SUPERIOR COURT OF DECATUR COUNTY
STATE OF GEORGIA

JAMES BRYAN WALDEN and
LINDSAY NEWSOME STRICKLAND,
Individually and on behalf of the estate of
their deceased son, REMINGTON COLE WALDEN,

Plaintiffs,

v. No. 12-cv-472

CHRYSLER GROUP LLC n/k/a
"FCA US LLC" and
BRYAN L. HARRELL,

Defendants.

CHRYSLER GROUP'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR NEW TRIAL

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTRODUCTION 1
BACKGROUND 3
ARGUMENT 5
I. This Court Should Order A New Trial On All Issues Because The Verdict Is The Result Of Passion And Prejudice. 6
A. The $120 Million Wrongful Death Award Is Arbitrary, Irrational, And Grossly Excessive. 8
B. The $30 Million Pain-And-Suffering Award Is Also Arbitrary, Irrational, And Grossly Excessive. 11
C. The Verdict Resulted From Plaintiffs' Improper Efforts To Bias And Prejudice The Jury Against Chrysler. 12
D. The Damage Awards Are Punitive And Unconstitutional. 16
II. In The Alternative, This Court Should Order A New Trial Unless Plaintiffs Consent To A Substantial Remittitur. 20
III. If Georgia Law Permits These Awards To Stand, Then Georgia Law Violates Due Process. 22
CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Advocat, Inc. v. Sauer,
353 Ark. 29 (2003) 21
Anthony v. Anthony,
143 Ga. App. 691 (1977) 20
Arnsdorff v. Fortner,
276 Ga. App. 1 (2005) 11
Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt,
286 Ga. 731 (2010) 20
Beam v. Kingsley,
255 Ga. App. 715 (2002) 21
Blunt v. Little,
3 F. Cas. 760 (C.C. Mass. 1822) 6
BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 19
Bravo v. United States,
532 F.3d 1154 (11th Cir. 2008) 7
Central of Georgia Railroad Co. v. Swindle,
260 Ga. 685 (1990) 2, 16, 17, 18
Central R.R. v. Smith,
76 Ga. App. 209 7
Colonial Stores, Inc. v. Coker,
77 Ga. App. 227 (1948) 6
Columbus Regional Healthcare System v. Henderson,
282 Ga. 598 (2007) 12
CSX Transportation, Inc. v. Levant,
262 Ga. 313 (1992) 17
Department of Human Resources v. Johnson,
264 Ga. App. 730 (2003) 6, 8, 9, 10, 11, 22
Fabrigas v. Mostyn,
96 Eng. Rep. 549 (C.P. 1773) 8
Floyd v. First Union Nat'l Bank,
203 Ga. App. 788 (1992) 14
Gasperini v. Center for Humanities,
518 U.S. 415 (1996) 6
Giaccio v. Pennsylvania,
382 U.S. 399 (1966) 22
Gielow v. Strickland,
185 Ga. App. 85 16
Gilbert v. DaimlerChrysler Corp.,
470 Mich. 749 (2004) 10, 19

Glabman v. De La Cruz,
954 So. 2d 60 (Fla. Ct. App. 2007) 10
Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 7, 8, 16, 22, 23
Hughes v. Ford Motor Co.,
204 F. Supp. 2d 958 (N.D. Miss. 2002) 21
Jones v. Livingston,
203 Ga. App. 99 (1992) 9
Kolb v. Holmes,
207 Ga. App. 184 (1993) 13
Kuta v. Newberg,
600 N.W.2d 280 (Iowa 1999) 21
Lisle v. Willis,
265 Ga. 861 (1995) 20
Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Moquin,
283 U.S. 520 (1931) 3, 7
Moody v. Dykes,
269 Ga. 217 (1998) 20
Norfolk S. Ry. Co. v. Blackmon,
262 Ga. App. 266 (2003) 17
Pac. Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 22, 23
Park v. Nichols,
307 Ga. App. 841 (2011) 21
Pilzer v. Jones,
242 Ga. App. 198 (2000) 11, 21
Savannah, Florida & Western Ry. v. Harper,
70 Ga. 119 (1883) 7
Scapa Dryer Fabrics, Inc. v. Knight,
2015 WL 1432505 (Ga. App. 2015) 11
Seaboard Air Line Ry. v. Miller,
5 Ga. App. 402 (1908) 10
Seaboard System R.R. v. Taylor,
176 Ga. App. 847 (1985) 2, 7
Smith v. Crump,
223 Ga. App. 52 (1996) 12, 22
Smith v. Satilla Pecan Orchard & Stock Co.,
152 Ga. 538 (1922) 13, 21
South-Western R.R. Co. v. Paulk,
24 Ga. 356 (1858) 1, 2
Spence v. Hilliard,
260 Ga. 107 (1990) 6
State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 13, 16, 18, 19, 22

Stewart v. Med. Ctr. for Cent. Ga.,
239 Ga. App. 90 (1999) 9
Strickland v. Owens Corning,
142 F.3d 353 (6th Cir. 1998) 14
TGM Ashley Lakes, Inc. v. Jennings,
264 Ga. App. 456 (2003) 9, 19, 20, 21
TXO Prod. Corp. v Alliance Res. Corp.,
509 U.S. 443 (1993) 14
Volkswagen of America, Inc. v. Gentry,
254 Ga. App. 888 (2002) 21
Wells v. Dallas Indep. Sch. Dist.,
793 F.2d 679 (5th Cir. 1986) 20, 22
Wheat Enterprises v. Redi-Floors,
231 Ga. App. 853 (1998) 6
Williams v. Worsley,
235 Ga. App. 806 (1998) 9

Statutes

O.G.C.A. § 51-12-12 ..... 3, 5, 20
O.G.C.A. § 51-4-2 8

Constitutional Provisions

Ga. Const. art. VI, § 1, part IV 6, 19

Defendant Chrysler Group LLC n/k/a FCA US LLC respectfully submits this memorandum of law in support of its motion for a new trial.

INTRODUCTION

The jury's stunning and unprecedented damage awards are grossly excessive and cannot stand. The $120 million wrongful death award is more than ***eleven times*** the largest wrongful death award ever upheld on appeal in Georgia history—and exceeds the largest prior award by more than $109 million. And the $30 million award for pain and suffering is more than ***four times*** the largest pain-and-suffering award ever upheld by Georgia courts.

These awards are arbitrary, irrational and not tethered to any legitimate compensatory objective. They were imposed at the behest of Plaintiffs' counsel to ***punish and deter*** Chrysler Group—even though there was no claim for punitive damages in this case. They are impermissible under Georgia law and unconstitutional under federal due process standards.

Georgia law vests trial courts with the power to order a new trial when a jury awards excessive damages or was swayed by passion and prejudice. The astonishing size of the awards in this case, standing alone, requires that this Court grant a new trial. And when viewed in context—as the direct result of Plaintiffs' improper appeals to the jury's passion and prejudice—there can be no doubt that the verdict was tainted by bias and must be set aside.

More than a century ago, in its first opinion construing the wrongful death statute, the Georgia Supreme Court recognized that juries have some degree of discretion in determining the amounts of wrongful death awards. And the court emphasized that "the greatest, if not the only protection against the abuse of this discretion, must be found in the stern determination of the Courts, not to allow a verdict to stand, which bears the impress upon its face, of passion, partiality, or prejudice." *South-Western R.R. Co. v. Paulk*, 24 Ga. 356, 369 (1858).

There can be no serious dispute that the verdict in this case—which exceeds by more than eleven times the largest award ever upheld in the more than 150 years the wrongful death statute has been in existence—"bears the impress upon its face, of passion, partiality, or prejudice." *Paulk*, 24 Ga. at 369. Indeed, because Plaintiffs introduced no evidence of what Remington Walden might have earned during his lifetime, the jury had no basis to award any damages based on lost earnings, so the entirety of the $120 million award was based on "intangible" noneconomic harm. On top of its extraordinary and unprecedented wrongful death award, the jury imposed an ***additional*** punishment—the $30 million pain-and-suffering award—that by itself exceeds, by multiples, the largest such award ever upheld in Georgia history.

The Georgia Supreme Court and Georgia Court of Appeals have held that the size of a jury award, standing alone, can establish that the jury was swayed by passion or prejudice. *See Central of Georgia Railroad Co. v. Swindle*, 260 Ga. 685, 686 (1990) (new trial must be granted when "'an award [is] so excessive or inadequate as to shock the judicial conscience and raise an irresistible inference that passion, prejudice or another improper cause invaded the trial'") (quoting *Seaboard System R.R. v. Taylor*, 176 Ga. App. 847, 849 (1985)). If the awards in ***this*** case are not sufficiently large to demonstrate passion and prejudice, it is difficult to envision a case that would ever meet the standard.

In deciding whether a verdict was tainted by passion and prejudice, Georgia courts also look for any indication in the trial proceedings that the jury might have been spurred to act from improper motives. Here, the record is replete with such evidence. Plaintiffs' counsel, from beginning to end, made improper appeals to the jury's passions and sympathies. Counsel asked Chrysler Group witnesses "how many [deaths] will it take?" and questioned them about the personal income of Chairman Sergio Marchionne. Plaintiffs urged the jury to act as a national

regulator by imposing a massive damages award, accusing the National Highway Traffic Safety Administration (NHTSA) of corruption, and telling the jury that automobile safety was improved through litigation and large verdicts rather than through regulation. Plaintiffs' closing argument was particularly egregious, as their counsel urged the jury—over Chrysler Group's repeated objections—to base the amount of the wrongful death award on Marchionne's income, insinuated that there were many other similar accidents that Chrysler was concealing, and told the jury that "Chrysler ought to be in Reidsville." Where such plainly improper arguments are immediately followed by irrational and stunningly excessive damage awards, there can be no doubt that the jury acted from passion and prejudice.

Because "no verdict can be permitted to stand which is found to be ***in any degree*** the result of appeals to passion and prejudice," *Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Moquin*, 283 U.S. 520, 521 (1931) (emphasis added), the proper remedy is for this Court to order a new trial on all issues. In the alternative, the Court should exercise its power under O.G.C.A. § 51-12-12(b) and order a new trial unless Plaintiffs consent to a substantial remittitur of the damage awards. Permitting these awards to stand would render unconstitutional Georgia law governing judicial review of wrongful death and pain-and-suffering awards. Because the jury instructions did not meaningfully guide or limit the jury in its exercise of discretion, rigorous judicial review of the resulting awards is necessary as a matter of due process to ensure that defendants are not subjected to arbitrary and utterly irrational punishments.

BACKGROUND

This case arises from an automobile accident that caused the death of four-year-old Remington Walden. Defendant Bryan Harrell was driving his pickup at more than 50 m.p.h. when he rear-ended the 1999 Jeep Grand Cherokee in which Remington was a rear-seat

passenger. The severe impact punctured the Grand Cherokee's fuel tank, causing a fire. Harrell pleaded guilty to vehicular homicide.

Plaintiffs—Remington's parents—sued Chrysler Group and Harrell. They claimed that the Grand Cherokee's fuel system was wantonly or recklessly designed, arguing that because the fuel tank was located behind the rear axle of the vehicle and inadequately protected, it was unreasonably susceptible to damage in rear-impact collisions. They also claimed that Chrysler failed to warn of the purported danger or hazard.

At trial, over Chrysler's objections, Plaintiffs questioned Chrysler Group employee Mark Chernoby about the personal income of Chrysler's chairman, Sergio Marchionne. Plaintiffs asked Chernoby about Marchionne's "annual pay," as well as "a $30 million cash award" and a "$15 million post mandate award" Marchionne supposedly received from Chrysler. 4/1 a.m. Tr. 22-23.[1] Plaintiffs asked about Marchionne's alleged receipt of "stock options worth $16,920,000," and argued that Marchionne's total compensation is "over $68 million." *Id*. at 24. Plaintiffs also asked about Marchionne's receipt of "fringe benefits such as personal use of aircraft, company car[] and driver, personal home security, medical insurance, accident and disability insurance, tax preparation and financial counseling." *Id*. at 22. During closing argument, Plaintiffs told the jury to use Marchionne's income as a proper benchmark in calculating the amount of a wrongful death award. *See* 4/2 p.m. Tr. 35, 42.

By continually mentioning American "citizens" and "the American People," Plaintiffs reminded the jury that Chrysler Group is owned by Fiat, a foreign corporation, and accused Chrysler of taking the position that "some of the Bainbridge citizens who testified before you . . .

[1] An official transcript was ordered by Chrysler Group's counsel on April 5. Citations to the transcript are to the unofficial transcripts provided by the court reporter during and immediately after the trial. The cited pages are attached hereto in Exhibit C.

were lying." 4/2 p.m. Tr. 8. Plaintiffs urged the jury to award an amount sufficient to punish and deter Chrysler, telling the jury that the best way to achieve automobile safety is through large jury awards rather than regulation. 3/24 a.m. Tr. 90. And Plaintiffs continually launched attacks on Chrysler witnesses and the company itself—arguments that culminated with the statement in closing argument that Chrysler should be in prison. 4/2 p.m. Tr. 6.

The jury found in Plaintiffs' favor. It found Chrysler Group 99 percent at fault and Harrell 1 percent at fault, despite the fact that Harrell had pleaded guilty to vehicular homicide, specifically including the charge that he caused the death of Remington Walden. The jury awarded $120 million in wrongful death damages, and an additional $30 million in pain-and-suffering damages.

ARGUMENT

The Georgia Legislature has empowered trial courts to order a new trial when a jury awards "excessive" damages. "If the jury's award of damages is clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence, the trial court may order a new trial as to damages only, as to any or all parties, or may condition the grant of such a new trial upon any party's refusal to accept an amount determined by the trial court." O.G.C.A. § 51-12-12(b).

As the Georgia Supreme Court has explained:

> Under the plain language of the statute a judge has three alternatives when a jury makes an award of damages that is clearly inadequate or excessive. The judge may (1) grant a motion for new trial; (2) grant a motion for new trial as to damages only; or (3) conditionally grant a motion for new trial. The third option gives the trial judge the opportunity to give the litigants the benefit of his or her trial experience and to spare the parties the expense and trouble of a new trial. Under this provision of the statute, the trial judge calculates an

> appropriate damage award. The parties then have an opportunity to accept the trial court's award and end the case, or reject it and proceed with a new trial.

Spence v. Hilliard, 260 Ga. 107, 107 (1990).

This Court should grant a new trial or, in the alternative, grant a new trial unless Plaintiffs consent to a substantial remittitur of the damage awards. Failing to vacate or substantially reduce these irrational, excessive and punitive awards would render Georgia's post-trial judicial review procedures unconstitutional.

I. This Court Should Order A New Trial On All Issues Because The Verdict Is The Result Of Passion And Prejudice.

The "power to set aside the jury's verdict and grant a new trial is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Gasperini v. Center for Humanities*, 518 U.S. 415, 433 (1996) (quotation marks and brackets omitted). Thus, "'[i]f it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.'" *Id*. (quoting *Blunt v. Little*, 3 F. Cas. 760, 761-62 (C.C. Mass. 1822) (Story, J.)).

The Georgia Constitution provides that "[e]ach superior court, state court, and other courts of record may grant new trials on legal grounds." Ga. Const. art. VI, § 1, part IV. This Court has the power to "set aside as excessive" a verdict that is "a result of prejudice [or] bias," *Colonial Stores, Inc. v. Coker*, 77 Ga. App. 227, 234 (1948), as part of the "'broad discretionary powers invested in trial courts to set aside verdicts,'" *Department of Human Resources v. Johnson*, 264 Ga. App. 730, 737 (2003) (quoting *Wheat Enterprises v. Redi-Floors*, 231 Ga. App. 853, 858 (1998)).

A new trial ***must*** be granted when a verdict is the result of passion or prejudice. As the United States Supreme Court has held, "no verdict can be permitted to stand which is found to be ***in any degree*** the result of appeals to passion and prejudice." *Moquin*, 283 U.S. at 521 (emphasis added).

Even when there is no "direct proof" of passion or prejudice, a verdict must be set aside as excessive when "the amount thereof, when considered in connection with all the facts . . . shock[s] the moral sense [or] appear[s] exhorbitant, flagrantly outrageous, and extravagant." *Seaboard System*, 176 Ga. App. at 849 (quotation marks omitted). *See also Savannah, Florida & Western Ry. v. Harper*, 70 Ga. 119, 122 (1883) ("That he had the power to grant the new trial because the general damages . . . was so excessive as to lead him to suspect bias or prejudice, is clear."); *Central R.R. v. Smith*, 76 Ga. App. 209, 213 (1986) (award was "not only extravagant, but so excessive as to disclose either bias in favor of the plaintiff, or prejudice to the defendant"). When an award is so excessive "as to shock the judicial conscience and raise an irresistible inference that passion, prejudice or another improper cause invaded the trial," it must be set aside. *Seaboard System*, 176 Ga. App. at 849 (quotation marks omitted). Thus, a verdict must be vacated when the awards on their face are grossly excessive. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 (1994) (explaining that early common law cases, "while generally deferring to the jury's determination of damages, steadfastly upheld the court's power to order new trials ***solely*** on the basis that the damages were too high") (emphasis added); *Bravo v. United States*, 532 F.3d 1154, 1169 (11th Cir. 2008) (vacating $15 million award to one parent and $5 million to other parent for non-economic losses they suffered on account of severe injuries to child on the ground that amount was "so extravagant that it shocks the judicial conscience") (quotation marks omitted).

In short, trial courts "infer passion, prejudice, or partiality from the size of the award," and damages "'may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury.'" *Oberg*, 512 U.S. at 422, 425 (quoting *Fabrigas v. Mostyn*, 96 Eng. Rep. 549 (C.P. 1773)). In this case, the amounts of the damage awards are shocking on their face ***and*** there is direct proof that the jury acted from passion and prejudice.

A. The $120 Million Wrongful Death Award Is Arbitrary, Irrational, And Grossly Excessive.

Georgia law provides that the measure of damages for wrongful death is "the full value of the life of the decedent, as shown by the evidence." O.G.C.A. 51-4-2(a). "This value consists of both the economic value of the deceased's normal life expectancy as determined by his expected lifetime earnings, plus the intangible element incapable of exact proof." *Johnson*, 264 Ga. App. at 738 (quotation marks omitted).

The evidence does not come remotely close to supporting a wrongful death award of $120 million. Because Plaintiffs introduced no evidence of what Remington might have earned during his lifetime, the jury had no evidentiary basis for awarding wrongful death damages based on lost earnings. Indeed, this Court specifically instructed the jury that "[i]f you find that Remington Cole Walden would have had future earnings, it would be for you to determine them, but there must be some evidence before you as to the amount of such earnings." 4/2 p.m. Tr. 61 (emphasis added). There was no such evidence.

Even allowing for an "intangible" component, nothing in Georgia law permits a $120 million wrongful death award. The award in this case is disconnected from the evidence and utterly irrational. It exceeds by a vast margin the largest wrongful death awards ever upheld on appeal in Georgia history. Attached to this motion as Exhibit A is a list of Georgia wrongful

death awards affirmed in published opinions since 1950.[2] The largest such award ever upheld was the $10,625,000 award in *TGM Ashley Lakes, Inc. v. Jennings*, 264 Ga. App. 456 (2003). The award in this case is more than ***eleven times*** the award in *TGM Ashley Lakes*, exceeding it by more than $109 million. In fact, the award in this case vastly exceeds the ***aggregate*** of all such awards in Georgia history.

Georgia juries and courts have awarded far lesser amounts even in wrongful death cases involving young decedents:

- Award of $2,000,000 for a 15-year-old electrocuted by faulty wiring. *Department of Human Resources v. Johnson*, 264 Ga. App. 730 (2003).
- Award of $127,679 in a medical malpractice case where a 14-year-old died from complications of a staph infection. *Stewart v. Med. Ctr. of Cent. Ga*., *Inc.*, 239 Ga. App. 90 (1999).
- Award of $750,000 for a 13-year-old electrocuted on the defendant's property. *Williams v. Worsley*, 235 Ga. App. 806 (1998).
- Award of $1,250,000 for a 17-year-old who died in a car accident. *Jones v. Livingston*, 203 Ga. App. 99 (1992).

Although the award in this case is not automatically deemed excessive merely because it is larger than awards in comparable cases, prior awards provide an important objective measure in evaluating whether a particular judgment is excessive. Prior awards demonstrate what juries and judges applying Georgia law consider to be reasonable amounts in wrongful death cases. That is why the Georgia Court of Appeals, in analyzing excessiveness, has looked for guidance

[2] Exhibit A is based primarily on a Westlaw search of the text of Georgia opinions since 1950 using terms including "wrongful death," "damages," "award," "value," and "life," among others.

to the amounts awarded in prior cases. *See, e.g.*, *Johnson*, 264 Ga. App. at 738 (comparing a wrongful death award to awards in other cases, and concluding that "[t]he $2 million verdict for [a teenager's] wrongful death does not shock the conscience, and it is not so much greater than other awards approved by this Court as to be flagrantly outrageous on its face"). *See also Seaboard Air Line Ry. v. Miller*, 5 Ga. App. 402 (1908) ("The fact that a verdict is greatly larger in amount than the sums fixed usually by juries in similar cases is evidentiary as to bias or mistake, but is not conclusive."); *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 765 (2004) ("[W]hen a verdict is . . . entirely inconsistent with verdicts rendered in similar cases, a reviewing court may fairly conclude that the verdict exceeds the amount required to compensate the injured party.").

Here, there can be no dispute that a $120 million wrongful death award is grossly excessive under Georgia law. The amount of this award bears no relationship to any legitimate compensatory objective. A rational jury does not award $120 million for wrongful death. *See Glabman v. De La Cruz*, 954 So. 2d 60, 63 (Fla. Ct. App. 2007) (ordering new trial because $8 million in wrongful-death damages was "so excessive" that it must have been "a product of passion and emotion"). The list of wrongful death awards that have been upheld on appeal in Georgia since 1950 confirms what is obvious from the face of the verdict: the $120 million wrongful death award is not just excessive, it is powerful evidence that the jury was not acting rationally but was motivated by passion and prejudice.[3]

[3] The fact that the jury apportioned only 1 percent of the fault to Bryan Harrell—the individual who caused the accident when, traveling at a highway speed, he rear-ended the Grand Cherokee—is contrary to the weight of the evidence and additional evidence that the jury acted from passion and prejudice.

B. The $30 Million Pain-And-Suffering Award Is Also Arbitrary, Irrational, And Grossly Excessive.

The jury's award of $30 million in pain-and-suffering damages is irrational and not supported by the evidence. Although Plaintiffs introduced testimony that Remington survived the collision, Plaintiffs acknowledged at trial that any period of suffering was mercifully brief. *See* 3/24 a.m. Tr. 96 (Plaintiffs' opening statement: "The second claim is for pain and suffering. Now, Remi didn't live long. We didn't have to listen to evidence. He didn't live long."); 3/26 a.m. Tr. 77 (Gaffney-Kraft testimony that Remi "may have lived up to a minute").

Just like the wrongful death award, the pain-and-suffering award is a stunning outlier. The Georgia Court of Appeals, in reviewing pain-and-suffering awards for excessiveness, looks to awards in comparable cases. *See Arnsdorff v. Fortner*, 276 Ga. App. 1, 5 & n.7 (2005); *Johnson*, 264 Ga. App. at 738.

Attached as Exhibit B to this motion is a list of Georgia pain-and-suffering awards upheld on appeal since 1950.[4] The largest such award was the $7 million pain-and-suffering award in *Arnsdorff*, which involved a plaintiff who was hospitalized for months, endured paralysis and "severe" pain, and underwent multiple surgeries, with more scheduled for the future. *See* 276 Ga. App. at 1-3. And even the $7 million *Arnsdorff* award was itself an outlier, as the second-largest award at the time was the $4 million award in *Pilzer v. Jones*, 242 Ga. App. 198 (2000).[5]

---

[4] Exhibit B is based primarily on a Westlaw search of the text of Georgia opinions since 1950 using terms including "pain and suffering," "damages," "jury," "verdict," "award," and "judgment," among others.

[5] In *Scapa Dryer Fabrics, Inc. v. Knight*, 2015 WL 1432505 (Ga. App. 2015), the jury awarded $7 million in pain-and-suffering damages, but the amount was reduced by more than 50 percent due to comparative negligence and on appeal the defendant did not challenge the remaining amount as excessive.

The jury's $30 million award in this case is more than four times the record-setting *Arnsdorff* award, exceeding it by $23 million.

Even assuming the facts in the light most favorable to the verdict, the suffering in this case was brief, in contrast to cases where the plaintiff endured severe suffering for significantly longer periods. For example, in *Smith v. Crump*, 223 Ga. App. 52, 57 (1996), the court of appeals upheld an award of $600,000 for "a lifetime of pain and suffering with a permanent physical disability, chronic depression, headaches, and sleep problems." Similarly, in *Columbus Regional Healthcare System v. Henderson*, 282 Ga. 598, 599 (2007), the Georgia Supreme Court upheld a $100,000 pain-and-suffering award for a 15-month-old child who suffered from a bleeding disorder from the moment of her birth through her death during surgery for a cerebral hemorrhage.

A $30 million pain-and-suffering award for what Plaintiffs acknowledge was at most one minute of suffering is irrational on its face and further proof that the jury was swayed by passion and prejudice.

C. The Verdict Resulted From Plaintiffs' Improper Efforts To Bias And Prejudice The Jury Against Chrysler Group.

The amount of the damage awards alone establishes that the jury was swayed by bias, passion and prejudice. An additional indicator is what led to those awards. Throughout the trial, Plaintiffs incited the jury by making numerous improper arguments that prejudiced the jury against Chrysler and directly resulted in the unprecedented and irrational damage awards.

From beginning to end, Plaintiffs injected irrelevant—yet highly prejudicial—information and arguments into this case. One recurring theme was the income of Chrysler's chairman, Sergio Marchionne. Plaintiffs questioned Chrysler's witness Mark Chernoby about Marchionne's "annual pay," as well as "a $30 million cash award" and a "$15 million post

mandate award" Marchionne supposedly received from Chrysler. 4/1 a.m. Tr. 22-23. Counsel said that "Mr. Marchionne exercised stock options worth $16,920,000, did he not?" and argued that Marchionne's total compensation is "over $68 million." *Id*. at 24. Counsel also asked about Marchionne's receipt of "fringe benefits such as personal use of aircraft, company car[] and driver, personal home security, medical insurance, accident and disability insurance, tax preparation and financial counseling." *Id*. at 22.

Plaintiffs hammered home this theme in closing argument, repeatedly citing Marchionne's salary as a way for the jury to calculate the amount of a wrongful death award. *See* 4/2 p.m. Tr. 35 ("Also what [Chrysler's counsel] said Remi's life was worth, Marchionne made 43 times as much in one year."); *id*. at 42 ("That's less than two years of what Mr. Marchionne made just last year. He made $68 million last year."). Chrysler Group continually objected to this line of argument. *Id*. at 35, 42.

It is highly improper to urge the jury to calculate the amount of a wrongful death award based on the salary and fringe benefits received by the defendant's senior executive, facts that have no relevance to any conceivable compensatory purpose. The Georgia Supreme Court has long held that the "general rule" in Georgia "is that evidence of the wealth or worldly circumstances of a party is ***never*** admissible, unless in those exceptional cases where position or wealth is necessarily involved." *Smith v. Satilla Pecan Orchard & Stock Co*., 152 Ga. 538, 541 (1922) (emphasis added); *see also Kolb v. Holmes*, 207 Ga. App. 184, 185 (1993) ("[G]enerally the wealth of the parties is utterly irrelevant."). Similarly, the United States Supreme Court has cautioned that arguments concerning a defendant's wealth "bear no relation to [a damage] award's reasonableness," and simply "provide[] an open-ended basis for inflating awards when the defendant is wealthy." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427-28

(2003) (quotation marks omitted). Moreover, an "emphasis on the wealth of the wrongdoer increase[s] the risk that the award may have been influenced by prejudice against large corporations." *TXO Prod. Corp. v Alliance Res. Corp*., 509 U.S. 443, 464 (1993) (plurality). Although evidence of wealth has in some cases been deemed admissible for purposes of a ***punitive*** damages award, *see Floyd v. First Union Nat'l Bank*, 203 Ga. App. 788, 791 (1992), there was no claim for punitive damages in this case and the use of this evidence violated Chrysler's due process rights. Plaintiffs' obvious purpose was to incite the jury, and whip up its prejudices and biases against a large corporate defendant.

Plaintiffs pursued a similar theme in attempting to stir up bias against a foreign corporation. Plaintiffs' counsel repeatedly referred to American "citizens" and "the American People" in a transparent effort to highlight the fact that Fiat (which owns Chrysler Group) is an Italian corporation. *See, e.g*., 3/24 p.m. Tr. 76-78 (Estes); *id.* at 98, 112, 116 (Marchionne); 3/25 a.m. Tr. 21, 22, 28, 30 (Marchionne); 3/27 a.m. Tr. 30, 62, 69 (Arndt); 3/30 a.m. Tr. 18 (Kam); 3/31 p.m. Tr. 136 (Chernoby). In closing argument, Plaintiffs made the "us versus them" distinction explicit, telling the jury that "Chrysler comes in here, denies responsibility, denies everything, makes up stuff, insinuates, implies, maybe even worse, that some of the Bainbridge citizens who testified before you . . . were lying about what they heard." 4/2 p.m. Tr. 8. *See Strickland v. Owens Corning*, 142 F.3d 353, 359 (6th Cir. 1998) ("It is true that an us-against-them plea can have no appeal other than to prejudice by pitting 'the community' against a nonresident corporation [and] is an improper distraction from the jury's sworn duty to reach a fair, honest and just verdict.") (citation omitted).

Plaintiffs also sought to stoke the jury's passions and prejudices by launching highly improper attacks on Chrysler Group and its employees. In questioning Mark Chernoby,

Plaintiffs' counsel asked "at what point, sir, would people burning up in these Jeeps with rear gas tanks, at what point would Chrysler decide it had a moral duty to warn people about the danger, do you know?" 3/31 p.m. Tr. 140. He then asked "[h]ow many of these wrecks is it going to take before Chrysler will warn the people . . . . How many would it take, sir?" *Id*. Counsel repeatedly asked Chernoby this question, until the Court finally sustained Chrysler's objection, *id*. at 142, but by then the damage had been done.

Plaintiffs' egregious closing argument took this improper theme to the next level. Even though this Court had sustained Chrysler's objection to counsel's questioning of Bryan Harrell (*see* 3/25 p.m. Tr. 54 ("Had you seen anybody for Chrysler locked up like you are locked up in the Georgia state prison over there in Reidsville?")), and counsel was therefore on notice that this was an improper line of attack, counsel told the jury in closing argument that "Chrysler ought to be in Reisdville instead of Bryan Harrell." 4/2 p.m. Tr. 6.

Plaintiffs also made repeated references to the Ford Pinto—a different vehicle made by a different manufacturer. The Pinto had no relevance to this case, but was used throughout the case by Plaintiffs (over Chrysler's objection) to prejudice and bias the jury against Chrysler Group. *See, e.g.*, 3/24 a.m. Tr. 66-67, 70-71 (Plaintiffs' Opening); 3/24 p.m. Tr. 125-26 (Marchionne); 3/25 a.m. Tr. 60-64 (Teets); 3/27 a.m. Tr. 10 (Arndt); 4/2 a.m. Tr. 10-11 (Plaintiffs' Closing Remarks); 4/2 p.m. Tr. 22 (Plaintiffs' Closing Argument).

All of these improper questions and arguments were part of a deliberate effort to prejudice the jury and incite it to "send a message" through a massive damages award against Chrysler Group, in plain violation of this Court's order in limine specifically forbidding "send a message" arguments. *See* 3/12/15 Order on Motions in Limine. The Supreme Court has warned that "the rise of large, interstate and multinational corporations has aggravated the problem of

arbitrary awards and potentially biased juries." *Oberg*, 512 U.S. at 431. This danger becomes acute where, as here, the jury is presented with wealth evidence and urged to impose a massive award under vague standards. "Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Id*. at 432. In light of the astonishing damage awards that immediately followed Plaintiffs' closing appeals to the jury's biases and prejudices, there can be no doubt that the verdict resulted from improper motives and must be vacated.

D. The Damage Awards Are Punitive And Unconstitutional.

The damage awards bear no rational relationship to any conceivable compensatory purpose. They were plainly motivated by the jury's desire to punish and deter Chrysler Group, even though Plaintiffs did not bring a claim for punitive damages and the jury was not instructed on punitive damages. *See Gielow v. Strickland*, 185 Ga. App. 85, 86 (1987) ("There is nothing in the [wrongful death] statute or in the case law to indicate that the jury is to be permitted to increase the amount of the award to express outrage at the manner in which the defendant caused the death of another."). Because the jury issued a punitive award when it was limited to awarding compensatory damages, the verdict must be vacated as a matter of Georgia law. In addition, the verdict violates due process because it is an arbitrary and grossly excessive punitive sanction.

1. The Georgia Supreme Court has held that where, as here, a punitive motive infects a jury's award of compensatory damages, the verdict cannot stand. In *Central of Georgia Railroad Co. v. Swindle*, 260 Ga. 685, 686 (1990), the court reversed the verdict where it concluded that "the jury intended at least a portion of the verdict to have the effect of punishing

the defendant and influencing its conduct rather than compensating the plaintiff for his injuries." The court examined the record and found "the jury verdict in this case to be a verdict that can only be logically explained as having resulted from a punitive cause." *Id*. The court focused on what it described as "a pervasive and persistent attempt on the part of the plaintiff to establish improper motive . . . on the part of the defendant railroad, suggesting that damages be awarded . . . for the purpose of punishing the defendant." *Id*. at 687 (quotation marks omitted). Because "this 'improper cause' permeated the trial and resulted in the jury's rendering a verdict based, at least in part, on punitive damages," the court explained, it must be reversed. *Id*.

The court reached the same conclusion in *CSX Transportation, Inc. v. Levant*, 262 Ga. 313 (1992). There, the court reversed a jury award of compensatory damages that resulted from a "punitive cause." *Id*. at 314 (quotation marks omitted). The court explained that a "detailed appraisal of the evidence bearing on damages leads us to believe that the verdict here raises an irresistible inference that an improper cause invaded the trial." *Id*. (quotation marks and brackets omitted). *See also Norfolk S. Ry. Co. v. Blackmon*, 262 Ga. App. 266, 266 (2003) ("Because we conclude that the jury's award was excessive and motivated by an improper punitive motive, we reverse."); *id*. at 270 (because "an award of compensatory damages alone could not have approached the figure awarded by the jury," the verdict "was likely influenced by a desire to punish [the defendant] rather than to compensate [the plaintiff]").[6]

The same reasoning applies here. The jury awarded damages in amounts intended to punish and deter Chrysler, rather than to compensate Plaintiffs. Compensatory damages "are

[6] Although the cases discussed above arose in the context of the Federal Employers' Liability Act (FELA), there is no reason they would not apply to all cases involving awards of compensatory damages. Indeed, the court in *Blackmon* expressly noted that review of FELA damage awards is governed by Georgia law, and that "[t]his standard is consistent with the standard of review for damage awards in non-FELA cases." 262 Ga. App. at 268.

intended to redress the concrete loss that the plaintiff has suffered," where "punitive damages serve a broader function" and "are aimed at deterrence and retribution." *State Farm*, 538 U.S. at 416 (quotation marks omitted). A total award of $150 million is astronomically beyond any amount necessary to fully compensate Plaintiffs. Rather, it was imposed to achieve deterrence and retribution.

Just as in *Swindle*, 260 Ga. at 686, the verdict in this case "can only be logically explained as having resulted from a punitive cause." Plaintiffs' closing argument confirms this. By urging the jury to calculate the amount of wrongful death damages by reference to Sergio Marchionne's income, counsel was asking the jury to impose a punitive award. The salary, bonuses, and fringe benefits Marchionne allegedly received have no conceivable relevance to the amount of a ***compensatory*** award of wrongful death damages. Rather, the reference to Marchionne's income was a classic—and improper—tactic commonly used when a lawyer is asking a jury to impose ***punitive*** damages in an amount sufficient to "send a message" and "get the attention" of a large corporate defendant.

Plaintiffs' opening and closing arguments left no doubt that they were asking the jury to punish Chrysler. Counsel told the jury that "Chrysler ought to be in Reidsville" (4/2 p.m. Tr. 6). Moreover, counsel urged the jury to use its verdict to act as a national automobile regulator and deter future conduct. *See* 3/24 a.m. Tr. 87 ("Millions of these Chrysler Jeeps with rear gas tanks are still on the road, they still pose a deadly danger . . . . We will ask you at the end of this case to fix that."); *id*. at 90 ("The fact is the things that make cars safer are lawsuits . . . ."). Indeed, the theme that the jury should act as a regulator permeated Plaintiffs' entire case. Counsel disparaged the federal safety standard governing fuel system integrity, FMVSS 301 (*id*. at 83), and attacked the safety agency itself as corrupt and ineffective (*id*. at 89). Plaintiffs asked the

jury to deter Chrysler and force it to change its course of conduct—a classic purpose of punitive damages. *See State Farm*, 538 U.S. at 416 ("punitive damages . . . are aimed at deterrence and retribution"). These improper arguments led to the punitive award because they motivated the jury to award an amount in damages that went well beyond the amount necessary to compensate Plaintiffs.

2. The damage awards also violate due process. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). Regardless of the label that a damages award bears—compensatory, noneconomic, or pain and suffering—due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416. Such punishments "further[] no legitimate purpose and constitute[] an arbitrary deprivation of property." *Id*. at 417.

The wrongful death and pain-and-suffering awards violate due process. Even though they are purportedly awards of compensatory damages, the awards are plainly punitive in nature. *Gilbert*, 470 Mich. at 765 n. 22 ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if . . . not labeled 'punitive.'"). The awards in this case have all the hallmarks of an arbitrary and unconstitutional punitive sanction. The jury was not given any meaningful guidance as to how to determine the amount of the awards—it was essentially told to do whatever it thought was right. The awards vastly exceed the amount necessary to compensate Plaintiffs. The Court should hold these awards unconstitutionally excessive as a matter of federal due process under *State Farm* and *Gore*.

II. In The Alternative, This Court Should Order A New Trial Unless Plaintiffs Consent To A Substantial Remittitur.

"[W]hen an award is so exaggerated as to indicate bias, passion [or] prejudice . . . remittitur is inadequate and the only proper remedy is a new trial." *Wells v. Dallas Indep. Sch. Dist*., 793 F.2d 679, 683-84 (5th Cir. 1986) (citation omitted). That standard is plainly met here. Nonetheless, in the event this Court declines to order a new trial, it should order a substantial remittitur of the damage awards to amounts that are supported by the evidence and consistent with prior awards in Georgia.

"Judicial remittitur, the power to reduce a damages award deemed clearly excessive, is a corollary of the courts' constitutionally derived authority to grant new trials under Art. VI, Sec. 1, Par. IV of the Georgia Constitution." *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 737 (2010); *see also Lisle v. Willis*, 265 Ga. 861, 862 (1995) ("[W]e hold that a trial court may condition the granting of a new trial on the plaintiff's refusal to remit the portion of the jury award that the court determines is excessive."); *Anthony v. Anthony*, 143 Ga. App. 691, 695 (1977) ("Trial courts and appellate courts have consistently been given authority to condition retrials upon the remission of improper or excessive damages.").

The remittitur power is enshrined in O.G.C.A. § 51-12-12, which "implements a prime legislative purpose of the tort reform act by sparing the parties and the courts the delay and expense of another trial and bringing the litigation to an expeditious but reasonable conclusion." *Moody v. Dykes*, 269 Ga. 217, 221 (1998). In this case, a very substantial reduction of both damage awards is necessary to bring them back in line with reason, justice, and the entire body of Georgia jurisprudence.

As reflected in Exhibit A, Georgia juries and courts have historically awarded $2.5 million or less in wrongful death cases, although there have been three outliers (*TGM*

Ashley Lakes, which awarded just over $10 million; *Volkswagen of America, Inc. v. Gentry*, 254 Ga. App. 888 (2002), where the $10 million award was not challenged for excessiveness on appeal; and *Park v. Nichols*, 307 Ga. App. 841 (2011), where the $5.1 million award similarly went unchallenged for excessiveness on appeal).[7]

Likewise, as reflected in Exhibit B, Georgia courts and juries have rarely awarded pain-and-suffering damages in excess of $1 million. And even in the few cases where Georgia courts have upheld such awards, the evidence of pain and suffering in those cases exceeded any such evidence in this case. *See Beam v. Kingsley*, 255 Ga. App. 715, 716 (2002) ($2,584,000 pain-and-suffering award where decedent experienced extreme pain for up to two minutes after car accident); *TGM Ashley Lakes*, 264 Ga. App. at 469 ($2,500,000 pain-and-suffering award where victim was conscious while being strangled to death); *Pilzer*, 242 Ga. App. at 199, 201 ($4,000,000 pain-and-suffering award where plaintiff suffered infection that hospitalized her for three months, required "numerous additional surgical procedures necessary to save her life," and left her body "permanently scarred and disfigured").[8]

The proper remedy when a verdict is tainted by passion and prejudice is to vacate it unconditionally. *Wells*, 793 F.2d at 683-84. In the event this Court declines to do so, it should

---

[7] In *TGM Ashley Lakes*, "[t]he jury heard evidence that the monetary value of [the decedent's] life was at least $1,800,000." 264 Ga. App. at 469. Here, Plaintiffs offered no evidence of expected lifetime earnings. Similarly, in *Park*, the plaintiffs introduced expert evidence of the decedent's anticipated lifetime earnings. *See* 2010 WL 6634991, at *6. In *Gentry*, because the excessiveness of the wrongful death award was not challenged on appeal, the opinion does not identify the evidence that might have supported the award.

[8] There are many instances of courts remitting excessive pain-and-suffering awards. *See, e.g.*, *Advocat, Inc. v. Sauer*, 353 Ark. 29, 48 (2003) ($15 million pain-and-suffering award "shock[ed] the conscience of this court"); *Hughes v. Ford Motor Co.*, 204 F. Supp. 2d 958, 965-66 (N.D. Miss. 2002) ($4 million award—most of which was for pain and suffering—remitted to $2.5 million even though plaintiff suffered burns, intense pain, and a "lifetime of disfigurement"); *Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999) (affirming reduction, from $982,000 to $300,000, of pain-and-suffering award to man who died when hit by car, on the basis that the decedent "remained conscious for only a few minutes after the accident").

instead order a new trial unless Plaintiffs consent to very substantial remittiturs of both damage awards, using prior awards as guidance. *See Johnson*, 264 Ga. App. 730 ($2,000,000 award for wrongful death of teenager); *Smith*, 223 Ga. App. at 57 ($600,000 pain-and-suffering award for "a lifetime of pain and suffering").

III. If Georgia Law Permits These Awards To Stand, Then Georgia Law Violates Due Process.

Due process requires "definite and meaningful constraint[s]" on jury discretion. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). These constraints are necessary to prevent "arbitrary deprivations of liberty or property." *Oberg*, 512 U.S. at 434. Thus a statute that grants a jury discretion "without imposing a single condition, limitation, or contingency" on that discretion violates due process. *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). The necessary constraint on jury discretion can come from statutes, judicial interpretation of those statutes, jury instructions, or judicial review of verdicts. *See id.* at 403; *Haslip*, 499 U.S. at 20-22.

The United States Supreme Court has emphasized that jury instructions are "a well-established and, of course, important check against excessive awards." *Oberg*, 512 U.S. at 433. "Vague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *State Farm*, 538 U.S. at 418 (citation omitted).

In this case, however, the jury was given little guidance in how to determine the amount of damages. As to wrongful death, the jury was instructed to make an award based on "the value of Remington Walden's life to himself." 4/2 p.m. Tr. 63. As to pain-and-suffering, the jury was instructed that "[t]he measure [of damages] is the enlightened conscience of fair and impartial

jurors." 4/2 p.m. Tr. 64. These instructions were constitutionally deficient because they failed to adequately guide the jury in determining damages, paving the way for the excessive and irrational damage awards that followed.

The failure of the jury instructions to guide the jury in assessing damages underscores the need for rigorous judicial review. As the United States Supreme Court has explained, damages "should not be committed to the unreviewable discretion of a jury," *Oberg*, 512 U.S. at 435, and judicial review must be "meaningful and adequate," with "real effect." *Haslip*, 499 U.S. at 20, 22. The damage awards in this case exceed—by many multiples—the largest awards ever upheld in Georgia history. They are not supported by the evidence; they are tainted by bias and prejudice; and they resulted from a jury that was not given constitutionally sufficient guidance. If Georgia's judicial review mechanisms would permit these arbitrary and irrational awards to stand, then those procedures themselves are unconstitutional as a matter of federal due process.

CONCLUSION

This Court should order a new trial on all issues or, in the alternative, order a new trial unless Plaintiffs consent to a substantial remittitur.

Dated: May 7, 2015.

Respectfully submitted,

Bruce W. Kirbo, Jr.
Georgia State Bar No. 422601
Bruce W. Kirbo, Jr. Attorney at Law, LLC
P.O. Box 425
Bainbridge, GA 39818
(229) 246-3900

SWIFT, CURRIE, McGHEE & HIERS, LLP

By: _____
M. Diane Owens
Georgia State Bar No. 557490
Terry O. Brantley
Georgia State Bar No. 078361
Bradley S. Wolff
Georgia State Bar No. 773388
Alicia A. Timm
Georgia State Bar No. 140823
The Peachtree – Suite 300
1355 Peachtree Street, N.E.
Atlanta, Georgia 30309-3238
(404) 874-8800