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STATE OF MICHIGAN

COURT OF APPEALS

NATALIE ATTIANESE, Personal Representative of the ESTATE OF JUDE ATTIANESE and the ESTATE OF ZACHARY ATTIANESE,

Plaintiff-Appellee,

v

JOSE ANGEL NOGUERAS and CHALLENGER MOTOR FREIGHT, INC.,

Defendants-Appellants.

FOR PUBLICATION
November 20, 2026
10:46 AM

No. 371420
Wayne Circuit Court
LC No. 19-015845-NI

Before: ACKERMAN, P.J., and BAZZI and LIEVENSE, JJ.

LIEVENSE, J.

This is a wrongful-death act case arising under MCL 600.2922. Defendants, Jose Angel Nogueras and Challenger Motor Freight, Inc. ("Challenger"), appeal by right the trial court's entry of judgment in favor of plaintiff, Natalie Attianese, personal representative of the Estates of Jude and Zachary Attianese, her husband and son, in the amount of approximately $68 million (about $78 million including interest). The case arises from an automobile accident: Jude was driving northbound on I-75 with Zachary in the passenger seat when Nogueras, who was driving an 18-wheel tractor trailer for Challenger, rear-ended them going over 50 miles per hour. Following a jury trial only as to damages, the jury awarded plaintiff $12,000,000 each for Jude and Zachary's preimpact fright and shock, $8,000,000 and $11,000,000, respectively, for their conscious pain and suffering, and millions more for loss of society and companionship.

On appeal, defendants argue that the trial court erred by: (1) allowing the jury to award damages for preimpact fright and shock; (2) allowing recovery for conscious pain and suffering based on the evidence presented, which included permitting a late change as to plaintiff's expert witness; (3) allowing evidence and argument regarding liability when defendants were only contesting damages; (4) allowing plaintiff to tell the jury that future damages for loss of society and companionship would be reduced to present value; and (5) refusing to grant a new trial or remittitur when the jury's verdict was grossly excessive.

We agree, in part, and hold that damages for preimpact fright and shock are not allowable under the wrongful death act. We also agree that, while the issue of conscious pain and suffering was properly before the jury, the trial court abused its discretion in allowing testimony from plaintiff's replacement expert witness under the circumstances. We therefore vacate the jury's verdict in part as to preimpact fright and shock damages, and remand for a new trial only as to conscious pain and suffering damages. We affirm the trial court's judgment in all other respects.

I. FACTUAL AND PROCEDURAL HISTORY

A. THE CAR ACCIDENT AND LAWSUIT

The Attianese family is from New Jersey. On the night of the accident, June 15, 2018, Jude and Zachary were traveling to Michigan for a funeral in Sterling Heights. Jude was 56 years old and operated a delivery business. Zachary was a 20-year-old college student and played high-level college baseball. Nogueras worked for Challenger, a Canadian trucking company doing business in Wayne County.

Jude and Zachary were stuck in traffic on I-75 north, moving at about three miles per hour because they were in a construction zone. Nogueras was driving his tractor trailer north on I-75 behind Jude and Zachary and undisputedly did not stop as he approached the traffic backup, instead rear-ending the car Jude and Zachary were in going over 50 miles per hour. The first impact by the tractor trailer caused their car to propel forward at over 50 miles per hour and strike the vehicle in front of it, causing a second impact. According to their autopsy reports, the cause of death for both the decedents was internal decapitation and diffuse subarachnoid hemorrhage, which involved a severing of the C-1 and C-2 vertebrae and a "mechanical separation of the skull from the spine," followed by bleeding from the blood vessels around the brain. The medical experts disagreed at trial whether decapitation occurred after the first or second impact. An eyewitness, Lawrence Chockley, who was first to reach the decedents' vehicle after the accident, testified that neither Jude nor Zachary were moving, both were unconscious, and he did not see that either was breathing. Police officers dispatched to the scene found the decedents unresponsive. There was no evidence that Nogueras applied the brakes before colliding with the decedents' vehicle. Nogueras had Parkinson's disease and was on medication that made him drowsy when the accident happened.

Plaintiff filed this lawsuit against Nogueras and Challenger in November 2019. Following discovery, plaintiff filed an amended complaint in August 2021 that added new factual allegations supporting plaintiff's claims but alleged the same three counts: vicarious liability against Challenger under MCL 257.401[1] (Count I); negligence against Challenger for the hiring, training, and supervision of Nogueras (Count II); and negligence against Nogueras (Count III). In their answer to the amended complaint, defendants admitted Challenger was vicariously liable for the

[1] MCL 257.401(1) states "the owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle" if "the motor vehicle is being driven with the owner's express or implied consent or knowledge."

decedents' deaths, and that Nogueras was negligent (Counts I and III), but denied that Challenger negligently supervised and trained Nogueras (Count II).

B. PRETRIAL MOTIONS

In October 2022, defendants moved for partial summary disposition under MCR 2.116(C)(10), arguing (1) plaintiff was not entitled to collect damages for the decedents' conscious pain and suffering because the evidence showed the decedents died on impact, (2) plaintiff could not collect damages for Zachary's loss of future earning capacity because he did not work at the time, and (3) plaintiff was not entitled to exemplary damages as a matter of law. The trial court denied defendants' motion and allowed plaintiff to broadly seek "any damages allowed under [the wrongful death act]," without specifically deciding the exemplary damages issue.

In March 2023, the parties filed motions in limine. In their motions, defendants argued that because they admitted liability as to Counts I and III, the trial court should limit the jury from hearing any liability evidence, even though they had not admitted liability as to Count II. Specifically, defendants argued that the jury should not be permitted to hear that Nogueras had Parkinson's disease and was on three medications that made him drowsy, and the trial court should bar any argument that Nogueras was "reckless," "careless," or "killed" or "murdered" the decedents, which would equate to gross negligence. Defendants also sought to preclude evidence to support plaintiff recovering damages for preimpact fright and shock and conscious pain and suffering. Defendants further sought to limit evidence of plaintiff's loss of society and companionship to not include evidence that the decedents were "good citizens" and "good people . . . out in the community," arguing damages under this category should be limited to the impact of loss on family members. Plaintiff responded that she should be allowed to introduce evidence of Nogueras's medical condition because Challenger had not admitted liability for negligently hiring and supervising Nogueras (Count II), and that plaintiff should be permitted to pursue any damages available under the wrongful death act.

Following a hearing on the motions, the trial court did not limit argument that would equate Nogueras's actions with gross negligence because the jury instructions would address such issues. The trial court also held: (1) plaintiff was permitted to introduce evidence of Nogueras having Parkinson's disease and his medication use because defendants had not admitted liability for negligent hiring and supervision; (2) plaintiff was permitted to introduce evidence supporting damages for preimpact fright and shock because no caselaw prohibited it; (3) whether the decedents experienced conscious pain and suffering was a fact question for the jury so plaintiff could introduce evidence relating to it; and (4) plaintiff could introduce evidence of the decedents' community involvement "as long as it relate[d] to [plaintiff's] loss."[2] Before trial, plaintiff waived her argument that she was entitled to damages for loss of wage earning capacity for Zachary.

[2] Defendants sought leave to appeal the trial court's rulings on the motions, but this Court denied relief. *Estate of Zachary Attianese v Jose Angel Nogueras*, unpublished order of the Court of Appeals, entered April 6, 2023 (Docket No. 365523).

C. JURY TRIAL AND VERDICT

One week before trial, on Monday, April 3, 2023, defendants filed a motion for leave to amend their answer to the first amended complaint to admit liability for Count II, on the condition that the trial court ruled that all liability evidence was inadmissible at trial. Specifically, defendants sought to exclude testimony of any witnesses to the accident and any reference to Nogueras's Parkinson's disease or Challenger's hiring and training practices. In an order issued April 6, 2023, the trial court stated "defendants cannot conditionally admit liability in exchange for a promise" that liability evidence would be excluded at trial. The order also clarified that plaintiff waived claims for exemplary damages and lost wages. In a final pretrial order the parties stipulated to on April 6, 2023 (but entered April 11), the parties agreed to litigate Challenger's negligent hiring and supervision under Count II.

Early on the first day of trial, Monday, April 10, 2023, Challenger again said it wanted to admit liability for Count II, and the trial court stated: "I can't stop you from admitting liability," but that "[w]e're going forward with the trial on all the evidence that's been accumulated so far." During voir dire, however, the trial court had not allowed Challenger to formally admit Count II, and the record reflects confusion about whether the parties could question prospective jurors about facts pertaining to liability for Count II, like Nogueras's Parkinson's disease and whether Challenger should have allowed him to drive. After a conference off the record, the trial court accepted Challenger's admission of liability for Count II and informed the parties it "might be cutting off six days of testimony" on events leading up to the accident. Plaintiff objected to limiting liability evidence because a final pretrial order had already addressed that issue, and argued the evidence was relevant to damages for preimpact fright and shock and conscious pain and suffering. Plaintiff moved for a mistrial, which the court did not rule on. The first day of trial adjourned at around 4:00 p.m. without an impaneled jury.

When court reconvened on April 11, the trial court, relying on *Payne v Gill*, unpublished per curiam opinion of the Court of Appeals, issued April 5, 2002 (Docket No. 224873), addressed the scope of liability evidence it would permit at trial considering defendants' admission of Count II, effectively limiting the admissibility of such evidence:

> The only lawful reason for liability evidence to be admitted would be at this point to garner sympathy and inflame the jury. The Court can't prohibit defendant from admitting liability. I can't force them to contest an[] issue which they're now conceding. The jury will not understand why they need to hear this evidence. . . .
>
> Under Michigan Civil Jury Instruction 17.01 it is reversible error to submit any issue which has been admitted. And, therefore, the liability issues in this case are wholly irrelevant. . . . In the interest of justice and judicial economy we are proceeding to a trial on injuries and damages. That includes conscious pain and suffering [and] pre-accident shock and fright. So they will know about the accident. They won't know about the liability of the company in hiring, retaining and supervising. [We've got] to show whatever panel we pick the accident and how it occurred. And then they're going to decide the damages based on the evidence.

Plaintiff objected, arguing that before defendants admitted Count II, the trial court ruled at the motion stage that it would not prohibit liability evidence, and defendants' late admission as to liability prejudiced plaintiff's ability to try the case. Citing *Cogo v Moore*, 119 Mich App 747; 327 NW2d 345 (1982), plaintiff also argued she should be allowed to introduce evidence of how Nogueras ended up asleep behind the wheel because knowing the cause of the accident had a damaging effect on plaintiff and was relevant to her damages claim for loss of society and companionship. Defendants disagreed, relying on the jury instruction, M Civ JI 17.01.

The trial court maintained that evidence of liability was no longer admissible, but clarified to plaintiff's counsel, "you can give the same opening you were going to give [with] all the evidence." The trial court then granted plaintiff's motion for a mistrial and stated it would allow trial to restart the following Monday, April 17, with a new venire "because the case changed significantly," and it permitted the facts of the accident to come in, then stated, "but there's no need to waste the jury's time with liability[] exclusive witnesses." Plaintiff's counsel requested that trial restart the next day, April 12, because plaintiff and some witnesses were in Michigan from out of state. The trial court agreed, and the parties selected and impaneled a new jury the next day, on April 12. Defendants filed a second amended answer that evening admitting liability as to all counts.

Opening statements occurred on April 13. Trial testimony spanned April 17, 18, and 19. The jury heard from expert and lay witnesses on preimpact fright and shock and conscious pain and suffering, and heard testimony from plaintiff and Ashley Attianese and Sabrina Attianese, Jude's daughters and Zachary's sisters, on loss of society and companionship. The trial was contentious at times, with counsel for both parties vigorously objecting to witness testimony, including about plaintiff's expert witness, who was replaced by another witness very late due to the changed trial schedule. During trial on April 17, the court estimated that because of Challenger's admission of liability on Count II, the jury did not hear around 70% of the testimony originally scheduled. On April 20, the jury heard closing arguments and jury instructions, deliberated for two hours, and reached a verdict.

The jury found in favor of plaintiff and awarded her damages as follows:

VERDICT		
	Jude (father)	Zachary (son)
Pre-accident fright/shock	$12 million	$12 million
Mental anguish and conscious pain and suffering between injury and death	$8 million	$11 million
Loss of society and companionship from June 15, 2018 to trial	$9 million plus 5% interest	$9 million plus 5% interest
Loss of society and companionship from April 23, 2023 to future	Through 2039: $3.2 million total	Through 2076: $19.6 million total

The court later adjusted future damages to present cash value, calculated accrued interest, and entered a judgment of $78,517,580.94, with $71,234,146.96 for past noneconomic damages and $7,283,433.98 for future noneconomic damages.

D. MOTION FOR NEW TRIAL OR REMITTITUR

Defendants sought a new trial or remittitur, arguing that the verdict was excessive and that the evidence presented was improper and inflamed the jury, as well as raising several other issues they raise on appeal. During oral argument on the motion, the parties acknowledged that the issue of what damages are recoverable under the wrongful death act was pending before the Michigan Supreme Court and potentially would alter then-existing law. The court denied that motion and entered a final order on June 17, 2024.

Defendants appealed. The Michigan Supreme Court decided the referenced case, *Daher v Prime Healthcare Servs-Garden City, LLC*, 515 Mich 254, 261; 29 NW3d 136 (2024), approximately a month later, on July 30, 2024.

II. PREIMPACT FRIGHT AND SHOCK DAMAGES

First, defendants argue that the trial court erred when it permitted plaintiff to seek damages for the decedents' preimpact fright and shock because such damages are not available under the wrongful death act. We agree.

A. RELEVANT TESTIMONY ON PREIMPACT FRIGHT AND SHOCK

Over defendants' objections, plaintiff introduced testimony seeking to prove the decedents experienced fright and shock before the first impact by the tractor trailer. Chockley, who was driving in the same traffic and direction as the decedents, testified that he saw the tractor trailer approaching in his rearview mirror, describing "something very tall coming up behind me, very quickly, quickly enough that I didn't think it was gonna be able to stop before it impacted the group of cars." Chockley also heard the approaching tractor trailer even though his windows were rolled up and the radio was playing, meaning he knew the crash was going to happen before it occurred.

Trooper Daniel Tyler, who investigated the accident and took a statement from Chockley, testified it was more likely than not that if Chockley heard and saw the tractor trailer approaching, the decedents would have also heard and seen it approaching because their vehicle was last in the line of stopped traffic. Trooper Jordan Enders, a detective for the Michigan State Police, testified that the average driver would see from their rearview mirror and hear a tractor trailer traveling over 50 miles per hour at night because the tractor trailer's lights would be on, the lights sit higher up than other vehicles, and a driver and passenger would hear its loud engine in standstill traffic.

Finally, when asked whether the decedents would have experienced "unthinkable emotional suffering" if they saw the tractor trailer approaching, Dr. Ljubisa Dragovic, defendants' medical expert, answered "If they were aware of that, but I have no evidence they were aware of that."

Based on the testimony, the jury awarded $24 million to plaintiff for the preimpact fright and shock that Jude and Zachary experienced ($12 million for each) before being rear-ended.

B. DAMAGES FOR PREIMPACT FRIGHT AND SHOCK ARE NOT AVAILABLE UNDER THE WRONGFUL DEATH ACT

At the time, the trial court's decision to let plaintiff seek damages for preimpact fright and shock was reasonable, but it is no longer under *Daher*, 515 Mich at 261, which our Supreme Court issued about a month after the trial court's final order denying post-judgment motions.

"Whether a particular kind of damages is recoverable for a given cause of action is a question of law, which we review de novo." *Id*. The proper interpretation of statutory language is also reviewed de novo. *Id*. When interpreting statutory language, we begin with the plain language of the statute. *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016). "We must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used." *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). "Additionally, when determining this intent we must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *Jesperson*, 499 Mich at 34 (quotation marks and citation omitted). Unambiguous statutes are enforced as written. *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014).

Before 1939, "Michigan maintained two separate and distinct causes of action where a death was involved—survival actions and wrongful death actions." *Hardy v Maxheimer*, 429 Mich 422, 433; 416 NW2d 299 (1987). If the death from the "wrongful act" was instantaneous, the cause of action was under the "wrongful death" act, whereas if there was a period of survival, the cause of action would be maintained under the "survival act." *Id*. (citation omitted). But in 1939 the Legislature did away with the "confusion in the application of these two statutes" because they "spawned numerous suits over what 'instantaneous death' meant." *Id*. (citation omitted). Now, the wrongful death act, MCL 600.2922, "provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death." *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004). "The statute itself makes no distinction between deaths which occur instantaneously or noninstantaneously." *Hardy*, 429 Mich at 433.

Damages allowable under the wrongful death act are set forth in MCL 600.2922(6):

> [T]he court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; [and] reasonable compensation for the *pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death* . . . . (Emphasis added.)

Before this Court's and our Supreme Court's opinions in *Daher*, two cases from this Court guided our interpretation of allowable damages under MCL 600.2922(6): *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644; 761 NW2d 414 (2008), overruled by *Daher*, 515 Mich at 282, and *Denney v Kent Co Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016), overruled by *Daher*, 515 Mich at 282.

In *Thorn*, 281 Mich App at 651, this Court held that damages need not be specifically listed in MCL 600.2922(6) to be recoverable, explaining the statute "should be construed as merely providing specific examples of the types of damages available, and not an exhaustive list." Relying on *Thorn*, this Court in *Denney*, 317 Mich App at 731, explained that "[t]he word 'including' in MCL 600.2922(6) 'indicates an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case.' " Thus, at the time of trial in this case, categories of damages like "preimpact fright and shock" that are not specifically enumerated in MCL 600.2922(6) were potentially recoverable depending on the facts of the case.

Daher changed that. In *Daher*, the plaintiffs, parents of the deceased minor, brought a wrongful death action against a hospital and medical providers alleging medical malpractice that led to their son's death. *Id*. at 259-260. The plaintiffs sought damages, including for the decedent's lost future earnings. *Id*. at 260. The defendants moved for summary disposition, arguing that such damages were not recoverable under the wrongful death act and that the plaintiffs' claims were speculative. *Id*. The trial court denied the motion, and the defendants appealed. *Id*.

Our Supreme Court disagreed with the trial court, concluding the wrongful death act does not allow for the recovery of any categories of damages not listed in MCL 600.2922(6):

> Given the extensive statutory history of the survival act and the WDA and the caselaw interpreting them, we are not persuaded that, by inserting the word 'including' into the statute . . . the Legislature intended to convert what had long been an exhaustive list into an open-ended list of damages types left entirely to the discretion of the jury. [*Daher*, 515 Mich at 278-279.]

The Court noted that the 1939 amendments to the wrongful death act limited damages to those *specifically enumerated* in the wrongful death act. *Id*. at 266-267. The Court then held that the legislative history and text of the 1971 amendments to the wrongful death act did not allow for lost future earnings because it was not listed in the statute. *Id*. at 268-271. The Court expressly overruled *Denney* and *Thorn* and emphasized that the 1971 amendments' addition of the word "including"[3] did not convert the list of recoverable damages into a nonexhaustive list. *Id*. at 279. The Court concluded that the legislative intent was clear in maintaining an exclusive list of recoverable damages under the wrongful death act. *Id*.

Here, plaintiff argued below that the wrongful death act allowed preimpact fright and shock damages because the types of damages listed in the statute were nonexclusive. That argument is now foreclosed by *Daher*. Thus, given that plaintiff argued at trial for a separate category of

[3] The *Daher* Court acknowledged that " 'including' is a term of enlargement, not limitation," citing *NACG Leasing v Dep't of Treasury*, 495 Mich 26, 31; 843 NW2d 891 (2014), but also that "[w]hen used in the text of a statute, the word 'includes' can be used as a term of enlargement or of limitation, and the word in and of itself is not determinative of how it is intended to be used." *Frame v Nehls*, 452 Mich 171, 178-179; 550 NW2d 739 (1996). *Daher*, 515 Mich at 278-279.

damages for preimpact fright and shock, and the jury awarded damages for that category, that portion of the verdict must be vacated under *Daher*.

Now on appeal, acknowledging *Daher*, plaintiff argues in the alternative that the preimpact fright and shock were the first instances of "injury" that the decedents suffered, the injury began when the decedents first anticipated they were going to be hit by the tractor trailer, and thus, preimpact fright and shock falls within the category of damages for "pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death" under MCL 600.2922(6). We disagree with plaintiff's arguments, and, applying *Daher*, we hold that preimpact fright and shock damages are not recoverable damages under the wrongful death act.

One problem with plaintiff's argument is that, even if it is possible that the decedents' conscious pain and suffering "between the time of the injury and death" under MCL 600.2922(6) began before the impact such that what occurred prior to the crash can support damages under that category, that was not how plaintiff litigated the case below. Plaintiff sought, and the trial court correctly approved, a verdict form that permitted the jury to award conscious pain and suffering from between injury and death. If preimpact fright and shock were included in conscious pain and suffering, as plaintiff now argues, there would be no need for the verdict form to include separate questions about preimpact fright and shock. But it did, and under *Daher* there was no basis in the statute for doing so.

Another problem with plaintiff's argument that she can recover for preimpact fright and shock in this manner is that it presupposes that the decedents' "injury," a prerequisite for recovering damages for conscious pain and suffering, began preimpact. Plaintiff's post-*Daher* argument on appeal is that the decedents' "injury" under the wrongful death act necessarily began preimpact, when "fright and shock" occurred, because caselaw and the model jury instructions permit recovery for damages for, for example, mental anguish and fright and shock, as components of pain and suffering. See M Civ JI 50.01 and 50.02. Given that we are remanding this case for retrial on conscious pain and suffering between injury and death, as we will discuss in Section III, it is necessary to address plaintiff's argument that she can recover for what happened pre-impact as part of the decedents' conscious pain and suffering between "injury and death."

Injury is undefined by the wrongful death act. "Undefined terms are presumed to have their ordinary meaning, unless they have acquired a peculiar and appropriate meaning in the law, in which case we accord them that meaning." *Daher*, 515 Mich at 262 (quotation marks and citation omitted). Also, absent a statutory definition, we look to the dictionary to determine its plain meaning. *Vodvarka v Grasmeyer*, 259 Mich App 499, 510; 675 NW2d 847 (2003). "Injury" is a noun that means "hurt, damage or loss sustained," "an act that damages or hurts."[4]

That definition, combined with the full text of the wrongful death act, indicates what the Legislature meant by injury. MCL 600.2921 (emphasis added) states: "Actions on claims for

[4] *Merriam-Webster.com Dictionary*, injury <https://www.merriam-webster.com/dictionary/injury> (accessed October 19, 2026).

injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to" section 2922. Thus, when determining when an "injury" occurs under the wrongful death act, we must be mindful of whether the "injuries [] result in death." Indeed, in *Karpinski v Saint John Hosp-Macomb Ctr Corp*, 238 Mich App 539, 544; 606 NW2d 45 (1999), this Court interpreted the word "injury" as it applied to the venue provision in the wrongful death act, i.e., where the original injury occurred, and held that the "Legislature did not consider the 'death' and the 'injuries resulting in death' to be synonymous," and instead interpreted the word "injury" to refer to the "injury resulting in death, rather than the death itself." *Id*.

There is also caselaw defining injury, and the parties cite caselaw from both the wrongful death context and otherwise to do so. The problem, of course, is that all wrongful death act cases arose pre-*Daher*, when parties were permitted to seek categories of damages beyond the categories listed in the statute, but they remain instructive.

Daley v LaCroix, 384 Mich 4; 179 NW2d 390 (1970), a non-wrongful death act case plaintiff cites to argue that "fright and shock" is recoverable, helps define when an "injury" occurs. In that case, our Supreme Court acknowledged that emotional distress or mental shock is recoverable but predicated that finding on a "definite and objective physical injury" having occurred. *Id*. at 12-13. *Daley* further held that the "absence of any physical impact" did not matter but did require "physical consequences" to the plaintiff first. *Id*.

One wrongful death act case, *Hardy*, also helps us define "injury" under the act. *Hardy* concerned whether the savings provision in MCL 600.5852 applied to wrongful death actions. In *Hardy* it was undisputed that two young boys died as a result of drowning when the canoe they rented capsized. *Hardy*, 429 Mich at 425-427. Our Supreme Court explained that, since "under the wrongful death act a cause of action accrues at the time of infliction of the fatal injury, rather than the time of death . . . , then even where the death is immediate, the act and injury causing death still must logically precede the death itself and thus the action accrues prior to and survives death." *Id*. at 440 (emphasis added). Under MCL 600.2921, if the cause of action accrues at the time of infliction of the fatal injury, then "injury" is that which results in death. *Hardy* went on to conclude that because the Legislature no longer distinguished between instantaneous and noninstantaneous death after the 1939 amendments to the wrongful death act, it did not need to consider whether drowning is instantaneous as a matter of law. *Id*. at 441. This conclusion is consistent with wrongful death act cases that have found that "a cause of action accrues at the time of infliction of the fatal injury," *id*. at 440, which implies that what occurs before the fatal injury is not part of the "injury."

Thus, applying *Hardy* and *Daley*, plaintiff is correct that an injury "does not require impact," but it does require some physical manifestation of the effect, or physical consequences, of defendant's actions for an "injury" to exist. See also *Goldman v Detroit United R*, 200 Mich 543, 545; 166 NW 1007 (1918) ("[T]he law does not recognize fright alone, unaccompanied by

any physical injury, as a basis for damages."). And in this case, there was no evidence of any physical consequences to either decedent until impact.[5]

Plaintiff's reliance on the model jury instructions to define "injury" because they permit recovery for mental anguish and fright and shock as components of pain and suffering also is unpersuasive. M Civ JI 50.02 states that, "[i]f the facts justify it, the jury may be instructed to consider shame and mortification, mental pain, and anxiety *which plaintiff suffered by reason of the injuries sustained*." (Emphasis added.) Thus, the inclusion of "fright and shock" as a recoverable type of damages in M Civ JI 50.02 *presupposes* that an "injury" has already occurred, because the instruction only applies as a list of damages options to include when fashioning M Civ JI 50.01 to a particular case. It does not define *when* the injury occurs.[6]

Ultimately, it was error under *Daher* to include a separate damages category in the verdict form for preimpact fright and shock because the plain language of the wrongful death act does not contemplate damages for anything experienced before "injury," that is, before any physical manifestation of the effect of defendants' actions that results in death.

Finally, defendants argue that "merely excising" the jury award for preimpact fright and shock under *Daher* is not a sufficient remedy because evidence supporting that theory of relief "permeated" the trial, was the basis for other court rulings, and impacted the jury's verdict on other issues. We need not address this argument in light of our decisions on defendants' other arguments on appeal. We vacate the portion of the jury's verdict awarding damages for preimpact fright and shock.

III. CONSCIOUS PAIN AND SUFFERING

Next, defendants contest certain trial court decisions that led to the jury awarding damages for conscious pain and suffering. They argue that the court abused its discretion when it permitted plaintiff's replacement expert witness, Dr. Kenneth Mankowski, to testify regarding conscious pain and suffering, and that it erred in denying their motion for a judgment notwithstanding the verdict (JNOV) and by permitting the jury to award damages for conscious pain and suffering because there was no admissible evidence to support it. We agree in part and hold that the trial court abused its discretion by permitting Dr. Mankowski to testify under the circumstances but

[5] Our analysis focuses on the facts of this case, but we are mindful that, at times, a plaintiff may be able to show physical consequences of a defendant's actions that play a role in or result in death before any contact or impact occurs.

[6] This Court has already recognized that fright and shock are appropriate considerations in determining damages for conscious pain and suffering *between the time of injury and death*. See *Taylor v Michigan Power Co*, 45 Mich App 453, 457; 206 NW2d 815 (1973). While damages for fright and shock may be recoverable in tort depending on the case, in the wrongful death context they can only be as part of—and not separate from—the conscious pain and suffering damages "between the time of the injury and death."

disagree that it was error to submit the question to the jury, and therefore we remand for a new trial as to conscious pain and suffering.

A. RELEVANT FACTUAL BACKGROUND

Plaintiff initially noticed two experts to testify at trial. Dr. Mankowski, a neurologist, was noticed as an expert witness regarding Parkinson's disease, which related to plaintiff's claim that Challenger negligently hired/supervised Nogueras, and plaintiff provided expert disclosures. Dr. Lawrence Shields, also a neurologist, was noticed to testify that the decedents experienced conscious pain and suffering, and plaintiff provided expert disclosures as to him. Defendants' decision during voir dire to admit liability on negligent hiring/supervision meant that Dr. Mankowski's testimony was not needed, but it also shortened the trial schedule in other ways, and plaintiff notified defendants and the court on Wednesday, April 12, 2023, that Dr. Shields would not be able to testify earlier than planned, potentially as early as on April 17. Thus, plaintiff announced a plan to call Dr. Mankowski in lieu of Dr. Shields on April 17 to testify about how and why the decedents experienced conscious pain and suffering.

Defendants objected to Dr. Mankowski testifying on this topic, and consideration of this issue requires a review of the discovery and pretrial motions stages of this case as to expert witnesses. In August 2022, in response to defendants' interrogatories, plaintiff informed defendants that Dr. Shields's anticipated testimony would conclude, based on his knowledge, training, and experience as a neurologist, and the investigation of the crash and decedents' autopsy reports, that "each [decedent] endured a period of conscious pain and suffering after the crash at issue and prior to their deaths." In Dr. Shields's later affidavit, he opined the autopsy reports did not reveal that the decedents died immediately and that neither lost consciousness as a result of the injuries, including internal decapitation, and that the decedents "would have experienced a period of awareness and consciousness where they would have experienced significant pain and suffering as well as fear of impending death."

Later, during a hearing on the motions in limine, defendants objected to Dr. Shields testifying at trial, arguing they had not yet received an expert report from Dr. Shields, and that the affidavit plaintiff provided for Dr. Shields only stated that the decedents experienced conscious pain and suffering, but did not explain how or how long, or what medical source Dr. Shields's opinion was based on. Plaintiff responded that discovery was now closed, and defendants never deposed Dr. Shields. Plaintiff's counsel further explained that during an early attempt at mediating the case, plaintiff shared with defendants a video of Dr. Shields explaining his opinions, so they were aware of Dr. Shields's opinions and the medical reasons for them. Defendants then asked to depose Dr. Shields after discovery and one month before trial. The trial court denied that request because discovery had closed and it allowed Dr. Shields to testify.

At trial, when plaintiff announced on April 12 that Dr. Shields would no longer be available to testify because of the scheduling change, the trial court permitted Dr. Mankowski to take Dr. Shields's place and testify to conscious pain and suffering. Defendants objected to the late change because plaintiff had not disclosed Dr. Mankowski's opinions and the bases for them in any disclosure as required by MCR 2.302(B)(4) and he was not deposed, but the court stated that because defense counsel did not depose Dr. Shields, it would not make any difference. Defendants then requested that they be able to depose Dr. Mankowski during trial, sometime before he was

slated to testify on April 17, but the trial court also denied that request. Instead, the trial court permitted Dr. Mankowski to testify based on plaintiff's counsel's representation that his testimony would be the same as Dr. Shields's and that it was relevant under MRE 702.

Dr. Mankowski testified on April 17. He was asked what information he relied on to form his expert opinion, and he responded that he reviewed the autopsy reports, police records, and photographs—and he did not review what Dr. Shields was going to testify to nor did he talk to Dr. Shields. Dr. Mankowski testified that the tractor trailer's first impact at a high rate of speed to the rear of the decedents' vehicle would have caused their torsos to thrust forward, but their heads and necks would not have moved initially, putting pressure on the lower cervical spine. The first impact, in his opinion, only caused "some neck strain, some neck damage," resulting in a concussion with a headache from the head hitting the headrest. Because their autopsy reports did not show any bruising of the brain, Dr. Mankowski opined that the first impact did not kill the decedents. Dr. Mankowski also noted that Jude's autopsy report stated that his aorta was severed from the accident, which caused him to die sooner than Zachary.

Dr. Mankowski further testified that the second impact, from the decedents' vehicle hitting the rear of the vehicle in front of them at about 50 miles per hour, is what caused internal decapitation. He continued that when internal decapitation occurred, the decedents' brains stopped communicating to tell the rest of their muscles to breathe, but they were still conscious for a period of time. Dr. Mankowski had no doubt that the decedents were conscious from the time of the first collision by the tractor trailer up to and through the propulsion into the car in front of them. He opined that Jude was conscious "for at least a minute[,] perhaps another five or ten seconds" and Zachary was conscious "for at least three minutes and perhaps another 5 or 10 seconds" after the accident. Dr. Mankowski explained Zachary's youth would have allowed him to remain conscious longer than his father, and Jude's severed aorta likely resulted in him becoming unconscious faster. He testified that, during that consciousness, the decedents were able to perceive that they could not breathe, which is "one of the most tortu[r]ous things human beings can go through."

Defendants cross examined Dr. Mankowski, during which time he conceded that because the decedents' spinal cords were severed from their skulls, they would not have felt any physical pain but only suffered emotionally from the awareness that they were going to die during those one to three minutes. Defendants also called an expert witness, Dr. Dragovic, who testified, in short, that he did not believe there was a "significant interval" between when the decedents were rear-ended by the tractor trailer and when they rear-ended the car in front of them. He opined that both injuries happened after the first impact—subarachnoid hemorrhage caused instantaneous unconsciousness while internal decapitation caused instantaneous death, and thus, the decedents experienced no conscious pain and suffering.

B. WHETHER THE ISSUE OF CONSCIOUS PAIN AND SUFFERING COULD BE SUBMITTED TO THE JURY

Before trial, defendants argued evidence of conscious pain and suffering was inadmissible because objective evidence confirmed the decedents died on impact, but the trial court determined this was a fact question for the jury. Defendants later argued that such evidence was inadmissible right before Dr. Mankowski testified and moved for a directed verdict and a JNOV on conscious pain and suffering because there was no evidence to support it. Although most of defendants'

argument on appeal concerns the propriety and admissibility of Dr. Mankowski's testimony on the issue, we nevertheless address the JNOV issue because it was preserved.[7]

We review a trial court's decision on a motion for directed verdict or JNOV de novo. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499; 780 NW2d 900 (2009). "A directed verdict or JNOV is only appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." *Nahshal v Fremont Ins Co*, 324 Mich App 696, 719; 922 NW2d 662 (2018). "If reasonable persons, after reviewing the evidence in the light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury." *Id*. (citation omitted).

The plaintiff in a civil action bears the burden of proving damages for conscious pain and suffering by a preponderance of the evidence. *Hannay v Dep't of Transp*, 497 Mich 45, 79; 860 NW2d 67 (2014). A decedent's conscious pain and suffering may be inferred from circumstantial evidence. *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 180; 475 NW2d 854 (1991). Even a brief period of consciousness will suffice. See *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 514-515; 556 NW2d 528 (1996) (jury could have reasonably inferred from witness testimony that the decedent in a one-car rollover accident suffered conscious pain and suffering); *Byrne*, 190 Mich App at 180-181 (jury could have reasonably inferred that a person who died of suffocation because sand obstructed his breathing passages and caused him to lose consciousness "within minutes" was conscious and suffered before death); and *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 460-461; 633 NW2d 418 (2001) (holding a jury instruction on conscious pain and suffering was proper where an expert testified that adult victims of drowning might struggle for between twenty and sixty seconds before falling unconscious).

While Dr. Dragovic opined that the decedents died after the first impact by the tractor trailer, other evidence, including the autopsy reports that did not show any bruising of the brain because the impact was softened by the headrests, indicated the decedents may have been conscious for some period of time after the first impact. Dr. Mankowski further testified that for a brief period after the first impact and internal decapitation, the decedents were able to perceive that they could not breathe. In light of this evidence, whether the decedents were conscious at any time between injury and death was properly submitted to the jury because reasonable jurors could have reached different conclusions on the issue. See *Byrne*, 190 Mich App at 180-181. The weight, reliability, or genuineness of the evidence is reserved solely for the jury. See *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 156; 908 NW2d 319 (2017). Defendants' motion for JNOV on this issue was properly denied.

[7] Motions for a directed verdict and judgment notwithstanding the verdict "are essentially challenges to the sufficiency of the evidence in support of a jury verdict in a civil case." *Nahshal v Fremont Ins Co*, 324 Mich App 696, 718-719; 922 NW2d 662 (2018) (quotation marks and citation omitted).

C. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING DR. MANKOWSKI TO TESTIFY UNDER THE THEN-EXISTING CIRCUMSTANCES

Based on the record and applicable law, however, we hold that the trial court abused its discretion in permitting plaintiff to substitute a new, unnoticed expert witness to testify about conscious pain and suffering without providing the relevant disclosures and without permitting defendants an opportunity to learn about the witness's opinions or bases for them.

The trial court's decision to admit evidence is reviewed for abuse of discretion. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 265; 617 NW2d 777 (2000). The court's decision to qualify an expert is also reviewed for abuse of discretion. *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005). The court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "We review de novo whether the trial judge properly interpreted and applied the rules of evidence to the facts." *Mitchell*, 321 Mich App at 154.

As discussed above, plaintiff could seek damages for conscious pain and suffering between the time of injury and death under the wrongful death act. MCL 600.2922(6). As is commonly done in wrongful death act cases, where the decedent cannot testify, plaintiff sought to prove damages based on circumstantial evidence and expert testimony. Under MRE 702[8]:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"The trial court has an obligation under MRE 702 to ensure that any expert testimony admitted at trial is reliable." *Clerc*, 267 Mich App at 602 (quotation marks and citation omitted). Thus, to be qualified to testify, the expert must satisfy three conditions: "(1) the expert must be qualified, (2) the testimony is relevant to assist the trier of fact to understand the evidence or to determine a fact in issue, and (3) the testimony is derived from recognized scientific, technical, or other specialized knowledge." *Id*.

Defendants do not contest Dr. Mankowski's qualifications to testify, argue that his testimony was irrelevant, or claim that his testimony was not derived from scientific, technical, or other specialized knowledge, and the court did not hold a *Daubert*[9] hearing. Rather, they argue on

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[8] The Michigan Rules of Evidence were substantially amended effective January 1, 2024. See ADM File No. 2021-10, 512 Mich lxiii (2023). This Court uses the rules of evidence in effect at the time of trial.

[9] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 589; 113 S Ct 2786; 125 L Ed 2d 469 (1993). When Dr. Mankowski was called to testify on April 17, the trial court stated: "We can

appeal that they were ambushed by the change and did not have an opportunity to prepare to refute his testimony, which caused prejudice, and it was an abuse of discretion to allow Dr. Mankowski to testify without plaintiff complying with MCR 2.302 and giving defendants an opportunity to learn about his opinions and the bases for them, such as through supplemental disclosures or a deposition.

In making this argument, defendants rely on *Morinelli*, 242 Mich App at 264-265, an insurance dispute concerning the scope of expert witness testimony, and the duty to supplement responses to requests for discovery on the scope and substance of expert witness testimony under MCR 2.302. In *Morinelli*, the plaintiff argued that he was denied a fair trial when the trial court permitted testimony from a defense expert on a topic (the quality of care provided by plaintiff's treating physician), when defendant had disclosed the witness to testify as to another topic. The plaintiff objected to the testimony because the expert testimony was "inconsistent with that represented in [the] defendant's answer to Morinelli's interrogatory regarding the scope of the opinions to be rendered by its experts." *Id*. at 265. The plaintiff asserted that he did not depose the defense expert because, based on the defendant's discovery responses, the plaintiff did not know that the expert would testify about the other issue. The plaintiff argued he was therefore unprepared to address the testimony, and he was prejudiced by it. *Id*. at 266. Based on the record, this Court agreed, finding that the trial court abused its discretion when it allowed the expert to testify to opinions that had not been disclosed. *Id*. at 268-269.

Analogizing to *Morinelli*, defendants argue that Dr. Mankowski's testimony went beyond what plaintiff had disclosed would be the scope of his testimony and was different from what Dr. Shields was expected to testify to, and that permitting the testimony was an abuse of discretion that caused them prejudice. Because resolving these issues is fact intensive, *Morinelli* is not directly controlling, but it does guide our analysis.

Dr. Mankowski's testimony clearly went beyond the scope of what plaintiff had disclosed and plaintiff provided no supplemental disclosure. How his testimony compared with Dr. Shields's expected testimony is more nuanced. Dr. Shields's affidavit explained that internal decapitation did not preclude either decedent from experiencing consciousness. The affidavit stated in relevant part:

> The autopsy of both, JUDE and ZACHARY ATTIANESE, reveal no direct traumatic injuries to either of their hearts, brains and/or lungs which would have resulted in immediate loss of consciousness and death. Based upon the direction of force and other factors, neither JUDE nor ZACHARY, lost immediate consciousness due to the injuries they sustained. The autopsies describe injuries to

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have a quick *Daubert* hearing." Defense counsel responded: "Judge, I don't need to take testimony from the doctor . . . ," then argued that the evidence was insufficient to allow opinion testimony on conscious pain and suffering and to submit the issue to the jury. The trial court held "under the law they only need one second of conscious pain and suffering," that evidence of conscious pain and suffering is circumstantial, and that "[w]e need testimony from the doctor to say whether or not it was possible."

> spinal cord which may be characterized as internal decapitation; this mechanism of injury would not preclude either JUDE or ZACHARY from experiencing conscious pain and suffering and awareness of impending death for a period of time before they both lost consciousness. . . . It is my opinion, to a reasonable degree of medical certainty, that JUDE and ZACHARY would have experienced this state *for a period of time after initial collision, until losing consciousness*.

Based on this affidavit, defendants knew they needed to prepare to cross examine Dr. Shields on the issue of whether the decedents were conscious after being internally decapitated. But, as defendants argue, Dr. Shields's affidavit does not specify how (such as based on the two impacts Dr. Mankowski testified to) or how long each decedent suffered, and defendants did not have any of the other information about Dr. Mankowski's opinions that he later testified to like they had for Dr. Shields. And it turned out that, inconsistent with plaintiff's counsel's representation that the testimony would be the same as Dr. Shields, Dr. Mankowski testified that he did not speak with Dr. Shields or review the substance of Dr. Shields's anticipated testimony before he testified. As a result, when the trial court permitted plaintiff to substitute Dr. Mankowski for Dr. Shields on April 12, it is unclear how defendants were supposed to prepare to cross examine him. Not even Dr. Shields had articulated in writing how and how long each decedent suffered consciously before death.

And, given that plaintiff had not provided supplemental disclosures, the trial court could have reasonably precluded Dr. Mankowski's proposed testimony by applying MCR 2.313(C).[10] The impact of the trial court's decision could have been minimized by permitting defendants to depose Dr. Mankowski, but it denied defendants' request to do so, even for just an hour sometime from April 12-17 as had been requested. Had the trial court granted defendants' request, defendants would have had an opportunity to prepare to cross examine Dr. Mankowski. As it was, once plaintiff elicited Dr. Mankowski's testimony that he did not know Dr. Shields's opinions, defendants were largely blind to possible avenues of cross examination.

The harm to defendants is especially noteworthy given the specificity of Dr. Mankowski's testimony about the effect of each impact on each decedent separately. And it is clear the jury found Dr. Mankowski's testimony credible and fashioned a damages award based on what he said—the jury awarded $8 million for the 65-70 seconds Dr. Mankowski testified Jude may have been conscious after the accident. The jury also awarded $11 million for the three minutes and 5-10 seconds Dr. Mankowski testified Zachary may have been conscious. This testimony, of which defendants had at best limited notice, therefore clearly prejudiced defendants. See MCR 2.613(A).[11]

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[10] MCR 2.313(C) states "If a party fails to provide information or identify a witness as required by MCR 2.302(A) or (E), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

[11] MCR 2.613(A) states:

Because defendants were prejudiced in this regard, we vacate this portion of the jury's verdict and remand for a new trial on conscious pain and suffering damages. See MCR 2.611(A)(1)(a).

IV. DEFENDANTS WERE NOT PREJUDICED BY THE TRIAL COURT'S DECISION TO PERMIT SOME LIABILITY EVIDENCE AND ARGUMENT

Defendants argue they are entitled to a new trial as to all issues because they were prejudiced by the trial court's decision to permit plaintiff's opening statement about, and to admit evidence of, defendants' liability at trial when only damages were at issue, especially in light of the trial court's earlier ruling that such evidence would only inflame the jury. Defendants argue the court's decision permitted plaintiff's counsel to engage in misconduct by telling the jury facts that were not relevant to the issues before it.

Given that we are vacating the award of damages for preimpact fright and shock and remanding the case for a new trial as to conscious pain and suffering, it is unclear from the briefing what significance this issue still has. Ultimately, we agree in part that some argument and evidence as to liability was presented that should not have been, but a new trial on all issues is not warranted for this reason.

As stated, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *Morinelli*, 242 Mich App at 265. This Court also reviews for abuse of discretion what constitutes a fair and proper opening or closing statement. *Lockridge v Oakwood Hosp*, 285 Mich App 678, 693; 777 NW2d 511 (2009). The court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App at 128.

As discussed above, damages for preimpact fright and shock are not allowable under the wrongful death act. Thus, plaintiff's liability argument and evidence that plaintiff claimed informed the jury about preimpact fright and shock were not relevant and should not have been permitted under *Daher*. Accordingly, and in hindsight since *Daher* had not been decided, the trial court abused its discretion when it permitted the jury to hear evidence that bore only on preimpact fright and shock because, as the trial court explained, it believed "reckless goes to show fright and shock." This abuse of discretion includes the trial court overruling any objections during trial that bore on the decedents' preimpact fright and shock, like road conditions miles before the accident. While basic facts of the case are admissible to provide the jurors context for the damages they are to decide, such details were not relevant to what damages plaintiff may be entitled to under the wrongful death act.

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

The same cannot be said regarding potential liability argument and evidence that informed the jury about the decedents' potential conscious pain and suffering and plaintiff's loss of society and companionship, which are recoverable under the wrongful death act. MCL 600.2922(6). Defendants contend that allowing such evidence was contrary to M Civ JI 17.01, which states:

> The defendant has admitted that [he / she] is liable to the plaintiff for any [injury / damages] which [he / she] caused. You are to decide only (what [injuries / damages] were caused by defendant and) the amount to be awarded to the plaintiff.

Submission of an issue to the jury is the formal process by which the court presents factual questions to the jury for determination. See MCR 2.515(A) (stating that "the court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict"). "It is reversible error to submit any issue to the jury which has . . . been admitted." *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991) (quotation marks and citation omitted). Contrary to defendants' arguments, however, the trial court never submitted the issue of liability to the jury. The way the verdict form was drafted made that much clear—after defendants admitted liability to Count II, the first eight questions about liability on the verdict form were edited to answer "yes." Defendants' arguments necessarily fail.

Defendants are correct that the trial court, at times, made inconsistent rulings regarding the relevance and admissibility of evidence potentially related only to liability. We do not, however, consider such rulings to be an abuse of discretion given that the evidence was potentially relevant to certain types of recoverable damages and the defense's position that the decedents died immediately,[12] and the defendants' late admission of liability played a role in the inconsistency. In these respects, defendants' argument, relying on *Fellows v Superior Products*, 201 Mich App 155; 506 NW2d 534 (1993), that the trial court committed reversible error is incorrect.

Defendants also complain that plaintiff's counsel engaged in misconduct with respect to the liability issue as early as voir dire. They first argue that plaintiff's counsel's conduct was so outrageous it caused a juror to have a panic attack, leading to a mistrial. While it is true that on April 10, a potential juror did become distressed over what appeared to be an issue with anxiety, the mistrial that plaintiff sought on April 10 was not related to the dismissed juror, but rather to the issues created by defendants admitting liability to Count II during voir dire, which affected counsel's questioning regarding Challenger's direct liability for negligent hiring, training, and supervision. The court also instructed the jurors that regardless of what was said by the attorneys, their arguments were not evidence to be considered. A jury was selected from a new venire on April 12, which cured any potential issues with voir dire on April 10.

Defendants ultimately believe that several statements made by plaintiff's counsel during the second voir dire, opening statements, throughout trial, and during closing, were a deliberate

[12] Plaintiff correctly notes that some evidence of how the accident occurred and its aftermath, such as the location of the vehicles, the speed of the tractor trailer, and observations of the bystanders and police officers, also was necessary to support defendants' position that the decedents did not experience any conscious pain and suffering.

attempt to inject liability issues into the trial and unfairly prejudiced them, including by effectively seeking exemplary damages, which are not recoverable. Defendants cite to, for example, an exchange during the second voir dire between plaintiff's counsel and a potential juror, where the potential juror stated the damages award would depend on "the state the trucker was in," and whether "he was under the influence of something." When plaintiff's counsel answered "He had a condition . . . " the trial court interrupted: "We're not going to get into it. Again, they've admitted liability. . . . Now, you're putting damages on not what they did but what it costs." Contrary to defendants' arguments, the trial court did step in to withhold liability issues from consideration.

Defendants also argue that approximately two-thirds of plaintiff's opening statement addressed Challenger's liability after the trial court stated plaintiff's counsel could say "whatever he wants" during opening and closing statements. Defendants highlight plaintiff's statements during opening that Challenger was reckless in hiring Nogueras, that Nogueras had Parkinson's disease and was on three medications which had warnings about sleep attacks, that he never should have been issued a license, and referred to the tractor trailer as a "lethal weapon" and "gigantic weapon." During closing argument, defendants accuse plaintiff's counsel of engaging in "anti-corporation class warfare themes" that Challenger was greedy and unfeeling, by stating "Keep your money, Challenger. Keep every penny of it," "they're big," and "these words were cheap." Defendants compare these statements to *Duke v American Olean Tile Co*, 155 Mich App 555; 400 NW2d 677 (1986), where

> in attempting to convince the jurors to return a verdict for a substantial monetary award, plaintiff's counsel referred to the defendant's executives as sitting in their "plush paneled corporate offices in Pennsylvania" and "sitting at the country club or something having lunch" with no concern for the complaints of consumers. Further, counsel advocated that a substantial verdict was required because "money talks," and the corporate executives would then "sit up and take notice" of the opinion of the jurors. He then stated: "They snicker now. They treat what we are doing here lightly, but I will tell you something, if you return a substantial verdict against the defendants, they won't snicker at you." [*Id*. at 562-563.]

We disagree that plaintiff's counsel's statements in this case rise to the level of "a deliberate course of conduct" by plaintiff's counsel "aimed at preventing defendant from having a fair and impartial trial." *Id*. at 562, quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 111; 330 NW2d 638 (1982). Rather, they were narrative elements typical of a closing argument. In the end, by the trial court's estimate, 70% of the witnesses plaintiff intended to call to address Count II, including Nogueras, were never called, meaning the trial court did limit evidence and argument about liability.

Even if some remarks were improper, they are not always error requiring reversal. *Reetz*, 416 Mich at 111. The jury in this case was instructed before opening statements that "opening statements are not evidence" and are "only intended to assist you in understanding the viewpoints and claims of the parties," and after closing statements that the only evidence the jury should consider is testimony and exhibits. Instruction by a trial court before opening statements and after closing statements that the statements of counsel are not evidence "is generally sufficient to cure the prejudice arising from improper remarks by counsel." *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). "[J]urors are and must be presumed to understand and

follow the court's instructions." *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993).

"A lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191-192; 600 NW2d 129 (1999). Seeing no such deliberate course of conduct, we decline to grant a new trial on grounds that liability evidence was improperly admitted that bore on the outcome of damages for conscious pain and suffering or any future damages.

We agree with the trial court that it is difficult to conduct a trial only as to damages for a traffic accident without giving the jury some information about how the accident happened and what they are there to decide. What evidence that touches on liability is admissible because it also touches on damages in cases where only the issue of damages is before the jury depends on what categories of damages the jury is charged with awarding. Seeking damages for conscious pain and suffering and loss of society and companionship necessarily involved questions of how long the decedents were conscious, how hard they were hit, and how the driver hit them.

Overall, the trial court's rulings on liability evidence were not an abuse of discretion.

V. FUTURE DAMAGES

We decide next whether there was any error by the trial court that led to the jury's award of future damages for loss of society and companionship. Defendants argue that the trial court abused its discretion when it allowed plaintiff to explain to the jury that the court would reduce its award of future damages to present cash value. We disagree.

A. RELEVANT FACTUAL BACKGROUND

Before trial, plaintiff moved in limine for the trial court to instruct the jury that the court would reduce any future damages awarded to present cash value. The trial court denied the motion because the jury instructions "were already clear." The trial court stated, however, that it would not prohibit plaintiff's counsel from telling the jury the court would reduce the verdict as to future damages to present cash value.

The only future damages available to plaintiff were damages for future loss of society and companionship. During closing argument, while walking the jury through the verdict form, plaintiff's counsel suggested an award of $1,000,000 per year with a "fair and reasonable" growth rate of 5% and explained the jury would need to provide a growth rate because the judge was required to reduce future damages to present value. Defendants objected, but the trial court overruled the objection consistent with its earlier ruling on the motion and allowed plaintiff's counsel to continue. Plaintiff's counsel went on to explain: "So if [y]ou don't give the growth rate what you think you're giving will be a fraction of what it actually is." Plaintiff's counsel then suggested how to calculate the damages award using the growth rate selected by the jury.

During defendants' closing argument, defense counsel suggested awarding damages for loss of society and companionship for each decedent in the amount of $150,000 to $180,000 a year at a 3% rate of increase. He did this to, in his own words, give the jurors an "anchor to think about," and mentioned that Zachary's potential as a major league baseball player, although speculation, was a legitimate consideration in the emotional loss plaintiff suffered. Later, when instructing the jury, the trial court stated "[y]ou should not reduce any award of future damages to present cash value," which comported with M Civ JI 53.03A.

The jury awarded plaintiff damages as to past loss of society and companionship, from the accident to the trial, and then as to future such damages awarded $150,000 a year for Jude, $150,000 a year for Zachary, and selected an annual growth rate of 3% per year for future noneconomic damages for loss of society and companionship. The approximately $22.9 million award was reduced to a present cash value of approximately $7.2 million.

B. ANALYSIS

This Court reviews for an abuse of discretion what constitutes a fair and proper opening or closing statement. *Lockridge*, 285 Mich App at 693. The trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App at 128. The proper interpretation of statutory language is reviewed de novo. *Daher*, 515 Mich at 261.

Under MCL 600.6306(1), "[a]fter a verdict is rendered by a trier of fact in favor of a plaintiff in a personal injury action other than an action for medical malpractice, an order of judgment shall be entered by the court." With respect to noneconomic damages, which are at issue in this case, the statute requires that "[a]ll future noneconomic damages [be] reduced to gross present cash value." MCL 600.6306(1)(e). The term "gross present cash value" is defined by the statute as "the total amount of future damages reduced to present value at a rate of 5% per year, compounded annually, for each year in which those damages will accrue, as found by the trier of fact . . . . " MCL 600.6306(2).

As stated, M Civ JI 53.03A forewarns juries to not reduce awards of future damages to present cash value. Also, there is no explicit provision in MCL 600.6306 that prohibits the court or counsel from informing the jury about the reduction of future damages. In contrast, in MCL 600.6304(5), relating to medical malpractice actions, the court is similarly required to reduce the award to conform with limitations imposed under MCL 600.1483; however, neither the court nor the parties may inform the jury of these limitations. See MCL 600.6304(5) ("The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.").

"Statutes that address the same subject matter or share a common purpose are *in pari materia* and must be read collectively as one law, even when there is no reference to one another." *LeFever v Matthews*, 336 Mich App 651, 663; 971 NW2d 672 (2021) (quotation marks and citation omitted). "The object of the rule *in pari materia* is to carry into effect the purpose of the legislature as found in harmonious statutes on a subject." *Apsey v Mem Hosp*, 477 Mich 120, 129 n 4; 730 NW2d 695 (2007) (quotation marks and citations omitted). "Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted

intentionally and purposely in their inclusion or exclusion." *LeFever*, 336 Mich App at 662-663. "When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Id*. at 663 (quotation marks and citation omitted).

It is evident when comparing MCL 600.6306 with MCL 600.6304 that the Legislature decided in one instance, MCL 600.6304, to direct the court and litigants to refrain from instructing the jury about limitations on the jury's award. Yet in the neighboring statute, that provision prohibiting the passing of the information to the jury is not present. This indicates an intent by the Legislature to permit the jury to hear about the reduction in present cash value from either the court or the parties. *LeFever*, 336 Mich App at 662-663. Further, despite plaintiff's explanation of reduction to present cash value and suggestion of a 5% growth rate, the jury adopted the 3% growth rate suggested by defendants in their closing argument. Thus, the trial court did not abuse its discretion in permitting plaintiff's counsel to explain to the jury that its award would be reduced by the trial court to present cash value.

VI. EXCESSIVE VERDICT/REMITTITUR

Finally, defendants argue the trial court erred in denying their posttrial motion for remittitur or a new trial because the jury verdict was excessive. We disagree.

This Court reviews a trial court's decision on a request for remittitur for an abuse of discretion. *Palenkas v Beaumont Hosp*, 432 Mich 527, 531; 443 NW2d 354 (1989). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App at 128. Constitutional issues, such as deprivation of due process, are reviewed de novo. *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995).

Remittitur is a "procedural process by which a verdict of the jury is diminished by subtraction." *Pippen v Denison, Div of Abex Corp*, 66 Mich App 664, 674; 239 NW2d 704 (1976). Under MCR 2.611(E)(1), the trial court may order remittitur "[i]f the court finds that the only error in the trial is the . . . excessiveness of the verdict . . . ." This Court has stated that "[r]emittitur can be ordered only if the verdict is so excessive as to shock the judicial conscience." *Pippen*, 66 Mich App at 674. "If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, it should not be disturbed." *Taylor*, 286 Mich App at 522.

As articulated above, we are vacating the jury's award of preimpact fright and shock and reversing and remanding the issue of damages for conscious pain and suffering for a new trial. Thus, the only portion of the jury's verdict left to consider is the award for loss of society and companionship. Defendants, however, make no specific argument as to why the jury's verdict for this category of damages was excessive. Moreover, with respect to future damages for loss of society and companionship, it was defense counsel who suggested that up to $180,000 per year for each decedent, increased at a growth rate of 3% per year, was an acceptable award. If anything, the jury awarded less than the $180,000 that defense counsel suggested for Zachary in consideration of Zachary's promising baseball career.

Because defendants indicated at trial that the jury award for future damages was just compensation, we decline to order remittitur for damages awarded for loss of society and companionship.

VII. CONCLUSION

Affirmed in part, vacated in part, and remanded for a new trial consistent with this opinion. We do not retain jurisdiction. No costs are awarded as neither party prevailed in full. MCR 7.219(A).

/s/ Andrew J. Lievense
/s/ Matthew S. Ackerman
/s/ Mariam S. Bazzi