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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXA ESTRELLA RAPOSO, individually and as Parents/Next Friends of A.E.N.T., a minor child; ZACHARY THORNTON, individually and as Parents/Next Friends of A.E.N.T., a minor child,

Plaintiffs - Appellees,

v.

UNITED STATES OF AMERICA,

Defendant - Appellant.

No. 25-4752

D.C. No. 3:23-cv-00157-MJP

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted August 12, 2026
Anchorage, Alaska

Before: CALLAHAN, BEA, and BUMATAY, Circuit Judges.

Plaintiffs, two parents proceeding individually and on behalf of their young daughter ("A.E.N.T."), sued the United States (the "Government") for medical

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

malpractice under the Federal Tort Claims Act (FTCA), alleging that various doctors and nurses negligently and recklessly treated the mother during childbirth and thereby caused a permanent injury to A.E.N.T.'s right arm. A.E.N.T. was born in a military hospital in Fairbanks, Alaska. While A.E.N.T. was being delivered, her right shoulder became impacted on her mother's pubic bone, a phenomenon known as "shoulder dystocia" that occurs in one to three percent of deliveries. The doctor who was delivering A.E.N.T. ("Dr. Penberthy") applied excessive lateral traction to A.E.N.T.'s head in an attempt to dislodge her shoulder. In so doing, the doctor damaged A.E.N.T.'s brachial plexus (a cluster of nerves in her upper spine). As a result, A.E.N.T.'s ability to use her right arm is permanently and seriously impaired. After a five-day bench trial, the district court found in favor of Plaintiffs as to both negligence and recklessness and awarded them over $6 million in compensatory damages, of which $5 million was for noneconomic harms.

The Government appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291. For the reasons explained below, we affirm in part, vacate in part, and remand.

1. We affirm the district court's finding that Dr. Penberthy's conduct amounted to recklessness, not mere negligence.

The Government contends that the district court applied the incorrect legal standard for recklessness and requests vacatur and remand. This argument has no merit. In its Findings of Fact and Conclusions of Law, the district court recited verbatim the applicable legal standard for recklessness, which in Alaska is the standard set out in the Restatement (Second) of Torts § 500. *See Hayes v. Xerox Corp.*, 718 P.2d 929, 935 (Alaska 1986). The district court found, quoting the Restatement, that "Dr. Penberthy knew or had reason to know that the use of excessive lateral traction would create an unreasonable risk of physical harm to A.E.N.T." *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965) ("The actor's conduct is in reckless disregard of the safety of another if," *inter alia*, "his conduct creates an unreasonable risk of physical harm to another"). Therefore, the district court applied the correct legal standard and based its finding of recklessness on that legal standard.

The Government might be understood as challenging the district court's factual finding of recklessness, which we review for clear error. But the district court's conclusion was not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Doe v. Snyder*, 28 F.4th 103, 106 (9th Cir. 2022) (citation omitted). Sufficient evidence established that Dr. Penberthy "kn[ew] or ha[d] reason to known" that the "act" of applying excessive lateral force to a child would "create[] an unreasonable risk of physical harm" to that child. RESTATEMENT (SECOND) OF TORTS § 500 (1965). As one of Plaintiffs' experts explained, it was well known that one should not apply excessive lateral traction because of the risk of brachial plexus injury. Further, credible evidence established that Dr. Penberthy had applied 40 pounds of lateral traction to A.E.N.T.'s head, even though the standard of care is to apply no more than five pounds of lateral force. Finally, because the shoulder dystocia lasted only 42 seconds, there was no reasonable basis for concluding that Dr. Penberthy's methods were necessary to prevent death or serious injury.

2. We vacate the district court's awards of $4 million in noneconomic damages to A.E.N.T. and $1 million in noneconomic damages to A.E.N.T.'s parents and remand with instructions that the district court reconsider the noneconomic-damages awards in a manner consistent with this memorandum disposition.

In FTCA cases, damage awards are reviewed under the applicable state's law. *Trevino v. United States*, 804 F.2d 1512, 1515 (9th Cir. 1986). Alaska permits the "maximum possible award supported by the evidence." *Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc.*, 963 P.2d 1055, 1061 (Alaska 1998). Under that standard, an award is "excessive only if 'it is so large as to strike us that it is manifestly unjust, such as being the result of passion or prejudice or a disregard of the evidence or rules of law.'" *Scott v. United States*, 884 F.2d 1280, 1283 (9th Cir. 1989) (quoting *Beaulieu v. Elliott*, 434 P.2d 665, 676 (Alaska 1967)). Although Plaintiffs contend that the Government waived this argument below by not arguing against Plaintiffs' proposed amount of noneconomic damages and instead challenging damages only on the basis of state-law limitations on noneconomic damages in negligence cases, Plaintiffs misapprehend the question at issue. "Locating the upper limit" of a permissible damages award "is a question of law, not fact." *Bell v. Williams*, 108 F.4th 809, 831 (9th Cir. 2024). As explained below, the district court erred in its resolution of this legal question.

First, the district court awarded an excessive amount of noneconomic damages to A.E.N.T. ($4 million).

Although "[r]eviewing a non-pecuniary award presents a 'delicate and difficult question' . . . . courts are required to maintain some degree of uniformity in cases involving similar losses." *Shaw v. United States*, 741 F.2d 1202, 1209 (9th Cir. 1984) (quoting *Felder v. United States*, 543 F.2d 657, 674 (9th Cir. 1976)). Here, the district court awarded $4 million in noneconomic damages to A.E.N.T. and $500,000 to each parent. A court "can consider awards in comparable cases" to determine whether a noneconomic damages award is excessive. *Bell*, 108 F.4th at 832. A comparison with other Ninth Circuit FTCA cases, specifically *Trevino*, *Shaw*, and *Scott*, demonstrates that the district court's noneconomic damages awards to A.E.N.T. and her parents were excessive.[1]

[1] Although *Trevino* and *Shaw* involved Washington law, rather than Alaska law, this makes no difference. Washington's standard for determining an excessive damage award is the same as Alaska's. An award is excessive under Washington law if the circumstances demonstrate "that the trial judge was swayed by passion or prejudice." *Shaw*, 741 F.2d at 1209. Under Alaska law, an award is excessive if "it is so large as to strike [the reviewing court] . . . as being the result of passion or prejudice[.]" *Beaulieu*, 434 P.2d at 676.

In *Shaw*, the injured child had "severe brain damage . . . . spastic quadriparesis, blindness, a seizure disorder, and profound mental and physical retardation." 741 F.2d at 1204. In *Trevino*, the child suffered from cerebral palsy and had impairments in all four limbs that required her to use crutches or a wheelchair. 804 F.2d at 1514. In both cases, we held that the district court's award of noneconomic damages was excessive and reduced the award. After adjustment for inflation, the reduced award in each case was approximately 75 percent of A.E.N.T.'s award here. Because A.E.N.T.'s injuries are far less severe than those in *Shaw* and *Trevino*, the noneconomic damages award here is excessive.

Second, the district court awarded an excessive amount of noneconomic damages to A.E.N.T.'s parents ($500,000 to each parent). Comparator cases suggest that these awards were excessive. The parents in *Shaw* and *Trevino*, for example, received damages for loss of consortium that, after adjusting for inflation, were less than one-third of what A.E.N.T.'s parents received here, even though the parents in *Shaw* and *Trevino* experienced far greater emotional anguish and a greater loss of companionship. In *Shaw*, for example, we reduced each parent's award to $153,000 (adjusted for inflation) based on a finding that the child with "profound mental retardation," 741 F.2d at 1204, could "respond, albeit on a very basic level, to both his mother and father," *id.* at 1210. A.E.N.T.'s disability does not limit her communication with her parents to "basic" responses.

Comparator cases are not the only evidence relevant to whether a noneconomic-damages award is excessive. "[T]estimony alone can support compensatory damages for emotional distress and pain and suffering[,] [b]ut exceptional damages awards require substantial evidence, whether it comes in the form of detailed testimony or other supporting documentation." *Bell*, 108 F.4th at 834 (internal citation omitted). Here, little testimonial evidence supports the parents' loss-of-consortium awards. The district court commented on the lack of testimony and record evidence regarding A.E.N.T.'s father's loss-of-consortium damages yet awarded him $500,000. *See* Trial Transcript, *Raposo et al. v. United States*, No. 3:23-cv-00157-MJP (D. Alaska Sept. 4, 2025), ECF No. 77, p. 93, lines 11–15 ("You had the parents on for a very short period of time. I think dad was 12 minutes. So you're asking for $500,000 for his loss of consortium. So where do I look in the record to support findings for that?"). The trial record contains scant evidence supporting the parents' awards, which totaled $1 million in damages for loss of consortium. Such evidence, which could come in the form of testimony, might demonstrate the parents' "mental anguish [and] grief," or the parents' loss of "companionship and solace." *Gillispie v. Beta Const. Co.*, 842 P.2d 1272, 1274 (Alaska 1992) (internal quotation marks omitted); *see Shaw*, 741 F.2d at 1209 ("Damages for destruction of the parent-child relationship are intended to alleviate parental grief, mental anguish, and suffering."). Ms. Raposo (A.E.N.T.'s mother) offered only brief testimony about emotional harm, and this testimony did not suggest deep anguish but rather depicted a relatively normal relationship between her and her then-four-year-old child. *See* Trial Transcript, *Raposo et al. v. United States*, No. 3:23-cv-00157-MJP (D. Alaska Sept. 4, 2025), ECF No. 73, p. 148, lines 15–20 ("I have to take more time with her. I have to wake up early. I have to wake her up even early [sic] for school because we need more time getting her dressed . . . . [I]t's frustrating seeing her frustrated . . . ."). Mr. Thornton (A.E.N.T.'s father) likewise said very little to support his loss of consortium claim. *See id.* at 158–59. That is not the kind of testimonial evidence that can support such "exceptional damages awards." *Bell*, 108 F.4th at 834. Therefore, we vacate the district court's awards of noneconomic damages to A.E.N.T.'s parents and remand to the district court.

We note that on remand, the district court should determine the noneconomic-damages awards based solely on the comparator cases that the parties cited in their briefs and the evidence in the trial record. The parties are not permitted to proffer new evidence regarding noneconomic damages.

3. We vacate the district court's award of future economic damages and remand with instructions that the district court calculate a revised lump-sum award using the interest rates on long-term bonds.

An Alaska statute required the district court to reduce the award of $1.08 million in future economic damages to present value based on "long-term future interest rates in the best and safest investments." Alaska Stat. § 09.17.040(b). It is not disputed that the "best and safest investments" refers to U.S. Treasury bonds. Here, the district court accepted the rate proposed by Plaintiffs, which their expert calculated using a blend of ten-year Treasury bill rates and three-month bond rates. *See* Findings of Fact and Conclusions of Law, *Raposo et al. v. United States*, No. 3:23-cv-00157-MJP (D. Alaska May 14, 2025), ECF No. 60, p. 26 ("[T]he Court concludes that the discounted present value of A.E.N.T.'s life care plan shall follow the method of calculation submitted by Plaintiffs' expert, Mr. Richards."). That was a legal error. No plausible interpretation of "long-term future interest rates" would include the interest rates of three-month U.S. bonds, which are among the shortest-term "best and safest" securities available to investors. *See* Alaska Stat. § 09.17.040(b). For example, a prominent financial services company explains that its "short-term bond index fund" tracks "the total return of an index composed of . . . bonds with maturities between 1–5 years." Schwab Asset Management, Schwab Short-Term Bond Index Fund.[2] Even Plaintiffs' expert economist conceded at trial that three-month bonds were "not" "considered long-term." Trial Transcript,

[2] https://www.schwabassetmanagement.com/products/swsbx.

Raposo et al. v. United States, No. 3:23-cv-00157-MJP (D. Alaska Sept. 4, 2025), ECF No. 74, p. 122, lines 21–23.

Because the district court misconstrued Alaska Stat. § 09.17.040(b), we vacate the district court's decision to use the discount rate proffered by Plaintiffs' expert and remand with instructions that the district court adopt a different discount rate in a manner consistent with Alaska law.

We note that on remand, the parties may submit additional evidence regarding the proper meaning of the statutory phrase "long-term future interest rates." For example, they may offer expert testimony from economists or financial professionals concerning the meanings of "short-term" and "long-term" rates in the investment community.

AFFIRMED IN PART; VACATED IN PART; REMANDED.