IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1084

Filed: 18 July 2017

Johnston County, No. 13 CVS 923

LARRY EDGAR MASSENGILL, Administrator of the Estate of the Late CLINTON ALEXANDER MASSENGILL, Plaintiff,

v.

BRIAN WAYNE BAILEY, Defendant.

Appeal by Defendant from judgment entered 10 June 2015, and order entered 17 March 2016, by Judge R. Frank Floyd in Superior Court, Johnston County. Heard in the Court of Appeals 5 June 2017.

Brent Adams & Associates, by Brenton D. Adams, for Plaintiff-Appellee.

Narron, O'Hale and Whittington, P.A., by John P. O'Hale and Frank B. O'Hale, for Defendant-Appellant.

McGEE, Chief Judge.

Brian Wayne Bailey ("Defendant") punched Clinton Alexander Massengill ("decedent") in the face on 18 September 2010, causing decedent to fall to the ground and hit his head. At that time, Defendant was twenty-five years old and decedent was twenty-three years old. Decedent was transported to two hospitals and, on 27

September 2010, died from his injuries. Larry Edgar Massengill, decedent's brother and administrator of decedent's estate ("Plaintiff"), brought the current action against Defendant by complaint filed 6 August 2012.

I. *Facts and Procedural History*

At trial, Defendant testified to the following: Defendant spoke with decedent in early September 2010 about attending a concert at a local nightclub ("the club") on the evening of 18 September 2010, and stated that decedent was a "good friend of [his]." Defendant arrived at the club on the evening of 18 September at approximately 10:00 p.m. Decedent had not yet arrived and Defendant called decedent to say he had arrived at the club. Defendant said he wanted to talk to decedent about an incident that had occurred some months prior, when Defendant's sister and decedent had both attended the same party. Defendant testified his sister had informed him that, at the party, decedent had taken her into a room and made unwanted sexual advances. Defendant testified he did not know if his sister's story was true.

Around 11:00 p.m. on 18 September, decedent arrived at the club with Plaintiff; decedent's sister, Jackie Lynn Massengill ("Lynn"); and two friends, Karen Lee Hill ("Karen") and Karen's son, Jordan Lee Hill ("Jordan"). At trial, Jordan testified to the following: He had heard decedent talking to Defendant on the phone earlier in the evening, informing Defendant they would be leaving for the club soon.

As they were driving to the club, Jordan also heard decedent talking with a man on the phone and the man was asking decedent if he was on his way and how long before he would reach the club. Jordan suspected, but was not certain, that Defendant made this call to decedent. After they parked, decedent and the others were walking toward the entrance of the club when, according to Plaintiff and Karen, they spotted Defendant outside the club "motioning, telling them to come on." Decedent motioned to Defendant that they were coming. At that time, Plaintiff did not know Defendant, but decedent, Lynn, Karen, and Jordan did know him. Defendant did not mention seeing decedent outside the club.

Decedent entered the club first, and Plaintiff entered last. Shortly after Plaintiff entered the club, he noticed a commotion and Lynn told him that decedent had been "knocked out." At trial, Defendant stipulated that he hit decedent in the face with a closed fist on 18 September 2010 and, as a result of that hit, decedent fell "backwards and hit his head on the ground."

Defendant also testified to the following: When he saw decedent enter the club, he approached him to "shake his hand" and talk about his sister's allegations, but "as I was walking over there, he give me a smartass smirk and before I knew what I'd even done I hit him. He hit the floor and I was tackled immediately after." Defendant said that initially he did not intend to hit decedent, but because of "that smirk he give me . . . something come over me and I hit him before I even knew what I'd done."

Defendant denied he hit decedent because of what Defendant's sister had told Defendant, and that it was "only the expression in [decedent's] face that caused [Defendant] to strike him." Defendant said he hit decedent only once. Defendant admitted that, at the time he hit decedent, he did intend to inflict injury, but that he now felt remorse for what he had done. However, Jordan testified that, when he noticed the disturbance in the club, he ran over and saw Defendant on top of decedent: "[Defendant] was kind of in a, you know, almost like a drawed [sic] back position looking down straddling [decedent] around the waist, his legs around [decedent's] waist or upper leg area, and the bouncers just kind of came in and just scooped [Defendant off of decedent]."

Defendant said he was told to leave the club, so he went outside to look for his girlfriend. Jordan testified that he followed Defendant out of the club and told him he should stay where he was and wait for the police, but that Defendant "was kind of irate and he started to walk away[,]" so Jordan told Defendant he could not leave and Defendant then "pulled a box cutter on me[.]" Jordan further testified that some of the bouncers were outside trying to calm Defendant, but that Defendant "said he was going to kill every last one of us[.]" Defendant denied this confrontation.

Plaintiff had been a police officer and an EMS technician, so he went to decedent to see if he had a pulse and if he was breathing. Karen testified that the

floor was concrete, and that the back of decedent's head was "split open[,]" bleeding profusely, and

> I got down on the floor and he was unconscious. He had blood coming from his mouth and his ears. I . . . said "[g]et me some towels, get me something and get me some water," and they went and got towels down and got the coats out of the coat closet because there was so much blood. I wet one of the towels and wiped the blood out his mouth and ears. And he finally come to. He never spoke.

Karen testified that the only sounds decedent was making "was sort of like growl, grunt[.]" Karen stated that blood kept trickling out of decedent's ears, but she tried to keep them clear, and she tried to stop the blood from coming out of the back of decedent's head, but "[t]here was a lot of blood, a lot." Jordan testified that, when he returned to the club, he saw decedent lying on the floor "bleeding from his ears and he was bleeding from the corners of his mouth and he had a big pool of blood gathering at the back of his head." Corporal William Ray Baker ("Corporal Baker") of the Selma Police Department testified that he responded to the incident at the club and observed decedent's condition. Corporal Baker testified that, when he arrived, decedent "was conscious but not responsive. He had blood coming from his mouth[,]" and "[h]is eyes were open, but they weren't focused."

Plaintiff testified that Defendant was removed from the club by staff and that he, Lynn and Jordan followed Defendant to try and keep him from leaving the scene. Plaintiff used his truck to block Defendant from leaving the parking lot in his car,

and Lynn jumped on the hood of Defendant's car until Plaintiff shouted at her that Defendant had a knife, and she jumped off. Defendant testified that, after he and his sister got into his sister's car, a truck blocked him in and a person jumped on the hood, so he grabbed a knife from the console, got out of his sister's car, exposed the blade, and told people to back off. Defendant then walked over to his girlfriend's car, got in, and they drove away. Plaintiff followed them in his truck.

Karen testified that when Jordan returned to the club from outside, he

> went to get [decedent's] phone off of [decedent] after they come back in, after [Defendant] had left, and [decedent] was like he never spoke. He was just like in shock trying – he knew somebody was after his phone, but he didn't quite know what to do, his hands were going crazy.
>
> So, I told him I said, "Jordan [is] getting your phone, don't worry about it, just relax." He tried to get up, I said "you can't move."

Karen also testified that, when EMS arrived and took decedent away from the club, there were multiple blood-soaked towels left on the floor that she threw in the trash and that she "had blood all over me[,]" and there was blood on the floor. Karen noticed EMS did not leave right away, so she went to investigate, and said "they were trying to get the IV, [decedent] sort of didn't know what was going on and went to fighting, trying to fight the rescue workers[.]"

Plaintiff continued to follow the vehicle in which Defendant and his girlfriend were riding, and called the police as he drove. Plaintiff followed the vehicle until police arrived, stopped the vehicle, and arrested Defendant.

Decedent was taken to Johnston Memorial Hospital in Smithfield, North Carolina. Lynn rode in the ambulance with decedent, and Karen followed in her vehicle. Plaintiff learned decedent had been taken to Johnston Memorial, and he also drove there. When Plaintiff arrived, decedent was in a bed in the emergency room, in a neck brace, and blood was coming out of his left ear. Karen and Lynn were already in the room. Karen testified:

> We come in and he was strapped down on a board. And actually there he started talking. That was the first he talked the whole time. And all he could say was how bad his head was hurting and get somebody to help him. And at that point he sort of like blew his mouth up and started pointing and – anyway, he was going to be sick. And I told [Plaintiff] I said grab that trash can and I had to flip him over so he could get sick and call the doctors and nurses in there to help him out. And he was just sitting there.
>
> I want to say that he knew – he was crying, but he was in such bad pain, tears were just running, going "my head is killing me." But they had already given him stuff for it and he was still in pain.

Plaintiff testified he picked up a trashcan for decedent, but decedent "just spewed everywhere." Plaintiff called his parents and they arrived shortly thereafter. Decedent could "say a few words," but "he couldn't talk like me or you now." Plaintiff was concerned that there was something seriously wrong with decedent because he

was throwing up, his eyes looked strange, and he could not talk very well. Karen testified that decedent was not talking normally, he "was real soft spoken" and "just like I'm in such pain." Jordan testified that decedent's head was very swollen, and he remembered decedent saying and screaming that he was in pain and his head hurt.

After doctors examined x-rays, they determined decedent needed a higher level of care, and contacted Life Flight. Decedent was conscious at Johnston Memorial Hospital until the doctors "sedated him when they put him on a respirator [until] the [L]ife [F]light come and got him." A Life Flight helicopter arrived and decedent was placed on board. However, shortly after the helicopter took off, it returned, and decedent's family was informed the helicopter could not fly because of bad weather. Decedent was then driven by a transport unit to UNC Hospital in Chapel Hill, North Carolina, in the early morning hours of 19 September 2010. At UNC Hospital, Decedent was "in and out of consciousness" and "he could say some words. No conversation, no – really no sentence structure. It was just like functioning at 20 percent[.]" When asked about decedent's pain, Plaintiff testified:

> That's even at Johnston Memorial Hospital what some words he did say and at UNC [Hospital] was my neck, my head hurts. But it won't like I just said it. He was like uggh, uggh. And Lynn would say what's wrong or Karen would say what's wrong, my neck hurts bad, like that, you know, just slurred, you know. It won't like yeah, my neck's hurting, you know. It was like he had to force his self to say his words. And, of course, it's just the way humans are,

> the way he kind of expressed his self was like uggh, uggh, that type of agony.

Karen testified that, when they went in to see decedent at UNC Hospital, "[h]e was still strapped down and they had been doing tests. And he just said, 'Please, please, untie me and . . . take me home.' I told him I couldn't." Decedent was conscious during this period, and "he was still in pain."

Decedent remained at UNC Hospital for eight days, and Karen testified that decedent had "actually started improving some [during the week, but] by the time I came back for the weekend, he had gone back downhill from the injuries." Jordan said decedent did not talk much after he was transferred to UNC Hospital, testifying that

> if you had known [decedent], that man talked more than any other man I've ever known in my life. He would literally talk you under that table right there and then talk you out of it. And after the ordeal happened, he could barely manage two or three words together. And if he did, they – they were not usually a full sentence.

Jordan testified that when decedent did talk it was "[s]lured and almost like a lisp, like he'd developed a lisp. . . . [That decedent] did [not] sound at all like his voice before . . . it was almost like he was whispering to you. Whenever he was telling his mamma he wanted to go home, he'd whisper it to her." Jordan testified that decedent appeared to be in pain while he was at UNC Hospital "just by the expression on his face. I mean, it was almost like he was trying to squint and make it go away. He

didn't know what to do. I mean, I imagine there was probably a part of him that was trapped in his mind but just couldn't do nothing."

Decedent was still at UNC Hospital on 27 September 2010, when he was declared brain dead, and the decision was made to remove him from life support. Karen testified she was at UNC Hospital when decedent died, that "[h]e was talking and then, you know, from his injuries he just – that was it." Decedent was an organ donor, and many of his organs were removed. His family was concerned that maybe he could still feel pain, but the doctors "comforted [them] the best way they could."

Both Plaintiff and Karen testified about decedent's relationship with his mother, stating that decedent was the youngest child by a number of years and, at age twenty-three, was his mother's "baby boy." Plaintiff was fifteen years older than decedent. Plaintiff testified that decedent and his mother had a special bond, and that decedent took care of her in many ways. He described decedent's relationship with his mother as "very close" and like both a child/mother relationship and a friendship. They were in each other's day-to-day lives, shopping and cooking together, and consulting each other about these things. Decedent and Plaintiff had another brother who had died in a motorcycle accident years prior, also at age twenty-three. Plaintiff testified that decedent had been there for his mother following their brother's death, "more loving and affectionate than say me [Plaintiff] and my sister was." Decedent lived with his parents, and "overall looked after [his] mother probably

a little more, I'd say, than [his] father [did.]" Along with taking care of the house and yard, decedent would buy his mother "expensive things" like flowers, jewelry, and shoes.

Karen testified that decedent, his mother, and the entire family would convene at Lynn's house for dinner "almost every day, every week." She agreed that decedent helped his mother out with different chores, and that they had "a little campground area. [Decedent] would go out there, mow the grass . . . . I mean, . . . they all worked together." Karen testified that, after decedent's death, his mother "became real angry and I don't think she really cared about her health as much anymore. She was diabetic. She . . . would eat whatever she'd want. She wouldn't check her sugar. It was like she didn't care anymore." Approximately a year after decedent's death, his mother suffered a massive stroke.

Jordan testified that he was "envious" of decedent's relationship with his mother because "they got along better than any other mother and son I can think of right now." Decedent was always truthful with his mother, and would do whatever she asked of him without complaint.

Decedent's mother was moved to a "rest home" at some point after decedent's death. Plaintiff testified concerning the impact of decedent's death on his mother:

> Still to this day it has a heavily heartfelt, profound effect on her. I go to the rest home and see her some and she'll start crying and I'll ask her why is she crying and she'll shake her head like this. And I'll say what is it? Of course,

> I know what it is. And . . . I say is it [decedent]? And she'll go yeah. Then she'll just cry even heavier. To this day it still dramatically bothers her.

Plaintiff testified that his mother cried "[j]ust about every time I s[aw] her[.]" Plaintiff testified that his mother was still suffering from losing decedent, and that he believed decedent's death "kind of put her in the state where she is now, excessively worrying all the time." Jordan testified decedent's death "destroyed" decedent's mother, saying: "I honestly believe if [decedent] was still living, [decedent's parents would] both be here today. [Decedent's mother is] here but to the – not a hundred percent."

Decedent's father died of a heart attack in April 2014, and Plaintiff and Lynn were made co-executors of decedent's estate. Plaintiff filed the complaint in this matter on 6 August 2012, alleging claims against multiple defendants. For the purposes of this appeal, Defendant is the only relevant defendant in this case, and the trial for wrongful death against Defendant began on 26 May 2015. Following the presentation of all the evidence, Plaintiff moved for directed verdict on the issue of liability, and Plaintiff's motion was granted. The issue of damages went to the jury on 29 May 2016, and the jury returned a verdict that Plaintiff was entitled to recover $3,409,612.00 for decedent's wrongful death. The issue of punitive damages was tried later, and the jury determined on 1 June 2015 that Defendant was not liable to

Plaintiff for punitive damages. Judgment against Defendant in the amount of $3,409,612.00 plus interest was entered on 3 June 2015.

Defendant filed a motion on 22 June 2015 for a new trial on damages, arguing that the jury's award was excessive and based upon passion and prejudice, and that Plaintiff's evidence at trial did not support an award of $3,409,612.00. Defendant's motion was heard on 22 February 2016, and was denied by order entered 17 March 2016. Defendant appeals.

II. *Analysis*

A. Admission of Expert Testimony

In Defendant's first argument, he contends the trial court abused its discretion in allowing Plaintiff's physician witness to "testify as an expert witness for the Plaintiff contrary to the applicable *Daubert*[1] standards." We disagree.

Defendant argues that when the trial court ruled on whether to allow the testimony of Plaintiff's expert, Dr. Abraham Oudeh ("Dr. Oudeh"), it should have relied on the current version of N.C. Gen. Stat. § 8C-1, Rule 702, which applies the *Daubert* standard. Rule 702 was amended, effective 1 October 2011, to adopt *Daubert* as the appropriate standard in place of the *Howerton*[2] standard that North Carolina had applied until the amendment of Rule 702. Defendant further argues that,

[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993).

[2] *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004).

"despite clear appellate guidance that the *Daubert* standards apply, a review of the trial transcript reveals that the trial court defaulted instead to the pre-2011 North Carolina law [the *Howerton* standard.]" Defendant contends that had the trial court applied the *Daubert* standard, it would have – or should have – excluded Dr. Oudeh's testimony. There are multiple problems with Defendant's argument.

First, Defendant did not preserve the argument he now makes on appeal – that the trial court applied the incorrect standard for the admission of expert testimony – by making proper objection at trial. Defendant's initial argument for exclusion of Dr. Oudeh's testimony, given on 26 May 2015, was the following:

> We would contend . . . that under [Rule] 702 that the doctor's review of – on an autopsy report, he's not a neurologist. He's an internal medicine fellow and acknowledged that he really didn't have any expertise in this area. We would submit, Judge, that he – and, of course, I know you're going to have to hear him by way of voir dire. And again this is by way of motion in limine, a preliminary motion, that his credentials do not permit him to testify as an expert in this case.

The trial court acknowledged that it could "readdress [Defendant's motion] if you're going to be requesting voir dire into the qualifications." Defendant's attorney then suggested that perhaps the trial court could just read Dr. Oudeh's deposition and make a decision based solely upon that. The trial court said it was not going to be able to read the deposition at that time, but that "[i]t sounds like [Dr. Oudeh] would be qualified to me. But if [Defendant] requests voir dire, I may have to go into voir

dire." The trial court stated that it might be able to read the deposition during jury selection, but if Defendant "want[ed] to request a voir [dire], we'll try to keep it as short as we can and we'll proceed by the proper method . . . before [Dr. Oudeh] testifies rather than try to take it up on cross-examination." The trial court therefore reserved its ruling on Defendant's motion until later.

Plaintiff informed the trial court that he intended to present Dr. Oudeh's testimony at trial by reading Dr. Oudeh's deposition to the jury, but that if the trial court "rule[d the] deposition [wa]s not admissible, then we'll probably call him[.]" Defendant stated he believed Dr. Oudeh's lack of qualifications were evident in the deposition and, therefore, asked the trial court to "[j]ust read the deposition, that's all I ask you to do." The trial court stated it would read Dr. Oudeh's deposition and they would revisit the issue later.

After reading Dr. Oudeh's deposition, the trial court revisited Defendant's motion to exclude Dr. Oudeh's testimony on 28 May 2015. Defendant handed the trial court "another copy" of his motion *in limine*, and stated: "There [are] three cases attached to it, one that deals with the law pre-October 2011. One is a United States Supreme Court case and one's a North Carolina post-2011."[3] Defendant reiterated that the basis of his objection was that Dr. Oudeh based his opinions solely on having read the medical examiner's report and "he didn't do the things – in the designation

[3] As noted above, Rule 702 was amended to adopt the *Daubert* standard in October 2011.

of expert, they said that he would read the medical records and read the file; he didn't do it." Defendant did not request a *voir dire* of Dr. Oudeh. The trial court finally ruled: "I'm going to allow the testimony. I'm going to allow the deposition of the doctor to come into evidence."

At no time did Defendant object that the trial court was applying the incorrect standard, nor did Defendant attempt to argue that Dr. Oudeh's testimony failed to meet the specific requirements of the *Daubert* standard as adopted by the 1 October 2011 amendment to Rule 702. Defendant cannot make this argument for the first time on appeal. "'A contention not raised in the trial court may not be raised for the first time on appeal.' *[S]ee also* N.C. R. App. P. 10(a)(1)." *Clark v. Bichsel*, 239 N.C. App. 13, 17, 767 S.E.2d 145, 148 (2015) (citations omitted). This argument is therefore dismissed. *Id*.

Second, Defendant also argues the trial court erred by failing "to conduct a *voir dire* and issue an order with findings of fact and conclusions of law permitting Dr. Oudeh to testify as an expert[.]" As is made clear from the discussions between the trial court and Defendant's attorney quoted above, the trial court left it up to Defendant to decide if he wanted to conduct a *voir dire* of Dr. Oudeh, and Defendant explicitly chose not to, deciding instead to have the trial court rely solely on Dr. Oudeh's deposition. Defendant's failure to request *voir dire* at trial, and failure to object to the lack of a *voir dire*, subjects this argument to dismissal. *Id*. Further,

even if the trial court erred by failing to conduct a *voir dire*, it was an error Defendant invited and, therefore, one from which Defendant cannot now demand relief. *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) ("A party may not complain of action which he induced.").

Third, because of the manner in which Defendant argues the issue of Dr. Oudeh's testimony on appeal, we are compelled to find no error in the admission of Dr. Oudeh's testimony, and the jury was free to consider his testimony in its deliberations. As noted above, Defendant's argument on appeal is that "despite clear appellate guidance that the *Daubert* standards apply, a review of the trial transcript reveals that the trial court defaulted instead to the pre-2011 North Carolina law[;]" and that had the trial court applied the appropriate *Daubert* standard, it would have – or should have – excluded Dr. Oudeh's testimony, because the evidence of Dr. Oudeh's qualifications did "not rise to the *Daubert* standards for expert witnesses."

However, because we have held that Defendant did not preserve any argument that the trial court applied the incorrect standard, we operate under the presumption that the trial court applied the correct standard, and we review Defendant's arguments pursuant to the same presumption.[4]

[4] Plaintiff argues that, because the cause of action in this matter arose before 1 October 2011, the pre-amendment *Howerton* standard applied in this case. Defendant contends that, because the complaint in this action was filed after 1 October 2011, the *Daubert* standard applies. In light of our holdings, we do not address these arguments.

Defendant affirmatively argues on appeal that the trial court applied the *Howerton* standard associated with Rule 702 prior to its 1 October 2011 amendment, and that it was the trial court's failure to apply *Daubert*, instead of *Howerton*, that resulted in the admission of Dr. Oudeh's testimony. Defendant does not argue that Dr. Oudeh's testimony should have been excluded even pursuant to the less rigorous *Howerton* standard. Therefore, we review Defendant's argument assuming *arguendo* that the *Howerton* standard was the correct standard to apply, and that the trial court applied the *Howerton* standard. Because Defendant does not argue that it would have constituted error for the trial court to have admitted Dr. Oudeh's testimony pursuant to the *Howerton* standard, Defendant has failed to make any valid argument that Dr. Oudeh's testimony was improperly admitted at trial. This argument is without merit.

B. Motion for a New Trial

In Defendant's second argument, he contends the trial court abused its discretion in denying his motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) & (7). We disagree.

Defendant argues that the verdict of over 3.4 million dollars was "grossly excessive," and the result of unfair passion or prejudice on the part of the jurors. The jury was instructed as follows:

> Actual damages are the fair compensation to be awarded to the estate for the death of [decedent] caused by the

> wrongful conduct of [D]efendant. Such damages may include expenses for care, treatment and hospitalization incident to the injury resulting in death, pain and suffering, . . . reasonable funeral expenses, the present monetary value of [decedent] to his next of kin. The total of all damages are to be awarded in one lump sum.

Concerning damages for decedent's pain and suffering, and compensation for the loss to decedent's mother, the trial court instructed:

> You may consider the nature, extent and degree of the injury sustained by [decedent]; the length of time [decedent] lived and was conscious of his pain and suffering. There is no fixed formula for valuing physical pain and mental suffering. You will determine what is fair compensation by applying logic and common sense to the evidence. . . . .
>
> Damages for [decedent]'s death also include fair compensation for the present monetary value of [decedent] to his next of kin. . . . . In this case, [decedent]'s next of kin is Jacquelyn Faye Massengill, his mother. There is no fixed formula for determining the present monetary value of [decedent] to his mother. You must determine what is fair compensation by applying logic and common sense to the evidence. You may consider the service – the services, protection, care and assistance of [decedent], whether voluntary or obligatory, to his mother. These words are to be given their ordinary meanings. You may consider the family and personal relationships between [decedent] and his mother . . . and what you find to be the reasonable value of the loss to them of these things over the life expectancy of [decedent], or as I will explain to you, over a shorter period. "The society, companionship, comfort, guidance, kindly offices and advice of [decedent] to his mother," these words are to be given their ordinary meanings. You may consider the family and personal relationships between [decedent] and his mother and what you find to be the reasonable value of the loss to her of these things over the

> life expectancy of [decedent], or as I will explain to you, over a shorter period.
>
> . . . .
>
> In determining the amount of actual damages to be awarded to [decedent]'s mother, you are not limited to the things which I have mentioned. You may consider any other evidence which reasonably tends to establish the monetary value of [decedent] to his mother.

The jury awarded Plaintiff $3,409,612.00 in compensatory damages. Decedent's medical bills amounted to $72,503.42, and his funeral expenses totaled $8,882.88. Defendant does not challenge those amounts. Therefore, the jury awarded Plaintiff a total of $3,328,225.70 (after subtracting medical and funeral expenses) for damages related to decedent's pain and suffering, decedent's mother's loss of companionship, and "any other evidence which reasonably tend[ed] to establish the monetary value" of decedent to his mother.

Defendant filed a motion for a new trial pursuant to Rule 59 on 22 June 2015, arguing that the jury's award of $3,328,225.70 for damages related to decedent's pain and suffering, and decedent's mother's loss of companionship, was not justified by the evidence at trial, and was excessive as a result of passion or prejudice. Rule 59 states in relevant part:

> (a) Grounds. – A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> . . . .

> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]

N.C. Gen. Stat. § 1A-1, Rule 59 (2015).

The trial court denied Defendant's motion by order entered 17 March 2016. The trial court included the following findings in support of its denial of Defendant's motion for a new trial: (1) decedent's mother was his sole surviving heir, and she was entitled to "the present monetary value of 19.7 years of services and companionship lost to her when her son was killed[;]" (2) witnesses "provided testimony that [decedent] provided assistance and care to his mother[,]" including chores, yardwork, gardening, driving her to different destinations, and "assisted her in other life activities" such as shopping and social events; (3) the evidence showed that decedent's mother "relied upon and benefited greatly from [decedent's] services and care[;] (4) decedent and his mother were "very close," "great friends," and decedent was living with his mother at the time of his death; (5) decedent and his mother would have dinner together every day and "would joke" with each other as friends would; and (6) "[decedent] and his mother possessed an unrivaled level of companionship." We hold that the evidence presented at trial, which has been discussed above, supports these findings.

The trial court further found that decedent "suffered greatly" as a result of Defendant's actions. The trial court based this finding on three lay witnesses who testified, *inter alia*, that, right after Defendant punched decedent and decedent fell to the ground, he was "bleeding profusely from the back of his head" and was "moaning in pain before EMS arrived[;]" that decedent "stated his head was hurting and vomited into a trashcan[;]" that he "appeared to be in great agony and that [his] speech was greatly affected[;]" and that decedent "repeatedly complain[ed] about the extreme pain to his head." The trial court noted that decedent "was in and out of consciousness from September 18, 2010 to September 27, 2010[;]" and that Plaintiff's expert, Dr. Oudeh, testified "that a head injury of [that] nature would cause someone to suffer greatly."

Our Supreme Court has thoroughly reviewed the limits of appellate review of a trial court's decision to grant or deny a motion for a new trial pursuant to Rule 59:

> The legislative enactment of the Rules of Civil Procedure in 1967 did not diminish the inherent and traditional authority of the trial judges of our state to set aside the verdict whenever in their sound discretion they believe it necessary to attain justice for all concerned, and the adoption of those Rules did not enlarge the scope of appellate review of a trial judge's exercise of that power. The principle that appellate review is restricted in these circumstances is so well established that it should not require elaboration or explanation here. Nevertheless, we feel compelled . . . to restate and reaffirm today the basic tenets of our law which would permit only circumscribed appellate review of a trial judge's discretionary order upon a Rule 59 motion for a new trial. Those tenets have been

competently set forth in innumerable prior opinions of this Court, and, for instructive purposes, we provide the following sampling therefrom.

In *Settee v. Electric Ry.*, the Court evinced a positive hesitancy to review such discretionary rulings by the trial court except in rare cases:

> While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited.

In *Bird v. Bradburn*, the Court espoused several sound reasons for leaving the discretionary power to set aside a verdict almost exclusively in the hands and supervision of the judge presiding over the trial:

> The power of the court to set aside the verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice. The judge is not a mere moderator, but is an integral part of the trial, and when he perceives that justice has not been done it is his duty to set aside the verdict. His discretion to do so is not limited to cases in which there has been a miscarriage of justice by reason of the verdict having been against the weight of the evidence (in which, of course, he will be reluctant to set his opinion against that of the twelve), but he may perceive that there has been prejudice in the community which has affected the jurors, possibly unknown to themselves, but perceptible to the judge - who is usually a stranger - or a very able lawyer has procured an advantage over an inferior one, an advantage legitimate enough in him, but which has brought about a result which the judge sees is contrary to justice. In such, and many other

> instances which would not furnish a legal ground to set aside the verdict, the discretion reposed in the trial judge should be brought to bear to secure the administration of exact justice.

In *Brink v. Black*, the trial judge had set aside the verdict, "because in his opinion it was against the weight of the evidence," and had granted a new trial. The only question presented to our Court was whether review of the judge's order was available. Justice Reade answered that:

> When a Judge presiding at a trial below grants or refuses to grant a new trial because of some question of "law or legal inference" which he decides, and either party is dissatisfied with his decision of that matter of law or legal inference, his decision may be appealed from, and we may review it. But when he is of the opinion that, considering the number of witnesses, their intelligence, their opportunity of knowing the truth, their character, their behavior on the examination, and all the circumstances on both sides, the weight of the evidence is clearly on one side, how is it practicable that we can review it, unless we had the same advantages? And even if we had, we cannot try facts.

. . . .

In sum, it is plain that a trial judge's *discretionary* order pursuant to G.S. 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown.

We have cited many decisions of this Court in support of this sound and settled proposition in order to demonstrate two other points which are pertinent to the case at bar. First, our Court has had many opportunities, if it were so inclined, to formulate a "precise" test for determining when an abuse of discretion has occurred in the trial judge's grant or denial of a motion for a new trial. Second, our

> Court has not, however, found it logically necessary or wise to attempt to define what an abuse of discretion might be in the abstract concerning any ground upon which a new trial may be granted. For well over one hundred years, it has been a sufficiently workable standard of review to say merely that a manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof.

Worthington v. Bynum, 305 N.C. 478, 482–85, 290 S.E.2d 599, 602–04 (1982) (citations omitted). It would be inappropriate for an appellate court to "substitute[ ] what it considered to be its own better judgment concerning the need for a new trial in the case [instead of] strictly review[ing] the record for the singular cause of determining whether [the trial judge] had clearly abused *his* discretion in that regard." *Id*. at 486, 290 S.E.2d at 604.

> [T]he trial judges of this state have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings. We believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case. Because of this, we find much wisdom in the remark made many years ago by Justice Livingston of the United States Supreme Court that "there would be more danger of injury in revising matters of this kind than what might result now and then from an

> arbitrary or improper exercise of this discretion." Consequently, an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.

Id. at 487, 290 S.E.2d at 605 (citations omitted).

Defendant cites to no appellate opinions of this State wherein a trial court was found to have abused its discretion by denying a motion for a new trial pursuant to Rule 59(b)(6) or (7) based upon an alleged "grossly excessive" jury verdict, and we find none. Instead, Defendant cites cases in which the jury returned verdicts awarding lesser amounts in damages than was awarded in the present matter. Defendant appears to be asking us to substitute our judgment for that of the jury and the trial court, which we cannot do. *Id.* at 486, 290 S.E.2d at 604. We hold that Defendant has not met his "heavy burden" of proving the trial court's denial of his motion for a new trial constituted one of those "extreme circumstances, not at all likely to arise" where the ruling "probably amounted to a substantial miscarriage of justice" and therefore constituted a "manifest abuse of discretion." *Id.* at 482, 484, 485 and 487, 290 S.E.2d at 603, 604 and 605 (citations omitted). This argument is without merit.

III. *Evidence to Support Award*

In Defendant's third argument, he contends the jury award was "too speculative to be proved as a matter of law." We disagree.

Specifically, Defendant argues that N.C. Gen. Stat. § 28A-18-2(b)(4) required Plaintiff to provide sufficient evidence establishing "the 'present monetary value' of the value 'reasonably expected' to the estate[.]" Defendant argues Plaintiff failed to present sufficient evidence to establish, beyond mere speculation, the "present monetary value" of decedent to his mother (services, companionship, care, assistance, comfort, guidance, et cetera). *See* N.C. Gen. Stat. § 28A-18-2(b)(4) (2015). Because Defendant contends the trial court committed an error of law and appellate review of his argument requires statutory interpretation, Defendant argues we should review this argument *de novo*.

In Defendant's initial brief, he specifically contended that this argument was made "not as an appeal of his Rule 59 motion for a new trial[.]" Defendant stated that, because he "gave timely notice of appeal from the [10 June 2015] judgment below, . . . this issue [was] preserved for appellate review." In other words, Defendant stated that his third argument was a *direct appeal* from the *underlying judgment*, and was *not* an appeal from the *order denying his Rule 59 motion for a new trial*. However, Defendant then argued:

> In [its] order denying Defendant[]'s motion [for a new trial], the trial court concluded "that the above-mentioned findings of fact and the verdict . . . are supported by the greater weight of the evidence." That conclusion goes to the trial court's discretion under N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) and (7). The trial court did not, however, rule specifically on whether the evidence at trial met the statutory requirements for damages as a matter of law

> under N.C. Gen. Stat. § 28A-18-2(b)(4). However, the trial court's refusal to grant a new trial presupposes that the verdict stands as a matter of law under that statute. Defendant[ ] challenges that legal conclusion in this appeal not as an appeal of his Rule 59 motion for a new trial, but arguing that the verdict is fundamentally too speculative as a matter of law to stand.

Defendant cannot use arguments he made in his 22 June 2015 motion for a new trial, nor conclusions the trial court either made, or failed to make, in its 17 March 2016 order denying Defendant's motion for a new trial, in support of his attempted direct appeal from the 10 June 2015 judgment. Any issues appealable from the 10 June 2015 judgment had to have occurred during the trial, or in the 10 June 2015 judgment. Defendant cannot appeal from the 10 June 2015 judgment based upon actions that either occurred or failed to occur after entry of that judgment.

Further, Plaintiff contends Defendant has failed to preserve that argument because Defendant "did not raise [this] issue at trial[.]" In Defendant's reply brief, he counters Plaintiff's argument, stating: "Defendant[ ] filed with the trial court his Motion for a New Trial wherein he explicitly argued '[P]laintiff's evidence at trial did not support a jury award of $3,409,612.00.' Defendant[ ] also filed a Memorandum of Law in support of his Motion for a New Trial on the Issue of Compensatory Damages." Defendant further stated that he "explicitly highlighted [in his 22 June 2015 motion for a new trial] to the trial court the speculative nature of the verdict that is fundamentally at odds with the express provisions of N.C. Gen. Stat. § 28A-18-2."

"'A contention not raised in the trial court may not be raised for the first time on appeal.' *[S]ee also* N.C. R. App. P. 10(a)(1)." *Clark*, 239 N.C. App. at 17, 767 S.E.2d at 148 (citations omitted). Clearly implied, this holding may be read that a contention not raised at trial, *before entry of the order or judgement appealed*, cannot be raised for the first time *on appeal of that order or judgment*. Defendant, in this argument, is attempting appeal from the 10 June 2015 judgment, not the 17 March 2016 order denying Defendant's motion for a new trial. Defendant's argument in support of his motion for a new trial has no relevance. This argument was not preserved for appellate review and is, therefore, dismissed. *Id.*

NO ERROR.

Judges HUNTER, JR. and INMAN concur.

Report per Rule 30(e).