ARIZONA COURT OF APPEALS

DIVISION ONE

JASON BARKER, et al., Plaintiffs/Appellees, vs. XL SPECIALTY INSURANCE COMPANY, et al, Defendants/Appellants.	No. 1 CA-CV 22-0643 Maricopa County Superior Court No. CV2019-055904

ANSWERING BRIEF

Robert J. Hommel (009725)
ROBERT J. HOMMEL, P.C.
10214 N. Tatum Blvd., Ste. A-900
Phoenix, Arizona 85028
(480) 778-0123
rhommel@hommelpc.com

Mark J. DePasquale (012688)
Mark J. DePasquale, P.C.
3300 N. Central Ave., Ste. 2070
Phoenix, Arizona 85012
(602) 744-7777
mjd@markdepasquale.com

Attorneys for Plaintiffs/Appellees Jason Barker and Veronica Barker

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INTRODUCTION

In this case, a unanimous jury found in favor of Jason Barker and Veronica Barker and against XL Specialty Insurance Company ("XL") and Sedgwick Claims Management Services, Inc. ("Sedgwick") on a claim of insurance bad faith and awarded the Barkers a combined total of $3 million in general damages and an additional $2.8 million in punitive damages. (XL and Sedgwick herein collectively referred to as "XL/Sedgwick") On appeal, XL/Sedgwick call this a "runaway verdict." But they do not contend that the verdict resulted from passion or prejudice; or that the general damages were unsupported by the evidence; or that the punitive damages were excessive.

In fact, XL/Sedgwick's counsel told the jury in closing argument that the case was about whether XL/Sedgwick's investigations and decisions caused the Barkers $3 million in damages and whether their conduct was intentional. He did not challenge that the Barkers had suffered $3 million in injuries--his argument was that those injuries were not caused by SL/Sedgwick's actions. The jury determined otherwise.

XL/Sedgwick's appeal is limited to two issues, neither of which merits vacating the judgment. First, they criticize the superior court's voir

dire of a potential juror ("Juror 8") and challenge the court's denial of their motion to strike Juror 8 for cause in the middle of voir dire. Contrary to the Opening Brief's mischaracterizations of the judge's exchange with Juror 8 as rehabilitation, Juror 8 *never* stated that she could not be fair and impartial. In the context of the questioning, when Juror 8 raised her hand in response to the judge's question about bias, it was nothing more than volunteering that she had life experiences relevant to the topic, as the panel was instructed to do a moment before. The trial judge did not "rehabilitate" Juror 8. Rather, after Juror 8's initial responses, the judge walked her through the mechanics of what it meant to decide cases on the evidence. After reflecting on her experiences, Juror 8 stated she could be fair and impartial. The trial judge was present to adjudicate Juror 8's responses and demeanor. Nothing in the record suggests that appellate deference to the judge's determination of whether a juror should be struck for cause should be set aside here.

This Court, however, need not reach these issues because they have been waived. During voir dire, XL/Sedgwick raised no concerns with the trial court about the court's voir dire questioning. And, although XL/Sedgwick initially objected to Juror 8 before counsel's voir dire, when

the judge asked for any remaining motions for cause after the completion of voir dire, XL/Sedgwick's counsel passed the panel. Because XL/Sedgwick did not object at the end of voir dire when the judge could consider the totality of Juror 8's answers and conduct, as required by ARCP Rule 47(d)(3), and passed the panel, the issue is waived.

XL/Sedgwick's second issue is the superior court's denial of their motion to preclude the Barkers' counsel from making a per diem argument for damages in closing, characterizing this argument as an undisclosed "computation of damages." The court did not abuse its discretion here either. XL/Sedgwick do not claim the Barkers presented any undisclosed evidence of damages. And they admit the Barkers disclosed their estimate of $3 million for general damages. The Appellants attack only the per diem arguments made in closing argument. Plaintiff provided more than adequate disclosure of the evidence that would be used to support general damages. Counsel's per diem arguments advocate a conceptual method for attaching quantifiable value to losses that have no empirical method of measurement. The fluid nature of general damages has been sustained by this Court as a basis not to require specific itemizations in notices of claim, and to deny a claim for bad faith in failing

to pay an unaccepted settlement offer while binding damages were litigated. The court did not abuse its discretion on this issue or err as a matter of law.

Finally, even if there were error on the per diem issue, it is harmless (ARCP Rule 61). The general damages the jury awarded were in the same amount the Barkers disclosed as their estimate, the same amount XL/Sedgwick's counsel referenced in his closing, and an amount *greater* than the amount the Barkers' counsel advocated for using the per diem approach. There can be no argument that the jury was improperly tethered to the per diem approach.

The superior court's judgment should be affirmed, and the Barkers awarded their attorney's fees on appeal pursuant to A.R.S. § 12-341.01.

STATEMENT OF THE CASE

The Opening Brief omits an ARCAP Rule 13(a)(4) statement of the lower court's disposition and the basis for appellate jurisdiction. The Barkers therefore submit the following statement pursuant to ARCAP Rule 13(b)(1).

The Barkers filed a complaint against XL/Sedgwick in Maricopa County Superior Court asserting claims arising from insurance bad faith (R. 1), which XL/Sedgwick answered denying liability (R. 9). The case was tried to a jury (R. 292, 293, 312, 320, 329, 332, 333) which rendered a unanimous verdict in favor of the Barkers as follows: $2 million in compensatory damages to Jason Barker; $1 million to Veronica Barker in compensatory damages; and $2.8 million in punitive damages. (R. 329) The Barkers filed a timely application for attorney's fees. (R. 351) XL/Sedgwick filed a motion for new trial under Rule 59 (R. 348) which the superior court denied on August 30, 2022. (R. 376). The superior court entered judgment on August 30, 2022 (R. 378) which, in addition to the compensatory and punitive damages referenced above, awarded the Barkers $600,000 in attorney's fee pursuant to A.R.S. § 12-341.01, taxable costs in the amount of $13,667.37, and interest at the rate of 6.5%. (R. 378) On September 28, 2022,

XL/Sedgwick filed a notice of appeal from the August 30, 2022 judgment (R. 382). On December 1, 2022, this Court stayed the appeal and revested jurisdiction with the superior court to permit the entry of a judgment with the certification of finality required by ARCP Rule 54(c). This Court ordered that the stay would be automatically lifted upon this Court's receipt of the Rule 54(c) judgment. On December 29, 2022, the superior court entered an amended judgment with the certification of finality required by Rule 54(c) (R. 438) This Court's online docket reflects receipt of supplemental superior court e-Record including a copy of an Amended Judgment on January 9, 2023. The notice of appeal is timely pursuant to ARCAP Rule 9(c). This Court has jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

STATEMENT OF THE FACTS

I. Factual Background

XL/Sedgwick provides a summary of the facts of this case that paint a benign account of their handling of the claim at issue. (O.B., 3) The Barkers provide the following more detailed account, supported by the evidence at trial.

A. Jason Barker's work injury gets referred to his employer's chosen care provider.

On February 1, 2017, Jason was injured in a car accident while working as a Century Link broadband technician. (APP021-22, ¶1-3). XL was CenturyLink's worker's compensation insurer. (APP022). Sedgwick was a third-party claims administrator, adjusting CenturyLink employees' worker's compensation claims. (*Id.*)

CenturyLink directed Jason to Concentra for care following the accident. (5/11/22Tr. 26:8-9). At that appointment Jason complained of neck and back pain. (*Id.,* 60:24-61:5) Concentra's internal specialist assured Jason his back was fine and wanted to focus treatment and diagnostics on Jason's relatively minor left shoulder pain. (Tr. Ex. 6, 5).

B. Sedgwick refuses to authorize a second opinion, misrepresenting its authority to do so.

Jason continued to experience back pain and asked Sedgwick if he could have a second opinion. (Tr. Ex. 7, 2-3) Two separate Sedgwick adjusters told him Sedgwick could not authorize a second opinion, which, under the circumstances, would require formal permission from the Industrial Commission of Arizona ("ICA"). (*Id*., 4-7; Baird Dep. Tr. (R. 284) 92:12-94:14)[1] In testimony, however, Deborah Baird, the Sedgwick primary adjuster, admitted Sedgwick could approve requests for second opinions without ICA permission (R284-286, 94:14-19, 58:19-59:21), so those statements were false.

C. The adjuster asks permission to deny the claim on pretextual reasons that are without basis.

In March and April, after Jason filed with the ICA to change doctors, Baird internally sought to terminate Jason's claim giving four reasons,

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[1] The videotape deposition of Deborah Ann Baird dated February 11, 2020, was played for the jury by Plaintiffs' counsel on May 9, 2022 (R. 312, 3-4; 5/9/22Tr. 6:11-9:11) and May 10, 2022 (R. 320, 2; 5/10/22Tr. 15:15-18). The designations are set forth in the Pretrial Statement (R. 194-196, 43-48) and the objections sustained are in the Pretrial Order (R. 227, 3). Other videotape depositions portions of which were played for the jury and cited herein are of Jan Chapman (R. 291)(R. 320); John Faryna, M.D. (R. 414)(R. 320); Kenneth J. Kopacz, M.D. (R. 395)(R. 320).

(R.284, 98:2-20; 109:24-110:8; 126:18-128:13; Tr. Ex. 7, 10; Tr. Ex. 13, 2; Tr. Ex. 19, 6; Ex. 26; %/5/2022Tr. 58:3-62:3). Her then-supervisor testified none of the alleged reasons to terminate benefits were valid. (R. 291) 17:12-24; 22:11-21).

After changing doctors, on March 17, 2017, Jason underwent an MRI showing a tear in the disc cover (annulus) and a 3mm bulge at the L5-S1. (Tr. Ex. 30, 1-2). The torn annulus causes pain mimicking radiculopathy from discal fluid leaking on to the nerve (*Id.*; R. 414, 55:9-56:17).

Between April and late 2017, Mr. Barker underwent injections into his disc attempting to resolve the pain and disc pathology. (5/11/22 Tr. 31:6-32:2) They did not provide relief. (*Id.*)

D. Sedgwick denies surgery on the morning of surgery based on a paper review from an out-of-state doctor.

On January 8, 2018, Mr. Barker underwent a repeat MRI which showed the disc herniation had increased from 3mm to 6 mm and was impinging on the nerve. (5/9/22Tr. 19:1-20:4). On March 27, 2018, he underwent a discogram which also showed the torn and leaking annulus at L5-S1. (Tr. Ex. 50; Tr Ex. 158; (R.414 26:5-27:11).

On April 30, 2018, he was referred to Dr. Faryna who recommended a fusion surgery to address both the impinged nerve and the torn annulus. (R. 414, 29:16-31:5) Dr. Faryna explained that Mr. Barker had 50% back pain caused by the torn annulus, and 50% leg pain caused by the disc herniation putting pressure on the nerve, and that is why fusion was the preferred treatment. (*Id.,* 27:17-29:15) Surgery was scheduled for May 15th, but was denied on the day of surgery by Sedgwick. (5/11/22Tr. 42:23-43:13; 180:17-22).

Sedgwick denied Dr. Faryna's recommendation on the basis of a paper review by an out of state physician. (Tr. Ex. 71). In testimony, that physician confirmed that medical decision making should never be made without examination of the patient (which he did not do) (R. 396, 12:9-14) and that he was not permitted to suggest alternative procedures to fusion. (R. 396, 14:19-15:10). He was only allowed to say yes or no to the treating physician's recommendation. (*Id*.) Nor did he reference the discogram which gave relevant information in favor of fusion. (Dr. Kopacz 11:18-19; 5/9/22Tr. 31:11-32:4, 40:7-22)

E. A second surgeon confirms fusion surgery as appropriate but requests authorization for a discectomy since fusion was denied—a request refused by Sedgwick.

Mr. Barker was referred to a second surgeon, Dr. Field, on May 21, 2018. (5/9/22Tr. 32:10-16) Dr. Field also felt fusion was the most appropriate procedure. (5/9/22Tr. 25:1-27:7; 40:19-22). However, because fusion was denied, he requested authorization for a discectomy, to at least get pressure off the nerve. (*Id*. 31:1-32:10). Sedgwick denied authorization.

F. Sedgwick's IME also recommends surgery, and Sedgwick unsuccessfully attempts to convince him to change his opinion.

Sedgwick then scheduled an IME with Dr. McLean to occur on June 20, 2018. Dr. McLean found that Mr. Barker had multiple neurological deficits, a consistent MRI, and he recommended a discectomy for Mr. Barker. (Tr. Ex. 53:8-9). Dr. McLean was not given the discogram results (*Id*., 5) which would have given additional pertinent information in favor of fusion. (5/9/22Tr. 40:7-22).

Rather than authorize surgery, Sedgwick instead, through counsel, asked Dr. McLean to reevaluate his opinion based on minor vehicle damage shown in one photograph. (Tr. Ex. 122). Dr. McLean confirmed the

causal relationship in a supplemental report dated August 4, 2018. (Tr. Ex. 74).

G. Sedgwick continues to deny surgery, launches a sweep for Barker's medical records, surveils Barker, and through an internet search, finds a Jason Barker who owns a construction company, but takes four months to determine it is someone else.

Again, instead of authorizing surgery, Sedgwick launched medical records sweep, contacting all physicians near Mr. Barker's residence, seeking any medical records concerning him. (5/5/22Tr.127:15-128:18). It turned up nothing. (*Id*.) Sedgwick scheduled multiple dates of surveillance of Mr. Barker, which only showed him limping consistent with his neurological deficits. (R. 284, 198:13-21) It conducted an internet search which revealed the name of someone named Jason Barker who owned a construction company. (5/5/22Tr. 129:3-10) Sedgwick claims it took 4 months, from June until October, to determine this was not the same Jason Barker they insured. (R. 284, 194:20-203:3)

H. Sedgwick finally authorizes back surgery on October 18, 2018, but by that time Barker has suffered permanent nerve damage.

On October 18, 2018, at the direction of CenturyLink's liaison, Sedgwick finally consented to authorize Jason's back surgery. (Tr. Ex. 66)

Dr. Field was informed of authorization on October 21, 2018, (5/9/22Tr. 71:9-21) and the surgery occurred November 15. (*Id*.) By that time the nerve was permanently injured. (*Id*. 35:1-24, 48:14-23)

I. Sedgwick internal reports show one-third of all claims sufficiently serious to pay disability benefits are in litigation.

Sedgwick authors an "Annual Stewardship Report" for CenturyLink, reporting savings achieved (reserves released) over the past year, and savings goals for the following year. (Tr. Exs. 87, 90). For 2017, Sedgwick reported an elimination of $4 million, off $5 million in reserves, as the fruit of its claim handling. (5/5/22Tr. 92:21-95:4) ("a very large reduction.") Sedgwick's "Trending Reports" (Ex. 91) show that throughout 2017 and 2018, 33% of all claims serious enough to pay disability benefits (indemnity claims) were in litigation. (5/5/22Tr. 85:22-88:11). An industry expert testified that number to be high, and that single digits would be reasonably expected. (*Id*., 86:23-24)

The Barkers subsequently filed this action against XL/Sedgwick (R. 1) which went to trial beginning May 4, 2022.

II. Background Related to Jury Selection and Voir Dire of Juror 8.

After the potential jury panel was seated on the first day of trial, the trial judge explained the voir dire process (5/4/22Tr. 10:10-13:24), instructed the jury on the meaning of "fair and impartial" (*Id.* 16:9-25), the meaning of "evidence" (*Id.* 17:1-11) and impartiality being the ability to decide the facts based on the evidence admitted at trial. (*Id.* 17:12-19)

A. After the trial judge instructs the potential jurors to raise their hands if they think they might have something relevant to say in response to a question, Juror 8, among other jurors, raises her hand in response to a question about bias.

As to the questioning, the judge instructed the potential jurors to raise their juror number if they had an answer to the question (*Id.* 11:15-16), and further instructed them as to when they should raise their hand:

> With respect to answering questions. If you are sitting in your chair and you are thinking maybe I have an answer to the question, maybe I don't. Err on the side of complete and full answers to questions even if you think it may or may not be relevant. **If you are even debating in your mind whether you have an answer, you have an answer that we want to hear. So go ahead and give us the information**. We are not here to judge you. We are here to get to know you.

(12:25-13:10) (emphasis added)

After being given a brief description of the case (5/4/22Tr. 46:22-47:16), along with the judge's instruction that they should provide answers

and share information, even if they were not sure it was relevant, Jurors 8, 9, 15, 24, (47:25-48:5), 31 (54:22-57:19), 2 (57:20-58:15) and 7 (58:16-61:2) raised their numbers in response to the question "[i]s there anybody who, based on just this description of the case, feels they cannot be fair and impartial?" (47:25-48:2)

B. Contrary to XL/Sedgwick's characterization, the jurors who raised their hands were not affirming they were biased.

XL/Sedgwick characterizes the juror's raising their hand as "affirming they could not be fair and impartial." (O.B. 7) But the jurors had just been instructed to raise their hands if they thought they had any relevant information in response to the question. The answers of several other jurors shows that they, too, did not believe that raising their hands was an affirmation of bias.

For example, Juror 24, an IT worker in the insurance industry (*Id.* 52:22-23), raised his hand to say he could be fair and impartial (52:24) but was "privileged to a lot of information processes" and "wanted to make sure there was no potential conflict of anybody you needed to know about." (53:7-9).

And, Juror 7, who ultimately sat on the jury (*Id.* 160:16-17), raised her hand in response to the bias question not to affirm any bias, but to disclose she was a retired claims manager at a workers compensation insurance company where she had worked for 31 years (58:16-59:2).

C. After Juror 8, like several other jurors, raises her hand, she informs the judge she advocates for patients and writes letters of necessity, but never states that she cannot be fair and impartial, and confirms that she can be fair and impartial.

XL/Sedgwick further mischaracterize the trial judge's voir dire questioning of Juror 8. There was no "rehabilitation" of Juror 8, because Juror 8 never said she was partial or biased. Juror 8's first remark was "Only thing is that I'm physical therapist, and sometimes we do—while I don't necessarily work with the workman's comp population it does kind of overlap with my profession quite a bit." (*Id.* 48:6-10) This vague statement—nowhere near an affirmation of bias—caused the trial judge to probe for further clarification by asking whether Juror 8 was a claims handler—she was not. (48:11-13) Again, Juror 8's answer did not provide any reason why she might have a bias. The trial judge continued by starting to ask Juror 8 if there was "anything about the fact that this involves a dispute like I've described---" when Juror 8 interrupted and

stated, "[j]ust the fact I would say that we oftentimes do go to bat for patients with insurance companies." (48:17-22). But when the judge asked Juror 8 if she was the person who did that, Juror 8 responded "no" although she "would be the one writing the letters of medical necessity and fighting for the patients." (48:23-49:1) Having elicited this response, and after making sure Juror 8 did not exhibit any confusion about the judge's description of being fair and impartial (49:3:10), the judge asked Juror 8 whether she would be able to set aside her experiences and find the facts in this case "based on the evidence admitted at trial". (49:11-15). Juror 8 answered unequivocally "yes". (49:16). The judge then asked whether Juror 8 could do so "uninfluenced by [her] line of work." (49:17-18) Juror 8 answered "I think so, yes." (49:19) The judge could have left that answer at that—which by saying "yes" was an acknowledgment that Juror 8 believed she could decide the case without the influence of her line of work. But when Juror 8 qualified her "yes" by starting with, "I think so", the judge probed further to see what Juror 8 meant by saying, "I think so" (49:20-50:6), asking:

> There will be witnesses testifying, there will be documents admitted into evidence. Can you find the facts deliberating and talking with the other jurors, you all talk to each other, but you

> are confined to fact finding based on what happens in the courtroom, the evidence admitted at trial, not what may happen outside of the courtroom in the past, currently, in the future that you may experience during trial. It is really confined to the four corners of the courtroom; do you understand that?"

(50:1-18). After Juror 8 stated "yes" to that question (50:19), the judge asked her whether she could do that, Juror 8, again unequivocally stated "yes" (50:20-21). The judge asked her whether she "could do that fairly and impartially" to which Juror 8 unequivocally stated "yes." (50:22-24)

Juror 8 not only did not give any reasons why "going to bat" for patients with insurance companies would make her unable to be fair and impartial, but repeatedly affirmed that she could be unbiased. *Not once* did Juror 8 even imply she had a bias against insurance providers.

D. <u>XL/Sedgwick's objection to Juror 8 in the middle of voir dire.</u>

Before permitting counsel to voir dire the jury panel, the trial judge held a sidebar to discuss, as an interim measure, possible cause strikes. (*Id.* 88:14-92:9) The judge identified four potential jurors she believed had made an obvious record for cause—one of whom the parties agreed to strike for cause, and the others the court ordered to be further questioned

by the attorneys separate from the other potential jurors. (*Id.*) The judge then asked if there were any other motions for cause. (90:22-23)

> MR. HOMMEL: Not until we have completed voir dire.
> THE COURT: This is keeping as we go, anything that is obvious?
> MR. HOMMEL: Number seven [the claims manager] is obvious. I think.
> THE COURT: I don't think so.
> MR. HOMMEL: Okay.
> THE COURT: But you are making the motion. What is the defense' position on number seven?
> MS. GRIMES: We are going to keep her.
> THE COURT: Okay.
> MS. GRIMES: Juror number eight as a vocation advocate. She should be advocating.
> THE COURT: You are making a motion, Mr. Hommel, your response to the motion?
> MR. HOMMEL: I object. She said she could be fair.
> THE COURT: Okay. The objection is sustained. Anybody else? Meaning I am not removing your objection, she is staying. Let's be clear about our language. Okay.

(*Id.* 90:23-91:23) The judge did not indicate that either of these rulings were final and could not be re-urged after voir dire was completed. The judge then turned the proceedings over to the lawyers to conduct their voir dire questioning of the jury panel (92:11-13)

E. Juror 8's impartiality is cemented by defense counsel's voir dire.

In her portion of the voir dire, counsel for XL/Sedgwick turned to Juror 8:

> MS. GRIMES: Now I want to ask a few specific questions. Juror number eight, you had indicated that you are a patient advocate. And what I want to know and understand is what types of things would make you want to advocate for your patient?
> [JUROR 8]: So I only know like certain cases, you know, that a lot of times patient will need equipment to make them either more independent, reduce burden, whatever the reason may be. And sometimes it's just going to bat for them whenever initially they are told no, that they don't require that equipment. Such as it appears in cases a little—where people are a little bit more debilitated and don't know enough where someone needs a power wheelchair, and they are denied on it. And then going to bat with them to say, you know, this is the reason, more on the medical side.
> MS. GRIMES: And when you say going to bat for them, do you—do you think that you could fairly judge information in front of you if you are provided a whole picture?
> [JUROR 8]: Yeah, and I think for every time that we do advocate for the patient, it's based on certain guidelines, and they have to meet them in order to qualify for that piece of equipment is where I am coming from. So it is not just because I think so that they would benefit or, you know, it would be good for them, but because they actually require it, and it is based on the guidelines provided for them.

(148:10-149:12) After ascertaining that Juror 8 did not know the doctors listed in this case (149:13-20), defense counsel continued questioning Juror 8 about her patient advocacy:

> MS. GRIMES: And you mentioned that you would often apply guidelines trying to get this treatment approved. Would you be able to—would you advocate for a patient who did not meet those guidelines?
> {JUROR 8]: I wouldn't be able to recommend it if they don't meet certain, you know, like, if they are not—like as a physical therapist, we have balance. So we will say if somebody is at risk of falling all the time and getting future injuries, it's—the outcome measures that I provide, they'll indicate that professionally.
> **Ethically I cannot recommend that. I'm not going to be writing a letter of medical necessity for something that they don't need or have requirements for.**

(149:1-150:11)(emphasis added). Thus, to the extent there was any lingering concern that Juror 8 was biased toward patients, her testimony that she would only advocate according to the guidelines of medical necessity and ethically could not recommend for patients who did not meet those guidelines demonstrated that she could be objective when it came to patient advocacy.

F. <u>Defense counsel passes the panel without raising a motion for cause on Juror 8 based on the entire voir dire.</u>

After both counsel had completed their voir dire examinations, the judge asked if there were any remaining motions for cause. (*Id.* 156:18) At this point XL/Sedgwick's counsel did not affirm an ongoing motion for cause but stated that "Defendant passes the panel as well." (156:25)

The following jurors were then chosen for the jury: 2 (a clinical researcher assessing fraud in human drug trials (66:15-30)), 4 (a retired RN 67:1-6)), 5 (a medical assistant (67:17-19)), 6, (supervisor at a box factory (68:3-6), 7 (discussed above), 8 (discussed above), 9 (an RN (70:2-4)), 10 (a retired residential builder and developer (70:8-9)), 11 (a neurologist (70:13)) and 16 (a retired police officer (72:22-23)).[2]

III. Background related to XL/Sedgwick's motion attempting to preclude the Barker counsel from suggesting to the jury in closing argument specific damages amounts for the Barkers' non-economic losses.

After the jury was selected, the Barkers' counsel made an opening statement which concluded with the amount he expected to ask the jury to

[2] Potential Jurors 5 and 11 (Jurors 3 and 9) did not complete the trial for personal reasons. (5/5/22Tr. 4:6-9:6; 5/9/22Tr. 4:3-7).

award the Barkers for pain and suffering, emotional distress, and other general damages:

> [A]t the end of the trial I am going to ask you for damages for Jason. And you don't have to take this down now, $2,041,550. That is—and I will tell you exactly how to compute that. And for Jessica…I mean Veronica, I'm going to ask for $783,012. I am going to show you exactly how I am going to compute that, too.

(5/4/22Tr. 228:12-18). The next day XL/Sedgwick's counsel complained to the trial court that WL/Sedgwick had not received any calculations or computations for "the $ 3 million demand that [the Barkers] had for general damages." (5/5/20Tr. 9:14-13:21) The Barkers' counsel advised that his calculations would be per diem arguments based upon the admitted evidence. He further pointed out that:

> [t]he purpose of disclosure is to notify them of any documents or evidence or calculations that they can dispute or look up or work into something. But general damages aren't subject to precise calculations. And anything I come up with, they are going to be free to reject. He is going to be free to say it's too much, it's crazy. They are just arguments in closing arguments.

(*Id.* 10:15-23) After further colloquy, the trial court requested that XL/Sedgwick object in writing if they wished to preclude Barkers' counsel's per diem arguments. (*Id.* 12:20-21)

A. XL/Sedgwick's Motion to Preclude and the Barkers' Response.

XL/Sedgwick subsequently filed a Motion to Preclude any Computation or Calculation of Damages Presentation ("Motion to Preclude") (R.283) asserting the Barkers had "refus[ed] to provide any type of calculation in discovery due to alleged difficulty in arriving at a computation or calculation" and seeking preclusion under ARCP Rule 37(c)(1). (*Id.*, 2) XL/Sedgwick acknowledged that the Barkers had provided XL/Sedgwick with an estimate of $3 million for Mr. Barker's general damages from permanent radiculopathy. But, XL/Sedgwick argued, Plaintiffs had not provided a "computation". (*Id.* 5) XL/Sedgwick cited *Montana Ranch Homeowners Association v. Beaith*, 2020 WL 3542135 (Ariz. Ct. App. June 30, 2020), review denied (Feb. 16, 2021), an unpublished decision in which the Court precluded previously undisclosed *evidence* supporting various damages including emotional distress damages, but which does not directly address per diem calculations from already admitted evidence. (¶ 20). XL/Sedgwick argued that "[p]ursuant to Ari. R. Civ. P. 37(c)(1), the 'trial court has broad discretion in determining whether evidence has been properly disclosed and whether it should be admitted at trial,' and that decision 'will not be

disturbed on appeal absent an abuse of discretion.'" (APP091 citing *Solimeno v. Yonan*, 224 Ariz. 74, 77 ¶ 9 (App. 2010). XL/Sedgwick also stated that "[p]er diem type arguments have been permitted and are left to the sound discretion of the trial court, and that "[t]here remains an objection to such arguments due to the nature of such arguments inflaming the passion of the jury and being done improperly." (APP092)

The Barkers filed a response (APP093-096) pointing out that they had "fully disclosed all the evidence of injuries and hardship endured" (APP094) and noting that they had also "disclosed the approximate amount that would be claimed for general damages." (APP095), However, how counsel would argue the damages from the evidence was work product, and there was no requirement of disclosure. (*Id.*) Plaintiffs further noted that XL/Sedgwick suffered no prejudice because the "target amount" of $3 million has been provided. (APP096).

The court heard oral argument on the Motion to Preclude where XL/Sedgwick stated in part that "while general damages can be difficult to compute, and are therefore not generally required to be able to provide a computation, if you provide a number, that is the number you provide to

the jury. (APP189-190) But, XL/Sedgwick, asserted, if there is a computation available, the Barkers should have disclosed it. (APP 190)

The Barkers' counsel argued that all evidence supporting the consortium and general damages claims had been disclosed along with the $3 million computation, but that how counsel was going to argue in closing for that number from the evidence was based on his non-disclosable mental impressions. (APP190)

After hearing argument, the trial court ruled as follow:

> I've read the motion, I've read the response. I am denying the motion. You are free to argue that you don't find support in the evidence for it. But he is allowed to argue to the jury that for the damages that each one of them has suffered, they each has a certain number that they are requesting the jury to award, and that the total is three [million]. And you are free to argue there is no evidence that you believe that's been presented that could support that kind of damage award. It's an argument issue, it is not an evidentiary issue. So the motion is denied."

(APP191 1-12; R.333 1-2).

B. <u>Counsel for the Barkers, using a per diem argument, argues in closing for a combined award for the Barkers of just over $2,820,000 and punitive damages in a lesser amount.</u>

In closing argument, the Barkers' counsel walked the jury through a per diem analysis that averaged the amounts sought for Jason Barker's injuries, by type of damage (pain and suffering, emotional

distress, loss of enjoyment of life) on a daily basis. (5/13/22Tr. 34:2-38:2)

At the end of this analysis, the Barkers' counsel summarized:

> So, the totals for Jason, I revised these figures from opening and I recomputed. The total for Jason, we are suggesting is $1,976,840. And you are not bound by these numbers. You can make them more, you can make them less. I would say that it should not be less than 1.5 million for him. And not more than 3 million for him.

(*Id.* 38:3-9)

After going through a similar process of breaking down the damages request for Veronica Barker's by type of damage (loss of consortium and emotional distress) and averaged in amounts per day, the Barkers' counsel asked the jury for $843,582.50 for Veronica. (*Id.* 39:18-19)

The Barkers' counsel then turned to argument on punitive damages:

> If you want to award punitive damages, make it an amount that will stick. Make it an amount they will have to pay that does not result in all kinds of arguing, even though—given this, you know, serious consideration. But I am asking you if you award punitive damages, not to award one cent more than the totals of their damages together. That's all. And their two damages that I gave you together come to $2,820,422.50. Do not award—if you accept my numbers—do not award more than that on punitive damages.

(*Id.* 39:22-40:13). XL/Sedgwick raised no objection to the Barkers' counsel's closing argument.

C. XL/Sedgwick's counsel tells the jury the case is about whether his clients' decisions caused the Barkers $3 million in damages, but focuses only on arguing no causation and does not challenge either the Barkers' counsel's per diem analysis or that the Barkers suffered $3 million in damages.

XL/Sedgwick's counsel then presented his closing statement. He did not attack—or even address—the Barkers' per diem argument. In fact, he characterized the case as being about a *higher* figure:

> This case is about whether that investigation, their decisions, resulted **in causing Mr. Barker $3 million in damages, and Mrs. Barker.** And whether their intentional—whether their conduct was intentional."

(*Id.* 45:5-9) (emphasis added). Further he did not challenge either the $3 million or the $1,976,840 for Jason and $843,582.50 for Veronica for a total of $2,820,422.50. (*Id.*, 44:6-63:23) Instead, he relied completely on the argument that the Barkers damages were not caused by XL/Sedgwick's delay:

> The measure of damages, pain and suffering damages. No one disputes that as a result of the motor vehicle accident, the result of his injury, that Mr. Barker has pain and suffering. No one disputes that as a result of that it was an incredible hardship on their family. What is in dispute is that our four-month investigation is the cause of that. And our dispute is that there is no evidence of that in the exhibits or in the testimony that has been presented."

(*Id.* 56:20-57:4)

D. The jury returns a verdict in favor of the Barkers of $3 million in compensatory damages and $2.8 million in punitive damages.

At 11:45 a.m. the jury retired to consider their verdicts (R. 329, 2), recessed for lunch for a little over an hour (*Id.*) and at 3:37, the jury returned with a *unanimous* verdict in favor of Jason Barker for $2 million, Veronica Barker for $1 million and punitive damages against XL/Sedgwick of $2.8 million. (*Id.*, 3).

STATEMENT OF THE ISSUES

1. Did the superior court commit reversible error and abuse its discretion by denying XL/Sedgwick's motion to strike Juror 8 for cause?
2. Did the superior court commit reversible error and abuse its discretion in its ruling denying XL/Sedgwick's Motion to Preclude the Barkers' per diem arguments on general personal injury damages in closing argument?

ARGUMENT

I. The superior court's ruling on Juror 8 should be affirmed.

On the matter of seating Juror 8 on the jury, XL/Sedgwick frame the issue as whether the superior court violated ARCP Rule 47(c)(5) in its voir dire questioning of that potential juror. (O.B., 18, 20-24)

A. XL/Sedgwick waived their objection to the voir dire questioning of Juror 8 by not raising it with the trial judge.

XL/Sedgwick raised no objection to the trial court's questioning of Juror 8 before the jury was selected. (*See* 5/4/2022Tr. 8:20-161:16) XL/Sedgwick's only objection regarding Juror 8-- "as a vocation advocate" (*Id.* 91:11-15)—was based on Juror 8's responses, not on the judge's manner of questioning.

Had XL/Sedgwick raised with the trial judge the criticisms now leveled on appeal, the judge could have considered whether to modify her questioning before the jury was empaneled and the entire trial played out. *See* *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994)(trial court and opposing counsel should have the chance to correct asserted defects before appeal). Because XL/Sedgwick did not do so, the issue is therefore waived. *BMO Harris N.A. v. Espiau*, 251 Ariz. 588, 594 ¶ 25 (App. 2021).

Further, while an issue not raised with the trial court may still be reviewed for fundamental error, *Ruben M. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 236, 239 ¶ 15 (App. 2012), such review is unavailable here. Fundamental error review is waived where an appellant fails to identify it as an applicable standard of review and/or fails to develop an argument that fundamental error has occurred. *State v. Vargas,* 249 Ariz. 186, 191 ¶ 22 (2020). Here, XL/Sedgwick neither identified fundamental error as a standard of review nor argued that the superior court committed fundamental error in denying the motion to strike Juror 8. Fundamental error review is therefore waived as well.

B. Waiver aside, the superior court did not violate Rule 47(c)(3) or abuse its discretion in conducting the voir dire of Juror 8.

Waiver aside, XL/Sedgwick fail to show that the superior court violated ARCP Rule 47 or otherwise abused its discretion in voir dire questioning of Juror 8.

XL/Sedgwick first asserts the superior court violated Rule 47(c)(5)(A)'s requirement that the court "thoroughly question the jury," a contention without merit.

1. *The superior court's management of voir dire is reviewed for an abuse of discretion.*

The superior court's determination of the scope of voir dire is reviewed for an abuse of discretion. *State v. Hulsey*, 243 Ariz. 367, 380, ¶ 37 (2018). Whether a specific voir dire question is allowable under Arizona law is a question reviewed *de novo*. *State v. Thompson,* 252 Ariz. 279, 293, ¶ 45 (2022).

2. *The superior court adequately questioned the jury panel to ensure qualified, fair, and impartial prospective jurors as required by ARCP Rule 47.*

In voir dire, the trial court "must thoroughly question the jury panel to ensure that prospective jurors are qualified, fair, and impartial." ARCP Rule 47(c)(5)(A). Here, the judge's voir dire (including explanations to the jury panel, questions to potential jurors and sidebars with counsel) takes over 80 pages of transcript before the trial judge turned the questioning over to the attorneys. (8:20-92:19) XL/Sedgwick do not contend the trial court's overall questioning of the jury panel fell short of Rule 47(c)(5)(A)'s requirements.

3. *The superior court neither "rehabilitated" Juror 8 – who required no rehabilitation – nor violated ARCP Rule 47 in voir dire questioning.*

Instead, XL/Sedgwick's criticism of the trial court is on a specific line of questioning of one juror (Juror 8). (O.B. 23-25). They assert the court's

questioning of Juror 8 was too brief, contend the court "rehabilitated" Juror 8 (O.B. 18), and characterize the questioning as an "aggressive move to beat down any suggestion of bias that was essentially assertive—expressing the wish of the trial judge that this juror recant…." (O.B. 24) XL/Sedgwick's contention is meritless.

a. Contrary to XL/Sedgwick assertions, Juror 8 never said "she could not possibly be fair and impartial."

XL/Sedgwick begins their argument with the false premise that Juror 8 said she was biased. Contrary to the Opening Brief, Juror 8 never "warned the Superior Court she could not be fair and impartial in this bad faith workers' compensation case" (O.B., 1), never "forthrightly and candidly told the [s]uperior [c]ourt she could not be fair and impartial" (OB 16), and never affirmed "she could not possibly be fair and impartial…." (O.B. 18).

b. Juror 8 did not affirm bias by raising her hand in response to the judge's question about bias.

Contrary to WL/Sedgwick's contention, Juror 8's act of raising her hand in response to the trial judge's question of bias was not an "affirmation that she could not be fair and impartial" (O.B., 7). Just minutes before this question was asked, the judge had instructed the

potential jurors to speak up if they had anything relevant to say in response to a question. (5/4/2022Tr. 12:25-13:10) In the context of that instruction, raising a hand meant a prospective juror thought they had something relevant to say, and cannot be interpreted by itself as an affirmation of bias.

Other prospective juror's responses to the judge's question confirm their understanding that their hand-raise was to provide relevant information, not to confirm bias. Both Juror 24 (the insurance IT technician) and Juror 7 (the worker's compensation insurance company claims manager XL/Sedgwick argued successfully to keep on the jury) raised their hands to provide relevant information although both testified they could be fair and impartial. (5/4/2022Tr. 52:21-54:21; 58:16-61:2). The record does not support that Juror 8's hand-raise, by itself, was an admission of bias.

c. *Juror 8's initial responses were equivocal, not an affirmation of bias.*

Juror 8's response to the judge's question about bias also bears no resemblance to the full-throated affirmation of bias suggested in XL/Sedgwick's Opening Brief. Her disclosure that she was a physical

therapist (*Id.* 48:6-10) was not a clear statement of bias. Her statement that she often goes to bat for patients with insurance companies (*Id.* 48:17-22), while relevant, is also not an assertion of bias. None of Juror 8's other responses to the judge's questions even remotely indicated bias. (*Id.* 48:6-51:3)

4. The trial judge did not browbeat Juror 8 into an agreement of non-bias.

XL/Sedgwick characterization of the trial judge's questioning of Juror 8 as being "as short as possible to beat down the suggestion from Juror Eight herself that she was biased" (O.B. 24) is inaccurate and unfair to the judge.

The judge did not browbeat Juror 8. Rather, she walked Juror 8 through the process of analyzing whether her job experience being a patient advocate would make her biased or unfair. She probed Juror 8 to get an understanding of Juror 8's position as a physical therapist. Having established that Juror 8 wrote "letters of medical necessity" and fought for patients, she asked whether Juror 8 could leave those experiences aside and decide the case based on the evidence at trial.

After walking Juror 8 through the applicable standards for being fair and impartial and deciding the case on the evidence, the judge essentially re-asked the question initially posed to the panel—could she be fair and impartial? The judge did not pressure Juror 8 to say she was unbiased, nor asked Juror 8 questions designed to lead Juror 8 to say she could be unbiased. If Juror 8 had sufficiently strong negative feelings against insurance companies that would prevent her from being fair, she had the chance to say so. But Juror 8 said nothing of the kind.

The judge gave Juror 8 yet another opportunity to say she could not be fair and impartial after Juror 8 said "I think so, yes" in response to the judge's question about her impartiality. Because the "I think so" might suggest equivocation, the judge told Juror 8 she needed to "dive a little deeper". (*Id.* 49:22-50:6) The judge asked Juror 8 "to reflect for a minute" and to tell the court if she could decide the case just based on the evidence presented at trial, not on what happens or happened outside the courtroom. (*Id.* 50:7-19). This was another chance for Juror 8 to say that her experiences outside the courtroom would interfere with confining her decision to the evidence. She did not. Instead, Juror 8 affirmed she could

decide fairly and impartially based on the law the judge provided and the facts as she found them in the case. (*Id.* 50:7-51:3)

5. XL/Sedgwick's assertions that the judge's interrogation was too short are without basis.

In an attempt to argue the court's voir dire violated Rule 47(c)(5)(A)'s requirement that the jury be "thoroughly" questioned, XL/Sedgwick characterize the trial court's voir dire of Juror 8 as too brief. (O.B. 23-25) But the court asked multiple questions of Juror 8 on this issue. (5/4/2022Tr. 48:6-51:3) Other than to repeatedly assert that the questioning was too short, XL/Sedgwick provide no basis to support the contention that the court's questioning of Juror 8 should have been longer.

XL/Sedgwick also fault the trial judge for failing to ask such questions as how long Juror 8 had worked, for how many patients and her feelings about her work. (O.B. 24) But in the written juror questions, Juror 8 was asked how long she had worked (6 months at her current employment, 3 years in the field)(5/4/2022Tr. 69:19-22). And, as set forth below, to the extent XL/Sedgwick found the trial judge's questioning insufficient, their counsel was permitted every opportunity to delve more fully into Juror 8's background.

6. To the extent XL/Sedgwick fault the trial judge for not asking extended questions, XL/Sedgwick were given ample opportunity to question Juror 8 on voir dire.

Complying with Rule 47(c)(5)(A), the trial court permitted the parties' counsel to conduct their own voir dire. (5/4/2022Tr. 92:14-142:1; 145:4-153:24)) She placed no time limitation on the attorney voir dire. (*Id.*)

XL/Sedgwick's counsel did, in fact, further question Juror 8 (*Id.* 148:9-150:11) whose further answers, as discussed below, only confirmed her impartiality. Thus, to the extent XL/Sedgwick did not believe the trial judge's questioning sufficiently thorough, since XL/Sedgwick had their shot—it is harmless error. *See* ARCP Rule 61.

7. The trial court did not violate the practices suggested in the comment to Rule 47(c)(5)'s comment, which, in any event is prescriptive, not mandatory.

XL/Sedgwick further contends that the trial court's examination of Juror 8 violates the commentary to the 2022 Amendment to Rule 47(c)(5). That Comment states:

> When *feasible*, the court *should* permit liberal and comprehensive examination by the parties, refrain from imposing inflexible time limits, and use open-ended questions that elicit prospective juror's views narratively. The court *should* refrain from attempting to rehabilitate prospective jurors by asking leading, conclusory questions that encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law.

(emphasis added). The Comment is taken from more extensive commentary language proposed by the Statewide Jury Selection Workgroup, a Workgroup of the Taskforce on Jury Data Collection, Practices, and Procedures ("SJSW) in their November 1, 2021 Report and Recommendations ("the SJSW Report").[3]

XL/Sedgwick incorrectly argues that the suggestions in the commentary regarding voir dire should be read as requirements of Rule 47 itself. (O.B. 24-25) First, Rule 47(c)(5) clearly states what the court "must" do in voir dire (oral questions, thoroughly questioning the jury panel, and allowing the parties sufficient time to conduct voir dire if requested). Rule 47(c)(5)(A). The comment, on the other hand, states what a court "should" do (where feasible ask open-ended questions and avoid leading, conclusory questions suggesting to the juror that the juror can set bias aside). In adopting this comment, the Arizona Supreme Court certainly knew the difference between "must" and "should". If avoiding leading, conclusory questions was absolutely prohibited so that any use would be

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[2] The Arizona Supreme Court rejected some of the language proposed by the SJSW in adopting this rule. Compare 2022 Amendment to Rule 47(c)(5) to the proposed 2021 Amendment to Rule 47(c)(5) (SWSJ Report, 30).

reversible error, the Court would have used "must" in the comment. Moreover, it is unlikely that the Court would have relegated such a requirement to the comments.

The SJSW itself frames the discouragement of the use of leading, conclusory questions to rehabilitate a juror as a "best practice" (SJSW Report, 3-4), and states that the Comment "encourages" courts not to rehabilitate potential jurors in this way. (*Id.* 13) The terms "should," "best practice," and "encourage" all suggest that the trial court in its discretion is not required to ask only open-ended questions or even non-leading questions.[4]

In their discussion of the SJSW Report (O.B. 20-23), XL/Sedgwick place particular emphasis on the research and conclusions contained in Jessica M. Salerno's "The Impact of Minimal Versus Extended Voir dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases", 45

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[4] *Herman v. City of Tucson*, 197 Ariz. 430, 434 (App. 1999) and *State v. Hansen*,215 Ariz. 287, 289 (2007), cited by XL/Sedgwick are inapposite. Those cases involve the construction of the language of statutes and rules so that all are given effect. In this case, the interpretation involves a Comment, a section that by its very nature is given a subordinate position to the language of the rule itself.

Law & Hum. Behav. 336 (2021)("the Salerno Study"). XL/Sedgwick cite the Salerno Study's conclusions regarding how mock jurors reacted to a mock judge asking whether they could set aside their biases. (O.B. 21) But while the SJSW recommended that the Salerno Study be specifically cited in the comment to provide further context (SJSW Report, 30), the Arizona Supreme Court deleted that citation from the final comment. This deletion suggests that the Arizona Supreme Court did not intend to adopt all of the findings and conclusions of this one study into the interpretation of Rule 47.

In the end, the Supreme Court (in a revision to Rule 47(c)(5)(B) not contained in the SJSW recommendations) leaves to the discretion of the trial court the nature of the questioning. Rule 47(c)(5)(B) states in part that "[t]he court retains the discretion to manage voir dire, including to preclude improper, excessive, or abusive questioning." In providing the Comment to the Rule, the Supreme Court has not removed the trial court's discretion in how voir dire is conducted but has provided encouragement as to a best practice. XL/Sedgwick argument on this issue fails.

C. XL/Sedgwick have also failed to meet their burden of proof that Juror 8 was biased.

In addition to criticizing the superior court's voir dire questioning, XL/Sedgwick argue the superior court abused its discretion by seating Juror 8. (O.B. 26-28) A party may challenge a prospective juror for cause on various grounds including that "the prospective juror has-by words or actions-shown bias or prejudice for or against any party or otherwise demonstrated their unfitness to serve as a juror." ARCP Rule 47(d)(1). Contrary to XL/Sedgwick's suggestion that the obligation is on the trial court to provide "substantial evidence" that Juror 8 was not biased (O.B. 27), XL/Sedgwick, as the party challenging Juror 8 for cause, "has the burden to establish by a preponderance of the evidence that the juror cannot render a fair and impartial verdict." Rule 47(d)(3). That rule further provides that "[i]n making its determination, the court must consider the totality of a prospective juror's conduct and answers given during voir dire as stated on the record by the trial court." *Id.* "Unless there are objective indications of jurors' prejudice, we will not presume its existence." *State v. Tison,* 129 Ariz. 526, 535 (1981).

1. *A trial court's ruling denying a motion to strike a juror is reviewed for an abuse of discretion.*

This Court reviews a trial court's denial of a motion to strike a juror under an abuse of discretion standard. *State v. Acuna Valenzuela*, 245 Ariz. 197, 209, ¶¶ 20-21(2018).

2. *XL/Sedgwick waived their argument that Juror 8 should have been struck for cause by failing to challenge her at the end of voir dire and by failing to raise an adequate objection during the voir dire proceedings.*

While XL/Sedgwick objected to Juror 8 in the middle of voir dire (5/4/2022Tr. 91:11-19), they did not renew their objection to Juror 8 after the additional voir dire questioning (including that of Juror 8) was completed. (*Id.*, 156:18-25). In fact, when the trial court asked if there were any remaining motions for cause, XL/Sedgwick's counsel "passed the panel." (*Id.* 156:19-25).

A challenge to a potential juror for cause is waived if not timely made. *State v. Rubio*, 219 Ariz. 177, 180, ¶ 8 (App. 2008)("[E]ven if a prospective juror's answers show he or she cannot be fair and impartial, the defendant waives any error by failing to timely challenge that juror.") Rule 47(d)(3) requires that a court in determining a challenge to a juror for cause "*must* consider *the totality* of a prospective juror's conduct and answers

given during voir dire...." (emphasis added) *See also*, *State v. Naranjo*, 234 Ariz. 233, 240, ¶ 17 (2014)(applying same standard in criminal cases) Therefore, it is incumbent on a party seeking to challenge a juror for cause to raise the objection at the conclusion of voir dire when the court could consider the totality of the potential juror's conduct and answers.

XL/Sedgwick's objection to Juror 8 during the voir dire process, before attorney voir dire had taken place, was premature. At that juncture, the court could not have made a determination on the challenge for cause that complied with Rule 47(d)(3)'s requirement that the totality of the jurors answers and conduct be considered because voir dire had not been completed.

Here, at the conclusion of voir dire, when the court could have considered the totality of Juror 8's answers and conduct, XL/Sedgwick's counsel passed the panel without raising an objection to Juror 8. Because XL/Sedgwick failed to raise a timely objection to Juror 8 and passed the panel, that objection is waived. [5]

[5] *State v. Shone*, 190 Ariz. 113, 116 (App. 1997), where this Court found that no waiver occurred when a party objected to a potential juror for cause during voir dire and then passed the panel, is distinguishable. In that case, objections for cause were made at the conclusion of voir dire, not while

3. *Regardless of waiver, XL/Sedgwick fails to show that the trial court abused its discretion in denying the motion to strike Juror 8 for cause under the deferential standard applied to the trial court's determination of fairness and impartiality of potential jurors.*

"The trial judge has the power to decide whether a venire person's view would actually impair his ability to apply the law." *State v. Jones*, 197 Ariz. 290, 302 ¶ 24 (2000). *See also* *State v. Glassel*, 211 Ariz. 33, 45, ¶ 37 (2005). "For this reason, deference must be paid to the trial judge who see and hears the juror." *Jones,* 197 Ariz. at 302, ¶ 24 (citations and internal quotation marks omitted). "In assessing a potential juror's fairness and impartiality, the trial court has the best opportunity to observe prospective jurors and thereby judge the credibility of each." *State v. Eddington*, 226 Ariz. 72, 75-76 ¶ 5 (App. 2010), *aff'd,* 228 Ariz. 361, ¶ 5 (2011). Indeed, the United States Supreme Court has stated that the trial court's determination of bias in jury selection is entitled to "special deference". *Patton v. Yount*, 467 U.S. 1025, 1038 (1984). In *Patton*, the Court also noted that it is not unusual for potential jurors in voir dire to give "ambiguous and at times

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there was still voir dire questioning continuing as in the present case. *Id.* And, unlike this case, counsel in that case was not permitted to further voir dire a potential juror who had given reason

contradictory" testimony. *Id.* at 1039. The Court further observed that potential jurors, unlike witnesses, have not been advised by lawyers prior to giving testimony and "thus cannot be expected invariably to express themselves carefully or even consistently." *Id.* "Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially." *Id*. In *Patton*, the Court upheld the trial court's denial of for-cause challenges to potential jurors who had given conflicting testimony, deferring to the trial judge's determination of which of the contradictory statements to credit. *Id.* at 1039-40. Even where the Court found ambiguity on the record because the potential juror's answers were simply "yes", the Court stated: "It is here that the federal court's deference must operate, for while the cold record arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty." *Id*. at 1040. *See also* *State v. Cisneros,* 2019 WL 2513407 at * 3, mem. decision (Ariz. Ct. App. June 18, 2019)(cited for persuasive purposes only pursuant to Ariz. R. Sup. Ct. Rule 111(c)).

Thus, in deference to the trial court's superior position to judge credibility, "[i]f a potential juror ultimately assures the trial judge that she

can be fair, it is not error to refuse to strike her". *State v. Sexton*, 163 Ariz. 301, 302-03 (App. 1989). *See also*, *State v. Payne*, 233 Ariz. 484, 499 ¶ 13 (2013); *State v. Purcell*, 199 Ariz. 319, 323 ¶ 8 (App. 2001).

Here, XL/Sedgwick's challenge to Juror 8 was not sufficient to establish by a preponderance of the evidence that Juror 8 could not render a fair and impartial verdict. Rule 47(d)(3). After having been instructed to provide any information to the court if there was any question in the potential juror's mind about an issue, Juror 8 raised her hand to tell the court about her advocacy for patients as a physical therapist. She never stated she was biased and affirmed she could be fair and impartial. The superior court did not err in refusing to strike Juror 8 for cause. *State v. Sexton*, 163 Ariz. at 302-303.

II. The superior court's denial of XL/Sedgwick's motion to preclude the Barkers' counsel from making a per diem argument for general damages was not reversible error.

XL/Sedgwick's second issue present is whether the superior court erred by allowing the Barkers' counsel to advocate per diem illustrations of general damages in closing argument. Like their argument regarding Juror 8, this argument is without merit and the superior court's ruling should be affirmed.

A. This Court reviews *de novo* whether a disclosure obligation exists but defers to the superior court's discretion on whether proper disclosure has been made and what can be admitted at trial.

"Whether a disclosure obligation exists in the first instance is a question of law that we review *de novo*." *Solimeno v. Yonan*, 224 Ariz. 74, 77, ¶ 9 (App. 2010). If such an obligation exists, "a trial court has broad discretion in determining whether evidence has been properly disclosed and whether it should be admitted at trial." *Id.* "Trial judges are better able than appellate courts to decide if a disclosure violation has occurred in the context of a given case and the practical effect of any non-disclosure." *Id.* The superior court has broad discretion in ruling on matters of disclosure and discovery which this Court will not overturn absent an abuse of discretion. *Marquez v. Ortega*, 231 Ariz. 437, 441 ¶ 14 (App. 2013).

B. The Barker's full disclosure of the evidence supporting their damages claim and their disclosure of $3 million general damages amount satisfies the sole purpose of Rule 26.1—to give the parties a reasonable opportunity to prepare for settlement or trial.

XL/Sedgwick have not disputed—either in the superior court or on appeal—that the Barkers gave full disclosure of the evidence supporting their claims for general damages. XL/Sedgwick also acknowledge that the

Barkers disclosed their $3 million estimate for those damages. (O.B. 5) Thus, it is undisputed that for purposes of settlement and trial, XL/Sedgwick had disclosure of both the evidence and the estimated amount of the general damages the Barkers would seek at trial. This was sufficient information for XL/Sedgwick to prepare for both settlement and trial.

"The disclosure rules are designed to provide parties 'a reasonable opportunity to prepare for trial or settlement—nothing more, nothing less.'" *Zimmerman v. Shakman*, 204 Ariz. 231, ¶ 13 (App. 2003), quoting *Bryan v. Riddel*, 178 Ariz. 472, 477 (1994). They are not intended as weapons for dismissal based on technicalities. *Id.*

XL/Sedgwick provides no authority requiring disclosure of the details of counsel's closing argument—the way counsel argues to the jury the inferences from the evidence presented at trial. The per diem argument the Barkers' counsel disclosed he would be making—and made—mainly averages the total damages by increments of time. The jury, which was provided with the actuarial instruction on the life expectancy of the Barkers (5/13/2022Tr. 15:24-16:15), was expected to take the Barkers' lifespans into account in determining general damages. Counsel's per diem arguments

assisted the jury in breaking down the total damages by time increments and by types of damage. But this is a matter of the details of counsel's argument.

In this case in particular, where all of the damages evidence was disclosed, where the damages requested were not only near the $3 million disclosed, but *less* than the disclosed amount, there was no violation of Rule 26.1 and XL/Sedgwick suffered no prejudice. The purpose of the rule was met; no more detail was required. *See Jones v. Cochise County*, 218 Ariz. 372, 378, ¶ 20 (App. 2008).

C. The superior court did not abuse its discretion by denying XL/Sedgwick's motion to preclude the Barkers' per diem arguments under ARCP Rule 37(c)(1).

XL/Sedgwick contends the superior court erred by denying their Motion to Preclude which would have prevented the Barkers' counsel's per diem argument at closing. (O.B. 13-15, 19, 32) In the Motion to Preclude, XL/Sedgwick argued ARCP Rule 37(c)(1) as the basis for preclusion. ARCP Rule 37(c)(1). (APP087) But the superior court properly denied the Motion to Preclude.

1. Rule 37(c)(1) is directed to the exclusion of untimely disclosed evidence absent a finding of good cause or no prejudice.

Rule 37(c)(1) states that "[u]nless the court specifically finds that such failure caused no prejudice or orders otherwise for good cause, a party who fails to timely disclose information, a witness, or a document required by Rule 26.1 may not use the information, witness, or document *as evidence* at trial…." (Emphasis supplied).

2. Here XL/Sedgwick did not assert that the Barkers untimely disclosed any ***evidence*** *forming the basis of their damages claim.*

XL/Sedgwick's motion did not argue that the Barkers failed to timely disclose any evidence supporting their damages claim. (See APP86-92, generally). It did not seek to prevent the Barkers' admission of evidence based on alleged non-disclosure. (*Id.*) Nor did it claim the Barkers failed to timely disclose any such evidence. (*Id.*) XL/Sedgwick instead focused on attempting to prevent the Barkers' counsel from drawing inferences from the evidence or making arguments to the jury regarding the amount of damages the Barkers were seeking.

3. *The Barkers' per diem references in closing arguments are not evidence; therefore, Rule 37(c)(1) does not apply.*

Attorney remarks, in opening statement or closing argument, are not evidence. *Quine v. Godwin,* 132 Ariz. 409, 412 (App. 1982). As noted by the California Supreme Court, this is specifically true of arguments for per diem calculations for pain and suffering: "Thus, an attorney who suggests that his client's damages for pain and suffering be calculated on a 'per diem' basis is not presenting evidence to the jury but is merely drawing an inference from the evidence given at the trial." *Beagle v. Vasold*, 417 P.2d 673, 678 (Cal. 1966).

4. *The superior court correctly determined that the per diem issue was one of argument, not evidence, and denied XL/Sedgwick's motion under Rule 37(c)(1).*

As XL/Sedgwick's Motion to Preclude sought to limit the Barkers' counsel's argument, not the admission of evidence, the trial court correctly held that this was "an argument issue, not an evidentiary issue." (APP191, 1-12) Because Rule 37(c)(1), by its terms, relates to the exclusion of evidence, it is not applicable, and does not form the basis for limitation of the Barkers' closing argument.

D. XL/Sedgwick failed to argue to the superior court that ARCP Rule 37(c)(4) precluded the Barkers' per diem argument, and the issue is therefore waived.

In the Opening Brief, XL/Sedgwick appear to agree with the Barkers' and the superior court's interpretation of Rule 37(c)(1) but now claim that the language of ARCP 37(c)(4) bars undisclosed materials and is not limited to the introduction of evidence. (O.B., 35) While XL/Sedgwick spend a page of the Opening Brief trying to tie Rule 37(c)(1) with Rule 37(c)(4), XL/Sedgwick are essentially arguing that the per diem arguments of the Barkers' counsel should have been barred by Rule 37(c)(4).

XL/Sedgwick, in their motion to exclude, did not argue to the superior court that Rule 37(c)(4) applies or provides a basis for limiting the Barkers' damages argument. (APP86-92) Because XL/Sedgwick did not give the superior court the opportunity to consider this argument, it is waived on appeal. *BMO Harris N.A. v. Espiau*, 251 Ariz. 588, 594 ¶ 25 (App. 2021). Similarly, XL/Sedgwick have not argued fundamental error on appeal and that issue is similarly waived and abandoned. *State v. Vargas*, 249 Ariz. 186, 191 ¶ 22 (2020).

E. XL/Sedgwick's argument also fails because Rule 26.1's computation of damages requirement should not be applied to counsel's closing argument advocacy in support of general damages not susceptible to precise computation.

1. *It is well settled that general damages are not susceptible to strict computation but are left to the discretion of the jury.*

"In an action for personal injuries, the law does not fix precise rules for the measure of [general] damages but leaves their assessment to a jury's good sense and unbiased judgment." *Meyer v. Ricklick*, 99 Ariz. 355, 358 (1966)(upholding jury verdict plaintiff alleged inadequate). Personal injury damages claims are "unique and generally not divisible or susceptible to relatively precise evaluation or calculation." *Voland v. Farmers Ins. Co. of Arizona*, 189 Ariz. 448, 452-53 (App. 1997). "Far from an exact science," this Court has stated that personal injury claims evaluation is often "no more precise than throwing darts at a board." *Id*.

Despite this well-recognized uncertainty in the calculation of general damages in personal injury cases, and despite undisputed full disclosure of all evidence to be submitted on the issue of damages, XL/Sedgwick here seek to rigidly impose on the Barkers the "computation of damages" disclosure provisions contained in Rule 26.1 for closing arguments that will

attempt to quantify an abstract concept. Such a requirement where damages are indisputably not subject to precise measurement is unrealistic and places plaintiffs in the impossible position of being required to specifically disclose a formula for general damages.

2. *General damages have not been held to the same computation standards as economic damages in other circumstances.*

This Court, on more than one occasion, has recognized that general damages are inherently difficult to compute. It has recognized this difficulty in determining whether the disclosure of damages requirement has been met in the context of a notice of claim:

> In a personal injury action, 'the plaintiff is seeking a lump-sum figure to compensate him for the injuries,' and that sum may encompass a variety of bases. Thus, it is not reasonable to interpret §12-821.01 to require either a precise accounting for each possible basis for damages, or expert reports supporting them. It instead requires only that the claimant provide the *facts* supporting a lump-sum award for those damages.

Jones v. Cochise County, 218 Ariz. 372, 378 (2008*M*)(citations omitted)(emphasis added).

In interpreting the computation of damages requirements of Rule 26.1, the same considerations for the "inherently flexible" nature of general damages should be applied. *See, Voland,* 189 Ariz. at 453. Here, there is no

dispute that the Barkers disclosed and provided all of the evidence supporting an award of general damages, and XL/Sedgwick do not argue that the $3 million dollars lump-sum amount the Barkers disclosed was unsupported by the evidence.

> 3. *While the issue of whether ARCP Rule 26.1 requires disclosure of arguments supporting the amount of general personal injury damages is a matter of first impression in Arizona, federal courts interpreting a similar provision in Fed. R. Civ. P. Rule 26(a)(1)(A)(iii) have held that such damages do not fall under the disclosure rule or are under a less strict standard of disclosure.*

No Arizona appellate court has interpreted Rule 26.1 to require disclosure of the arguments that may be made to convert the plaintiff's qualitative losses to quantitative values. Some federal courts have commented on this issue in the context of disclosure under Fed. R. Civ. P. Rule 26(a), federal counterpart to ARCP Rule 26.1 which contains similar language regarding disclosure of damages computations.[6] Generally, the

[66] That rule requires disclosure of "a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered…." Fed. R. Civ. P. Rule 26(a)(1)(A)(iii)

courts have either found that the computation of damages disclosure requirement does not apply to non-economic damages such as pain and suffering or that such that the disclosure requirement is less demanding than for calculations of economic loss.

A number of courts, including the only federal circuit court weighing in on the matter, have held, or suggested in dicta, that vague emotional distress damages are not amenable to the damages calculation requirements of Rule 26(a). *See Williams v. Trader Pub. Co.,* 218 F.3d 481, 486 n.3 (5th Cir. 2000)(dicta)("Since compensatory damages for emotional distress are necessarily vague and are generally considered a fact issue for the jury, they may not be amenable to the kind of calculation disclosure contemplated by Rule 26(a)(1)(C)."); *Cleveland v. Behemoth*, 2022 WL 5264494 (S.D. Cal., Oct. 6, 2022)(noting other courts reasoned computation not required for damages such as for emotional distress, and excusing failure to provide a computation because defendant was informed of plaintiff's intention to pursue this type of damages).

Other cases have recognized the difficulty of quantifying general damages, but have required plaintiffs to disclose all evidence supporting non-economic damages and to provide a range of damages or a damages

amount if they are going to assert one at trial. *See Heaton v. Gonzalez*, 2022 WL 843892 (D.N.M. March 22, 2022)(Evidence supporting non-economic damages must be disclosed and specific amounts not disclosed may be precluded); *McCrary v. Country Mutual Ins. Co.*, 2014 WL 1871891 (N.D. Okla. May 9, 2014)(requiring disclosure of evidence supporting request for emotional distress damages and a dollar range of amount plaintiff intended to request from the jury).

Here, there is no dispute that Barkers disclosed all evidence supporting their claims for non-economic damages. There is also no dispute that the Barkers provided the dollar range of $3 million. The amount requested was within this range. Further, the amount the Barkers requested was lower than the $3 million disclosed and lower than the $3 million amount referenced by XL/Sedgwick's own counsel in his closing statement. (Compare 5/13/2022Tr. 40:9-11 with 45:5-9) Under any of these interpretations, the Barkers did not violate the discovery rules on the issue of damages.

F. <u>XL/Sedgwick's arguments that the per diem argument is *per se* prejudicial are without merit.</u>

1. *XL/Sedgwick waived the argument that per diem arguments are prejudicial because they do not consider present value by not raising the issue with the superior court or arguing it to the jury.*

XL/Sedgwick argues on appeal that per diem arguments are prejudicial because "through their false precision, they crowd out the jury's own sense of valuation." (O.B. 33-34) In other words, XL/Sedgwick appears to be arguing for overturning *Hing v. Yousely*, 10 Ariz. App. 540 (1969). However, their Motion to Preclude did not raise this argument with the trial court as a basis to preclude the per diem argument. (See APP86-92, generally). While the Motion to Preclude pointed to certain instances when the per diem argument could be misused (APP92, and n.2), and made a passing reference that "[t]here remains an objection to such arguments due to the nature of such arguments inflaming the passion of the jury and being done improperly," no argument was made that *Hing* should be overruled and per diem arguments excluded entirely. This argument is therefore waived. *BMO Harris N.A.*, 251 Ariz. at 594 ¶ 25.

2. XL/Sedgwick's reliance on out-of-state cases preluding per diem arguments ignores controlling Arizona authority which permits such arguments.

XL/Sedgwick, citing only out-of-state authority, argue that "per diem arguments are…prejudicial because, through their false precision, they crowd out the jury's own sense of valuation." (O.B. 33-34). But XL/Sedgwick ignore the controlling authority from this Court that a counsel's use of a "per diem" approach to damages in final argument is "a matter properly left to the sound discretion of the trial court," and is not, *per se*, prejudicial reversible error. *Hing v. Youtsey*, 10 Ariz. App. 540, 544 (1969).

In *Hing*, this Court noted that the defendant in that case relied upon *Botta v. Brunner*. 138 A.2d 713 (N.J. 1958) "for the proposition that the use of an arithmetical per diem formula argument constituted prejudicial and reversible error." *Hing*, 10 Ariz. App. at 544. But this Court distinguished *Botta* on procedural grounds and observed that the majority of jurisdiction rejected the *Botta* rule. *Hing*, 10 Ariz. App. at 544.[7] This Court held that

[7] This observation is supported by analysis by the California Supreme Court in *Beagle v. Vasold*, 417 P.2d 673 (1966), which identified 21 jurisdictions in which the per diem argument was either permitted or

"the better rule is that such a matter is properly left to the sound discretion of the trial court." *Id.* (citations omitted).

Adopting the majority position, the California Supreme Court provided a more detailed defense for the majority position:

> We do not find the reasoning of Botta convincing. It is, of course, axiomatic that pain and suffering are difficult to measure in monetary terms. Yet the inescapable fact is that this is precisely what the jury is called upon to do. As one critic of Botta has noted: 'The plaintiff sues for money. The defendant defends against an award of money. The jury is limited to expressing its finding in terms of money. Nevertheless, the jury must be precluded from hearing any reference whatever to money. It must retire to the jury room In vacuo on this essential of the case where the unmentionable and magical conversion from broken bones to hard cash may then take place.'
>
> It is undeniable that the argument of counsel does not constitute evidence. However, it does not follow, as averred in Botta, that the suggestion of a sum for damages can have no foundation in the evidence. Indeed, it is necessarily inferred from observation of the plaintiff in the courtroom and from expert testimony regarding the nature of his injuries and their consequences. If the jury must infer from what it sees and hears at the trial that a certain amount of money is warranted as compensation for the plaintiff's pain and suffering, there is no justification for prohibiting counsel from making a similar deduction in argument. An attorney is permitted to discuss all reasonable inferences from the evidence. It would be paradoxical to hold that damages in totality are inferable from the evidence but that when this sum is divided into segments

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committed to the sound discretion of the trial court, and 11 jurisdictions where it was not. 417 P.2d at 677.

> representing days, months or years, the inference vanishes. (citations omitted)
>
> Thus, an attorney who suggests that his client's damages for pain and suffering be calculated on a 'per diem' basis is not presenting evidence to the jury but is merely drawing an inference from the evidence given at the trial. Of course, the trial court has the power and duty to contain argument within legitimate bounds and it may prevent the attorney from drawing inferences not warranted by the evidence. For example, counsel should not be permitted to argue future damages for pain and suffering on a 'per diem' basis where the evidence would not justify an inference that the plaintiff will suffer pain in the future.

Beagle v. Vasold, 65 Cal. 2d 166, 176–77, 417 P.2d 673, 678 (1966).

As to the cases cited by XL/Sedgwick, *Crum v. Ward*, 122 S.E. 2d 18, (W. Va. App. 1961) and *Caley v. Manicke*, 182 N.E.2d 206 (Ill. 1962) both follow the *Botta* rule, and both were decided before this Court rejected that analysis in *Hing*. *Miller v. Owens*, 184 Misc. 2d 570 (Sup. Ct. N.Y. County, N.Y. 2000) is a New York trial court opinion reflecting New York law where the minority position was adopted. *Miller*, 184 Misc. 2d at 571. These cases are inapposite. Here, the Barkers' counsel expressly told the jury they are not bound by the per diem references.

XL/Sedgwick fail to address the controlling Arizona precedent on this issue, let alone argue why this Court should abandon its *stare decisis*

previous decision to align with the majority of jurisdictions on the per diem issue.

G. Even if this Court found the superior court abused its discretion in its ruling on the per diem argument issue, any such error was harmless and not the basis for vacating the judgment and ordering a new trial.

Even if the superior court erred in its order regarding the Barkers' per diem argument, that error is not reversible unless it "affect[ed] any party's substantial rights." ARCP Rule 61. *See also*, *Ryan v. San Francisco Peaks Trucking Co., Inc.*, 228 Ariz. 42, 52, ¶ 39 (App. 2011); Ariz. Const. art. 6, § 27 ("No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.") Here, the verdict for damages of $3 million matched the amount mentioned to the jury by defense counsel in closing argument, not the lower $2,820,422.50 suggested by the Barker's counsel. (5/13/2022Tr. 45:5-9) Further, the $3 million amount matched the amount the Barkers had disclosed in discovery. (O.B. 5) And, XL/Sedgwick's counsel, other than indicating this was a $3 million case, did not argue damages or make any attempt to challenge the per diem arguments made by the Barkers' counsel. (5/13/2022Tr. 44:6-63:23) Further the jury, in

choosing the larger figure, showed that it was exercising its assessment of the Barkers' damages independent of the per diem argument.

Thus, the disclosure argument really only turns on how the Barkers' broke down that amount—both by time and type of injury—so that it could be more easily processed by the jury. Where XL/Sedgwick raised no challenge to the $3 million amount in closing, it cannot make any showing that its substantial rights were affected by the court's denial of the Motion to Preclude.

XL/Sedgwick's argument that the jury somehow used the Barkers' general damages argument as the basis for the $2.8 million punitive damages award is purely speculative and does not make sense. First, the amount awarded on punitive damages is not the exact amount the Barkers were seeking on compensatory damages—it is more than $20,000 less. Second, XL/Sedgwick does not explain how the jury could have been so confused as to use arguments for compensatory damages as the basis for a punitive damages award. Third, it is more likely that the jury heeded the request of the Barkers' counsel in closing argument to make any punitive damages award less than the compensatory damages award.

H. If this Court orders a retrial, it should be limited to a trial on the amount of general damages and punitive damages.

XL/Sedgwick assert that "fairness and logic demand reversal" based on the error they assert the superior court committed by permitting Plaintiffs' argument on the general damages. However, they provide no authority supporting their position as to any remand, nor do they specify whether they seek reversal only of the general damages claim or also the punitive damages and attorney's fees awards, and if the latter, they provide no authority nor argument supporting their position.

Although Plaintiffs believe no basis exists for a remand of this case, if this Court determines to do so based upon the error asserted based on the damages arguments, the remand should be limited to the issue of general damages, and punitive damages.

A new trial can be granted limited to damages issues when liability and damages are not inextricably entwined and can be separated without prejudice to the parties. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 27, ¶ 15 (App. 2000). Here, the jury unanimously found liability. The only question raised here is whether the per diem argument had an effect on the damages award. There is no basis for retrying liability. Punitive damages

should be retried because their reasonableness is determined in part by their ratio to compensatory damages. *See, Nardelli v. Metropolitan Group Property and Cas. Ins. Co.*, 230 Ariz. 592, ¶¶ 95-96 (App. 2012).

NOTICE UNDER RULE 21(a)

Pursuant to ARCAP Rule 21(a), Plaintiffs state their intention to claim attorneys' fees incurred on appeal pursuant to A.R.S. § 12-341.01.

CONCLUSION

For the foregoing reasons, Plaintiffs Jason and Veronica Barker request that this Court affirm the judgment of the superior court in all respects and grant Plaintiffs their attorney's fees and costs on appeal pursuant to A.R.S. § 12-341.01 and ARCAP Rule 21(a).

RESPECTFULLY SUBMITTED this 4th day of April, 2023.

Robert J. Hommel (009725)
ROBERT J. HOMMEL, P.C.
10214 N. Tatum Blvd., Ste. A-900
Phoenix, Arizona 85028
(480) 778-0123

MARK J. DEPASQUALE P.C.

/s/ Mark J. DePasquale
Mark J. DePasquale SBN 012688
MARK J. DEPASQUALE, P.C.
3300 N. Central Ave., Suite 2070
Phoenix, AZ 85012
602-744-7777
mjd@markdepasquale.com

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1. This certificate of compliance concerns a brief, and is submitted under Rule 14(a)(5).

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3. The document to which this Certificate is attached does not exceed the word limited that is set by Rule 14.

/s/ Mark J. DePasquale

Mark J. DePasquale