DISTRICT COURT, WELD COUNTY, COLORADO 901 9th Avenue, P.O. Box 2038, Greeley, CO 80632 (970) 475-2400	DATE FILED: August 22, 2023 3:31 PM CASE NUMBER: 2021CV78
Plaintiffs: **Chris Covelli** and **Kathi Covelli** *v.* *Defendants:* **Toyota Motor Corporation**; **Toyota Motor North America, Inc.**; **Toyota Motor Sales, U.S.A., Inc.**; and **Toyota Motor Engineering & Manufacturing North America, Inc.**	▲ COURT USE ONLY ▲ Case No. 2021 CV 78 Division 4

Judgment

A 10-day jury trial was held July 24 through August 4, 2023. The jury deliberated and rendered its verdict, which was announced in open court. The jury found that the 2019 Toyota Tundra driven by Chris Covelli was unreasonably dangerous because of a defective design and that the defective Tundra was a cause of the injuries and losses sustained by the Chris Covelli and his wife, Kathi Covelli. The jury assigned 90% of the fault to the Toyota defendants and 10% of the fault to nonparty Darin Potts.

The jury awarded damages in the following amounts:

Category	*Gross Amount*	*Reduced by 10%*
Noneconomic losses (Chris Covelli)	$8,000,000	$7,200,000
Economic losses (Chris Covelli)	$20,969,200	$18,872,280
Physical Impairment (Chris Covelli)	$9,000,000	$8,100,000
Loss of Consortium (Kathi Covelli)	$5,000,000	$4,500,000

The court accepted the jury's verdict and recorded it, and the jury was then discharged. Because the jury's award of damages is subject to statutory adjustments and prejudgment interest, the court deferred entering judgment based on the jury's verdict until the parties had an opportunity to submit their positions and calculations as to these adjustments.

1. Application of the cap on noneconomic damages

Colorado law caps noneconomic damages arising out of personal injuries. § 13-21-102.5(2)(b), (3)(a), C.R.S. 2021. The dollar amounts in the statute are adjusted for inflation, and the cap applicable to claims that accrued between January 1, 2008 and January 1, 2020 is $468,010, or if the court finds that the damages have been proved by clear and convincing evidence, $936,030.

Based on the evidence presented at trial, the court finds that the Covellis' damages have been proved by clear and convincing evidence, justifying the imposition of the upper limit cap of $936,030. *See Pisano v. Manning*, 510 P.3d 572, 576-78 (Colo. App. 2022).

The Covellis contend that this cap should be applied on a per-defendant basis to each of the four Toyota defendants independently, and then aggregated, resulting in a cap on noneconomic damages equal to four times $936,030, resulting in a total cap of $3,744,120. The Toyota defendants object and contend that a single cap of $936,030 should be applied.

The Covellis rely on *General Electric Co. v. Niemet*, in which the Colorado Supreme Court held that "the cap in section 13–21–102.5 applies to the liability share of each defendant in a case, and does not act as a cap on the total amount a plaintiff may recover from several defendants." 866 P.2d 1361, 1368 (Colo. 1994). The Toyota defendants concede that the cap can be aggregated in a multi-defendant case, but attempt to distinguish this principle established by the

General Electric Co. case on the basis that the jury did not apportion liability here among the four Toyota defendants. They argue that "[p]ost-verdict, there is no way to parse out what percentage of fault, if any, the jury would have attributed to each of the related Toyota entities." *Toyota's Memo. in Support of Proposed Final Judg.* at 8 (filed 8/11/23). They speculate that the jury might have attributed no fault to some of the Toyota entities.

While it is true that there is no way to know for sure what the jury might have done had the jury been asked to apportion fault among the individual Toyota defendants, it is also true that this is a problem of the Toyota defendants' own making. The Toyota defendants sought to have the jury apportion liability between them and the nonparty, Darin Potts, which is why the court instructed the jury to do so. But the Toyota defendants did not seek to have the jury apportion fault amount them. They instead submitted a proposed verdict form that did not include jury interrogatories as to this issue, which is why the court did not instruct the jury to apportion fault among the four Toyota defendants.

The court assumes that the Toyota defendants had strategic reasons for (1) submitting a proposed verdict form that did not request the jury to apportion liability among them, (2) not proposing any jury instructions as to this issue, and (3) not raising this issue during the jury instruction conference. "The trial court may not assume the role of an advocate and bears no responsibility to redraft tendered civil instructions to correct errors in those instructions." *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 587 (Colo. 2004); *see also Hansen v. State Farm Mut. Auto. Ins. Co.*, 957 P.2d 1380, 1384-85 (Colo. 1998) (holding that requiring a trial court to redraft incorrect civil

instructions "would be tantamount to interjecting the trial judge into the strategic decision-making of both parties in every trial").

Thus, the Toyota defendants either waived the issue of apportionment, or, if it was error not to instruct the jury as to apportionment among the Toyota defendants, they invited the error they now seek to exploit. A party must make specific, contemporaneous objections to a verdict form to allow the trial court to correct errors before the form is given to the jury. *Nichols v. Burlington N. & Santa Fe Ry. Co.*, 148 P.3d 212, 215 (Colo. App. 2006). Similarly, a party must contemporaneously object to proposed instructions before they are presented to the jury; any errors not objected to are waived. C.R.C.P. 51; *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011).

"The application of the doctrine of invited error is triggered by actions of a party during litigation" and can be "applied to a wide range of conduct." *People in Interest of M.S.*, 129 P.3d 1086, 1087 (Colo. App. 2005) (citing *Horton v. Suthers*, 43 P.3d 611, 618 (Colo. 2002)). This doctrine prevents a party from profiting from error it induced. *Horton*, 43 P.3d at 618. This doctrine can also apply to passive conduct when a party "expressly acquiesces to conduct by the court or the opposing party." *Id.* at 619.

As a consequence of the Toyota defendants' trial strategy, they waived their argument that the noneconomic damages cap should not be applied on a per-defendant basis because the jury did not apportion liability among them. And because the Toyota defendants affirmatively and purposely avoided having the jury make this determination, they cannot now be allowed to profit from their litigation conduct that invited any error in not having the jury do so.

The court therefore applies the noneconomic damages cap on a per-defendant basis, which results in a total cap on the noneconomic damages

awarded to Chris Covelli in the amount of $3,744,120. The court notes that this cap represents less than half of the full amount of noneconomic damages awarded by the jury. There is no double-recovery or injustice in applying the cap on a per-defendant basis under these circumstances. This approach is also consistent with the policy rationales discussed by the Supreme Court in the *General Electric Co.* case.

The court also agrees with the Covellis' arguments based on *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1054 (Colo. 1995). While the Toyota defendants were generally referred to as "Toyota" for simplicity and convenience at trial, the jury was informed throughout the trial—including in the statement of the case given by the court at the beginning of the jury selection process—that the Covellis' claims were brought against four separate defendants. At the end of the trial, the court again instructed the jury in *Instruction No. 1* that the Covellis' claims were brought against:

> Toyota Motor Corporation, or "TMC," which is located in Japan; Toyota Motor Engineering & Manufacturing North America, Inc., or "TEMA," which is located in Michigan; Toyota Motor North America, Inc., or "TMNA"; and Toyota Motor Sales, U.S.A., Inc., or "TMS." TMNA is responsible for coordinating the business activities for Toyota in North America, and TMS is responsible for the marketing and distribution of the Tundra pickup truck.

The jury heard trial testimony that TMC and TEMA were jointly responsible for designing and engineering the 2019 Tundra and that TEMA was responsible for manufacturing the Tundra in a manufacturing plant in Texas. The jury was even shown photographs of the interior of this plant and some of the machinery involved in the manufacturing process.

The Toyota defendants have never argued that they are effectively one entity. To the contrary, it was always understood throughout the trial—and at times explicitly stated in testimony—that each of the four Toyota defendants played unique roles in the design, development, manufacturing, marketing, and sale of the 2019 Toyota Tundra. If any of the four Toyota defendants had not performed its intended function in concerted action with the other Toyota entities, the Covellis would not have been able to purchase the defective Tundra.

Thus, the court is satisfied that there is sufficient evidence in the record to impose joint and several liability on the four Toyota defendants. Considering how this case was tried, which includes several instances in which counsel for the Toyota defendants sought to explain or clarify the different roles that each Toyota defendant played in the process, coupled with the Toyota defendants' affirmative actions in not seeking to have the jury apportion liability among them, the Toyota defendants have also waived any objection to joint and several liability.

2. Loss of consortium claim

Colorado law also caps noneconomic damages in derivative claims, such as the loss of consortium claim brought by Kathi Covelli here. § 13-21-102.5(3)(b). But the statute provides that no noneconomic damages are recoverable for a derivative claim unless the trial court's finds justification by clear and convincing evidence. Adjusted for inflation, the cap applicable to claims that accrued between January 1, 2008 and January 1, 2020 is $468,010.

Based on the evidence at trial, the court finds justification by clear and convincing evidence to support Kathi Covelli's recovery of $468,010 in

noneconomic damages. For the reasons already discussed, this cap also applies on a per-defendant basis. This calculation produces a total cap of $1,872,040.

The court further notes that the Toyota defendants submitted a verdict form that lumped noneconomic damages with economic damages as to the loss of consortium claim and did not ask the jury to apportion their damages award between these two categories. Consequently, the court concludes that the Toyota defendants waived any objection to the damages awarded by the jury for loss of consortium, and if there was any error in not having the jury apportion these damages, the Toyota defendants invited that error and cannot now profit from it.

Economic damages for loss of consortium are not subject to any cap. The court therefore assumes that the damages awarded by the jury in excess of the cap on noneconomic damages are for economic losses. Consequently, the court includes the full amount of the loss of consortium damages in the judgment.

3. Prejudgment interest calculation

Taking into account the reduction in Chris Covelli's recoverable noneconomic damages, the base amount recoverable against the Toyota defendants is $35,216,400.

Where a plaintiff prevails in a personal injury action and has claimed interest in the complaint, the court is required to add prejudgment interest to the damages when entering judgment, calculated at the rate of 9% per annum from the date the action accrued to the date the judgment is satisfied. § 13-21-101(1), C.R.S. 2021. Simple interest is recoverable from the date the action accrued to the date the lawsuit is filed. *Id.* Interest is compounded annually from the date the lawsuit is filed to the date the judgment is satisfied. *Id.*

Chris Covelli was injured in the rollover crash on September 25, 2019 and the Covellis filed this case on September 7, 2021. The court therefore awards prejudgment interest according to the following calculations (which are all rounded to the nearest dollar):

Date Range	Base Amount	Interest at 9%	New Base Amount
9/25/19 – 9/6/21 (713 days – simple interest from date of loss to date of filing)	$35,216,400	$6,191,328 [($35,216,400 x 0.09)/365) = $8,683.49 daily rate, x 713)	$41,407,728
9/7/21 – 9/6/22 (365 days - compounded)	$41,407,728	$3,726,695 ($41,407,728 x 0.09)	$45,134,423
9/7/22 – 8/22/23 (350 days - compounded)	$45,134,423	$3,895,150 [($45,134,423 x 0.09)/365 =$11,129 daily rate x 350 days	**$49,029,573**

Accordingly, consistent with the jury's verdict, judgment hereby enters under C.R.C.P. 58(a) in favor of the plaintiffs, Chris Covelli and Kathi Covelli, and against the defendants, Toyota Motor Corporation (TMC), Toyota Motor Engineering & Manufacturing North America, Inc. (TEMA), Toyota Motor North America, Inc. (TMNA), and Toyota Motor Sales, U.S.A., Inc. (TMS), in the total amount of damages awarded by the jury, after application of the cap on noneconomic damages, plus prejudgment interest, in the total amount of **$49,029,573**.

The plaintiffs are also entitled to post-judgment interest on the outstanding balance in the statutory amount (9% per annum if no appeal is taken, and 7% per annum if an appeal is taken), compounded annually, until the judgment is fully satisfied.

The plaintiffs are the prevailing party and are entitled to costs under C.R.C.P. 54(d). The plaintiffs have 21 days from today to submit a bill of costs under the procedures set forth in C.R.C.P. 121, § 1-22.

Unless they have already done so, the parties are ordered to file, within seven days from today, electronic copies of their exhibits which were admitted or offered at trial.

So Ordered:
August 22, 2023

BY THE COURT:

Todd Taylor
District Court Judge