

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

**TRACI CLAIMANT, wife of/and  
BRIAN CLAIMANT**

**CIVIL ACTION**

**VERSUS**

**NO.: 02-2289**

**JONES MOTOR CO., INC.  
WILLIAM DRIVER and  
PROTECTIVE INSURANCE COMPANY**

**SECTION: A(4)**

**PLAINTIFFS' MEMORANDUM IN OPPOSITION  
TO DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER  
OF LAW, NEW TRIAL AND, IN THE ALTERNATIVE,  
REMITTITUR**

**MAY IT PLEASE THE COURT:**

Defendants complaints of the following are without merit:

1. This court's denial of Defendants' Motion in Limine/Request for *Daubert* Hearing to Exclude the Testimony of Plaintiffs' Expert Toxicologist
2. The sufficiency of the evidence to support the jury's award of exemplary damages under La.R.S. 2315.4;
3. The amount of the jury's exemplary damage award;
4. The amount of the jury's general damage award; and
5. The amount of the jury's future medical expenses award.

**STATEMENT OF THE CASE**

This case is about Defendant Driver, a tractor-trailer driver who killed and permanently and severely injured people because he drove on Methadone (a Schedule II narcotic and controlled dangerous substance), after lying and falsifying documents to remain licensed, knowing it was illegal and hazardous to the traveling public, and an enabling employer who stood idly by despite obvious red flags.

## **STATEMENT OF FACTS**

### **I. The Accident**

On July 9, 2002 at about 8:30 a.m., Traci CLAIMANT was driving her co-worker and friend, (she called him “Mac”), to Baton Rouge to make sales calls for Abbott Laboratories. (Tr. 19-22) Mrs. CLAIMANT and her husband, Brian, had come to know Mac’s family and children over the years and visited them socially at their home. (Tr. 21-22) As they drove along, and Mac told Mrs. CLAIMANT about his upcoming family vacation, and his little girl’s first trip to the beach, they noticed traffic gradually slowing and stopping ahead. (Tr. 22-23) Visibility was fine despite a slight rain (Tr. 22), and Mrs. CLAIMANT gradually slowed for the traffic. (Tr. 23) Then came the fiery crash.

Simmons and Harris, two other motorists also struck by DRIVER’s rig, confirmed that visibility was unobscured, the slow-down was gradual and neither of them, nor the other surrounding cars had a problem slowing gradually to a safe stop. (Tr. 65, 73-74, 81) After slowing, Simmons saw DRIVER’s eighteen-wheeler “coming too fast” in his rearview mirror. Simmons “gunned it” and tried to change lanes, but was hit. (Tr. 65) The eighteen-wheeler did not slow down at all - “zero,” according to Simmons (Tr. 66), “plow[ing] into the traffic...going fast enough to ram through three or four cars” and then push his car twenty to thirty feet against the guardrail, according to Harris. (Tr. 82-83)

When Harris exited his car, he saw Traci’s Jeep on fire (Tr. 83) with Traci inside “screaming, hollering, hysterical.” (Tr. 84) “I couldn’t just stand there and watch this woman

die in the car,” Harris testified. (Tr. 84) Harris tried, but could not break the window, while Traci continued screaming hysterically inside. (Tr. 84) Traci was trying to get out, trying to open the door on one side, then the other, but “she couldn’t get out, she was trapped.” (Tr. 85)

Through tears, Traci recalled “coming to” after hitting her head on the steering wheel, seeing flames and realizing her car was on fire, but unable to open a door. (Tr. 23) She leaned over the passenger side, where the fire was worst, and started shaking Mac saying, “Wake up. We have to get out,” but he never would. (Tr. 23-24) She noticed men trying, but unable to open her door, and when they went away, “I was terrified I was going to die in the car.” (Tr. 23-24) For what “seems like forever” she was trapped inside. (Tr. 24)

After Simmons and Harris tried unsuccessfully to get to Traci (Tr. 68, 84), Simmons got an iron pipe and threw it to Harris, who busted Traci’s window and pulled her through while the car continued burning. (Tr. 68, 85) Simmons and Harris then went back for Mac, who moaned and tried to get out. (Tr. 69, 86) However, the car “went boom, up in flames” with Mac trapped inside. (Tr. 87) Efforts to extinguish the flames were unsuccessful. (Tr. 69-70) Mac perished in the inferno, and Traci managed to escape with severe mental and physical injuries as described below.

DRIVER admitted to State Troopers on the scene that his visibility was not impaired. (Tr. 147) Police questioning less than four hours after the crash revealed that DRIVER could not recall whether his rig had slid straight or jack-knifed, nor the types or number of vehicles he had hit. (Tr. 146-147) The investigating trooper concluded that DRIVER was “inattentive” or “distracted,” and noted that DRIVER’s high vantage point from his rig gave him an even better view of the traffic ahead than other drivers who had clearly seen the traffic ahead and had plenty of time to slow down safely. (Tr. 148)<sup>1</sup> The State Police took and tested DRIVER’s urine. The

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<sup>1</sup>The court granted Defendants’ Motion in Limine, prohibiting evidence of the following additional strange post-accident behavior of DRIVER. Plaintiffs proffered the following: Simmons got the iron pipe used to break Traci’s window from DRIVER’s rig. When he went to the rig, DRIVER remained in the cab on the telephone. (Tr. 77, proffer) When Simmons got DRIVER out and requested something to use to break a window, Traci’s screaming

sample tested positive for Methadone. (Tr. 5, stipulation) Defendants stipulated to the accuracy and proper methodology of the State Police Crime Lab's positive result. (Tr. 5)

## **II. DRIVER's Drug History and Falsification of Records to Intentionally Illegally Operate Eighteen-Wheelers While Dependent On Methadone**

With thirty years' experience driving eighteen-wheelers (Tr. 101-102), DRIVER began working for Jones in January of 2001. (Tr. 81) DRIVER admitted at trial that he took Methadone on the day of the crash and was on Methadone at the time of the crash. (Tr. 105-107) As described in further detail below, federal law prohibits driving eighteen-wheelers on Methadone, a Schedule II narcotic and controlled dangerous substance. **DRIVER offered no explanation for his complete failure to slow his truck at trial.** However, the evidence established that DRIVER falsified documents to conceal his Methadone habit during two biannual medical examinations mandated by the U.S. Department of Transportation ("DOT medical exam") so that he could drive eighteen-wheelers illegally. The first exam was August 1, 2000. (Tr. 89) DRIVER knew that the purpose of the exam process was to determine whether he was medically qualified to safely operate eighteen-wheelers (Tr. 89), and that answering questions accurately on the written portion was important for the safety of the driving public. (Tr. 98) DRIVER admitted that "it would have been very important to tell the doctor [he] was taking [Methadone] so [he] could be safe on the road." (Tr. 91-92) Despite this understanding, on August 1, 2000, in response to the question: "Do you take prescription medication? List," DRIVER answered: "Tylenol #3 rarely for back injury." (Tr. 90-91; Exhibit 27, August 1, 2000 DOT medical exam form)<sup>2</sup> **In truth, however, DRIVER had been prescribed Methadone every month and had taken it every day for ten months since October of 1999.** (Tr. 91-94,

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could be heard. (Tr. 77, proffer) DRIVER gave Simmons the pipe and got back into his rig without offering any assistance. (Tr. 78, proffer) When Simmons returned to DRIVER's rig for a fire extinguisher, he had to get DRIVER back out of the cab, and DRIVER gave him the fire extinguisher, then got back into the cab without even asking why it was needed or saying anything. (Tr. 78, proffer) After successfully moving to exclude evidence of DRIVER's bizarre behavior, Defendants cry of lack of evidence of DRIVER's post-accident behavior is disingenuous. (Defendants' Post-Trial Memo., p. 6)

<sup>2</sup>DRIVER first denied that the form even requested disclosure of prescription medications, admitting this only after being confronted with the form. (Tr. 90-91)

97; Exhibit 17, pp. 110-111, DRIVER's VA Hospital records)<sup>3</sup> While DRIVER testified that he had not taken Tylenol #3 at all since October of 1999, that claim was suspect as well, given his multiple lies and false testimony. (Tr. 94, 97-98) DRIVER's incredible explanations for his failure to disclose his Methadone habit kept changing at trial until he finally admitted that he had no explanation of why "Tylenol #3" instead of Methadone appeared on the August 1, 2000 form. (Tr. 102)<sup>4</sup>

DRIVER repeated the DOT medical exam certification process on August 7, 2002, **less than one month after causing the fatal crash of July 9, 2002.** (Tr. 99) Once again, when asked to disclose medications on the exam form, DRIVER answered "Tylenol #3." (Tr. 100; Exhibit 28, August 7, 2002 DOT medical exam form) In truth, by then, DRIVER had been taking Methadone steadily every day for approximately two years and ten months. (Tr. 99-100) With complete lack of remorse, **DRIVER admitted that, despite knowing that the medical recertification process is important to protect the public from unfit drivers of eighteen-wheelers, he lied on this form even after causing this fatal crash because he wanted to keep driving eighteen-wheelers.** (Tr. 101-102)<sup>5</sup> His plan was to continue driving commercially on Methadone because "That's the only way I knew how to make a living." (Tr. 104)

DRIVER's claim that he was unaware that driving on Methadone was hazardous and

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<sup>3</sup>DRIVER further denied, then admitted only when confronted with his medical records that he had been taking Methadone at all as of the August 1, 2000 DOT medical exam. (Tr. 91-94)

<sup>4</sup>DRIVER first explained that putting Tylenol #3 was innocent "force of habit," because he had taken Tylenol #3 and #4 for pain since 1985 following back and knee surgeries, and had "almost" gotten addicted to Tylenol with Codeine, when doctors put him on Methadone. (Tr. 97)

In later testimony, DRIVER gave the jury a new, equally incredible explanation:

"Q: When you filled out that form or signed that form with the information it contained, faulty information that you had taken Tylenol #3 and not Methadone, are you telling us you forgot for the last ten months you were being prescribed nothing but Methadone?

A: I mean because I was in a hurry when I took the physical. I had a load ready to go and I just, I just wanted this [form] and wrote it out." (Tr. 98)

<sup>5</sup>"Q: After testing positive for Methadone in connection with the fatal accident, one month later you are out there asking to get recertified, and you know that this recertification process is important to protect the public safety from people unfit to drive 18-wheelers, correct? A: Yes, sir. Q: And at that point in time you lied and said I take Tylenol 3 and nothing else on your form, and you didn't say you take Methadone? A: Yes, sir. Q: Is that correct? A: Yes, sir. Q: You wanted to keep operating 18-wheelers, correct? A: Yes, sir, been doing it for over 30 years." (Tr. 101-102)

illegal (Tr. 102) lacked credibility. When DRIVER began working for Jones in January of 2001, Jones provided him with the Federal Motor Carrier Safety Regulations Pocketbook. (Tr. 102, 109; Exhibit 21, Federal Motor Carrier Safety Regulations Pocketbook by U.S. Department of Transportation Federal Motor Carrier Safety Administration) Presumably, as a 30-year veteran of commercial driving (Tr. 101-102), this was not a first. DRIVER signed a form acknowledging receipt of the safety handbook and agreeing to familiarize himself with those regulations. (Tr. 112-113; Exhibit 22) He understood that his agreement to become familiar with the safety regulations was important to his safety as a driver. (Tr. 113) He admitted that he had the safety handbook available to consult and knew that its purpose was for his reference to rules that may apply to him. (Tr. 102-103) However, DRIVER claimed that he did not bother looking at the rules involving driving while taking prescription medications. (Tr. 103)

The regulations contained in the safety handbook forbid commercial driving (and employers from permitting driving) while taking any controlled substance **except** pursuant to the instructions of a licensed physician “who has advised the driver that the substance will not adversely affect the driver’s ability to safely operate a commercial motor vehicle.” The instructions to the medical examiner clarify: “This exception does not apply to Methadone.” (Exhibit 21, excerpt from pocketbook p. 204, 40 CFR Section 382.213(a) and (b); p. 367, 40 CFR Section 391.41(b)(12), Section 391.43) DRIVER admitted that no doctor ever told him that Methadone would not affect his ability to safely drive a commercial motor vehicle. (Tr. 110) Thus, DRIVER’s safety handbook clearly informed him that he was disqualified from driving commercial motor vehicles. The safety handbook further informed DRIVER that even if a doctor for some reason had told him he could safely drive on Methadone, he would still have been disqualified.<sup>6</sup>

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<sup>6</sup>DRIVER admitted knowing that the safety handbook had an index to facilitate reference to regulations pertaining particularly to himself and admitted that his review of these regulations in court told him that he was not qualified to drive a commercial motor vehicle. (Tr. 111) While he denied ever reading these regulations prior to trial (Tr. 103, 111-112), the jury was certainly permitted to infer that DRIVER was lying (once again) and actually

DRIVER further admitted that he had received and read “most of” the package insert that came with his Methadone prescription from the pharmacist, but (conveniently) did not read the part that says: “Methadone may impair the mental and/or physical abilities required for the performance of potentially hazardous tasks such as driving a car or operating machinery.” (Tr. 111-112)<sup>7</sup>

The regulations also forbid employers having actual knowledge that a driver has used a controlled substance from permitting the driver to drive. (Exhibit 21, p. 204, 40 CFR Section 382.213(b)) An employer, like Jones, is permitted by the regulations to “require a driver to inform the employer of any therapeutic drug use.” (Exhibit 21, p. 204, 40 CFR Section 382.213(c)) However, the record contains no evidence that Jones made any further inquiry of DRIVER, despite his disclosure of Tylenol #3 with Codeine on his August 2000 and 2002 DOT medical exam forms obviously warranting such an inquiry. Had Jones made the inquiry, and had DRIVER’s prior failure to disclose Methadone been innocent as defendants claim, the inquiry would have revealed his Methadone habit, and he would not have been driving an eighteen-wheeler under the influence of Methadone on July 9, 2002.

### **III. Expert Testimony Established That Methadone Impaired DRIVER’s Driving and Was a Contributing Cause of the Crash.**

Claimant Toxicologist has been a highly-credentialed Professor of Toxicology in the Department of Psychiatry at the LSU Medical School in Shreveport for approximately twenty years, where she teaches medical students toxicology and pharmacology. (Tr. 118-119)<sup>8</sup>

knew the regulations disqualified him, especially in light of his inability to explain his failure to disclose his Methadone habit on the August 1, 2000 DOT medical exam form, his admission that he lied when he failed to disclose it again on his August 7, 2002 form and his unwillingness to testify truthfully until confronted with undeniable records. The jury apparently drew this obvious inference and concluded that DRIVER intentionally lied on both forms, **knowing** that his Methadone habit disqualified him for safety reasons, but coldly determined to keep driving.

<sup>7</sup>The testimony of toxicologist and pharmacologist set forth in more detail later in this memorandum, establishes that the package insert contained that warning. (Tr. 125-128)

<sup>8</sup>Dr. Claimant Toxicologist has worked in the fields of toxicology and pharmacology at a post-graduate level since 1970, having worked for six years prior in the U.S. Air Force Reserve toxicology lab. (Tr. 119) Defendants stipulated to Dr. Claimant Toxicologist’s expertise in the fields of toxicology and pharmacology and to her extensive professional background as set forth in her *curriculum vitae*, introduced as Exhibit 41. Dr. Claimant Toxicologist explained that pharmacology is the science of how drugs work and finding the optimal dose for clinical

Dr. Claimant Toxicologist testified that the presence of Methadone in DRIVER or his taking Methadone as prescribed, impaired DRIVER, causing sufficient problems in his ability to respond in this accident (Tr. 173-174) and was a contributing factor, or cause, in this crash. (Tr. 120, 138)<sup>9</sup> Dr. Claimant Toxicologist's opinion was soundly grounded in her extensive education, years of experience, and a thorough study of the facts of this case, as well as scientific resources addressing how the effects of Methadone relate to accidents.<sup>10</sup>

Dr. Claimant Toxicologist testified that Methadone is a controlled substance and one of the most powerful narcotics prescribed. (Tr. 126-127) Dr. Claimant Toxicologist further explained to the jury that the Physician's Desk Reference (PDR)<sup>11</sup> warns that Methadone affects the central nervous system similarly to Morphine and should be prescribed and managed with the same degree of caution as Morphine (Tr. 125, 128), but Methadone is actually even stronger than Morphine. (Tr. 157) One principal effect is **sedation**. (Tr. 128) One prescribed use is for severe, chronic pain. (Tr. 127) The PDR warns, under the heading "**Use in Ambulatory Patients,**" that **Methadone may impair the mental and/or physical abilities required for the performance of potentially hazardous tasks such as driving a car or operating machinery, and the patient should be cautioned accordingly.**" (Tr. 129) **DRIVER was an "ambulatory patient,"** as one not hospitalized or bedridden. (Tr. 129) Since Methadone impairs the mental

use in treating illnesses. (Tr. 119) Toxicology deals with whether a person has an adverse effect or side-effect with taking a drug or in case of an overdose. (Tr. 120)

<sup>9</sup>Dr. Claimant Toxicologist explained that she did not conclude DRIVER was "intoxicated," defined as "falling down drunk," and he had not "completely" lost control of his mental and physical capacities. Rather, he was "impaired" in that the Methadone caused sufficient problems in his ability to respond "in this crisis." (Tr. 173-174) Methadone simply does not cause slurred speech, unsteadiness on feet or emotional liability as alcohol does. (Tr. 159)

<sup>10</sup>Dr. Claimant Toxicologist explained that she based her opinion upon her review of the physical damages, police report, including the statements of DRIVER and other witnesses, the State Police drug lab's positive Methadone result, DRIVER's VA medical records and the assumption that DRIVER took his Methadone as prescribed in those records (although the records also showed his willingness to exceed and even double the prescribed dose). (Tr. 120-124) The steps she takes to reach an opinion include reading all police reports and witness interviews and performing a thorough lab research on the drug in question. (Tr. 122)

<sup>11</sup>The PDR is one resource used in the fields of pharmacology and toxicology to study the effects of Methadone on persons and how those effects may relate to causing accidents. (Tr. 125) The PDR contains the actual drug manufacturer's warnings. (Tr. 127-128) Before the manufacturer's warnings go into the PDR, they are reviewed by the United States Food & Drug Administration, which uses advisory panels to go over in public meetings the understanding and wording of those warnings. (Tr. 134-135) These same PDR warnings are placed in the package inserts supplied by pharmacies with the prescription. (Tr. 128)

and physical abilities required to drive a car, Methadone reactions are much more dangerous for drivers of eighteen-wheelers. (Tr. 129)

Under the heading “**Adverse Reactions,**” the PDR states: “the most recently [sic, should read “commonly”] observed adverse reactions including [sic] **lightheadedness, dizziness, sedation,** nausea, vomiting and sweating.” (Tr. 129) Other reactions to the central nervous system include euphoria, dysphoria, weakness, headache, insomnia, agitation, **disorientation, visual disturbance, drowsiness,** changes in mood and **mental clouding.** (Tr. 130) Drowsiness **commonly** occurs when taking the drug and when doses are escalated. (Tr. 130) **The PDR explains that these effects are also more prominent in ambulatory patients.** (Tr. 130)

Dr. Claimant Toxicologist explained that operating a motor vehicle requires “visual skills - you have to perceive what’s happening all around you...you have got to take it in,” perceptual skills and concentration whereby the driver perceives what is happening around him and ahead of him, then mental processing whereby the brain sends a signal to the arms or legs to physically respond to manage the wheel, shift gears, let up on the gas and work the brake pedal. (Tr. 140) These skills are termed “psychomotor performance” in lab studies. (Tr. 140) Stopping in time requires: (1) perception of the slow-down ahead, followed by (2) decision-making once the slow-down is perceived, then (3) physical reaction of braking in order to avoid the wreck. (Tr. 124) Impairment in attention and awareness will delay the perception of the slow-down. Thus, impairment in attention and awareness **or** in perception of the slow-down will delay the response time in reacting physically to avoid an accident. (Tr. 125) Therefore, if a drug impairs attention or awareness or perception of a slow-down ahead, that would likely contribute to an accident, such as this accident, where the driver does not slow his vehicle quickly enough before impact is made with other vehicles. (Tr. 125)

Dr. Claimant Toxicologist conducted an extensive study of the scientific literature on Methadone’s effects on the psychomotor performance skills required for driving through the

National Library of Medicine. (Tr. 138) She reviewed over one hundred fifteen (115) studies conducted as of 1995. (Tr. 139) She looked at the control groups and found that close to sixty percent of the Methadone studies showed **changes in the perception and psychomotor skills required to operate a motor vehicle.** (Tr. 139-140, 172)

Dr. Claimant Toxicologist also attended a scientific workshop within two months prior to testifying at trial, and after rendering her initial report, specifically addressing Methadone and driving in more recent studies. (Tr. 138) The workshop included a “very good” and recent January 2003 reference on opiates and their effects on performance. (Tr. 138) Dr. Claimant Toxicologist specifically studied the effects of Methadone from that reference. (Tr. 138) The recent studies reported in the January 2003 reference **also reported changes in perception and the ability to do psychomotor control.** (Tr. 140) Dr. Claimant Toxicologist explained that many of the studies are done of doses higher than DRIVER’s because Methadone maintenance patients, those being treated for heroin addiction, tend to take higher doses. (Tr. 139) However, a number of studies involving doses less than DRIVER’s prescribed daily dose of 20mg demonstrated impairment in psychomotor control and unfitness to drive.<sup>12</sup>

For instance, one study showed that at daily Methadone doses of 20-120mg, patients’ **distance perception impairment** reached significance. (Tr. 142) Another study showed Methadone patients, as compared to the control group, had an **impairment to the rate of information processing.** (Tr. 142) Another study of a 5 or 10mg dose demonstrated that drivers will **obtain less information and suffer loss of visual acuity.** (Tr. 142) Another study showed Methadone users to have a **slower rate of information processing.** (Tr. 142) Another study showed that patients at daily Methadone doses of 17.5mg to 60mg demonstrated **significant** detriment in tracking, reactive stress and psychopathological shortcomings. (Tr. 142) The general opinion reached in that study was “**unfit to drive.**” (Tr. 142) Another study showed that

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<sup>12</sup>DRIVER’s daily dose at the time of the accident was 20mg as prescribed, or 40mg if he chose to double his dose as he testified. (Tr. 108-109)

**only 6 out of 28 Methadone takers had sufficient driving skills, and the majority showed a reduction in psychomotor skills.** (Tr. 142-143) Another study concluded Methadone users showed cognitive impairment with almost fifty percent of them **severely** impaired. (Tr. 143) Another study found that Methadone was the third most frequent drug in DUI (driving under the influence of drug) cases and the fifth most frequent in accident cases. (Tr. 143) Another study conducted in 2002 demonstrated **impairment in psychomotor speed and impairment in decision-making, both important in the timing of perceiving, then reacting to a danger.** (Tr. 145) That study concluded that subjects were slow to perceive the event and slow to process it and slow to initiate action, although once action was initiated, reaction time was non-impaired. (Tr. 145-146) Another study showed that Methadone patients' reaction time was faster than the control group, but the **Methadone group made more mistakes.** (Tr. 166) Another study reflected that at a daily Methadone dose of 35-85mg, patients exhibited **significant impairment in attention, perception and learning tasks; these would give someone trouble in reacting to a traffic issue.** (Tr. 141)

Dr. Claimant Toxicologist further testified that she is familiar with the Federal Motor Carrier Safety Regulations of the U.S. Department of Transportation, Federal Motor Carrier Safety Administration. (Tr. 131) **The regulations are based upon both scientific and medical consensus on what is safe.** (Tr. 131) The regulations completely prohibit driving on Methadone, noting that commercial motor vehicle drivers “must have the perceptual skills to monitor a sometimes complex driving situation, the judgment skills to make quick decisions when necessary and the manipulative skills to control an oversized steering wheel, shift gears using a manual transmission and maneuver a vehicle in crowded areas.” (Tr. 131-132; Exhibit 21, p. 363)<sup>13</sup>

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<sup>13</sup>The regulations state that a person is physically qualified to drive a commercial motor vehicle if he does not use a controlled dangerous substance...or narcotic. (Tr. 132; Exhibit 21, p. 367) Methadone is a narcotic. (Tr. 132) The regulations recognize an **exception** where the narcotic is prescribed by a licensed medical practitioner who has advised the driver that the drug would not adversely affect his ability to safely operate a commercial motor

Dr. Claimant Toxicologist explained that everybody metabolizes Methadone differently and that there is a great deal of variation in how the drug is handled in each individual's body. (Tr. 162) Thus, she has not seen a study demonstrating a specific lowest level of blood concentration to produce a measurable change in whatever response is being measured. (Tr. 162) However, Dr. Claimant Toxicologist reviewed all of the studies as a whole. (Tr. 175) **The studies upon which Dr. Claimant Toxicologist based her conclusions were those that she looked at and was convinced the methodology was acceptable.** (Tr. 169) As noted above, they included doses less than DRIVER's prescribed dose. The studies as a whole show a problem with perception and alertness in perceiving an event to react to, which equates to some reduction or loss in control of mental facilities. (Tr. 175) The studies show impairment in the psychomotor skills required to operate a motor vehicle, which include visual skills, perceptual skills, concentration and mental processing whereby the brain signals the arms and legs to physically respond by braking, steering, shifting, etc. (Tr. 139-140) Additionally, the PDR warns that Methadone may impair **mental and/or physical abilities** required for driving. The PDR's warning and common adverse side-effects are especially directed toward ambulatory patients like DRIVER. (Tr. 129-130) Federal regulations, **representing a scientific and medical consensus on what is safe** (Tr. 131), make it illegal to drive while taking Methadone at **any dose**. (Tr. 176)

Dr. Claimant Toxicologist reviewed DRIVER's medical records and the positive (stipulated) drug lab result. DRIVER testified that he took Methadone on the day of the accident and was on Methadone at the time of the accident. (Tr. 105-107) She assumed DRIVER took his Methadone as prescribed, although the records show his willingness to exceed and even double

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vehicle. (Tr. 132; Exhibit 21, p. 367) Dr. Claimant Toxicologist works and interacts with a number of physicians, and none would advise a Methadone patient that it is safe to operate a tractor-trailer while taking Methadone. (Tr. 131) Dr. Claimant Toxicologist has worked with doctors at a family practice pain clinic on this very issue, and they will not advise a Methadone patient that Methadone will not adversely affect the driver's ability to safely operate a commercial motor vehicle based on the regulations and on what they know about Methadone. (Tr. 133) Finally, even if a Methadone patient were able to somehow find a doctor who thought one could safely operate a commercial motor vehicle on Methadone, the regulations hold that the above **exception** does not apply to Methadone, and under no circumstances is a Methadone patient fit according to the law to drive commercial motor vehicles. (Tr. 134)

the prescribed dose. (Tr. 120-122) Dr. Claimant Toxicologist reviewed a lengthy description of the accident scene in the police report, indicating that preceding accidents had caused the slowing of traffic. (Tr. 123) It was important to Dr. Claimant Toxicologist's opinion that the vehicles surrounding DRIVER's eighteen-wheeler were able to clearly see the slow-down ahead, and gradually and easily stop in time. (Tr. 123-124) Dr. Claimant Toxicologist's impression from statements of witnesses, police reports and review of the physical damages indicated that DRIVER plowed through the other vehicles with little or no attempt made to stop. (Tr. 124, 148) Dr. Claimant Toxicologist further noted DRIVER's admission to police on the scene that nothing was obscuring his visibility, so she eliminated that as a cause of the accident. (Tr. 146-147) Dr. Claimant Toxicologist also placed importance upon DRIVER's complete inability to remember less than four hours after the accident what types or how many vehicles he had hit or whether he had slid straight or jack-knifed, indicating memory problems. (Tr. 146-147) Studies relate Methadone to memory impairment. (Tr. 284-285) Dr. Claimant Toxicologist noted the investigating officer's conclusion that DRIVER was inattentive or distracted, and had an even better view of traffic ahead than others because of the height of his rig. (Tr. 148) Inattention and distraction are exactly the types of impairment that multiple studies have shown to exist in people on Methadone, which impairs the functions that allow someone to have the attention and mental clarity to perceive them as quickly as those not on Methadone. (Tr. 149) Dr. Claimant Toxicologist was also aware of DRIVER's willingness to conceal his Methadone habit in order to keep driving commercial vehicles. (Tr. 135-137) Finally, when DRIVER testified, he offered no explanation for his complete failure to slow his truck.

With good reason, the jury exercised its discretion in finding Dr. Claimant Toxicologist's credibility and opinion to be more sound than that of defendants' toxicologist. First, Defendant Toxicologist's factual assessment was lacking. When Defendant Toxicologist explained what materials he reviewed and what facts he understood about the accident, he made no mention of

DRIVER's inability to recall such simple facts as whether he slid straight or jack-knifed, or the number or types of vehicles he crashed; he likewise made no mention of DRIVER's statement that his visibility was unobscured, nor that other motorists surrounding DRIVER were able to perceive the slow-down ahead and gradually and safely slow down themselves. (See generally, Tr. 252-254) Moreover, neither Defendant Toxicologist nor DRIVER or any other defendant even attempted an explanation of why DRIVER made little or no attempt to stop before crashing. Defendant Toxicologist was not even aware until cross-examination at trial that DRIVER had lied during the process of his DOT medical examinations. (Tr. 280-281)

Defendant Toxicologist agreed that Methadone is a powerful narcotic (Tr. 266), affecting the central nervous system like Morphine, acting on the same receptor in the brain and spinal cord. (Tr. 277) He also testified that Methadone produces side-effects including euphoria and a sense of well-being and it can be addicting and has the potential for being abused. (Tr. 276-277) He agreed that the PDR warns that **Methadone may impair the mental and physical abilities required for the performance of, and may be potentially hazardous in tasks such as driving a car or operating machinery, and the patient should be cautioned accordingly.** (Tr. 278) He agreed that the package insert that comes with a prescription of Methadone would contain the same warning as the PDR. (Tr. 278-279) He agreed that the regulations prohibit persons prescribed Methadone from operating eighteen-wheelers. (Tr. 279-280) He testified that the purpose of those regulations is to keep highways safe and to diminish the likelihood of accidents (Tr. 280), and that the purpose in this case would be to prohibit completely the use of Methadone while driving a commercial vehicle. (Tr. 280) Defendant Toxicologist agreed that individuals react differently to medication, Methadone in particular, with some more likely to react to a particular dose than others. (Tr. 290-291)

Early in his testimony, Defendant Toxicologist first attempted to opine that DRIVER was not "intoxicated" by reference to dictionary definition, which Defendant Toxicologist equated

with the word “drunk.” (Tr. 259) While he later opined that DRIVER had not been caused to “lose normal control of his mental and physical faculties” due to Methadone (Tr. 261), he essentially equated this opinion again to an absence of alcohol-like drunkenness: “You don’t have **gross motor incoordination**. You don’t see some of the **major** effects that have been described or are described for alcohol. Just doesn’t happen.” (Tr. 261-262, emphasis added) **But Defendant Toxicologist later admitted that when one is “intoxicated to the extent that your driving skills are diminished, that the risk of an accident becomes very much, much greater.”** (Tr. 273)

Turning to the scientific literature, Defendant Toxicologist testified that he reviewed “a lot of literature...over and over again,” looking for information that could identify certain effects with the amount of drug that was prescribed in this case. (Tr. 258-259) Defendant Toxicologist initially reported in the broadest of terms that “it is reported in the literature that opioids such as Methadone and Morphine do not appear to disrupt performance related to driving.” (Tr. 281) However, this was an obvious overstatement, as Defendant Toxicologist later admitted that scientific literature concludes that **Methadone does affect performance in driving** and can slow perception and affect attentiveness and attention span at levels. (Tr. 282) Defendant Toxicologist further claimed that impairment of perception was found only “in a number of studies **in much higher levels than 20**. At the levels would have been greater than 100mg per day. For example, there were other studies 80mg per day, **but certainly not 20.**” (Tr. 264-265) But he could find “nowhere in the literature that suggested that such risks under these conditions were enhanced.” (Tr. 273)

This was an overstatement as well. Defendant Toxicologist conceded on cross-examination that one study showed that at a daily dose of 20-120mg (20 being the actual prescribed dose for DRIVER), **distance perception impairment reached significance**. (Tr. 287) **He further admitted that impaired distance perception with regard to a hazard causes**

**delay in the process of decision-making, braking and ultimately stopping a vehicle in time.**

(Tr. 287) Defendant Toxicologist further conceded that another study of persons taking a daily dose of 17.5mg (less than that prescribed for DRIVER at the time of the accident) to 60mg demonstrated significant detriment to tracking, reactive stress, psychopathological shortcomings and pathological shortcomings with the general opinion “**unfit to drive.**” (Tr. 288) Defendant Toxicologist conceded another study concluding that only 6 out of 28 Methadone patients tested had sufficient driving skills, and the majority showed a reduction in psychomotor skills. (Tr. 288-289) Defendant Toxicologist acknowledged citing the “Durkey” study in his own report. That study demonstrated cognitive impairment in the Methadone group, **with almost fifty percent severely impaired.** (Tr. 289) Defendant Toxicologist admitted that another study showed significant impairment in attention, perception and learning tasks at a daily dose of 35-85mg. (Tr. 286) Defendant Toxicologist agreed that a 2001 study related Methadone to **impairment of episodic memory.** (Tr. 284-285)

Defendant Toxicologist initially claimed that “**every paper in the literature** shows that the amount of Methadone equivalent to 65 or 68mg would produce an effect that would be less than that seen by approximately one to two beers in an average size person.” (Tr. 261) However, he would later admit that one study cited in his own expert report demonstrated that at a daily dose of 50mg, the Methadone group, compared to the control group, **exhibited impairment of control, psychomotor speed and working memory, and that the wide range of impaired functions was “striking” and may have important implications for daily functioning.** (Tr. 282-283) Defendant Toxicologist admitted that impairment in psychomotor speed and decision-making would be a loss of normal control of normal mental and physical faculties. (Tr. 284)<sup>14</sup>

Defendant Toxicologist then testified that, based upon the literature he reviewed,

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<sup>14</sup>But, Defendant Toxicologist still would not equate this impairment of control, psychomotor speed and working memory at a daily dose of 50mg with his definition of “intoxicated.” (Tr. 283)

Methadone does not produce “threatening effects” until a daily dose of 60mg. (Tr. 283-284)<sup>15</sup> But after acknowledging that Mr. DRIVER had decided he was going to “escalate” his dose that day (Tr. 283), Defendant Toxicologist admitted that a person who escalates his dose on an unusual day from 20mg per day to 40mg per day may be more impaired than a person on a **sustained** dose of 60mg per day. (Tr. 284)

While Defendant Toxicologist claimed an opinion different than Dr. Claimant Toxicologist’s, he agreed with much of her testimony. Defendant Toxicologist agreed that before one can begin reaction time, there must first be a perception of the hazard requiring reaction. (Tr. 286) The perception is followed by a decision-making, then a reaction-making. (Tr. 286) A delay in perception time can bring about an accident caused by a driver not slowing down before he plows into a group of vehicles. (Tr. 286) **Defendant Toxicologist admitted that when one is “intoxicated to the extent that your driving skills are diminished, that the risk of an accident becomes very much, much greater”** (Tr. 273), and the fact that someone may drive for one or two years on the same drug or drinking the same amount without having an accident does not mean he was not intoxicated on the day of an accident. (Tr. 273)

Defendant Toxicologist conceded that he would not recommend that DRIVER be a licensed CDL driver because he would be violating the law and “he may be a danger if he is taking high doses.” (Tr. 290)

#### **IV. The Record Supports a Reasonable Inference That DRIVER Exceeded Or Doubled His Prescription Dose and/or Combined Methadone With Other Prescription Drugs, Producing Even Escalated Impairment On the Date of the Accident.**

The scientific literature and the facts of this accident soundly support Dr. Claimant Toxicologist’s opinion that the Methadone in DRIVER, **even if taken only as prescribed,**

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<sup>15</sup>Compare earlier testimony that “**every paper in the literature** shows that the amount of Methadone equivalent to 65 or 68mg would produce an effect that would be less than that seen by approximately one to two beers in an average size person.” (Tr. 261)

impaired his ability to respond to the traffic slow-down ahead, and was a contributing cause of the accident. However, the record contains substantial evidence from which the jury could have reasonably drawn the inference that DRIVER took more Methadone than prescribed, even double the prescription dose, and/or combined Methadone with other prescription drugs on the date of the accident producing even **escalated** impairment.

Dr. Claimant Toxicologist's review of the scientific literature demonstrated that self-dose escalation is common in **pain management** Methadone patients, up to 78%, according to one study. (Tr. 144-145) Dr. Claimant Toxicologist explained that if someone is prescribed 5mg four times per day, and doubles the dose to 10mg four times per day, there is a good probability it will produce **escalated** side-effects. (Tr. 130-131) Dr. Claimant Toxicologist's review of the VA records demonstrated DRIVER's willingness to exceed the prescribed dose as far back as March 19, 2001. (Tr. 135-136; Exhibit 17, p. 7) The April 29, 2002 record further reflects DRIVER's complaints that his pain control with Methadone was decreasing and would recur prior to the next dose. (Tr. 136; Exhibit 17, p. 53) The record of DRIVER's very next visit of October 28, 2002 (his first after the July 9, 2002 accident) reflects DRIVER's admission to doctors that he doubles his dose from the prescribed level of 20mg per day (5mg four times per day) to 40mg per day (10mg four times per day). (Tr. 135-137; Exhibit 17, p. 57) The October 28, 2002 record further reflects DRIVER's declaration that his pain was worst first thing in the morning, and this accident happened in the morning. (Tr. 137)

DRIVER first denied, then admitted only when confronted with his medical records, that he took more Methadone than was prescribed if the pain was bad. (Tr. 94-95) DRIVER first denied, then admitted only when confronted with his medical records, that he sometimes took **double the prescribed Methadone dose** - up to 10mg four times per day, when his prescription was only for 5mg four times per day, without noticeable improvement in pain, as reflected in his discussion with his physician on October 28, 2002. (Tr. 94-96, 108-109; Exhibit 17, p. 57)

DRIVER also admitted telling doctors that his pain is at its worst in the morning. (Tr. 108-109; Exhibit 17, p. 57, DRIVER's VA medical record of October 28, 2002) The accident was at approximately 8:30 a.m. (Tr. 21)

DRIVER's multiple lies, then admissions only when confronted with undeniable records, coupled with the following testimony provided the jury with at least a strong inference of his double-dosing on the morning of the accident:

“Q: So what you are reflecting there is sometimes you take double the prescribed dose?

A: Yes, sir, but never when I was driving.

Q: Oh, I see.

A: Never when I get behind the wheel of a truck.

Q: But you took it that day, July 9, 2002?

A: Yes, sir.” (Tr. 108-109)

The testimony of Defendants' toxicologist, Dr. William George, acknowledging that DRIVER escalated his dose that day, further supports the same inference: “Q: Mr. DRIVER had decided he was going to escalate that day, he would be at 40[mg], huh? A: Yes.” (Tr. 283)

Defendant Toxicologist agreed with Dr. Claimant Toxicologist that DRIVER's VA records reflect DRIVER's explanation to doctors that he would take more than the prescribed dose, and double the prescribed dose on occasion when he felt he needed it from 5mg four times per day to 10mg 4 times per day. (Tr. 275) Defendant Toxicologist further agreed with Dr. Claimant Toxicologist that if someone who steadily takes 5mg of Methadone four times per day takes 10mg four times per day on a particularly bad day, the greater dose should produce an increased response, based not only on the dose mechanism, but also on the fact that one's body has not become accustomed to the new level. (Tr. 274)

DRIVER testified that doctors will not prescribe other medications with Methadone because it would be dangerous. (Tr. 98) However, DRIVER's medical record of April 29, 2002 reflects that DRIVER was also being actively prescribed Elavil along with his Methadone just six weeks before the accident. (Exhibit 17, p. 53) The October 28, 2002 record (the very next

visit) reflects that he was still being prescribed Elavil, as well as Amitriptylene, Cesantranol and Naproxen with the Methadone, and DRIVER's statement that Methadone, "along with" Naproxen and Elavil was "not decreasing pain as well." (Exhibit 17, p. 57) This supports a reasonable inference that DRIVER was prescribed Elavil and other medications along with his Methadone as of the July 9, 2002 crash. Defendant Toxicologist explained to the jury that if someone takes another prescription drug along with Methadone, it can cause greater sedation and a greater increase in the risk of driving based upon the literature. (Tr. 273-274)

**V. Mrs. CLAIMANT Suffered Severe and Permanent Physical and Mental Injuries.**

After the crash, Traci was trapped inside her burning car, screaming hysterically and while trying to escape for what "seems like forever." (Tr. 23-24; 83-85) After she was pulled through the window, the car exploded into flames with Mac still trapped inside. (Tr. 87)

Falling down and in shock, Traci watched rescue efforts from a distance, but could not really see what was going on. (Tr. 26-27, 228) Mac would never emerge from the burning vehicle. (Tr. 26) She could not accept what she instinctively knew - that Mac did not survive. (Tr. 27) She could hear the paramedics, but could not talk to respond. (Tr. 27-28) Simmons recalls Traci stumbling, traumatized, crying and hysterically asking about Mac. (Tr. 69-70) When she was told Mac did not make it, she fainted. (Tr. 72)

Traci was on the scene for at least an hour before leaving in a helicopter strapped to a spine board. (Tr. 28, 72) At the hospital, Traci complained of dizziness, neck, head, left arm and mid-back pain. She was x-rayed and her contused head was CT scanned. (Tr. 28-30) When pain in her neck, tingling in her arms and spasms in her hand continued for six weeks, Traci began treating with orthopedic surgeon, Dr. Vaclav Hamsa, on August 20, 2002. (Tr. 31-33, 179) Dr. Hamsa initially prescribed Vioxx (Tr. 181), but when her complaints remained unchanged, he ultimately ordered a cervical MRI on May 30, 2003, which showed a small disc rupture at C5-6 with indentation of the dura or sac around the nerve root and a "very large disc rupture" at the

C6-7 level with irritation of the nerve root. (Tr. 182-184) Dr. Hamsa related the injuries to the July 9, 2002 accident. (Tr. 183) Since Traci was pregnant with her first child at the time, Dr. Hamsa explained that her body would produce a hormone called Relaxin which may relax the ligaments and worsen her condition. (Tr. 185)

Traci gave birth to Brian, Jr. approximately nine weeks before this December 2, 2003 trial. (Tr. 37) At the time of trial, she described a constant pain from her neck down into her shoulders, a tingling in her arm that was “more disturbing than anything” and right (dominant) hand spasms causing her to drop things and lose mobility. (Tr. 35-36, 37-38) Her pains cause her difficulty holding Brian, Jr. and with sleeping. (Tr. 38-39, 58-59)

Dr. Hamsa testified that the disc rupture will never go back in and get off of the dura. (Tr. 187) He assigned a 6% permanent whole man impairment. (Exhibit 10, June 13, 2003 report, p. 2) This was unrefuted. “On the good side with conservative care,” the disc rupture and pain and symptoms it causes will stay exactly the same, or “might settle down a little bit,” but “it is not going to go away. It is going to stay in that particular position.” (Tr. 187) “[W]ith age and change, she may improve ... [b]ut again it is a cyclic problematic situation” with one or both ruptured levels, “and that’s why there’s an impairment per cent given.” (Tr. 188) Traci is now more susceptible and vulnerable to further cervical spine injury. (Tr. 188) Her future is uncertain and her future medical treatment will possibly include surgery. (Tr. 192-193) Based upon Traci’s continuing complaints, Dr. Hamsa now recommends an EMG study of the affected nerve, then physical therapy, cervical traction, electrical stimulation to the cervical neck muscles and anti-inflammatory medications. (Tr. 186-187) Traci has been going to a doctor in Arkansas for neck and shoulder problems. (Tr. 50)

Defendants’ IME orthopedic surgeon, Dr. John Lee Moss, saw Traci on August 4, 2003 for approximately ten minutes.<sup>16</sup> (Moss depo. 8-9, 20) He found her to be truthful and

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<sup>16</sup>Dr. Moss testified by video-taped deposition. The transcript was introduced and made part of the record in lieu of being re-transcribed at trial.

cooperative. (Moss depo. 21-22) Dr. Moss agreed that the impact of this accident would be sufficient to cause a bulging or herniated disc in an otherwise healthy cervical spine. (Moss depo. 27) Dr. Moss believed that the C6-7 disc was symptomatic (Moss depo. 33), and her pain complaints were from the accident in question. (Moss depo. 16, 32) Dr. Moss described this bulge as a focal lesion or bulge as opposed to a circumferential one. (Moss depo. 35) The C6-7 disc indents the thecal sac and causes irritation and pain. (Moss depo. 36-37) Dr. Moss agreed that the disc bulge is not going to get off of the thecal sac, and her complaints could be permanent. (Moss depo. 39) Dr. Moss recommended physical therapy after her pregnancy three times a week for six weeks, including heat and ice, stretching and strengthening exercises for the neck. (Moss depo. 38)

Mentally and emotionally, in the days following the accident, Traci recalls being in shock, having nightmares and feeling that co-workers, who loved Mac, blamed her. (Tr. 32) She attempted to call Mac's wife, and left a message, but never received a return call. (Tr. 32) She still thinks about calling again, but has not. (Tr. 32) Traci does not believe her feelings of fault will ever go away. (Tr. 32) Traci became so fearful of driving (her sales job required 1,000 miles per week) that she was forced to leave the job she loved in July of 2003 to take a desk job with the same company in Arkansas. (Tr. 36-37, 43) Traci and Brian were forced to sell their home and leave Abita Springs, where they had made friends and loved living. (Tr. 20, 36-37)

Traci describes that she was more independent before the accident, and now leans on Brian more. (Tr. 45) If Brian takes longer to go to the store than usual, she panics, afraid that something has happened to him. (Tr. 45) Traci's husband, Brian, describes Traci before the accident as confident, outgoing and not insecure at all. (Tr. 55) Now, she is not as independent or outgoing. (Tr. 59) As an example, Brian related that he had a job interview expected to last an hour which lasted an hour and a half. When he got to his car, he found six messages from Traci trying to find out where he was. (Tr. 59) Brian confirmed that Traci's nightmares about

the accident have recently gotten even worse. (Tr. 60) Brian believes Traci needs more counseling. (Tr. 61) Brian testified that Traci is not a complainer by nature. (Tr. 61) With regard to her work, Brian related that Traci enjoyed her national sales meetings prior to the accident, but now does not want to deal with people and how they view her. (Tr. 60) Because of Traci's new fears of feeling unsafe at home alone, Brian has been unable to take jobs he wanted both before and after moving to Arkansas, because they required travel which would leave Traci home alone. (Tr. 46-47, 57-58)

Traci first visited psychiatrist, on July 24, 2002. She had "event amnesia," able to recount everything until hitting her head, then a little vague from there on. (Tr. 205) This happens when an event is "so traumatic that you essentially want that part of the film to be blank." (Tr. 227) Traci felt very guilty about surviving. (Tr. 206) She focused on how she could have changed anything to change the outcome of the accident. (Tr. 206-207) She had problems concentrating, dealing with co-workers' inquisitiveness, intrusive thoughts, preoccupation and forgetfulness. (Tr. 207) He placed her on the anti-depressant Paxil and diagnosed posttraumatic stress disorder, adjustment disorder with mixed anxiety and depressed mood. (Tr. 207-209) She had mixed feelings about dealing with Mac's family since she was the driver and did not attend his funeral. (Tr. 209) She had nightmares, as well as intrusive thoughts during the day and night, clinically significant distress and impairment in her social and occupational functioning, as well as guilt feelings. (Exhibit 11, Psychiatrist records, p. 6) recommended psychotherapy. (Tr. 209)

When Traci returned to Psychiatrist on August 1, 2002, she was much more volatile, and emotions "came out all over the table." (Tr. 213) As of August 1, 2002, she continued with spontaneous crying spells. (Tr. 221) She reported feeling "too detached about what happened. I am not ready to face it or how to face it." (Exhibit 11, p. 9) The diagnosis remained the same. (Exhibit 11, p. 12)

Traci visited Psychiatrist again on February 10, 2003. Through tears, Traci related disappointment at not getting “Worker of the Year Award” due to lost time caused by the accident, but then related guilt for feeling self-pity for not receiving an award when Mac died. (Tr. 214) Psychiatrist discussed “survivor guilt” as an emotional burden carried by the survivor of an accident when another dies even if the survivor accepts that he or she is not responsible for the accident. (Tr. 214) A patient having survivor guilt will often relate intrusive thoughts and guilt of a tragedy with normal life events. (Tr. 214-215) For example, while Brian and Traci are enjoying their new son, Traci experiences guilt associated with this good event, thinking of Mac’s two children not knowing their father. (Tr. 215) Psychiatrist’s diagnosis of posttraumatic stress disorder remained the same, with occupational problem and continued intrusive thoughts, survivor guilt and hyper-vigilance, although Traci was making some progress. (Tr. 215; Exhibit 11, p. 14) Since Traci still met the diagnostic criteria for posttraumatic stress disorder more than three months following the event, her condition was considered chronic. (Tr. 217-221)

When Traci visited Psychiatrist again on May 30, 2003, the diagnosis of posttraumatic stress disorder remained, still with intrusive thoughts, survivor guilt and hyper-vigilance. (Exhibit 11, p. 17) Traci related “a lot of anxiety” when driving for fear “that I was going to get hit again and another car would explode. I was pretty lucky to get out of the first one. I don’t want to tempt fate again.” (Exhibit 11, p. 16) Traci further reported being “even more high-strung than before the accident. I am more on edge now than I would have been before.” (Exhibit 11, p. 16) She reported “flashbacks” of the accident during the day. (Exhibit 11, p. 17) She continued having active residual of dysfunctional symptoms with clinical dysfunction in her work environment. (Exhibit 11, p. 17) Psychiatrist advised that Traci may be at added risk for postpartum depression, usually treatable with medication and psychotherapy. (Exhibit 11, p. 18) He recommended, and still recommends, that she “talk it through” (meaning therapy) to avoid interference in her relationships with her husband, child and future life. (Tr. 221) People can

lose the ability to be affectionate to others because they have already lost someone and have a sense of shortened life because they do not expect to have a career, marriage or children. (Tr. 219) Psychiatrist still recommends Paxil or Zoloft as medications. (Tr. 222)

Traci's horrendous experience continues to plague her emotionally. Traci related that no part of her life is unaffected by her mindset toward the accident, and not a single day has gone by that she has not reflected upon it. (Tr. 45) She describes a vivid memory of the accident still "always right there at the back of my mind," with a twinge of pain triggering memories of being trapped inside the car, trying to get out and watching it explode with Mac inside. (Tr. 39) She still has nightmares, seeing the car go up in flames over and over again. (Tr. 40) With regard to work and co-workers, she feels she will always be treated differently as "this person who was in that really bad car accident," who has brought fears to lots of spouses of co-workers having similar driving jobs. (Tr. 40) Traci described a co-worker's spouse at a meeting just twelve weeks before trial saying, "I didn't realize you were that one," which drove home again that she is "that person." (Tr. 42)

Traci related that since the birth of Brian, Jr., it has been hard knowing that Mac's children will not know him like Brian, Jr. will know his parents. (Tr. 44) She thinks about ways she could have avoided or changed the accident in "what if" terms, sometimes as often as three to four times per week. (Tr. 44-45) She is angered that someone drove a truck on Methadone when they should not have and caused the loss of Mac's life and her life to change forever. (Tr. 47)

Psychiatrist explained how Traci trivializes her own injuries and emotional distress because she measures it against Mac's death. (Tr. 223-224) Her baby will double in weight in a year and she will have memories of the event every time she lifts her child and feels pain in her shoulder. (Tr. 224) The smell of gasoline makes her recall the fire. (Tr. 234) We can never physically erase traumatic life events. (Tr. 241) While therapy may help compartmentalize the

memories and images of the traumatic event, the memories and images will continue indefinitely. (Tr. 222) Traci will never completely forget these events for the rest of her life. (Tr. 223) Traci is now at a higher risk of reacting dramatically to other traumatic events in the future, with more difficulty coping with a future traumatic event. (Tr. 241) Although Psychiatrist often has questions about patients embellishing symptoms, Traci, if anything, “under-represents what the nature and severity of her emotional distress is. She wants to be strong and project a good image.” (Tr. 224-225) That will make treating her a little more difficult. (Tr. 225)

Traci’s future life expectancy at the time of trial (at age 29) was 51.9 years. (Exhibit 15, Life Expectancy Tables; Tr. 326, jury instructions advising same through judicial notice)

## ARGUMENT

### **I. This Honorable Court Acted Well Within Its Discretion in Admitting the Testimony of Plaintiffs’ Expert Toxicologist, Dr. Barbara Claimant Toxicologist.**

Defendants’ claim of this court’s “refusal to hold a hearing” on their motion to exclude Dr. Claimant Toxicologist’s testimony (Defendants’ memo., p. 1) and abdication of its gatekeeping duties (Defendants’ memo., p. 2) is legally erroneous and factually inaccurate.

A district court’s decision to admit or exclude expert testimony is reviewed for abuse of discretion, and its ruling will be sustained unless “manifestly erroneous.” *Tyler v. Union Oil Co. of California*, 304 F.3d 379, 392 (5<sup>th</sup> Cir.2002). Significantly, and contrary to Defendants’ assertions, Rule 702 “makes no attempt to set forth procedural requirements for exercising the trial court’s gatekeeping function over expert testimony.” Fed.R.Evid. 702, Advisory Committee Note. In fact, the Supreme Court has stressed:

The trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability, and to decide **whether or when special briefing or other proceedings are needed** to investigate reliability, as it enjoys when it decides *whether or not* that expert’s relevant testimony is reliable.

Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary “reliability” proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert’s reliability arises. Indeed, the Rules seek to avoid “unjustifiable expense and delay” as part of their search for “truth” and the “[j]ust determin[ation]” of proceedings.

*Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152-153, 119 S.Ct. 1167, 143 L.Ed 2d 238 (1999) (emphasis added).

Thus, Defendants claim of this court’s “refusal to hold a hearing” on their motion (Defendants’ memo., p. 1) fails to recognize this court’s great discretion in determining **how** to assess reliability including **whether** to require special briefing or proceedings.

Moreover, Defendants’ claim of “refusal” is inaccurate. The actual sequence was as follows: On November 13, 2003 at the pre-trial conference, Defendants first filed their motion, memorandum and attachments, and all counsel advised the court that a ruling on the motion could facilitate settlement. The court advised all counsel that opposition memoranda would then be due November 19<sup>th</sup> (as the court’s November 13 minute entry reflects), and the motion would be considered submitted and under advisement. The court asked all counsel if anyone wished to submit anything further for consideration in its ruling on the motion. Defendants advised they were taking Dr. Claimant Toxicologist’s deposition on November 19<sup>th</sup> and may submit a transcript to the court. The court clearly advised it would rule after considering the documentary submissions of all parties. Defendants requested no particular form of hearing, nor the opportunity to present live testimony. Defendants took Dr. Claimant Toxicologist’s deposition on November 19<sup>th</sup>, but did not submit it to the court. On November 24, 2003, the court denied Defendants’ motion stating: “Defendants’ Motion in Limine/Request for ***Daubert*** hearing is denied. Both the Plaintiffs’ and the Defendants’ expert witnesses will be allowed to testify, subject to cross-examination.” (November 24, 2003 minute entry)

Fifth Circuit case law suggests that a district court “must articulate its basis for admitting

expert testimony” for appellate review purposes. *Mathis v. Exxon Corporation*, 302 F.3d 448, 460 (5<sup>th</sup> Cir. 2002).<sup>17</sup> In light of Defendants’ claim of this court’s “refusal to hold a hearing,” Plaintiffs anticipate that Defendants will seek to interpret the November 24 minute entry on appeal to mean that this court abdicated its gatekeeping duties when, in truth, the court considered all arguments and evidence that all parties chose to submit before ruling. **Accordingly, in ruling on Defendants’ post-trial motions, Plaintiffs respectfully pray that the court articulate its basis for finding Dr. Claimant Toxicologist’s testimony reliable in order to avoid a remand requesting such findings be articulated, clarifying whether or not it “refused” to consider all motions, memoranda and exhibits submitted by all parties before ruling on the motion.**

This court, without question, properly exercised its discretion in denying Defendants’ motion. *Bocanegra v. Vicmar Services, Inc.*, 320 F.3d 581 (5<sup>th</sup> Cir. 2003) is directly on point. There, the Fifth Circuit very recently concluded that “the trial court’s reliance on *Daubert* to exclude [a toxicologist’s] testimony concerning **possible cognitive impairment** resulting from [defendant’s] ingestion of marijuana on [the accident date] was an abuse of discretion.” *Id.*, at 590 (emphasis added). Finding the exclusion under Rule 403 similarly erroneous, the Fifth Circuit remanded for a new trial. *Id.*, at 590. The marijuana was smoked eight hours before the accident, its potency was unknown, and there was no blood or urine test confirming either its presence or a quantity in the driver’s system.

The district court’s erroneous reasons for excluding the toxicologist’s testimony in *Bocanegra* were identical to the arguments now made by the Defendants herein:

The trial court appears to have concluded that [the toxicologist’s]

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<sup>17</sup>The Fifth Circuit considers both the evidence elicited in connection with the *Daubert* motion and at trial in reviewing the district court’s decision to allow expert testimony. See *Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661, 671 (5<sup>th</sup> Cir.1999). See also *Clay v. Ford Motor Company*, 215 F.3d 663, 667 (6<sup>th</sup> Cir.2000), noting that district court is not required to hold a *Daubert* hearing, and in the absence of a hearing and explicit recitation that the testimony in question is both relevant and reliable, appellate court reviews the record to determine whether district court erred in finding testimony relevant and reliable.

testimony did not pass muster under *Daubert* for essentially two reasons. First, he noted that [the toxicologist] was unable to point to any causal connection between [defendant's] marijuana use and the accident. Second, the trial judge stated that since [the toxicologist] did not know the quantity or quality of the marijuana [defendant] ingested on December 9, [the toxicologist] could not opine that [defendant] was impaired.

*Id.*, at 586.

On the causal connection issue, the *Bocanegra* Court reasoned:

Because of [the toxicologist's] knowledge and training in the field of toxicology, his testimony would have been helpful to the fact-finder, not because it would have explained the connection between the marijuana and the accident, but because it explained the effect of recent ingestion of marijuana on an individual's cognitive functions, including perception and reaction time, both critical factors in any accident. We do not consider the fact that [the toxicologist] was unable to point to erratic driving or excessive speed as determinative of whether his testimony was helpful to the jury. Nothing in the record shows that a driver *must* be driving erratically or at an excessive rate of speed to be impaired by marijuana. The critical issue in this case was whether [defendant's] reaction time was affected by his ingestion of marijuana. [The toxicologist's] testimony tends to show that it was. Even Defendants' expert, Claimant Toxicologist, expressed reservations about an individual's driving ability after ingesting marijuana. When asked whether he would get in a car as a passenger with a driver who told him that he had taken five or six hits off a joint eight hours before, Claimant Toxicologist replied, "Probably not."

*Id.*, at 587.<sup>18</sup>

On the causal connection issue, the *Bocanegra* Court concluded:

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<sup>18</sup>The *Bocanegra* Court's lengthy and approving discussion of two analogous Louisiana Appellate Court opinions is insightful. "A recent decision by a Louisiana intermediate appellate court supports our conclusion. In *Wingfield v. Louisiana*, No. 2001 CA 2668, 2001 CA 2669, 2002 WL 31667846, 835 So.2d 785 (La. Ct. App. Nov.8, 2002), the trial court excluded expert testimony that "impairment of the driver from marijuana use was probable and could have contributed to the cause of the accident." *Id.* at \*5, at ----. The appellate court concluded that the trial court erred in excluding such evidence because "the specific scientific knowledge imparted by the experts would be more probative than prejudicial." *Id.* at \*5, at ----. The court noted that the *Daubert* guidelines require " 'only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion' " and that the possibility of baseless prejudice against marijuana smokers would be addressed by the presentation of evidence from both sides. *Id.* Although the court held that the exclusion of the testimony was error, the court found that the error was harmless. *Id.* at \*8, at ----. See also *Louisiana v. Richie*, 556 So.2d 651 (La.App.1990), *rev'd on other grounds*, 590 So.2d 1139 (La.1991) (holding that evidence of a defendant's chronic marijuana use and possession of marijuana in a criminal prosecution for negligent homicide resulting from the defendant's operation of a motorboat was admissible even though there was no evidence that the defendant smoked marijuana the day of the accident)." *Id.*, at 587 (n. 3).

Based on the foregoing, we conclude that the trial court erred in finding that [the toxicologist's] failure to point to a causal connection between [defendant's] marijuana use and the accident rendered his testimony unhelpful to the jury.

*Id.*, at 587.

The *Bocanegra* Court next addressed the issue of the toxicologist not knowing the quantity of marijuana ingested by the defendant driver, stating:

We see no reason why Appellees could not present evidence concerning the fact that the THC content is unknown to the jury. **The unknown specific THC ingested would go to the weight to be given to [the toxicologist's] testimony, not its admissibility.**

*Id.*, at 589 (emphasis added).

The *Bocanegra* Court explained that the concepts of *Daubert* and its progeny are not applied in a theoretical vacuum. Rather, they must be applied practically, and in the concrete world of the district court:

We are mindful that in the tightly controlled environment of a scientific study scientists are able to eliminate many unknowns. For example, in studies involving any drug, scientists can quantify the dosage ingested by participants in the study, they can know the quality and quantity of the psychoactive component in the drug, and they can, if they desire, determine the relative ability of a participant to absorb a drug. The real world, however, does not operate like a controlled study.

**If all variables were required to be eliminated in a case where an actor has used marijuana or another drug and then been involved in an accident, evidence of drug use would never be presented to the fact-finder. Without evidence of [defendant's] marijuana use in this case, the evidence presented at trial bore little resemblance to what actually happened.** *Daubert* and its progeny do not compel such a result.

*Id.*, at 589-590 (emphasis added; footnote omitted).

While *Bocanegra* factually drives the outcome here, the Fifth Circuit's reasoning is nothing novel. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed 2d 469 (1993), the Supreme Court held that the "general acceptance" prerequisite to admissibility of expert testimony set forth in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923)

was superceded by the Federal Rules of Evidence, and more specifically, Rule 702. *Daubert*, 509 U.S. at 587-588.<sup>19</sup> The Court reasoned that the “general acceptance” standard was at odds with the **liberal thrust** and general approach of **relaxing the traditional barriers** to opinion testimony provided by the Federal Rules of Evidence. *Id.* *Daubert*, in conjunction with Federal Rule of Evidence 702, “imposes a special obligation upon a trial judge to ensure that any and all scientific testimony...is not only relevant, but reliable.” *Kuhmo*, 526 U.S. at 147 (quoting *Daubert*, 509 U.S. at 589). The relevance requirement derives from Rule 702's requirement that the testimony “assist the trier of fact.” *Daubert*, 509 U.S. at 591. Reliability is demonstrated by a showing that the knowledge offered is “more than subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 590. “Proposed testimony must be supported by appropriate validation - i.e., ‘good grounds,’ based on what is known.” *Id.*, at 590. However, “it would be unreasonable to conclude that the subject of the scientific testimony must be ‘known’ to a certainty...” *Id.*, at 590.

The *Daubert* Court offered a list of illustrative, but not exhaustive, factors that district courts may apply in evaluating the reliability of expert testimony, including whether the expert’s theory or technique: (1) can be or has been tested; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error or standards controlling its operations; and (4) is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593-594.

The Court later clarified in *Kumho*, *supra*:

a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony’s reliability. But, as the Court stated in *Daubert*, the test of reliability is ‘flexible,’ and *Daubert*’s list of specific factors neither necessarily nor exclusively applies to all experts in every case.

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<sup>19</sup>After its revision in 2000, Rule 702 provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

Kumho, 526 U.S. at 141 (emphasis in original).

Daubert “did not otherwise work a sea change over federal evidence law.” United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Mississippi, 80 F.3d 1074, 1078 (5<sup>th</sup> Cir.1996). Accordingly, the reliability analysis should not supplant trial on the merits even when, **unlike here**, the evidence in question is borderline, or even “shaky.” Pipitone v. Biomatrix, Inc., 288 F.3d 239, 250 (5<sup>th</sup> Cir.2002). Rather, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” Id. (quoting Daubert, 509 U.S. at 596). Therefore, “in determining the admissibility of expert testimony, the district court should approach its task ‘with proper deference to the jury’s role as the arbiter of disputes between conflicting opinions. As a general rule, **questions relating to the bases and sources of an expert’s opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury’s consideration.**” 14.38 Acres of Land, 80 F.3d at 1077 (emphasis added, quoting Viterbo v. Dow Chemical Co., 826 F.2d 420, 422 (5<sup>th</sup> Cir.1987)). “Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.” Ruiz-Troche v. Pepsi Cola, 161 F.3d 77, 85 (1<sup>st</sup> Cir.1998). Thus, the proponent must demonstrate that the expert’s findings and conclusions are reliable, **but need not show that the expert’s findings and conclusions are correct.** DRIVER v. Ashland Chem., Inc., 151 F.3d 269, 276 (5<sup>th</sup> Cir.1998) (en banc).

The goal of Daubert and its progeny is to exclude expert testimony that is unverifiable “junk science.” See Skidmore v. Precision Printing and Packaging, Inc., 188 F.3d 606, 618 (5<sup>th</sup> Cir. 1999).<sup>20</sup> Given the Supreme Court’s instruction and the liberal thrust of the Federal Rules of

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<sup>20</sup>The Skidmore Court stated that absent any indication that the expert’s testimony amounted to “the sort of ‘junk science’ Daubert blocks,” there was no abuse of such discretion to admit the testimony. Id., at 618. Justice Stevens has described a type of testimony so scientifically unreliable as to be inadmissible, stating: “[a]n example of ‘junk science’ that should be excluded under Daubert as too unreliable would be the testimony of a phrenologist who would purport to prove a defendant’s future dangerousness based on the contours of the defendant’s skull.”

Evidence, it is hardly surprising that “[a] review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.” See Fed. R. Evid. 702, Advisory Committee Note. The Fifth Circuit recently boiled the inquiry down to its common-sense basics, explaining:

There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

*Vogler v. Blackmore*, 352 F.3d 150, 156 n. 5 (5<sup>th</sup> Cir.2003) (quoting Fed. R. Evid. 702, Advisory Committee Note, affirming district court’s permitting testimony by plaintiff’s “grief expert”).

Here, Dr. Claimant Toxicologist’s opinion was derived from sound methodology and a reliable basis far surpassing what *Daubert* and Rule 702 require, and what the Fifth Circuit recently deemed sufficient in *Bocanegra*, *supra*, on strikingly similar facts. Dr. Claimant Toxicologist testified that the presence of Methadone in DRIVER or his taking Methadone as prescribed, impaired DRIVER, causing sufficient problems in his ability to respond in this accident (Tr. 173-174) and was a contributing factor, or cause, in this crash. (Tr. 120, 138) Her opinion was based on a thorough study of the facts and scientific literature, as well as her many years of experience. (Tr. 120-122)

Dr. Claimant Toxicologist explained that operating a motor vehicle requires “visual skills - you have to perceive what’s happening all around you...you have to take it all in,” concentration, then mentally processing it with the brain then sending a signal to the arms and legs to physically respond by managing the wheel, shifting gears, letting up on the gas and working the brake pedal. (Tr. 140) These skills are called psychomotor performance in lab studies. (Tr. 140) Stopping an eighteen-wheeler in time requires (1) perception of the slow-down ahead, followed by (2) a decision-making process once the slow-down is perceived, then

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*General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 522 n. 6, 139 L.Ed. 2d 508 (1997) (Stevens, J., concurring).

(3) an actual physical reaction of braking in order to avoid the wreck. (Tr. 124) Attention and awareness are important to enable a driver to begin the first step of perception of the slow-down ahead. (Tr. 124) Thus, lack of attentiveness or awareness or a slow-down of attentiveness or awareness tends to delay the perception, **even if** the person perceiving the problem would thereafter react in normal fashion. (Tr. 125) This is true because it would delay the response time in taking the physical corrective action. (Tr. 125) Thus, a drug causing somebody to be inattentive or lack awareness or experience delay in the perception of a slow-down ahead would likely contribute to an accident such as this one, where DRIVER did not slow down quickly enough before crashing. (Tr. 125)

Defendants stipulated to the accuracy and methodology of the Louisiana State Police Crime Lab's positive urine test for DRIVER. They stipulated to Dr. Claimant Toxicologist's extensive qualifications. DRIVER admitted he took Methadone on the date of the accident and was on Methadone at the time of the crash. (Tr. 105-107) DRIVER's testimony and medical records demonstrated that he was prescribed Methadone at 20mg daily (5mg four times per day), but would take more, even double that amount (10mg four times per day) when he chose, perhaps on the date of the accident as well. (Tr. 108-109; Exhibit 17, pp. 53, 57)

Dr. Claimant Toxicologist conducted an extensive scientific literature research demonstrating in multiple studies that Methadone impairs the psychomotor skills of vision perception, concentration and mental processing whereby the brain signals the body to respond physically, required for drivers to perceive and timely physically react to a slow-down by braking in time to avoid a crash, causing **unfitness to drive**, at doses even less than DRIVER's prescribed dose. (See generally, Tr. 138-146, 166) More specifically, the studies demonstrated impairment of the following: distance perception, rate of information processing, ability to obtain information, visual acuity, severe cognitive impairment, psychomotor speed, decision-making, initiation of action, attention, perception and learning tasks. Studies further demonstrated

significant detriment in tracking, reactive stress and psychopathological shortcomings with the general opinion “unfit to drive.” Another study showed that only 6 out of 28 Methadone takers had sufficient driving skills, the majority showing a reduction in psychomotor skills. Another found Methadone to be the third most frequent drug in DUI (driving under the influence of drug) cases and the fifth most frequent in accident cases. Another study demonstrated Methadone patients’ reaction time as being faster, but with more mistakes. The impairments demonstrated in these studies would cause someone problems in perceiving and physically reacting to a traffic issue. (See § III under FACTS herein, pp. 8-18; Tr. 138-146, 166.) Dr. Claimant Toxicologist reviewed all the studies as a whole and based her opinion on those for which she was convinced the methodology was acceptable. (Tr. 169, 175)

Dr. Claimant Toxicologist’s opinion was further supported by sources as basic as the PDR, which warns that Methadone, as one of the most powerful narcotics prescribed affects the central nervous system like Morphine, causing sedation, disorientation, visual disturbance, drowsiness, mental clouding and lightheadedness as the most commonly-observed reactions. (Tr. 125-130) The PDR further states that these effects are more prominent in ambulatory patients like DRIVER. (Tr. 125-130) The PDR further specifically warns ambulatory patients that Methadone impairs one’s mental and/or physical abilities to drive and patients should be cautioned accordingly. (Tr. 125-130) Dr. Claimant Toxicologist’s opinion was further supported by the **medical and scientific consensus** behind the complete prohibition by federal law of driving while taking Methadone under any circumstances at any dose. (Tr. 131-134; Exhibit 21, p. 363) Even Defendants’ expert, Dr. William George, acknowledged the studies and their findings (Tr. 283-287), the PDR warnings and the federal law prohibition of driving on Methadone.

Dr. Claimant Toxicologist’s opinion was further supported by the following **undisputed** facts: All surrounding vehicles were able to clearly see the slow-down ahead and gradually and

easily stop in time (Tr. 123-124), DRIVER plowed through the other vehicles with little or no attempt to stop (Tr. 124,148), DRIVER could not remember less than four hours after the accident what types or how many vehicles he had hit or whether he had slid straight or jackknifed, indicating memory problems (Tr. 146-147), DRIVER admitted that nothing was obscuring his visibility, thus eliminating that as a cause of the accident (Tr. 146-147), DRIVER failed to offer any explanation at trial for his complete failure to slow his rig prior to the crash, and the investigating officer concluded that DRIVER was inattentive or distracted and had a better view of the traffic ahead than others because of the height of his rig. (Tr. 148) Finally, while Dr. Claimant Toxicologist's opinion was fully supported assuming DRIVER took his Methadone only as prescribed, the record supported the reasonable inference that DRIVER took double his prescribed dose of Methadone and/or combined his Methadone with Elavil and other prescription drugs, producing even escalated impairment. (See § IV, under FACTS herein at pp. 18-21.)

*Daubert* recognizes that “it would be unreasonable to conclude that the subject of the scientific testimony be ‘known’ to a certainty...” *Daubert*, 509 U.S. at 590. Rather, the knowledge offered must be “more than subjective belief or unsupported speculation.” *Id.* Defendants’ complaints, which relate to the bases and sources of Dr. Claimant Toxicologist’s opinion, go to its weight rather than its admissibility. *14.38 Acres of Land*, 80 F.3d at 1077. Defendants were permitted vigorous cross-examination of Dr. Claimant Toxicologist and the presentation of contrary evidence through Defendant Toxicologist. The scientific literature, the PDR, the medical and scientific consensus as reflected in the federal safety regulations as well as the facts all supported Dr. Claimant Toxicologist’s opinion and contradicted the opinion of Defendant Toxicologist. The jury was appropriately instructed on the burden of proof and permissibly concluded that Dr. Claimant Toxicologist’s credibility and opinion were more sound. Dr. Claimant Toxicologist’s testimony did not even approach the sort of “junk science” *Daubert*

blocks.

Defendants' reliance upon *General Electric Company v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed. 2d 508 (1997) is misplaced. There, the Supreme Court granted certiorari "to determine what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert*..." 522 U.S. at 138-139. The court held that abuse of discretion is the appropriate standard and applied this standard to conclude that the district court did not **abuse its discretion** when it excluded the expert testimony at issue. *Joiner*, 522 U.S. at 139. More specifically, the *Joiner* Court stated: "We hold that the Court of Appeals erred in its **review** of the [district court's] exclusion of Joiner's expert's testimony. In applying an overly 'stringent' review to that ruling, it failed to give the trial court the deference that is the hallmark of abuse-of-discretion review." *Joiner*, 522 U.S. at 143. The district court had refused to allow expert testimony that PCB's cause cancer in humans when the opinion was based only upon studies of **infant mice** under the following circumstances: The "infant mice in the studies had had massive doses of PCB's injected directly into their peritoneums or stomachs." *Joiner*, 522 U.S. at 144 (footnote omitted). The PCB's were injected into the mice in a highly concentrated form. The cancer developed by the mice was of a different type than plaintiff's, and plaintiff was an adult human being whose alleged exposure to PCB's was far less than the exposure in the animal studies, having a concentration of only between 0-to-500 parts per million. *Id.* No study demonstrated that even adult mice developed cancer after being exposed to PCB's and one of the experts admitted that no study had demonstrated that PCB's led to cancer in any other species. The *Joiner* Court held: "The studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court to have rejected the expert's reliance on them." *Id.*, at 144-145 (emphasis added). The Court found that while trained experts commonly extrapolate from existing data, a district court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.*,

at 146. The *Joiner* Court concluded:

We hold, therefore, that abuse of discretion is the proper standard by which to review of a district court's decision to **admit or exclude** scientific evidence. We further hold that, **because it was within the district court's discretion to conclude** that the studies upon which the experts relied were not sufficient, whether individually, or in combination, to support their conclusions that Joiner's exposure to PCB's contributed to his cancer, the **District Court did not abuse its discretion** in excluding their testimony.

*Id.*, at 146-147 (emphasis added).

Significantly, as Justice Stevens stressed in his separate opinion: “[I]t bears emphasis that the Court has not held that it would have been an abuse of discretion to admit the expert testimony. The very point of today’s holding is that the abuse-of-discretion standard of review applies whether the district judge has excluded or admitted evidence.” *Joiner*, 522 U.S., at 155 (Stevens, concurring in part and dissenting in part).

Unlike in *Joiner*, Dr. Claimant Toxicologist did not rely upon studies involving massive doses of Methadone injected into infant mice. Rather, she relied upon an extensive study of well-known scientific resources involving the effects of Methadone on humans at levels similar to those prescribed to DRIVER, although he sometimes took more, even double the prescribed amount. *Joiner* has no bearing here. The court properly permitted Dr. Claimant Toxicologist to testify.

## **II. The Record Strongly Supports the Jury’s Verdict for Exemplary Damages**

Defendants’ request for judgment as a matter of law or new trial, complaining of insufficient evidence to support the jury’s verdict for exemplary damages under La.R.S. 2315.4 is without merit. The record strongly supports the jury’s verdict.

### **A. Judgment as a Matter of Law Standards**

In *Isaacs v. American Petrofina*, 368 F.2d 193 (5<sup>th</sup> Cir.1966), the court set forth the standards for ruling on a motion for directed verdict as follows:

It is the function of the jury, not the court, to weigh and evaluate the evidence on both sides of a contested question. If there is a

conflict in the evidence, the jury must resolve such conflict. If the state of the evidence is such that it presents no conflict, nevertheless, if reasonable minds may draw conflicting or contrary inferences from the same evidence requiring different verdicts, it is for the jury to determine which is the correct inference. For the purpose of this opinion, we must accept as true the credible evidence adduced by the [nonmovant].

The evidence must be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him which may be fairly drawn. It is not for the court to weigh the conflicting evidence or to judge the credibility of witnesses. Whenever the evidence is such that fair-minded men may draw different inferences therefrom, and reasonably disagree as to what the verdict should be, the matter is one for the jury.

*Id.*, at 195-196 (citations omitted).

“In ruling on a motion for directed verdict, a court must examine **the entire record** in the light most favorable to the nonmovant and draw all inferences in that party’s favor.” *Becker v. Paine Webber, Inc.*, 962 F.2d 524, 526 (5<sup>th</sup> Cir.1992) (emphasis added). The court should consider the evidence “drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to the non-moving party.” *Brown v. Bryan County, OK*, 219 F.3d 450, 456 (5<sup>th</sup> Cir.2000). The court “must disregard all evidence favorable to the moving party that the jury is not **required to believe**.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed. 2d 105 (2000) (emphasis added). Judgment as a matter of law should not be granted unless “the facts and inferences point so strongly and overwhelmingly in movant’s favor that reasonable jurors **could not** reach a contrary conclusion.” *Flowers v. S. Reg’l Physician Servs., Inc.*, 247 F.3d 299, 235 (5<sup>th</sup> Cir.2001) (quotations and citations omitted, emphasis added). The “standard of review with respect to a jury verdict is especially deferential.” *Brown*, at 456. “Attributing weight to conflicting evidence and drawing inferences from such evidence are within the province of the jury and its decision should be given deference if the record contains **any competent evidence to support its findings**.” *Green v. Administrators of Tulane Educational Fund*, 284 F.3d 642, 653 (5<sup>th</sup> Cir.2002) (emphasis

added).<sup>21</sup>

## B. New Trial Standards

The standard of review of a district court's denial of a motion for new trial or remittitur is one of abuse of discretion. *Vogler v. Blackmore*, 352 F.3d 150, 154 (5<sup>th</sup> Cir.2003). “[T]here is no abuse of discretion denying a motion for new trial unless there is a **complete absence of evidence** to support the verdict.” *Id.* (quoting *Esposito v. Davis*, 47 F.3d 164, 167 (5<sup>th</sup> Cir. 1995)). The appellate standard of review is “somewhat narrower when a new trial is denied, and somewhat broader when a new trial is granted.” *Pagan v. Shoney's, Inc.*, 931 F.2d 334, 337 (5<sup>th</sup> Cir.1991) (emphasis added, quoting *Franks v. Associated Air Center, Inc.*, 663 F.2d 583, 586 (5<sup>th</sup> Cir.1981)).

A motion for new trial based on evidentiary grounds should not be granted unless “at a minimum” the verdict is against the **great weight** of the evidence, **not merely against the preponderance** of the evidence. *Carter v. Fenner*, 136 F.3d 1000, 1010 (5<sup>th</sup> Cir.1998) (emphasis added). “[F]acts once found by a jury in the context of a civil trial are not to be re-weighed and a new trial granted lightly.” *Pagan, supra*, at 338 (quoting *Spurlin v. General Motors Corp.*, 528 F.2d 612, 620 (5<sup>th</sup> Cir.1976)).

## C. The Record Strongly Supports Exemplary Damages under Louisiana Law

Recovery of exemplary damages under Article 2315.4 requires proof of three elements: (1) that the driver was intoxicated, **or** had consumed a sufficient quantity of intoxicants to make him lose **normal** control of his mental and physical faculties; (2) that the intoxication was **a** cause-in-fact of the resulting injury; and (3) wanton or reckless disregard for the rights and safety

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<sup>21</sup>Defendants waived relief by post-trial judgment as a matter of law on the issues of future medical expenses and “cause-in-fact,” discussed *infra*. When Plaintiffs rested, Defendants moved for judgment as a matter of law on three issues only - loss of consortium, whether or not defendant was “intoxicated,” and whether he engaged in “willful and wanton conduct.” (Tr. 248-249) Defendants reurged the motion “on intoxication and the loss of consortium” at the close of the evidence. (Tr. 294) Absent a motion for judgment as a matter of law on the issues of future medical expenses and “cause-in-fact,” there can be no post-trial motion for judgment as a matter of law on same. *Purcell v. Sequin State Bank & Trust Company*, 999 F.2d 950, 956-957 (5<sup>th</sup> Cir.1993). Plaintiffs do not contend that this affects Defendants’ post-trial motion for new trial.

of others. *Lafauci v. Jenkins*, 2001 2960 (La.App.1st Cir. 1/15/03), 844 So.2d 19, 25 (emphasis added); La.C.C. art. 2315.4.<sup>22</sup> **“Whether the elements requisite to recovery under L.S.A.-C.C.P. art. 2315.4 have been proven is a question of fact, not to be set aside in the absence of manifest error.”** *Angeron v. Martin*, 93-2381 (La.App.1st Cir.12/22/94), 649 So.2d 40, 43.

Under the first element, “[i]n order to prove that a person is incapable of operating a motor vehicle by reason of intoxication, **it need not be shown that he was drunk**, but only that he had sufficient quantity of intoxicants to make him lose **normal** control of his mental and physical faculties.” *Levet v. Calais & Sons, Inc.*, 514 So.2d 153, 159 (La.App.5th Cir.1987) (emphasis added).

Defendants erroneously suggest that expert testimony from a toxicologist regarding the specific known effects of a specific measured blood level of intoxicants on driving performance is required to carry plaintiffs’ burden of proof under Article 2315.4. However, contrary to Defendants’ assertions, Louisiana law holds that the jury can consider a multitude of factors to determine intoxication, **even without any evidence of blood levels of intoxicants and without any expert testimony**. For example, in *Owens v. Anderson*, 93-1566 (La.App.4th Cir.1/27/94), 631 So.2d 1313, the court rejected the defendant’s argument that medical testimony indicating the defendant’s blood-alcohol level was required as proof of “intoxication,” stating: “blood-alcohol level is not the only way in which intoxication can be established in a civil case. The triers of fact can look to the **totality of the circumstances** as the Fifth Circuit did in *Levet*...” *Id.*, at 1317-1318 (emphasis added).

In *Levet, supra*, no evidence of a blood level and no expert testimony of “intoxication” was presented. The evidence only established that all of one six-pack and a portion of a second six-pack of beer had been consumed among three persons without establishing how much each

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<sup>22</sup>While claims brought under Article 2315.4 most commonly involve alcohol, Defendants do not question its application to driving under the influence of drugs and such application has never been seriously questioned. See, for instance, *Minvielle v. Lewis*, 610 S.2d 942 (La.App.1st Cir.1992). (Punitive damages claim was based upon impairment by drugs, not alcohol.)

person had consumed. Nevertheless, the court held that the jury did not abuse its discretion in concluding “intoxication,” causation and wanton and reckless disregard based upon evidence that the defendant driver failed to heed a stop sign and flashing red light before entering into the wrong lane of an intersection. *Levet*, at 159.<sup>23</sup>

In *Dekeyser v. Automotive Casualty Insurance Company*, 1997-1251 (La.App.4th Cir.2/4/98), 706 So.2d 676, the court affirmed the jury verdict of \$850,000 exemplary damages **with neither a blood level nor expert testimony**. The defendant driver admitted consuming alcohol prior to driving, but no amount was ever established. Plaintiff presented evidence that the defendant driver smelled of alcohol, spoke nervously, slurred her speech and appeared unconcerned or disinterested. The court concluded:

This Court finds no error in the jury's determination that Ms. Kelly drove intoxicated on the night of the accident and her intoxication was a cause-in-fact of Dekeyser's injuries. Furthermore, the court finds no error in the jury's conclusion that Kelly's actions, failing to slow, stop or otherwise avoid the obstruction of the stalled and stopped cars on this clear night on a well-lit, often-travelled, and multi-lane roadway indicated her "wanton and reckless disregard for the rights and safety of others."

The jury believed that Grace Kelly's slurred speech and other unusual behavior and admission of consuming alcohol at the Mardi Gras celebrations on the day of the accident evidenced her intoxication, that this intoxication caused her to drive into the rear of a stopped car, and that her behavior amounted to "wanton and reckless disregard". The jury heard plaintiff's witnesses' descriptions of Kelly's behavior and the collision and Kelly's description of her behavior and the accident, and the jury believed the plaintiff's witnesses' accounts.

*Dekeyser*, at 685.

The *Dekeyser* Court further stressed: “Many witnesses also testified that other vehicles had easily avoided the stalled/stopped cars. *Id.*, at 684.

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<sup>23</sup>Multiple-offense, felony driving while intoxicated criminal convictions are also commonly upheld despite the stricter burden of proof in the complete absence of blood level evidence. See, for example, *State v. Landry*, 2001-0784 (La.App.4th Cir. 12/12/01), 804 So.2d 791; *State v. Bourgeois*, 00-1585 (La.App.5th Cir. 3/14/01), 785 So.2d 848.

Under the second element, plaintiffs must demonstrate only that a driver's impairment was a **cause-in-fact** of the accident; they are not required to prove that it was the **sole** cause of it. In *Roberts v. Benoit*, 605 So.2d 1032 (La.1991), the Louisiana Supreme Court clearly explained, on rehearing, that when multiple causes are present, "cause-in-fact" exists when the conduct in question was a "substantial factor," or had "something to do with" or "appreciably enhanced the chance of" bringing about the plaintiff's harm, **even under a finding of likelihood that the harm might still have occurred in the absence of such conduct**. At issue in *Roberts* was whether the alleged negligence of the Orleans Sheriff's Office in hiring, commissioning and training the defendant deputy could be considered a cause-in-fact of his accidental discharge of a gun. The *Roberts* Court explained:

Cause in fact is generally a "but for" inquiry; if the plaintiff probably would have not sustained the injuries but for the defendant's substandard conduct, such conduct is a cause in fact. Stated differently, the inquiry is "[d]id the defendant contribute to the plaintiff's harm or is the defendant a cause of the plaintiff's harm?" **An alternative method for determining cause in fact, which is generally used when multiple causes are present, is the "substantial factor" test. Under this test, cause in fact is found to exist when the defendant's conduct was a "substantial factor" in bringing about the plaintiff's harm.**

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Applying these principles to the instant case, although the cause in fact determination is not without difficulty, we cannot find that the court of appeal erred in affirming the trial court's finding that Sheriff Foti's alleged negligence in hiring, training and/or commissioning [defendant] as a deputy **had something to do with - was a cause in fact of - plaintiff's injuries.**

*Id.*, at 1042 (citations omitted, emphasis added).

On rehearing, the *Benoit* Court clarified the cause-in-fact element, stating:

However, we clarify the cause-in-fact element in one respect. This case appears to be a close one on the issue of cause-in-fact. **It is likely that this accident might have occurred had [defendant], who already owned a weapon, never been commissioned. Thus, it is impossible to say with any degree of certainty "but**

**for” the sheriff’s conduct, this accident would not have happened. Nonetheless, inasmuch as the sheriff’s actions can be said to have appreciably enhanced the chance of the accident occurring, they are a cause-in-fact of the accident.**

*Id.*, at 1052 (emphasis added).<sup>24</sup>

The Louisiana Supreme Court’s explanation of “cause-in-fact” is reflected in numerous appellate opinions holding that La. C.C. Art. 2315.4 requires proof only that the intoxication, or loss of **normal** control of mental and physical faculties, was a cause-in-fact, not the **sole** cause-in-fact of the injuries. In *Blackshear v. Allstate Insurance Company*, 94-765 (La.App.3rd Cir. 12/7/94), 647 So.2d 589, 595, although the record contained expert testimony that the defendant was impaired, **there was no expert or other direct testimony at all that the impairment caused the accident.** Nevertheless, noting that the evidence substantiated impairment and that “a plaintiff is not required to prove that the defendant’s intoxication was the sole cause of his injuries,” the court found “no manifest error in the trial court’s conclusion that the intoxication was a cause-in-fact of the accident. *Id.*, at 595.

In *Duplechain III v. Old Hickory Casualty Insurance Company*, 594 So.2d 995 (La.App.3rd Cir.1992), stressing that intoxication must only be a cause-in-fact, not the **only** cause-in-fact of the accident, the court rejected the defendant’s argument that he stopped his vehicle in the roadway, causing an accident, because he was arguing with his wife, not because he was intoxicated. *Id.*, at 998. The opinion reflects no testimony directly addressing the causation issue, but rather, only the testimony of an expert “as to how much alcohol is required to reach a level of .24%.” *Id.*, at 998.

In *McDaniel v. DeJean*, 556 So.2d 1336 (La.App.3rd Cir.1990), the court rejected a similar argument when the defendant claimed the cause of a rear-end collision was not his intoxication, but rather, his fatigued condition. *Id.*, at 1340. The *McDaniel* opinion reflects no

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<sup>24</sup>The *Benoit* Court, although finding cause-in-fact, held the sheriff’s office was not liable because plaintiff had not proven “legal cause.”

expert testimony regarding causation.

In *Angeron v. Martin*, 93 2381 (La.App.1st Cir.12/22/94), 649 So.2d 40, the record contained expert testimony that the alcohol in the defendant would have caused him to be impaired. *Id.*, at 44. However, there was no testimony at all on the issue of causation. The court held: “Based on the foregoing alone, we find no error in the trial court’s determination that [defendant’s] intoxication was a cause-in-fact of the injuries suffered by plaintiff.” *Id.* The court noted that whether the elements of article 2315.4 have been proven is a question of fact, not to be set aside in the absence of manifest error. *Id.*, at 43.

In *Hanson v. Benelli*, 1997-1467 (La.App.4th Cir.9/30/98), 719 So.2d 627, witnesses testified that the defendant’s car was speeding and swerving with no headlights on and did not appear to attempt to stop prior to the accident. He tested positive for a blood-alcohol content of .15%, but his DWI charge was later dismissed. The defendant denied being intoxicated, and attributed the accident to his attempts to retrieve his emergency light (he was a police officer) from the floor under his feet. **The trial court found** this evidence insufficient to establish cause-in-fact, noting that “[n]o other testimony was elicited as to the cause-in-fact of the collision and the plaintiff’s injury” other than the defendant’s testimony about retrieving his light from the floor. *Id.*, at 638. Accordingly, **the trial court found** that plaintiff failed to prove that the defendant’s intoxication was a cause-in-fact of the plaintiff’s injuries. *Id.*, at 638. **The Fourth Circuit reversed**, stating:

**Despite the lack of expert testimony**, we find the district court’s determination that [defendant] was intoxicated is fully supported by the record.

\* \* \*

**In view of this same evidence, however, we find clear and manifest error in the determination below concerning the lack of testimony on the issue of causation.** Rather than indicating

that the trier of fact rejected the [witnesses'] description of events, as the defendant suggests, it appears instead that the court believed this lay testimony was insufficient under the law. As explained above, however, scientific evidence or expert opinion is not essential to a finding of intoxication. Furthermore, as noted in *Bourgeois, supra*, "it is common knowledge that even a minimal amount of alcohol **may cause a functional impairment.**" Considering that [defendant's] blood-alcohol level was 0.15% four hours after the accident, we find the record evidence **compels the conclusion that his intoxication contributed to his inability to retrieve the emergency light more quickly or to respond more appropriately to the situation. It was thus established that, as required under Article 2315.4, [defendant's] intoxication was a cause-in-fact of the accident and [plaintiff's] injuries.**

*Id.*, at 639 (emphasis added).

The great discretion afforded the jury in the "causation" determination is well-illustrated in the vehicular homicide case of *State v. Copes*, 566 So.2d 652 (La.App. 2<sup>nd</sup> Cir.1990). There, a **criminal** conviction for vehicular homicide, which also requires causation between the intoxication and the accident, **but under the heightened burden of proof**, was sustained where there was "no evidence that the defendant was driving erratically. He was in his proper lane of traffic and the accident happened in the center of the lane." *Id.*, at 655-656. The prosecution expert testified that the defendant's .133 blood-alcohol level would have impaired the defendant's perception, judgment and reactions. **The defendant's expert testified that in the absence of the alcohol and its effects, the accident would have happened anyway.** The *Copes* Court held: "[I]t was reasonable for the jury to **infer** that defendant's blood alcohol concentration contributed to his lack of judgment in driving after dark without headlights." *Id.*, at 656 (emphasis added). "The jury could have concluded **beyond a reasonable doubt** that defendant's intoxication played a part in his driving without his headlights and failing to see the victim. Thus, defendant's intoxication combined with his operation of his automobile without headlights was a cause of the victim's death." *Id.*, at 656 (emphasis added). "The assignments of error relating to sufficiency of the evidence are without merit." *Id.*

Under the third element, Louisiana courts describe the required level of proof of the

“wanton or reckless disregard for the rights or safety of others” element as follows:

However, the statute in question in the instant case does not require proof of “wanton and reckless *conduct*” on the part of the defendant. The element necessary to recovery under La.C.C.P. art. 2315.4 is “wanton and reckless *disregard* for the rights and safety of others.” Thus, no evidence of a specific action on the part of the defendant is necessary. In order to prove “wanton and reckless disregard” the plaintiff is required only to prove a “general state of mind” and a “conscious indifference to the consequences.”

*Bourgeois v. State Farm Mutual Automobile Insurance Co.*, 562 So.2d 1177, 1183 (La.App.4th Cir.1990) (quoting *Griffin v. Tenneco Oil Co.*, 531 So.2d 498, 500 (La.App.4th Cir.), *writ denied*, 534 So.2d 430 (La.1988).

The *Bourgeois* Court further noted that the wanton and reckless element is often considered a “given” by the majority of Louisiana appellate courts if the defendant’s intoxication was a cause of the accident. *Id.*, at 1182. “Therefore, in most circuits, only two issues must be proven since the intoxication element and the ‘wanton and reckless’ element are proven by the same facts.” *Id.*<sup>25</sup>

Turning to this record, the court must deny Defendants’ motion unless it finds, viewing all evidence, drawing all reasonable inferences, and resolving all credibility determinations in Plaintiff’s favor, that the facts and inferences point **so strongly and overwhelmingly in Defendants’ favor** that reasonable jurors **could not** have found the presence of all three elements of Article 2315.4, as defined above. In other words, if the evidence is such that fair-minded men may draw different inferences therefrom, and reasonably disagree as to what the verdict should be, the jury’s verdict must stand. *Isaacs, supra*, 368 F.2d at 196.

By no stretch of the imagination can the record support Defendants’ motion, as the record here **strongly supports** the finding of all three elements. As noted above, the first two elements require proof that DRIVER’s “intoxication” was a “cause-in-fact” of Traci’s injuries.

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<sup>25</sup>While the *Bourgeois* Court noted that the Louisiana Fourth Circuit required intoxication and wanton and reckless disregard as separate required elements, the court stressed that the wanton and reckless element did not require evidence of a specific action on the part of the defendant. Rather, it required only proof of a general state of mind and a conscious indifference to consequences. *Id.*, at 1183.

“Intoxication,” as defined by the case law, requires proof that DRIVER was impaired in the use of, or had lost **normal** control of his mental and physical faculties. Proof that DRIVER was “drunk” is not required. Neither expert testimony, nor a blood-level is required, and the jury can find such “intoxication” from the totality of the circumstances. “Cause-in-fact” requires only that such “intoxication,” as defined above, was a “substantial factor,” or had “something to do” with or “appreciably enhanced the chance of” the crash, **even under a finding of likelihood that the crash might have occurred even in the absence of same.** *Roberts*, 605 So.2d at 1042, 1052.

Dr. Claimant Toxicologist testified that the presence of Methadone in DRIVER or his taking Methadone as prescribed impaired DRIVER and caused sufficient problems in his ability to respond in this accident (Tr. 173-174) and was a contributing factor, or cause, in this crash (Tr. 120, 138). Her opinion was based on a thorough study of the facts and scientific literature, as well as her many years of experience. (Tr. 120-122)

Dr. Claimant Toxicologist explained that operating a motor vehicle requires “visual skills - you have to perceive what’s happening all around you...you have got to take it all in,” concentration, then mentally processing it with the brain then sending a signal to the arms and legs to physically respond by managing the wheel, shifting gears, letting up on the gas and working the brake pedal. (Tr. 140) These skills are called psychomotor performance in lab studies. (Tr. 140) Stopping an eighteen-wheeler in time requires (1) perception of the slow-down ahead, (2) a decision-making process once the slow-down is perceived, then (3) an actual physical reaction of braking in order to avoid the wreck. (Tr. 124) Attention and awareness are important to enable a driver to begin the first step of perception of the slow-down ahead. (Tr. 124) Thus, lack of attentiveness or awareness or a slow-down of attentiveness or awareness tends to delay the perception, **even if** the person perceiving the problem would thereafter react in normal fashion. (Tr. 125) This is true because it would delay the response time in taking the

physical corrective action. (Tr. 125) Thus, a drug causing somebody to be inattentive or lack awareness or experience delay in the perception of a slow-down ahead would likely contribute to an accident such as this one, where DRIVER did not slow down quickly enough before crashing. (Tr. 125)

Defendants stipulated to the accuracy and methodology of the Louisiana State Police Crime Lab's positive urine test for DRIVER. They stipulated to Dr. Claimant Toxicologist's extensive qualifications. DRIVER admitted he took Methadone on the date of the accident and was on Methadone at the time of the crash. (Tr. 105-107) DRIVER's testimony and medical records demonstrated that he was prescribed Methadone at 20mg daily (5mg four times per day), but would take more, even double that amount (10mg four times per day) when he chose, perhaps on the date of the accident as well. (Tr. 108-109; Exhibit 17, pp. 53, 57)

Dr. Claimant Toxicologist conducted an extensive scientific literature research demonstrating in multiple studies that Methadone impairs the psychomotor skills of vision, perception, concentration and mental processing whereby the brain signals the body to respond physically, required for drivers to perceive and timely physically react to a slow-down by braking in time to avoid a crash, causing **unfitness to drive**, at doses even less than DRIVER's prescribed dose. (See generally, Tr. 138-146, 166) More specifically, the studies reported changes in one's perception and ability to do psychomotor control. (Tr. 140) For instance, one study showed that at daily Methadone doses of 20-120mg, patients' **distance perception impairment** reached significance. (Tr. 142)<sup>26</sup> Another study showed Methadone patients, as compared to the control group, had an **impairment to the rate of information processing**. (Tr. 142) Another study of a 5 or 10mg dose demonstrated that **drivers will obtain less information and suffer loss of visual acuity**. (Tr. 142) Another study showed Methadone users to have a **slower rate of information processing**. (Tr. 142) Another study showed that patients at daily

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<sup>26</sup>DRIVER's daily dose at the time of the accident was 20mg as prescribed, or 40mg if he chose to double his dose as he testified. (Tr. 108-109)

Methadone doses of 17.5mg to 60mg demonstrated **significant** detriment in tracking, reactive stress and psychopathological shortcomings. (Tr. 142) The general opinion reached in that study was “**unfit to drive.**” (Tr. 142) Another study showed that **only 6 out of 28 Methadone takers had sufficient driving skills, and the majority showed a reduction in psychomotor skills.** (Tr. 142-143) Another study concluded Methadone users showed cognitive impairment with almost fifty percent of them **severely** impaired. (Tr. 143) Another study found that Methadone was the third most frequent drug in DUI (driving under the influence of drug) cases and the fifth most frequent in accident cases. (Tr. 143) Another study conducted in 2002 demonstrated **impairment in psychomotor speed and impairment in decision-making, both important in the timing of perceiving, then reacting to a danger.** (Tr. 145) That study concluded that subjects were slow to perceive the event and slow to process it and slow to initiate action, although once action was initiated, reaction time was non-impaired. (Tr. 145-146) Another study showed that Methadone patients’ reaction time was faster than the control group, but the **Methadone group made more mistakes.** (Tr. 166) Another study reflected that at a daily Methadone dose of 35-85mg, patients exhibited **significant impairment in attention, perception and learning tasks; these would give someone trouble in reacting to a traffic issue.** (Tr. 141) **Dr. Claimant Toxicologist reviewed all the studies as a whole and based her opinion on those for which she was convinced the methodology was acceptable.** (Tr. 169, 175) Even Defendants’ expert, Dr. William George, acknowledged the studies and their findings. (Tr. 283-287)

Dr. Claimant Toxicologist’s opinion was further supported by **sources as basic as the PDR**, which warns that Methadone, as one of the most powerful narcotics prescribed affects the central nervous system like Morphine, **causing sedation, disorientation, visual disturbance, drowsiness, mental clouding and lightheadedness as the most commonly-observed reactions.** (Tr. 125-130) The PDR further states that these effects are **more prominent in**

**ambulatory patients like DRIVER.** (Tr. 125-130) The PDR further specifically warns ambulatory patients that **Methadone impairs one's mental and/or physical abilities to drive** and patients should be cautioned accordingly. (Tr. 125-130)

Dr. Claimant Toxicologist's opinion was further supported by the **medical and scientific consensus** behind the complete prohibition by federal law of driving while taking Methadone under any circumstances at any dose. (Tr. 131-134; Exhibit 21, p. 363)

Dr. Claimant Toxicologist's opinion was further supported by the following **undisputed** facts: All surrounding vehicles were able to clearly see the slow-down ahead and gradually and easily stop in time (Tr. 123-124), DRIVER plowed through the other vehicles with little or no attempt to stop (Tr. 124,148), DRIVER could not remember less than four hours after the accident what types or how many vehicles he had hit or whether he had slid straight or jackknifed, indicating memory problems (Tr. 146-147), DRIVER admitted that nothing was obscuring his visibility, thus eliminating that as a cause of the accident (Tr. 146-147), DRIVER failed to offer any explanation at trial for his complete failure to slow his rig prior to the crash, and the investigating officer concluded that DRIVER was inattentive or distracted and had a better view of the traffic ahead than others because of the height of his rig. (Tr. 148) Finally, while Dr. Claimant Toxicologist's opinion was fully supported assuming DRIVER took his Methadone only as prescribed, the record supported the reasonable inference that DRIVER took double his prescribed dose of Methadone and/or combined his Methadone with Elavil and other prescription drugs, producing even escalated impairment. (See § IV, under FACTS herein at pp.18-21.)

Here, as is common, the jury was presented with the opinions of two opposing experts. Each was subject to vigorous cross-examination. The jury was fully instructed on determining credibility and assessing expert testimony. The scientific literature, the PDR, the medical and scientific consensus as reflected in the Federal Safety Regulations, as well as the facts, all

supported Dr. Claimant Toxicologist's opinion and contradicted the opposing opinion of Defendant Toxicologist. The jury was free to accept Dr. Claimant Toxicologist's well-supported opinion and reject that of Defendant Toxicologist, especially in light of the inconsistencies demonstrated throughout his testimony, his incomplete factual assessment (Tr. 252-254), his lack of any explanation of why DRIVER made little or no attempt to stop before crashing, his lack of awareness that DRIVER had lied during the process of his DOT medical examinations (Tr. 280-281), his acknowledgment that Methadone is a powerful narcotic (Tr. 266), affecting the nervous system like Morphine (Tr. 277) and can be addicting and has the potential for being abused (Tr. 276-277), his acknowledgment of the warnings in both the PDR and package inserts that Methadone may impair the mental and physical abilities required for driving (Tr. 278-279), his acknowledgment that the regulations prohibit persons prescribed Methadone from operating eighteen-wheelers (Tr. 279-280), his testimony that the purpose of the regulations is to keep highways safe by diminishing the likelihood of accidents, and in this case, to prohibit completely the use of Methadone while driving a commercial vehicle (Tr. 280), his acknowledgment of the studies cited by Dr. Claimant Toxicologist (described above), finding impairment in a multitude of psychomotor skills (Tr. 282-289), his admission that impaired distance perception with regard to a hazard causes delay in the process of decision-making, braking and ultimately physically stopping a vehicle in time (Tr. 287), his admission that impairment in psychomotor speed and decision-making would be a loss of control of normal mental and physical faculties (Tr. 284), his admission that a delay in perception time can bring about an accident caused by a driver not physically slowing down before plowing into a group of vehicles (Tr. 286), his admission that when one is "intoxicated to the extent that your driving skills are diminished, that the risk of an accident becomes very much, much greater," (Tr. 273) and his conclusion that he would not recommend that DRIVER be a licensed CDL driver because he would be violating the law and "he may be a danger if he is taking high doses." (Tr. 290) The court cannot second-guess the

jury's credibility call in believing Dr. Claimant Toxicologist over Defendant Toxicologist. The record firmly establishes the first two elements.

The third element of Article 2315.4, "wanton and reckless disregard for the rights and safety of others," requiring a general state of mind in DRIVER of conscious indifference to the consequences, is also fully supported by the record. As set forth in detail in § II, under FACTS herein at pp. 4-8, DRIVER falsified documents to conceal his Methadone habit during his DOT medical examinations so that he could drive eighteen-wheelers illegally. (Tr. 89) He knew the purpose of the exam process was to determine whether he was medically qualified to safely operate eighteen-wheelers (Tr. 89) and that providing accurate information was important for the safety of the driving public. (Tr. 98) He admitted that telling the doctor he was taking Methadone would be very important for his safety on the road. (Tr. 91-92) However, he lied and concealed his Methadone habit during at least two biannual medical examinations mandated by the U.S. Department of Transportation so that he could operate eighteen-wheelers illegally. (Tr. 90-94, 97-98, 102; Exhibit 27) With complete lack of remorse, DRIVER repeated the same lies when he repeated the DOT medical exam process less than a month after this fatal crash because he wanted to still keep driving eighteen-wheelers. (Tr. 99-104; Exhibit 28) The entire time, DRIVER had available his own personal Federal Motor Carrier Safety Regulations Pocketbook. (Tr. 102, 109; Exhibit 21) He had agreed to familiarize himself with the regulations, understanding that they were important to his safety as a driver. (Tr. 112-113; Exhibit 22) He knew that its purpose was for his reference to rules that may apply to him. (Tr. 102-103) However, he claimed that he did not bother looking at the rules involving driving while taking prescription medications. (Tr. 103) DRIVER admitted knowing the pocketbook had an index to facilitate reference to regulations pertaining to himself, and admitted that reviewing these regulations in court told him he was not qualified to drive a commercial motor vehicle. (Tr. 111) The jury apparently drew the obvious conclusion that DRIVER, with thirty

years' experience driving eighteen-wheelers (Tr. 101-102), knew that his Methadone habit disqualified him for safety reasons, but coldly determined to keep driving. Finally, DRIVER admitted that he had received and read "most of" the package insert that came with his Methadone prescription from the pharmacist, but (conveniently) did not read the part warning that Methadone may impair the mental and/or physical abilities required for driving. (Tr. 111-112) The package insert contains that warning. (Tr. 125-128) Despite all of the above, DRIVER admitted that he took Methadone on the day of the crash and was on Methadone at the time of the crash. (Tr. 105-107) None of this evidence was even disputed. The record firmly establishes the third element.

As a simple comparison, the *Dekeyser* Court confirmed a jury verdict of \$850,000 in exemplary damages, affirming the jury's finding of all three required elements on the basis of: (1) Defendant's admission that she had consumed alcohol, (2) no established amount of alcohol consumed and no blood-alcohol level, (3) witnesses' description that Defendant had slurred speech, spoke nervously and appeared disinterested, (4) lack of an explanation for Defendant's failure to slow or stop when surrounding drivers easily did, (5) no expert testimony. *Dekeyser, supra*, 706 So.2d at 684-685. Here, we have much more: (1) DRIVER's admission that he took Methadone on the day of the crash and was on Methadone at the time of the crash, (2) medical records confirming an actual amount of Methadone prescribed, (3) police questioning on the scene demonstrating DRIVER's inability to recall simple facts about the accident (Dr. Claimant Toxicologist and Defendant Toxicologist explained that slurred speech or unsteadiness would not be expected from Methadone impairment), (4) lack of any explanation for DRIVER's failure to slow or stop when surrounding drivers clearly saw the slow-down and gradually and slowly stopped, (5) DRIVER's admission that his visibility was unobscured, eliminating that as a cause, (6) well-supported expert testimony by Dr. Claimant Toxicologist that the Methadone in DRIVER, taken as prescribed, impaired his psychomotor skills and his ability to respond to the

slow-down and was a contributing factor or cause in the crash.

One cannot reasonably argue that this record, viewed in the light most favorable to Plaintiffs, giving the benefit of all reasonable inferences to Plaintiffs, and resolving all credibility determinations in Plaintiffs' favor, points **so strongly and overwhelmingly in Defendants' favor** that reasonable jurors **could not find** (1) that the Methadone in DRIVER made him lose **normal** control of his mental and physical faculties; (2) that this was a "substantial factor" or had "something to do" with, or "appreciably enhanced the chance of" the crash, even if the jury also concluded the crash might likely have occurred in the absence of same (see *Roberts*, 605 So.2d at 1042, 1052); and (3) that DRIVER had a general state of mind of conscious indifference to the consequences, thus establishing wanton or reckless disregard for the rights or safety of others. The jury weighed evidence and made credibility calls (their exclusive province) deciding a question of fact which is not to be set aside except for manifest error. *Angeron*, 649 So.2d at 43. Defendants motion must therefore be denied.

### **III. The Jury Acted Well Within Its Discretion In Setting the Amount of Exemplary Damages Under the Unique Facts of This Case.**

Defendants' claim of excessiveness of the jury's exemplary damage verdict is without merit. The jury did not abuse its vast discretion in setting the amount of exemplary damages at \$1,500,000 under the circumstances of this case. In the absence of a claim that an exemplary damage award is grossly excessive under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, "the role of the appellate court, at least in the federal system, is merely to review the trial court's 'determination under an abuse-of-discretion standard.'" *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433, 121 S.Ct. 1678, 149 L.Ed. 2d 674 (2001) (quoting *Browning-Ferris Industries of Vt, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279, 109 S.Ct. 2909, 106 L.Ed. 2d 219 (1989)). The role of the trial judge is "to determine whether the jury's verdict is within the confines set by state law and to determine,

by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered.” *Id.* (quoting *Browning-Ferris Industries*, 492 U.S. at 279). Thus, while federal standards control the review of jury verdict by a district court and court of appeals, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law. *Browning-Ferris Industries*, 492 U.S. at 278-279.

In *Mosing v. Domas*, 202- 0012 (La. 10/15/02), 830 So.2d 967, the Louisiana Supreme Court recently affirmed a jury award of \$500,000 in exemplary damages under La.C.C. Art. 2315.4 where plaintiffs’ total compensatory damages were less than \$56,000. The record contained no evidence of the defendant’s financial strength. The defendant was an individual citizen driving a regular automobile. The court found no “shocking disparity” in a 1 to 9 ratio of compensatory to exemplary damages. *Id.*, at 981. While plaintiffs’ actual harm resulted only in a brief hospital stay and a temporary disability that resolved in a short period of time, the *Mosing* Court stressed that the **potential harm** of the defendants’ wanton and reckless behavior was significant. *Id.*

The *Mosing* Court explained that under Louisiana law, exemplary damages serve the important purpose of “punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant’s example.” *Id.*, at 978. The *Mosing* Court concluded that, in the absence of a constitutional claim, “the determination of whether an exemplary damage award is excessive under Louisiana law is properly reviewed for abuse of discretion, giving proper deference to the trier of fact’s determination as to the appropriate amount of the award. *Id.*, at 975.

The *Mosing* Court reasoned that the legislature deliberately left the assessment of the appropriate amount to the jury, by not placing a cap on the amount awardable under La.C.C. Art. 2315.4 as it did in other Louisiana “penalty” statutes. *Id.*, at 974 to 975. The *Mosing* Court

explained that “exemplary damages are more concerned with the conduct of the tort-feasor than with the damages of the victim, and are regarded as a fine or penalty for the protection of the public interest.” *Id.*, at 974. Thus, the level of punitive damages is in the nature of a “subjective determination as to the amount necessary to punish and deter.” *Id.*, at 974. Determining the proper amount “is an intensely fact-sensitive undertaking.” *Id.*, at 974. “Such fact-driven determinations are the unique province of the jury or trier of fact.” *Id.*

The *Mosing* Court adopted, as “appropriate factors to consider,” the three guideposts of the Supreme Court’s *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed. 2d 809 (1996), and added the defendants’ economic wealth, assets and income as an additional relevant factor. *Id.*, at 978. Thus, the following factors may be considered in reviewing an award of exemplary damages under Louisiana law: (1) The degree of reprehensibility of the defendant’s conduct; (2) The disparity between the harm and/or potential harm suffered by the plaintiff, and the exemplary damages award; (3) The difference between the exemplary damages awarded by the jury and the civil or criminal penalties authorized or imposed in comparable cases; (4) The economic wealth, assets and income of the defendants. *Id.*; *Gore*, 517 U.S. at 574-575. The *Mosing* Court stressed that “each case is different, and the adequacy or inadequacy of the award should be determined by the facts or circumstances particular to the case under consideration.” *Id.*, at 979 (quoting *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1260 (La.1993)). The instant record, viewed in light of these guideposts, fully supports the exemplary damage award.

The first guidepost, reprehensibility of the defendant’s misconduct, is considered the most important indicium of the reasonableness of a punitive damages award. *Gore*, 517 U.S. at 575; *Mosing*, at 979. Reprehensibility is determined by considering whether: “the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a

reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *Gore*, 517 U.S. at 576-577. Here, the harm caused was physical, resulting in the near death experience, severe psychological harm and permanent physical injuries to Traci as well as the burning death of her passenger. Additionally, DRIVER’s conduct involved conscious indifference and reckless disregard of the health and safety of all motorists, as well as repeated actions, intentional malice, trickery and deceit. The record shows that DRIVER drove his tractor-trailer repeatedly on our interstate highways while taking Methadone despite actual knowledge that doing so was both hazardous and illegal. He engaged in trickery and deceit in lying and falsifying documents during his medical certification process so he could drive eighteen-wheelers on Methadone in arrogant defiance of known dangers and the law. Incredibly, less than a month after killing and severely injuring human beings in this accident, he lied and falsified documents again during his recertification process so he could keep driving commercial rigs. DRIVER’s absolute lack of remorse continued at trial with excuses and attempts to gain the jury’s sympathy as he testified (non-responsively to any question posed) that he had been “almost” addicted to pain medication (Tr. 97) and had to earn a living (Tr. 104). The first guidepost fully supports the jury’s verdict.

The second guidepost examines the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award. The Supreme Court has declined “to impose a bright-line ratio which a punitive damages award cannot exceed.” *State Farm Mutual Automobile Insurance Company v. Campbell*, \_\_\_ U.S. \_\_\_, 123 S.Ct. 1513, 155 L.Ed. 2d 585 (2003). However, “[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1.” *Campbell*, \_\_\_ U.S. at \_\_\_\_\_. The *Gore* Court noted: “In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis.

When the ratio is a breathtaking 500 to 1, however, the award must surely ‘raise a suspicious judicial eyebrow.’” *Gore*, 517 U.S. at 583 (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 481, 113 S.Ct. 2711, 125 L.Ed. 2d 366 (1993)).

This is not a case of a jury reaching “extreme results that jar one’s constitutional sensibilities.” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S.Ct. 1032, 113 L.Ed. 2d 1 (1991). The Supreme Court in *Haslip* upheld an \$800,000.00 exemplary damages award “more than four times the amount of compensatory damages, ... more than two hundred times [the plaintiff’s] out-of-pocket expenses and much in excess of the fine that could be imposed.” *Haslip*, 499 U.S. at 23. Unlike here, *Haslip* involved only economic damages for insurance fraud and posed no potential threat to public safety. In *TXO Production Corp.*, *supra*, the Court affirmed a state court award of \$10,000,000 where compensatory damages were only \$19,000, or “526 times greater than the actual damages awarded by the jury.” *TXO Production Corp.*, 509 U.S. at 453. It was a slander of title action which involved no threat to public safety. In *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed. 2d 219 (1989), the Supreme Court approved of a ratio of exemplary to compensatory damages over 100 to 1 (\$51,146 in compensatory, \$6,000,000 in exemplary damages in an antitrust action not involving a threat to public safety. *Id.*, at 262.

Here, the actual harm to Mr. and Mrs. CLAIMANT involved, not just economic damages, but substantial direct injury to the body and mind, valued by the jury at \$500,000. Thus, the ratio of actual to exemplary damages is a mere 1 to 3. Moreover, the potential harm to Traci was the fiery death she narrowly escaped. Thus, the potential harm far exceeded the award of exemplary damages. In light of the above-cited cases, and especially the Louisiana Supreme Court’s approval of a 1 to 9 ratio of actual to exemplary damages in *Mosing*, the 1 to 3 ratio here is far from an abuse of the jury’s vast discretion.

The *Mosing* Court stressed that the Louisiana legislature did not cap exemplary damages

awardable under La.C.C.Art. 2315.4 as it did in other Louisiana penalty statutes, deliberately leaving this assessment to the discretion of the jury. *Id.*, at 974-975. Significantly, even under those penalty statutes that do impose a cap, a cap of triple damages is commonplace.<sup>27</sup> The jury's 1 to 3 ratio of actual to exemplary damages and much smaller ratio of potential harm to exemplary damages was well within its discretion. The second guidepost fully supports the verdict.

The third guidepost compares "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct..." *Gore*, 517 U.S. at 583. This factor accords deference to legislative judgments concerning appropriate sanctions for the conduct at issue. *Gore*, 517 U.S. at 583. In Louisiana, La.R.S. 14:32.1 provides that the operator of a motor vehicle who kills a human being while under the influence of a controlled dangerous substance listed in Schedule I, II, III, IV or V as set forth in La.R.S. 40:964 can be charged with vehicular homicide. Under La.R.S. 40:964, Methadone is listed as a Schedule II controlled dangerous substance. **The penalty under La.R.S. 14:32.1 includes a prison term of up to 20 years, along with a \$15,000 fine with at least one year served without benefit of probation, parole or suspension of sentence.** The criminal penalty of a twenty-year prison term demonstrates Louisiana public policy and legislative judgment that DRIVER's misconduct warrants the harshest of penalties. The third guidepost fully supports the jury's verdict.

The fourth guidepost, the economic wealth, assets and income of the Defendants, further supports the jury's award. Without objection, plaintiffs introduced the income tax returns of Jones Motor Company for 1998 through 2002. (Plaintiffs' Exhibit 32, *in globo*.) For 2002, Jones showed gross receipts of \$63,172,961; total income of \$8,304,945 and ordinary income of

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<sup>27</sup>See *Mosing*, at 974-975 (citing La.R.S. 51:1409, which assesses triple damages and attorney's fees for the knowing use of unfair or deceptive trade practice. La.R.S. 3:4278.1, allowing triple damages for cutting down trees on the land of another, knowingly and without authorizations; La.R.S. 9:3552, permitting triple finance charges plus attorney's fees for bad faith violations of consumer credit transaction laws; and La.R.S. 51:137, providing for triple damages plus attorney's fees for violations of the monopoly laws).

\$1,645,530. For 2001, those figures were \$57,741,612; \$7,940,761 and \$1,120,192, respectively. Defendants offered no financial evidence for the jury to consider.<sup>28</sup> Significantly, the *Mosing* Court affirmed the jury's \$500,000 exemplary damage award against an individual citizen even in the complete absence of evidence of the defendant's financial situation. *Mosing*, at 979. The fourth guidepost fully supports the jury's verdict.

In *Dekeyser v. Automotive Casualty Insurance Co.*, 1997-1251 (La.App.4th Cir.2/4/98), 706 So.2d 676, the court affirmed a jury's award of \$850,000.00 for exemplary damages against an intoxicated driver where general damages were \$500,000.00 and special damages were \$45,060.57. *Id.*, at 679. The *Dekeyser* Court summarily dismissed the defendant's claim of excessiveness, noting:

Visiting Louisiana for Mardi Gras celebrations, Grace Kelly decided to drink and drive to continue the fun and festivities. Kelly's actions caused severe injury to plaintiff. Potentially, Ms. Kelly's actions **could have caused serious injury or death for many people**. Reasonable minds could differ on the appropriate amount to award to exemplify the wrongful conduct of the defendant. The award of \$850,000.00 did not abuse the discretion of the jury.

*Id.*, at 687 (internal quotations omitted, emphasis added).

Here, DRIVER's actions could have caused serious injury and death to many people, and did cause serious injury to Traci and death her passenger. The award in *Dekeyser* was upheld against an individual citizen driving a regular automobile, with no evidence of her financial situation, no evidence that her intoxicated driving was a calculated or repeat offense, and no evidence that she had specialized training in the hazards of driving impaired as commercial drivers do.

The exemplary damage verdicts of \$850,000 and \$500,000 in *Dekeyser* and *Mosing*,

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<sup>28</sup>Quoting the federal Fifth Circuit, the *Mosing* Court noted that the defendant, not the plaintiff, must carry the burden of introducing evidence of net worth if the defendant wishes that evidence to be considered. *Id.*, citing *Woods-Drake v. Lundy*, 667 F.2d 1198, 1203 n. 9 (5<sup>th</sup> Cir.1982).

respectively, should not be viewed as the “outer limits.” *Mosing* and *Dekeyser* both simply upheld the exemplary damage verdicts as an appropriate exercise of the jury’s vast discretion. Indeed, the Louisiana Supreme Court stressed in *Mosing* that the “reviewing court is not to decide what it considers to be an appropriate award, but rather, to review the exercise of discretion by the trier of fact. ‘Each case is different, and the adequacy or inadequacy of the award should be determined by the facts or circumstances particular to the case under consideration.’” *Mosing*, at 979 (citing *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1260 (La. 1993)). The jury’s vast discretion is highlighted by the legislature’s decision not to place a cap on exemplary damage awards under La.R.S. 2315.4. The reasonableness of the award is underscored by its falling within the triple damage caps imposed by other Louisiana penalty statutes. Here, every factor in the analysis set forth in *Mosing* supports the verdict. While a much larger exemplary damages verdict would have been reasonable, the jury’s verdict here was certainly not an abuse of its vast discretion under the facts of this case.

#### **IV. The General Damages Awards Were Not an Abuse of the Jury’s Vast Discretion.**

The jury did not abuse its vast discretion in awarding \$258,000.00 for past and future mental anguish, \$110,000.00 for past and future loss of enjoyment of life and \$60,000.00 for past and future physical pain and suffering.<sup>29</sup>

When an award is challenged through the district court’s discretionary decision not to grant a new trial or remittitur, the Fifth Circuit’s standard of review is “abuse of discretion of the district court, rather than the reasonableness of the jury’s award.” *Esposito v. Davis*, 47 F.3d 164, 167 (5<sup>th</sup> Cir.1995). See also *Stokes v. Georgia-Pacific Corp.*, 894 F.2d 764 (5<sup>th</sup> Cir.1990). “Under these circumstances, there is no abuse of discretion denying a motion for new trial unless

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<sup>29</sup>Under Louisiana law, “loss of enjoyment of life is a separate element of compensable general damages which is not necessarily included in an award for general damages.” *Hebert v. Old Republic Insurance Company*, 01-355 (La.App.5th Cir.1/29/02), 807 So.2d 1114, 1118 (affirming an award of \$100,000 for loss of enjoyment of life as a separate element of damages).

there is a **complete absence of evidence** to support the verdict.” *Id.* (emphasis added).

In the Fifth Circuit “we start from the bedrock principle that the determination of the extent of damages is for the trier of fact, and in this area, the appellate court should step lightly or not at all.” *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 767 F.2d 1151, 1155 (5<sup>th</sup> Cir.1985). In *Caldarera v. Eastern Airlines*, 705 F.2d 778 (5<sup>th</sup> Cir.1983), the Fifth Circuit stated:

We do not reverse a jury verdict for excessiveness except on “the strongest of showings.” The jury’s award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to “shock the judicial conscience,” “so gross or inordinately large as to be contrary to right reason,” so exaggerated as to indicate “bias, passion, prejudice, corruption, or other improper motive” or as “clearly exceed[ing] that amount that any reasonable man could feel the CLAIMANT is entitled to.”

*Id.*, at 783-784 (footnotes and citations omitted).

When the jury awards under attack are, as here, for mental anguish and loss of enjoyment of life, the Fifth Circuit describes the great discretion afforded the jury in the strongest of terms, stressing that courts must give:

special solicitude to findings of damages for grief and emotional distress, in large part “[b]ecause the assessment of damages for grief and emotional distress is so dependent on the facts and is so largely a matter of judgment, we are chary of substituting our views for those of the trial judge. He has seen the parties and heard the evidence; we have only read papers. The jury’s assessment of damages is even more weighted against appellate reconsideration, especially when...the trial judge has approved it.” *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 767 F.2d 1151, 1155 (5<sup>th</sup> Cir.1985). It is under this narrow review that the jury’s awards to [plaintiffs] must be evaluated.

*Vogler v. Blackmore*, 352 F.3d 150, 154 (5<sup>th</sup> Cir.2003).

Intangible elements of damages such as mental anguish, emotional distress and loss of enjoyment of life are perhaps the most difficult to quantify. They are unique to each individual.

Experiencing the same horrific event may cause little or no damage to one person, yet deeply and permanently devastate another. Moreover, the effects of deep and devastating emotional trauma are rarely obvious to the casual observer. One may struggle through a regular work schedule and engage in common physical activities appearing “normal,” while secretly invaded by inescapable and paralyzing guilt, nightmares, anxiety, co-dependence, intrusive thoughts and daily memories of a terrifying and devastating experience unimaginable to most. Thus, it comes as no surprise that awards for intangible emotional damages vary widely.

The jury actually heard Traci describe how this tragedy has affected her emotionally from the moment it happened through the time of trial. They were able to gauge the depth and severity of her unique and personal mental anguish through her demeanor, her tone and her tears. They heard Traci’s husband, Brian, tell how the accident has damaged Traci’s personality, independence and outlook on life. They heard from disinterested witnesses’ testimony that Traci was “screaming, hollering, hysterical” while trapped with non-responsive Mac in the burning car. (Tr. 84-85) They heard Traci testify through tears that she was terrified she would die in the car for what seemed like forever. (Tr. 23-24) They heard of Traci’s traumatic experience of seeing her car explode into flames with Mac, her friend, still trapped inside. (Tr. 87) They heard how Traci was stumbling, traumatized, fainting, crying and hysterically asking about her friend on the scene. (Tr. 69-72) They heard of Traci’s struggle with nightmares and feeling that co-workers blamed her for Mac’s death. (Tr. 32) They heard how Traci’s attempts to cherish irreplaceable tender moments with her newborn son can be invaded by guilt as she thinks of Mac’s two children not knowing their father. (Tr. 44, 215) They heard how not a single day has gone by that Traci has not reflected upon this horrible accident (Tr. 45), and how lifting her child and feeling pain in her neck and shoulder will trigger the memories. (Tr. 224) They heard of her nightmares, seeing the car explode over and over. They heard Psychiatrist testify that Traci will never forget these events for the rest of her life (Tr. 223), estimated at 51.9 years (Exhibit 15, Tr.

326), and how she is at higher risk of reacting dramatically to events in the future. (Tr. 241) They heard how this tragedy made Traci change jobs and uproot from a home and community they loved. They heard of a multitude of other profound ways Traci has been affected by her experience. (Further details of Traci's injuries are set forth in § V under FACTS herein at pp. 21-27.)

The record regarding Mrs. CLAIMANT' emotional damages alone more than adequately supports the jury's entire general damage verdict, especially given the "special solicitude" granted the jury in determining mental damages. The jury's general damage awards for mental anguish and loss of enjoyment of life do not "shock the judicial conscience" nor are they "so gross or inordinately large to be contrary to right reason." Accordingly, they should be left undisturbed.

Analysis under the maximum recovery rule often employed in the Fifth Circuit compels the same result, as the following relevant cases demonstrate:<sup>30</sup>

Over ten years ago in *Boudreau v. Farmer*, 604 So.2d 641 (La.App.1st Cir.1992), the court affirmed a general damage award of \$600,000.00 (\$350,000.00 for mental and physical pain and suffering plus \$250,000.00 for loss of enjoyment of life) to a female high school junior who was knocked unconscious in a vehicular collision, was taken to the emergency room, x-rayed and sent home the same day. She was diagnosed with a cervical strain or sprain and a prolapsed cervical disc with no surgical recommendation. She was advised to refrain from

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<sup>30</sup>When using the maximum recovery rule, the Fifth Circuit reviews damages awards in the context of awards in cases with similar injuries in the relevant jurisdiction. *Vogler*, at 156. In this diversity case, Louisiana cases and federal cases applying Louisiana law comprise the relevant jurisdiction. *Id.* The Fifth Circuit employs the "maximum recovery" rule when granting a remittitur, whereby damages are reduced to the maximum amount a reasonable jury could have awarded, but adding a multiplier of fifty percent (50%) in jury trials so long as no multiplier was used in calculating those past awards. *Id.* While recent Fifth Circuit panels have employed the maximum recovery rule (as in *Vogler, supra*), other panels have rejected the practice: "Comparison of verdicts rendered in different cases is not a satisfactory method for determining excessiveness *vel non* in a particular case and...each case must be determined on its own facts." *Wiley v. Stensaker Schiffahrtsques*, 557 F.2d 1168, 1172 (5<sup>th</sup> Cir.1977)(quoting *Fruit Indus., Inc. v. Petty*, 268 F.2d 391, 395 (5<sup>th</sup> Cir.1959). Other Fifth Circuit panels analyze an excessive damages claim "primarily on the evidence in this record, and secondarily on the rough guidance provided by awards approved for similar injuries by the Louisiana appellate courts and the decisions of this court applying Louisiana law." *DRIVER v. M.V. Angela*, 353 F.2d 376, \_\_\_ (5<sup>th</sup> Cir.2003). The record supports the damages awarded in this case regardless of the method used.

manual labor, and limit sports activities, lifting and using her arms overhead. She was also diagnosed with major depression and mild chronic traumatic stress disorder. Doctors believed that her chronic head and neck pain would continue into the future. *Id.*, at 647-648. Her orthopedic surgeon also diagnosed Scheuermann's disease, a developmental abnormality, but did not relate it to the accident. *Id.*, at 654 (n. 12). Her past medical expenses were only \$8,641.28. *Id.*, at 648.

Over ten years ago in *Gaugh v. Natural Gas Pipeline Co. of America*, 966 F.2d 763 (5<sup>th</sup> Cir.1993), the Fifth Circuit reduced a jury award of \$1,444,599.00 for post traumatic stress disorder to \$600,000.00. There, plaintiff's physical injuries "had little compensable value," as "they resolved within days of the accident." *Id.*, at 765-767. After a ship struck a gas pipeline, causing an explosion, plaintiff jumped overboard and swam away from the heat and flames. One injured seaman he attempted to assist drowned. Plaintiff was only in the hospital for two days, but began experiencing nightmares, flashbacks and depression. *Id.*, at 764. His psychologists testified that his post-traumatic stress disorder typically requires two to three years of treatment, the lawsuits were aggravating it and memories of the event will remain for the rest of his life. *Id.*, at 764-765. Acknowledging that awards for similar injuries provide "rough guidance," the court found "no satisfying analogs" to plaintiff's injuries, as many posttraumatic stress disorder patients also suffered severe physical injuries, while others were neither injured nor endangered. *Id.*, at 767.<sup>31</sup>

In *Nielsen v. Northbank Towing, Inc.*, 1999-1118 (La.App.1st Cir.7/13/00), 768 So.2d 145, the court affirmed an award of \$350,000.00 in general damages in favor of a Jones Act seaman. Plaintiff was a diver for McDermott. He was forced to abandon a barge in the Bay of

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<sup>31</sup>Although *Gaugh* was a general maritime law case originating in the Eastern District of Texas, the Fifth Circuit looked as far as a 1989 Illinois state court case it described as "[p]erhaps the best guidepost." *Id.*, at 767 (citing *DeYoung v. Alpha Constr. Co.*, 542 N. E. 2d 859 (1989)). While *Gaugh* is not technically a case from the "relevant jurisdiction" for maximum recovery rule analysis, it confirms that the jury's award here does not "shock the judicial conscience" and is not "so gross or inordinately large as to be contrary to right reason" or "clearly exceeding that amount that any reasonable man could feel the CLAIMANT is entitled to."

Campeche off the coast of Mexico by jumping into heavy seas while a storm was approaching. While he saw several crew members perish at sea, plaintiff managed to swim to a life raft within ten minutes. *Id.*, at 159. After a couple of hours in the life raft with other crewmembers, he was rescued by another vessel. *Id.*, at 159. By the time of trial, the parties did not seriously dispute that plaintiff had recovered from his physical injuries, undescribed in the opinion other than to say that he “injured his shoulder as he hit the water.” *Id.*, at 159. Plaintiff’s treating psychiatrist diagnosed post-traumatic stress disorder, and said he would need psychiatric care for two more years beyond March 9, 1998. (The incident was October 15, 1995.) *Id.*, at 161. Plaintiff testified that his symptoms were no longer as severe, but he continued to have flashbacks, nightmares, paranoia and anxiety. *Id.*, at 161. The court found the award of \$350,000.00 to be “neither abusively high nor abusively low.” *Id.*, at 161.

In *Duncan v. Kansas City Southern Railway Co.*, 2000-0066 (La. 10/30/00), 773 So.2d 670, the Louisiana Supreme Court affirmed an award of \$350,000.00 for mental anguish and negligent infliction of emotional distress for a seven year old passenger of a van hit by a train. Her twelve year old sister was killed and her eleven year old sister suffered spinal cord and brain injuries. The seven year old suffered less serious physical injuries (not described in the opinion). The award of \$350,000.00 for mental anguish and emotional distress was based upon post-traumatic stress disorder and survivor’s guilt. *Id.*, at 684. The seven year old had fear of riding in the family van and it was recommended that she have periodic counseling. *Id.*

In *Miley v. Landry*, 582 So.2d 833 (La. 1991), the Louisiana Supreme Court awarded \$300,000.00 in physical and mental pain and suffering to a plaintiff whose only physical injury was a musculoskeletal strain where the accident aggravated a pre-existing psychological condition.

While no two cases are exactly alike, the above-cited cases represent damage awards for closely-analogous emotional injuries alone. However, Mrs. CLAIMANT also suffered permanent

physical injuries. She has a large disc rupture at C6-7 with irritation of the nerve root and a small disc rupture at C5-6 with indentation of the dura or sac around the nerve root. (Tr. 182-184) The disc ruptures are permanent (Tr. 187), as is her 6% permanent whole man impairment. (Exhibit 10, June 13, 2003 report, p. 2) Traci is now more susceptible and vulnerable to future cervical spine injury. (Tr. 188) Even defendants' IME orthopedic surgeon, Dr. Moss, found that the C6-7 disc bulge indents the thecal sac and causes irritation and pain. (Moss depo. 36-37) Dr. Moss agreed that her complaints of pain could be permanent. (Moss depo. 39) Dr. Moss recommended physical therapy three times a week for six weeks, as well as stretching and strengthening exercises for the neck. (Moss depo. 38) Traci's treating orthopedic surgeon, Dr. Hamsa now recommends an EMG study of the affected cervical nerve, physical therapy, cervical traction, electrical stimulation to the cervical neck muscles and anti-inflammatory medications. (Tr. 186-187) Traci has been treating with a doctor in Arkansas for neck and shoulder problems. (Tr. 50) Dr. Hamsa testified that Traci's future is uncertain, and her future medical treatment will possibly include surgery. (Tr. 192-193) At trial, Traci described a constant pain from her neck down into her shoulders, a tingling in her arm that was "more disturbing than anything" and right (dominant) hand spasms causing her to drop things and lose mobility. (Tr. 35-36, 37-38) Her pains cause her difficulty holding her baby son and with sleeping. (Tr. 38-39, 58-59) Thus, the upper limit of reasonableness for a general damage award for Mrs. CLAIMANT' emotional and physical injuries far exceeds what the jury awarded.

Defendants erroneously urge the court to reduce the jury's award here to levels representing the lowest awards in the relevant jurisdiction, when the inquiry is the "maximum amount a reasonable jury could have awarded." *Vogler*, at 156. Additionally, the cases Defendants cite are far too dissimilar to be called fair comparisons.

The low-award cases cited by Defendants and their dissimilarity to the case at bar are summarized as follows: In *Knepper v. Robin*, 1999-95 (La.App.3rd Cir.11/17/99), 745 So.2d

1248, plaintiff suffered TMJ and lumbar disc injuries as well as depression after a car accident. Unlike Mrs. CLAIMANT, she did not narrowly escape burning alive while trapped in her vehicle. Unlike Mrs. CLAIMANT, there was testimony of other significant independent stressors in plaintiff's life, "including her grandmother's death in 1992, both her sister's and mother's depression, a close friend who committed suicide and Plaintiff's boyfriend problems." *Id.*, at 1254. Nevertheless, the court raised her mental and physical (lumped together) pain and suffering award from \$55,500.00 to \$75,000.00. The court added an award of \$20,000.00 for loss of enjoyment of life, for a total general damage award of \$95,000.00 since the trial court erroneously refused to provide a separate jury interrogatory for that separate element of damages. The case is dissimilar and irrelevant, and the court considered the award, as raised, to be the lowest within reason.

In *Denton v. Reed*, 98-1056 (La.App.5th Cir. 2/23/99), 739 So.2d 1217, the court merely refused to raise a general damage award of \$35,000.00 out of deference to the jury's great discretion. Plaintiff was in a simple two-car collision and had a lumbar disc injury. A second accident presented a major causation issue. The case did not involve a terrifying near-death experience or psychological diagnoses such as post-traumatic stress disorder or survivor's guilt. Although the court found the general damage award of \$37,000.00 to be "on the low side," the award was affirmed as a proper exercise of "the jury's much discretion." *Id.*, at 222.

In *Cortez v. Zurich Insurance Co.*, 98-2059 (La.App.1st Cir.12/28/99), 752 So.2d 957, a light pole fell onto plaintiff's parked car causing the roof of her car to hit her head. She was able to open the car door and walk into a store to call her husband. She ultimately had a cervical fusion. While she was diagnosed with posttraumatic stress disorder and depression, within a year following her accident, she was also greatly troubled by the death of her cousin and her cousin's child and witnessing the accidental death of her husband. *Id.*, at 970. Deferring to the jury's great discretion, the court affirmed a general damages award of \$215,000.00 (\$120,000.00

physical pain and suffering, \$20,000.00 mental anguish, \$75,000.00 loss of quality of life). Cortez actually supports the jury's general damage award to Mrs. CLAIMANT.

In Baudoin v. Acadia Parish Police Jury, 620 So.2d 453 (La.App.3rd Cir.1993), an intersectional collision killed the driver and her son. The driver's brother and her boyfriend were injured. The boyfriend's injuries consisted of being "shaken up in the accident and pretty well bruised." Id., at 457. He claimed that he could not work for three years because of "mental problems" and "high blood pressure" resulting from the death of his girlfriend and her son. Id., at 457-458. However, "[t]he only evidence with regard to these alleged consequences of the accident was [plaintiff's] own testimony." Id., at 458. The court found that plaintiff completely failed to prove mental trauma because such proof legally requires more than the victim's self-serving testimony. Id., at 458. Finding no permanent physical injuries, the court awarded \$5,000.00 for pain and suffering. Baudoin bears no resemblance to this case.

In Morrison v. Kappa Alpha PSI Fraternity, 31, 805 (La.App.2nd Cir.5/7/99), plaintiff was beaten in a fraternity hazing incident. He suffered "contusions to the neck, headaches and a cervical strain. At the most, he was treated for fourteen months for his physical injuries." Id., at 1121. Plaintiff also claimed emotional injuries. He was diagnosed with an adjustment disorder and depression. The treating psychiatrist testified that all difficulties would resolve within six months of trial with the exception of plaintiff's distrust of black males, although he conceded that plaintiff considered himself an outcast among black men before the hazing incident. Id., at 1121. Although plaintiff's attorneys urged the jury to award \$100,000.00 in general damages, the jury awarded \$300,000.00. Id., at 1121. The court reduced the award to \$40,000.00, noting that the injuries were "primarily psychological and, for the most part, resolved as of trial." Id., at 1121. All remaining problems, except pre-existing ones would be resolved in six months. Morrison bears no resemblance to this case.

In Dickerson v. Lafferty, 32, 658 (La.App.2nd Cir.1/26/00), 750 So.2d 432, an

automobile accident killed the driver and caused minor physical injuries to her seven year old grandson. He was able to exit the vehicle, but his grandmother was trapped in the vehicle “for some time.” She died later that day. He was diagnosed with posttraumatic stress disorder and described as having feelings of guilt. He saw a psychologist only twice, and on the second visit, significant improvement was noted. *Id.*, at 434. By trial, his difficulty sleeping had resolved, but he was agitated when riding in a car. The bench trial award of \$52,500.00 in general damages was reduced to \$15,000.00. *Dickerson* bears no resemblance to this case.

In *Manny v. Evans*, 780 So.2d 1136, plaintiff saw her husband struck and killed by a car. She suffered no physical injury. The opinion reflects no treatment with a psychologist or psychiatrist. Her mental anguish aggravated her pre-existing sarcoidosis and caused her to have nightmares for a year and a half. *Id.*, at 1139. The court deferred to the factfinder’s vast discretion in affirming an award of \$10,000.00. *Manny* is far from a fair comparison.

In *Barnes v. Bott*, 615 So.2d 1337 (La.App.4th Cir.1993), a boy who witnessed his half-brother get struck and killed by a car was awarded \$15,000.00. He suffered no physical injury, and was treated by a child psychologist weekly for less than a year because he became withdrawn and had sleeping problems and intense guilt feelings. *Barnes* is in no way similar to this case.

In *Davis v. State DOTD*, 94-308 (La.App.3rd Cir.12/7/94), 647 So.2d 552, a mother and two minor children were injured in a vehicular collision. Deferring to the vast discretion of the jury, the court affirmed an award of \$25,000.00 to one daughter who suffered minor lacerations and soft tissue injuries, but was trapped inside the car for almost an hour and witnessed her unconscious mother bleeding and her severely injured older sister hysterical. The opinion does not reflect any psychological treatment or diagnosis. Nor does it reflect any permanent, or even long lasting physical or emotional sequelae as did the case at bar. *Davis* is a dissimilar case in which a low jury verdict was affirmed in deference to the jury’s vast discretion.

In *Ford v. State DOTD*, 1999-1297 (La.App.3rd Cir.4/12/00), 760 So.2d 478, plaintiff was seriously injured in a vehicular accident which killed her seventy-five year old mother. Defendants accurately note that the court reversed the district court's JNOV increase in the separate mental anguish award, based specifically upon her presence at the death of her mother, because of the vast discretion afforded the jury, which found an award of zero to be appropriate. However, Defendants fail to mention that the court affirmed the district court's JNOV increase for plaintiff's own mental anguish and emotional distress awards from \$10,000.00 to \$100,000.00; loss of enjoyment of life from zero to \$50,000.00 and physical pain and suffering from \$10,000.00 to \$300,000.00, as the lowest reasonable awards under the applicable state standards. If anything, *Ford* supports the jury verdict herein.

Therefore, to the extent this court reviews prior cases for guidance, the above-cited cases are more appropriately considered. In fact, even assuming, arguendo, that the cases cited above and those cited by Defendants (discussed below) were equally analogous (although they are not), only the higher damage awards cited above are logically considered for determining the maximum reasonable amount.

Finally, Defendants' attempt to classify the jury's mental anguish award to Mrs. CLAIMANT as impermissible damages under La.C.C. Art. 2315.6 to someone not a designated beneficiary under the article is misguided. In *Morris v. Maryland Casualty Company*, 94-1556 (La.App.3rd Cir.5/3/95), 657 So.2d 198, the court held that the engineer of a train involved in a car-train collision, killing the car's driver, stated a cause of action for recovery of damages for resulting psychological harm because the engineer was not a "bystander" who viewed the accident or came upon the scene shortly thereafter, but was instead an actual participant. Thus, La.C.C.Art. 2315.6 was inapplicable, and the plaintiffs stated a cause of action for "any damages he sustained as a result of being involved in the accident which resulted in the death of [the car's

driver].” *Id.*, at 200. See also *Guillory v. Arceneaux*, 580 So.2d 990 (La.App.3rd Cir.), *writ denied*, 587 So.2d 694 (La.1991); *Deville v. Budd Const. Co.*, 617 So.2d 570 (La.App.3rd Cir.), *writ denied*, 625 So.2d 180 (La. 1993) (holding that, as one of the actual accident victims, plaintiff was entitled to compensation for any mental anguish he felt, as well as pain and suffering, due to being involved in the accident); *Clomon v. Monroe City School Bd.*, 572 So.2d 571 (La.1990) (finding that defendant bus driver had breached a specific statutory duty owed not only to children on bus, but also to motorists who relied on the presence of signals to avoid injuring children exiting the bus, and therefore allowing claim for emotional damages to car driver who struck a child, but suffered no physical injury, had no relationship to the child and was contributorily negligent).

Mrs. CLAIMANT could not control the tragic burning death of Mac, or her own severe mental and physical injuries caused by DRIVER’s egregious conduct. As a participant in the accident, Mrs. CLAIMANT is entitled to recover for all of her injuries, mental as well as physical. The evidence presented to the jury involved Mrs. CLAIMANT’s own physical and mental injuries. In fact, Mrs. CLAIMANT testified that she did not actually witness Mac while he burned in her vehicle or afterward (Tr. 26-27, 228), and the jury charges properly excluded any reference to awarding damages based upon her witnessing injuries to another. Additionally, as in *Clomon*, DRIVER breached a specific statutory duty meant to protect all motorists when he drove his tractor-trailer under the influence of Methadone. Defendants’ attempt to classify Mrs. CLAIMANT’s damages as impermissible under La.C.C. Art. 2315.6 is without merit.

**V. THE JURY’S AWARD OF \$62,000 TO TRACI CLAIMANT FOR FUTURE MEDICAL EXPENSES IS SUPPORTED BY THE RECORD.**

Defendants’ claim of insufficient evidence to support the jury’s award of \$62,000 in future medical expenses is without merit. Louisiana law provides:

In order to recover future medical expenses, the appellate record must establish that future medical expenses will be necessary and

inevitable. *Stiles v. K Mart*, 597 So.2d 1012, 1013 (La.1992). An award for future medical expenses will not be supported in the absence of medical testimony that they are indicated and setting out the probable cost. *Holliday v. United Services Auto. Ass'n*, 569 So.2d 143, 146 (La.App. 1st Cir.1990). **Nevertheless, when the record establishes that future medical expenses will be necessary and inevitable, courts should not reject the award because the record does not provide the exact value, if the court can determine from the record, past medical expenses, and other evidence a minimum amount that reasonable minds could not disagree would be required.** *Stiles*, 597 So.2d at 1013; *Brumfield v. Guilmino*, No. 93-0366 (La.App. 1st Cir. 3/11/94), 633 So.2d 903, 908, writ denied, 94-0806 (La. 5/6/94), 637 So.2d 1056.

***Richard v. St. Paul Fire & Marine Insurance Co.***, 94-2112 (La.App.1st Cir.6/23/95), 657 So.2d 1087, 1093 (emphasis added).

In ***Richard***, plaintiff's treating physician "testified that Richard 'may' need to have future surgery on his knee...", he expected plaintiff to need continued treatment and "anticipated further diagnostic testing, the possibility of neurological or orthopedic intervention on Richard's lower back, and further rehabilitation of the knee and possibly the back." ***Id.***, at 1092-1093. Plaintiff's other treating physician testified that "he did not anticipate further surgery in the near future. He agreed that Richard **may** need total knee replacement in the future, but, if so, not for approximately 25 years." ***Id.***, at 1093. Based upon that record, the ***Richard*** Court determined:

The record herein clearly establishes that future medical expenses will be necessary and inevitable. The record also shows that Richard incurred past medical expenses of approximately \$73,000.00. Richard also has a history of significant and unusual complications. **Although the medical experts did not establish with certainty the extent of future surgery plaintiff may need, the evidence in the record is sufficient to find that the jury award of \$200,000.00 is not an abuse of the trier of fact's much discretion.**

***Id.***, at 1093 (emphasis added).

Here, the jury's \$62,000 future medical expense award was likewise well within the jury's much discretion. Traci's future life expectancy at the time of trial (at age 29) was 51.9 years. (Exhibit 15, Life Expectancy Tables; Tr. 326) Defendants stipulated that plaintiffs' past

medical bills totaled \$9,418.68. (Tr. 324) These medical bills included Dr. Hamsa's bills, reflecting office visits costing \$300 for an initial visit and \$140 for subsequent visits (Exhibit 2), and Psychiatrist's bills reflecting clinical sessions billed at \$200 per hour, costing \$190, \$142.50, \$200 and \$200, respectively, for each clinical session Traci attended. (Exhibit 3) A cervical MRI at Medical Center Diagnostics generated a bill of \$624.28. (Exhibit 8)

Dr. Hamsa now recommends an EMG study of the affected cervical nerve, physical therapy, cervical traction, electrical stimulation to the cervical neck muscles and anti-inflammatory medications. (Tr. 186-187) Traci has been treating with a doctor in Arkansas for neck and shoulder problems. (Tr. 50) Her disc ruptures, with nerve irritation, are permanent (Tr. 187), as is her 6% permanent whole man impairment. (Exhibit 10, June 13, 2003 report, p. 2) At trial, Traci described a constant pain from her neck down into her shoulders, a tingling in her arm that was "more disturbing than anything" and right (dominant) hand spasms causing her to drop things and lose mobility. (Tr. 35-36, 37-38) Her pains cause her difficulty holding her baby son and with sleeping. (Tr. 38-39, 58-59) As in Richard, Traci's treating orthopedic surgeon, Dr. Hamsa, testified that Traci's future is uncertain, and her future medical treatment will possibly include surgery. (Tr. 192-193) Traci is now more susceptible and vulnerable to future cervical spine injury. (Tr. 188) Even defendants' IME orthopedic surgeon, Dr. Moss, found that the C6-7 disc bulge indents the thecal sac and causes irritation and pain. (Moss depo. 36-37) Dr. Moss agreed that her complaints of pain could be permanent. (Moss depo. 39) Dr. Moss recommended physical therapy three times a week for six weeks, as well as stretching and strengthening exercises for the neck. (Moss depo. 38)

Additionally, Traci's treating psychiatrist testified that she should receive further psychotherapy. (Tr. 221) Psychiatrist still recommends Paxil or Zoloft as medications. (Tr. 222) She is at a higher risk of reacting dramatically to other traumatic events in the future (Tr. 241), and treating her will be more difficult than the typical patient. (Tr. 225) She will have

memories of the event every time she lifts her child and feels pain in her shoulder. (Tr. 224) Her memories and images of the traumatic event will continue for the rest of her life. (Tr. 222-223)

The jury's award amounted to less than an average of \$1,200 per year, or \$100 per month of Traci's remaining life expectancy. Based on the testimony of Drs. Hamsa, Moss and Ginzburg, Traci's future medical costs will far exceed that amount for the first few years. The jury could have reasonably concluded that, thereafter, even in the absence of a surgery, Traci will need to take some form of anti-inflammatories and need other medical care for the remainder of her life, as her cervical injuries are permanent. Adding a reasonable sum for the recommended physical therapy, EMG study, cervical traction, electrical stimulation and anti-inflammatory medications and future follow-up with an orthopedic surgeon as recommended by Dr. Hamsa, as well as the future psychotherapy, Paxil or Zoloft recommended by Psychiatrist and especially given his testimony that Traci will be more difficult to treat than the typical patient and is at higher risk of reacting dramatically to other traumatic events in the future, that her memories and images of this traumatic event will continue for the rest of her life, and the cost of past orthopedic visits and counseling sessions as reflected in the record, the award of \$62,000 for all future medicals Traci will incur for the rest of her life was well within the jury's vast discretion. This award was certainly not "against the great weight of evidence."

### **CONCLUSION**

Defendants' post-trial motions should be denied in their entirety.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have on this \_\_\_\_ day of \_\_\_\_\_, 2004, served a copy of the foregoing pleading on all counsel for all parties by:

Hand Delivery  
 Facsimile

Postage Prepaid U.S. Mail  
 UPS/Federal Express

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**J. PRICE McNAMARA**