COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION NO. 12-448

ALBERT R. DUBUQUE, JR.,
EXECUTOR OF THE ESTATE OF KIMMY A. DUBUQUE

vs.

CUMBERLAND FARMS, INC.[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S POST-TRIAL MOTIONS

1. Introduction

This action arises out of the death of 43 year old Kimmy Dubuque, who was fatally struck by a motor vehicle while she was walking into the Cumberland Farms store in Chicopee. Kimmy Dubuque's widower, Albert Dubuque, filed this action as executor of his wife's estate, alleging that Cumberland Farms was negligent and grossly negligent for failing to install protective barriers on its property.

On March 8, 2016, a Hampden County jury, after a nine day trial over which I presided, returned a verdict for the plaintiff and awarded $32,369,024.30 in compensatory damages and $10 in punitive damages. Cumberland Farms now moves for judgment notwithstanding the verdict, for a new trial, and for remittitur. For the reasons set forth below, the Court allows the motion for a remittitur and denies the remaining motions.

2. Background

a. Trial Evidence

On November 28, 2010, Kimmy Dubuque was standing in the doorway to the

[1]Another named defendant, V.S.H. Realty, Inc., was dismissed prior to trial by stipulation of the parties.

Cumberland Farms store in Chicopee while nearby, 81 year old Edwin Skowyra lost control of his vehicle on Front Street when he suffered a stroke. Viewing the evidence in the light most favorable to the plaintiff, Skowyra's car accelerated to 70 m.p.h., crossed the intersection of Front and Grove Streets, proceeded straight onto the Cumberland Farms property, and was travelling at 57.61 m.p.h. when it crashed into the store and struck and instantly killed Kimmy Dubuque. Kimmy Dubuque left a husband, Albert Dubuque, and their teenage daughter, Jillian. The plaintiff incurred burial, but no medical expenses.

The Cumberland Farms parking lot and its store are located in a straight, unimpeded line from Front Street, where it ends and is intersected by Grove Street and Grove Avenue. At the time of the accident, drivers could enter the Cumberland Farms property through three different driveways. Two driveways were on either side of the store, one on Grove Street and another on Grove Avenue. Drivers could also enter the property via an apex driveway. Thus, vehicles entered the property from several directions and at times cut through it to avoid red lights. The Cumberland Farms store had no protective barriers. One Cumberland Farms employee and neighboring resident, Amy Gladu, told a store manager that she was concerned about the way vehicles were entering the property at the Chicopee store. Amy Gladu's husband testified that he saw vehicles driving too fast on the Cumberland Farms property.

In the late 1970s, Chicopee prospectively prohibited apex entrances, but the Cumberland Farms store was not legally required to relocate or close its previously established apex entrance from the street. The plaintiff's experts testified at trial that the apex entry off Front Street made Cumberland Farms' parking area dangerous because it allowed unimpeded entry to the lot without any traffic-calming measures, such as requiring drivers to make a turn before entering.

More than one year before this accident, the Massachusetts Department of Transportation and the City of Chicopee asked Cumberland Farms to close the apex entry to the store.

Cumberland Farms owns and operates approximately 600 convenience stores in the Eastern United States. At trial, the plaintiff introduced into evidence an internal Cumberland Farms report prepared in July of 2010 about motor vehicle strikes on Cumberland Farms stores between 2000 and 2009. The report indicates that at that time, 537 stores had no bollards and 59 stores had bollards. The report contains a table with limited information about 485 strikes (the date of incident, person involved, amount of property damage, nature of damage, and date of maintenance). The report summarizes the total property damages ($1,633,422), the average cost to Cumberland Farms per recoverable incident ($4,253), and the average number of incidents per week (.93). The report notes that there had been, in the 2000 to 2009 period, 13 personal injury incidents, totalling $2,159,258 in personal injury claims and a total of $3,792,680 in property damage and personal injury claims paid out. The report states that there had been multiple strikes at 109 stores. Finally, the projected cost of retrofitting and/or constructing bollards at 537 sites at $3,500 per site was $1,879,500.

Most of the incidents involved minor property damage, but some resulted in substantial personal injuries and/or property damage. Cumberland Farms vigorously and repeatedly challenged the admissibility of evidence of those strikes before and during trial. I had denied the motion *in limine* and explained,

> "I've preliminarily found that the jury can make a substantial -- could find a substantial similarity in the circumstances only to the extent that they involve motor vehicles striking Cumberland Farms stores -- and this is important -- that decision as has been set forth and forms my ruling that such information is admissible not for the truth of the matter asserted therein but rather for the purpose of demonstrating that Cumberland Farms was

on notice of those particular car strikes . . . ."

(Trial Transcript 2/9/16, 113:2-13). I had determined before trial that the scope of the relevant risk was uncontrolled vehicles hitting at or near a Cumberland Farms store entrance and endangering pedestrians.

Of those hundreds of strikes, the plaintiff highlighted specific incidents in New England. At a Maine store, a customer's vehicle hit gas pumps and caused an explosion. In an incident in New Hampshire, police had chased a vehicle which eventually crashed into Cumberland Farms' landscaping blocks and price sign. In South Deerfield, Massachusetts, a customer accidentally accelerated her vehicle, crashed into the store, and hit a customer, who consequently had his leg amputated.

Cumberland Farms had unsuccessfully argued that the prejudicial value of evidence of other strikes outweighed its probative value. As to the jury's consideration of those strikes, I gave the following limiting instruction:

> "You may consider, if you wish, evidence pertaining to prior car strikes at Cumberland Farms stores as notice to Cumberland Farms of those car strikes and not as evidence of negligence and/or gross negligence on the part of Cumberland Farms in those prior car strikes. You may only consider such evidence as proof of negligence or gross negligence in this case if you first find that the earlier car strikes were substantially similar to the incident at issue. And as with all the evidence Mr. Dubuque presents, Mr. Dubuque must prove by a preponderance of the evidence that the other car strikes are substantially similar by a preponderance of the evidence."

(Trial Transcript 2/9/16, 120:11-121:1). I repeated these instructions after the closing arguments.

The plaintiff's expert witnesses testified to their opinion that Cumberland Farms had been negligent in not providing a more effective protection for customers, such as adequate crash barriers, bollards, and planters, which would have cost between $10,000 and $20,000, and that

such negligence was a material and important ingredient in causing Kimmy Dubuque's death. In 2009, Cumberland Farms was in the course of implementing a plan to install bollards able to stop vehicles travelling up to 15 miles per hour at stores that either had already been struck 2 or more times or which were in the top 200 of 600 stores in terms of profitability. As noted above, by 2009, 59 Cumberland Farms stores had bollards.

Cumberland Farms' defense was that, prior to this incident, no other drivers had caused damage at the Chicopee store, and that Cumberland Farms was not legally required to redirect traffic, erect barriers, or take any other measures when it acquired the property in 1974. Cumberland Farms also noted that several other stores in the immediate vicinity did not provide protective barriers, and its expert testified that some types of barriers would not have made a difference if Skowyra had been driving 60 m.p.h. when his car hit Kimmy Dubuque.

The plaintiff's counsel, in his closing argument, referred to Cumberland Farm's $17.5 billion annual revenue and proposed, without objection, that the jury award damages so that Cumberland Farms "feels the pain." The plaintiff's counsel further suggested that the jury award his client $10 million in compensatory damages (using 1,900 days as a unit of measurement for the value of Kimmy Dubuque's life) and a punitive damages award of $45 million.

I offered defense counsel the opportunity for a five minute rebuttal to the plaintiff's suggestions as to the value of Kimmy Dubuque's life, but defense counsel declined.

b. Jury Instructions

After the closing arguments, I instructed the jurors on, *inter alia*, the duty of care and foreseeability as follows, in pertinent part:

> "Wherever there is a duty to exercise care, the quantity of care required of a

person increases with any increase in the likelihood of harmful consequences to others if adequate care is not used. Where serious injury is foreseeable, the likelihood of accidents need not be high to warrant careful consideration of safety features.

. . . .

"It is not necessary that Cumberland Farms have foreseen precisely the manner in which Ms. Kimmy Dubuque's death occurred, but it was enough that Cumberland Farms should have realized that there was preventable real danger to its patrons.

"Cumberland Farms' duty to use reasonable care in the circumstances is the duty of one with the knowledge and skill of a similarly situated and reasonable person or entity in the same circumstances, including the circumstance of being an owner and operator of a chain of convenience stores with stores across the Eastern United States.

"A landowner must act as a reasonable person or entity in maintaining its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.

"In determining whether Cumberland Farms acted reasonably under the circumstances, you must determine the nature and extent of any efforts that were reasonable and necessary in light of the circumstances.

. . . .

"[T]o establish causation, Mr. Dubuque must show that the general type of harm was reasonably foreseeable to a person or entity in Cumberland Farms' position at the time of the alleged negligence. Mr. Dubuque does not have to establish that Cumberland Farms foresaw, or should have foreseen, the precise manner in which the harm occurred; but Mr. Dubuque must show that the harm suffered was the natural consequence of Cumberland Farms' negligence.

"Cumberland Farms is liable for those injuries that are a reasonably foreseeable consequence of its negligence. When we say that something is foreseeable, we mean that it is a predictable consequence of Cumberland Farms' negligent acts or omissions.

"Cumberland Farms is not obliged to protect against unforeseeable accidents. Simply because, in hindsight, an event was possible does not mean that it was foreseeable. An event must be reasonably probable to be deemed reasonably foreseeable."

With respect to damages, the jurors were charged that they could not consider or include as elements in their award of compensatory damages grief, anguish or bereavement, and that any award of compensatory damages should be no more or less than full and fair compensation for the loss to the plaintiff.

The jurors were instructed that under the Wrongful Death Statute, G. L. c. 229, § 2, they could award no less than $5,000 in punitive damages if they found that Kimmy Dubuque's death

were caused by gross negligence of Cumberland Farms. I instructed the jurors that in determining the amount of any punitive damage award, they could take into account several factors, including (1) the reasonable relationship to the harm that is likely to occur from Cumberland Farms' conduct as well as to the harm that has actually occurred; (2) the financial position of Cumberland Farms; and (3) a reasonable relationship to the degree of reprehensibility of Cumberland Farms' conduct. I emphasized that:

> "[t]he most important factor to be considered in determining the size of a punitive damage award is the degree of Cumberland Farms' culpability. Punitive damages are to be assessed with reference to the degree of culpability of the parties who caused the death rather than with reference to the harm suffered by the persons receiving the award. The focus of punitive damages is on punishment and deterrence of Cumberland Farms, not compensation for Mr. Dubuque."

c. Jury Deliberations, the Jury Note, and the Verdict

The jurors deliberated for two and a half days. On February 23, 2016, they had reached a verdict and asked if they could deliver a message to Cumberland Farms in connection with their verdict. Despite my response that the only message they could send would be the verdict, the jurors included a written note with their verdict. I reviewed the note *in camera,* outside the presence of counsel, and impounded it upon finding that it (1) was a product of the jurors' deliberations, (2) did not bear upon any issue pertaining to negligence, gross negligence, causation, damages, or punitive damages, and (3) was gratuitous. I ruled that the written statement would not be read.

In the special verdict form, the jury inconsistently answered the questions. Although ten of the twelve jurors found by a preponderance of the evidence that the defendant was negligent, eleven found that the defendant's negligence was a substantial contributing factor in Kimmy

Dubuque's death and that the defendant's conduct constituted gross negligence or willful, wanton or reckless conduct. The jury awarded the plaintiff $32,369,024.30 in compensatory damages and $10 in punitive damages, contravening the jury instruction that the minimum punitive damage award in wrongful death actions is $5,000. The plaintiff waived that minimum.

3. Issues Underpinning All Three Post-Trial Motions

Cumberland Farms' three post-trial motions are largely, although not exclusively, bottomed on two intertwined arguments: (1) that the jury should not have heard or considered evidence of the hundreds of building strikes at other Cumberland Farms stores, and (2) that the jury received erroneous instructions concerning the evidence of those strikes and how they related to Cumberland Farms' duty of care and the foreseeability of the risk of harm. After assessing these core issues, I will address Cumberland Farms' remaining arguments in the motions before me.

a. Substantial Similarity of Other Vehicular Strikes

Cumberland Farms' principal argument is that the jury was likely confused and prejudiced by what it contends was erroneously admitted evidence of the hundreds of building strikes not shown to be substantially similar to the Chicopee accident. This argument is unavailing, as the evidence was properly admitted and the jurors were adequately instructed on how to consider it.

The jurors were instructed that in order to consider the strikes as evidence of negligence or gross negligence, they had to find that the car strikes were substantially similar to the Chicopee incident, and the plaintiff bore the burden of proving substantial similarity. This instruction, in light of the record at trial, conformed to *Santos* v. *Chrysler Corp.*, 430 Mass. 198, 202 (1999). In *Santos*, the court explained:

> "Evidence of incidents similar to the plaintiffs is viewed with disfavor because the other incidents may have been the consequence of idiosyncratic circumstances. . . . However, such evidence is admissible if the judge first determines that the jury could find a substantial similarity in [the] circumstances . . . . The judge also must determine that there is a minimal danger of unfairness, confusion, and undue expenditure of time in the trial of collateral issues . . . . The admission of other incident evidence rests within the judge's discretion . . . . The differences between the other incidents and the plaintiff's accident could be considered by the jury in terms of weight of the evidence."

Id. (internal quotations and citations omitted). See also *Crivello* v. *All-Pak Machinery Systems, Inc.*, 446 Mass. 729, 738 (2006); *Croall* v. *MBTA*, 26 Mass. App. Ct. 957, 959 (1988).

> "Such evidence [of accidents purportedly similar to that of the plaintiff] is admissible to prove a defendant's knowledge of a dangerous condition only upon a showing, by its proponent, that the circumstances of the other accidents were 'substantially identical' and the danger of confusion, undue waste of time, or unfairness appears small."

Read v. *Mt. Tom Ski Area, Inc.*, 37 Mass. App. Ct. 901, 902 (1994).

I had determined before trial that the scope of the relevant risk at issue was uncontrolled vehicles hitting at or near a Cumberland Farms store entrance and endangering pedestrians due to a lack of adequate protective barriers. This conclusion is amply supported by Cumberland Farms' obvious purpose in creating its internal report: to assess the risk and cost of damages caused by out of control vehicles on Cumberland Farms' property and the cost and need for installing bollards to reduce those risks. The plaintiff has established, therefore, that each of the strikes itemized in Cumberland Farms' internal report fell within that scope of risk. I have determined that the jury could find a substantial similarity between those strikes and the Chicopee accident in the circumstances. See *Santos*, 430 Mass. at 202. Cumberland Farms cannot now shrink that scope and cry foul. Furthermore, the differences between the Chicopee accident and the other building strikes could be properly considered by the jury in terms of the weight of the evidence. See *id.*

The risk of unfairness, confusion, or undue expenditure of time at trial from the admission of this evidence was small. See *Robitaille* v. *Netoco Community Theatre,* 305 Mass. 265, 269 1940. The jury was well equipped to consider that evidence only for the purpose of putting Cumberland Farms on notice of such incidents and the relevant risks they involved. There was no error or abuse of discretion. See *Kromhout* v. *Commonwealth*, 398 Mass. 687, 693 (1986) (where substantial identity in circumstances appears, and danger of unfairness, confusion or undue expenditure of time in trial of collateral issues seems small, the admission of such evidence has resided in judge's sound discretion).

Nor is there merit to Cumberland Farms' argument that the jury should not have considered those strikes as evidence of gross negligence on the grounds that most of them involved only minor impacts. The jurors were correctly instructed that they could only consider evidence of prior strikes as evidence of gross negligence if Dubuque proved by a preponderance of the evidence that the other car strikes were substantially similar. The jury is presumed to have followed that instruction. See *Reckis* v. *Johnson & Johnson*, 471 Mass. 272, 304 n.49 (2015). The $10 punitive damage award, far below the statutorily required $5,000 minimum, signals that the jury did not find Cumberland Farms' conduct to be highly reprehensible, but rather a minimal degree of gross negligence.

For all these reasons, there is no merit to Cumberland Farms' argument that the jury made erroneous findings and legal conclusions based upon the evidence of other vehicular strikes at Cumberland Farms property, or that the jury had an insufficient or improper evidentiary basis (in Cumberland Farms' report) upon which to find that Cumberland Farms' conduct was negligent or grossly negligent.

Finally, even assuming for the sake of argument only that some evidence of building strikes may have been erroneously admitted, any such potential error would not have been prejudicial, as the plaintiff presented ample other admissible evidence upon which the jury could have reasonably found that Cumberland Farms was negligent and grossly negligent.

b. Duty of Care and Foreseeability

Cumberland Farms takes issue with the jury instructions insofar as they referred to Cumberland Farms as the owner and operator of a chain of stores in the Eastern United States, claiming that this reference implicitly imposed a higher duty of care upon Cumberland Farms than if it had been viewed as just a single local store. Contrary to Cumberland Farms' argument, the jury was not instructed that Cumberland Farms had a greater duty of care because it was the owner and operator of a large chain. The reference to Cumberland Farms' chain store ownership did not alter the duty, but properly instructed that the duty of care is dependent, in part, upon the defendant's knowledge of the risks. Where, as the owner of a large convenience store chain, the operator has received and assessed incident reports and thus has reason to know of certain risks through its operation of hundreds of stores, that notice and knowledge is relevant to both the duty of care and the foreseeability of the risk.

There was no legal or factual reason to limit the jury's consideration of the issues of duty and foreseeability to one store or one type of vehicular incident, as Cumberland Farms argues, when Cumberland Farms' experience in operating hundreds of stores put it on notice of the reasonably foreseeable risks. "In deciding on the reasonable foreseeability of harm, all the circumstances are examined." *Flood* v. *Southland Corp.*, 416 Mass. 62, 72 (1993).

Cumberland Farms also challenges my instruction concerning foreseeability: that it was

not necessary "that Cumberland Farms have foreseen the manner in which Ms. Kimmy Dubuque's death occurred, but it was enough that Cumberland Farms should have realized that there was a preventable real danger to its patrons."

Contrary to Cumberland Farms' argument, this jury instruction did not convey to the jury what I may have opined about the case, but rather it communicated the correct legal standard. Cf. *Glick* v. *Prince Italian Foods of Saugus, Inc.*, 25 Mass. App. Ct. 901, 902 (1987) ("Proximate cause does not require the particular act which caused the injury to have been foreseen, only that the general character and probability of the injury be foreseeable"). See also *Flood* v. *Southland Corp.*, 416 Mass. at 72 (at store where there had been numerous problems with youthful conduct but not serious injuries, and where defendant store's employee knew that two individuals outside just beyond employee's view were "pretty high" and that one had a knife, jury would be warranted in determining that a risk of harm, the stabbing of someone, was reasonably foreseeable).

Cumberland Farms' argument also takes the jury instruction out of context, as the preface to this instruction was that Cumberland Farms had a duty to use reasonable care in all the circumstances. The relevant circumstances in this case included Cumberland Farms' knowledge of substantially similar strikes at its other stores, the risks associated with an apex driveway at the Chicopee store, and the lack of any protective barriers whatsoever at the Chicopee property. Whether a risk of injury is reasonably foreseeable is usually a fact question for the jury. See *Luisi* v. *Foodmaster Supermarkets, Inc.*, 50 Mass. App. Ct. 575, 577 (2000). The plaintiff presented evidence from which the jury could have fairly found that the accident in Chicopee was foreseeable. See *id.* at 72-73. From the evidence before them, the jurors could have reasonably

found that: (1) Cumberland Farms was on notice that on its property, personal injury and/or property damage had occurred in connection with out of control motor vehicles; (2) Cumberland Farms had reason to know that the apex driveway and traffic patterns at its Chicopee store increased the risk of accidents; (3) Cumberland Farms owed a duty of care to persons on its premises to protect against the risk of such harm occurring; and that, as a result, (4) extra safety precautions should have been taken to reduce the foreseeable risk of personal injury occurring. It follows that there was no error in giving the challenged instructions or in denying Cumberland Farms' proposed jury instructions as to foreseeability and duty.

4. Motion for Judgment Notwithstanding the Verdict

The standard governing a motion for judgment notwithstanding the verdict is essentially the same as that for a motion for directed verdict. See *Birbiglia* v. *Saint Vincent Hospital, Inc.*, 427 Mass. 80, 83 (1998). The court views the evidence in the light most favorable to the plaintiff, disregards evidence favorable to the Cumberland Farms, and must sustain the verdict if the plaintiff has presented any evidence from which the jurors reasonably could have arrived at their verdict. See *Smith* v. *Bell Atlantic*, 63 Mass. App. Ct. 702, 711 (2005); *Tosti* v. *Ayik*, 394 Mass. 482, 494 (1985). In ruling on a motion for judgment notwithstanding the verdict, the court must determine whether anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff. See *Cormier* v. *Pezrow New England, Inc.*, 437 Mass. 302, 308 (2002).

Pursuant to Mass. R. Civ. P. 50(b), Cumberland Farms moves for judgment notwithstanding the verdict on the grounds that there was insufficient evidence at trial to establish that the high speed accident which occurred here was foreseeable or that Cumberland

Farms had a duty to prevent it. As just explained above, the jury reasonably could have found from the evidence that the number of building strikes and vehicles out of control on Cumberland Farms' properties causing personal injuries and property damage, along with the additional known dangers of apex driveways and the lack of any protective barriers, made the risk of harm at the Chicopee store foreseeable. The jury further could have found that Cumberland Farms failed to exercise reasonable care by not installing any barriers at the apex, near the store, or anywhere in between, to prevent or even reduce the risk of the accident. The fact that Cumberland Farms did nothing at all was something the jury could have fairly taken into account in finding gross negligence, even though the majority of building strikes on Cumberland Farms' radar did not result in personal injuries. Accordingly, Cumberland Farms' motion for judgment notwithstanding the verdict fails. See *Cormier* v. *Pezrow New England, Inc.*, 437 Mass. at 308.

5. Motion for New Trial

The court should not grant a new trial unless "it appears on a survey of the whole case that otherwise a miscarriage of justice would result." *Evans* v. *Multicon Construction Corp.*, 6 Mass. App. Ct. 291, 295 (1978). In a civil case, the judge should allow a motion for new trial if "the verdict is so markedly against the weight of the evidence as to suggest that the jurors allowed themselves to be misled, were swept away by bias or prejudice, or for a combination of reasons, including misunderstanding of applicable law," or failure to "come to a reasonable conclusion." *W. Oliver Tripp Co.* v. *American Hoechst Corp.*, 34 Mass. App. Ct. 744, 748 (1993).

Cumberland Farms contends that it is entitled to a new trial on 35 grounds, many of

which have been addressed above (regarding, e.g., the admissibility of prior strikes, foreseeability of risk, and duty) and need no further discussion. To the extent that the new trial motion is based upon alleged jury bias or other improper influence, or that it challenges the amount of the compensatory damage award, the Court deals with such arguments later in connection with Cumberland Farms' motion for a remittitur. The remaining litany of arguments advanced in support of Cumberland Farms' new trial motion merit only the following cursory discussion.

Cumberland Farms was not entitled to a jury instruction that its compliance with pertinent government standards was evidence of its non-negligence. The jurors were instructed that

> "Compliance with state or local regulations or requirements may be considered in determining whether Cumberland Farms was negligent, but is not conclusive on the question of Cumberland Farms' negligence. That is a question to be determined under common law as I have instructed you."

The jury had before it evidence that the apex entrance was no longer considered safe, despite its grandfathered status, and that government authorities had asked Cumberland Farms to remove that entrance. The issued instruction was appropriate on this record.

Cumberland Farms complains that I improperly allowed the plaintiff to present previously undisclosed testimony and opinions of the latter's expert witnesses, traffic engineer James D'Angelo, economist Craig Moore, mechanical engineer Paul Roland, and retired police officer and accident reconstructionist Eino Thompson, and further that Thompson's opinions exceeded his qualifications.

With respect to D'Angelo, Cumberland Farms asserts that the plaintiff was allowed to introduce and use during D'Angelo's trial testimony a diagram just produced that morning to Cumberland Farms depicting concrete planters which could have been used to block the apex

entrance to the Chicopee store. Cumberland Farms has not shown that it was prejudiced by the jurors' exposure to the diagram, even if it were belatedly disclosed (which the plaintiff hotly disputes), where Cumberland Farms vigorously cross-examined D'Angelo and effectively called the jurors' attention to a major weakness: that D'Angelo did not conduct any tests to determine how effective the barrier in the diagram would have been. (Trial Testimony 2/10/16 71-73). Moreover, the diagram was not admitted into evidence and the jurors were instructed repeatedly not to treat documents other than exhibits as evidence.

As to Moore's testimony concerning the value of Kimmy Dubuque's life, Cumberland Farms contends that Moore was allowed to use and show the jury a table that had not previously been disclosed to Cumberland Farms and that he used a flat discount rate in contrast to the variable future discount rate set forth in his earlier expert disclosure. According to Cumberland Farms, these last minute changes in Moore's trial testimony caught it by surprise and denied it a fair opportunity to review the expected testimony ahead of trial. Nothing in the record, however, suggests that Cumberland Farms was actually prejudiced by these new table calculations or methodology, where the later disclosure was more favorable to Cumberland Farms because it reduced the amount of damages.

Cumberland Farms next maintains that Roland testified about a diagram which had only been produced to Cumberland Farms the night before his testimony. The new diagram depicts a bollard array with a reinforced metal plate down its center, in contrast to standard pipe bollards referenced in Roland's pre-trial report. The belated disclosure precluded Cumberland Farms' experts from being able to assess and challenge the diagrams. It did not, however, prejudice Cumberland Farms, as even the pre-trial disclosure put Cumberland Farms on notice of Roland's

opinion that using steel plates would help keep the bollards from bending. In any event, I did not admit that diagram into evidence due to its belated disclosure. Furthermore, on cross-examination, defense counsel thoroughly and adeptly elicited testimony from Roland that just because one could construct and install a very strong barrier, that may not be necessary or even desirable--and could even backfire-- at an apex driveway like the Chicopee store.

With respect to Thompson, Cumberland Farms claims that I improperly permitted him to alter his estimates on the speed of Skowyra's vehicle at the time it struck Kimmy Dubuque. This argument is without merit; Thompson's initial estimate was 54 m.p.h. and it changed to 57.61 m.p.h.[2] This upward adjustment benefitted Cumberland Farms' argument that the higher the speed, the less likely that protective barriers would have prevented the accident. Although there was evidence that the differences in energy and force are exponentially greater with higher speeds, Cumberland Farms has not shown what a difference 3.6 m.p.h., would have made in its arguments, or that Thompson's estimation of the vehicle's speed exceeded his qualifications as a retired police officer with significant experience and education in accident reconstruction.[3]

Cumberland Farms argues that it was error to show the jury the surveillance video, over objection, of the accident at the South Deerfield store which triggered a lawsuit against

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[2] Cumberland Farms' bare assertion that the Skowyra vehicle was travelling at 70 m.p.h. when it hit Kimmy Dubuque is not supported by its citations to the record. The record shows that at some point, the Skowyra vehicle travelled at 70 m.p.h., but that its brakes had been applied and that by the time it hit the store and Kimmy Dubuque, its velocity was 57.61 m.p.h.

[3] Cumberland Farms also contends that I improperly admitted into evidence the curricula vitae of Thompson and Moore because those documents are hearsay and irrelevant to the litigation. Cumberland Farms does not so much as explain how the admission into evidence of those documents actually prejudiced it or why they are irrelevant. Cumberland Farms did not object to the admission of Moore's curriculum vitae at trial and therefore has waived this argument. Even if these documents should not have been admitted, it is unclear how their admission created an error which caused a miscarriage of justice entitling Cumberland Farms to a new trial.

Cumberland Farms for not having protective barriers or bollards. The video shows that a customer, while parking her vehicle, accidentally accelerated to 10-15 m.p.h., crashed into the store, and struck a male customer, resulting in the amputation of his leg. As explained above, there is no merit to Cumberland Farms' contention that the South Deerfield and Chicopee accidents are not substantially similar, such that the surveillance video was irrelevant or prejudicial. Both involved out of control motor vehicles on Cumberland Farms property, causing personal injury and property damage.

In overruling Cumberland Farms' objection to showing this video, I explained to counsel that any similarity or dissimilarity between the South Deerfield and Chicopee accidents would go to the weight of the evidence and that I found that the South Deerfield event had been established as the precipitating event that caused Cumberland Farms to consider installing protective barriers. There was no error. See *Santos* v. *Chrysler Corp.*, 430 Mass. at 203 (differences between other vehicular accidents and plaintiff's accident could be considered by the jury in terms of weight of the evidence).

Finally, Cumberland Farms asserts that it is entitled to a new trial because the plaintiff's counsel told the jurors in his closing argument that they should award punitive damages so that Cumberland Farms "feels the pain" and that Cumberland Farms takes in $17.5 billion in annual revenue. Because gross negligence was a theory of the plaintiff's case which went to the jury, it was not improper for counsel to argue for a punitive damages award in this way. In any event, this argument had little or no impact; the jurors' nominal award of $10 in punitive damages defeats any claim of prejudice from those statements.

The defendant's remaining arguments in support of its new trial motion (apart from the

matters considered below) are contradicted by the record and merit no discussion.

6. Motion for New Trial on Compensatory Damages or, Alternatively, Remittitur

The allowance of a new trial motion based on an excessive award of damages and the determination of remittitur are matters within the sound discretion of the judge. *Loschi* v. *Massachusetts Port Auth'y*, 361 Mass. 714, 715 (1972). The Court can determine the amount of a remittitur or order a new trial on damages, see *Labonte* v. *Hutchins & Wheeler*, 424 Mass. 813, 826 n.17 (1997), but should not grant a new trial on the ground that the damages are excessive until the plaintiff has first been given an opportunity to remit so much of the damages as the court adjudges is excessive, see Mass. R. Civ. P. 59(a).

A judge acting on a motion for remittitur under Mass. R. Civ. P. 59(a) has broad discretion and remits only so much of the damages as the court adjudges as excessive in order to bring the award within the range of verdicts supported by the evidence. *Clifton* v. *Massachusetts Bay Transportation Authority*, 445 Mass. 611, 623 (2005). Although a plaintiff "need not prove damages with mathematical certainty, 'damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty.'" *Connolly* v. *Suffolk Cty. Sheriff's Dept.*, 62 Mass. App. Ct. 187, 198 (2004), quoting *Kitner* v. *CTW Transport, Inc.*, 53 Mass. App. Ct. 741, 748 (2002). The court should not reduce an award that does not "so shock[] the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." *Labonte* v. *Hutchins & Wheeler*, 424 Mass. at 825. On the other hand, "[i]t is an error of law if 'the damages awarded were greatly disproportionate to the

injury proven or represented a miscarriage of justice.'" *Evans* v. *Lorillard Tobacco Co.*, 465 Mass. 411, 464 (2013), quoting *Labonte* v. *Hutchins & Wheeler*, 424 Mass. at 824.

In its motion under Mass. R. Civ. P. 50(c) and Mass. R. Civ. P. 59(a), Cumberland Farms moves for a new trial or, alternatively, a remittitur. It challenges the amount of the compensatory damages as excessive, contending that (1) the award was the product of bias, passion, prejudice or other improper influence; (2) the award is disproportionate to the evidence of damages presented at trial; (3) the award is over three times higher than the total compensatory award suggested by the plaintiff, and is far higher than verdicts awarded in comparable Massachusetts cases of wrongful death without evidence of conscious pain and suffering; and (4) the jury did not follow the Court's instructions in awarding damages.[4]

This was not a jury initially predisposed to finding premises liability. During the panel voir dire, most of the seated jurors answered questions in ways which evinced skepticism about how the owner of the store, as opposed to the driver, could be liable. I observed that the jury was attentive throughout the trial and presumably followed my instruction to the effect that any compensatory damage award is to compensate the plaintiff and not to punish the defendant. See

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[4]Additionally, on May 12, 2016, Cumberland Farms submitted for the first time documentation that on April 21, 2011, the plaintiff had entered a settlement agreement with Skowyra, who paid the plaintiff $250,000 to release all claims against him. Cumberland Farms argues that the compensatory damages award should be offset and reduced by that amount pursuant to the contribution statute, G. L. c. 231B, § 4. For two reasons, Cumberland Farm's offset argument fails. First, Cumberland Farms waived that argument by successfully objecting to the plaintiff's counsel's closing argument that the Court would instruct the jury that it would offset the recovery. Consequently, I instructed the jury not to consider Skowyra's actions. Second, Cumberland Farms failed to submit evidence of the settlement agreement until May 12, 2016. Pursuant to Mass. R. Civ. P. 59, Cumberland Farms' deadline for filing its motion for new trial was ten days after entry of judgment. Rule 59 requires that when a motion for new trial rests on an affidavit, the affidavit must be filed with the motion. In this action, judgment entered on March 8, 2016. Although Cumberland Farms filed its new trial motion on March 18, 2016, it waited nearly two more months to provide any documentary support for the offset argument, although it knew of the settlement agreement during trial and could have filed an affidavit with its new trial motion. The untimeliness of Cumberland Farms' submission of documentary support contravenes Rule 59 and persuades me that Cumberland Farms did not properly preserve its offset claim.

Reckis v. *Johnson & Johnson*, 471 Mass. at 304 n.49.

The jury deliberated for two and a half days before reaching a compensatory damages award calculated to the penny. It is not clear how the jury calculated the amount of the compensatory damages award. The total compensatory damages award of $32,369,024.30, minus the economic damages (lost income of $1,593,799 plus the funeral expenses) equals $30,762,240.30. This represents annual compensation of $396,932,13 for each of the two beneficiaries.

The plaintiff selectively cautions against comparing this compensatory damages award to others.[5] Although comparing juries' compensatory damages awards has been called "a dangerous game," see *Recklis* v. *Johnson & Johnson*, 471 Mass. at 303 n. 47, such comparisons may be useful in identifying excessiveness. Cumberland Farms points out that, compared to compensatory damage awards issued by other juries, the award here is astronomically higher than awards rendered in wrongful death cases not involving conscious pain and suffering. See, e.g., *Lech* v. *Digital Equipment Corp.*, 1993 WL 13737112 (Worc. Super. Ct. 1993) ($6,350,000 award, including $2,075,000 in punitive damages, where 38 year old husband and father died instantly in vehicular collision).

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[5]Higher compensatory damage awards have been issued where there is evidence of pain and suffering. See, e.g., *Reckis* v. *Johnson & Johnson, Inc.*, 471 Mass. at 273-274 (jury awarded $50 million in compensatory damages to child, plus $6.5 million to each of her parents, for pain and suffering endured by child who, after receiving multiple doses of over the counter medicine, developed rare and painful disorder causing permanent impairments).

The plaintiff argues that a "compelling comparison" case is found in *Evans* v. *Lorillard Tobacco Co.*, 465 Mass. 411, 415 (2013). In *Evans*, the jury awarded damages, including for pain and suffering, against a cigarette manufacturer in favor of a decedent smoker's estate and decedent's son. The trial judge allowed the defendant's motion for remittitur and reduced the compensatory damages award to decedent's estate from $50 million to $25 million, and to the plaintiff (the decedent's son) from $21 million to $10 million. *Id.* at 415. On appeal, the Supreme Judicial Court concluded that the remittitur award was neither an abuse of discretion nor did it represent a miscarriage of justice. *Id.* at 464. Because *Evans* involved pain and suffering over a protracted period, it is inapposite to the case before me.

Notwithstanding the jury's reasonable conclusion that Cumberland Farms was negligent, some aspects of the trial and the verdict persuade me that the compensatory damage award was influenced by some degree of partiality and mistake. The $32,369,024.30 awarded was more than three times than the $10 million requested by the plaintiff and is disproportionately high compared to the evidence of compensatory damages sustained by the plaintiff, particularly absent pain and suffering by Kimmy Dubuque. The disproportion between the evidence and the compensatory damages award appears to reflect the jurors' mistake or partiality rather than an effort to compensate for actual damages. See *Clifton* v. *Massachusetts Bay Transportation Authority*, 445 Mass. at 623.

Cumberland Farms complains that the plaintiff's counsel, in closing argument, overstepped the boundaries of proper argument by referring to Cumberland Farms' $17.5 billion annual revenue. While that statement was permissible for purposes of arguing that the jury should award punitive damages on the gross negligence claim, the jury's consideration of that statement certainly poured over to their consideration of a compensatory damages award on the negligence claim, and to that extent, it was inflammatory.

The jurors' failure to comply strictly with my instructions raises additional concerns about whether the award was, to some degree, the product of mistake or partiality. First, the jury's award of $10 in punitive damages contravened my instruction that the minimum amount of a punitive damages award in this context is $5,000. See G. L. c. 229, § 2. Second, despite my informing the jury that the only message it could send would be the verdict, the jury included with the verdict slip a written message. The written message sent by the jurors did not substantively add anything to the verdict; it was entirely gratuitous. The fact that the jurors sent

the note, however, persuades me that their passion about the case clouded their judgment in rendering the verdict and likely in calculating the award as well.

Finally, the verdict was inconsistent in that only ten jurors found that Cumberland Farms was negligent, yet eleven jurors found that Cumberland Farms' negligence was a substantial contributing factor in Kimmy Dubuque's death and that the defendant's conduct constituted gross negligence or willful, wanton or reckless conduct. While none of these deviations, viewed in isolation, may be significant, together they cast some doubt upon the jury's ability to follow the jury instructions and to produce logical, consistent, and dispassionate responses.

The compensatory damages award here shocks "the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." *Labonte* v. *Hutchins & Wheeler*, 424 Mass. at 825. I find that the jury's verdict awarding compensatory damages should not have reasonably exceeded $20 million, and that such a reduced verdict comports with the evidence of actual damages caused by Cumberland Farms' negligence and gross negligence. See *Clifton* v. *MBTA*, 445 Mass. at 623 (Mass. R. Civ. P. 59(a) requires judge to remit only so much of damages as the court adjudges is excessive). Accordingly, I allow Cumberland Farms' motion for remittitur. The plaintiff has 30 days to decide whether he accepts the reduced compensatory damage award of $20 million. If he does not accept it within 30 days, Cumberland Farms' trial motion will be deemed to be allowed as to the issue of compensatory damages only. See Mass. R. Civ. P. 59(a).

ORDER

For the foregoing reasons, it is hereby **ORDERED** that:

1. Cumberland Farms, Inc.'s Motion for Judgment Notwithstanding the Verdict is **DENIED**; and

2. Cumberland Farms, Inc.'s Motion for a New Trial and Motion for Remittitur are **ALLOWED** insofar as the award of compensatory damages is reduced to $20 million. The plaintiff, Albert Dubuque, as Executor of the Estate of Kimmy A. Dubuque, has thirty (30) days from the date that this Order enters to inform the court in writing as to whether he accepts this reduced compensatory damages award. If he accepts it, a new judgment shall issue reflecting the reduction. If he does not accept it, Cumberland Farms, Inc.'s motion for new trial shall be allowed as to the issue of compensatory damages only, and a new trial shall be conducted on that limited issue. See Mass. R. Civ. P. 59(a).

Mark D Mason
Justice of the Superior Court

Dated: June 24, 2016