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SUMMARY
February 17, 2022

2022COA22

No. 19CA2352, *Pisano v. Manning* — Damages — Limitations on Damages for Noneconomic Loss or Injury

Under section 13-21-102.5(3)(a), C.R.S. 2021, any award of noneconomic damages “shall not exceed” \$468,010, unless the court “finds justification by clear and convincing evidence therefor,” in which case the court may award up to \$936,030.

A jury awarded plaintiff approximately \$1.5 million in noneconomic damages incurred in connection with a traffic accident caused by defendant. The court denied plaintiff’s request to exceed the statutory cap, finding that the case did not present “exceptional circumstances.”

The division concludes that the trial court did not abuse its broad discretion. The division rejects plaintiff’s argument that the statute limits the trial court to determining whether the jury’s

award of noneconomic damages was supported by clear and convincing evidence. Instead, the division says, what must be supported by clear and convincing evidence is the trial court's justification for exceeding the statutory cap. And in determining whether a justification exists, the court could properly consider whether plaintiff's injuries amounted to "exceptional circumstances." As to that question, the division concludes that the record supports the trial court's determination that the circumstances of the case were not exceptional.

Court of Appeals No. 19CA2352
Jefferson County District Court No. 17CV30548
Honorable Tamara S. Russell, Judge

Catherine Pisano,

Plaintiff-Appellant,

v.

Leann Manning,

Defendant-Appellee.

ORDER AFFIRMED

Division II
Opinion by JUDGE HARRIS
Román, C.J., and Lipinsky, J., concur

Announced February 17, 2022

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Ruebel & Quillen, LLC, Jeffrey Clay Ruebel, Westminster, Colorado, for Amici Curiae Colorado Civil Justice League, Colorado Defense Lawyers Association, National Association of Mutual Insurance Companies, and American Property Casualty Insurance Association

¶ 1 In this personal injury case, plaintiff, Catherine Pisano, appeals the trial court's order limiting the award of noneconomic damages owed by defendant, Leann Manning, in accordance with the statutory cap under section 13-21-102.5(3)(a), C.R.S. 2021. Pisano contends that, in denying her request to exceed the cap, the trial court erred by, first, applying an incorrect legal standard, and, then, by finding that the evidence did not satisfy that standard.

¶ 2 We affirm.

I. Background

¶ 3 In April 2014, Manning rear-ended Pisano's car while Pisano was stopped in traffic on Interstate 70. Manning admitted fault for the accident. Thus, at trial, held in 2019, the issues were causation and damages.

¶ 4 Pisano sought economic, noneconomic, and physical impairment damages. She specifically argued that the noneconomic damages — her pain and suffering and loss of quality of life — arose from the physical impairments caused by the accident: headaches, neck pain, and cognitive problems.

¶ 5 The parties contested the cause and severity of each of Pisano's physical impairments.

¶ 6 There did not seem to be a serious dispute that Pisano’s headaches, which often turned into migraines, began after the accident. However, her pain journal suggested that the severity of her headaches had decreased over time.

¶ 7 The medical experts agreed that Pisano had sustained a neck injury from the accident. However, they disagreed whether the initial injury caused her later radicular pain, which started roughly three and a half years after the accident and for which she had surgery in December 2017. One of Pisano’s experts opined that the accident caused degeneration of her discs, resulting in the radicular pain. He testified that Pisano “suffered a permanent lifelong injury to her neck as a result of th[e] crash,” and that she would need regular ablation treatments to resolve facet pain for the rest of her life.¹ The defense’s medical expert, on the other hand, opined that the later radicular pain was unrelated to the accident and said that it was “preposterous” to think that Pisano would need ablation

¹ The doctor who performed the procedure described ablation as a “nerve burn.” Heat is used to “stun th[e] nerves” so that the “inner parts of the nerve die off,” providing relief from facet joint pain. According to the doctor, facet joints are the “two joints on either side of the back of the spine.”

treatments for the next thirty years. He acknowledged that Pisano's prognosis was "not good," but he attributed that prognosis to multiple factors, including Pisano's sensitivity to medications, her low pain threshold, stress, and "a kind of passive approach to getting better."

¶ 8 With respect to cognitive impairment, Pisano's neuropsychology expert testified that post-accident, Pisano exhibited a steep decline in cognitive functioning as compared to her pre-accident baseline. One of the defense's experts, however, questioned the reliability of the cognitive functioning tests because Pisano had failed two performance validity tests and had scored so low on other tests that, if the tests were accurate, she had "perform[ed] at [the level of] someone . . . with severe dementia." Another defense expert opined that it was unlikely Pisano had sustained a concussion during the accident, and he was skeptical of her cognitive complaints because, according to the expert, those complaints did not match up with her general day-to-day level of functioning.

¶ 9 At the time of trial, Pisano was the director of Head Start services at Catholic Charities, a position she had held since 2013,

the year before the accident. In that role, she oversaw six sites to ensure teacher compliance with state and federal licensing regulations, ran training programs, helped to write grant proposals, and directly supervised four employees.

¶ 10 Pisano testified that she has had “a daily headache that since the accident has never gone away,” though she acknowledged that by the time of trial, the pain was generally “at kind of a 1” on a scale of one to ten. To keep the headaches at bay, Pisano said that she made sure to get enough sleep, limited her exercise, and carefully controlled her stress to ensure that the day did not “get too overwhelming.” At work, to accommodate her injuries, she had a standing desk and a special chair. She checked her email only twice a day and limited office meetings so that she did not get overwhelmed with interruptions. After the accident, she had to “work all the time” to complete her job duties. She testified that she was able to succeed at her job because her team was exceptionally supportive and would “jump in” to help when necessary. Pisano’s annual performance reviews corroborated that she excelled at work.

¶ 11 Pisano testified that, although she “look[s] okay,” the accident significantly changed the quality of her life. She was once an avid

outdoorsperson, but after the accident she could no longer do physical activities. She does not drive her children to or attend their extracurricular activities anymore, so she has lost special time with them. Her favorite time of day used to be picking up her children, but now it is “when [she] can lay down because . . . that’s the only time [she does not] feel significant pain.” She said that the chronic pain has worn her down and made her an “irritated, horrible person.” She is not as friendly, easygoing, flexible, or fun. She avoids social situations because of her poor memory. She and her husband do not spend much time together because, by the end of the day, she just wants to retreat. She said that her house is not as joyful a place as it was before the accident.

¶ 12 During closing argument, Pisano’s lawyer explained her theory of impairment and noneconomic damages, arguing that the physical impairments — the headaches, neck pain, and cognitive impairment — “are the things that cause the pain and suffering.” She said that impairment damages would compensate Pisano for the loss of “all of those joyful things that she used to do.” Counsel suggested an award of \$300 a day for the headaches, neck pain, and cognitive impairment from the date of the accident to Pisano’s

expected date of death, for a total of approximately \$4.5 million in impairment damages. And then counsel asked the jury to award one hundred dollars a day — or \$1,548,000 — in noneconomic damages for Pisano’s past and future pain and suffering.

¶ 13 The jury declined to award any damages for physical impairment but awarded \$1,548,000 in noneconomic damages.

¶ 14 Manning filed a post-trial motion to limit the noneconomic damages award in accordance with the damages cap provided in section 13-21-102.5(3)(a). Under the statute, any award of noneconomic damages “shall not exceed” \$468,010, unless the court “finds justification by clear and convincing evidence therefor,” in which case the court may award up to \$936,030.² § 13-21-102.5(3)(a).

² As originally enacted, the statute limited noneconomic damages to \$250,000, or \$500,000 if the court found a justification for exceeding the cap. However, the statute provides for increases to the statutory caps based on inflation, and in 2019 the caps, as adjusted for inflation, were \$468,010 and \$936,030. See § 13-21-102.5(3)(c), C.R.S. 2021; see also Colorado Secretary of State, Certificate (Jan. 14, 2020), <https://perma.cc/G34X-5AS8>.

¶ 15 Pisano requested that the trial court exceed the statutory cap and award her the maximum amount of \$936,030.³ She argued that the evidence showed, clearly and convincingly, that her neck injuries were permanent; she would need “on-going procedures to manage her pain”; she lives with daily headaches and has to take medication and avoid noise, lights, and activity to prevent the headaches from developing into migraines; and her pain has interfered with her daily life.

¶ 16 The trial court granted Manning’s motion and denied Pisano’s, reasoning that “an increase in damages beyond the statutory cap of \$468,010.00 is reserved for exceptional circumstances.” The trial court found that, unlike the plaintiffs in cases where courts had justified an award above the cap, Pisano “does not have a reduced life expectancy, she is able to live independently, she does not suffer from severe scarring, and she still has her mobility.” As a result,

³ In their amicus brief, the Colorado Civil Justice League, the Colorado Defense Lawyers Association, the National Association of Mutual Insurance Companies, and the American Property Casualty Insurance Association urge affirmance on the ground that enforcing the lower statutory cap provides “balance and predictability to the legal marketplace.” But predictability is built into the statutory scheme regardless, as a plaintiff can never be awarded more than twice the lower statutory cap.

the trial court was not persuaded “by clear and convincing evidence that Plaintiff’s injuries have risen to the level of exceptional circumstances justifying exceeding the statutory cap.”

II. The Trial Court’s Order Limiting Damages Under Section 13-21-102.5(3)(a)

¶ 17 Pisano contends that the court applied an incorrect legal standard in determining whether to exceed the statutory cap, by requiring a showing of “exceptional circumstances.” And, she argues, even if the court applied the correct legal standard, it nonetheless abused its discretion by not finding exceptional circumstances in this case. We disagree with both contentions.

A. The Court Applied the Correct Legal Standard

1. Standard of Review and Principles of Interpretation

¶ 18 We review questions of statutory interpretation *de novo*.

Sperry v. Field, 205 P.3d 365, 367 (Colo. 2009). In interpreting a statute, our primary goals are to discern and give effect to the General Assembly’s intent. *Krol v. CF & I Steel*, 2013 COA 32, ¶ 15. We look first to the statutory language, giving the words and phrases used therein their plain and ordinary meanings. *Id.* If the statutory language is clear and unambiguous, we need not look

beyond its plain terms and must apply the statute as written. *Vigil v. Franklin*, 103 P.3d 322, 328 (Colo. 2004).

¶ 19 We review the trial court's application of section 13-21-102.5(3)(a) to the particular circumstances of a case for an abuse of discretion. *Wallbank v. Rothenberg*, 140 P.3d 177, 179 (Colo. App. 2006).

2. Analysis

¶ 20 Section 13-21-102.5(3)(a) provides in relevant part that

[i]n any civil action . . . in which damages for noneconomic loss or injury may be awarded, the total of such damages shall not exceed the sum of two hundred fifty thousand dollars, unless the court finds justification by clear and convincing evidence therefor. In no case shall the amount of noneconomic loss or injury damages exceed five hundred thousand dollars.

¶ 21 Pisano argues that the phrase “unless the court finds justification by clear and convincing evidence therefor” refers to the award of noneconomic damages. In other words, she contends that the court, in determining whether to exceed the statutory cap, asks only whether the jury’s award of noneconomic damages was supported by clear and convincing evidence. If yes, she says, then

the court must award damages in the amount of the higher statutory cap.

¶ 22 We reject that reading of the statute as inconsistent with the provision’s plain language and purpose.

¶ 23 Under the plain language of the provision, the standard limit on noneconomic damages is \$250,000, or \$468,010 as adjusted for inflation. *See Pearson v. Dist. Ct.*, 924 P.2d 512, 517 (Colo. 1996) (the term “shall not” constitutes a “mandatory command” by the legislature). Thus, the statutory cap “reflects the legislature’s intent to identify the maximum non-economic recovery that should be available in a typical case.” *Schwab v. Martino*, No. 05-cv-01456, 2007 WL 4522714, at *5 (D. Colo. Dec. 17, 2007) (unpublished opinion). Thus, an award in excess of the statutory cap necessarily represents an exception to the standard limit. *See Wallbank*, 140 P.3d at 179 (explaining that, under an analogous provision in the Health Care Availability Act, the court may invoke a “limited exception” to the statutory damages caps upon a showing of good cause or where application of the cap would be unfair).

¶ 24 The trial court may invoke the exception only if it “finds justification” by clear and convincing evidence to exceed the cap.

See Nelson v. United States, No. 11-cv-02953, 2014 WL 1929585, at *14 (D. Colo. May 14, 2014) (unpublished opinion). A “justification” is “an acceptable reason for doing something.” Merriam-Webster Dictionary, <https://perma.cc/9X8Z-F9X5>. Therefore, the court must find a reason, by clear and convincing evidence, to award damages above the statutory limit. That is, contrary to Pisano’s reading of the statute, the justification for exceeding the cap, not the fact of noneconomic damages, must be supported by clear and convincing evidence. *See Colwell v. Mentzer Invs., Inc.*, 973 P.2d 631, 639 (Colo. App. 1998) (“[T]here must be a justification by clear and convincing evidence” to support the award.).

¶ 25 Pisano’s interpretation, which focuses exclusively on the requirement of “clear and convincing evidence,” reads out the threshold requirement of a “justification.” According to Pisano, the court’s only task is to determine whether the jury’s “findings of fact” meet the “clear and convincing standard.” But even setting aside the problem that the jury did not make “findings of fact” that the trial court could review, that construction is at odds with the language the legislature chose. If the legislature had intended that exceeding the statutory cap would turn entirely on the standard of

proof adduced at trial, it could have said so. In that case, the provision would provide that “the total of such [noneconomic] damages shall not exceed the sum of two hundred fifty thousand dollars, unless the court finds *that the jury’s award is supported* by clear and convincing evidence.” Instead, the legislature authorized trial courts to exceed the cap only if the court’s *justification* for doing so is supported by clear and convincing evidence. We are not at liberty to disregard language in a statute; rather, we must construe the statutory language as the legislature enacted and assume that the legislature did not choose words idly. *Justus v. State*, 2014 CO 75, ¶ 29.

¶ 26 And under Pisano’s reading of the statute, how would a court determine by how much to exceed the statutory cap? The provision gives the court “discretion in determining how much of an increase is appropriate in any given case.” *Hoffman v. Ford Motor Co.*, 690 F. Supp. 2d 1179, 1182 (D. Colo. 2010), *rev’d on other grounds*, 493 F. App’x 962 (10th Cir. 2012). If the question were simply whether the jury’s award is supported by clear and convincing evidence, then in every case where the standard of proof is satisfied, would the court automatically award the maximum amount permitted under the

statute? If not, what criteria would guide its decision? Pisano's interpretation does not account for the range between the standard cap and the statutory maximum and is therefore inconsistent with the provision.

¶ 27 Nor are we persuaded that the trial court erred by considering whether the case presented "exceptional circumstances" to justify an award above the statutory cap. The statute does not delineate what constitutes "justification" to exceed the cap. *Schwab*, 2007 WL 4522714, at *4. "Justification" might refer to a finding that the Plaintiff's non-economic injuries are unusually severe, that there is unusually detailed proof that the Plaintiff has suffered a monetary amount of damages that exceeds the cap, or that the Plaintiff has shown that the policy concerns underlying the cap are not appropriately applied in the particular situation.

Id.

¶ 28 But a trial court might properly consider other factors as well. On this issue, we find *Wallbank* instructive, as that case involved statutory damage caps under a similar provision of the Health Care Availability Act (HCAA). The HCAA allows the trial court to exceed the statutory cap if, "upon good cause shown," the court finds that

application of the cap would be “unfair” in a particular case. *Wallbank*, 140 P.3d at 179 (emphasis and citation omitted). The division first determined that (like “justification”) “good cause” means a “legally sufficient reason.” *Id.* at 180 (quoting Black’s Law Dictionary 235 (8th ed. 2004)). But because the HCAA provision does not specify the factors a trial court must consider, the division concluded that “a court may exercise its discretion to consider factors it deems relevant” in deciding whether good cause to exceed the statutory cap has been established. *Id.* at 180-81.

¶ 29 We apply the same standard here. In deciding whether an award above the cap in section 13-21-102.5(3)(a) is justified, the court may consider any factors it deems relevant. If, after considering all the relevant factors, the court finds any justification (by clear and convincing evidence) to exceed the cap, the statute gives the court broad discretion to do so. Thus, the court did not err by considering whether Pisano’s case presented any “exceptional circumstances” or whether the case was more typical, such that an award above the statutory cap might not be justified.

¶ 30 Indeed, in the thirty-five years since the legislature enacted section 13-21-102.5(3)(a), courts have consistently relied on a

case's exceptional circumstances to justify the decision to exceed the cap. *See Mower v. Century I Chevrolet, Inc.*, No. 02-cv-01632, 2006 WL 2729265, at *22 (D. Colo. June 16, 2006) (unpublished opinion) (explaining that case law interpreting section 13-21-102.5(3)(a) "appears to merely examine the nature and extent of the non-economic injuries"); *see also Hoffman*, 690 F. Supp. 2d at 1181 (finding justification to exceed the statutory cap because the case "presents the type of exceptional circumstance" warranting additional damages, specifically that the teenaged plaintiff was rendered a tetraplegic); *Carpenter v. Am. Fam. Mut. Ins. Co.*, No. 13-cv-1986, 2015 WL 8529775, at *1 (D. Colo. Dec. 11, 2015) (unpublished opinion) (finding justification to exceed the cap where the plaintiff's "permanent loss of sensation in her genital and urinary organs," which affected her sex life and her marital relationship, was "catastrophic"); *Nelson*, 2014 WL 1929585, at *14 (finding justification to exceed the statutory cap based on the "extreme deleterious nature and extent of [the plaintiff's] injuries," the limitations caused by the injuries, and the plaintiff's "extensive pain and suffering"); *Schwab*, 2007 WL 4522714, at *4 (justification to exceed the cap could be based on any number of "unusual[]")

circumstances of the case); *Warembourg v. Excel Elec., Inc.*, 2020 COA 103, ¶ 117 (justification to double the statutory cap was based on the plaintiff’s “profound, severe, and life-altering” injuries); *Colwell*, 973 P.2d at 639 (finding justification to exceed the cap because the plaintiff’s multiple sclerosis was progressing and she was likely going to “end up in a wheelchair”); cf. *Watson v. Dillon Cos.*, No. 08-cv-00091, 2013 WL 4547477, at *5 (D. Colo. Aug. 28, 2013) (unpublished opinion) (declining to exceed the cap because the court did not find that “exceptional circumstances are present in the instant case”).

¶ 31 Conversely, we are not aware of any case that stands for the proposition that a trial court must exceed the statutory cap if it determines that the jury’s noneconomic damages award was supported by clear and convincing evidence. The “clear purpose of [a] damages cap is to limit damages.” *Wallbank*, 140 P.3d at 181. Therefore, to grant an exception to the cap merely because the jury awarded noneconomic damages, even on strong evidence, “would essentially circumvent the basic intent of” section 13-21-102.5(3)(a). *Id.*

¶ 32 In sum, we conclude that the trial court applied the correct legal standard in determining whether to award damages in excess of the statutory cap.

B. The Court Did Not Abuse Its Discretion by Declining to Find a Justification for Exceeding the Statutory Damages Cap

¶ 33 Alternatively, Pisano contends that, even if the trial court applied the correct legal standard, the case presented exceptional circumstances and, therefore, trial abused its discretion by declining to exceed the statutory cap and award the maximum amount of damages permitted by the statute.

1. Standard of Review

¶ 34 As an initial matter, we reject Manning's argument that this contention is unpreserved. Pisano was not required to identify in her response to Manning's motion to apply the cap every fact that supported her argument. Manning raised the issue, the court considered Pisano's response, and the court issued a ruling. The contention is preserved. See *Battle N., LLC v. Sensible Hous. Co.*, 2015 COA 83, ¶ 13.

¶ 35 As explained, section 13-21-102.5(3)(a) permits, but does not require, the court to exceed the cap if the court finds "justification"

for doing so. Because exceeding the statutory cap is permissive, not mandatory, the decision whether to exceed the cap is within the trial court's discretion. *See Gen. Steel Domestic Sales, LLC v. Bacheller*, 2012 CO 68, ¶ 41; *see also Wallbank*, 140 P.3d at 181.

2. Analysis

¶ 36 Pisano's argument that the court erred by failing to find exceptional circumstances justifying a higher award is based on a flawed premise. According to Pisano, because her noneconomic damages were established by clear and convincing evidence, the court should have exceeded the cap and awarded her \$936,030. But as we have explained, the trial court may exceed the statutory cap if it finds a justification, not the fact of noneconomic damages, by clear and convincing evidence.

¶ 37 Under the correct standard, we will reverse only if the trial court's finding that there was no justification to exceed the cap was manifestly arbitrary, unreasonable, or unfair. *See Churchill v. Univ. of Colo.*, 2012 CO 54, ¶ 74. In making that determination, we ask whether the trial court's decision fell within a range of reasonable options — that is, whether it exceeded the bounds of rationally available choices. *Id.*

¶ 38 On this record, we cannot conclude that the trial court's decision not to award damages in excess of the cap was so arbitrary or unreasonable as to be irrational.

¶ 39 The jury found that Pisano had suffered no compensable physical impairments, including no cognitive impairment, as a result of the accident. And at trial, Pisano argued that her noneconomic injuries arose directly from her physical impairments.

¶ 40 While Pisano presented evidence that the crash caused persistent headaches and neck pain, her own journal showed that the pain was being effectively managed with medication and had substantially decreased in the year leading up to trial. Whether Pisano's disc degeneration was caused by the accident was contested, as was the claim that she would require yearly ablation treatments for nerve pain.

¶ 41 Pisano, her husband, and her sister testified about personality changes and an overall diminution in her quality of life. But Pisano also acknowledged that she continued to excel at a high-level job, her doctors had not placed her on any physical restrictions, and she was able to take care of herself and her family.

¶ 42 It is not sufficient that the jury valued Pisano's noneconomic injuries at more than three times the statutory limit. In every case where the court must decide whether to apply a statutory cap, the jury's verdict has exceeded the limit. Thus, the court does not abuse its discretion by requiring something more than the mere fact of a jury award to justify exceeding the statutory cap.

¶ 43 The legislature intended "to allow courts to take into account individual circumstances in determining whether to exceed the cap." *Hoffman*, 690 F. Supp. 2d at 1182. Given the conflicting nature of the evidence presented at trial, we are not in a position to second-guess the trial court's assessment of the circumstances of Pisano's case.

III. Conclusion

¶ 44 The order is affirmed.

CHIEF JUDGE ROMÁN and JUDGE LIPINSKY concur.