

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-36918

Court of Appeals No. A-1-CA-35002

Dist. Ct. No. D-101-CV-2012-01906

Hon. Francis J. Mathew

ALFREDO MORGA, Individually and on behalf of the
Estate of YLAIRAM MORGA, Deceased, and as Next
Friend of YAHIR MORGA, Minor Child,

and

RENE VENEGAS LOPEZ, Individually and as the
Administrator of the Estate of Marialy Ruby Venegas Morga,
Deceased, and Georgina Leticia Venegas, Individually,

Plaintiffs-Respondents,

vs.

FEDEX GROUND PACKAGE SYSTEM, INC., RUBEN'S
TRUCKING, LLC a/k/a RUBEN REYES a/k/a SHOOTER'S
EXPRESS TRUCKING, INC. and The Estate of ELIZABETH
SENA QUINTANA, M & K's TRUCKING, INC.,

Defendants-Petitioners,

On Petition for Writ of Certiorari to the Court of Appeals of New Mexico

BRIEF OF *AMICUS CURIAE*
TRUCKING INDUSTRY DEFENSE ASSOCIATION
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BUTT, THORNTON & BAEHR, P.C.
Monica R. Garcia
Rheba Rutkowski
P.O. Box 3170
Albuquerque, New Mexico 87190
(505) 884-0777

Attorneys for Amicus Curiae
Trucking Industry Defense Association

EXHIBIT A

TABLE OF CONTENTS

	<i>Page</i>
Table of Authorities	ii
INTEREST OF <i>AMICUS CURIAE</i> /INTRODUCTION	1
BACKGROUND	4
ADDITIONAL REASONS SUPPORTING CERTIORARI.....	7
A. This Court’s Review is Necessary to Ensure Meaningful Review for Excessiveness and to Clarify Standards	7
CONCLUSION	12
CERTIFICATE OF COMPLIANCE.....	13

TABLE OF AUTHORITIES

Pages

New Mexico Cases

Aken v. Plains Elec. Generation & Transmission Co-op., Inc.,
2002-NMSC-021, 132 N.M. 4018

Bank of New York v. Romero,
2014-NMSC-007, 39 320 P.3d 13

Cf. Los Chavez Cmty. Ass’n v. Valencia Cty.,
2012-NMCA-044, 277 P.3d 4753

Coates v. Wal-Mart Stores, Inc.,
1999-NMSC-013, 127 N.M. 4710

Elder v. Marvel Roofing Co.,
1964-NMSC-152, 74 N.M. 35711

Hall v. Stiles,
1953-NMSC-041, 57 N.M. 2817

Hanberry v. Fitzgerald,
1963-NMSC-100, 72 N.M. 38310

Hasse Contracting Co. v. KBK Fin., Inc.,
1999-NMSC-023, 127 N.M. 31611

Lopez v. Townsend,
1933-NMSC-045, 37 N.M. 5748

Lucero v. Northland Ins. Co.,
2015-NMSC-011, 346 P.3d 11541

Montgomery v. Vigil,
1958-NMSC-133, 65 N.M. 10710

Nava v. City of Santa Fe,
2004-NMSC-039, 136 N.M. 64710

Norwest Bank New Mexico, N.A. v. Chrysler Corp.,
1999-NMCA-070, 127 N.M. 39711

<i>Owen v. Burn Const. Co.</i> , 1977-NMSC-029, 90 N.M. 297	12
<i>Ponder v. State Farm Mut. Auto. Ins. Co.</i> , 2000-NMSC-033, 129 N.M. 698	11
<i>Richardson v. Rutherford</i> , 1990-NMSC-015, 109 N.M. 495	11
<i>Sandoval v. Baker Hughes Oilfield Operations, Inc.</i> , 2009-NMCA-095, 146 N.M. 853	10
<i>Sandoval v. Chrysler Corp.</i> , 1998-NMCA-085, 125 N.M. 292	2, 8, 11
<i>Sunnyland Farms v. Cent. N.M.</i> , 2013-NMSC-017, 301 P.3d 387	3
<i>Vivian v. Atchinson, T. & S.F. Ry.</i> , 1961-NMSC-093, 69 N.M. 6	11

Federal Cases

<i>Cooper Indus., Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424 (2001).....	9
<i>Exxon Shipping Co. v. Baker</i> , 554 U.S. 471 (2008).....	3, 9

Other State Cases

<i>Crookston v. Fire Ins. Exch.</i> , 817 P.2d 789, 802 n.15 (Utah 1991).....	8
--	---

Statutes, Regulations, and Rules

49 C.F.R. §387.9	3
NMSA 1978 §34-5-14	2, 3
Rule 12-320 NMRA.....	1, 2
Rule 12-502 NMRA.....	2, 3, 13

UJI 13-1802 NMRA.....3

UJI 13-1807 NMRA.....3

UJI 13-1830 NMRA.....3

Other Authorities

Jared R. Love, Note: The “Soft Cap” Approach: An Alternative for Controlling Noneconomic Damages Awards, 52 Washburn L.J. 1199

Mary Ellen Biery, “Trucking Companies Hauling in Higher Sales,” March 4, 2018, at <https://www.forbes.com/sites/sageworks/2018/03/04/trucking-companies-hauling-in-higher-sales/#1d57d0f63f27>2

Michelle Rafter “Soaring Insurance Rates Stymie New, Independent Truckers,” June 6, 2017, at <https://www.trucks.com/2017/06/06/insurance-rates-stymie-independent-truckers/>.....3

Nick Carey, “Small Trucking Firms Fear Being Driven Out of Business by Electronic Logging Rule,” Oct. 14, 2016, at <https://www.insurancejournal.com/news/national/2016/10/14/429340.htm>.....2

Small Business Ass’n, New Mexico Profile, 2017, at https://www.sba.gov/sites/default/files/advocacy/New_Mexico_1.pdf.....2

In 2012 (last year available), New Mexico freight shipments by value totaled \$48,793,000,000. Bureau of Transportation Statistics by State: New Mexico, at https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/state_transportation_statistics/state_transportation_statistics_2015/chapter-3/table3_11

Danny Schnautz, Owner-Operator Independent Drivers Ass’n, April 29, 2015 testimony before Committee on Transportation & Infrastructure, Subcommittee on Highways and Transit, U.S. House of Representatives, at <https://transportation.house.gov/uploadedfiles/2015-04-29-schnautz.pdf>1

As of May 2016, there were an estimated 9,910 heavy and tractor-trailer truck drivers in New Mexico. *Id.* at https://www.bls.gov/oes/current/oes_nm.htm#53-0000.....1

INTEREST OF *AMICUS CURIAE*/INTRODUCTION

The Trucking Industry Defense Association (TIDA),¹ a non-profit founded in 1993, is committed to sharing resources among its over 1,600 member motor carriers, trucking insurers, defense attorneys, and claims-servicing companies, and to reducing costs of claims and lawsuits against the trucking industry. <http://www.tida.org/>. TIDA regularly participates as *amicus curiae* in cases involving issues of concern to its members, including in this Court. *Lucero v. Northland Ins. Co.*, 2015-NMSC-011, 346 P.3d 1154.

The issues raised in the Petition are of great significance to TIDA members operating in New Mexico and to the entire trucking industry, an industry largely comprising small businesses² that is vital to the economies of New Mexico³ and the Nation. Through the knowledge and experience of its members, TIDA offers information, analysis, and perspectives that may assist the Court in its

¹This brief is filed under Rule 12-320(E) NMRA, which governs amicus participation in proceedings other than direct appeals and where discretionary review has been granted, and provides that amicus participation “shall proceed according to Paragraphs A through C.” No counsel for any party authored this brief in whole or in part, and no counsel or party (other than amicus and its counsel) contributed money intended to fund its preparation or submission.

²Danny Schnautz, Owner-Operator Independent Drivers Ass’n, April 29, 2015 testimony before Committee on Transportation & Infrastructure, Subcommittee on Highways and Transit, U.S. House of Representatives, at <https://transportation.house.gov/uploadedfiles/2015-04-29-schnautz.pdf>.

³In 2012 (last year available), New Mexico freight shipments by value totaled \$48,793,000,000. Bureau of Transportation Statistics by State: New Mexico, at https://www.rita.dot.gov/bts/sites/rita.dot.gov/bts/files/publications/state_transportation_statistics/state_transportation_statistics_2015/chapter-3/table3_1. As of May 2016, there were an estimated 9,910 heavy and tractor-trailer truck drivers in New Mexico. *Id.* at https://www.bls.gov/oes/current/oes_nm.htm#53-0000.

consideration of these issues; for example, in understanding the adverse impact of the decision below (Opinion) on the ability to evaluate and defend personal-injury cases and on the operating costs of a highly regulated industry with some of the narrowest profit margins of any U.S. industry.⁴ Consistent with the Committee Commentary to Rule 12-320(E), TIDA focuses here on grounds warranting certiorari. NMSA 1978 §34-5-14; Rule 12-502.

The issues presented in the Petition are of substantial importance, not only to the trucking industry but to the administration of the New Mexico civil justice system, as the decisions in this case reflect an abdication of the judicial duty to act as a check on excessive verdicts, *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶¶14-17, 125 N.M. 292, leaving any business, large or small⁵—indeed, any person—sued for negligence in New Mexico courts potentially without meaningful review of compensatory damages awards. Meaningful review is especially important where, as here, the damages are non-economic damages for intangible injuries, as to which jurors are instructed that “[n]o fixed standard exists” for

⁴Profit margins are small; averaging 6% in 2017, up from 2.5-4% for the previous five years. Mary Ellen Biery, “Trucking Companies Hauling in Higher Sales,” March 4, 2018, at <https://www.forbes.com/sites/sageworks/2018/03/04/trucking-companies-hauling-in-higher-sales/#1d57d0f63f27>. The increase is unlikely to continue, given that trucking companies must implement Electronic Logging Data (“ELD”) systems in every vehicle over a two-year period beginning December 18, 2017, at an estimated cost of \$1.8 billion, principally impacting productivity of small trucking businesses. Nick Carey, “Small Trucking Firms Fear Being Driven Out of Business by Electronic Logging Rule,” Oct. 14, 2016, at <https://www.insurancejournal.com/news/national/2016/10/14/429340.htm>.

⁵According to 2017 data, 99% of New Mexico businesses (154,489) are small businesses, with 336,684 employees comprising approximately 56% of the New Mexico labor force. Small Business Ass’n, New Mexico Profile, 2017, at https://www.sba.gov/sites/default/files/advocacy/New_Mexico_1.pdf.

determining them (UJI 13-1802,13-1807,13-1830), and the amount awarded may have little to do with evidence or fact-finding.

The unpredictability and variability of such damages raises operating costs, including insurance costs (likely limiting availability as well),⁶ and complicates settlements. Lack of meaningful review contravenes fairness principles fundamental to our justice system, placing defendants at risk of arbitrary deprivation of property and rights as litigants. *Cf. Los Chavez Cmty. Ass'n v. Valencia Cty.*, 2012-NMCA-044, ¶¶20-21, 277 P.3d 475 (due-process principles of fairness “are basic to our justice system”); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497-513 (2008) (discussing the “stark unpredictability of punitive [damages] awards” and the need for courts “to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary”).

The issues raised in the Petition are of substantial public interest that likely will arise again and should be examined and clarified by this Court. This Court’s review is critical to ensure the fair administration of civil litigation in New Mexico. NMSA 1978 §34-5-14(B)(4); Rule 12-502(C)(2)(d)(iv); *Bank of NY v. Romero*, 2014-NMSC-007, ¶¶1,39, 320 P.3d 1 (cert granted to address “recurring procedural and substantive issues” of “substantial public importance in many other cases”); *Sunnyland Farms v. Cent. N.M.*, 2013-NMSC-017, ¶3, 301 P.3d 387 (cert

⁶Insurance costs are substantial, especially for new and small trucking businesses: the Federal Motor Carrier Safety Administration requires \$750,000 to \$5,000,000 in commercial liability insurance alone. 49 C.F.R. §387.9; Michelle Rafter, “Soaring Insurance Rates Stymie New, Independent Truckers,” June 6, 2017, at <https://www.trucks.com/2017/06/06/insurance-rates-stymie-independent-truckers/>.

granted to “re-examine the standard for consequential contract damages in New Mexico”).

BACKGROUND

Following a collision between a FedEx tractor-trailer and a pickup truck driven by Marialy Morga in which both drivers and Marialy’s four-year-old daughter Ylairam were killed and her 19-month-old son Yahir was seriously injured, plaintiffs sued FedEx and others. Op.¶¶2-3. FedEx stipulated pre-trial that it would be responsible for liability attributed to any defendant. Op.¶3. Finding all defendants liable, a jury awarded compensatory damages of \$61 million for Ylairam’s death, \$32 million for Marialy’s death, \$32 million for Yahir’s injuries, and over \$40 million to Alfredo Morga (Marialy’s husband and father to Ylairam and Yahir). Plaintiffs sought punitive damages; the jury awarded none.

According to the Court of Appeals (COA), jurors were instructed that, should they decide in favor of Ylairam’s estate, they “must then fix the amount of money which you deem fair and just for the life of Ylairam, for the following elements of damages: reasonable expenses of funeral and burial; lost earning capacity, and the lost value of household services; the value of her lost life; and the mitigating or aggravating circumstances attending the wrongful act, neglect, or default.” Op.¶20 (quotation marks, alterations omitted). The Opinion does not describe the evidence of economic damages, but it apparently consisted of evidence that funeral/burial expenses totaled less than \$7,000 for both decedents and testimony from plaintiffs’ expert valuing Ylairam’s lost earning capacity and loss of household services at less than \$1.2 million. FedExBIC5.

Jurors were instructed that, should they decide in favor of Marialy's estate, they "must fix the amount of money which you deem fair and just for her life, including the following elements of damages: the reasonable expenses for the funeral and burial; the lost earning capacity and the lost value of household services; the value of her life apart from her earning capacity; aggravating or mitigating circumstances attending the wrongful act, neglect, or default"; and the loss of guidance and counseling to the deceased's minor child." Op.¶22 (quotation marks, alterations omitted). The Opinion does not describe the evidence of economic damages but it apparently consisted of evidence that funeral/burial expenses totaled less than \$7,000 for both decedents and testimony from plaintiffs' expert valuing Marialy's lost earning capacity and loss of household services at less than \$900,000. FedExBIC5.

Jurors were instructed that, should they decide in favor of Yahir, they "must fix the amount of money which will reasonably and fairly compensate him for injuries related to the following elements of damages: past and future medical expenses; the nature, extent, and duration of the injury; pain and suffering experienced; loss of enjoyment of life; and emotional distress resulting from the death of his mother." Op.¶18 (quotation marks, alterations omitted). Economic-damages evidence consisted of evidence that "Yahir incurred \$58,444.68 in medical treatment" and testimony that "Yahir would need \$417,926.47 in future medical care." Op.¶19.

Jurors were instructed that, should they decide in favor of Alfredo, they "must fix the amount of money which will reasonably and fairly compensate him

for injuries related to the following elements of damages: past and future medical expenses; the nature, extent, and duration of the injury; pain and suffering experienced as a result of the injury; loss of enjoyment of life; aggravation of a pre-existing ailment or condition; and emotional distress resulting from the death of his wife, Marialy, his daughter, Ylairam, and the injuries to his son Yahir.” Op.¶15 (quotation marks, alterations omitted). Economic-damages evidence consisted of testimony that Alfredo “would need \$250,068 in physician care, medications, and rehabilitation services in the future due to the injuries suffered as a result of the accident.” Op.¶16.

The verdict form does not separate damages into components, but the largest necessarily are non-economic damages for intangible injuries such as loss of enjoyment of life and emotional distress. FedEx moved for a new trial or remittitur for excessive damages, which was denied by a district judge (Mathew) who did not preside over the trial, Op.¶6; Pet.3, but who certified familiarity with the record and that proceedings could be completed without prejudicing parties, 8/7/2015 Order ¶2. The denial order stated:

[T]he jury’s verdict substantially supports the award and . . . the verdict was not the result of passion, prejudice, partiality, sympathy, undue influence or a mistaken measure of damages. The special verdict form indicates clearly that the jury understood that they were returning a verdict for compensatory damages. When a judge grants a remittitur, the judge is attempting to substitute his or her judgment for that of the jury, and, in this case, the Court does not think that that is appropriate. The appellate court will sit in a position that is every bit as capable of granting a remittitur if this case calls for one, and the Court thinks that the matters that have been issues in this case for the Court to decide are matters that should get to the appellate court as quickly as possible so that there can be some finality.

Id. ¶3. The order does not say that damages are not excessive or are supported by substantial evidence. *Id.* It reflects an understanding that relief constitutes an improper substitution of judicial judgment for jury judgment, and deference to appellate courts based on the view that Judge Mathew was in no better position than those courts to determine excessiveness. *Id.*

The COA rejected FedEx’s arguments, including that de novo review should apply. Op.¶¶8-10. The COA held that Judge Mathew did not abuse his discretion “in denying the Defendants’ motions for a new trial or remittitur on the grounds of insufficient evidence to support the damage awards for Plaintiffs’ non-economic injuries.” Op.¶25.

ADDITIONAL REASONS SUPPORTING CERTIORARI

A. This Court’s Review Is Necessary To Ensure Meaningful Review For Excessiveness And To Clarify Standards.

The Opinion states that “[t]his case presents an opportunity to address important issues faced by the judicial system—how do appellate courts measure the outer limits of a jury’s discretion to award compensatory damages and whether we should utilize mathematic ratios as an acceptable basis to reduce damage awards in large verdict case.” Op.¶2. But it left the question of standards for determining whether compensatory damages are excessive “to the public and its ongoing debate with the legislative branch about the American judicial system and any major policy changes in New Mexico.” Op.¶31.

The COA abdicated the judicial duty to act as a check on excessive verdicts, crucial to ensure the fairness and integrity of the court system. *Hall v. Stiles*, 1953-NMSC-041, ¶9, 57 N.M. 281 (“It cannot be questioned that the court should grant

relief from excessive verdicts.”); *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶¶14-17, 125 N.M. 292 (admonishing that “[t]he courts have a duty to act” as a check on excessive verdicts; explaining that “[t]he trial judge is an equal partner in th[e jury] system, which depends on the review and oversight function of the trial judge to correct the occasional aberrant verdict, either too high or too low, by using the tools at hand”) (citing *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 802 n.15 (Utah 1991), as stating that “[the] trial judge has duty to act unflinchingly as [the] thirteenth juror to prevent jury system from becoming ‘a capricious and intolerable tyranny’”). This duty is critical to protect the parties’ rights and public confidence in the courts, *Chrysler*, 1998-NMCA-085, ¶¶16-17, especially where the challenged damages are huge non-economic compensatory damages, which cannot be valued by evidence; as to which the jury is instructed that “[n]o fixed standard exists” for determining them; and no jury instruction or legal guidelines protect defendants from arbitrary imposition of unlimited damages amounts, other than the vague common law of excessive verdicts. “Where a duty is imposed upon the court, which affects a right of a litigant, it is error to refuse to perform such duty.” *Lopez v. Townsend*, 1933-NMSC-045, ¶25, 37 N.M. 574.

Punitive damages are subject to constitutional limitations and de novo review for reasons that apply equally to non-economic compensatory damages. *Aken v. Plains Elec. Gen. & Trans. Co-op., Inc.*, 2002-NMSC-021, ¶¶17-19, 132 N.M. 401 (holding that punitive damages must be reviewed de novo for compliance with constitutional limitations on excessiveness by “mak[ing] an independent assessment of the record”; noting, *inter alia*, that “after most jury

trials, there are no findings of fact on which to rely in order to make a separate appellate judgment on punitive damages” and that independent review is “necessary if appellate courts are to maintain control of, and to clarify, the legal principles”) (quotation marks, citations omitted); *Baker*, 554 U.S. at 504 (jury instructions “can go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damage (the cost of medical treatment, say”); *id.* at 506 (“as long as there are no punitive-damages guidelines, . . . it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary”) (quotation marks, citations omitted).

An award of non-economic damages for intangible injury does not represent a factual determination based on evidence but “an opinion as to the correct legal proxy for the plaintiff’s otherwise non-compensable harm,” one highly susceptible to influence by impermissible factors such as sympathy and arguments aimed at igniting a response in the form of enormous damages awards. Jared R. Love, Note: The “Soft Cap” Approach: An Alternative for Controlling Noneconomic Damages Awards, 52 Washburn L.J. 119, 137-38 (“The role of a judge reviewing this type of award is to determine whether this legal proxy was excessive. Thus, this review is correctly described as a legal question rather than a factual one.”); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 446 (2001) (“One million dollars’ worth of pain and suffering does not exist as a ‘fact’ in the world any more or less than one million dollars’ worth of moral outrage.”) (Ginsberg, J., dissenting). TIDA recognizes that this Court has not held that compensatory damages must be reviewed for compliance with constitutional limitations. The

point is simply that many concerns underlying judicial guidelines for evaluating punitive damages for constitutionality and requiring de novo review apply equally to non-economic compensatory damages.

Although some cases⁷ say that “[t]he applicable standard in reviewing the denial of a motion for a new trial or remittitur is abuse of discretion,” *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶13, 146 N.M. 853, many give no indication that abuse of discretion applies in determining excessiveness, *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶¶19-20,26, 136 N.M. 647 (“the trial court did not err by granting remittitur” where evidence insufficient to support emotional-distress damages award and no evidence “indicat[ed] that Plaintiff was entitled to damages greater than those [plaintiff] requested”) (quotation marks, citation omitted); *Montgomery v. Vigil*, 1958-NMSC-133, ¶25, 65 N.M. 107 (holding that “the trial court erred in refusing to order a remittitur or a new trial” after determining upon re-examining the evidence that damages were not supported by substantial evidence and were “so excessive as to indicate passion, prejudice, partiality, sympathy or that the jury has mistaken the measure of damages”) (alterations, quotation marks, citation omitted).

Abuse-of-discretion review is difficult to reconcile with this Court’s pronouncements that excessiveness is determined as a matter of law, whether by the trial court or on appeal, *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013,

⁷The Opinion states (Op.¶8) that *Hanberry v. Fitzgerald*, 1963-NMSC-100, ¶2, 72 N.M. 383, is such a case. The cited paragraph recites appellant’s contentions, which include that the trial court abused its discretion in multiple ways and also that “the verdict is excessive, requiring a remittitur or a new trial.” The analysis does not suggest that the issue was reviewed for abuse of discretion. *Id.* ¶¶31-37.

¶49, 127 N.M. 47; *Richardson v. Rutherford*, 1990-NMSC-015, ¶28, 109 N.M. 495; *see Elder v. Marvel Roofing Co.*, 1964-NMSC-152, ¶12, 74 N.M. 357 (damages awarded excessive “as a matter of law because unsupported by the evidence”); *Vivian v. Atchinson, T. & S.F. Ry.*, 1961-NMSC-093, ¶21, 69 N.M. 6; *Vivian*, 1961-NMSC-093, ¶21 (appellate court determines excessiveness as a matter of law); *Chrysler*, 1998-NMCA-085, ¶14 (trial judge determines excessiveness as a matter of law), implicating de novo review of matters of law, *Hasse Contr. Co. v. KBK Fin., Inc.*, 1999-NMSC-023, ¶9, 127 N.M. 316, and of “the trial court’s application of the law to the facts in arriving at its legal conclusions,” *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶7, 129 N.M. 698.

The rationale for deference is that “[t]he trial court sees the various witnesses, observes their demeanor during direct and cross-examination, as well as the attitude of the jurors during the progress of the trial, and the conduct of lawyers,” whereas the appellate court “read[s] the cold record.” *Chrysler*, 1998-NMCA-085, ¶14 (quotation omitted); *see Coates*, 1999-NMSC-013, ¶49 (“The trial court, unlike the appellate court that views the record cold, is in the unique position to observe the witnesses and their demeanor as well as the jurors’ attitude during the trial.”); *Norwest Bank New Mexico, N.A. v. Chrysler Corp.*, 1999-NMCA-070, ¶39, 127 N.M. 397 (basis for deference arises from recognition that “the trial court is in the best position to evaluate the effect of trial proceedings on the jury”). That predicate does not exist where the judge who ruled on the new-trial/remittitur motion did not observe the trial, but only “read the cold record.”

Owen v. Burn Const. Co., 1977-NMSC-029, ¶18, 90 N.M. 297 (“[W]here the question is determinable by inspection of the record alone, without the aid of extrinsic evidence, it is then a matter of law and is for the court.”).

The unpredictability of non-economic compensatory damages raises costs, complicates settlements, and threatens businesses and the economy. The Court should grant review to clarify, at a minimum, standards for determining and reviewing such damages for excessiveness.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

BUTT, THORNTON & BAEHR, P.C.

By /s/ Rheba Rutkowski

Monica R. Garcia

Rheba Rutkowski

mrgarcia@btblaw.com

rrutkowski@btblaw.com

P.O. Box 3170

Albuquerque, New Mexico 87190

(505) 884-0777

Attorneys for Amicus Curiae

Trucking Industry Defense Association

CERTIFICATE OF COMPLIANCE

I certify that this Brief of Amicus Curiae Trucking Industry Defense Association in Support of Petition for Writ of Certiorari complies with the type-volume limitations of Rule 12-502(D)(3) in that it was prepared using a proportionally spaced typeface (Times New Roman) and contains 3,150 words in the body, as defined in Rule 12-502(D)(1), per the word-count feature of Microsoft Word 2010.

/s/ Rheba Rutkowski
Rheba Rutkowski

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of this Brief of *Amicus Curiae* Trucking Industry Defense Association in Support of Petition for Writ of Certiorari to be filed and served through the Odyssey electronic system this 15th day of March, 2018:

James Scherr, Esq.
jamesscherr@scherrlegate.com

Sam Legate, Esq.
samlegate@scherrlegate.com

Joseph Cervantes, Esq.
joseph@cervanteslawnm.com

L. Helen Bennett, Esq.
hbennett@swcp.com

Daniel Anchondo, Esq.
daniel@anchondolaw.com

Edward Ricco, Esq.
ericco@rodey.com

/s/ Rheba Rutkowski
Rheba Rutkowski