

**COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO**

CATHERINE KEREGE, surviving
daughter of HARRIET CATHERINE
VOLNER, deceased, and personal
representative of the Estate of
HARRIET CATHERINE VOLNER,
on her own behalf and on behalf of all
statutory beneficiaries,

Plaintiffs/Appellees,

vs.

VISCOUNT HOTEL GROUP,
L.L.C., doing business at THE
VISCOUNT HOTEL,

Defendant/Appellant.

NO. 2 CA-CV 2010-0208

Pima County Superior Court
No. C20081176

ANSWERING BRIEF

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STATEMENT OF THE CASE

¶ 1 This is a premises liability tort action brought by Plaintiff Catherine Kerege on behalf of all the statutory survivors of Decedent Kitty Volner—Catherine and her three siblings. Kitty Volner fell down stairs while present as an invitee at the Viscount Suite Hotel in Tucson. Plaintiff alleged that defendant maintained a dangerous condition that caused Ms. Volner to fall.

¶ 2 The matter went to trial, and the jury returned a verdict finding defendant to be eighty percent at fault and Ms. Volner twenty percent at fault. The jury assessed damages of \$750,000 for each survivor, to be reduced to \$600,000. (R. 74).

STATEMENT OF FACTS

¶ 3 Defendant operates the Viscount Suite Hotel in Tucson. Adjacent to the hotel lobby are steps leading down to an atrium—the south atrium stairwell. (Tr. 4/07/2010, p. 71:2-9). The 1982 building code applied at the time the hotel was constructed. (p. 15:12-14). Expert witness Frank Mascia, an architect, examined the construction plans approved by the City of Tucson in 1986 as well as a hotel floor plan from defendant’s website. (pp. 15:24-16:22; 17:20-25; Ex. 24). Both documents depicted a center handrail at the south atrium stairwell. (p. 18:2-9).

¶ 4 Mr. Mascia determined that based on the intended use and width of the south atrium stairwell the building code required installation and maintenance of the center handrail. (p. 18:10-19:20). He quoted the code commentary:

Probably the most important single safety device that can be provided in connection with stairs is the handrail. It will never be known how many missteps, accidents, injuries or even fatalities have been prevented by properly installed sturdy handrails. Basically it's contemplated the handrail will be within relatively easy reach of every stair user.

(p. 23:1-21). Mr. Mascia explained that the center handrail provides a visual cue there is a change in elevation and provides the ability to grab and hold on to something if one starts to fall. Although the stairwell had side rails, it was over twelve feet wide. (pp. 20:10-15, 24:6-21).

¶ 5 Defendant's former employee John Hubbard worked at the Viscount from 1988 through September 2007. (Tr. 4/07/2010, pp. 69:18-70:7). He remembered there had been a center handrail at the south atrium stairwell and that defendant removed the handrail, even though it was in good, secure condition. (pp. 74:24-75:5; 76:22-78:5). He also recalled that defendant changed the carpeting covering the stairs. (pp. 78:6-22).

¶ 6 Mr. Mascia observed that the handrail had been removed and told the jury that the removal was in violation of the building code, making the stairwell dangerous. (Tr. 4/07/2010, pp. 26:11-21; 32:19-21; 3823-40:10). He also opined that the danger created by removal of the handrail "was exacerbated, made worse by the fact that this large-patterned carpet was on the floor, basically almost making it like camouflaged, in my opinion." (pp. 36:23-376). Floor pattern and color are important "in terms of being able to identify changes, to differentiate surfaces...so you have to be very careful about floor textures and colors." (p. 36:1-8).

¶ 7 Defense expert Wayne Silberschlag, also an architect, agreed that the building code required defendant to maintain the center handrail and that it was a violation of the building code to remove it. (4/09/2010, pp. 35:25-40:4). Mr. Silberschlag agreed that because of the building code requirements Kitty Volner had a right to have the center handrail present as a visual cue and safety

device. (p. 53:19:22). He was so certain a center handrail was required that he advised hotel owner and general manager Larry Cesare he was in violation of the building code and should have a center handrail reinstalled. (pp. 53:23-54:7).

¶ 8 Kitty Volner was married for 50 years, survived her husband, and continued living in her own home. (4/08/2010 p.m., pp. 7:1-6; 83:8-22). She walked without assistance, did her own cooking, cleaning and shopping, and drove herself around town. She wore glasses and had no problems seeing and perceiving things. Her four children lived in Tucson and Albuquerque. (pp. 8:22-9:3; 9:6-14; 10:3-23).

¶ 9 On September 13, 2007 (Thursday) Kitty went to the Viscount to have breakfast with family and friends. She and her sister-in-law, Ellie Volner, went to the hotel together and walked inside and approached the south atrium stairwell side-by-side, with Ellie on Kitty's right side. Ellie explained that she spotted friends across the atrium and looked back at Kitty who "was in motion, falling" and landed at the bottom of the stairs. There was no indication that she had tripped or stumbled, only that she just went down as though she had not seen the stairs. (4/08/2010 p.m., pp. 14:13-15:11; 17:1-17; 20:4-21:4). Robert Casalegno was in the atrium breakfast area to meet Ellie and Kitty. He saw them across the atrium at the top of the steps and looked away. When he

looked back he could not see Kitty anymore. (Ex. 31, pp. 12:14-14:24).

Viscount employee Linda Applegate saw Ellie and Kitty enter the hotel lobby area. Applegate was attracted to Kitty's jogging suit and watched the ladies walk across the lobby. Kitty "just all of a sudden disappeared and you heard a loud thud." (Tr. 4/09/2010, pp. 65:21-66:5; 68:14-17).

¶ 10 John Hubbard testified that he remembered other falls occurring before on the same stairs. (Tr. 4/07/2010, p. 80:1-81:4). Mr. Casalegno learned from a hotel employee that others had fallen previously at the same stairs. (Exhibit 31, pp. 17:22-18:21, video deposition transcript). Betty Joyce fell down the same stairs later the same day Kitty fell. (Ex. 38, p. 14:10-12) ("steps weren't visible...just looked like a continuation of the carpet"). Dolores McGee fell down the same stairs the next month, on October 10, 2007, when her husband was pushing her wheelchair and neither one saw the stairs. (Ex. 34, p. 8:11-12, 9:19) ("suddenly I was flying...all looked like flat surface to go on"). Darlene Fulmer fell three days later on October 13, 2007. (Ex. 35, pp. 9:5-12; 16:17-18:12) (remembered she used steps without problem when center handrail was there but did not detect steps when she fell). Dorothy Dumnich fell down the south atrium stairs on October 14, 2008. (Ex. 37, p. 15:20-21) ("I was looking, and I just—I just missed the steps completely"). Betty Simon fell down these stairs on December 9, 2008. (Ex. 30, p. 21:19-24) ("I just did not

see the stairs...just merges together or something”). Later that day Simon’s daughter Renee Bizzak and son-in-law William Bizzak walked into the hotel not knowing where Betty had fallen. Mr. Bizzak prevented Renee from falling when he saw the stairs at the last second possible to prevent another injury. (Ex. 28, p. 11:3-9; Ex. 29, pp. 14:22-15:3). Jane Axtell fell down the south atrium stairs on December 6, 2009. (Ex. 36, pp. 8:15-24; 15:2-8) (very cautious because she used a walker; not seeing south atrium steps, she went where it falsely looked safest).

¶ 11 Kitty was taken to Tucson Medical Center. (Tr. 4/08/2010 p.m., pp. 24:13-15; 88:11). Later that day a trauma surgeon advised her children that the injury was “really bad.” (p. 88:17). One side of her head “looked fine...like there was nothing going on,” while the other side had cuts and bruises and “looked devastating.” (p. 88:19-89:5). She was, however, conscious and speaking normally. (p. 90:11-20). Kitty stated, “No, I didn’t even see the stairs and I just fell off of them.” (p. 95:2-3). The doctor (neurosurgeon Kurt Schroeder) showed the family CTs and MRIs and explained what was happening in Kitty’s brain; initially, he was cautiously optimistic. (p. 93:6-13). The day after the injury (Friday), however, Kitty lost consciousness, and the doctor recommended surgery to suction clotting blood out of the brain and reduce swelling, though he was not sure he could get it all. (p. 94:1-14;

96:6-15). The children were making medical decisions and agreed to the surgery, which was done Friday night. (pp. 95:21-24; 97:10). Exhibit 14 consisted of photos that showed Kitty's appearance after the surgery. (p. 89:6-90:5).

¶ 12 In the early stages of unconsciousness, Kitty was still somewhat responsive, making movements based on hearing voices; she continued to respond to touch, good signs said the doctor. She gradually became less responsive and by Sunday "she was just nonresponsive." (p. 97:15-98:6). At six days after the injury Dr. Schroeder described "heroic measures" that were available to try and improve the situation but asked the children to evaluate how they wanted to proceed in light of her grave condition. He was very descriptive about what was happening in her brain based on imaging and other tests; she had suffered multiple strokes. The medical evidence indicated that if she were to live she "would more than likely be [in] a vegetative state." (p. 98:13-99:1).

¶ 13 Kitty was on a ventilator. On Wednesday, almost a week after the fall at the Viscount stairs, Dr. Schroeder gave the family the option of removing life support and explained that she might pass quickly or it might take days.

Son Paul Volner explained—

And we talked about what, knowing Mom and the life -- the life that she loved, the activeness of her life, her ability to be independent, and understanding that she would require 24-hour care if she were to survive this for any length that she had left to

live, we decided that she wouldn't want that. Our dad, who had passed away years before, wouldn't have wanted that for his wife. So—

(p. 99:19-100:1). The children made a decision to remove life support.

She continued to breathe on her own, labored, but she continued to breathe for, I don't know, another two-and-a-half hours or so. And the doctor said this could go on for many hours, possibly days. So that some of us didn't—it was—it was horrible.

Kitty died shortly thereafter. (p. 100:5-19).

STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion in allowing evidence of falls that occurred after Kitty Volner's?
2. Did plaintiff's counsel argue punitive damages in closing argument, thereby prejudicing the jury?
3. Did plaintiff's counsel violate the "Golden Rule" and also wrongly vouch for plaintiff's cause with personal opinion, thereby prejudicing the jury?
4. Did the trial court abuse its discretion in preventing defense counsel from arguing that an absence of falls prior to Kitty Volner's fall showed the stairway was not unreasonably dangerous?
5. Did the trial court abuse its discretion in concluding that the probative value of photographs of the decedent outweighed any potential for confusion of the issues?
6. Did the trial court abuse its discretion in refusing three of defendant's requested jury instructions? Was the jury on the whole correctly instructed?
7. Was there any accumulation of errors that denied defendant a fair trial?

ARGUMENT

¶ 14 “At the appellate level, there is an initial presumption that a judgment is correct. The burden is on the party who disagrees with the judgment to show that the trial court abused its discretion.” *General Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992).

1. THE TRIAL COURT CORRECTLY PERMITTED PLAINTIFF TO PRESENT EVIDENCE OF SUBSEQUENT FALLS.

¶ 15 *Standard of Review:* This court reviews “evidentiary rulings for an abuse of discretion and generally affirm[s] a trial court’s admission or exclusion of evidence absent a clear abuse or legal error and resulting prejudice.” *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶33, 96 P.3d 530, 541 (App.2004).

¶ 16 *Argument:* The context for evaluating defendant’s allegation regarding the admission of evidence is plaintiff’s burden of proving that the premises were not “reasonably safe for use by invitees.” *Preuss v. Sambo’s of Arizona, Inc.*, 130 Ariz. 288, 289, 635 P.2d 1210, 1211 (1981). The occurrence of other falls was probative on this issue. Case law is unanimous that evidence of both prior and subsequent similar incidents is admissible to prove that a location or condition is not safe: *Petrelli v. Federated Department Stores*, 40 A.D.3d 1339 (N.Y. 2007) (“admissible and of probative value on the issue of

whether a dangerous condition existed”); *Ebach v. Ralston*, 510 N.W.2d 604, 608 (N.D. 1994) (“relevant to establish the dangerousness of the premises at the time of an accident”); *Burlington No. Railroad Co. v. Whitt*, 575 So.2d 1011 (Ala. 1990) (“admissible on the issue of whether a place was safe”); *Wood v. Walt Disney World Co.*, 396 So.2d 769 (Fla. 1981); and *Dudley v. County of Saratoga*, 145 A.D.2d 689, 535 N.Y.S.2d 231 (N.Y.A.D. 1988). The occurrence of other injuries, no matter when they occurred supports a conclusion that the location or condition was not safe.

¶ 17 Defendant wanted the jury to think Kitty Volner was the only person to ever fall down these stairs, because it knew that if the jury thought hers was the one and only fall to occur it would be less likely to perceive the true danger created by the stairs. Defendant moved in *limine* to preclude evidence of the other similar incidents. Its primary argument was that the evidence was irrelevant (R. 51); however, defendant no longer contends that the evidence was irrelevant and nearly concedes it was admissible pursuant to evidentiary Rules 401 and 402. (Opening Brief, p. 15, n. 11.)

¶ 18 Defendant’s secondary argument in its motion *in limine* was that evidence of subsequent falls was prejudicial. (R. 51, p. 3:15-22). Although defendant did not mention Rule 403 in either its motion *in limine* or its Opening

Brief, it seems that defendant is, in fact, invoking Rule 403 by asserting that the evidence “should have been precluded as highly prejudicial.” (¶21).

¶ 19 But the exact nature of defendant’s Rule 403 argument is unclear. In the motion in *limine* defendant argued, “The jury would assume that Defendant was negligent at the time of the Subject Accident because other accidents have happened at Defendant’s hotel after the Subject Accident. Such an assumption would be unfair, unduly prejudicial and improper.” (R. 51, p. 3:17-22). In its Opening Brief, defendant concludes, “The jury was obviously confused, and Defendant prejudiced, by the evidence and related arguments.” (¶24). Defendant has never argued that the evidence was per se prejudicial, in the sense that it incited the passions of the jury, only that defendant would be harmed because the jury would be confused about the purpose for which the evidence was offered, perhaps thinking defendant was on trial for the subsequent accidents. This is really a Rule 403 “confusion of the issues” argument, a consideration that is different than “unfair prejudice.” See discussion in *Shotwell v. Donahoe*, 207 Ariz. 287, ¶¶33-34, 85 P.3d 1045, 1054 (2004).

¶ 20 Regardless, the test is one of balancing the probative value against one of the Rule 403 dangers: “unfair prejudice, confusion of the issues, or misleading the jury.” Defendant’s argument did not give the trial court any

reason to conclude that the danger of confusion or unfair prejudice outweighed the probative value of the evidence. When the trial court was making its decision on this issue, defendant simply labeled the probative value as “minimal” and then stated its own conclusion, all without analysis, that the jury would find defendant negligent because of falls that occurred after decedent fell. (R. 51, p. 3:17-22).

¶ 21 In fact, the evidence of other falls on the stairs was highly probative. Only one incident in the course of many years might be viewed as an aberration, which defendant would have argued was solely the fault of the person falling. Multiple falls, however, showed the true picture, establishing an element common to numerous events—the dangerous condition of the stairs. Although defendant argues there was “other evidence of ‘unreasonable danger’” (Opening Brief, ¶22), there was no other evidence that could so clearly establish the danger presented by these stairs. Defendant now acknowledges that there were *prior* falls (¶¶6, 22; p. 4 n. 3); however, defendant failed to identify anyone who fell before Kitty Volner, so there was no testimony available from those persons to explain how their falls occurred or how they were affected by the carpet pattern or removal of the center handrail that was required by the building code. The evidence surrounding *subsequent* falls could not be duplicated by anything else.

¶ 22 Defendant suggested in its motion in limine that the jury “would assume Defendant was negligent at the time of the Subject Accident because other accidents have happened at Defendant’s hotel after the Subject Accident.” (R. 51, p. 3). Defendant’s concern about evidence of *subsequent* events, however, would be the issue of defendant’s “notice” of the condition, and that was not a disputed issue in the trial. A business owner is required to address unreasonably dangerous conditions of which it has notice. *Preuss*, 130 Ariz. at 289, 635 P.2d at 1211. An owner has notice when (1) it actually created the condition, (2) it knew of the condition prior to the injury, or (3) the condition existed for such a length of time that the owner should have been aware of it. *Id.* Because it was undisputed in this trial that defendant itself created the defects when it removed the center handrail and installed the confusing carpet, notice of the condition was simply not an issue in the case and was not a point on which defendant could have suffered prejudice.

¶ 23 Defendant made a perfunctory argument, anyway, that it did not have “notice,” by stating there was no evidence of prior falls and therefore no reason for defendant to perceive there was a danger in the stairs. (Tr. 4/09/2010, pp. 156:23-24; 165:11-14). As defendant has pointed out in its own brief, however, there was testimony of prior falls. (¶6, citing Tr. 4/07/2010 at

pp. 79:1-80:24).¹ Defendant did not give the trial court any reason to find that the danger of confusion or unfair prejudice outweighed the probative value of the subsequent falls, and the trial did not then show the court's decision to be incorrect.

¶ 24 Defendant states now that plaintiff “did not use the subsequent falls evidence to argue unreasonable danger.” (¶22). This is not true. For example, the first page of transcript of plaintiff's counsel's closing argument shows:

I believe that it is going to take your verdict to let the Viscount know that they have a very dangerous condition in their hotel that has caused unbelievable amounts of suffering to this family. You've heard innumerable witnesses that have taken headers off of that stairwell, just like Kitty Volner did.

(Tr. 4/09.2010, p. 124:18-23). Counsel's first argument to the jury was to make a link that other falls showed this was a very dangerous condition.

¶ 25 Counsel also pointed out that the testimony of Dorothy Dumnich (Exhibit 37), one of the subsequent fall victims, established how dangerous the stairs became when defendant moved the code-required center handrail:

She said, oh, yeah, I've used those stairs before but there was a railing there, and I had no problem with that. But guess what? The first time she uses that stairwell when that railing was no longer there, what happened?

¹ Also, Robert Casalegno learned from a hotel employee that others had fallen previously. (Exhibit 31, pp. 12:7-14:18; 17:22-18:21).

(Tr. 4/09/2010, p. 129:20-25). Ms. Dumnich's experience told the jurors that defendant made the stairs dangerous when it removed the center handrail.

¶ 26 Counsel further pointed out that the video deposition testimony of William Bizzak (Exhibit 28) showed how dangerous the stairs became when defendant replaced the old carpeting with a busy, paisley pattern that camouflaged the steps:

Special forces guy that is trained to have perception. He darn near does a header off there. Saves his wife from going off. And he took a photograph. He said take a look here, Mr. Hunsaker. Does that look like – can you see those stairs? See how that pattern flows together like that? And you're telling me that I'm supposed to see that?

(Tr. 4/09/2010, p. 130:7-13). Counsel added that the “descriptions of the witnesses” showed, “It's deceptive. Looks flat. All blend into the atrium. Looks like one level. It's really bad. It's a dangerous condition.” (p. 130:14-17). Counsel reminded the jury that Ed McGee, who pushed his wife's wheelchair down the stairs, testified that the stairs were hidden: “And he says we didn't see any indication this was a stairwell. We didn't see those side rails. We didn't see those stairs.” (p. 133:10-13). Furthermore, counsel pointed out that witness Jane Axtell testified she always avoided stairs. The reason she fell on the subject stairs was that she never saw them; the location looked flat and safe to her. (p. 141:15-20).

¶ 27 The evidence of subsequent falls was relevant to show that the condition was dangerous, and, contrary to defendant’s assertion, plaintiff’s counsel made that very argument to the jury.

¶ 28 Defendant states that plaintiff’s counsel “improperly used the evidence to argue the hotel’s notice of the unreasonable danger.” (¶23). Again, there was no reasonable dispute about whether the hotel, which created the condition, had notice. Also, a review of the transcript shows that defendant’s assertion, which is supported only by a footnote containing a mash-up of unidentified argument, is false. The quotations in note 12 (Opening Brief, p. 16) are from Tr. 4/09/2010, found in a section that begins on p. 165, where plaintiff’s counsel first identified the issue of notice: “If they create it, they’re on notice. But it doesn’t stop there.” (p. 165:23-24). Next, counsel reminded the jury of the evidence: “[E]mployees say that it happens all the time. This isn’t the first time it happened”—referring to prior, not subsequent, falls. (p. 166:2-3). Counsel then pointed out the hotel did not document every fall at those stairs and argued that typically the actual number of events is higher than the number reported. (p. 166:9-24). Counsel referred to subsequent falls only to demonstrate that not all falls were discovered by or reported to the hotel—not once even implying that the subsequent falls gave notice prior to Kitty Volner’s fall. (p.166:7-12). Then, sharing with the jury the end of this thought

process—in light of the fact that (1) defendant actually created the condition, and (2) the employees knew of prior accidents—counsel asked how the defendant could possibly say it did not have notice of the condition. (p. 166:25). Counsel used only *prior* accidents to reinforce the fact that defendant was on notice, an argument secondary in importance to the fact that defendant actually created the condition.

¶ 29 The second portion of defendant’s footnote no. 12 (p. 16) (“Who’s next? What’s it going to take?”), is from plaintiff’s counsel’s argument after he had moved on from the issue of notice. (p. 167:7-8). It certainly does not support the assertion that plaintiff’s counsel argued evidence of subsequent accidents proved notice. Defendant has mischaracterized the closing argument by using a footnote of excerpts that are not cited to the record.

¶ 30 Defendant ends by stating the “jury was obviously confused” and “believed its obligation was to punish or deter the Defendant.” (¶24). This allegation is not at all obvious and is not supported by the record. The jury knew that the building code required a center handrail for safety and that defendant removed that handrail. The jury saw photographs of the stairs and heard first-hand the experiences of numerous persons who fell at the stairs or nearly fell because they walked right up and never realized the stairs were there. Far from being confused, the jury reasonably concluded that the stairs were

dangerous. Defendant speculates that the jury enhanced its verdict to punish defendant because of subsequent falls. A verdict that is higher than defendant's evaluation of the case does not show that the jury was confused by the issues. The significance of the verdict amount is fully discussed in the following section.

2. **PLAINTIFF’S COUNSEL DID NOT ARGUE PUNITIVE DAMAGES IN CLOSING ARGUMENTS AND DID NOT COMMIT ANY MISCONDUCT.**

¶ 31 *Standard of Review:* The appellate court is “guided by two principles” when reviewing the denial of a motion for mistrial based on an allegation that misconduct during closing argument prejudiced the jury:

First, counsel are allowed wide latitude in their closing arguments. Also, the trial court has great discretion in controlling the conduct of the trial. If the trial court does not find that an argument unduly prejudiced the jury, then on reviewing the printed record [the appellate court] will not disturb its ruling absent a clear showing of prejudicial error.

Hales v. Pittman, 118 Ariz. 305, 313, 576 P.2d 493, 501 (1978).

¶ 32 “The trial judge is allowed considerable discretion in controlling the conduct of a trial, and is best able to weigh the prejudicial effect upon the jury of any misconduct by counsel.” *Rancho Pescado, Inc. v. Northwestern Mut. Life*, 140 Ariz. 174, 188, 680 P.2d 1235, 1249 (App. 1984). “That court has the whole picture and is better equipped to make such a judgment than an appellate court.” *Id.* 140 Ariz. at 189, 680 P.2d at 1250.

¶ 33 *Argument:* There was no misconduct by plaintiff’s counsel, and the amount of the verdict is not excessive but simply reflects the jury’s reasonable view of the loss suffered as a result of a mother’s death.

A. There was no misconduct by plaintiff’s counsel, who argued liability, not punitive damages.

¶ 34 Defendant has maintained throughout the entire course of this lawsuit that in spite of the building code violation its stairs were perfectly fine and there was no danger associated with them. On the last day of trial defendant called its expert to testify:

Q. (By Mr. Hunsaker) Mr. Silberschlag, did you come to a conclusion, sir, with regard to this particular stairwell as to whether or not it was safe for the use of the public?

A. Yes, it’s a very safe stairwell.

(Tr. (4/09/2010, p. 25:20-24). Defense counsel then argued to the jury, “I submit it wasn’t unreasonably dangerous, sure, a stair has some dangers to it. ...But is it unreasonably dangerous, is the question.” (Tr. 4/09/2010, p. 157:2-5). That defense position was the context for closing argument by plaintiff’s counsel.

¶ 35 Defendant asserts that plaintiff’s counsel impermissibly argued punitive damages. Defendant acknowledges an analytically similar case: *Cota v. Harley Davidson*, 141 Ariz. 7, 684 P.2d 888 (App. 1984), a product liability case in which the plaintiff was injured while riding a motorcycle he alleged was defective. *Cota* supports plaintiff’s position here. The defendant manufacturer, like defendant in the present case, denied there was a defect that made the motorcycle dangerous. 141 Ariz. at 15, 684 P.2d at 896. “During closing

argument, plaintiffs’ attorney told the jury that they should ‘send a message’ to defendants, so that the injury suffered by Cota would not happen to any other motorcycle rider.” *Id.* Specifically, plaintiff’s counsel argued as follows:

You have more power than the president of the United States, because you and only you can right a wrong, and you and only you can decide the credibility of the witnesses. You and only you can send a message to the motorcycle industry, can send a message to Harley-Davidson and the A.M.F. and say, This isn’t going to happen anymore.

Id. The verdict was for the plaintiff, and the manufacturer, like the defendant in this case, complained that plaintiff’s counsel had made an impermissible punitive damages argument. The court, however, concluded, “This was not a punitive damages argument and was entirely proper in the context of the manner in which the case was tried.” *Id.*

¶ 36 The context of the manner in which the *Cota* case was tried was that the defendant had not received the message yet and continued to deny that its product was defective. Plaintiff’s counsel there encouraged the jury to send a message with a verdict for the plaintiff determining the defendant’s liability. The arguments in the present matter were no different; they were made in the context of defendant strongly arguing that the stairway in question was not dangerous, and plaintiff responding that the jury’s liability verdict would tell defendant otherwise.

¶ 37 This was not a punitive damages argument. As defendant even acknowledges, plaintiff's counsel specifically encouraged the jury to "give the full measure of damage, so that there will never hopefully be another fall at Viscount hotel on these stairs." (Tr. 4/09/2010, p. 172:22-24). The "full measure" of damages is not a request for a punitive amount above the degree of loss suffered by the survivors. This quoted statement immediately followed plaintiff's counsel telling the jury that a human life has great value and that the survivors' losses were significant and that the loss was not any less just because of Kitty Volner's age, so it was clearly a compensatory damages argument and not a punitive damages argument (and not an argument that invoked the subsequent accidents on the stairs). (p.172:8-17).

¶ 38 Suggesting the verdict would prevent another loss was a request that the jury inform defendant that it was being held legally liable because it was maintaining a dangerous condition. This is precisely the type of argument approved in the *Cota* case where plaintiff's counsel said, "[S]end a message to Harley-Davidson and the A.M.F. and say, This isn't going to happen anymore." In other words, *Tell the jury with your verdict of liability that the defendant needs to fix the problem so that no one else gets hurt.* This is proper argument, specifically approved by this court in *Cota*, and the trial judge immediately recognized it as such. (Tr. 4/09/2010, p. 149:19-151:20).

¶ 39 Defendant’s allegation of misconduct has no merit. The specific language cited by defendant in ¶¶27-32 (Opening Brief) was all part of the argument to send a message:

- inexcusable disregard for the safety of patrons;
- the night manager ignored Mr. McGee, whose wife went down the stairs in a wheelchair;
- protection for children and the elderly;
- make it stop, they are still doing nothing;
- who’s next;
- voice of the community.

Each and every one of these statements by plaintiff’s counsel was an element of suggesting the jury should tell defendant with its verdict that its stairs were defective and dangerous—yes, it does make a difference when you remove a handrail that is required by the building code.

¶ 40 Although defendant argues that plaintiff’s counsel “asked the jury to award Plaintiffs a *significant enough amount* in damages to send a message” (Opening Brief, ¶34, emphasized language by defendant), plaintiff’s counsel did not say that. Defendant did not provide a link to the trial transcript for any such argument, and plaintiff’s counsel never suggested that the jury should enhance the damages above and beyond the “full measure.”

B. It was the jury's discretion to determine reasonable damages.

¶ 41 Defendant argues that the amount of damages awarded proves the jurors must have been influenced by counsel's conduct and not the evidence. The reason given is that the jurors awarded more than the specific dollar amount first suggested by plaintiff's counsel; however, defendant ignores the complete record. Plaintiff's counsel first stated that "the value of losing a mother under these circumstances of what they've been through and being denied that relationship with their mother, that was snuffed out, is worth \$250,000 for each of those children." Defendant leaves out of its quotation the very next words by plaintiff's counsel: "I think that's the value, *if not more so*, for a mom." (Tr. 4/09/2010, pp. 147:23-148:3).

Counsel readdressed the issue in rebuttal:

[I]t's been suggested that the life, just because Kitty Volner was 78 years old, that her life is just not as valuable. Well, I disagree. If anything, it's more valuable. I like to think that, at least from my perspective, the golden years, as you call them, are every bit as important as all of the years in between. And this family has been denied their mother unjustly. This has been a terrible wrong and it needs to be righted. If he threw out a number in hopes that, well, maybe you'll just low ball and split the difference between the two numbers, *candidly, from my perspective, that number that I gave you was low. I would like to think you think the value of a human life, Kitty Volner in this case, has greater value than what I suggested.*

(Tr. 4/9/2010, p. 171:22-172:10). Argument about the value of the case was never limited to any fixed amount.

¶ 42 There is no support for defendant's position that the number suggested by plaintiff's counsel set a ceiling for reasonable jurors; in fact, by stating \$250,000, "if not more," counsel was suggesting a "floor." Defendant would not agree that by suggesting \$100,000 it was creating a minimum amount to be awarded. Both attorneys encouraged the jurors to think for themselves and exercise their right to determine reasonable damages, specifically advising the jurors that the appropriate amount of compensation was what they the jurors thought it should be and not what the attorneys suggested. Plaintiff's counsel: "And you have the absolute control to make that decision as to what the loss is to this family." (Tr. 4/09/2010, p. 172:11-12). And from defense counsel:

And I submit to you that if you get even to the question of damages in this case, that what Mr. MacBan has suggested to you is not the proper amount. It's for you to decide. It's not for the attorneys to decide. It's not for me to decide at all.

(Tr. 4/09/2010, p. 164:24-25). If the jury had awarded less than what either attorney suggested, the defense response would be that it is simply the jury's prerogative to award what it deems appropriate. That is precisely what happened in this case. Jurors are always reminded that what the attorneys say in closing argument is not evidence, and their findings are not limited by what the attorneys tell them.

¶ 43 Defendant labels the amount awarded as "excessive," but that is stated only by substituting defendant's argument for the jury's evaluation.

Obviously, the trial was conducted to get the jury's assessment of fault and damages, not defendant's, and the jury's award is not excessive simply because it exceeds what defendant states a proper award would be. The applicable standard is very strict. The amount of damages "is a question particularly within the province of the jury." *Frontier Motors Inc. v. Horrall*, 17 Ariz.App. 198, 200, 496 P.2d 624, 626 (App. 1972). This court will not disturb a jury's damage award unless it is "so unreasonable and outrageous as to shock the conscience of this court." *Acuna v. Kroack*, 212 Ariz. 104, ¶36, 128 P.3d 221, 231 (App. 2006). Furthermore, "A court will not intervene when there is conflicting evidence. Instead, both the trial court and the court of appeals defer to "a jury's good sense and unbiased judgment." *Ritchie v. Krasner*, 221 Ariz. 288, ¶36, 211 P.3d 1272, 1284-85 (App. 2009) (jury awarded more than the amount suggested by plaintiff's counsel). The amount of the award here is not shocking to the conscience. It is not unreasonable. It is entirely within the realm of reasonable judgment by jurors who listened to the evidence.

3. **PLAINTIFF’S COUNSEL DID NOT VIOLATE THE “GOLDEN RULE” AND DID NOT IMPROPERLY STATE PERSONAL OPINION.**

¶ 44 *Standard of review:* “The granting or denial of a new trial on the grounds of misconduct of counsel is a matter within the trial court’s discretion. A new trial on grounds of misconduct is never granted ‘as a disciplinary measure but only to prevent a miscarriage of justice....’” *Grant v. Arizona Public Service*, 133 Ariz. 434, 451, 652 P.2d 507, 524 (1982). The granting of a new trial because of misconduct by counsel in closing argument “is only sparingly granted,” *Anderson Aviation Sales Co., v. Perez*, 19 Ariz.App. 422, 429, 508 P.2d 87, 94 (App. 1973), and is reserved for “only the most serious cases to prevent a miscarriage of justice.” *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 52, 211 P.3d at 1287.

¶ 45 *Argument:* The trial court correctly denied defendant’s motion because, first, defendant did not make objections premised on the “Golden Rule” or ER 3.4(e) (personal vouching) until its motion for new trial. (R. 90). The “usual practice requires objection to be made at the time, and that the court be requested to admonish the jury to disregard the improper conduct.” *Phoenix Newspapers Inc. v. Church*, 24 Ariz.App. 287, 294, 537 P.2d 1345, 1352 (App. 1975). Furthermore,

The presumption is that an admonition to the jury by the court will remove the effect of the improper remarks. Unless, therefore, it

appears that the misconduct was of so serious a nature that no admonition or instructions by the court could undo the damage, a failure to make timely objection is a waiver of error.

Id. Waiting until a recess to move for a mistrial is not the correct procedure.

Hales, 118 Ariz. at 313, 576 P.2d at 501; *Grant*, 133 Ariz. at 453, 652 P.2d at 526; *Liberatore v. Thompson*, 157 Ariz. 612, 619, 760 P.2d 612, 619

(App.1988). This rule was well stated as follows:

A party is foreclosed from complaining on appeal of misconduct during arguments to the jury where his counsel sat silently back during the arguments, allowed the alleged improprieties to accumulate without objection, and simply made a motion for a mistrial at the conclusion of the argument.

Brokopp v. Ford Motor Co., 71 Cal.App.3d 841, 860, 139 Cal.Rptr. 888, 899 (Cal.App. 1977). In this case defendant did not even include these issues in its motion for mistrial. Defendant has waived objections, and the argument of misconduct should be summarily rejected.

A. The “Golden Rule.”

¶ 46 Furthermore, there was no misconduct; plaintiff’s counsel did not violate the Golden Rule, the purpose of which is to preclude argument that “appeals to the jurors to place themselves in the position of a litigant and to decide the case based upon what they would want under the circumstances.”

Rosen v. Knaub, 173 Ariz. 304, 309, 842 P.2d 1317, 1322 (App. 1992).

¶ 47 It was perfectly legitimate argument to ask the jurors to look at the case from the perspective of Ms. Volner’s survivors, the claimants. The jurors were charged with determining the injury to the children who lost their mother. Counsel therefore asked, “*Can you imagine going into a hotel and ending up dead? Think of that. Imagine that.*” (Tr. 4/09/2010, p. 142:11-12) (language objected to is emphasized throughout this argument). Counsel was obviously not asking the jurors to imagine that they had awakened dead in a hotel; rather, he was commenting on the bizarre, unexpected nature of the death. People do not normally die when visiting a hotel to have breakfast with friends. There was no long, slow decline where the family knew it was coming and prepared. It was, instead, a shocking and traumatic turn of events for the children.

¶ 48 Plaintiff’s counsel also stated, “I can’t repeat everything that you have heard about Kitty, but *it’s clear to me that Kitty is representative of an awful lot of moms that you can relate to.*” (p. 145:2-5). The context of this statement was plaintiff’s counsel defining a mother and establishing what it means to lose a mother: “Moms are about love. They’re about affection. They’re about companionship. They’re about care. They’re about protection. They’re about guidance. That’s what moms do. That’s why God gave us moms. There’s no substitute for a mom.” (p. 144:14-18). Counsel simply established the value of a mother like Kitty Volner. By defining everything that

is good about moms and by defining Kitty Volner as one of those moms plaintiff's counsel did not ask the jurors to place themselves in the position of the victims and to decide the case based upon what they would want under the circumstances.

¶ 49 Defendant also cites the following statement by plaintiff's counsel: *"That's a terrible loss. And to think that your mom, you see her so full of life and enjoyment, and the first thing you see when you get to the hospital..."* (p. 145:13-16). Saying "your mom" did not ask the jurors to think about their own mothers. In very formal English usage one would use the impersonal pronoun "one:" *And to think that one's mother, one sees her so full of life and enjoyment....* More common, however, in writing but especially in speaking, is to use the second person "your" and "you;" this casual form of speaking is ubiquitous, and it is clearly understood that the speaker does not literally refer to the person being addressed. Defense counsel spoke the same way: "I submit to you when you use your 3-D, your peripheral vision, your depth perception, this is a visible condition." (Tr. 4/09/2010, p. 162:13-15).

¶ 50 The context of the statement by plaintiff's counsel, which defendant again ignores, makes it clear he was not talking to the jurors in the second person:

Can you just see her [Kitty] in just the month before she died, she's in Albuquerque. The description that Paul gave where

she's like the Story Teller, that she's sitting down and she's inviting them all in. And all the kids are kind of scattering around her, trying to get as close as they can just to be next to her. To feel the warmth, the guidance, the love, the affection. All things that come from a mom. And then to have it all snuffed out. Snuffed out. *That's a terrible loss. And to think that your mom, you see her so full of life and enjoyment, and the first thing you see when you get to the hospital—you haven't seen these photographs yet, you need to take a look at them.* You saw the reaction on Paul's [surviving son] face."

(p. 145:13-18). Plaintiffs counsel was describing the Volner family and what it was like for the children to experience their mother's love and see her full of life and then to suddenly see her gravely injured in the hospital. Counsel was not asking the jurors to imagine themselves and their mothers, something that defendant can imply only by completely ignoring the context and thereby misleading the reader.

¶ 51 Defendant objects to additional language, repeated here in some context:

That's what they were having to deal with there. And then to have her go from talking to you, to slipping into a coma. And then having to get her through surgery. And then watch little by little her ability to communicate, squeeze of a hand, the response of a touch, to be lost. And then to finally have the physician come in and say there's no chance for recovery here. *Your option can be to remove life support. Can you imagine how horrible that decision had to be?* No child should have to make a decision to pull life support from their mother. No one. That's not natural. That defies nature to have to make that decision from a traumatic event like this. It shouldn't happen. *And then to finally make that decision, that agonizing decision, and give the go-ahead, and then sit around and watch, just watch the monitors, and watch mom,*

until everything all of a sudden goes flat-line. Heart rate stops. Blood pressure stops. Pulse stops. That's horrible. And it shouldn't, it shouldn't have happened.

(Tr. 4/09/2010, p. 146:2-20). Again, the context clearly shows that plaintiff's counsel was simply reminding the jurors what Kitty Volner's surviving children had gone through while they watched their mother decline and pass on. This argument does not fall under the Golden Rule.

¶ 52 It is not possible to create a trial that is emotionally sterile, and it is perfectly legitimate to ask the jurors to understand the emotional injury suffered by the plaintiff; the damages instruction clearly makes that part of the jury's consideration. Furthermore, the rule goes both ways, and the defense should not ask the jurors to step into the shoes of the defendant. In this case, however, defense counsel argued—

And I asked people, if you have people come into your own homes, you expect them to make use of their sight and intelligence to know where they are and to avoid obstacles. Otherwise, somebody could trip over your coffee table. You're liable. Trip over a waste paper can, you're liable.

(Tr. 4/09/2010, pp. 158:21-159:1). Although defense counsel set up this argument as something about which he had asked witnesses, perhaps the true intent was to prompt the jurors to imagine that a guest in their homes had been injured and was suing them. If it was not intentional, it demonstrates how difficult it is for counsel to talk about the case in terms that the jury can

understand without saying something that might prompt the jurors to personalize the issues in some way.

¶ 53 “The mere mention of putting themselves in defendant's place does not constitute reversible error, without a studied purpose to prejudice the jury.” *Brummitt v. Chaney*, 18 Mich.App. 59, 170 N.W.2d 481, 485 (1969), *cited by Beaumaster v. Crandall*, 576 P.2d 988, 995 (Alaska 1978). The statements of plaintiff's counsel, analyzed above in the context of counsel's argument, certainly do not reflect a studied purpose to prejudice the jury. All of the statements were made in the course of explaining to the jury what the surviving children experienced.

¶ 54 Even if “one” assumes that arguments by plaintiff's counsel did invite the jurors to place themselves in the shoes of defendant's tort victims, where the argument “was not sufficient to have caused the jury to return a verdict which was the result of passion and prejudice,” the court “will not interfere.” *Taylor v. DiRico*, 124 Ariz. 513, 518, 606 P.2d 3, 8 (Ariz.1980). In this case, the comments by plaintiff's counsel that defendant has cited could not have caused the jurors to imagine themselves as victims any more than the testimony that they heard regarding the loss. The court should not interfere with the verdict.

B. Vouching by Counsel.

¶ 55 As defendant notes, ER 3.4(e) prohibits a lawyer, while in trial, from stating a personal opinion regarding—

- The justness of a cause,
- The credibility of a witness, or
- The culpability of a civil litigant.

Defendant argues that plaintiff’s counsel stated personal opinion in violation of this rule. Again, because defendant failed to object during trial this argument should be summarily rejected. Defendant states, “Waiver does not apply when it appears ‘that the improper conduct of counsel actually influenced the verdict.’” *Quoting Ritchie v. Krasner*, 221 Ariz. 288, ¶51, 211 P.3d 1287.² But defendant leaves out the next line of the quotation, which is, “The trial judge is in the best position to determine this....” *Id.*

¶ 56 Regardless, the specific allegations of misconduct would not support an order for new trial. Defendant first quotes the emphasized portion of the following argument:

[I]t’s one thing to take the railing out, which is clearly a visual cue, but when you also, after taking that visual cue out, you put in a

² As defendant notes, *Ritchie v. Krasner*, quotes *Anderson Aviation Sales Co., Inc. v. Perez*, 19 Ariz.App. at 429, 508 P.2d at 94. *Anderson* does not actually say anything about waiver not applying—only that “the trial judge is in the best position to determine [whether improper conduct actually influenced the verdict] and his decision will not be overturned unless there is an abuse of discretion.” *Id.* In *Anderson* it was the trial judge who interrupted closing argument; he then cautioned the jury and then denied a request for mistrial. *Id.*

flooring surface that camouflages those stairs, you give a double whammie, and *that makes immanent [sic] sense to me why these folks were going off like dominoes once both of those things occurred. As long as you had the stairway railing up, I don't think it made any difference what the carpeting looked like* because you can't miss something that's this wide and it's two-by-sixes running down the full middle of the stairway, *but when you throw in some carpeting that camouflages what you're looking at, that is a death trap. It's a hidden danger.*

(p. 140:1-13). Regarding this argument, defendant merely states that “counsel directly commented on the evidence.” (¶43). What the rule cited by defendant prohibits is offering personal opinion regarding the justness of a cause, and defendant makes no attempt to explain how this argument might violate ER 3.4(e). The fact that plaintiff’s counsel commented from his own point of view on this issue was insignificant, as he was merely parroting the testimony of expert witness Frank Mascia. (Tr. 4/07/2010, pp. 36:23-37:6).

¶ 57 Also, the comment was similar to one offered by defense counsel, who offered his own opinion regarding the credibility of witnesses:

If it were flat like these people tried to say to you that we thought it was, it would have to continue out here. ...How anyone could reasonably say to you that we thought that it was flat out there *is beyond me. It's just beyond me.*

(Tr. 4/09/2010, p. 162:24-25). Defense counsel also stated, “There isn’t any reasonable way, *I don't think*, that you could say that Ms. Volner didn’t have some fault for her own.” (p. 162:24-25). This is clearly a statement of opinion regarding the justness of a cause and the culpability of defendant. Neither side

objected to such comments, choosing instead to simply live with whatever the jury would make of them, if anything. The fact that very experienced defense counsel did not object during the argument and did not include it as a basis for his motion for mistrial is an indication that the argument was not objectionable. (Tr. 4/09/2010, p. 148).

¶ 58 Defendant next complains that plaintiff's counsel "told the jury exactly what he thought the case was worth." (¶43). Not only did defendant fail to object at trial, but defendant did not even raise this objection in its motion for new trial. (R. 90). The trial court never had an opportunity to address this allegation. Obviously, the trial court could not have erred in declining to order a new trial based on an argument that was never presented to that court.

¶ 59 Importantly, "[r]eversal will be required only when it appears probable that the misconduct 'actually influenced the verdict.'" *Leavy v. Parsell*, 188 Ariz. 69, 72, 932 P.2d 1340, 1343 (1997) (citation omitted). Defendant's very argument, however, establishes that the comment by plaintiff's counsel did not improperly influence the jury. Defendant alleges that plaintiff's counsel personally vouched for awards of \$250,000 per person; however, the jury rejected that suggestion and awarded more. The

fact is that the jury awarded what it thought was appropriate and not what either attorney suggested.

¶ 60 Defendant inserts four more citations to arguments by plaintiff's counsel and states that counsel "inject[ed] his personal opinion regarding these matters. (Opening Brief, ¶¶43-44). These comments are not examples of personally vouching for disputed issues:

- *I was touched by Paul's letter to his mother,*
- *I personally believe moms have unbelievable value,*
- *I disagree that her life (at age 78) is not as valuable,*
- *I personally think that our greatest responsibility is to our children.*

These are simple observations with which no one could really take issue.

Counsel was not telling the jury how he personally thought the jury should resolve disputed issues in the case.

¶ 61 Citing *Leavy v. Parsell*, 188 Ariz. at 72, 932 P.2d at 1343, defendant states that "any doubts" about the prejudicial effects of misconduct "must be resolved in favor of the parties aggrieved." (¶35). What the Arizona Supreme Court actually said was, "Because this is a factual determination, no presumption of prejudice or lack of prejudice should be applied. If the misconduct is serious, however, the judge should resolve any doubt in favor of the party aggrieved." 188 Ariz. at 72, 932 P.2d at 1343. The trial judge made

that factual determination in this case based on his first-hand observation of the trial and concluded that it had been conducted without prejudice. “Because the trial court is present and able to assess the prejudicial effect of arguments firsthand, its discretion in granting or denying a motion for new trial is quite broad.” *Rosen, supra*, 173 Ariz. at 309, 842 P.2d at 1322, vacated on other grounds by 175 Ariz. 329, 857 P.2d 381 (1993).

¶ 62 In *Leavey* the court stated that the first step in the analysis is the nature of the conduct and in that case found egregious conduct:

Counsel deliberately and knowingly did what the judge expressly ordered him not to do. This was not a case of a lawyer getting carried away and injecting improper issues or comments in final argument. Such misconduct occurs, improper though it may be.

188 Ariz. at 72, 932 P.2d at 1343. The court added that “one of the improper remarks was directly relevant to the issue of witness credibility, the essential issue in this case of diametrically conflicting stories.” *Id.* The court noted that the evidence was “quite evenly divided between the parties and that the “deliberate and knowing acts of misconduct...may very well have produced the very result sought.” 188 Ariz. at 72-73, 932 P.2d at 1343-44.

¶ 63 In this case the record shows that even if plaintiff’s counsel crossed the line at any point it was not deliberate or contrary to orders arising out of motions in *limine*. It was not different from the way defense counsel argued the case. Furthermore, this was not a close case of evenly divided

evidence where the jury was asked to choose between “diametrically conflicting stories.” *Id.* Quite to the contrary, both experts to testify agreed that defendant had illegally removed an important safety device—the center handrail. The jury reached the only reasonable conclusion, which was that defendant maintained a dangerous condition that caused the death of Kitty Volner. Furthermore, the jury found that Kitty shared fault, so it was clearly not a case where the jury got swept away in a tide of passion or prejudice. This case does not meet the *Leavy* factors. 188 Ariz. at 73, 932 P.2d at 1344.

4. DEFENDANT’S POSITION REGARDING AN ASSERTED ABSENCE OF PRIOR FALLS DID NOT MEET ESTABLISHED FOUNDATIONAL REQUIREMENTS.

¶ 64 In its statement of Issues Presented for Review (Opening Brief, p. 14, no. 3), defendant asks, “Did the trial court abuse its discretion in preventing defense counsel from arguing that the absence of falls prior to Ms. Volner’s showed the stairway was not unreasonably dangerous?” The heading of defendant’s argument, however, suggests there was error by the trial court “in precluding evidence” (p. 26), and defendant cites for the applicable standard of review the rules pertaining to the admission or rejection of evidence. (¶45). The argument then segues into a discussion about whether defendant should have been precluded from making a closing argument about the absence of prior falls. (¶ 49). In fact, defendant fails to cite any proposed evidence that the court excluded.

¶ 65 Defendant fails to cite any standard of review applicable to an assertion that the court improperly prohibited argument to the jury about a lack of prior falls. Defendant cites no authority that would support a position that the trial court impermissibly limited defendant’s argument. Plaintiff cannot address an implied argument and will only discuss what defendant briefed, which is the assertion that the evidence met the requirements of *Jones v. Pak-Mor Manufacturing Co.*, 145 Ariz. 121, 123, 700 P.2d 819, 821 (1985). The

evidence did not meet that standard; defendant completely failed to satisfy requirements for a defense based on a lack of prior falls.

¶ 66 Beginning as early as 1936, the general rule in Arizona was that the court will not allow a defendant to present evidence of the absence of prior accidents in an attempt to prove a product or condition was safe. *Id.*, 145 Ariz. at 123, 700 P.2d at 821, citing *Fox Tucson Theaters Corp. v. Lindsay*, 47 Ariz. 388, 56 P.2d 183 (1936). In the *Pak-Mor* case, however, the court determined that pursuant to Rule 403 the court may, in only specific, limited circumstances, admit some evidence of an absence of accidents. The court cautioned as follows at the outset of its analysis:

Nevertheless, experience teaches us that the problems of prejudice, inability of the opposing party to meet the evidence, and the danger of misleading the jury are substantial. We are aware, also, that defendant's "lack of notice" of injury does not establish the fact that no injuries had occurred, and that a "long history of good fortune" may not preclude the conclusion that the product was defective and unreasonably dangerous.

145 Ariz. at 126, 700 P.2d at 824. The key to admissibility is "the proponent of the evidence must establish that if there had been prior accidents, the witness probably would have known about them." 145 Ariz. at 127, 700 P.2d at 825.

For example—

The defendant may have established a department or division to check on the safety of its products and may have a system for ascertaining whether accidents have occurred from the use of its products. The defendant or its insurers may have made a survey

of its customers and the users of its product to determine whether particular uses of the product have produced particular types of injuries. Information may have been compiled by and obtained from governmental agencies such as the Consumer Product Safety Commission.... Defendant may have established a system with its insurers, distributors, or retailers whereby retail customers are encouraged to report accidents, accidents are investigated, and data is compiled.

Id. Each of the examples cited by the court involved some type of affirmative action to seek out information above and beyond what is fortuitously reported to the defendant by third parties.

¶ 67 The court also defined the evidence that should not be admitted:

Thus, if the import of the evidence is no more than testimony that no lawsuits have been filed, no claims have been made, or “we have never heard of any accidents,” the trial judge generally should refuse the offered evidence since it has very little probative value and carries much danger of prejudice.

Id. Defendant did not even offer that much evidence. Defendant now cites the testimony of its Executive Housekeeper, Linda Applegate (¶48), the employee who was near the stairs when Kitty Volner fell. Defense counsel asked Ms. Applegate about what she saw and also asked her how many guests the hotel had per month in the year 2007. (Tr. 4/09/2010, p. 63:21-64:9). Defense counsel never asked Ms. Applegate, however, about an absence of accidents. Larry Cesare, the hotel owner who was responsible for removal of the center handrail, was present for the trial but did not testify. (Tr. 4/06/2010, p. 12:6-9;

4/09/2010, pp. 39:10-13, 84:10-12). Defendant presented no evidence at all of an absence of accidents.

¶ 68 Defendant tries to put the burden of proof on plaintiff by arguing, “Yet none of Plaintiff’s witnesses testified to accidents occurring before Ms. Volner’s.” (Opening Brief, ¶48). First, it was not plaintiff’s burden to prove that accidents occurred before Kitty fell; rather, it was defendant’s burden to try and prove it probably would have known about prior accidents from an effective system for identifying accidents that revealed none. Second, the assertion is clearly not true; both Robert Casalengo and John Hubbard testified there were prior accidents. There was no evidence from which defense counsel could reasonably argue that there was an absence of accidents. Defendant did not have the evidence to offer regarding an absence of accidents and was hoping to slip in a surprise jury argument based on Applegate’s testimony about the number of guests at the hotel.

¶ 69 Defendant tries to write off the testimony of Mr. Hubbard by saying that he only testified about his own awareness and not what was reported to upper management. (Opening Brief, p. 27, n. 15). But the issue under *Jones v. Pak-Mor* is not notice; rather, the issue is “whether a particular danger was unreasonable,” and the “[s]afety history, including the presence or absence of prior accidents...is evidence which may make [a finding of danger] ‘more

probable or less probable.’” 145 Ariz. at 125, 700 P.2d at 823. Plaintiff was talking about other accidents in order to prove that the stairs were dangerous, and defendant wanted to falsely argue an absence of accidents to support its position that the stairs were not dangerous. This was separate from the issue of notice, so what mattered was that the prior accidents had occurred and not whether Mr. Hubbard reported them to anyone else.³

¶ 70 One of the reasons why defendant failed to have a single witness testify that there was a lack of prior accidents was that defendant did not have evidence of a system that would have identified accidents. Although defendant has an “Incident Report” form that is filled out in the event of a reported injury, defendant offered no evidence from which it could be reasonably inferred that defendant *probably* would have known about accidents and near-accidents.

There was no system in place to discover accidents. There was no evidence, for example, of an employee whose job it was to monitor the property for incidents involving guests, no evidence of a security video system in place to monitor the property and look for incidents involving guests, no evidence of signs on the property advising guests to report incidents or how to report them, and no evidence that defendant conducted surveys to solicit injury information from guests. There was no evidence of a system that had discovered incidents not

³ Mr. Hubbard was one of the managers, handling technical issues of the hotel, *e.g.*, computers. (Tr. 4/07/2010, p. 70:8-12).

witnessed first hand by an employee or immediately reported by an injured guest. The Bizzaks established that defendant did not discover near accidents. (Ex. 28, 29). Mr. McGee established that no one noticed his wife's wheelchair tumbling down the stairs and that it took two trips to the front desk to stir any interest in their accident. (Ex. 32, pp. 16:16-19:3).

¶ 71 Ms. Applegate, the only hotel employee defendant called to testify, stated that if a hotel guest fell on the premises an incident report would be written only if an employee witnessed the fall or the guest happened to make a report to the front desk. (Tr. 4/09/2010, pp. 81:15-82:1) The "system" was purely passive.

¶ 72 Defendant failed to show that it took any affirmative action to discover incidents involving guests and was unable to show that had there been prior accidents it *probably* would have known about them. In fact, due to the nature of defendant's business operation and this lawsuit it would be extremely unusual if it had been able to lay such a foundation. Although *Pak-Mor* was a product liability case, the court stated, "This problem, however, is not peculiar to safety-history evidence in product liability cases" but is "a variant of the 'negative evidence' problem." 145 Ariz. at 126, 700 P.2d at 824. The court then discussed this evidentiary issue in the context of a premises liability case:

We are cognizant, also, that in the ordinary case (*see Fox Tucson Theaters Corp. v. Lindsay, supra*) involving the design or

construction of buildings or intersections, the evidentiary predicate which we have described will militate strongly against admission of the evidence. Where, for instance, plaintiff alleges that premises were negligently designed or maintained, the mere fact that no prior accidents have been reported is incomplete. It does not tell us how many near-accidents, nor how many fortuitous escapes from injury, may have occurred, and it leaves the opponent of the evidence no method to ascertain and identify those who may have passed by the area, under what conditions, and with what risks or experience. In such a case, the scales tip strongly in favor of rejection of the evidence.

145 Ariz. 128, 700 P.2d 826. Defendant's position did not satisfy the *Pak-Mor* requirements. There was no evidence from which defendant could reasonably argue that an absence of accidents demonstrated the property was safe.

5. THE TRIAL COURT CORRECTLY ADMITTED PHOTOS OF DECEDENT IN THE HOSPITAL.

¶ 73 *Standard of Review:* A trial court’s determination under Rule 403 is reviewed for abuse of discretion in admitting or denying evidence. *Rhue v. Dawson*, 173 Ariz. 220, 226, 841 P.2d 215, 221 (App. 1992).

¶ 74 *Argument:* The claimants here were all wrongful death statutory survivors who were entitled to recover for their “anguish, sorrow, mental suffering, pain, and shock...not just for the fact of the decedent’s death, but also for the manner in which the decedent dies to the extent the manner of death makes the experience more difficult for the survivor.” *Girouard v. Skyline Steel, Inc.*, 215 Ariz. 126, ¶¶13, 16, 158 P.3d 255, 259 (App. 2007). The court in *Girouard* further defined the rule as follows:

Thus, insofar as the manner of a decedent’s death may have added to a wrongful death plaintiff’s anguish resulting from the death, as opposed to anguish caused by knowledge of premortem pain suffered by the decedent, it is highly relevant to the plaintiff’s claim for damages.

215 Ariz. 126, ¶ 17, 158 P.3d at 259. The manner in which a death may have added to the anguish of the survivors “is highly relevant.” The photos at issue explained the manner of death and the anguish of the survivors.

¶ 75 Defendant’s argument is confusing. Defendant describes the photographs as “horrific” (¶51) and “gruesome” (¶52), quotes from plaintiff’s counsel’s description of the photos, and gives the court a photo of a gruesome

movie character (that was never admitted into evidence); however, defendant does not argue that the photographic demonstration of Kitty Volner's surgical wounds incited the passions of the jury. In fact, in the trial court defendant never argued that it would suffer prejudice because of the "gruesome" nature of the photographs. Defendant only argued what it appears to argue here, which is that the photographs would cause the jury to make an award "for the pain and suffering of the person who has been injured." (Tr. 4/06/2010, pp. 4:21-5:11; 4/08/2010, pp. 8:13-9:7; 4/09/2010, p. 5:21-24). So, even though defendant referred to "prejudice" when arguing to the trial court and continues to call it "prejudice" here (§51) and to argue there was a "prejudicial effect" (§53), what defendant is really arguing is "confusion of the issues," a different Rule 403 consideration.

¶ 76 The appellate issue is whether the trial court correctly determined that the probative value of the photos outweighed any danger of confusion of the issues.

¶ 77 The decedent Kitty Volner had four adult children who gathered around her after the accident and then, during the next six days, suffered through the very difficult experience of witnessing her deterioration. They visited her and saw that she became unable to communicate with them. She was taken away for surgery but continued to worsen. The injury and then

especially the surgery completely changed her appearance and added to the trauma the children were experiencing. Eventually, they were told there would be no positive outcome and that it was recommended life support be removed. They made that painful decision and experienced their mother's death. Evidence of this process, including the change that they saw in their mother's appearance was "highly relevant" to the survivors' claim for damages as this evidence helped the jury understand the anguish that they experienced. The probative value of the photographs was high.

¶ 78 On the other side of the scale there was no danger of confusion of the issues. As the trial judge noted, defendant conceded that the survivors were free to testify about their mother's appearance. (Tr. 4/06/2010, pp. 4:24-5:1, 5:20-21). Kitty's appearance was going to be part of the trial, anyway, by defendant's agreement, so there was no risk at all that the additional step of admitting the photographs would create confusion about the issues.

¶ 79 Furthermore, Kitty Volner's medical records and bills were not admitted in evidence.⁴ Neither was there any testimony about her experiencing pain and suffering. There was nothing about the presentation of evidence to suggest that the jury was to award damages for the suffering that Kitty

⁴ Defense counsel talked about the medical records as though they were in evidence and improperly argued to the jury in closing that the records proved the fault of Kitty Volner (Tr. 4/09/2010, pp. 154:4-155:1); however, the records were never admitted. (See R. 71).

experienced. Plaintiff's counsel never even argued that Kitty had suffered or that compensation was to be paid for her suffering; to the contrary, he specifically argued that pursuant to the court's legal instructions "the four surviving children were to be compensated for their "loss of love, affection, companionship, care, protection, and guidance since the death and in the future." (Tr. 4/09/2010, p. 143:2-18). They were to be compensated for their "pain, grief, sorrow, anguish, stress, shock, and mental suffering already experienced and reasonably probable to be experienced in the future." (p. 146:21-24). This language tracked verbatim the court's accurate damages instruction. (R. 68, p. 12).

¶ 80 There was no suggestion that the survivor's were responsible for Kitty's medical bills, which were not admitted or even offered. The entire focus of the damages argument by plaintiff's counsel was the anguish of the survivors who, before the fall down the stairs at defendant's hotel were enjoying their mother's companionship and affection and then were suddenly in the hospital witnessing her death. (p. 145:13-146:20). Counsel's final argument to the jury was "that this family has been denied their mother unjustly," and he asked the jury to "decide what the loss is *to this family*." (p. 172:3, 11-12).

¶ 81 There is no basis in the record to support defendant’s assertion that “[t]he photographs invited the jury to award damages for the decedent’s pain and suffering.” Nothing about the evidence, the argument of counsel, or the instructions by the court suggested to the jury that it make such an award. The presumption is that the jurors follow the instructions given to the best of their ability. *Mitchell v. Emblade*, 80 Ariz. 308, 404-05, 298 P.2d 1034, 1038 (1956). Defendant agreed that the fact Kitty Volner was injured and her appearance was disturbing was admissible. Defense counsel was free to quote the court’s instructions as well as the arguments of plaintiff’s counsel if he thought it was necessary to clarify the nature of the loss at issue.

¶ 82 The extremely low risk, if any, that the photographs would create confusion certainly did not “substantially” outweigh their highly relevant nature and strong probative value. Rule 403. The court did not err by admitting the photographs.

6. **THE TRIAL COURT PROPERLY REJECTED JURY INSTRUCTIONS THAT DEFENDANT REQUESTED.**

¶ 83 *Standard of Review:*

Jury instructions are considered in their entirety on appellate review. In determining whether the instructions given were correct, the test is “whether, upon the whole charge, the jury will gather the proper rules to be applied in arriving at a correct decision.” ...It is not error for the court to refuse to give a requested instruction that is adequately covered by the instructions that are given.

Timmons v. City of Tucson, 171 Ariz. 350, 355, 830 P.2d 871, 876 (App. 1991) (citations omitted). A “trial court has substantial discretion in determining how to instruct the jury.” *Smyser v. City of Peoria*, 215 Ariz. 428, ¶33, 160 P.3d 1186, 1197 (App.2007). A reviewing court will not overturn a verdict “unless there is substantial doubt as to whether the jury was properly guided in its decision.” *Dawson v. Withycombe*, 216 Ariz. 84, ¶63, 163 P.3d 1034, 1035 (App.2007).

¶ 84 *Argument:* Citing *Golonka v. GMC*, 204 Ariz. 575, 593, 65 P.3d 956, 974 (App. 2003), defendant argues a trial court is required to instruct the jury on all legal theories supported by the evidence. (¶54). The trial court did exactly that in this case. Defendant contended that Kitty Volner was at fault, and the trial court instructed the jury, “Defendant claims that decedent Kitty Volner was at fault.” (R. 68, p. 7). The court then defined fault and negligence, told the jury that defendant bore the burden of proof on this defense, told the

jury to consider the defense if it found defendant at fault, and explained how to manage relative percentages of fault on the verdict form. (R. 68, pp.7-11). (See also Tr. 4/09/2010, pp. 175:16-177:4). Nothing more was required, and the court did not err in refusing to put its stamp of approval on defendant's specific theories about why Kitty was at fault.

A. The court did not err in refusing defendant's requested instruction regarding pain and suffering of decedent Kitty Volner.

¶ 85 Waiting until the last day of trial, after the other instructions had been “settled,” defense counsel suddenly asked the court to add an instruction based on language from A.R.S. § 14-3110: “Upon the death of the person injured, damages for the pain and suffering of the person injured shall not be allowed.” (Tr. 4/09/2010, p. 113:11). This provision is not part of the wrongful death act under which this lawsuit was brought; rather, it falls under the general provisions for probate administration.

¶ 86 Defendant argues that the instruction was necessary to “drive home” its concern about the damages award. (¶55). But driving home one party's unsubstantiated worry is not the standard for instructing the jury. “Once the court has defined the legal principles in understandable language, it becomes the obligation of counsel to explain the applicability of the legal principles to the facts in evidence. The court is not required to instruct on every suggested refinement.” *Hales v. Pittman*, 118 Ariz. 305, 310, 576 P.2d 493,

498 (1978), *citing Porterie v. Peters*, 111 Ariz. 452, 458, 532 P.2d 514, 520 (1975) (“Instructions are not given to aid one side or the other in jury argument”). Defense counsel was free to quote the court’s instructions as well as the arguments of plaintiff’s counsel if he thought it was necessary to clarify that the jury was not to make an award for Kitty Volner’s pain and suffering.

¶ 87 There was no error in refusing defendant’s last-minute request for a special damages instruction. The topic was adequately covered by other instructions and addressed a concern that was unsubstantiated, particularly in light of the fact that there was no evidence offered, and no argument asserted, in support of an award for Kitty’s pain and suffering.

B. The court did not err in refusing to give an instruction discussing liability for an open and obvious condition.

¶ 88 Defendant filed proposed jury instructions. (R. 59). Neither the instructions nor the pages were numbered, which makes it difficult to refer to them, but as defense counsel explained to the trial judge, “they [were] offered as alternatives to each other sort of.” (Tr. 4/09/2010, p. 118:14-15). Three of these instructions referred in some way to the idea that a defendant is not liable for injury caused by a condition that is open and obvious. When instructions were being settled, and it was time for counsel to make a record of any disagreement with the judge’s decisions, defense counsel failed to identify a particular instruction to be given, again referred to them as alternative

instructions, and failed to give the court a legal reason why any of the three instructions should have been given. (p. 118:12-24).

¶ 89 The Civil Jury Instructions Committee of the State Bar of Arizona does not recommend giving an instruction on “open and obvious,” reasoning that it is adequately covered by RAJI (CIVIL) 4th Fault Instructions and Premises Liability 1. (See comments to Premises Liability 1). The trial judge in this case did give the Premises Liability 1 instruction, (R. 68, p. 4), which specifically told the jury that defendant had an obligation only with respect to “an unreasonably dangerous condition.” The court also instructed the jury that Kitty Volner was at fault if she “failed to use reasonable care.” (R. 68, p. 7). The trial judge correctly reasoned that these instructions adequately covered legal concepts that would allow counsel to make appropriate arguments to the jury. (Tr. 4/09/2010, pp. 117:4-10; 118:4-11; 118:25-119:7). Defense counsel then addressed the jury and argued that Kitty Volner was at fault because the stairs were an open and obvious condition. (p. 156:6-19; 157:11-20). The result was a verdict that apportioned twenty percent fault to Ms. Volner, so it was not at all necessary to give a specific instruction commenting on the open and obvious concept advanced by the defense.

¶ 90 Significantly, the Committee has provided a recommended instruction to be used where “some courts may find it appropriate in some cases

to give an instruction on ‘open and obvious.’” (Comments to Premises Liability 1). Defendant did not offer that instruction but instead delivered three alternatives without ever picking one and asking the court to give it. Defendant failed to articulate a clear, specific request, failed to offer legal reasons for giving any of the alternative requests, and failed to request an instruction that added anything that was necessary either for the judge to correctly educate the jury or for defendant to fully and successfully argue its specific theories. Defendant should not be heard now to complain that the jury was inadequately instructed.

C. The court did not err in refusing an instruction discussing the decedent’s use of sight and intelligence.

¶ 91 One of defendant’s theories was that Kitty Volner was herself at fault. Pursuant to defendant’s request the court instructed the jury that if it determined defendant was negligent it “should then consider defendant’s claim that decedent, Kitty Volner, was at fault.” (R. 68, p. 10). The court defined “negligence” as “the failure to act as a reasonably careful person would act under the circumstances.” (p. 7). This adequately informed the jury of the standard to apply to the defense and gave defendant all the opportunity required to make an argument regarding Kitty Volner’s fault.

¶ 92 Citing *Vegodsky v. City of Tucson*, 1 Ariz.App. 102, 399 P.2d 723

(App. 1965) (pedestrian alleged negligent maintenance of city streets),

defendant asked the court to give an additional instruction:

The duty to exercise ordinary care to avoid injury includes the duty to exercise ordinary care to observe and appreciate danger or threatened danger. A person is required to make reasonable use of his faculties of sight and intelligence to discovery [sic] danger and conditions of danger to which he is or might have become exposed. If you find the *plaintiff* failed to exercise that degree of care, then you should find that the *plaintiff* was guilty of *contributory negligence*. [emphasis added] (R.59).

The request was properly refused. First, the language that defendant offered simply did not fit the facts of the case. This is not a first-party tort action where contributory negligence is a defense; instead, this is a wrongful death action brought on behalf of statutory survivors. The plaintiff, Catherine Kerege, did not bring this action for her own fall; she was not required to exercise any degree of care and could not possibly be “guilty of contributory negligence.” As written the requested instruction was nonsensical, and it was not the court’s obligation to rewrite the instruction for defendant to make it fit the case.

¶ 93 Second, the concept was adequately and accurately covered by the court’s other instructions, which advised the jury that it could find Decedent Kitty Volner at fault if it determined that her failure to use reasonable care caused the injury. The jury made precisely that finding, so we know that “upon the whole charge” the jury instructions were adequate for defendant.

¶ 94 Defendant’s request was similar to the one made in *Porterie v. Peters, supra*, a motor vehicle collision case where the plaintiff wanted the court to instruct the jury that—

General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it. When there is evidence to the effect that one did look, but did not see that which was in plain sight, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive.

111 Ariz. 452, 457-58, 532 P.2d 514, 519-20. The trial court refused to give the instruction, and the court of appeals agreed: “The requested instruction, even if supported by the evidence, is that type of instruction which should not be given. Matters of so-called common experience are more appropriately jury argument—not jury instructions.” *Id.* Defendant in this case was requesting an instruction that addressed a matter of common experience—looking at one’s surrounding environment—that was appropriate for argument, which counsel did in fact make (Tr. 4/09/2010, p. 153:18-154:3; 158:12-25), but not for jury instruction. The trial court is not required to spin every argument asserted by a party into an instruction to be read by the court.

7. **THERE WAS NO ACCUMULATION OF ERRORS, AND DEFEDANT RECEIVED A FAIR TRIAL.**

¶ 95 The jury was correctly instructed on all applicable rules of law and properly exercised its discretion to admit both evidence of subsequent accidents and the injury photographs depicting what the children experienced during their mother's death. It was proper to preclude argument based on an asserted absence of accidents, as that was not supported by the evidence. Plaintiff's counsel acted well within the rules by suggesting that the jury's finding of liability would advise the defendant it did have a dangerous condition. Counsel did not violate rules applicable to closing argument and did not prejudice the jury. There was no mistake by the trial judge that interacted with conduct of plaintiff's counsel to deprive defendant of a fair trial.

CONCLUSION

¶ 96 Plaintiff respectfully urges the court to affirm the judgment.

Dated this 11th day of April 2011

MacBan Law Offices

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that this Answering Brief uses proportionately spaced type of 14 points, is double-spaced using a roman font, does not average more than 280 words per page, and contains 13,354 words as computed by Microsoft Word, the processing system used to prepare the brief.

Dated this 11th day of April, 2011

MacBan Law Offices

/s/ David F. Toone

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the Appellee's Answering Brief
on this 11th day of April, 2011:

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