

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,
Appellant,
vs.
ESTATE OF MICHAEL DAVID ADAMS,
BY AND THROUGH HIS MOTHER
JUDITH ADAMS, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE,
Respondent.

No. 56840

FILED

JAN 03 2014

TRAIIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Shagorah*
DEPUTY CLERK

*ORDER GRANTING MOTION TO RECALL REMITTITUR AND TO
MODIFY MARCH 29, 2013, ORDER FOR ALLOWANCE OF INTEREST*

Respondent has filed a motion to recall the remittitur and clarify instructions for the allowance of interest, arguing that when this court entered a dispositive order resolving this appeal on March 29, 2013, reducing respondent's judgment, the order neglected to instruct the district court about the allowance of interest on the modified judgment. See NRAP 37(b) (providing that if this court "modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest"). Appellant opposes the motion, arguing that it should be treated as a petition for rehearing under NRAP 40, and denied as untimely.

Having considered the parties' arguments, we grant respondent's motion. See *Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc.*, 103 F.3d 80, 81 n.1 (10th Cir. 1996) (applying FRAP 37, which is identical to NRAP 37, in explaining that when an appellate court's mandate overlooks interest, recall and reformation of the mandate is appropriate to answer the question of how interest should be applied).

In resolving this appeal, this court concluded that the district court acted within its discretion in awarding damages to respondent based

on loss of probable support, but that it abused its discretion by awarding separate damages for both loss of probable support and lost economic opportunity because the loss of probable support element of damages “translates into, and is often measured by, the decedent’s lost economic opportunity.” See *Fallini v. Adams*, Docket No. 56840 (Order Affirming in Part, Reversing in Part, and Remanding, March 29, 2013) (quoting *Alsenz v. Clark Co. School Dist.*, 109 Nev. 1062, 1064-65, 864 P.2d 285, 286-87 (1993) (explaining that in a wrongful death action, the estate could not recover for both lost economic opportunities of the decedent and loss of probable support, as this would amount to a double recovery)). This court therefore affirmed the wrongful death judgment to the extent that it awarded damages for grief, sorrow, and loss of support, but reversed the portion of the judgment that awarded additional damages for lost career earnings. *Id.*

Since the district court’s judgment was partially reversed only to the extent that it awarded duplicative damages for lost career earnings and thus the partial reversal was grounded on the judgment’s dollar value and reduced accordingly, interest on the modified judgment shall accrue from the date of the district court’s original judgment. See *Bancamerica Commercial Corp.*, 103 F.3d at 81 (noting that “[i]n determining whether postjudgment interest should accrue from the date of the district court’s original judgment or the date of a later judgment,” an appellate court examines “the extent to which the case was reversed” (quoting *N. Natural Gas Co. v. Hegler*, 818 F.2d 730, 737 (10th Cir. 1987))). In analyzing the extent to which a case was reversed, the Third Circuit Court of Appeals in *Dunn v. HOVIC*, concluded that the post-judgment interest calculation should begin on the date when the jury verdict was originally entered, since the “jury’s decision was never overturned and the matter was never

retried,” noting that on appeal, “the entire award was not vacated, but was merely reduced.” 13 F.3d 58, 61-62 (3d Cir. 1993) (awarding a plaintiff post-judgment interest from the original judgment’s date, even though the original judgment was \$26.3 million and the ultimate judgment after appeal and remittiturs was \$1.5 million); *see also Cordero v. De Jesus-Mendez*, 922 F.2d 11, 16 (1st Cir. 1990) (explaining that “where the original judgment is basically sound but is modified on remand, post-judgment interest accrues from the date of the first judgment”); *N. Natural Gas Co.*, 818 F.2d at 737 (mandating interest to accrue from the date when the first judgment was awarded because the reversal of the first judgment “was not on any basic liability errors or errors in procedure which affected the basic issues but on a dollar value, a matter of degree”). Accordingly, we recall the remittitur and amend the mandate in the March 29, 2013, order to include instructions for the allowance of post-judgment interest on the modified judgment to accrue from the date of the original judgment. *Dunn*, 13 F.3d at 61-62; *N. Natural Gas Co.*, 818 F.2d at 737.

It is so ORDERED.

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

cc: Hon. Robert W. Lane, District Judge
Marvel & Kump, Ltd.
John Ohlson
Aldrich Law Firm, Ltd.
Nye County Clerk