico had already included employees of
16 subcontractors as protected third persons—or “others” in the parlance of the
17 Restatement (Second) of Torts—when it adopted Restatement (First) of Torts § 414
18 (1934) in *DeArman v. Popp*s, 1965-NMSC-026, ¶ 21, 75 N.M. 39, 400 P.2d 215.
19 *Cass*, 1975-NMCA-142, ¶¶ 39-41. The Court of Appeals then explicitly held that the

1 same rationale and rule applied to the duty described in Sections 416 and 427 of the
2 Restatement (Second) of Torts. That is, the term “others” in these two sections
3 included employees of independent contractors within its ambit. *Cass*, 1975-NMCA-
4 142, ¶¶ 42-46.

5 {30} The Court of Appeals recognized that there was authority to the contrary and
6 that the Restatement (Second) itself included indications that employees of
7 independent contractors should not receive the benefit of Sections 416 and 427
8 protection. *Cass*, 1975-NMCA-142, ¶¶ 48-49. The Court of Appeals opinion brushed
9 those concerns aside and held that based on the Restatement, public policy, and the
10 “long sustenance of the rule,” employees of independent contractors were owed a
11 duty of due care when the work being performed was inherently dangerous. *Id.* ¶ 54.

12 {31} The Court of Appeals opinion in *Cass* mirrors substantively the opinion
13 Plaintiff would have us issue in this case. The difficulty for Plaintiff is that our
14 Supreme Court specifically disagreed with and disapproved of the Court of Appeals’
15 holding and rationale. *Montanez*, 1976-NMSC-028, ¶¶ 15-16. The Supreme Court
16 specifically held that the employees of independent contractors were not within the
17 class of persons protected by Sections 413, 416, and 427 of the Restatement (Second)
18 of Torts. The Court explicitly approved the underlying rationale of other cases so

1 holding, in particular cases that the Court of Appeals had cited with disapproval.¹
2 *Montanez*, 1976-NMSC-028, ¶ 15; see *Welker v. Kennecott Copper Co.*, 403 P.2d 330
3 (Ariz. Ct. App. 1965), *rejected on other grounds by Lewis v. N.J. Riebe Enters., Inc.*,
4 825 P.2d 5 (Ariz. 1992); *King v. Shelby Rural Elec. Coop. Corp.*, 502 S.W.2d 659
5 (Ky. Ct. App. 1973). *Contra Cass*, 1975-NMCA-142, ¶ 49.

6 **2. *Saiz and Enriquez Do Not Undermine Montanez***

7 {32} Plaintiff's response is that developments in New Mexico law have superseded
8 the Supreme Court's reasoning in *Montanez*. We disagree.

9 {33} Plaintiff relies on *Saiz* and *Enriquez* for her position. *Saiz*, of course, was the
10 case in which New Mexico adopted Sections 413, 416, and 427 of the Restatement
11 (Second) of Torts and their concepts of peculiar risk and inherent danger. The facts
12 in *Saiz* are so different from *Montanez*, however, that *Saiz* says little if anything about
13 whether the Supreme Court would decide *Montanez* differently now. *Saiz* involved
14 a classic "innocent bystander." A high school student attending a football game
15 simultaneously touched a metal electric conduit running up a wooden light pole and
16 a nearby metal fence. He was electrocuted because the contractor who installed the

17 ¹On the other hand, the Court reaffirmed liability under Section 414 of the
18 Restatement (First) of Torts (1934), when an owner or general contractor retains some
19 control over the work being done. *Montanez*, 1976-NMSC-028, ¶ 17. This type of
20 duty continues to be recognized in New Mexico. *Hinger v. Parker & Parsley*
21 *Petroleum Co.*, 1995-NMCA-069, ¶ 36, 120 N.M. 430, 902 P.2d 1033.

1 electrical service used the wrong kind of bushing where the buried electrical service
2 line met the metal conduit. *Saiz*, 1992-NMSC-018, ¶¶ 3-4, 29. Given these facts, the
3 Supreme Court had no reason to consider the effect, if any, its decision would have
4 on the holding of *Montanez*. In our position as an intermediate appellate court we are
5 loath to speculate whether the Court would now modify or reverse *Montanez*. *State*
6 *ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 21, 135 N.M. 375, 89 P.3d
7 47 (stating that Supreme Court “decisions remain binding precedent until [the
8 Supreme Court] see[s] fit to reconsider them, regardless of whether subsequent cases
9 have raised doubts about their continuing vitality” (internal quotation marks and
10 citation omitted)); *Behrens v. Gateway Court, LLC*, 2013-NMCA-097, ¶ 16, 311 P.3d
11 822 (stating that the Court of Appeals is bound by Supreme Court precedent);
12 *Dunning v. Buending*, 2011-NMCA-010, ¶ 11, 149 N.M. 260, 247 P.3d 1145 (stating
13 that the Court of Appeals is bound by Supreme Court precedent even when aspects
14 of that precedent have been rejected by other authorities).

15 {34} Similarly, *Enriquez* provides little or no guidance as to how the Supreme Court
16 would decide the *Montanez* issues today. First, *Enriquez* is an opinion of this Court
17 and cannot be deemed to have reversed or modified Supreme Court case law which
18 is otherwise in good standing. More to the point, however, the facts in *Enriquez* again
19 are materially different from the facts in *Montanez*.

1 {35} In *Enriquez*, an employee of a local Boy Scouts council was badly injured
2 when a large tree he was helping to cut down broke and fell in an unexpected
3 direction. 1998-NMCA-157, ¶¶ 12-17. He sued the Boy Scouts of America asserting
4 that it should have provided more training and supervision of the tree cutting process
5 in its position as the chartering organization for the local council. *Id.* ¶ 51. The
6 relationship between the plaintiff in *Enriquez* and the Boy Scouts of America was not
7 that of a general contractor or owner and an independent contractor and its
8 employees. *Enriquez* recognized this factual difference with *Montanez* explicitly.
9 *Enriquez*, 1998-NMCA-157, ¶ 113. Thus, *Enriquez* cannot be read to alter or call into
10 question the holding in *Montanez*.

11 {36} In interpreting *Saiz*, we did observe that the “relationship between the
12 owner/employer and the independent contractor is not, and should not be, the focus
13 of the inquiry.” *Enriquez*, 1998-NMCA-157, ¶ 103. But, again, that comment was
14 made in the course of analyzing a factual scenario much different from the one
15 present here. Further, we made clear that imposition of strict liability was a policy-
16 driven inquiry and that undertaking inherently dangerous work does not necessarily
17 require a finding of joint and several liability. *See Abeita v. N. Rio Arriba Elec.*
18 *Coop.*, 1997-NMCA-097, ¶ 15, 124 N.M. 97, 946 P.2d 1108 (holding that an
19 electrical utility that was held sixty percent liable for an electrocution on a

1 construction job was not jointly and severally liable given that it had no power to
2 actually halt work at the site).

3 {37} In sum, neither *Saiz* nor *Enriquez* undermine the rationale and holding of
4 *Montanez*. And, as we will discuss in the next section of this Opinion, the vast
5 majority of cases addressing the issue agree with *Montanez*.

6 **3. The Great Weight of Authority From Other Jurisdictions Follows the**
7 ***Montanez* Approach**

8 {38} As evidenced by the discussions and outcomes in *Montanez* and *Cass*, the
9 status of employees of independent contractors as beneficiaries of the protection
10 offered by the “peculiar risk” provision of the Restatement has been uncertain from
11 the beginning. Dean Prosser, as the reporter for the 1965 edition of the Restatement
12 (Second) of Torts, suggested a Special Note that would disallow claims by employees
13 of independent contractors against owner/employers. *See* Restatement (Third) of
14 Torts § 55 cmt. h (2012) (providing an overview of the history of the issue within the
15 Restatement process and an overview of the case law). The Special Note was not
16 included apparently because the case law was still in flux, though Dean Prosser did
17 note that the “prevailing point of view is that there is no liability on the part of the
18 employer of the independent contractor.” *Id.*

19 {39} In the fifty years since the 1965 version of the Restatement (Second) of Torts
20 debuted, the prevailing view has only strengthened. The commentary to Section 57

1 of the Restatement (Third) of Torts—which replaces former Sections 416 and 427,
2 among others—now flatly states that “[t]he hirer of an independent contractor is not
3 subject to liability to an employee of the independent contractor under any of the
4 vicarious-liability avenues in this [c]hapter.” *Id.* cmt. d. And Subsection (d) of the
5 Reporters’ Notes to Section 57 states that the “vast majority of cases disallow claims
6 by employees of independent contractors against hirers on vicarious-liability
7 theories.”

8 {40} Our own research confirms this observation. We found only two cases allowing
9 such claims against a general contractor under Sections 416 and 427 of the
10 Restatement (Second) of Torts. *See Makaneole v. Gampon*, 777 P.2d 1183, 1187
11 (Haw. 1989); *Elliott v. Pub. Serv. Co. of N.H.*, 517 A.2d 1185, 1187-89 (N.H. 1986).
12 It would serve little purpose to list all of the contrary authority. The cases are, as they
13 say, “legion.” Representative of the cases holding that Sections 416 and 427 do not
14 apply to personal injury claims by employees of subcontractors against general
15 contractors or owners are: *Welker*, 403 P.2d at 335-38; *Privette v. Superior Court*,
16 854 P.2d 721, 727-29 (Cal. 1993) (in bank); *DeShambo v. Nielsen*, 684 N.W.2d 332,
17 339-41 (Mich. 2004); *Conover v. N. States Power Co.*, 313 N.W.2d 397, 403-05
18 (Minn. 1981); *Gaytan v. Wal-Mart*, 853 N.W.2d 181, 200-02 (Neb. 2014) (overruling

1 prior case law allowing such claims); *Zueck v. Oppenheimer Gateway Props., Inc.*,
2 809 S.W.2d 384, 390 (Mo. 1991) (en banc).²

3 {41} In contrast, the liability of hirers of subcontractors for their own negligence in
4 the exercise of retained control is alive and well. Section 56 of the Restatement
5 (Third) of Torts replaces Section 414 of the Restatement (Second) of Torts. New
6 Mexico has recognized the applicability of Section 414 liability since at least our
7 Supreme Court’s opinion in *DeArman*. See 1965-NMSC-026, ¶ 21; see also *Valdez*
8 *v. Cillessen & Son, Inc.*, 1987-NMSC-015, ¶¶ 16, 20-27, 105 N.M. 575, 734 P.2d
9 1258 (reversing summary judgment in favor of general contractor because there were
10 genuine issues of fact as to the extent and nature of the control it has over injury-
11 causing activity); *Moulder v. Brown*, 1982-NMCA-078, ¶ 16, 98 N.M. 71, 644 P.2d

12 ²The special concurrence proposes an employee centric approach to evaluating
13 whether an activity should be considered inherently dangerous. The approach it
14 suggests is contrary to the Restatement emphasis on “activities” rather than personal
15 attributes of potential plaintiffs. In addition, it would be difficult to administer.
16 Assessing the level of training and the capabilities of individual plaintiffs in the
17 activity at issue would make inherent danger a question for the jury rather than the
18 question of law it currently is. Here, for example, if Saenz had been a newcomer to
19 the job, would the activity have been inherently dangerous as to him, but not to
20 someone on the same job with more experience and training? Such issues are more
21 appropriately handled by applying our normal and familiar rules of comparative
22 negligence.

1 1060.³ Of course, such negligence claims based on retained control do not provide a
2 basis for imposing joint and several liability.⁴

3 {42} In sum, we conclude that *Montanez* still controls claims made by employees
4 of subcontractors against property owners and general contractors. And neither *Saiz*
5 nor *Enriquez* provide any basis for questioning its continuing vitality. As an
6 intermediate appellate court, we cannot change or overrule *Montanez*. As such, there
7 is no basis for imposing joint and several liability on Ranack.

8 **JURY INSTRUCTION AND JURY VERDICT ISSUES**

9 {43} Plaintiff puts forth separate arguments concerning the jury instruction and the
10 verdict entered by the jury. First, she argues that the district court erred in
11 giving—over objection—an incorrect formulation of the wrongful death damages
12 instruction and thus confusing the jury as to the proper allocation of damages between
13 Saenz’s estate and his survivors. Second, she argues that the jury’s decision to award

14 ³We note that our Supreme Court cited *Montanez* with approval in *Valdez*. See
15 *Valdez*, 1987-NMSC-015, ¶¶ 29-31. Justice Ransom, the author in *Saiz*, concurred.

16 ⁴*Valdez* has likely been partially reversed. In *Tafoya v. Rael*, 2008-NMSC-057,
17 ¶ 17, 145 N.M. 4, 193 P.3d 551, the Supreme Court recognized a limited cause of
18 action for negligent hiring of a subcontractor in favor of an employee of the
19 subcontractor. The Court was careful to point out, however, that the liability would
20 be subject to normal comparative fault principles. *Id.* ¶ 22.

1 zero in damages to the estate is not supported by substantial evidence. We disagree
2 with her first argument, but agree with the second.

3 **1. The UJI 13-1830 NMRA Instruction Given Was Wrong but no Prejudice**
4 **Is Apparent**

5 {44} UJI 13-1830 is the uniform instruction on the measure of damages in a
6 wrongful death case. It includes, as a bracketed option, a paragraph on loss of
7 consortium damages. *Id.* ¶ 6. It also includes bracketed language in its last paragraph
8 that instructs the jury that it must not permit the amount of damages to be influenced
9 by “the loss of the deceased’s society to the family.” This language is in direct
10 conflict with the language describing loss of consortium damages. As a result, the
11 Use Notes for UJI 13-1830 provide that “[i]f the personal representative is also the
12 surviving spouse . . . the damages described in [I]tem 6 should be included and the
13 bracketed material in the last sentence of the instruction should be excluded.”

14 {45} Plaintiff’s requested UJI 13-1830 instruction mistakenly included both
15 provisions. Noting the mistake, Plaintiff pointed it out to the district court and asked
16 that the latter material be deleted. Plaintiff cited concerns for jury confusion but did
17 not cite the Use Note to the district court. The district court refused the request.

18 {46} Given the Use Notes, the instruction given to the jury was wrong. But, as
19 Plaintiff notes, not every defective jury instruction, even one that deviates from the
20 UJI, gives rise to reversible error. Plaintiff must demonstrate that the error created

1 prejudice or harmed substantial rights. *Kennedy v. Dexter Consol. Sch.*, 2000-NMSC-
2 025, ¶ 26, 129 N.M. 436, 10 P.3d 115. Our review is de novo. *Salopek v. Friedman*,
3 2013-NMCA-087, ¶ 16, 308 P.3d 139. And while we will resolve doubts in favor of
4 the party claiming prejudice where an instruction is inconsistent with the UJI,
5 *Kennedy*, 2000-NMSC-025, ¶¶ 26-27, we will not set aside a judgment based on mere
6 speculation that the erroneous instruction influenced the outcome of the case.
7 *Fahrbach v. Diamond Shamrock, Inc.*, 1996-NMSC-063, ¶ 31, 122 N.M. 543, 928
8 P.2d 269.

9 {47} Plaintiff argues that the jury’s confusion was evident from the way it
10 distributed the damages it did award—comparable amounts to each of the children,
11 and a substantially greater amount to Plaintiff for loss of consortium, but zero to the
12 estate. Plaintiff also relies on the fact that toward the end of its deliberations the jury
13 posed the following question: “Does ‘total amount of damages to the Estate of
14 Charles Saenz’ include all amounts awarded to Virginia, Rob[in], and sons[,] or is it
15 meant to be a separate amount?”

16 {48} We perceive no prejudice to Plaintiff from the jury instruction. The most
17 natural kind of prejudice to be expected from the error would be a reduction in loss
18 of consortium damages. But Plaintiff makes no argument that those damages were
19 inadequate or even reduced as a result of the error. Rather, Plaintiff suggests that the

1 jury may have awarded damages actually belonging to the estate to the individuals to
2 somehow make up for a presumed belief that they could not award loss of society
3 damages. On the face of it, this suggestion is mere speculation and provides no basis
4 for setting aside the verdict.

5 {49} In any event, Plaintiff's suggestion is all but an impossible scenario.
6 Unusually, we have in this case an indication of the jury's thinking. The jury question
7 quoted above shows that the jury was thinking about the issue of division of damages.
8 With all counsels' approval, the district court responded that the "[t]otal amount of
9 damages to the Estate of Charles Saenz" is separate. Given the question and the
10 answer, combined with the absence of any indication about confusion about loss of
11 consortium damages, there is no basis to suspect that the jury apportioned any
12 damages belonging to the estate to the individuals. Thus there is no basis to suspect,
13 much less conclude that prejudice flowed from the UJI 13-1830 error.

14 **2. There Is No Substantial Evidence to Support an Award of Zero Damages**
15 **to the Estate.**

16 {50} Finally, Plaintiff argues that the district court erred in denying her motion for
17 a new trial because the award of zero damages to the estate was contrary to the
18 evidence. To the extent that Ranack argues that this contention was not preserved
19 because Plaintiff failed to raise it before the jury was excused, we disagree. The rule
20 stated in *Thompson Drilling, Inc. v. Romig*, 1987-NMSC-039, 105 N.M. 701, 736

1 P.2d 979, and its progeny applies only to challenges of a jury verdict based on
2 inconsistency, ambiguity, or indefiniteness. In *Thompson*, the defendant argued that
3 “the jury verdict [was] invalid because it [was] ambiguous and indefinite as to the
4 amount of damages.” *Id.* ¶ 5. Similarly, in *Ramos v. Rodriguez*, the appellant argued
5 that “the special verdict form submitted by the judge omitted necessary language
6 which thereby resulted in a jury verdict that was contradictory and inconsistent on its
7 face.” 1994-NMCA-110, ¶ 9, 118 N.M. 534, 882 P.2d 1047. In both cases, these
8 arguments were not addressed on appeal because the appellant failed to raise them
9 before the jury was discharged. *Thompson*, 1987-NMSC-039, ¶ 5; *Ramos*, 1994-
10 NMCA-110, ¶ 13; *see also G & G Servs., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-
11 003, ¶ 41, 128 N.M. 434, 993 P.2d 751 (“A litigant who fails to object to an alleged
12 inconsistency in a jury’s verdict before the jury is dismissed may be held to have
13 waived any further challenge to the alleged inconsistency.”).

14 {51} But this rule does not apply to motions for a new trial based on a lack of
15 substantial evidence under Rule 1-059 NMRA. Addressing a fact pattern similar to
16 that here, the Alaska Supreme Court held that the

17 rule [that a challenge to a verdict based on inconsistency is waived if not
18 raised before the jury is discharged] has limited application here. The
19 [plaintiff’s] failure to raise the issue of inconsistency before the court
20 discharged the jury precluded it from later asserting that the
21 inconsistency entitled it to a new trial as a matter of law. But that failure
22 did not strip the estate of its right to move for a new trial on the

1 discretionary ground that the verdict was against the weight of the
2 evidence.

3 *Kava v. Am. Honda Motor Co.*, 48 P.3d 1170, 1176-77 (Alaska 2002).

4 {52} Reaching a similar conclusion, the Kentucky Supreme Court explained that the
5 difference lies in whether the verdict contains a “patent irregularity” or is a “complete
6 verdict.” *Cooper v. Fultz*, 812 S.W.2d 497, 499 (Ky. 1991), *abrogated on other other*
7 *grounds by Cooper v. Leatherman*, 532 U.S. 424 (2001). In *Cooper*, the jury awarded
8 damages for medical expenses but entered “0” on the line for mental and physical
9 suffering on the verdict form. *Id.* at 498. On appeal, the Court considered “whether,
10 by thus specifying a deliberate intention to make no award for one (or more) elements
11 of damages, the jury has returned a verdict with a patent irregularity which is waived
12 by failing to timely object, or whether this represents a completed verdict which is
13 subject to challenge as inadequate on motion for a new trial.” *Id.* at 499. It noted that
14 the explicit entry of zero on the jury form differs fundamentally from leaving the form
15 blank, stating, “it is futile to require a jury that has consciously inserted ‘0’ or its
16 equivalent to reconsider its decision. This is not the same situation as that created
17 when a jury has left a verdict slot blank. Such a verdict is patently irregular or
18 incomplete.” *Id.* at 500 (internal quotation marks and citation omitted). Citing
19 Kentucky’s version of Rule 59, it went on,

1 Where there is a patent deficiency or irregularity, the [rule requiring
2 objection before the jury is discharged] should be followed. However,
3 it is untenable to utilize that procedure where the jury has deliberately
4 awarded nothing, despite the evidence and instructions to the contrary.
5 Such a verdict is no more incomplete or irregular than had the jury
6 inserted one dollar. It may be defective as contrary to the evidence and
7 the law that relates to the adequacy of an award, but such a defect is one
8 appropriate to be addressed by the trial court upon a motion for a new
9 trial.

10 *Id.* (internal quotation marks and citation omitted).

11 {53} Other states have echoed this reasoning. The West Virginia Supreme Court
12 explained that “[c]ritically, the objective that underlies the general rule of requiring
13 that an objection to the verdict form must be made prior to the jury’s discharge is to
14 provide the trial court with an opportunity to ‘cure’ any alleged defect or irregularity
15 in the form prepared by the jury.” *State ex rel. Valley Radiology, Inc. v. Gaughan*,
16 640 S.E.2d 136, 141 (W. Va. 2006). It went on to state that

17 [n]o similar opportunity to cure is required for an inadequate award of
18 damages . . . because a request for a new trial based on the inadequacy
19 of damages is not a procedural objection to the verdict form, but a
20 substantive objection to the amount of damages awarded in view of the
21 evidence presented and the findings of the jury as to fault. Consequently,
22 there is no basis for invoking the waiver rule . . . when the post-trial
23 objection is solely to the adequacy of the damages.

24 *Id.*; accord *Ga. Farm Bureau Mut. Ins. Co. v. Hyers*, 661 S.E.2d 682, 683 (Ga. Ct.
25 App. 2008) (“Failure to move for a directed verdict also bars the party from
26 contending on appeal that he is entitled to judgment as a matter of law because of

1 insufficient evidence. This failure does not, however, bar the party from contending
2 that he is entitled to a new trial on that ground.” (citation omitted)); *Clay v. Choctaw*
3 *Nation Care Ctr., LLC*, 2009 OK CIV APP 35, ¶¶ 20-21, 210 P.3d 855, 860
4 (affirming the grant of a new trial where the movant failed to object before the jury
5 was discharged, stating, “there was nothing irregular, incorrect, or confusing about
6 the form of the verdict[,]” noting that “[t]he alleged error . . . [did] not involve the
7 verdict’s form, but its substance[,]” and finding no waiver).

8 {54} Plaintiff did not specify in her motion the rule under which she moved for a
9 new trial. Consequently, we examine the arguments in the motion to determine which
10 rule applies. *Century Bank v. Hymans*, 1995-NMCA-095, ¶ 10, 120 N.M. 684, 905
11 P.2d 722 (“The movant need not cite the provision authorizing the motion; the
12 substance of the motion, not its title, controls.”). In Plaintiff’s motion, she argued that
13 the jury’s award of zero damages to the estate “was . . . against the overwhelming
14 evidence propounded upon the [j]ury in this matter.” A claim that the verdict is
15 contrary to the clear weight of the evidence falls within the proper ground for a new
16 trial under Rule 1-059. *See* Rule 1-059(A) (“A new trial may be granted to all or any
17 of the parties and on all or part of the issues in an action in which there has been a
18 trial by jury, for any of the reasons for which new trials have heretofore been
19 granted.”); *see also Pool v. Leone*, 374 F.2d 961, 963 (10th Cir. 1967) (stating that

1 the plaintiff's claim that the verdict was contrary to the evidence is a ground
2 "recognized at common law and in the courts of the United States prior to the
3 adoption of Rule 59(a) as proper grounds for the granting of a new trial"). Hence, we
4 understand Plaintiff's motion for a new trial to invoke Rule 1-059 and conclude that
5 her argument that the verdict was not supported by the evidence was not waived by
6 her failure to object to it on these grounds before the jury was discharged.

7 {56} "The grant or denial of a new trial is a matter resting within the sound
8 discretion of the trial court, and the reviewing court will not reverse absent a manifest
9 abuse of that discretion." *Martinez v. Ponderosa Prods., Inc.*, 1988-NMCA-115, ¶ 4,
10 108 N.M. 385, 772 P.2d 1308.

11 {57} "We are of the opinion that proof of a wrongful death of necessity implies
12 recoverable damages." *Baca v. Baca*, 1970-NMCA-090, ¶ 25, 81 N.M. 734, 472 P.2d
13 997. *Contra Marchese v. Warner Commc'ns, Inc.*, 1983-NMCA-076, ¶¶ 32, 35, 100
14 N.M. 313, 670 P.2d 113 (rejecting the plaintiff's argument that "one cannot find a life
15 valueless in New Mexico" and stating that "the amount of damages is a correct one
16 for the jury to decide"). Such damages may be based on, but are not limited to,
17 pecuniary injury. *Baca*, 1970-NMCA-090, ¶ 25; *Stang v. Hertz Corp.*, 1969-NMCA-
18 118, ¶ 8, 81 N.M. 69, 463 P.2d 45 ("Damages for the wrongful death may be
19 recovered by proof of the present worth of life of decedent to the decedent's estate."),

1 *aff'd* 1970-NMSC-048, 81 N.M. 348, 467 P.2d 14. Damages based on pecuniary
2 injury to the estate are rarely zero. *Reffitt v. Hajjar*, 892 S.W.2d 599, 603 (Ky. Ct.
3 App. 1994) (stating that it is not “proper in a wrongful death action to award nothing
4 for destruction of earning power unless there is evidence from which the jury could
5 reasonably believe that the decedent possessed *no power to earn money*” (internal
6 quotation marks and citation omitted)); *see* Eric A. Posner & Cass R. Sunstein,
7 *Dollars and Death*, 72 U. Chi. L. Rev. 537, 544 (2005) (stating that zero damages are
8 appropriate for a “victim who has no future income, no dependents, and no spouse,
9 and who dies without feeling pain” as a matter of “formal law,” but that this rule is
10 not always followed in practice). Even in the absence of pecuniary injury, however,
11 the jury may also consider “[t]he present worth of the life, . . . [based on] the age,
12 occupation, earning capacity, health, habits, and the probable duration of the life of
13 decedent.” *Baca*, 1970-NMCA-090, ¶ 25; *see* Posner & Sustein, *supra* (stating that
14 New Mexico recognizes hedonic damages in wrongful death cases).

15 {58} In *Jones v. Pollock*, 1963-NMSC-116, ¶ 5, 72 N.M. 315, 383 P.2d 271, the
16 Court considered whether a new trial should have been granted where the jury found
17 the appellees liable for the appellants’ injuries but awarded little or no damages for
18 their medical costs incurred as a result of those injuries. The Court concluded that
19 “[i]t does not stand to reason for the jury to have arrived at the determination that

1 [the] appellees are liable for the injuries suffered by [the] appellants without it also
2 finding that [the] appellants merited an award for the injuries.” *Id.* ¶ 10. As to the
3 amount of the award, the appellees argued that while they had stipulated to the total
4 amount of the appellants’ medical bills, they did not stipulate to the recoverable
5 amount. *Id.* ¶ 9. The Court rejected this argument, stating that the “appellees cite no
6 evidence in the record which would tend to lessen the amount which [the] appellants
7 claim they incurred as a result of the accident. There was no controversy as to the
8 amount of the medical expenses. The only evidence offered on this point was that
9 submitted by [the] appellants.” *Id.* There being no evidence tending to reduce the
10 recovery for medical costs, the Court concluded that “where it is shown, . . . that the
11 verdict of the jury on the question of damages is clearly not supported by substantial
12 evidence adduced at the trial of the case, a motion for a new trial should be granted,
13 and not to do so is an abuse of discretion by the court.” *Id.* ¶ 12; *see Hammond v.*
14 *Blackwell*, 1966-NMSC-258, ¶ 13, 77 N.M. 209, 421 P.2d 124 (holding that a new
15 trial was required where the district court found the plaintiff suffered a loss of earning
16 ability as a result of an accident but failed to award any damages for such loss).

17 {59} Here, Plaintiff presented evidence that Saenz was working at the time of his
18 death and that he was a competent and dependable employee making between \$10
19 and \$33 per hour. There was also evidence presented on Saenz’s role in his family

1 and his relationship with his wife and children. While there was evidence that Saenz's
2 wage-earning capacity was mitigated by the fact that he had been convicted and
3 incarcerated for a felony charge and that he had a fitful relationship with his wife,
4 these factors could work to reduce the amounts Saenz might have earned or
5 contributed to his family—they cannot cancel them out entirely. Having found that
6 Ranack was forty-five percent at fault for Saenz's death, the jury could not find under
7 the evidence presented to it that the damage to his estate was zero. The jury was free
8 to settle on essentially any figure—ranging from a nominal sum to an amount akin to
9 the amounts awarded to his survivors—but it could not under the evidence find zero
10 damages. We conclude that an award of zero damages to Saenz's estate is not
11 supported by the evidence and remand for a new trial as to damages to the estate only.

12 {60} **IT IS SO ORDERED.**

13

14

MICHAEL D. BUSTAMANTE, Judge

15 **I CONCUR:**

16

TIMOTHY L. GARCIA, Judge

18 **JONATHAN B. SUTIN, Judge**

19 **(specially concurring in part and dissenting in part).**

1 **SUTIN, Judge (specially concurring in part and dissenting in part).**

2 {61} I do not disagree with the Majority’s analysis and conclusion that *Montanez*
3 precludes a holding that Ranack is jointly and severally liable for all of the damages
4 found by the jury. Majority Op. ¶¶ 15, 26-42. I write separately to address what I
5 believe to be an important issue raised in this case, namely, whether the work that
6 Saenz was doing at the time of his death may be considered “inherently dangerous”
7 as a matter of law. This issue was addressed by the district court, it is central to
8 Plaintiff’s argument on appeal, and in my view, it highlights an aspect of New
9 Mexico case law that needs to be clarified. *See id.* ¶¶ 14, 21, 23. Additionally, I
10 disagree with the Majority’s decision to remand for a new trial as to damages to the
11 estate, and as to that issue, I respectfully dissent. *Id.* ¶¶ 50-59.

12 **As a Matter of Law, Saenz Was Not Engaged in an Inherently Dangerous**
13 **Activity**

14 {62} Acting pursuant to Section 41-3A-1(C), in *Saiz*, our Supreme Court established
15 a public policy exception to several liability. 1992-NMSC-018, ¶ 34. The *Saiz* Court
16 began its analysis by recognizing the longstanding tort principle that, although an
17 employer of an independent contractor is not generally responsible for the
18 independent contractor’s negligence, the general rule has no application where, by
19 virtue of work that is “inherently dangerous,” the employer has a nondelegable duty
20 to ensure that precautions are taken. *Id.* ¶¶ 10-12, 15. In order to serve the policy

1 underlying the imposition of a nondelegable duty to ensure that safety precautions are
2 taken in regard to inherent dangers, the *Saiz* Court determined that employers should
3 be held strictly liable for injuries caused by the failure to ensure such precautions. *Id.*
4 ¶ 33. This, in turn, would promote the “special public policy” of protecting “third
5 persons in an area of inherent danger” and encouraging “conscientious adherence to
6 standards of safety where injury likely will result in the absence of precautions.” *Id.*
7 ¶ 35. To effectuate these public policy considerations, the *Saiz* Court held that,
8 pursuant to Section 41-3A-1(C)(4), “when precautions are not taken against inherent
9 danger, the employer is jointly and severally liable for harm apportioned to any
10 independent contractor for failure to take precautions reasonably necessary to prevent
11 injury to third parties arising from the peculiar risk.” *Saiz*, 1992-NMSC-018, ¶¶ 34,
12 36. I refer to this public policy exception in *Saiz* as “the *Saiz* exception.”
13 {63} The *Saiz* exception was derived from Sections 416 and 427 of the Restatement
14 (Second) of Torts. *Saiz*, 1992-NMSC-018, ¶¶ 11-14. Section 416 of the Restatement
15 (Second) of Torts, “Work Dangerous in Absence of Special Precautions,” provides
16 that when one employs an independent contractor to do work that the employer
17 “should recognize as likely to create during its progress a peculiar risk of physical
18 harm to others unless special precautions are taken,” the employer is subject to
19 liability for physical harm to “others” caused by the independent contractor’s failure

1 to exercise reasonable care to take the special precautions. This is so regardless of
2 whether “the employer has provided for such precautions in the contract or
3 otherwise.” *Id.* The Restatement’s illustrations of the application of Section 416
4 demonstrate that it was intended to apply to injured third parties who had no
5 connection to the employer or to the independent contractor and who were injured
6 through no fault of their own by virtue of the independent contractor’s failure to take
7 precautions for the safety of the general public. *See id.* cmt. c, e (illustrating the
8 intended application of Section 416).

9 {64} Section 427 of the Restatement (Second) of Torts, “Negligence as to Danger
10 Inherent in the Work,” subjects an employer of an independent contractor to liability
11 for injuries to “others” caused by the independent contractor’s failure to take
12 reasonable precautions against “a special danger” where the work for which the
13 independent contractor was hired involves a “special danger to others which the
14 employer knows or has reason to know to be inherent in or normal to the work[.]”
15 Like those accompanying Section 416, the Restatement’s illustrations of the
16 application of Section 427 demonstrate that it was intended to apply to circumstances
17 in which a third party, a member of the public, with no relationship to the employer
18 or to the independent contractor was injured as a result of the independent

1 contractor’s failure to take precautions necessary to alert the public to a dangerous
2 condition. *See id.* cmt. d (providing illustrations).

3 {65} Recognizing that Sections 416 and 427 were different formulations of the same
4 principle, the *Saiz* Court synthesized the respective sections in its holding that “one
5 who employs an independent contractor to do work that the employer as a matter of
6 law should recognize as likely to create a *peculiar risk* of physical harm to others
7 unless reasonable precautions are taken is liable for physical harm to others caused
8 by an absence of those precautions.” *Saiz*, 1992-NMSC-018, ¶ 15 (emphasis added);
9 *see id.* ¶ 12 n.6 (stating that work that presents a “peculiar risk” or “special danger”⁵
10 is “inherently dangerous”).

11 {66} Plaintiff argues that Saenz’s work activity was inherently dangerous under the
12 *Saiz* exception. Plaintiff’s theory of inherent danger is based on an argument that the
13 work activity that Saenz was performing when he died satisfies the three-part test
14 established in *Gabaldon*, 1999-NMSC-039, ¶ 13, for evaluating whether an activity
15 is inherently dangerous as a matter of law.

16 ⁵The *Saiz* Court concluded that although the terms “peculiar risk” and “special
17 danger” both appear in the Restatement, it would treat them as equivalent; following
18 the Court’s lead in *Saiz*, I do not distinguish these terms and, for simplicity, use the
19 term “peculiar risk” exclusively. *See id.* ¶ 12 n.6.

1 {67} To be considered inherently dangerous as a matter of law, the at-issue activity
2 must present a “peculiar risk.” *Saiz*, 1992-NMSC-018, ¶ 12 n.6 (stating that work is
3 inherently dangerous because it presents a peculiar risk). In general, a “peculiar risk”
4 is one that is outside the realm of personal experience, such that the person subjected
5 to the risk is unfamiliar with the associated danger. *See Valdez v. Yates Petroleum*
6 *Corp.*, 2007-NMCA-038, ¶ 11, 141 N.M. 381, 155 P.3d 786 (stating that personal
7 experience with an activity that results in familiarity with its dangers defies a
8 conclusion that the risks of the activity are peculiar). In the context of construction
9 work, a peculiar risk is one that is “not routinely encountered in the contractor’s line
10 of work.” *Sievers v. McClure*, 746 P.2d 885, 889-90 (Alaska 1987).

11 {68} Under the particular circumstances of this case, the work that Saenz was
12 engaged in at the time of his death does not come within the legal definition of
13 “inherently dangerous” work. Saenz was a skilled, experienced, and knowledgeable
14 ironworker, equipped with fall-protection devices, aware of the hazards and required
15 safety precautions of his trade, aware of normal routine matters of ironwork activity,
16 and aware of the risk and hazard of falling from the height of an unfinished building.
17 Furthermore, Saenz had worked on large construction projects, including having
18 participated in the structural steel construction work of several buildings from the
19 ground up.

1 {69} Saenz had trained both of his sons, Jason and Marcus, to be ironworkers. Jason
2 testified that Saenz was “extremely safety conscious” and that Saenz had trained him
3 in ironwork safety precautions, including how to use a harness, a beamer, and a
4 lanyard, and eventually, how to work at heights. Marcus, who was working with
5 Saenz on the day of Saenz’s accident, testified that Saenz warned him “several times”
6 not to work at heights or to walk across beams without being tied off. Saenz also
7 advised his co-workers on safety matters, including “how to be careful[,]” “how to
8 tie off[,]” and “how to make sure that [they] were working safely at the job.”

9 {70} Both Ranack’s and Alamo’s employees were required to use fall protection,
10 including a requirement to tie off when working from elevated areas, which,
11 according to Ranack’s policy, included any height over six feet. Thus, Saenz was
12 required to be tied off when working at the height from which he fell. Evidence at
13 trial established that the task that Saenz was attempting to perform when he fell could
14 have been accomplished safely by, in keeping with the tie-off requirement, tying
15 himself off to a joist or to the steel structure that was in place, or by using a ladder to
16 reach his destination rather than walking across the concrete wall. Evidence at trial
17 also showed that had Saenz tied off, he would have fallen no more than six feet before
18 his lanyard would have arrested his fall. The foregoing factual presentation was
19 credited both by the jury and by the district court.

1 {71} Owing to his knowledge and experience in regard to the dangers of the
2 ironwork trade and the fact that he was skilled in guarding against the dangers, the
3 risk of death or injury from falling was not “peculiar” to Saenz. *See Valdez*, 2007-
4 NMCA-038, ¶ 11 (stating that personal experience with an activity that results in
5 familiarity with its dangers defies a conclusion that the risks of the activity are
6 peculiar); *see also Warnick v. Home Depot U.S.A., Inc.*, 516 F. Supp. 2d 459, 469
7 (E.D. Pa. 2007) (“All construction work involves a risk of some harm; only where the
8 work is done under unusually dangerous circumstances does it involve a . . . peculiar
9 risk.” (internal quotation marks and citation omitted)); *Sievers*, 746 P.2d at 889-90
10 (holding that, in the context of construction work, a peculiar risk is one that is “not
11 routinely encountered in the contractor’s line of work” such that the employer of a
12 contractor may only be held liable for “those hazards which the independent
13 contractor is unlikely to be aware of and therefore unable to protect against”). To the
14 contrary, Saenz was well aware of the risk of falling and the ever-present need to
15 guard against that risk when working from heights. Because the presence of a peculiar
16 risk is an inextricable element of “inherent danger,” the circumstances here do not
17 support a conclusion that Saenz was engaged in an inherently dangerous activity.
18 *Saiz*, 1992-NMSC-018, ¶¶ 11, 12 n.6 (explaining that work is inherently dangerous
19 because it presents a peculiar risk).

1 {72} Having concluded that the work that Saenz was performing does not come
2 within the meaning of “inherent danger” as that term was used in *Saiz*, I further
3 conclude that the three-part test established by the *Gabaldon* Court for evaluating
4 whether an activity is inherently dangerous does not apply under the circumstances
5 of this case. *See Gabaldon*, 1999-NMSC-039, ¶ 13 (establishing a three-part test to
6 determine whether an activity should be considered “inherently dangerous” as that
7 term was used in *Saiz*). Under the *Gabaldon* test, in order to conclude that an activity
8 is inherently dangerous: (1) “the activity must involve an unusual or peculiar risk of
9 harm that is not a normal routine matter of customary human activity”; (2) “the
10 activity is likely to cause a high probability of harm in the absence of reasonable
11 precautions”; and (3) “the danger or probability of harm must flow from the activity
12 itself when carried out in its ordinary, expected way[.]” *Id.* Because they were derived
13 from the *Saiz* definition of “inherent danger,” the factors of the *Gabaldon* test
14 contemplated an unwitting plaintiff, a member of the general public, who is unable,
15 by virtue of his lack of experience with the dangerous condition awaiting him, to
16 guard against the risk presented by a dangerous condition. *See id.* ¶ 14 (“The first
17 prong addresses the relative rarity of the activity and the concomitant lack of contact
18 or experience with the activity and its dangers by the general public.” (internal
19 quotation marks and citation omitted)). In light of Saenz’s knowledge and experience

1 as an ironworking tradesman and that Saenz was a subcontractor’s employee, instead
2 of a third party, the *Gabalton* three-factor analysis is too limited an analysis through
3 which to evaluate Saenz’s ironwork task. Even if the *Gabalton* test were construed
4 to apply to a circumstance in which the injured party was the employee of a
5 subcontractor (contrary to *Montanez*), additional factors would have to be
6 considered—particularly, the knowledge, skill, and experience of the injured party.
7 Considering these additional factors would, for the reasons that I set forth earlier, lead
8 to a conclusion that, under the circumstances of this case, Saenz was not engaged in
9 an inherently dangerous activity.

10 **The District Court’s Denial of Plaintiff’s Motion for a New Trial Should Be**
11 **Affirmed**

12 {73} On the special verdict form, the jury returned verdicts finding “the total amount
13 of damages suffered by Plaintiff Virginia Saenz, Individually to be \$482,000” and
14 finding “the total amount of damages suffered by the Estate of Charles Anthony
15 Saenz, Deceased, to be \$0.” The jury’s verdict was read in open court. Plaintiff’s
16 counsel did not raise any issue in regard to estate damages prior to the discharge of
17 the jury. Rather, the issue was raised for the first time more than two weeks after the
18 trial ended, when Plaintiff filed a motion for a mistrial. In that motion, Plaintiff
19 sought a mistrial in the post-jury-discharge proceeding based on an argument that, in
20 arriving at the zero verdict for the Estate, the jury ignored “overwhelming evidence,”

1 somehow measured by a substantial evidence standard, constituting jury abuse of
2 discretion, including jury bias, prejudice, or passion. Ranack asserted in response that
3 the elements of possible injury to Saenz and his estate was vigorously contested and
4 set out examples of Saenz’s difficulties retaining employment, his criminal history,
5 the impact of that history on his future employment opportunities, his having lived
6 apart from his family while in prison and while not in prison, and his failure to
7 support his offspring. The district court denied Plaintiff’s mistrial motion, seemingly
8 convinced that substantial evidence supported the verdict given the “number of items
9 brought into evidence[,]” including “[t]he criminal history of this individual, the fact
10 that he had just gotten out of jail some months earlier, so on and so forth.”

11 {74} “The jury’s verdict is presumed to be correct[,]” and “[w]hen the jury makes
12 a determination and the trial court approves, the amount awarded in dollars stands in
13 the strongest position known in the law.” *Ennis v. Kmart Corp.*, 2001-NMCA-068,
14 ¶ 27, 131 N.M. 32, 33 P.3d 32 (internal quotation marks and citation omitted). In this
15 appeal, there exists no issue of bias, passion, prejudice, excessive verdict, or improper
16 admission of evidence. There exists no contention of district court error in regard to
17 the special verdict submitted to the jury. Plaintiff undisputedly did not preserve in the
18 district court any concern with the special verdict. The jury was discharged with
19 Plaintiff’s full knowledge of the verdict.

1 {75} Instead of attacking the basis on which the district court concluded that
2 substantial evidence existed, Plaintiff and the Majority rely on notions of an
3 “inadequate” verdict, “contrary to the evidence,” and “overwhelming evidence” of the
4 jury’s erroneous failure to award damages to the estate. Majority Op. ¶¶ 50-52, 54.
5 The Majority buttresses its position with foreign (and in my view, inapplicable)
6 authorities to support the assertion for the case at hand that the waiver rule does not
7 apply. Ranack relies on *Thompson*, 1987-NMSC-039, ¶ 11, for the proposition that
8 by failing to object to the jury’s verdict or otherwise alert the district court to the
9 alleged error prior to the jury’s dismissal, Plaintiff waived the opportunity to raise any
10 claim of error in regard to the amount of estate damages. I agree with Ranack. *See id.*
11 (“[T]he right to object to an improper verdict is waived when not made at the time of
12 the verdict and cannot be reclaimed and revived by resorting to a motion for a new
13 trial or on appeal.”). For the reasons that follow in this dissent, the denial of
14 Plaintiff’s post-jury-discharge motion can and should be upheld, if not based on
15 substantial evidence as determined by the district court, then, contrary to the
16 Majority’s analysis, because Plaintiff failed to preserve an attack on the jury’s verdict
17 and the fault lay not in verdict inadequacy but in Plaintiff’s litigation approach or
18 failures.

1 {76} Embedded in New Mexico law is the requirement that a party object to an
2 improper verdict before the jury is discharged, and that the party that fails to object
3 waives the right to a new trial after the jury’s discharge. *Id.*; *Guest v. Allstate Ins. Co.*,
4 2009-NMCA-037, ¶ 36, 145 N.M. 797, 205 P.3d 844, *reversed in part on other*
5 *grounds by* 2010-NMSC-047, 149 N.M. 74, 244 P.3d 342; *G & G Servs., Inc.*, 2000-
6 NMCA-003, ¶¶ 40-42; *Diversey Corp. v. Chem-Source Corp.*, 1998-NMCA-112,
7 ¶ 39, 125 N.M. 748, 965 P.2d 332; *Ramos*, 1994-NMCA-110, ¶ 13; *see also*
8 *Philippine Nat’l Oil Co. v. Garrett Corp.*, 724 F.2d 803, 806 (9th Cir. 1984)
9 (recognizing that failure to object to a no-damages verdict at the time that it is read
10 constitutes a waiver of any future objections to the form of the verdict and further
11 stating that in the federal system “failure to award damages does not by itself render
12 a verdict invalid”); *Balderas v. Starks*, 2006 UT App 218, ¶¶ 17-19, 138 P.3d 75
13 (stating that a failure to object to the sufficiency or legality of a verdict before the jury
14 is discharged constitutes a waiver of the objection and recognizing that the waiver
15 rule avoids “the expense and additional time for a new trial by having the jury which
16 heard the facts clarify the [matter] while it is able to do so” (internal quotation marks
17 and citation omitted)).

18 {77} In *Diversey*, this Court explored whether a fundamental error could override
19 the failure to timely object to an ambiguous verdict. 1998-NMCA-112, ¶¶ 36-40. The

1 question of ambiguity involved whether the use of “and/or” in an instruction rendered
2 the jury’s verdict ambiguous with the consequence that the jury improperly awarded
3 a double recovery for the same injury. *Id.* ¶ 36. The Court determined that
4 fundamental error generally did not apply in civil cases and limited any exception to
5 waiver to specific “exceptional circumstances” found in four specific cases. *Id.* ¶ 40
6 (stating that fundamental error may be found in civil cases in which “substantial
7 justice was not done, the court was deprived of jurisdiction to hear the case, the issue
8 was one of general public interest that would impact a large number of litigants, or[]
9 there was a total absence of anything in the record of the case showing a right to
10 relief” (internal quotation marks and citation omitted)). None of the exceptional
11 circumstances exist in the present case. Furthermore, Plaintiff created all of which she
12 now complains.

13 {78} The jury was instructed based on UJI 13-1830 that “[t]he lawsuit has been
14 brought by Virginia Saenz, Individually and on behalf of the estate of . . . Saenz, who
15 is now deceased.” This instruction was adopted verbatim by the court from Plaintiff’s
16 requested UJI 13-1830 which she modified, substituting “on behalf of the surviving
17 beneficiaries” with “on behalf of the estate[.]” The term “estate” was not defined for
18 the jury in any jury instruction. The special verdict form given to the jury was
19 likewise, in pertinent part relating to damages, adopted from Plaintiff’s requested

1 special verdict form. Plaintiff’s requested special verdict form given to the jury did
2 not carry out UJI 13-1830’s use note suggestion that the “various elements of
3 damages . . . be broken out separately on the special verdict form . . . in order to
4 identify damages recoverable by the estate” as distinguished from those recoverable
5 by the decedent’s spouse and beneficiaries for loss of consortium. Thus, neither the
6 UJI 13-1830-based instruction nor the special verdict form as given to the jury at
7 Plaintiff’s request explained the distinguishing factors inherent in “Virginia Saenz,
8 Individually and on behalf of the estate,” as those words appeared in the instruction,
9 or “Virginia Saenz” as the “surviving spouse,” as those would have appeared in an
10 unmodified UJI 13-1830. And, importantly, Plaintiff did not point out or explain to
11 the jury any differences or distinguishing factors about damages recovery in closing
12 argument.

13 {79} Plaintiff’s UJI 13-1830-based instruction could easily have given an impression
14 to and reasonably have been interpreted by the jury to say that Virginia Saenz was
15 entitled to one recovery encompassing both her individual and representative
16 capacities. Plaintiff’s special verdict form did not clarify potential recoveries. The
17 special verdict form provided a blank space for damages “suffered by Plaintiff
18 Virginia Saenz, Individually[,]” which, given the way the instruction read, namely,
19 “Individually and on behalf of the estate,” could reasonably be read as calling for

1 recovery of one amount consisting of damages in both capacities. Nowhere in the
2 special verdict form was there a separate place for the jury to consider damages
3 recoverable by “Virginia Saenz on behalf of the estate.” Further, Virginia Saenz as
4 “surviving spouse” appears nowhere in the special verdict form. In awarding zero as
5 “damages suffered by the Estate of Charles Anthony Saenz” (with “the Estate”
6 nowhere described, nowhere differentiated from “Virginia Saenz, Individually,” and
7 nowhere indicating whether the award should be given to Virginia Saenz in her “on
8 behalf of the estate” capacity) the jury could reasonably have concluded from the
9 instructions, the special verdict form, and the lack of any explanation to the jury by
10 Plaintiff, that its award of \$482,000 properly included all of the compensation for
11 “Virginia Saenz, Individually *and* on behalf the estate” according to Plaintiff’s UJI
12 13-1830-based and modified instruction. (Emphasis added.)

13 {80} During its deliberations, the jury sent a note to the court asking the following
14 question: “Does ‘total amount of damages to the Estate of . . . Saenz’ include all
15 amounts awarded to [Plaintiff and the children] or is it meant to be a separate
16 amount?” This question lacked clarity. Given the manner in which Plaintiff had the
17 jury instructed, including how her special verdict form read, the question could
18 reasonably be interpreted as asking not whether there should be separately awarded
19 damages pursuant to a division or distinction between “Individually” on the one hand

1 and either “on behalf of the estate” or “the Estate” on the other hand, but whether,
2 upon or after an award “of all amounts” to Plaintiff, individually and on behalf of the
3 estate (and to the children), the Estate was still to receive a separate amount. The
4 court consulted counsel for both parties regarding how to respond to the question.
5 Initially, Plaintiff’s counsel suggested sending the jury an answer saying: “Yes.” To
6 which the court astutely responded that the problem with that answer would be that
7 the jury would then ask, “What is the estate entitled to?” The court insightfully
8 explained, from “looking at the damages instruction for wrongful death, . . . I am not
9 quite sure if it itemizes the damages for the estate.” The court instructed counsel to
10 recess and look at the issue to figure out a way to respond to the note. Counsel
11 returned with an agreed upon answer for the jury, still lacking in clarity, that read, “It
12 is separate[.]” which the court suggested be slightly modified to state, “The ‘total
13 amount of damages to the Estate of . . . Saenz is separate.” Both parties agreed to the
14 court’s modification and that answer was submitted to the jury.

15 {81} The evidence at trial was that the value of Saenz’s lost wages over the
16 remainder of his working lifetime was estimated to be \$450,000. No other dollar
17 amounts were in evidence with respect to damages. On the face of the special verdict
18 form, the jury awarded \$482,000 in damages “suffered by Plaintiff Virginia Saenz,
19 Individually[.]” And the jury awarded damages “suffered by” the children: to Saenz’s

1 daughter, \$50,000 and to each of Saenz’s sons, \$25,000. The special verdict form
2 made no mention of “consortium.”

3 {82} It is reasonable to conclude that the \$482,000 award to Plaintiff, individually,
4 indicates that the jury likely included in the award “all amounts awarded to
5 [Plaintiff]”—that is, all amounts that would flow to her “Individually and on behalf
6 of the estate,” as instructed. This conclusion is supported, among other things, by the
7 fact that the jury asked “Does [total amount of damages to the Estate of . . . Saenz]
8 include all amounts awarded to [Plaintiff and the children,] or is it meant to be a
9 separate amount?” The question of how much of any intended award to Virginia Saenz
10 on behalf of the estate should flow to her as a wrongful death beneficiary under the
11 Wrongful Death Act and how much should be allocated to Virginia Saenz,
12 individually, for loss of consortium, is not suggested or argued by Plaintiff on appeal.
13 *See generally* NMSA 1978, § 41-2-3 (2001) (governing the distribution of the
14 proceeds of a wrongful death judgment).

15 {83} Under the circumstances, one can reasonably assume that the jury’s award of
16 \$482,000 to “Virginia Saenz, Individually” represented more than the value of
17 Plaintiff’s loss of consortium, given Plaintiff’s evidence of economic damages of
18 \$450,000. It is reasonable to conclude that, within its \$482,000 award, the jury

1 included damages to Plaintiff in both capacities, individually and on behalf of the
2 estate, based on the instruction and special verdict form given to the jury, Plaintiff's
3 counsel's misunderstanding or misinterpretation of the jury's question and failure to
4 ask the court to inquire further, and counsel's failure or decision not to explain to the
5 jury the distinctions and differences in Plaintiff's capacities, the damages elements,
6 the commensurate recovery rights, and how the jury should read and complete the
7 special verdict form. It is likely that the jury did not intend to award \$482,000 to
8 Plaintiff solely for consortium.

9 {84} The outcome in this case is not a fault of the district court, and it does not fall
10 within any of *Diversey's* alternatives to fundamental error. *See* 1998-NMCA-112,
11 ¶¶ 36-40. The outcome was the product of Plaintiff not having assured that the jury
12 was properly and carefully instructed on the damages elements and the different
13 capacities and recoveries, together with a conforming special verdict form.

14 {85} The Majority holds that a failure to timely object, before the jury was
15 discharged, to an inadequate damages award and particularly a zero damages award,
16 as opposed to an inconsistent or ambiguous verdict, does not constitute a waiver.
17 Majority Op. ¶¶ 50-53. New Mexico has not addressed that issue. As noted by the
18 Majority, on the waiver issue, cases outside New Mexico have made a distinction

1 between verdicts with alleged inadequate damage awards and verdicts that are
2 inconsistent with respect to such awards. *Id.* ¶¶ 51-53.

3 {86} The Majority’s reliance on foreign case law is misplaced. *See id.* ¶¶ 51-54.
4 Each foreign authority is distinguishable for several reasons. In none of the
5 authorities on which the Majority relies was there complicity by the plaintiff in
6 submitting a defective or ambiguous jury instruction and special verdict form and, as
7 here, in perpetuating a misunderstanding of the jury’s question. In none of the relied
8 upon authorities does it appear that the plaintiff failed in closing argument to explain
9 how to decide what to award. In none of the authorities was there a special verdict
10 awarding substantial compensatory damages considerably close in amount to the
11 evidence of economic damages presented in the case and reasonably interpretable to
12 include loss of consortium. In none of the authorities was a sum awarded to a plaintiff
13 in a wrongful death case “individually” when the award rationally could have been
14 intended by the jury, based on its reading of the instructions and verdict form, to
15 cover not just damages “individually” (for consortium) but also “on behalf of the
16 estate.”

17 {87} *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), is
18 significantly factually different from our case, and when carefully analyzed, supports
19 this dissent. *Zhang* shows that the special verdict in our case consisted of two legal

1 conclusions of damages and that, despite the claimed inconsistency, the verdict
2 should stand. *Zhang* also makes clear that with general verdicts or legal conclusions
3 in a special verdict form, such as in the present case, a party can waive a sufficiency
4 of evidence argument when the issue does not involve factual findings of the jury in
5 a special verdict circumstance, as here, but instead involves legal conclusions as to
6 damages. 339 F.3d at 1031-34. Further, and significantly, the *Zhang* court stated:

7 Another persuasive line of cases involves discrepancies between
8 findings of liability and damage awards, typically arising when a jury
9 finds liability but nonetheless awards zero damages. . . . [T]he damage
10 award is not really a separate general verdict, but it is nonetheless a legal
11 conclusion, and so these types of cases involve purported conflicts
12 between two legal conclusions. . . . Justice Brandeis wrote that the trial
13 court’s refusal to grant a new trial cannot be held erroneous as a matter
14 of law. Appellate courts should be slow to impute to juries a disregard
15 of their duties, and to trial courts a want of diligence or perspicacity in
16 appraising the jury’s conduct. This rule retains vitality, and we have
17 noted that the federal rule is that failure to award damages does not by
18 itself render a verdict invalid.

19 *Id.* at 1036 (internal quotation marks and citations omitted).

20 {88} The outcome here stemmed from the lack of clarity of the UJI 13-1803-based
21 instruction and the special verdict form, from the inadequate understanding of and
22 response to the jury question, and from the failure to explain to the jury in closing
23 argument how the awards should be made and divided, including what the “Estate”
24 as shown in the special verdict form meant, as opposed to what “Virginia Saenz,

1 Individually and on behalf of the estate” (as stated in the modified instruction) meant.

2 This footprint of complicity is the culprit here, not verdict inadequacy.

3 {89} Further, it simply cannot be disputed that the several problems created by
4 Plaintiff could have been resolved if, upon hearing the zero damages verdict for the
5 estate along with the substantial award to Plaintiff, individually, Plaintiff had raised
6 the issues at the time. This would have given the district court the opportunity to
7 consider ways in which the jury could be further instructed or the parties could make
8 further argument to clarify and resolve questions about the verdict.

9 {90} This case is not about exceptional circumstances, and there is no clear
10 inadequacy in the verdict that should give rise to a new trial. This case was fully and
11 fairly tried before a jury by experienced counsel. The district court did not abuse its
12 discretion or otherwise err in denying Plaintiff’s motion for a new trial. *See id.*
13 (stating that where a jury finds liability but nonetheless awards zero damages, the
14 “refusal to grant a new trial cannot be held erroneous as a matter of law [because
15 a]ppellate courts should be slow to impute to juries a disregard of their duties, and to
16 trial courts a want of diligence or perspicacity in appraising the jury’s conduct”
17 (internal quotation marks and citation omitted)).

18 {91} In conclusion, I fully understand and am sympathetic with the difficulties even
19 experienced litigators have in the vicissitudes, challenges, and surprises in the

1 litigation arena. Attorneys must be immediately aware of the problematic
2 occurrences. They must make on-the-spot decisions. Litigators ought not to enter into
3 the fray without careful thought about every aspect of trial, from anticipating
4 evidentiary issues, to readiness in making clear objections, to anticipating and
5 perceiving error, to assuring clear, correct, and complete jury instructions and special
6 verdict forms, to anticipating jury misunderstanding of instructions and forms, and
7 to jury error. It should be the rare instance in which this Court overturns, in a fully
8 and fairly tried case, what appears to be an ambiguous or unclear jury verdict, or even
9 one that may appear to be inadequate, but, as here, stems from the complaining
10 party's own steps or mis-steps. This Court should not be in the business of saving
11 parties from their trial strategies or mis-steps and forcing complete new trials on trial
12 courts and prevailing parties under these circumstances.

13
14

JONATHAN B. SUTIN, Judge