2d Civil No. B161431

IN THE COURT OF APPEAL, STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LOTTIE NELSON, et al.,

Plaintiffs and Respondents

v.

COUNTY OF LOS ANGELES, et al.

Defendants and Appellants.

Appeal from a Judgment of the Los Angeles County Superior Court
Case No BC213704
Honorable David L. Minning

COMBINED APPELLANTS' OPENING BRIEF AND RESPONDENTS' BRIEF

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INTRODUCTION

On the night of September 13, 1998, Dwayne Nelson ("Dwayne") – recently paroled and high on cocaine – stood in the middle of a busy intersection and fired a loaded gun at passing motorists. Sheriff's deputies arrested him, then later attempted to restrain him by use of a Total Appendage Restraint Procedure ("TARP"). Dwayne died at some point during or immediately after the completion of the application of the TARP. Dwayne's parents – who had not seen him for over 20 years and knew little about his life – sued for wrongful death. A runaway jury assessed plaintiffs' loss at $2 million, then reduced that amount to $1.3 million to account for Dwayne's contributory negligence.

This case should never have gone to the jury.

First, it should have been dismissed for lack of standing. A parent can sue under the wrongful death statute only if he was financially dependent on the decedent or is his heir at law. (§ 377.60.)[1/] Dwayne's parents qualify on neither ground.

They never seriously asserted, much less tried to prove, that they were dependent on Dwayne; if anything, it was the other way around. That meant plaintiffs had to prove they were Dwayne's heirs – a status they could occupy *only* if he were *not* survived by issue. Yet, the record is devoid of evidence on that issue. Dwayne's father Wallace Nelson testified that he did not know whether Dwayne had children; his mother Lottie Nelson was not even asked; and no other evidence was introduced on the matter.

Given the blank record on standing, this Court must reverse the judgment with directions to enter judgment for defendants.

1/ Unless otherwise stated, all statutory references are to the Code of Civil Procedure.

Second, plaintiffs had to prove the cause of Dwayne's death to a medical probability, and had to do so by expert medical testimony. Plaintiffs contended that the deputies' negligent application of the TARP caused Dwayne to die from positional asphyxia and their negligent use of CPR failed to revive Dwayne and reverse the asphyxia. But plaintiffs' one medical expert totally failed to prove these contentions by competent evidence to a medical probability.

While the expert concluded that Dwayne died of positional asphyxia, his own testimony showed that Dwayne's sudden death was as likely to have resulted from causes unrelated to the use of the TARP. His testimony on CPR was, by his own admission, pure speculation. None of his opinions was based on special knowledge or training or on reliable sources. And when viewed in light of the whole record, they do not rise to the dignity of substantial evidence on medical causation.

Plaintiffs failure to prove causation requires reversal.

Lastly, the damages award shocks the conscience. Dwayne hadn't seen his parents for over 20 years, gave them no financial support and was a career criminal with no job prospects; had he lived, he likely faced further time in prison. Given this, the jury could not have valued plaintiffs' loss at $2 million, or anything remotely close, based on the factors it was permitted to consider – the pecuniary value of decedent's moral and financial support, society and companionship.

Rather, it seems the jury awarded emotional distress and punitive damages – neither permitted in wrongful death cases; for example, the jurors agreed to award damages to "send a message" to the County, which is tantamount to awarding punitive damages. Thus, the jury award was excessive and based on jury misconduct. That also compels reversal.

STATEMENT OF FACTS

A. Dwayne Nelson's Criminal Background.

Dwayne was incarcerated multiple times in California. He was first imprisoned for robbery, given a suspended sentence and placed on probation; then violated probation, was sent to prison, and later paroled, then violated his parole, and returned to prison. (Reporter's Transcript ["RT"] 1018.) Next, he was convicted for selling cocaine, and was sentenced to four years plus one for his prior conviction. (*Ibid.*) He was paroled and then arrested for and convicted of possession of cocaine and cocaine paraphernalia, and sent back to prison for three years plus another year. (RT 1018-1019.) Then, he was paroled again, violated that parole, went back to prison, and was again paroled six days before his death. (RT 1019.)

And prior to coming to California, Dwayne "served about five arrests." (*Ibid.*)

B. Dwayne's Medical History.

Dwayne suffered from life-threatening medical conditions. Plaintiffs' medical expert, Dr. John Cooper, testified that there were "two notable things in [Dwayne's] medical history" – a long-term diagnosis of paranoid schizophrenia and hypertension. (RT 729, 735.)

Dwayne also had a long-term cocaine habit. (RT 730, 755, 1124, 1127, 1129.) He was convicted of both the sale and possession of the drug. (RT 1018-1019.) In the present case, at the time of his arrest by the defendant deputies, Dwayne was high on cocaine. He also had an enlarged heart, possibly caused by his high blood pressure, an anomaly or

deformation in the right coronary artery that supplies blood to the body, and fibrosis, an increase in fibrous tissue to the heart. (RT 734-736, 755; Appellants' Appendix ("AA") 1367, 1376.)

These conditions interacted. "[P]eople who suffer in [sic] paranoid schizophrenia are more likely to be subjected to chronic drug abuse problems," cocaine can elevate the blood pressure and fibrosis can be caused by long-term cocaine use. (RT 730, 734-736, 749, 751, 755, 1129, 1208.)

Experts for both sides concurred that Dwayne's conditions could cause sudden death. Cocaine use could in and of itself cause sudden death. (RT 747, 786, 1127-1129, 1204.) So, too, could the state of excited delirium caused by cocaine use. (RT 747-748, 786, 1127-1128, 1207.) And, according to plaintiffs' police and medical experts, sudden death in those cases could occur even in the absence of force or restraint. (RT 637-638, 748, 786.) Defense expert Dr. Neal Benowitz testified that high blood pressure was "a risk factor for sudden death without cocaine." (RT 1210.) And plaintiffs' expert Dr. Cooper testified that coronary anomalies (such as Dwayne's deformed artery) had been associated with sudden death. (RT 736-737, 750, 786.)[2/]

2/ Dr. Cooper testified that a significantly enlarged heart could cause sudden death, but differed with the coroner and defense experts as to whether Dwayne's heart was significantly enlarged. (RT 747, 758, 1287; AA 1367.)

C. Dwayne's Death.

1. Six days out of prison, Dwayne, high on cocaine, stands at a busy intersection and shoots a loaded gun at passing motorists.

Six days after being paroled, Dwayne went to the intersection of Normandie Avenue and Imperial Highway in the City of Los Angeles and began firing a gun in the air and at passing vehicles. (RT 568-569, 619-620, 635, 822-823, 862-863, 914-915, 1017, 1067.) Deputy David Porter, responding to a "call of a man with a gun," saw Dwayne, gun in hand, "standing in the center median of the east-west traffic flow of Imperial Highway." (RT 914-915, 930.)

Dwayne was high on cocaine and suffering from excited delirium. (RT 575, 636-637, 730, 731, 748, 812-813, 1202-1204, 1213-1214; see also RT 1068 [upon searching Dwayne, one deputy found a "rock cocaine pipe that was still hot"].) In fact, as the coroner's toxicological analysis showed, there were substantial amounts of cocaine in Dwayne's system. (AA 1384, 1386; RT 1202, 1213-1214.)

Dwayne displayed all the characteristics of excited delirium. (See RT 732-733.) Deputy Porter "heard the suspect yelling and screaming and just saying things that I could not make out." (RT 930.) Deputy Sean Hoodye, who handcuffed and placed Dwayne in the patrol car, described him as "rolling side to side, screaming out, calling out to God. Most of his statements were incoherent . . . [or] basically seemed irrational." (RT 1070-1071.) Hoodye also testified that Dwayne "was sweating profusely. . . . [H]e appeared to be extremely excited; still making incoherent statements. Once he's set in the vehicle, basically the same thing." (RT 1071.) Deputy Jeffrey Siroonian, who saw Dwayne for the first time after he was arrested and placed in a patrol car, described Dwayne "sitting there with a blank

look. He was sweating profusely and just babbling, ranting, and raving." (RT 812-813.) And Deputy Porter saw Dwayne "in the back seat of the radio car slumped over," and "sweating quite profusely," and "he kept talking and rambling and just nothing was coherent for anything that he was trying to say." (RT 934.)

2. The deputies arrest Dwayne.

The deputies told Dwayne to drop the gun, put up his hands and lie down, and he complied, although he continued yelling and screaming. (RT 915-916, 930, 931.) He was handcuffed, placed in a patrol car and driven to the parking lot of a nearby Winchell's donut shop. (RT 569, 915-918, 931-933, 1068.)[3/]

3. The deputies restrain Dwayne because of his erratic, violent behavior.

Once confined and handcuffed in the patrol car, Dwayne began acting in an agitated and convulsive manner (RT 569, 851, 895). Deputy Hoodye testified that at times Dwayne was calm, but "at other times where he reacted so violently, he actually shook the car with me from side to side and basically the way I'm rocking now is about how vigorous the car shook." (RT 1071.) Deputy Siroonian testified that Dwayne "actually leaned over to his left and started trying to kick out the window of the patrol car. Most of the blows were hitting the vinyl portion just below the glass. Some actually hit the glass." (RT 813.) Deputy David Florence testified that in addition to yelling and screaming, Dwayne "was flailing about. He

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3/ Plaintiffs contended that Dwayne had improperly been taken there to start the booking process. (RT 572, 573.) Defendants contended they went to the parking lot because it was the nearest safe place near the busy intersection and to canvas the area for potential victims, witnesses and evidence. (RT 667, 825-826, 932-933, 1069-1070; see RT 1098.)

repeatedly kicked out the door, the lower portion of the door, and tried to kick out the window." (RT 868.)

Deputy Siroonian recognized the danger. He'd seen that behavior in an individual "under the influence of cocaine and PCP where they broke their cuffs. I saw another person under the influence of cocaine where they were tazered in the chest, and the person actually removed the darts or ripped the darts out of their chest. And in both cases, they didn't show any . . . signs of pain. They weren't feeling anything. These people have . . . phenomenal strength. And it is that type of behavior that I was seeing in Mr. Nelson." (RT 813-814.) Deputy Porter too had "encountered individuals like this before where one moment they are docile, and the next minute they explode, extremely strong, very violent, feel no pain whatsoever." (RT 863-864.)

The deputies feared that left unrestrained, Dwayne would injure himself or a deputy and damage the patrol car. (RT 873-874, 899, 1095.) Accordingly, they determined to use a TARP to restrain him. (RT 855-856, 873, 1071.)[4/] The deputies on the scene called for a supervisor and for backup, and then removed Dwayne from the car. They then applied the TARP. (RT 818-822, 857-859, 860-861, 865-866, 895.)[5/]

4/ "Tarping is commonly called hog-tie where they tie their wrists and ankles together to restrain them," i.e. "when you utilize a leather strip with hooks on it to secure their wrists and ankles." (RT 1181, 1190; see also RT 570.)

5/ It was not easy removing Dwayne from the car, as he was kicking at the car and at the deputies, and continued "screaming, ranting and raving" (RT 814-818) or applying the TARP, as Dwayne was "kicking, trying to roll from side to side, lifting his elbows up and down" and deliberately interfering with the application of the TARP. (RT 896, 936.) Deputy Curt Alan Messerschmidt described Dwayne's strength as "superhuman"; he "had at least three of us, if not four of us, trying to contain him on the ground. He was still able to move us about." (RT 897.)

Plaintiffs elicited testimony from a police practices expert that "there was not a necessity clearly illustrated to use this particular method of restraining Mr. Nelson, and that this method was then not reasonable under the circumstances, and that it was utilized without an understanding of the possible consequences of utilizing this method in the way that it was utilized, and that there were alternative means for restraining Mr. Nelson if a necessity existed." (RT 586-587.)[6/]

4. Dwayne dies during or after the completion of the tarping.

When the deputies completed the tarping, they turned Dwayne over on his side, and noticed that he was not moving or speaking, and was "apparently unconscious." (RT 923-924, 936, 1073.) The deputies then performed CPR, while paramedics were summoned. (RT 937-939, 1074-1077, AA 1378.)[7/] There is no dispute that Dwayne died during or at the conclusion of the tarping. (RT 496-497, 524, 703; see AA 1378.) He was 41. (AA 1367, 1410.)

Plaintiffs and their medical expert contended that Dwayne died from positional asphyxiation due to the application of the TARP. (RT 496-497, 501, 510, 720, 728; AA 6.) Defendants and their experts contended that he died from the conditions that exposed him to sudden death – cocaine use, excited delirium, his enlarged heart and/or his deformed artery. (RT 512,

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6/ On the other hand, plaintiffs' expert conceded that (1) he could not state whether his alternatives were viable; and (2) the deputies "were faced with an individual who was moving about in some unspecified way in the back seat of that car and causing that car to shake or move on its suspension" and that "they need to take some kind of action to ensure that Mr. Nelson does not injure himself or damage the interior of the police car to the degree that they can." (RT 625-626, 684.)

7/ Plaintiffs contended that the deputies were negligent in the manner in which they performed CPR. (RT 497-499, 510-511.)

518, 1202-1210, 1218-1219, 1257-1263, 1280-1284.) The coroner determined that Dwayne's "sudden death" resulted from "ischemic heart disease" due to "congenital aberrant right coronary artery origin," with a contributing factor of cocaine use, and that "restraint procedures did not play a significant or contributory role in his death." (AA 1376-1377, 1384.)[8/]

D. Dwayne Had Not Seen His Parents For Over 20 Years.

Plaintiffs had been separated since Dwayne was a child. (AA 1410; RT 967.)[9/] At the time of his death, neither one had seen Dwayne for over 20 years. (RT 968, 973; AA 1433-1435; DNL 8-9.) They were unaware or misinformed about the details of his life, both small and significant; for example they did not know his addresses or telephone numbers or the locations where he was incarcerated or the true reasons for his incarceration, and they knew almost nothing about his serious medical

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8/ Because the jury found that the deputies' negligence caused Dwayne's death, it implicitly accepted plaintiffs' contention that Dwayne died of positional asphyxia. However, as we argue below, plaintiffs failed to prove to a reasonable medical probability that positional asphyxia was the cause of Dwayne's death, and therefore the matter of causation should never have been sent to the jury.

9/ The certified transcript of Wallace Nelson's deposition is attached to the Appellants' Appendix following the exhibits. (AA 1400.) Though not numbered as an exhibit, the trial court ordered that it be made part of the record. (RT 1316-1318.) The video of Wallace's deposition was played in its entirety to the jury. (RT 999-1000.) Wallace's counsel informed us that he intends to lodge the video with this Court. In addition, a ten-minute excerpt from Lottie's deposition was played to the jury. (RT 985-990, 998-999.) We are lodging that ten-minute video and the corresponding pages from the certified transcript of Lottie's deposition. We have highlighted the passages played for the jury. "DNL" refers to defendants' Notice of Lodging. "PNL" refers to plaintiffs' Notice of Lodging Trial Exhibits. (See Lottie's Appellant's Opening Brief 2, fn. 2.)

conditions or drug use and could name none of his friends. (RT 973, 975, 978-985; AA 1436-1437, 1439-1440, 1447-1449, 1456-1457; DNL 2-3, 6, 7, 9, 12-20, 22-23.) Plaintiffs testified that during that 20-year period, Dwayne and they communicated "through cards, letters and phones." (RT 968, 973; AA 1437-1438.)

PROCEDURAL HISTORY

A. The Complaint.

The operative complaint is the Second Amended Complaint. (AA 1.) It contains four causes of action: wrongful death, negligent supervision, assault and battery. Plaintiffs brought the first cause of action as individuals, the second as individuals and administrators of Dwayne's estate and the remaining two only as estate administrators.

B. The Summary Judgment Motion.

The trial court granted defendants summary judgment on plaintiffs' second, third and fourth causes of action, holding that those claims belonged exclusively to the estate of Dwayne Nelson, and the estate did not comply with the California Tort Claims Statute, Government Code, section 810 et seq. (CT 1002-1007.)[10/]

10/ "CT" refers to the Clerk's Transcript filed by plaintiff, appellant and respondent Lottie Nelson in connection with her cross appeal. The Clerk's Transcript appears to contain the summary judgment papers in their entirety, although most of the evidence therein is not relevant to the narrow issues raised by Lottie's appeal. To the extent that evidence was not admitted during trial, it cannot be considered in deciding this appeal. (*Evangelize China Fellowship, Inc. v. Evangelize China Fellowship* (1983) 146 Cal.App.3d 440, 444.)

C. The Verdict And Judgment.

The jury found in a special verdict that the defendant deputies "act[ed] negligently in tarping Dwayne Nelson;" the negligence "cause[d] Dwayne Nelson's death"; Dwayne was negligent and contributed to the cause of his death; each plaintiff suffered damages in the amount of $1 million and 35 percent of the negligence was attributable to Dwayne. (RT 1537-1553; AA 809, 812-814.)[11/]

The trial court entered judgment on the special verdict on July 25, 2002. (AA 816.)

D. Post-Trial Motions.

Defendants filed motions for new trial and for judgment notwithstanding the verdict. (AA 1196, 1213.) Plaintiff Lottie Nelson filed a motion for attorneys fees. (CT 1012.) The court denied all motions. (AA 1354, 1356; RT 1555.)

E. The Appeals.

Defendants timely appealed from the judgment and the order denying their JNOV motion. (AA 1359.) Plaintiff Lottie Nelson appealed from the summary judgment award on her second, third and fourth causes of action and from the denial of her attorneys fees motion. (CT 1271, 1276.)[12/]

11/ The vote was unanimous on negligence, but 10-to-2 on causation and damages and 9-to-3 on contributory negligence percentages.

12/ Defendants' response to Lottie's appeal is found at pp. 67 et seq., post.

LEGAL ARGUMENT

I. THE JUDGMENT MUST BE REVERSED BECAUSE PLAINTIFFS LACK STANDING TO BRING A WRONGFUL DEATH ACTION.

A. Lack Of Standing Under Section 377.60 Is A Jurisdictional Defect, And May Be Raised At Any Stage Of The Proceedings.

Section 377.60 provides, in pertinent part, that "[a] cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted" only by certain specifically identified classes of persons; for example, a decedent's surviving spouse and children "or, if there is no surviving issue of the decedent," also the persons "who would be entitled to the property of the decedent by intestate succession." The question of whether a plaintiff falls within the class of persons entitled to sue for wrongful death under section 377.60 is a question of standing. (E.g., *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1440; *Phraner v. Cote Mart, Inc.* (1997) 55 Cal.App.4th 166; *Villacampa v. Russell* (1986) 178 Cal.App.3d 906, 908 [former section 377].)

As a jurisdictional issue, standing may be raised at any time, even for the first time on appeal. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361.) Here, defendants raised lack of standing in a directed verdict motion and in new trial and JNOV motions. (RT 1394-1396, 1555 et seq.; AA 1196, 1213.) The court denied the motions.[13/]

13/ As we show below, there is evidence that Dwayne told prison staff (continued...)

B. Plaintiffs Were Obligated To Prove That They Had Standing To Bring A Wrongful Death Action, And Failed To Meet Their Burden Of Proof.

1. The Legislature has enacted strict limitations on who qualifies to bring a wrongful death action.

The right to sue for wrongful death did not exist at common law; it is wholly a creature of statute. (*Chavez v. Carpenter, supra,* 91 Cal.App.4th at 1438.) The Legislature "both created and limited the remedy" by restricting the persons entitled to sue under the statute. (*Id.* at 1439, internal quotes omitted.) A wrongful death cause of action "exists only so far and in favor of such person as the legislative power may declare." (*Id.* at 1438-1439, internal quotes omitted.)

Under the earliest versions of the wrongful death statute (§ 377), suit could be brought only by the decedent's heirs, as defined by the rules of succession in the Probate Code. (*Evans v. Shanklin* (1936) 16 Cal.App.2d 358, 360-362.) Section 377 was amended in 1968 to permit an action by a decedent's dependent parents, who were not heirs. (See *Hazelwood v. Hazelwood* (1976) 57 Cal.App.3d 693, 696.) Then, in 1975, the statute was amended to permit actions (1) by persons, including parents, "who would be entitled to succeed to the property of the decedent according to the provisions" of the Probate Code if the decedent died without leaving issue;

13/(...continued)
he had three children. Prior to trial, plaintiffs sought a preliminary determination under Evidence Code section 402 that the prison records recording those statements were admissible to prove the truth of Dwayne's assertions. The court held that the statements were not admissible. It did not decide the issue of whether plaintiffs had standing to sue.

and (2) by additional specified non-heirs if they had been dependent on decedent. (See *id.* at 695, fn. 1.)

The current statute (amended in 1992, and renumbered as § 377.60) essentially repeats the prior law governing who may bring a wrongful death action. (See Cal. Law Revision Com. coms., 14 West's Ann. Code Civ. Proc. (2001 supp.) foll. § 377, p. 24, § 377.60, p. 70; *Chavez v. Carpenter, supra,* 91 Cal.App.4th at 1439-1440.) Under section 377.60, the following persons have standing to sue in the following order and subject to the following conditions:

- The decedent's surviving spouse, domestic partner, children, and issue of deceased children are entitled to sue without preconditions. (§ 377.60, subd. (a).)

- The putative spouse, children of the putative spouse, stepchildren and parents are entitled to sue – *if* they were *dependent* on the decedent. (§ 377.60, subd. (b).)

- The persons who would be entitled to the property of the decedent by intestate succession are entitled to sue – *if* there is *no* surviving issue of the decedent. (§ 377.60, subd. (a).)[14/]

Courts are bound by these limits. "[T]he limitation on those who may bring the action is one which is imposed by the Legislature and, absent a constitutional basis for departure from a clear expression of legislative intent, we are bound thereby." (*Steed v. Imperial Airlines* (1974) 12 Cal.3d 115, 120.) And they have strictly enforced this standing requirement under every version of the state. (*Evans v. Shanklin*, *supra*, 16 Cal.App.2d at 360-363 [mother not heir, and therefore not entitled to sue, because decedent survived by spouse and children]; *Mayo v. White* (1986) 178 Cal.App.3d

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14/ This mirrors the Probate Code, under which parents and other relations are entitled to succeed to the decedent's property only if the decedent died without surviving issue. (§ 6402.)

1083, 1088-1089 [decedent's siblings "while potential heirs under Probate Code section 225 . . . are not proper heirs at law and are ineligible to bring an action under . . . section 377"]; *Steed v. Imperial Airlines, supra*, 12 Cal.3d at 118 [stepdaughter not eligible to sue]; *Phraner v. Cote Mart, Inc., supra*, 55 Cal.App.4th at 169-171 [adopted child not qualified to sue for biological mother's wrongful death].)

2. A decedent's parents can sue for wrongful death only if they were financially dependent on him or he died without surviving issue.

The Legislature has always imposed preconditions on the standing of parents to sue under the wrongful death statute. Until 1968, parents could sue only if they were heirs – and they could not be heirs if the decedent had died leaving surviving children.

The leading case on the matter is *Evans v. Shanklin, supra.* There, the decedent's elderly mother, who had depended on decedent for support and maintenance, brought a wrongful death action under section 377, which then permitted suits only by decedent's "heirs or personal representatives." (Quoted, 16 Cal.App.2d at 360.)

Because the decedent died leaving surviving issue, the court held that "the mother of the decedent would not, under our statutes of succession, succeed to any of her deceased son's estate, and therefore the plaintiff in this case . . . is not an heir" and cannot bring a wrongful death action. (*Id.* at 362.) The court rejected the notion that "considerations of social security and social justice" could allow the court to expand the class of persons who could sue, stating: "[T]he decision of the legislature as to how far it will extend the right [to sue] is conclusive." (*Id.* at 362-363.)

In 1968, the Legislature amended section 377 to allow the dependent parents of a decedent to sue, even if they were not heirs. That remains the

rule today. (*Chavez v. Carpenter, supra,* 91 Cal.App.4th at 1445.) It is long settled that "dependence refers to financial support." (*Ibid.* [the term "would be rendered virtually meaningless if emotional dependency was sufficient to sue for wrongful death," internal quotes omitted].)

Thus, parents can bring a wrongful death action in *only* two circumstances: (1) *if* they had been dependent on the decedent or (2) *if* the decedent died without children, which would make the parents the next persons "entitled to the property of the decedent by intestate succession." (§ 377.60, subd. (a); Prob. Code, § 6402, subd. (b).) As a recent case summed up the matter:

> The first subdivision of the wrongful death statute *gives standing* to those persons "who would be entitled to the property of the decedent by intestate succession," but *only* "if there is no surviving issue of the decedent." [Citation.] Under the laws of intestate succession, a decedent's parents become heirs where there is no surviving issue. (Prob. Code, § 6402, subd. (b).) But where a decedent leaves issue, "his parents would not be his heirs at all [citations] and *therefore not entitled to maintain* this [wrongful death] action at all."

(*Chavez v. Carpenter, supra,* 91 Cal.App.4th at 1440, emphasis added.)

3. A wrongful death plaintiff bears the burden of proving that he is qualified to sue under the statute.

The threshold question in every wrongful death case is whether the plaintiff is within the limited class of persons that the Legislature allows to bring the statutory action. The plaintiff must plead that he is entitled to sue for wrongful death. (*Davis v. Southern Arizona F. Lines, Ltd.* (1938) 30 Cal.App.2d 48, 49 [wrongful-death complaint dismissed because plaintiff-parents did not allege they were heirs at law of decedent].) And "[w]hatever plaintiff is obligated to plead, plaintiff is obligated to prove." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 654.) Thus, in a

wrongful death action, the plaintiff must prove he or she has standing to sue under the statute. *Jolley v. Clemens* (1938) 28 Cal.App.2d 55 is directly on point.

There, the court reversed a wrongful death judgment in favor of decedent's parents because of "a defect in [their] proof going to the question of whether or not they were heirs of the decedent at all." (*Id.* at 74.) Specifically, the plaintiff-parents failed to show that the decedent died without surviving issue. That is *exactly* the same defect in proof that requires reversal here.

In *Jolley*, the decedent and his wife lived together for approximately two months; thereafter, the marriage was annulled without objection from the decedent. That was the full extent of the record. As the court pointedly noted: "There is no testimony as to whether there was any issue of the marriage or not, nor whether or not the decedent ever had issue otherwise than by this marriage." (*Ibid.*) This was a critical evidentiary gap, for if the decedent "left issue, respondents as his parents would not be his heirs at all [citations] and therefore not entitled to maintain this action at all." (*Ibid.*)

The court left no doubt that it was the plaintiff who had the burden of showing that a decedent died without issue: "Respondents *were bound to show the absence of issue* as part of the proof that they are heirs at law at all." (*Id.* at 75, emphasis added.) Because the record was bare on that issue, the court held that "there was a defect *in respondents' proof* going to the question of whether or not they were heirs of the decedent at all, the absence of issue being *a necessary ingredient of proof* that they are heirs." (*Id.* at 74, emphasis added.)[15/]

15/ The court contrasted a failure to join a surviving spouse, which could be waived, with a failure to prove the absence of issue, which was jurisdictional: "Respondents were bound to show the absence of issue as part of the proof that they are heirs at law at all. They would, however, still

(continued...)

Jolley was expressly followed in *Coats v. K-Mart Corp.* (1989) 215 Cal.App.3d 961. There, the trial court non-suited a wrongful-death plaintiff because, as decedent's non-dependent parent, she was required but failed to prove "that decedent left no issue." (*Id.* at 966, 969, 970.) The court of appeal affirmed. Citing *Jolley*, it held that for a non-dependent parent to qualify to sue under the wrongful death statute, "the *parent's affirmative case* must establish that decedent had no issue." (*Id.* at 969, emphasis added.) Reviewing the record, the court concluded that plaintiff's "testimony falls far short of establishing that decedent left no issue and that [plaintiff] was the proper heir to maintain the action." (*Id.* at 970.)[16/]

Jolley and *Coats* govern the interpretation of section 377.60. At the time *Jolley* was decided, the wrongful death statute authorized two classes of persons to sue: heirs and personal representatives. (See *Evans v. Shanklin, supra*, 16 Cal.App.2d at 360.) A decedent's parents were not heirs unless decedent had died without children. (See Former Prob. Code, § 223; *Evans*, 16 Cal.App.2d at 362; *Jolley*, 28 Cal.App.2d at 74.) And the parents had the burden of proving the absence of issue.

At the time *Coats* was decided, the wrongful death statute allowed parents to sue under two circumstances: (1) if decedent had no surviving issue, because then his parents were heirs (§ 377, subd. (b)(1); Prob. Code, § 6402); and (2) where the parents had been dependent on the decedent (§ 377, subd. (b)(2)). (*Coats*, 215 Cal.App.3d at 969.)

15/(...continued)
be heirs at law even if there were a surviving spouse. The question whether or not there is one, *does not, therefore, go to respondents' right to sue*, but only to the question of whether or not such spouse ought to be joined with them in suing." (28 Cal.App.2d at 75, emphasis added.)

16/ Most recently, *Jolley* and *Coats* were cited in *Chavez v. Carpenter, supra,* 91 Cal.App.4th at 1440, 1442.

That is still the law under the current statute. (§ 377.60, subd. (a); Prob. Code, § 6402, subd. (b).) That is because section 377.60 restates "without substantive change" the provisions of section 377 with regard to a parent's entitlement to sue for the wrongful death of a child. (See Cal. Law Revision Com. com., 14 West's Ann. Code Civ. Proc., *supra*, foll. § 377, p. 24, § 377.60, p. 70.)

4. Plaintiffs presented no evidence to prove their standing to bring a wrongful death action.

Plaintiffs never tried to prove that they were dependent on decedent Dwayne Nelson. No surprise there. Decedent was a convicted felon, who hadn't seen either parent for over 20 years. (RT 968, 973; AA 1433-1435; DNL 8-9.) There is no evidence that he made any financial contributions to his parents; indeed, it was the other way around. (RT 1006; AA 1457.)

Thus, under section 377.60, as under the earlier versions of the wrongful death statute at issue in *Jolley* and *Coats*, Lottie and Wallace Nelson, as Dwayne's non-dependent parents, were required to prove that Dwayne died without issue in order to qualify to sue for wrongful death.

Plaintiffs have not met that burden. They have not even tried. Rather, the trial record is a complete blank on the question of whether decedent died without issue.

C. The Trial Court Erred In Not Dismissing Plaintiffs' Wrongful Death Suit For Lack Of Standing.

For plaintiffs to prove they were Dwayne's heirs, they had to introduce evidence that Dwayne died without issue; for, if he "left issue, [plaintiffs] as his parents would not be his heirs at all . . . and therefore not

entitled to maintain [a wrongful death] action at all." (*Jolley v. Clemens, supra,* 28 Cal.App.2d at 74.) Introducing no evidence was not an option. (Cf. *Wehr v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 188, 194 [even assuming "burden of proof eases or shifts . . . it was incumbent on applicant to at least produce prima facie evidence that [decedent's] death arose out of his employment"].)[17/]

Because plaintiffs introduced no evidence on standing, and therefore failed to prove a requisite element of their cause of action, the trial court was obligated to dismiss plaintiffs' case. Instead, it effectively required defendants to prove plaintiffs lacked standing.

The trial court held that a parent bringing a wrongful death action was not required to prove that he or she was the decedent's heir at law *unless* there was already "credible evidence" before the court "that decedent had been married or had issue." (AA 1356-1357.) It then distinguished *Jolley* on the ground that the court there already "had before it evidence that decedent had been married which apparently gave rise to its inquiries as to the existence of issue," whereas in the present case, "no evidence was presented at trial and the court has . . . no credible evidence before it now [i.e., on the post-trial motions] that decedent had been married or had issue." (*Ibid.*)

This stands the law on its head. Neither *Jolley* nor any other case has ever held that a wrongful-death plaintiff's obligation to prove standing was contingent on the presence of some anterior evidence that "gave rise to . . . inquiries as to the existence of issue." On the contrary, the plaintiff has the burden of proving that element of his case, regardless of what evidence is or is not otherwise in the record. "No matter how overwhelming the proof of

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17/ Plaintiffs faced no unique difficulties in trying to prove they were Dwayne's heirs; indeed, as co-administrators of his estate, they presumably had considerable resources at their disposal to aid in the task.

some elements of a cause of action, a plaintiff is not entitled to a judgment unless there is sufficient evidence to support all of the requisite elements of the cause of action." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205.)

And here the burden of proof obligation has jurisdictional implications; to place the burden of proving standing on the defendant undercuts the statutory mandate that only heirs at law can bring wrongful death actions.

Nor does the state of defendants' evidence change matters. As shown below, at the hearing under Evidence Code section 402 ["402 hearing"], the court held that prison records recording Dwayne's statements that he fathered children were not sufficiently trustworthy to be admitted to show that he died with issue. "But the rejection of that evidence does not support a contrary finding." (*Beck Development Co. v. Southern Pacific Transportation Co., supra*, 44 Cal.App.4th at 1206.) It does not mean that Dwayne died *without* issue – and cannot satisfy plaintiffs' burden of proof.

This is well demonstrated in *Beck*. There, the trial court rejected defense evidence that a site was toxic, but also rejected plaintiff's evidence for the contrary conclusion. In that circumstance, the appellate court held, "[t]he [trial court's] finding that neither side adequately characterized or tested the site is a finding of a failure of proof that must be held against Beck since, as plaintiff, it had the burden of proof." (*Ibid.*)

The trial court here made the same mistake made by the trial court in *Beck*: It treated both sides as equivalent, as if no one had the burden of proof. Thus, in denying defendants' JNOV motion, the court noted, first, that they failed to produce other evidence after the prison records were ruled inadmissible and, second, that "there was no evidence before the court that any search had been made of the birth records." (AA 1357.)

But that statement, to paraphrase *Beck*, is "a finding of a failure of proof that must be held against [Lottie and Wallace] since, as plaintiff[s], [they] had the burden of proof." After all, "[i]f an absence of evidence could satisfy the burden of proof" – i.e. if plaintiffs here could rely on the lack of evidence that Dwayne had children to prove that he left no children – "the concept of burden of proof would have no meaning." (*Roddenberry v. Roddenberry*, *supra*, 44 Cal.App.4th at 655.)[18/] [19/]

D. Plaintiffs Made a Conscious Decision *Not* to Introduce Any Evidence to Prove Standing.

No "equities" can rescue plaintiffs from their failure to prove this jurisdictional element of their case. (*Lewis v. Regional Center of the East Bay* (1985) 174 Cal.App.3d 350, 355 ["[e]quity would call for" allowing grandparents to sue for wrongful death, but "that is for the Legislature, not the courts"].) But in any event, there are no "equities" in plaintiffs' favor; they knew their proof obligations, and deliberately chose not to meet them.

18/ Even if the court's topsy-turvy view of the burden of proof were the law – and it clearly is not – the prison records were more than sufficient to satisfy any requirement for anterior evidence that "gave rise to inquiries as to the existence of issue."

19/ The court was also misguided in its concern that section 377.60 required plaintiffs to prove a negative. (RT 1558). First, proof that plaintiffs are Dwayne's heirs is not on its face proof of a negative. Second, the law frequently requires plaintiffs to prove negative propositions. (E.g., *Abrams v. Motter* (1970) 3 Cal.App.3d 828, 837-838 [seller required to prove that buyer did not use due diligence "though in one sense it means proving a negative"]; *Gunderson v. Gunderson* (1935) 4 Cal.App.2d 257, 260 (plaintiff must prove negative allegation "where it constitutes a part of the original substantive cause of action upon which the plaintiff relies"]; *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 799 [to prove malicious prosecution, plaintiff must prove prior action "brought without probable cause"]; see generally 1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 9, p. 162.)

1. Plaintiffs knew that they had the burden of proving standing.

It has been clearly articulated for more than 60 years that wrongful-death plaintiffs must prove the absence of issue as part of their case in chief. Both counsel and their clients are expected to know the law. (*People v. Clark* (1990) 50 Cal.3d 583, 624-625.)

Here, plaintiffs did know the law: At the outset of the lawsuit, they alleged as an element of their case that they "are the two surviving adult heirs at law of Dwayne Nelson, deceased" (AA 15) – a status they could claim only if Dwayne had died without surviving children. (*Chavez v. Carpenter, supra,* 91 Cal.App.4th at 1440.)

At least *two years before* trial commenced, both sides obtained prison records recording that Dwayne had children. And *two months prior* to trial, the court confirmed that plaintiffs had the burden of proving standing to bring a wrongful death action. (RT 201.)

2. The evidence plaintiffs chose not to introduce at trial.

Neither plaintiff presented any evidence that would show that Dwayne died without issue. Plaintiff Wallace Nelson candidly admitted that he did not know either whether Dwayne had been married or had fathered children. (AA 1271, 1444; RT 168.) Lottie Nelson did not testify on the matter at all. Indeed, her counsel stated in chambers that he was "not going to raise that issue" during his examination of Lottie. (RT 959.)

In short, plaintiffs never even tried to make out a prima facie case that Dwayne died without issue. For example, plaintiffs marked as an exhibit what purported to be an undated letter in which Dwayne told Lottie

that he had no children, but then withdrew it.[20] Similarly, at the 402 hearing, Lottie's counsel stated that Lottie was prepared to testify that a doctor told her that Dwayne became sterile at age five on account of having the mumps. (RT 189-190, 197.) In fact, Lottie never testified on that subject. Her counsel ultimately declined to produce her at the 402 hearing: "Why should I present any evidence at this stage . . . in light of the court's position that they're the proffering party?" (RT 201-202.)[21] And, at trial, Lottie was not asked and did not testify about her counsel's assertion that Dwayne was sterile.[22]

3. The evidence plaintiffs chose not even to seek.

At the 402 hearing, the court asked whether "any searches have been made" in the public records, opining that if Dwayne had fathered any children, "they would have been conceived more than likely in Memphis, Tennessee." (RT 191-192.) It became clear that plaintiffs had made no searches, in Tennessee, or anywhere else. (RT 192-193, 194.)

20/ Lottie's counsel agreed to remove the letter "if that is going to take the issue away"; he apparently acted to forestall defendants from calling witnesses that Lottie's counsel knew would provide foundation for the prison records. (AA 775; RT 1194, 1270-1273.) One of those witnesses was Yvonne Parrish, "[t]he actual person in the custodial facility who took information from Dwayne" and recorded it in the prison records. (AA 775; RT 1560.) As soon as plaintiffs withdrew the letter, defendants rested. (RT 1271-1273.)

21/ The "court's position" was that defendants, as the moving party under section 402, had the burden of proving the foundational facts necessary to admitting the prison records. (RT 194, 200-202.) The court made clear, however, that the ultimate burden of proving standing remained with plaintiffs. (RT 201.)

22/ Obviously, had such testimony been adduced, it would have been inadmissible hearsay, as the trial court appeared to recognize when Lottie's counsel first raised the matter. (See RT 189-190.)

Then, plaintiffs got a second chance. They obtained a two-month trial continuance. (RT 220.) Even then, plaintiffs apparently undertook no investigation of the records.[23] Wallace effectively conceded that point in arguing post-trial that "plaintiffs [were] entitled to proceed with the trial after the 402 hearing believing that this issue [i.e., standing] was behind them." (AA 1264.)[24] As we've seen, plaintiffs produced no evidence on the matter at trial. In fact, it appears that the first and *only* effort either plaintiff made to investigate whether Dwayne left surviving children occurred, incredibly, *after* judgment, in response to defendants' post-trial motions. At that point, plaintiff Wallace Nelson retained a detective service to research "the birth histories for Mark, Gregory and Jeannette Nelson in Memphis and Shelby County, Tennessee." (AA 1263, 1273.)[25]

23/ This is surprising. In asking for a continuance, Lottie Nelson's counsel claimed that he "need[ed] to complete discovery." (RT 217.) And Wallace Nelson's counsel asked the court to "give us time to find out whatever that burden is. Do we go to Memphis? Do we search the County of Los Angeles . . . ? Do we come in and say there is no such thing? I mean, we need some time if you are going to grant this motion." (RT 194.) Lottie's counsel concurred: "If the burden shifts on us, we will go search the records." (RT 197.)

24/ Lottie Nelson also asserted that "[t]his court made a ruling as to whether or not Dwayne Nelson had children." (RT 958.) Not so. The trial court repeatedly noted the limited nature of the 402 proceeding, and consistently characterized its ruling only as a decision on the admissibility of the prison records. (RT 200-201, 206, 958-959.) Far from the issue being settled, during trial, defense counsel stated his intention to impeach Lottie with the prison records if her counsel asked her whether Dwayne had children. (RT 959.)

25/ Wallace offered no explanation as to why this search was made only at the post-judgment stage of the case. At any rate, the detective service's finding – it claimed to have located no records – was unauthenticated and unsworn. (AA 1273, 1274, 1338.)

Even if it had been presented at trial and in admissible form, it could not have shifted the burden of producing evidence on the issue of standing to the defendants. The record shows that after moving back and forth

(continued...)

E. Dwayne Made Statements Showing That He Fathered Three Children. They Were Admissible And Would Have Been Used Had Plaintiffs Made A Prima Facie Case That They Were Dwayne's Heirs.

Because plaintiffs' chose to present no evidence on standing, defendants had nothing to counter, and therefore did not introduce evidence on the issue. That was the appropriate procedure. A defendant is "charged with producing its own evidence as to the matters established" only if a plaintiff meets his "initial burden." (*Smith v. Santa Rosa Police Dept.* (2002) 97 Cal.App.4th 546, 568, internal quotes omitted.) "[I]f a plaintiff presents evidence to establish each element of its case, the defendant has the burden of going forward with its own evidence as to those issues." (*Id.* at 569, internal quotes omitted.) But if a plaintiff "fail[s] to meet the burden of proof cast upon him the defendant would not be required to prove facts and circumstances discrediting the plaintiff's allegation or showing its unlikelihood or improbability. Until the burden is met by the plaintiff the defendant may remain silent." (*Shapiro v. Equitable Life Assur. Soc.* (1946) 76 Cal.App.2d 75, 95.)

Had plaintiffs made any showing whatsoever on standing – which they did not – defendants were prepared to introduce statements by decedent, made to prison officials, that he had fathered three children. As we've seen, defendants were also prepared to call prison officials to lay a foundation for the introduction of those statements, one of whom had

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25/(...continued)
between Tennessee and Chicago, Dwayne settled with Wallace in Chicago when he was 17 or 18, then moved to Atlanta for a couple of years, and then went to live in Los Angeles. (RT 967, 968, 978, 1019; AA 1418-1424, 1427, 1431-1434.) He could have fathered children in any of those places. Searching the records only in Tennessee, and only for the years when Dwayne was between 17 and 22 years old, would appear to be insufficient.

personally taken down Dwayne's statements. (See RT 1270-1273, 1560; AA 775.)

1. The prison records were admissible for the truth of the matters asserted therein.

Various prison records, extending over a ten-year period, record the fact that decedent told prison staff that he had children. Prior to trial, defendants moved under section 402 to establish the admissibility of six such records, wherein decedent told prison staff that he had fathered three children. Prison staff recorded the statements as part of their official duties. Each document states that Dwayne had three children; some state their names and/or sex and that they reside with their mother. This is information that could have come only from decedent. The documents (AA 582-589) are:

- An "Institutional Staff Recommendation Summary," based in part on "a personal interview . . . held with the inmate on 10/7/92," which records that Dwayne stated that he had three children, living with their mother, Barbara Bradford Nelson.

- A printed Department of Corrections' form, dated March 20, 1996, filled out by prison staff, recording that decedent has one female and two male children.

- A printed official form entitled "Identification Worksheet, Next-Of-Kin Notification And Disposition Of Remains, Property And Funds," filled out by prison staff and *signed by decedent* on June 9, 1998, recording that decedent has "3" children.

- A printed official form marked Department of Corrections, Medical History, dated May 11, 1998, on which the number "3" is filled in after the printed word "Children."

- A printed Department of Corrections form entitled Condensed Mental Health Assessment & Treatment Setting Transfer, dated May 3, 1996, based on an inmate interview, noting that decedent "has 3 children in Tennessee w/ little contact."

- A printed Department of Corrections' form entitled Reception Center Mental Health Evaluation, dated May 26, 1998, in which an employee has written "3 children."[26/]

The prison records were admissible to show that Dwayne told prison staff that he fathered children and as evidence of the truth of those statements.[27/]

a. The prison records were admissible to show that Dwayne made the statements recorded therein.

Under section 1280, the official records exception to the hearsay rule, a writing made by a public employee, within the scope of his duty, and as a record of an act or event, is admissible to prove that the act or event occurred. To come within the exception, the writing must be made at or near the time of the act or event and the sources of information and method and time of preparation must indicate trustworthiness. (See *Rupf v. Yan*

26/ Plaintiffs submitted additional prison records (AA 621-650) in which decedent apparently gave different answers to questions about his marital status and the number of his children. The differences may be explained by the different dates of the documents. At any rate, based on the records submitted to the court during the 402 hearing, it appears that Dwayne never told prison officials that he had no children.

27/ This is the usual procedure where there is multiple hearsay. (See Evid. Code, § 1201[where "hearsay evidence consists of one or more statements," each must "meet[] the requirements of an exception to the hearsay rule"]; *People v. Reed* (1996) 13 Cal.4th 217, 224-225 [certified hearing transcript admissible under section 1280 to show what occurred at hearing and under section 1291 (witness unavailability exception) to prove truth of matters to which witnesses testified at hearing].)

(2000) 85 Cal.App.4th 411, 430, fn. 6 [writing admissible under section 1280 if "based upon the observations of a public employee who had a duty to observe facts and report and record them correctly"].)

No one disputes that Dwayne's prison records were official public documents within the meaning of section 1280.[28/] Nor can there be any doubt that an observed act or event includes statements made to public employees. (See *Lake v. Reed* (1997) 16 Cal.4th 448, 461-462 [police report admitted under section 1280 as proof *that plaintiff told the officer* he had been driving his car, although officer had not personally observed plaintiff driving]; *People v. Monreal* (1997) 52 Cal.App.4th 670, 678 [that part of probation report containing "officer's summary of defendant's statement to her" was admissible under section 1280 because statement was "promptly recorded in the probation officer's paraphrase" at or near time it was made and officer's "source of information here was defendant himself"].)

Here, the prison records were made by prison staff acting within the scope of their duties at or near the time they interviewed Dwayne. The documents show that on their face, and there was testimony at the 402 hearing (as there would have been at trial) that the records were based on "personal interviews with the inmate" by prison intake workers who take personal information from the inmate. (RT 146, 148).[29/]

In addition, Evidence Code section 664 establishes a statutory presumption "that official duty has been regularly performed." (*People v. George* (1994) 30 Cal.App.4th 262, 274.) Courts rely on that presumption

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28/ For example, at the 402 hearing, Wallace Nelson's counsel stated that "we don't dispute these are records from the prison system." (RT 151.)

29/ At the 402 hearing, Barbara Ramirez, an 18-year veteran of the Department of Corrections, testified as custodian of records that she was familiar with the prison records. (RT 146-147.) She stated: "I'm a case records analyst, and I review these documents on a daily basis." (RT 147.)

"as a basis for finding that the foundational requirements of Evidence Code section 1280 are met." (*Ibid.*, internal quotes omitted; accord *People v. Martinez* (2000) 22 Cal.4th 106, 125-127 [computer printout of criminal history was made within scope of public employee's duty]; *Shannon v. Gourley* (2002) 103 Cal.App.4th 60, 64 [section 664 creates "rebuttable presumption that blood-alcohol test results recorded on official forms were obtained by following the regulations and guidelines"].)

The prison records also satisfied Evidence Code section 1280's trustworthiness requirement because they show they were "based upon the observations of public employees who have a *duty* to observe the facts and report and record them correctly." (*People v. George*, *supra*, 30 Cal.App.4th at 273-274.) The court can infer that the public employee accurately recorded the event solely from "the presumption that public officers do their duty. . . . It is the influence of the official duty, broadly considered, which is taken as the sufficient element of trustworthiness, justifying the acceptance of the hearsay statement." (*Gananian v. Zolin* (1995) 33 Cal.App.4th, 634, 640, fn. 4, internal quotes omitted; *Wilson v. Zolin* (1992) 9 Cal.App.4th 1104, 1107-1108 [error to exclude blood-alcohol test report under section 1280, because court "ignored the presumption stated in Evidence Code section 664, which . . . necessarily satisfied DMV's initial burden of proving indicia of trustworthiness"].)

Here, there was no motive for prison staff to invent information; indeed, the Department of Corrections relied on these records if decedent was injured or died. And Dwayne signed one of the documents himself.[30/]

30/ The prison records were also admissible under the business records exception in Evidence Code section 1271. (*People v. Hayes* (1971) 16 Cal.App.3d 662, 668; *People v. Lopez* (1963) 60 Cal.2d 223, 254, cert. den. (1964) 375 U.S. 994 [84 S.Ct. 634, 11 L.Ed.2d 480], overruled on other grounds in *Donaldson v. Superior Court* (1983) 35 Cal.3d 24.) Under that section the proponent must show that the writing was made in the regular

(continued...)

b. The prison records are admissible as proof that in fact decedent fathered children.

If independently admissible, statements in an official record may be introduced to prove both that the statements were made and that they were true. (E.g., *Lake v. Reed, supra,* 16 Cal.4th at 461-462 [police report admissible to show *not just* that plaintiff *told* officer he was driving, but to prove plaintiff *was* driving, because statement was separately admissible as party admission]; *Rupf v. Yan*, *supra*, 85 Cal.App.4th at 430, fn. 6.)

Here, the truth of Dwayne's statements are admissible under each of two exceptions to the hearsay rule. Evidence Code section 1227 provides:

> Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action for wrongful death brought under Section 377 of the Code of Civil Procedure.

Here, decedent's statements are being offered "against the plaintiff[s] in an action for wrongful death."

Evidence Code section 1310 excepts from the hearsay rule statements "by a declarant who is unavailable as a witness concerning" a parent and child relationship or a relationship by blood or marriage. (§ 1310, subd. (a).) The statement may be rejected only if it "was made under circumstances such as to indicate its lack of trustworthiness." (§ 1310, subd. (b).)

Here, Dwayne had personal knowledge of the matter declared and no motive to lie, and there was no controversy regarding the matter. (See Cal.

30/(...continued)
course of a business and produce a qualified witness to testify to its identity and mode of preparation.

Significantly, at the 402 hearing, Wallace's counsel admitted that "these are records from the prison system" (RT 151, 164) and Lottie's counsel stated "no one is contesting" their authenticity or that they are admissible "on the business records exception" (RT 172, 180-181, 183).

Law Revision Com. coms., 29B pt. 4 West's Ann. Evid. Code (1995) foll. § 1310, p. 402.)

2. The court erred in ruling that the prison records were not admissible to prove the truth of Dwayne's statements.

The court held that the prison records were not admissible because they "are not sufficient, not trustworthy enough." (RT 208, 213.) But that question was for the jury.

Trustworthiness is for the court to decide only if it is a threshold requirement for bringing evidence within a hearsay exception. (Cf. *People v. Gonzales* (1990) 218 Cal.App.3d 403, 413-414.) While trustworthiness is a threshold requirement under Evidence Code section 1280, the inquiry is a narrow one: Did the public employee accurately record the event or statement?

Here, the trial court accepted that the prison staff had accurately copied down Dwayne's words. It could not have done otherwise: Accuracy is assumed based on "the presumption that public officers do their duty." (*Gananian v. Zolin*, *supra*, 33 Cal.App.4th at 639-640 & fn. 4.) And no evidence was ever introduced to overcome the presumption that prison officials correctly recorded Dwayne's statements.

Rather, the court was concerned with the truth of what Dwayne told the prison staff, i.e. with Dwayne's reliability as a witness.[31/] But that is a

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31/ The court noted that the prison records showed that (1) Dwayne stated "he was single and that he was married and that he was divorced, that he had no kids, that he had one kid, that he had two kids, they he had three" and (2) he suffered from hallucinations and was a narcotics addict. (RT 207.) It was "those representations" that the court found "totally unreliable." (RT 958-959.) Far from doubting that prison staff accurately recorded Dwayne's words, the court relied on the accuracy of the prison records in concluding that Dwayne was an untrustworthy witness.

matter for the jury. Trustworthiness in that sense is not a threshold requirement under section 1280. And trustworthiness is in no sense a threshold requirement under section 1227. Therefore, Dwayne's statements were admissible for their truth; any inconsistencies in the evidence went to its weight, not its admissibility.[32/]

This Court need go no further in this brief. Plaintiffs' total failure to carry their burden of proof on standing compels reversal with directions to enter judgment for defendants.

II. THE JUDGMENT MUST BE REVERSED BECAUSE PLAINTIFFS FAILED TO PROVE CAUSATION TO A MEDICAL CERTAINTY.

Plaintiffs contended that Dwayne died from positional asphyxia due to the use of the TARP. Plaintiffs were required to prove that contention to a reasonable medical probability. That meant plaintiffs had to prove by competent medical testimony that Dwayne was more likely to have died from positional asphyxia than from causes unrelated to the tarping. To meet this burden, plaintiffs offered the testimony of Dr. John Cooper.

While he testified that Dwayne died from positional asphyxia, Dr. Cooper also validated several alternatives that constitute reasonable causal

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32/ The court also ruled that the probative value of the prison records was substantially outweighed by their prejudice under section 352. (AA 738.) Under section 402, a court only "decide[s] preliminary questions of fact upon which the admissibility of evidence depends" (*People v. Superior Court (Blakely)* (1997) 60 Cal.App.4th 202, 209, fn. 6), and its ruling "is not binding on the trial court if the subject evidence is proffered later in the trial" (*People v. Williams* (1997) 16 Cal.4th 153, 196). The rulings certainly would have been reconsidered, if plaintiffs had produced any evidence that Dwayne died without children. And the record seems to reflect that fact. (See RT 959.) Moreover, the court's ruling was an abuse of discretion; a decedent's own statements cannot be considered prejudicial just because they are conflicting.

explanations for Dwayne's sudden death during the application of the TARP. Cooper admitted that cocaine use and excited delirium could each independently cause sudden death – without regard to any effect of the TARP. Dwayne had a deformed artery, and Cooper testified that such coronary anomalies were associated with sudden death. Dwayne had high blood pressure, and one defense expert gave uncontested testimony that such hypertension can also cause sudden death.[33/]

And these alternatives were consistent with the coroner's finding that Dwayne's "sudden death" resulted from "ischemic heart disease" due to "congenital aberrant right coronary artery origin," with a contributing factor of cocaine use, and that "restraint procedures did not play a significant or contributory role in his death." (AA 1376-1377, 1384.)

Cooper's testimony did not prove that positional asphyxia was more likely the cause of Dwayne's sudden death than any of these alternative causes. Therefore, plaintiffs failed to elevate the possibility that Dwayne died from positional asphyxia to a medical probability – and thus failed as a matter of law to prove causation.

Indeed, Cooper failed to prove that positional asphyxia was even a possible cause of Dwayne's death, because he was not competent to give an expert opinion on the matter. He did not perform Dwayne's autopsy, and did not review the slides of his heart and body tissues. There was no showing that he had any personal experience regarding asphyxia due to use of a total appendage restraint. He relied on articles that he could not name and general training he did not describe. The one publication he identified by name was superceded – its author recanted the very conclusion on which Cooper based his opinion.

33/ Cooper acknowledged that a significantly enlarged heart could cause sudden death, but he asserted that Dwayne's heart was not significantly enlarged.

Plaintiffs also contended that the deputies were negligent in the manner in which they applied CPR after Dwayne died. Here, too, plaintiffs failed to show causation to a medical probability; Cooper merely speculated that CPR could reverse positional asphyxia – he said it was "possible." As we show below, a mere possibility does not prove causation.

A. In A Wrongful Death Or Personal Injury Action, The Plaintiff Must Prove Causation To A Medical Probability Or His Case Cannot Go To The Jury.

1. The plaintiff has the burden of proving causation.

Plaintiffs suing for tort damages have the burden of proof on causation, and must show that the defendant's wrongful conduct "was a substantial factor in bringing about the plaintiff's harm." (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 481.) That rule applies in wrongful death cases; indeed, causation is written into the statute; under section 377.60, the cause of action that may "be asserted" is one for "the *death* of a person *caused by* the wrongful act or neglect of another." (See *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1497, 1507, emphasis added ["plaintiff must prove the defendant's conduct was a substantial factor *in causing the decedent's death*. The Legislature has not extended the statutory cause of action to permit recovery where this predicate is not established"].)

2. The plaintiff must prove causation by expert medical testimony.

"[M]edical causation can only be determined by expert medical testimony." (*Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222

Cal.App.3d 379, 385.) Where that is the issue, the jury is "necessarily dependent, at least to some extent, on the opinions of experts; the causation issue must necessarily be determined by reliance on knowledge 'sufficiently beyond common experience.'" (*Nash v. Prudential Ins. Co. of America* (1974) 39 Cal.App.3d 594, 598, quoting Evid. Code, § 801.)

The jury cannot be left to speculate. "In California, causation [in personal injury action] must be founded upon expert [medical] testimony and cannot be inferred from the jury's consideration of the totality of the circumstances unless those circumstances include the requisite expert testimony on causation." (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1384-1385, 1386.)

3. A medical expert must prove causation to a reasonable medical probability by excluding all other reasonable causal explanations.

"The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case." (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402.)

It is not sufficient for an expert simply to ascribe a causal connection between negligence and death; he must exclude other possible causes. "That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause *only* becomes 'probable' when, *in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action.* This is the outer limit of inference upon which an issue may be submitted to the jury." (*Jones v.*

Ortho Pharmaceutical Corp., supra, 163 Cal.App.3d at 403, emphasis added.) And "more likely than not" means "something more than a '50-50 possibility.'" (*Bromme v. Pavitt, supra*, 5 Cal.App.4th at 1504, fn. 3.)

Even where an expert purports to testify to a medical certainty, that is not enough; he must exclude other "reasonable causal explanations." (E.g., *Cottle v. Superior Court, supra*, 3 Cal.App.4th at 1384, 1385-1386 [expert testimony that changes exhibited by plaintiffs "indicating an increased probability of infection" are "in all probability related to living in close proximity to chemicals in the environment" did not prove causation to a medical probability because testimony did "not tie the changes to the chemicals at the [subdivision] as separate from other chemicals in the environment," internal quotes omitted].)

Expert medical testimony "can enable a plaintiff's action to go to the jury only if it establishes a reasonably probable causal connection between an act and a present injury." (*Jones v. Ortho Pharmaceutical Corp., supra*, 163 Cal.App.3d at 403 [granting non-suit because insufficient evidence to prove causation].) "If the experts cannot predict probability in these situations, it is difficult to see how courts can expect a jury of laymen to be able to do so." (*Ibid.*, internal quotes omitted.)

B. Plaintiffs' Expert Witness Did Not Prove A Causal Connection Between The Tarping And Dwayne's Death To A Medical Probability. At Most, He Showed That Dwayne Was As Likely To Have Died From Causes Unrelated To The Tarping As From Positional Asphyxia.

1. Plaintiffs contend that Dwayne died of positional asphyxia.

Throughout this litigation, plaintiffs have advanced a single theory as to how the use of a TARP caused Dwayne's death: "[T]he decedent's cause of death was suffocation, and/or 'positional asphyxia,' due to the use of the total appendage restraint [or hogtie] upon decedent." (AA 6; RT 496-497, 501, 510, 720, 728.) That is what plaintiffs argued to the jury. And, as we show below, that is what plaintiffs' expert witness identified as the cause of Dwayne's death.

2. Plaintiffs' medical-causation expert failed to prove that Dwayne was more likely to have died from positional asphyxia than from other medical causes that also explain his sudden death.

Plaintiffs only evidence of causation was the testimony of Dr. John Cooper. He testified that Dwayne died from positional asphyxia as a result

of being placed in the hogtie position as part of the tarping process. (RT 720-724, 728, 733.)[34/] [35/]

However, Cooper himself showed that positional asphyxia was not the only reasonable causal explanation for Dwayne's death. Rather, Cooper conceded Dwayne could have died suddenly from other causes that fit the facts of this case and are unrelated to the tarping. Thus, he failed to testify to the cause of Dwayne's death "with any reasonable degree of medical certainty" (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487) or to prove it "within a reasonable medical probability" (*Jones v. Ortho Pharmaceutical Corp.*, *supra*, 163 Cal.App.3d at 402-403). Therefore, the issue of causation should not have been sent to the jury, because Cooper's testimony shows that Dwayne could have died from some or all of the following causes:

Death from cocaine use and excited delirium. It is undisputed that at the time Dwayne was tarped, he was high on cocaine and suffering from excited delirium. (RT 575, 636-638, 812-813, 1068, 1202-1204, 1213-1214; AA 1376-1377, 1386.) Dr. Cooper fully concurred. (RT 730-733, 748, 757.)[36/]

34/ We show in Section C below that Dr. Cooper failed to show that positional asphyxia was even a possible cause of Dwayne's death.

35/ According to Cooper, "asphyxia is a cause of death in which not enough oxygen gets to the vital organs." (RT 720.) And in positional asphyxia, "you have kind of a combination of things that actually interfere with the breathing process itself." (RT 720-723.)

36/ According to Cooper, excited delirium is "basically an unusual but certainly not rare response to the drug cocaine," especially crack cocaine, in which people "become very agitated, excited. They – they begin acting irrationally and this usually goes along with kind of an increase in metabolism of the heart is pounding. They get excited. They're breathing fast, and they tend to have also an elevated body temperature, and sometimes the elevated body temperature itself can put them at risk." (RT 732-733.)

Cooper testified that the use of cocaine or being under its influence "in and of itself [can] cause sudden death." (RT 747, 786.) So, too, according to Cooper, can the state of excited delirium. (RT 732-733, 747-748, 786.) Plaintiffs' police tactics expert concurred. (RT 637-638.)

Therefore, Cooper ruled in but failed to rule out cocaine use or excited delirium, or both, as reasonable causal explanations for Dwayne's sudden death.

Death from heart disease due to anomaly in decedent's right coronary artery. It is also undisputed that Dwayne had an anomaly or deformation in his right coronary artery. (RT 734-736, 749, 751, 755; AA 1367 et seq.) As Dr. Cooper testified, Dwayne's autopsy showed that he had "an anomalous coronary artery configuration," and that it "was attributed by the coroner's office as the cause of death." (RT 736.) Cooper acknowledged the legitimacy of this determination:

> [I]t is certainly a valid point that needs to be discussed because in point of fact there have been otherwise unexplained death [*sic*] in people who have then a normal autopsy and then they had this particular abnormality in the origin of the right coronary artery.

(RT 736.)

Cooper also conceded that "these coronary anomalies can be associated with sudden death." (RT 786.) Nonetheless, he asserted that in his opinion, the artery anomaly "didn't play a factor" in Dwayne's death because, first, he was "put in a position that is classic for restraint asphyxia," and therefore, "we have a known cause for death"; and, second, he "lived for 41 years without ever having any symptoms . . . from this abnormal coronary artery origin." (RT 736-737.)

The first reason is totally circular. It depends on accepting that positional asphyxia was the "known cause for death" when that is the very issue plaintiffs need to prove. "A possible cause *only* becomes 'probable'

when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." (*Jones v. Ortho Pharmaceutical Corp., supra*, 163 Cal.App.3d at 403, emphasis added.) But positional asphyxia is only the probable "known cause for death" in "the absence of other reasonable causal explanations." Thus, Cooper has things backwards: Positional asphyxia only becomes the "known cause of death" if Cooper independently excludes the coroner's explanation for Dwayne's death – his aberrant right coronary artery plus the contributing factor of cocaine.

The second reason is not supported by competent evidence. For one thing, Cooper was not qualified to opine that the absence of symptoms from his artery condition meant it was not the cause of Dwayne's death; Cooper never encountered Dwayne's type of heart anomaly in an autopsy, never wrote any papers "on this type of anomaly,"and did not consult any article or publication in opining on the matter. (RT 750-751.) For another, Cooper's opinion contradicts his own testimony that the artery condition can surface for the first time after death: "[I]n point of fact there have been otherwise unexplained death [*sic*] in people who have then a normal autopsy and then they had this particular abnormality in the origin of the right coronary artery." (RT 736.)

Finally, there is nothing in the record to support the assertion that Dwayne had no symptoms from his artery condition during his 41 years. An expert cannot create his own facts, but may reach conclusions "only . . . on the basis of the established facts." (*Leslie G. v. Perry & Associates, supra,* 43 Cal.App.4th at 487.)

In short, Dr. Cooper ruled in without successfully ruling out Dwayne's deformed artery as the cause of his sudden death.

Death from enlarged heart. It is undisputed that Dwayne had an enlarged heart. (RT 734-736, 749, 751, 755; AA 1367.) Cooper testified

that an enlarged heart can by itself cause sudden death, if it is "significantly enlarged." (RT 747, 758.)[37/] However, Cooper opined that Dwayne's heart was only "mildly enlarged," and therefore the condition "did not play[] a factor" in his death. (RT 735.)

If Dwayne's heart was significantly enlarged, then according to Cooper's own testimony, that condition was yet another possible, independent cause of Dwayne's death. Cooper's assertion that Dwayne's heart was only mildly enlarged depends on the baseline for normal in a person of Dwayne's size. It was uncontested that Dwayne's heart weighed 425 grams. (RT 735; AA 1367, 1373.) Cooper testified that the upper limits of normal for a person of Dwayne's size was 380 grams, or "maybe 400 grams." (RT 735, 746.) The autopsy report stated that the "normal heart weight for [Dwayne's] body length" was 349 grams. (AA 1367.)

But Cooper's contrary conclusion as to normal heart weight is not based on reliable data. Here's the relevant testimony:

> Q. And from what source do you conclude or come to the opinion that 380 is normal?
> A. That is from whichever textbooks I was trained on.
> Q. You don't have an independent recollection what that one is by chance, do you?
> A. No.

(RT 746-747.)

Thus, Cooper was unable to show that his conclusion was based on reliable data. "[A]ny material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] . . . [T]he expert's opinion is no better than the facts on which it is based." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Yet, here, there was no means to test the reliability of Cooper's sources. "It is proper to draw from an expert testimony showing

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37/ Dr. Fishbein agreed: "[O]ne of the strongest factors [associated with an increased risk of sudden death] is enlarged heart or hypertrophy of the heart." (RT 1131-1133.)

whether he has relied on or considered any authority in formulating his opinion and, if he has done so, to confront him with it if it contradicts him [citation]; and to cross-examine him on any books he may have used in forming it." (*Hope v. Arrowhead & Puritas Waters, Inc.* (1959) 174 Cal.App.2d 222, 230-231.)

Cooper's inability to identify his sources rendered his assertion that Dwayne's heart was only mildly enlarged untestable and therefore inadmissible. What remains is his admission that a significantly enlarged heart can cause sudden death, and the opinions of the coroner and the defense experts that Dwayne's heart was significantly enlarged.[38/]

3. The jury was improperly allowed to speculate about causation.

Even if positional asphyxia were a possible cause of Dwayne's death – and we show below that plaintiffs failed to prove even that – plaintiffs must elevate that possibility to proof within a "reasonable medical probability." (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 133 ["(e)vidence of causation must rise to the level of a reasonable probability"].) Thus, their "expert may not base his opinion on conjecture but may identify a causative force by a process of eliminating other causes." (*People v. Sundlee* (1977) 70 Cal.App.3d 477, 484.)

38/ The baseline number for a normal heart weight used in the autopsy report was supplied by Dr. Fishbein, acting as a consultant to the coroner, long prior to any litigation. (RT 1130.) Fishbein testified to extensive training and credentials in the field of heart disease, including significant involvement in research and publication (RT 1102-1109); in contrast, Cooper cited no special training or credentials in that field, and no research or publications. Fishbein insisted that Dwayne's enlarged heart was significant (RT 1130) and Dr. Neuman testified that "even using Dr. Cooper's numbers, [Dwayne's] heart is enlarged by 15 percent" and using the autopsy numbers, "by 25 percent. This is hardly mildly enlarged." (RT 1287.)

Here, Dr. Cooper did precisely the opposite; he *expanded* rather than eliminated the alternative hypotheses for Dwayne's death. Yet, causation must be proved to a medical probability; that level of proof "is the outer limit of inference upon which an issue may be submitted to the jury." (*Jones v. Ortho Pharmaceutical Corp., supra*, 163 Cal.App.3d at 403.)

C. Plaintiffs Failed To Prove That Positional Asphyxia Was Even A Possible Cause Of Dwayne's Death.

Dr. Cooper's conclusion that Dwayne died from positional asphyxia was not based upon *competent* expert testimony, because it was not based on facts in the record, reliable sources or special expertise. "Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions." (*People v. Lawley* (2002) 27 Cal.4th 102, 132, internal quotes omitted.)

Dr. Cooper was a last-minute replacement for the medical expert plaintiffs had initially designated. (AA 753, 773; RT 222 et seq.) As we show below, he was not qualified or prepared to testify on positional asphyxia due to tarping.

1. Dr. Cooper was not qualified to give an opinion on whether Dwayne died from positional asphyxia due to the use of the TARP.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) However, "[t]he test in each case is whether the witness has

sufficient skill or experience *in the particular field* so that his testimony would be likely to assist the jury in the search for the truth." (*Salasguevara v. Wyeth Laboratories, Inc., supra*, 222 Cal.App.3d at 385, emphasis added.)

Here, Dr. Cooper claimed he was qualified to opine that Dwayne died from positional asphyxia because "I'm basing it on my own experience in positional asphyxia, which has lots of other causes besides restraint, and the literature and just general training as part of preparing for the board examinations to be well versed in all sorts of asphyxia." (RT 765.) In fact, Cooper had no real training or experience in positional asphyxia due to the use of the TARP or hog-tie and no direct experience of Dwayne's death. Thus:

- Cooper did not perform or observe the autopsy of Dwayne Nelson. (RT 743.) Yet, as Cooper admitted, an autopsy provides the optimal conditions for determining cause of death. (*Ibid.* [the "best time to do an autopsy is initially, and the best information comes from the autopsy"], 749.)

- Cooper never reviewed the slides of Dwayne's heart or other body tissues. (RT 748.)[39/]

- Although Cooper performed or consulted on some 1500 autopsies, he never saw a coronary anomaly like the one Dwayne had. (RT 750.)

- Cooper's supposed hands-on experience with positional asphyxia as a result of restraint involved at most two autopsies, and maybe none at all. In the two autopsies – performed as a family-retained consultant – he concluded that death was caused by positional asphyxia as a result of restraint, but his opinion was directly contrary to the coroner's

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39/ "[O]ne of the two most important things that he could look at," according to defense expert Dr. Neuman. (RT 1289.)

"conclusion of a heart-drug combination as cause of death." (RT 762-766.) This cloud on his credentials is undoubtedly why Cooper stressed his "experience in positional asphyxia" in regard to "other causes *besides restraint.*" (RT 765, emphasis added.)

- Cooper has never been published on the subject of positional asphyxia, nor has he done any "research in this particular area of hog-tie and resulting in positional asphyxiation." (RT 765.)

In *People v. Catlin* (2001) 26 Cal.4th 81, a doctor was held qualified to testify that defendant's mother had died from paraquat poisoning, although he lacked previous experience with that poison. Citing the general rule that "the pathologist who conducts an autopsy generally is permitted to testify as to cause, means, and time of death," the court stressed that the expert performed decedent's autopsy and relied on "laboratory results performed by other professionals," including the "toxicology report disclosing the presence of paraquat" in decedent. (*Id.* at 132-133.)

Here, in contrast, Cooper did not perform the autopsy on Dwayne, did not review the slides of Dwayne's heart or other body tissues and did not rely on – indeed, rejected – the laboratory results and findings in the coroner's report.

Notwithstanding his other credentials, Cooper was not qualified "by force of special knowledge, experience or education" to opine on the cause of Dwayne's death. (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1080-1081 [although doctor performed approximately 100 heart catheterizations using PE-280 tubing, and "was an expert in the fabrication and use of the catheter," he was not qualified to give opinion about defect in catheter walls "which could not be detected by him on examination"].)

2. Dr. Cooper did not base his opinion on the cause of Dwayne's death on reliable evidence.

An expert's opinion is not admissible unless based on reliable evidence. (Evid. Code, § 801, subd. (b); *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135 [if based "upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value"].) If based "on information furnished by others, the opinion will be of little value unless the source is reliable." (1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 31, p. 561.)

What are Cooper's reliable sources? There are none. As we've shown, he can't rely on his own experience, since he did not perform Dwayne's autopsy and at best encountered restraint asphyxia in two autopsies on which he functioned as a consultant representing family members. (RT 762-766.) That does not constitute sufficient experience to support his testimony. (See *Porter v. Whitehall Laboratories, Inc.* (7th Cir. 1993) 9 F.3d 607, 614, fn. 6 [rejecting medical experts's claim of first-hand experience when he testified that he had "encountered only about five cases of anti-GBM RPGM in his career"].)

Moreover, Cooper could not rely on this supposed autopsy experience because he made no effort to connect it to the facts of this case. (See *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1526-1527 [rejecting testimony where expert made "no effort to show any connection" between experiment with shower head similar to one that injured plaintiff and experts' opinion as to hotel's maintenance obligations]; *Solis v. Southern Cal. Rapid Transit Dist.* (1980) 105 Cal.App.3d 382, 390 [no adequate foundation when expert conclusion based on experiment not shown to be under "substantially the same" conditions as accident].)

Nor can Cooper rely on published sources to support his opinion. Cooper claimed to have relied on articles in pathology books and

publications, but he identified only one by name – an article by Dr. Donald Reay, written in 1988, which Cooper referred to as "the hallmark article" that "forms the foundation for anyone's fundamental knowledge about this sort of phenomenon." (RT 767-768, 780.) Yet, when confronted with a later publication in 1998 in which Reay recanted his earlier conclusions – and thereby removed the foundation for Cooper's opinion – Cooper insisted that Reay's original article "is not the article that's most important here." (RT 770-771, 777-778, 781-782.)[40/] Yet, Cooper could not give the name or author of that "most important" article. Rather, he testified: "[T]he article that is of most importance – and I forgot the exact title, but it is 'restraint asphyxiation in police custody' or something to that nature." (RT 778.)

This won't do. "Once an expert offers his opinion . . . he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert . . . may be 'subjected to

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40/ Based on a first-time reading of Dr. Reay's 1998 textbook chapter during a ten-minute court break, Dr. Cooper categorically denied that Reay had recanted his previous opinion, although Cooper conceded that Reay in fact wrote that the hog-tie position does not produce any serious or life-threatening respiratory effects. (RT 771-772, 781-783, 788-789.)

If Cooper's testimony is taken at face value, none of this may matter; as we've shown in the text, Cooper claimed that Reay's original article "is not the article that is most important here." But to the extent that the admissibility of Cooper's opinion depends at all on Reay's original article, the court must determine whether that article remains a reliable source given Reay's 1998 book chapter. And that foundational question is a matter of law for the court to determine based on all the evidence (see *Korsak v. Atlas Hotels, Inc.*, supra, 2 Cal.App.4th at 1524-1525), which includes the testimony of defense experts that in that chapter, Reay disclaimed the view that "hog-tying causes positional asphyxia" (RT 1291) and recanted what he originally wrote about positional asphyxia (RT 1175-1178).

The trial court did not make that determination, stating that "I'm not even sure I'm going to understand what is in that article to be honest with you, and I don't have the time to read it." (RT 789-790.) Instead, the court told defense counsel to impeach Cooper through his own witnesses. (RT 789-790, 1391-1393.) Therefore, this Court must independently determine the matter; in doing so, it must consider the record as a whole. (Cf. *Roddenberry v. Roddenberry, supra*, 44 Cal.App.4th at 652, 654.)

the most rigid cross examination' concerning his qualifications, and his opinion and its sources." *(Hope v. Arrowhead & Puritas Waters, Inc., supra*, 174 Cal.App.2d at 230.)

How can the court determine the reliability of Cooper's sources if Cooper can't identify them when asked on cross-examination? How can the court determine that his sources are "of a type that reasonably may be relied upon by an expert in forming an opinion" as required by Evidence Code section 801? It obviously can do neither. Cooper's total lack of preparation defeats defendants' statutory right to "fully cross-examine[]" the expert as to "the matter upon which his or her opinion is based and the reasons for his or her opinion." (Evid. Code, § 721, subd. (a); *People v. Odom* (1980) 108 Cal.App.3d 100, 115 [expert may "be *fully cross-examined*" on "treatises, learned documents, textual material [he] relied upon"]; *Korsak v. Atlas Hotels, Inc., supra*, 2 Cal.App.4th at 1526 [rejecting as unreliable expert's sample based on "unknown sources" whose authenticity, reliability or representative nature "are totally undeterminable based upon [expert's] testimony"]; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 133-134 [what security expert "learned from an unidentified contact in an unidentified police department scarcely constitutes the sort of material that may be reasonably relied upon by an expert in forming his opinion"].)

3. Dr. Cooper's opinion was not based on facts in the record.

"'While an expert may, in his area of expertise, reach conclusions beyond the ken of the ordinary layman, he may only do so on the basis of the established facts. *He may not himself create the facts upon which the conclusion is based.*'" (*Leslie G. v. Perry & Associates, supra,* 43 Cal.App.4th at 487.)

There are insufficient facts in the record to permit Dr. Cooper to opine that Dwayne died of positional asphyxia due to the use of the TARP. That is why he based his testimony on generalities about tarping unconnected to any evidence regarding Dwayne. First, he testified that positional asphyxia is where "you have a kind of a combination of things that actually interfere with the breathing process itself." (RT 721.) From there, he leaped to the conclusion that "in the particular instance of Mr. Nelson, the breathing process is interfered with in multiple steps." (*Ibid.*) But Cooper cannot back this up with facts.

To begin with, he actually dismissed the notion that there had been any significant actual blockage of Dwayne's airwaves due to the application of the TARP. Cooper noted that Dwayne's face was against the ground, and "at one point one of the officers has a knee on his head," and he concluded that "there is probably some small elements in this case of actual obstruction of the airways," but "that is not the main problem." (RT 722.)

Cooper then described "the main problem": "[T]he chest has to expand and contract" and in tarping "the chest can't expand diaphragmatically and it can't expand with intercostal muscle action," and the hog-tying procedure "just accentuates these other elements of the chest not being able to expand." (RT 722-724.) That, Cooper concluded, "is why the hog-tying procedure is so dangerous because it really locks in that fixedness of the chest cavity. And so this is what positional asphyxia is in this restraint context." (RT 724.)

However, "what positional asphyxia is in this restraint context" doesn't prove that in this case, Dwayne died because of positional asphyxia due to the use of the TARP. Even plaintiffs' police tactics expert David Dotson refused to make that connection:

> Q. As far as positional asphyxiation is concerned, your belief is that Mr. Nelson died of positional asphyxiation from that which you have read in conjunction with the tarping.

Is that an accurate statement?

A. I cannot draw that conclusion.

(RT 640.)

As Dotson plainly knew, every use of a TARP does not result in death from positional asphyxia. Indeed, the uncontested evidence shows that death from tarping is extremely rare. (RT 1182-1183.)

And Cooper repeatedly failed to provide a nexus between his testimony about the general dangers of the restraint procedure and the specific facts of Dwayne's tarping. For example, plaintiffs repeatedly stressed that the deputies placed their weight on Dwayne in applying the TARP. Indeed, in his opening statement, Lottie's counsel singled that fact out as the cause of Dwayne's death. (RT 502, 503.) But Cooper didn't assign that fact much of a role in reaching his opinion that Dwayne died of positional asphyxia:

> It is a factor. Although *it is difficult to know* exactly how much weight was applied to Mr. Nelson's back, but *presumably* the officer kneeling on the back is certainly applying additional forces that inhibit the expansion of the chest, but even though in the weight of the officers, *it is hard to say how much weight is actually being applied.* We just know that *some was*.

(RT 732, emphasis added.)

"Some weight" is inevitably applied in every tarping. So what? That does not show why Dwayne's tarping was the cause of his death.

Dwayne weighed approximately 243 pounds. (AA 1385; RT 809.) Plaintiffs stressed that fact as well. (RT 595, 731-732, 810.) Did that prove that Dwayne's death was caused by the tarping? All Cooper could state was that a person's weight was a "predisposing factor to restraint asphyxia." (RT 731-732.) But, as we've already seen, Dwayne's weight – not to mention his cocaine use, enlarged heart, hypertension and excited

delirium – also disposed him to sudden death from causes wholly unrelated to the tarping.

D. There Was No Proof To A Medical Certainty That The Manner In Which The Deputies Applied CPR Caused Dwayne's Death.

Plaintiffs contended that the deputies were negligent in the manner in which they applied CPR. (RT 497-499; 510-511.)[41/] However, plaintiffs totally failed to prove to a medical certainty that had the deputies properly applied CPR, it could have reversed Dwayne's death from positional asphyxia. Their medical expert Dr. Cooper did not even pretend to do more than speculate:

> Q. Based on your review and experience and training, could a proper attempt to administer C.P.R. reverse positional asphyxiation?
> Mr. Gonzales: Speculation.
> The Court: Answer based upon his education and experience.
> Mr. Terrell: Yes.

41/ The evidence for this contention was itself not substantial. Significantly, David Dotson, plaintiffs' police tactics expert, did not even testify on the matter. Dr. Cooper claimed that "it took [the deputies] a minute and a half to actually start any kind of CPR, and after when they did start CPR, they still had his arms cuffed behind him which makes it very, very difficult to get perfected chest compression." (RT 738.) He concluded that "I did note what I felt to be a lack of sense of urgency." (RT 739.) The deputies and defense experts denied any improper or harmful delay. (RT 831-832, 1074-1078, 1289-1290.) At any rate, as we show below, there is no evidence that Cooper had any special knowledge, education or training as to CPR; for example, he testified that "people that have been trained in first aid of any kind generally jump right on it" (RT 740), but there was no showing that Cooper was himself trained in first aid, or indeed how a trained person would apply the concept of "jump[ing] right on it" to a criminal suspect high on cocaine. In fact, Cooper virtually admitted he was not testifying as an expert when he volunteered that "probably you don't need special expertise to look at the videotape and kind of pick this up. There is kind of a -- a leisurely approach to resuscitating him." (*Ibid.*)

The Witness: It is *possible*.

(RT 740, emphasis added.)

Indeed, Cooper did not even go that far in regard to the facts of *this case*; he never testified that it was even possible that *Dwayne* could have been revived by CPR. Rather, he admitted that he was not able to make a specific determination as to the conditions of Dwayne's CPR: "I couldn't tell from the tape really because it was dark how much actual chest compression they [the deputies] were getting, but it couldn't have been optimal." (RT 741.) And there was no showing that Cooper had any special knowledge or training to allow him to opine on either the administration or likely effect of CPR.[42/]

E. In Closing Argument, Plaintiffs Effectively Conceded Cooper's Failure To Prove Causation And Invited The Jury To Speculate On What Caused Dwayne's Death.

Lottie's counsel acknowledged that causation was the key issue in the case. (RT 496, 1415.) He told the jury the bare bones of Dr. Cooper's conclusion that Dwayne died of positional asphyxia. (RT 1425.) But, otherwise, on the causation issue, he relied on and urged the jury to "read Exhibit 8." (RT 1421-1422, 1425.) Wallace's counsel also enlisted Exhibit 8 to prove causation. (RT 1447.)

42/ Compare Cooper's lack of special training or credentials to Dr. Neuman, who is a specialist in and teaches pulmonary medicine and advance cardiac life support. (RT 1244-1252.) Dr. Neuman disputed Cooper's assertions regarding CPR, and, unlike Cooper, explicitly testified on the question of medical probability, opining that "regardless of the effectiveness or ineffectiveness of the CPR, in this case it never achieved the points where more likely than not Mr. Nelson would have survived." (RT 1283-1284, 1289-1290.)

Exhibit 8 is a policy memorandum entitled "Defensive Tactics Hobble" prepared by the Los Angeles County Sheriff's Department. (PNL 8-2.) It cannot serve as evidence of causation; as we've seen, medical causation can only be determined by expert medical testimony. Moreover, Exhibit 8 states that defendants with "cocaine psychosis" or "excited delirium" are "high risk and must be closely monitored especially after the hobble has been applied." (PNL 8-3.) It did not and could not prove that Dwayne died because of positional asphyxia; just because death could result from tarping – which is the *most* Exhibit 8 shows – doesn't mean it happened here. Indeed, in recognizing that "[a] suspect experiencing either cocaine psychosis or excited delirium is already experiencing . . . "[a]n accelerated heart rate [and] [i]ncreased blood pressure" (PNL 8-4), Exhibit 8 is consistent with Cooper's testimony that those conditions could independently have caused Dwayne's death.

Wallace's counsel also made only fleeting use of Cooper's testimony, arguing that Cooper "explained to you about positional asphyxiation and what it is and how it works, especially with a man with a potted belly and how it is difficult to breath." (RT 1449.) That was it. Instead, Wallace's counsel invited the jury to speculate on the matter of causation "from any first aid you have ever read about or done, any knowledge that you have of the human body just living in the world." (RT 1449.)

This flies in the face of the requirement that causation must be proved to a medical probability. But counsel had little choice – Cooper's testimony wasn't sufficient to prove Dwayne died of positional asphyxia.

Lottie's counsel also invited the jury to speculate about the effect of the deputies administration of CPR. He stressed not what Cooper said on the matter – merely noting that Cooper "talked about the manner they applied CPR"– but what defense experts supposedly didn't say, arguing that

there was not "a single shred of testimony from any of their high-priced experts on CPR." (RT 1416-1417, 1418-1419, 1425-1426.)

F. None Of Cooper's Opinions On Causation Rise To The Level Of Substantial Evidence.

Even were Cooper's expert testimony admissible – and, as we've shown, it has *no* evidentiary value– it plainly doesn't rise to the dignity of substantial evidence. (*Roddenberry v. Roddenberry, supra,* 44 Cal.App.4th at 651-654.)

"Substantial evidence is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citations.] [It] . . . is not synonymous with 'any' evidence . . . . The focus is on the quality, rather than the quantity, of the evidence. . . . Speculation or conjecture alone is not substantial evidence." (*Id.* at 651, internal quotes omitted.)

"Expert opinion testimony constitutes substantial evidence only if based on conclusions or assumptions supported by evidence in the record." (*Ibid.*, internal quotes omitted.) "An expert's opinion which rests upon guess, surmise or conjecture, rather than relevant, probative facts, cannot constitute substantial evidence." (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1111, internal quotes omitted.)

In judging whether plaintiffs proved causation by substantial evidence, the court must look to the record as a whole. "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Roddenberry v. Roddenberry, supra,* 44 Cal.App.4th at 652.)

Here, Dr. Cooper's opinions stood alone. On the other side, the defense experts and the coroner concluded that Dwayne did not die from positional asphyxia. (RT 1218, 1257-1269, 1278-1282.) Dr. Neuman, for

example, testified that (1) a hogtie position "has absolutely no effect on the amount of oxygen in the blood," and thus cannot cause asphyxia; (2) hog-tying plus cocaine use does not cause asphyxia; cocaine stimulates rather than constricts breathing; and (3) Dwayne died too quickly for the cause of his death to have been asphyxia. (RT 1262-1263, 1278-1284, 1307.) The sequence of events is "not compatible with positional asphyxiation and only compatible with a sudden cardiac event." (RT 1280-1281.)

The defense doctors testified that Dwayne died from sudden cardiac death. Benowitz testified that "the combination of cocaine and heart disease was the most likely cause of Mr. Nelson's death" and "completely consistent with a sudden cardiac death." (RT 1202-1219.) Neuman concluded that Dwayne died from "sudden cardiac death" due to the risk factors of cocaine use, hypertension and "an anomaly coronary artery." (RT 1280-84.) And Fishbein testified that Dwayne "died of sudden death due to coagulated ischemia which is lack of oxygen to the blood because of an abnormal coronary artery that he had," and that "cocaine use was a contributing factor in the death." (RT 1107.)

When viewed as part of the record as a whole – i.e. in light of the testimony of the defense experts and of plaintiffs' police practices expert – Cooper's lone assertion that positional asphyxia caused Dwayne's death cannot constitute substantial evidence of causation. A reasonable trier of fact could not have found that Dwayne more likely than not died from positional asphyxia. Only by examining "the whole record" can an appellate court "uncover just such irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law." (*Roddenberry v. Roddenberry, supra,* 44 Cal.App.4th at 651-654, internal quotes omitted.)

III. THE JUDGMENT MUST BE REVERSED BECAUSE THE DAMAGES AWARD IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS EXCESSIVE AS A MATTER OF LAW, INCLUDES A TYPE OF DAMAGES NOT PERMITTED IN A WRONGFUL DEATH ACTION AND RESULTED FROM JURY MISCONDUCT.

A damages award may be overturned on appeal if it is not supported by substantial evidence, if it is excessive or if it is the product of jury misconduct. Reversal can be based on each of these grounds independently or on their cumulative effect. Thus, even if the award is supported by substantial evidence, it may be overturned as excessive "when the facts are such that the excess appears as a matter of law or are such as suggest at first blush, passion, prejudice or corruption on the part of the jury" (*Mize v. Atchison, T. & S. F. Ry. Co.* (1975) 46 Cal.App.3d 436, 453) or when "the verdict is so large that, at first blush, it shocks the conscience and suggests [jury] passion, prejudice or corruption" (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 820). And "[a]lthough jury misconduct is a distinct ground for granting a new trial, evidence of jury misconduct may be relevant to a determination that damages were excessive." (*Lauren H. v. Kannappan* (2002) 96 Cal.App.4th 834, 839; accord *Tramell v. McDonnell Douglas Corp.* (1984) 163 Cal.App.3d 157, 171 [trial judge permitted "to include misconduct by jury as a reason for his conclusion that damages were excessive"]; *Iwekaogwu v. City of Los Angeles*, *supra*, 75 Cal.App.4th at 820 [court permitted to include "questionable" jury activity as reason damages were excessive].)

Here, the jury awarded plaintiffs $2 million, and then reduced that to account for Dwayne's contributory negligence to the sum of $1.2 million. The record is totally devoid of evidence to support this astronomical

damages award. It is even higher than what Wallace's counsel told the jury was a reasonable damages amount. (RT 1459.) It truly shocks the conscience. Moreover, an uncontested juror affidavit confirms what the unsupported award strongly suggests – the jurors consciously disregarded the jury instructions and used the damages award to punish defendants.

Defendants moved for a new trial on the grounds of excessive damages and jury misconduct. (AA 1213-1214.) The trial court denied the motion. (AA 1354, 1356.)

"On appeal from denial of a motion for new trial on grounds of juror misconduct, the appellate court has a constitutional obligation [citation] to review the entire record, including the evidence, and to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial." (*Iwekaogwu v. City of Los Angeles*, *supra*, 75 Cal.App.4th at 817-818, internal quotes omitted.)

A. The Damages Awarded Are Not Supported By Substantial Evidence And Are Excessive As A Matter Of Law.

California law limits the damages that may be awarded in a wrongful death action. On the one hand, "[t]he wrongful death plaintiff is entitled to recover damages for his own pecuniary loss which may include loss of the decedent's financial support," services, training, and advice as well as the pecuniary value of his society and companionship. (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 176; *Ure v. Maggio Bros. Co., Inc.* (1938) 24 Cal.App.2d 490, 496; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1423, pp. 903-904, § 1425, pp. 906-907.)

On the other hand, no damages may be recovered for the mental and emotional distress or suffering of either the decedent or plaintiff heir.

(*Krouse v. Graham* (1977) 19 Cal.3d 59, 72.) "[T]he cases uniformly have held that a wrongful death recovery may not include such elements as the grief or sorrow attendant upon the death of a loved one" or "compensation for sad emotions and injured feelings" or the "sentimental[] value of [the] loss" or "wounded feelings." (*Id.* at 68, 69, internal quotes and emphases omitted.) Nor can the plaintiff "recover for the decedent's pain and suffering prior to his death . . . . Courts have meticulously limited the damages of the heirs to their own loss." (*Willis v. Gordon* (1978) 20 Cal.3d 629, 637.) And a plaintiff's "own loss," as we've seen, is also strictly limited to the pecuniary value of decedent's services, support and society.

Here, plaintiffs had been separated since Dwayne was a child, and neither had seen him face-to-face for over 20 years. There is no evidence that Dwayne provided any financial support or services to plaintiffs in the past, or that he was likely to do so in the future had he lived. If anything, Dwayne's parents supported him.

Neither parent was aware of even basic facts about Dwayne's life: They did not know about his health, medications, drug use, friends, addresses, telephone numbers or where and for what reasons he was incarcerated. (See pp. 9-10, 19, *ante.*)

Needless to say, Dwayne had no future financial prospects – an important consideration in determining wrongful-death damages. (E.g., *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 568.) According to the uncontested testimony of Judge Dino Fulgoni, had Dwayne lived, and had he been convicted of the crimes he committed on the night of September 13, 1998, he would likely have served from 11 to 21 years in prison. (RT 1016, 1053.) As we've seen, Dwayne had a cocaine habit, and had been in and out of prisons for the better part of twenty years.

Plaintiffs testified to the fact that they regularly spoke to Dwayne on the phone and each introduced a half dozen letters and cards Dwayne sent

over the years. However, that evidence is not sufficient to support the jury finding that plaintiffs suffered $2 million in damages.

First, plaintiffs never claimed that they suffered a loss of Dwayne's financial support, services, training or advice. Second, there is no substantial evidence that in any meaningful sense plaintiffs lost the society and companionship of the son who they had not seen for over 20 years. Whatever weight may be given to the phone calls, cards and letters, plaintiffs' loss does not support the jury's seven-figure award.

Indeed, the award was so disproportionate as to indicate it was based on passion and prejudice. "Where the evidence relates to the amount of damages, the proper test is the one used by appellate courts, that a damage award is not supported by substantial evidence if it is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice. [Citations.] In making this assessment, the court may consider, in addition to the amount of the award, indications in the record that the fact finder was influenced by improper considerations." (*Don v. Cruz* (1982) 131 Cal.App.3d 695, 707.)

Here, plaintiffs' evidence related to their own sorrow and grief at losing their son and their own and Dwayne's pain and suffering – *none* of which is compensable under the wrongful death statute. Worse yet, such evidence is by definition highly emotional; here, it swayed the jury to improperly award damages for emotional distress. For example:

- Lottie Nelson testified that Dwayne told her he was going to come home, and then she added: "He came home, but he was in a casket." (RT 968.) Later, she related how she spoke to Dwayne "when he was laying in that casket," telling him "'I wish it had been me.'" (RT 976.)

- Lottie slipped the bonds of defense counsel's question to give an emotional description of her reaction to Dwayne's death:

Q. You didn't – excuse me, you didn't have any information to indicate that the police did anything wrong. You just believed that; is that correct?

A. I believed it, and I thank God for bringing me to this date to let me know what happened to my son, and I want to tell you all keep Jesus in your life.

Q. Mrs. –

A. Because if you don't, you are not going to survive. These days hurt. I mean they hurt. If I didn't have God with me in this courtroom, I can't make it. I have hypertension. Last Saturday, I had to call my doctor in Memphis and see to call me a prescription out here. When they took my blood pressure, it was very too high. My heart was raising too fast. Keep Christ in your life.

(RT 984.)

- Lottie's counsel argued throughout the trial that Lottie's parents still had not been given all the parts of Dwayne's body (RT 504-505), and in his closing argument, he asked the jury why the County doesn't "give Ms. Nelson her son's brain and heart back? It is amazing, isn't it? Why won't they give it to her?" (RT 1421.) This subject matter, irrelevant to any issue in the case, was so emotional and inflammatory that, after it was raised in plaintiffs' opening argument, one juror asked to be removed from the case. (RT 532-539.)

- In opening statement, Lottie's counsel candidly stated that Lottie would testify "how it hurts from her perspective" and in closing argument, he argued that the jury should measure Lottie's closeness to Dwayne by the fact that she had "the hard pain" of burying Dwayne and that "the next time she sees her son is when she is in heaven." (RT 505, 1436.)

On facts not unlike the present case, courts have held that wrongful-death awards in far lesser amounts were excessive. For example:

- *Parsons v. Easton* (1921) 184 Cal. 764, 771-773: Supreme Court reversed as excessive a $6000 judgment for parents of mentally

impaired 27-year-old son, who at the time of his death was earning $360 a year and, except for a short period, had not been of pecuniary benefit to his parents but a "burden and a cause of solicitude and care." Moreover, the son "would sometimes be away for two years at a time" and "would write to his mother for money." (*Id.* at 772.)

The court concluded that although the plaintiffs may have "dearly loved" their son and may have "loved him the more because of his infirmities and helplessness," the "evidence in this case does not show circumstances indicating that the society, comfort, and protection of the son had been of any appreciable pecuniary advantage to the plaintiffs, or any reasonable probability that it would be so in the future." (*Id.* at 774.)

- *Fields v. Riley* (1969) 1 Cal.App.3d 308, 314: Court affirmed defense verdict on damages in wrongful death case because "the jury apparently concluded that the plaintiff-father suffered no pecuniary loss, nor did he suffer a loss of the child's comfort and society through his death," since "plaintiff left the state, saw the child but seldom, and did not contribute to his support."

- *Ure v. Maggio Bros. Co., Inc.*, *supra*, 24 Cal.App.2d at 498: Reversing $10,000 judgment for mother for wrongful death of 47-year-old daughter and order denying new trial because there was no "competent evidence supporting the finding that the services which would have been rendered by Mary, had she lived" were reasonably worth $10,000, although the "reasonable value of such services were susceptible of proof."

- *Fields v. Daily* (1990) 68 Ohio.App.3d 33 [587 N.E.2d 400, 404]: Affirming order granting new trial on damages. Even though Ohio – unlike California – allows damages for mental anguish, $1 million award to mother was excessive where her son was frequently absent from home and "she was often unaware of her son's whereabouts" during those times.

In contrast, where substantial wrongful death damages have been upheld, the facts are diametrically opposite to the record here. For example:

- *Griott v. Gamblin* (1961) 194 Cal.App.2d 577, 578-580: The court affirmed a wrongful death judgment in excess of $8,000 for loss of elderly father where "[h]e was the patriarch of an extremely close and devoted family," whose "life was dedicated to his children's comfort, society and protection," including the performance of "all of the household functions for one of his sons and some services for the other" children.

- *Fox v. Pacific Southwest Airlines*, *supra*, 133 Cal.App.3d at 568: Though remanded to reduce judgment to present value, jury award of $152,076 to parents was otherwise proper where decedent "was a young man of exceptional quality," who "was in his senior year of medical school," had "established a close relationship with his peers as well as his family" and "expressed to his parents a willingness to help support them in the future . . . especially if they had medical needs."

- *Tramell v. McDonnell Douglas Corp., supra,* 163 Cal.App.3d at 161-162, 165: The court affirmed the trial court's reduction of a wrongful-death award from $4.1 million to $1.8 million because of juror misconduct. The trial court found the latter amount "to be fair and reasonable" in that decedent was a well-educated and ambitious 36-year-old with outstanding business capabilities who left a wife and three children, and the amount was supported by an economist's testimony of lost earnings and pension benefits in excess of $3 million.

Given Dwayne's circumstances, the jury's $1.2 million award, based on a finding that plaintiffs suffered damage in the amount of $2 million, shocks the conscience.

B. The Jury Disregarded Its Instructions By Effectively Awarding Punitive Damages Not Permitted In A Wrongful Death Action.

The court instructed the jury to award "as damages such sum, as under all the circumstances of the case, will be just compensation for the loss which each heir has suffered by reason of the death of Dwayne Nelson" and to limit the award to "reasonable compensation for the loss of love, companionship, comfort, affection, society, solace, or moral support of a child." (RT 1411.) It further instructed that "[i]n determining the loss each heir has suffered," the jury was "not to consider: One, any pain or suffering of the decedent. Two, any grief or sorrow of the heirs. Or three, the poverty or wealth of any heir." (*Ibid.*)

The jury awarded damages contrary to the court's instructions. For one thing, that is an inescapable inference from the facts. Given Dwayne's lack of future prospects and the absence of a close relationship between him and his parents, the jury could not have valued plaintiffs' loss at anything near $2 million. For another, the jury deliberately went outside the instructions to award a type of damages – punitive damages – that are expressly barred by statute in wrongful death cases. (§ 377.61; *Ford Motor Co. v. Superior Court* (1981) 120 Cal.App.3d 748, 751.)

Juror Gary Thompson testified that during damages deliberations, four jurors "indicated that the amount to be awarded to each of the two plaintiffs should be an amount sufficient to 'send a message to the County of Los Angeles,' and then the others followed." (AA 1228.) In response, Thompson cautioned the jury that "we should be following the jury instructions and that there was nothing in those instructions which indicated that a desire to 'send a message' should be a consideration when arriving at an amount of money to be awarded as damages to the plaintiffs." (*Ibid.*)

However, ten jurors disregarded Thompson "and after further discussion *specifically agreed* to award the plaintiffs one million dollars each without offering any other rational[e] other than to 'send a message' to the County." (*Ibid.*)

But "sending a message" is exclusively the role of punitive damages. (*Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 953-954; *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 819-820 [if jury agreed "that the damages award should set an example and send a message to the City," that would be impermissible effort "to include punitive damages in its verdict"]; *Adams v. Murakami* (1991) 54 Cal.3d 105, 110 ["the quintessence of punitive damages is to deter future misconduct by the defendant"]; *Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 354-355 ["counsel requested a form of punitive damages by suggesting the deterrent value of awarding a large verdict" and the negative "message" a lesser sum would send].)

Accordingly, the jury here engaged in misconduct. A party may impeach a verdict through juror declarations, as long as they testify to "overt acts" rather than to the "subjective reasoning processes of the individual juror." (Evid. Code, § 1150; *Krouse v. Graham*, *supra*, 19 Cal.3d 59, 80.) Our Supreme Court has held that affidavits evidencing agreement among jurors to award a plaintiff unrecoverable damages is within section 1150, because such an agreement is "objectively verifiable" and "subject to corroboration." (*Id.* at 80-81.) Indeed, proof of an express agreement is not even required. (*Id.* at 81.)

The defendants here showed that the jury agreed to do something not permitted by the instructions. That proves misconduct. And the agreement can be express or implied. (See *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 506-508 [reversing denial of new trial because juror declarations showed hostility to police department; if jurors "actually

discussed the subject of attorneys' fees and specifically agreed to increase the verdicts to include such fees, such discussion and agreement would appear to constitute matters objectively verifiable, subject to corroboration, and thus conduct which would lie within the scope of [Evidence Code] section 1150," internal quotes and emphasis omitted]; *Tramell v. McDonnell Douglas Corp., supra,* 163 Cal.App.3d at 171-173 [juror declaration stating that jury discussed impact of attorneys' fees and taxes on plaintiff's recovery supported new trial in that it permitted inference that jury had agreed to compensate plaintiff for fees and taxes; even "extensive discussion evidencing an implied agreement to that effect, constitutes misconduct requiring reversal," internal quotes omitted].)

The Thompson declaration is competent evidence of jury misconduct. It shows (1) an *express* agreement by jurors to award damages in order to send the County a message; and (2) an *implied* agreement by the jurors to take that action can *also* be inferred from Thompson's testimony that the jurors discussed using the damages award for that purpose.[43/]

CONCLUSION

If this Court agrees that plaintiffs failed to prove either standing or causation – each a key element of their cause of action – it must reverse the

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43/ Plaintiffs submitted no admissible evidence to controvert this. Lottie Nelson's attorney Leo Terrell submitted a declaration stating what was purportedly said at a meeting he had with Mr. Thompson. (AA 1287.) Needless to say, that was inadmissible hearsay (*Burns v. 20th Century Ins. Co.* (1992) 9 Cal.App.4th 1666, 1671), and defendants objected to the declaration on that and other grounds (AA 1337-1338). Moreover, nothing in the Terrell declaration changes the legal significance of Thompson's declaration. For example, Mr. Terrell stated that Thompson told him that no juror told another how to vote or what to vote for. (AA 1289.) So what? Thompson testified that the jury agreed to an amount of damages so as to send a message to the County, not that any juror was instructed or strong-armed to vote a particular way.

judgment with directions that the trial court enter judgment for defendants. At the very least, it should reverse the judgment and remand for a new trial on damages.

RESPONDENTS' BRIEF

INTRODUCTION

Plaintiff Lottie Nelson appeals from the trial court's (1) grant of summary judgment on the second (negligent supervision), third (assault) and fourth (battery) causes of action of the Second Amended Complaint for failure to comply with the Government Tort Claims Act; and (2) denial of her motion for attorney fees under Code of Civil Procedure section 1021.5. The rulings of the trial court were correct as a matter of law.

The summary judgment should be affirmed. In dismissing Lottie's second through fourth causes of action, the court held that those claims belonged exclusively to the estate of Dwayne Nelson, and the estate did not comply with the California Tort Claims Statute, Government Code, section 810 et seq. (CT 1002-1007.) The court was correct as a matter of law.

It is undisputed that the dismissed causes of action belonged to Dwayne's estate. It is also undisputed that no claim was presented by the estate or someone claiming to act as its representative. Nonetheless, Lottie asserts that she is entitled to pursue those estate causes of action because (1) a claim that never mentioned the estate and was filed by Lottie Nelson as an individual somehow substantially complied with the claims act; and (2) defendant Los Angeles County waived the claim statute defense by failing to notify plaintiff that she had failed to name the estate as a claimant.

As we show below, Lottie is wrong on both counts. The trial court's summary judgment ruling must be affirmed.

The denial of Lottie's attorneys fees motion must also be affirmed. Lottie asserts that the trial court's denial of her motion for attorneys fees under the private attorney-general statute, Code of Civil Procedure section 1021.5, was a prejudicial abuse of discretion.

Lottie is wrong. Indeed, her motion was utterly without merit, and the trial court had no choice but to deny it.

Section 1021.5 attorney fees can be obtained only where a lawsuit enforces an important public right that confers a significant benefit on the public at large. That did not happen here. But if it had, Lottie could still not obtain a fee award. For "[s]ection 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest." (*Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 114.) Thus, no fees can be awarded where "the primary effect of a lawsuit was to advance or vindicate the plaintiff's personal economic interest." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1170.)

That's all that was involved here – Lottie's personal economic interests. Her primary incentive to sue was the lure of a huge civil judgment; indeed, her counsel asked the jury to award her *five million* dollars. (RT 1438.) Lottie's pecuniary stake in the lawsuit precludes a section 1021.5 fees award.

Indeed, a wrongful death action, which permits only a monetary recovery, by definition vindicates purely private interests. (*Alvarez v. Wiley* (1977) 71 Cal.App.3d 599, 602-603.) Unsurprisingly, we have found no wrongful death action in which section 1021.5 fees were awarded, and the trial court was correct in refusing them here.

LEGAL DISCUSSION

I. THE ESTATE'S ACTION IS CLEARLY BARRED BECAUSE NO CLAIM FOR DAMAGES ON ITS BEHALF WAS PRESENTED TO THE COUNTY.

Lottie Nelson presented a government tort claim for damages to the County of Los Angeles, on her own behalf, on October 7, 1998. (Clerk's Transcript ["CT"] 885-886.) That claim was rejected by the County on January 25, 1999. (AA 30.) No claim was ever presented by the estate of Dwayne Nelson, or by anyone acting as representative of the estate. (CT 97.)

To maintain an action against a public entity, an injured party must first present a claim to the public entity within six months after accrual of the cause of action. (Gov. Code, §§ 911.2, 945.4.) California courts have long recognized that where different claimants suffered suffered separate and distinct injuries, one claimant may not rely on a claim presented by another, even if the injuries arise from the same act or transaction. (*Nguyen v. Los Angeles County Harbor/UCLA Medical Center* (1992) 8 Cal.App.4th 729, 733-734; *Petersen v. City of Vallejo* (1968) 259 Cal.App.2d 757, 766-767.) Thus, *each* claimant and *each* cause of action must be fairly reflected in a timely claim presented to the public entity. (*Nelson v. State of California* (1982) 139 Cal.App.3d 72.)

The importance of filing separate claims for individual claimants is not just a matter of form, but directly affects the potential liability of the public entity. Each plaintiff in a wrongful death action is entitled to a separate recovery if he can show individual injury. (*Petersen v. City of Vallejo* (1968) 259 Cal.App.2d 757, 766-767.) For example, the damages recoverable by the heirs in a wrongful death action are distinct and different

from the damages recoverable by the estate. (*Nguyen v. Los Angeles County Harbor/UCLA Medical Center*, *supra*, 8 Cal.App.4th at 733-734; *Gallup v. Sparks-Mundo Engineering Co.* (1954) 43 Cal.2d 1, 11 [damages recoverable in survival action (i.e., medical expenses) not recoverable in wrongful death action]; *Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [funeral expenses recoverable in wrongful death; medical expenses incurred prior to death recoverable in survival action].) As explained in *Dominguez v. City of Alhambra* (1981) 118 Cal.App.3d 237, 243:

> The survival, pursuant to Probate Code section 573 [now Code of Civil Procedure section 377.20], of the cause of action the decedent could have maintained during his lifetime, is wholly distinct from a cause of action by the decedent's heirs for wrongful death pursuant to Code of Civil Procedure section 377 [now section 377.60]. [Citations.] The [survival] action . . . is by the estate and is for the injuries suffered by the decedent prior to his death. The [wrongful death] action . . . is by the heirs, not the estate, and is for the loss of support, comfort and society suffered independently by the heirs as a result of the death itself. Section 377 expressly excludes damages recoverable under Probate Code section 573.

Here, as noted, the estate of Dwayne Nelson did not present a separate claim to the County of Los Angeles prior to commencing this lawsuit. Plaintiff Lottie Nelson does not dispute that fact, nor does she deny that the estate was required to present a claim. Nonetheless, she insists that the estate is entitled to sue because (1) her individual claim substantially complied with the claim presentation requirements so as to cover the estate's claim; and (2) the County waived the claim statute defense by failing to notify plaintiff that her claim was defective for failing to name the estate as a claimant. (Appellant's Opening Brief ["AOB"] 35-36, 41.) As we now explain, neither contention has any merit.

A. The Doctrine Of Substantial Compliance Will Not Save The Estate's Causes Of Action.

Government Code section 910 requires that the following information be included in a claim:

> (a) The name and post office address of the claimant. (b) The . . . address to which the person presenting the claim desires notices to be sent. (c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted. (d) A general description of the . . . injury, damage or loss incurred. . . . (e) The name or names of the public employee or employees causing the injury, damage or loss, if known. (f) The amount claimed . . . as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.

The doctrine of substantial compliance – which excuses full compliance with the claim presentation requirements – applies where there has been *some* compliance with *all* the requirements of section 910, but compliance has been defective; as, for example, when the address of the accident given in the claim is inaccurate, or the verification is by someone other than the claimant. (See *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 456, and cases cited therein; *Nguyen v. Los Angeles County Harbor/UCLA Medical Center, supra,* 8 Cal.App.4th at 733.) However, the doctrine "has no application when, as here, there has been a failure to comply with *all* of the statutory tort claim requirements." (*Nguyen v. Los Angeles County Harbor/UCLA Medical Center*, *supra*, 8 Cal.App.4th at 733.) Thus, the doctrine does not apply where the claim entirely omits a particular item of information required by section 910 – such as the place of the accident or the verification signature. (See *City of San Jose v. Superior Court*, *supra*, 12 Cal.3d at 456, and cases cited therein.) In short, "'substantial compliance cannot be predicated on no compliance.'" (*Ibid.*)

Lottie contends that her individual claim "meets all the requirements of Government Code § 910" (AOB 35), and plaintiff is right – but only insofar as it asserts *Lottie Nelson's individual claim.* With respect to the estate's claim, Lottie's claim is woefully inadequate. Lottie's injuries are separate and distinct from the decedent's injuries and only the estate has the right to pursue the decedent's claims against the defendant. (§ 377.30.) Lottie's individual claim cannot stand in for the claim that was not filed by the estate.

Nguyen v. Los Angeles County Harbor/UCLA Medical Center, *supra*, 8 Cal.App.4th 729 is on point. There, a minor daughter presented a claim to the county alleging personal injury as a result of medical negligence. No claim was presented on behalf of her parents, and the daughter's claim did not describe any injury to them. The parents sued for negligent infliction of emotional distress, and argued that because their claim was derivative of their daughter's claim, they were entitled to rely on her claim. The Court of Appeal flatly rejected this argument, explaining that an injured party may not rely on a claim presented by another injured party "if the injury suffered by the second injured party was separate and distinct." (*Id.* at 733-734.) While the parents' injuries arose out of the same transaction as the injuries to their daughter, they "were separate and distinct from those suffered by their daughter. . . . The alleged emotional injuries and economic damages were personal to the plaintiff parents. Therefore, the plaintiff parents could not rely on their daughter's tort claim." (*Id.* at 734.)

Petersen v. City of Vallejo, *supra*, 259 Cal.App.2d 757, is also instructive. There, the Court of Appeal refused to allow a decedent's daughter to "piggyback" her claim for wrongful death on the wrongful death claim timely presented by her mother. The court rejected the daughter's argument that her mother's claim "'was implicitly on behalf of

all heirs who might be entitled to share in any eventual recovery.'" (*Id.* at 766.) There was "nothing in the record to indicate that the mother, as agent, filed a claim on behalf of her daughter," nor any allegation that "the daughter was named as a claimant, or that any sum was claimed on her behalf." (*Ibid.*) Moreover, the daughter cannot:

> rely upon the claim of her mother on the theory that there can be only one action, and therefore one claim for wrongful death. . . . Although recovery under section 377 is in the form of a 'lump sum,' the amount is determined in accordance with the various heirs' *separate interests* in the deceased's life and the loss suffered by each by reason of the death, and no recovery can be had by an heir who did not sustain a loss. Accordingly, each heir should be regarded as having a personal and separate cause of action.

(*Id.* at 766-767, emphasis added.)

Here, Lottie's claim names only herself, in an individual capacity, as the claimant and refers to her purported individual injuries – i.e., "loss of son, economic losses, emotional and mental injuries." (CT 885.) The claim does not mention the estate or the estate's damages, both items required by section 910. Their total absence means that the claim cannot, and does not, "substantially comply" with section 910.

Plaintiff points out that the claim refers in one place to "the survival statute" and argues that this oblique reference indicated that she intended to assert a claim on behalf of the estate as well as herself individually. (AOB 36.) Whatever she may have *subjectively* intended, however, the claim, on its face, *does not* assert a claim on behalf of the estate.

In this regard, the claim states that "the actions of the Los Angeles county [*sic*] Sheriff's Deputies along with other employees of the County of Los Angeles constitute assault, battery; negligent hiring, supervision, disciplining, retention and firing of sheriff's deputies, ultrahazardous activity, as well as the common law torts of wrongful death, negligence, intentional infliction of emotional distress, and the survival statute." (CT

886.) Literally, then, the claim avers that the actions of County employees constitute various causes of action, including "the survival statute."

But Code of Civil Procedure section 377.20 (the "survival statute") does not establish a cause of action. It merely states that a cause of action that could have been brought or pursued by the decedent survives his death. It could be any cause of action, not just an action for personal injury. (§ 377.20, subd. (b).) Thus, the mere mention of the "survival statute" in the claim does not begin to notify the public entity about the nature or extent of the estate's potential claim.

Moreover, even if the "survival statute" reference were sufficient to alert the County that the estate had a claim, the claim still fails to substantially comply with section 910: It does not identify the estate, or its administrator or representative, as a claimant; does not describe the injury to the estate; and does not contain an amount of damages for the estate. The bottom line is that the mere mention of the "survival statute" in Lottie's claim is utterly insufficient to substantially comply with the claim statute. (Cf. *City of San Jose v. Superior Court*, *supra*, 12 Cal.3d at 455 ["claims statutes must be satisfied even in face of the public entity's actual knowledge of the circumstances surrounding the claim"]; *Petersen v. City of Vallejo*, *supra*, 259 Cal.App.2d at 766 ["the mere fact the governmental entity has some notice or knowledge of the accident and possible claim will not excuse failure of the claimant to file a timely claim as required by the statute"].)

B. The County Was Not Required To Guess At Lottie's Undisclosed Claims Or Capacities. It Was Entitled To Rely On The Claim As Presented.

Plaintiff contends that since the estate is not a legal entity and any lawsuit by the estate must be filed by the executor or administrator of the estate, the claim presented in Lottie's name necessarily covers all claims that could be asserted by her as an individual or as co-administrator of the estate. (AOB 39-40.) This contention must be rejected.

First, there is no requirement that a claim, as opposed to a lawsuit, on behalf of an estate *must* be presented by the administrator or executor. A minor may present a claim to a public entity without a guardian ad litem, even though the child needs the guardian to pursue his or her lawsuit. (*Hernandez v. County of Los Angeles* (1986) 42 Cal.3d 1020, 1025 [minor must present claim to public entity whether or not he has a guardian ad litem].) So, too, although the lawsuit on behalf of the estate must be pursued by its representative, the cause of action is an asset of "the estate." (*Estate of Waits* (1944) 23 Cal.2d 676, 678; *Garofalo v. Princess Cruises, Inc.* (2000) 85 Cal.App.4th 1060, 1072 [survival action belongs to estate, though usually brought by administrator or representative].)

Second, regardless of who presents the claim on the estate's behalf, the claim must, at the very least, indicate that the claimant is, in fact, the estate. Lottie's claim does not do this. There is no mention that she *is* an administrator of the estate, let alone that she is making the claim on the estate's behalf. Indeed, the record shows that plaintiff was not even appointed administrator of the estate until *months after* she presented the claim. (Lottie's Motion to Augment, Exh. 1.) Consequently, there is no way for the County to have known that the claimant's *secret intent* was to present the claim on the estate's behalf as well as her own behalf.

To adopt plaintiff's position – that a claim filed by an individual in one capacity (individual or representative) automatically covers all other claims by that individual in any other capacity, real and potential, disclosed and undisclosed – would require a public entity to act on conjecture and surmise and deny it the very certainty promised by the claims statutes. If it were to have any certain basis on which to evaluate its exposure, the public entity would be required to send a letter *in every case* and in response to virtually *every claim*, inquiring whether the claimant was filing in his or her individual capacity only or if there were other potential claims they might make as executor of an estate, president of a corporation, guardian of a disabled person, etc. Needless to say, this would be unduly burdensome for the public entity. Moreover, such an approach would violate the letter of the law, which requires a claimant to present information to the public entity – it does not require the public entity to go in search of claims.

Plaintiff's position would wreak havoc for potential claimants, as well; for example, where a decedent's estate sought leave to present a late claim more than six months after the cause of action accrued. If the executor had already presented a timely claim as an individual, but failed to file the estate's lawsuit within six months after denial of the individual claim, as required by Government Code section 945.6, the estate's claim would be time-barred before it even had a chance to comply with the claim-presentation requirements. In such a case, the executor of the estate could argue that the initial claim on his own behalf did *not* cover the estate. But, under Lottie's approach, he would be out of luck.

In short, the public entity must be allowed to rely on the claim *as presented.* Here, as presented, Lottie's claim does not cover the estate.

C. The County's Supposed Opportunity To Investigate Lottie's Claim Does Not Excuse Her Failure To Comply With The Claims Statute.

Plaintiff contends her claim covers the estate's claim because the purpose of the claim presentation requirement was met – i.e., the County had an opportunity to investigate the circumstances surrounding the claim, and if it had done so, the County would have discovered (because plaintiff would have told the County) that the estate intended to pursue its own claim. (AOB 41.) However, a public entity is not required to investigate even known claims, let alone to try to uncover *undisclosed* claims. It was up to plaintiff to notify the County that the estate intended to pursue a claim and *not* to wait until the County conducted an investigation to impart that information. The presentation of a claim by one person, even though it gives the public entity a full opportunity to investigate, does not excuse the absence of a claim by another claimant. (*Lewis v. City and County of San Francisco* (1971) 21 Cal.App.3d 339, 341.)

Plaintiff's reliance on *White v. Moreno Valley Unified School Dist.* (1986) 181 Cal.App.3d 1024 (AOB 36-38) is misplaced. That case involved a unique situation – medical expenses incurred as a result of injuries to a minor. Such expenses belong both to the minor who was injured and to his parents who have the financial responsibility to pay for them. Since either the minor or the parents can pursue such expenses in a lawsuit based on the minor's injuries, it doesn't matter who presents the claim or who pursues the expenses in the lawsuit, as long as the public entity defendant received *a* claim for such expenses prior to the lawsuit being filed. (181 Cal.App.3d at 1033.)

The instant case is completely different. Here, there is no overlap in the estate's damages and the damages recoverable by the heirs. The heirs

cannot file a claim for injury to the estate, nor can the estate pursue a claim for injury to the heirs. *White* has no application to this situation.

D. The Estate May Not Rely On The Claim Presented By Wallace Nelson.

In the opening brief, Lottie twice mentions a claim presented by decedent's father Wallace Nelson. (AOB 9-10, 34.) That's it. She does not argue or assert that Wallace's claim covers the estate's claim. She relies entirely on her own claim – and properly so, since she did not rely on Wallace's claim in the trial court: It was *not* attached to her opposition to the summary judgment motion and it was *not* cited in her response to the County's separate statement of material facts. (CT 137-138.)

The question of whether Wallace's claim was presented on behalf of the estate is not before this Court. First, facts not contained in the separate statement do not exist for purposes of summary judgment. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.) Second, plaintiff's failure to raise this issue in the trial court waives it on appeal. (*Traxler v. Varady* (1993) 12 Cal.App.4th 1321, 1329-1330.) Third, "[w]hen an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; cf. *Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 900, fn. 5 [point raised in footnote of 50-page opening brief and expanded to 10 pages in reply was waived for failure to raise it in the opening brief].)

Even if Wallace's claim could be considered here, it was, like Lottie's claim, clearly filed only on his own behalf and not on behalf of the estate or in his capacity as co-administrator for the estate. (AA 34.) As the trial court held, "the name of the claimant was clearly Wallace Nelson.

There is no mention that the claim is being brought in a representative capacity. When the possible liability reflected in a tort claim filed by [a] party is different in kind and nature from the possible liability to a second injured party, the second injured party may not rely on the tort claim filed by the first party." (CT 1003-1004, internal quotes omitted, in part quoting *Nguyen v. Los Angeles County Harbor/UCLA Medical Center*, *supra*, 8 Cal.App.4th at 733-734.)

II. THE COUNTY DID NOT WAIVE THE CLAIM STATUTE DEFENSE. IT WAS NOT REQUIRED TO SEND PLAINTIFF NOTICE OF DEFECT FOR OMITTING THE ESTATE AS A CLAIMANT.

A claim may be "defective" if it lacks any of the information required by Government Code section 910 – for example, the claimant's name and address, the date and location of the occurrence, a general description of the injury or loss incurred, and the amount of damages claimed. A public entity must notify the claimant that a claim is "defective" within 20 days after the claim is presented to allow the claimant to provide the missing information. (Gov. Code, § 910.8.) If the public entity does not send notice of a defect, the defect is considered waived. (Gov. Code, § 911; *Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 708, fn. 7.)

In order to trigger the notice-waiver defense provisions of Government Code section 910.8, the "defect" must be disclosed on the face of the claim; for example, where the claim omits the amount of damages, it is obvious from the claim itself that that item is missing. However, when the omission is not obvious from the face of the claim, the claim is not "defective" within the meaning of section 910.8, and the public entity waives nothing by failing to send notice of a defect or inquire about

whether the claimant left any information out of the claim. (*Donohue v. State of California* (1986) 178 Cal.App.3d 795, 805.)

A claim is not "defective" within the meaning of section 910.8 if it omits additional claimants, causes of action or negligent acts. In *Donohue*, for example, the court held that the defendant was not required to notify the plaintiff that his claim lacked a cause of action that he later alleged in the complaint. The court explained that the defendant could not have discovered plaintiff's failure to include the omitted cause of action until the complaint was filed, much later. Accordingly, the omission was not a "defect" within the meaning of section 910.8 and the public entity waived nothing. (*Id.* at 805.)

Here, the insufficiency of the instant claim lies in its omission of one of several claimants. Since the County could not have discovered this omission until the complaint was filed, the claim was not "defective" within the meaning of section 910.8 and the County did not waive anything by failing to notify plaintiff that her claim did not cover any third parties, including decedent's estate.

Plaintiff's reliance on *Alliance Financial v. City and County of San Francisco* (1998) 64 Cal.App.4th 635 is misplaced. That case involved a single claimant with a single claim and the only question was whether a letter sent to the public entity with an invoice for work performed constituted a "defective claim" where the letter stated that the claimant "'would be happy to meet with the [entity's] representatives prior to filing an action for recovery of those sums.'" (*Id.* at 647.) The court held that it was a defective claim and that the entity's silence operated as a waiver of any defects.

The instant case is different. Lottie's claim was sufficient as a claim on her own behalf, but it failed entirely to assert a claim of any kind on

behalf of the estate of Dwayne Nelson. Its omission was not a mere problem of form.

Since Lottie has shown no error in the trial court's decision on the motion for summary judgment of the estate's claims, that part of the judgment must be affirmed.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING LOTTIE NELSON'S MOTION FOR ATTORNEYS FEES UNDER SECTION 1021.5.

A. A Trial Court's Refusal To Award Fees Under Section 1021.5 Can Be Reversed Only Upon A Showing Of Prejudicial Abuse Of Discretion Based On The Absence Of Any Reasonable Basis For The Court's Action.

Whether section 1021.5 fees are appropriate is a question "best decided by the trial court in the first instance." (*Draeger v. Reed* (1999) 69 Cal.App.4th 1511, 1525.) That "decision will be reversed only if there has been a prejudicial abuse of discretion" (*ibid.*), i.e. "only if the resultant injury is sufficiently grave to amount to a manifest miscarriage of justice, and no reasonable basis for the action is shown" (*Angelheart v. City of Burbank* (1991) 232 Cal.App.3d 460, 467).

The appellate court must decide "whether the trial court's actions are consistent with the substantive law and, if so, whether the application of law to the facts of the case is within the range of discretion conferred upon the trial court." (*Board of Administration v. Wilson* (1997) 57 Cal.App.4th 967, 973.) The court "abuses its discretion where no reasonable basis for the action is shown." *(Beach Colony II v. California Coastal Com., supra,*

166 Cal.App.3d at 110, internal quotes omitted.) If "the court was not asked to, and did not make findings on substantial factual issues, [the appellate court] must infer all findings necessary to support the judgment and proceed to examine the record to determine if they are based on substantial evidence." (*Ibid.*)

Here, during oral argument, the trial court stated: "I read your arguments. I considered the matter. And I don't think this was an attorneys fees case respectfully." (RT 1569.) That is a sufficient statement of reasons, particularly given that Lottie made no request for findings. This is confirmed by *Draeger v. Reed*, *supra*, 69 Cal.App.4th 1511:

> Contrary to Draeger's characterization, the court did, in fact, state a reason for rejecting his request for attorney fees under Code of Civil Procedure section 1021.5. After reviewing the parties' points and authorities, *it ruled this was not an appropriate case for such an award. In other words, Draeger failed to satisfy the statutory requirements.* The record supports the court's ruling.

(*Id.* at 1526, emphasis added.)

On the only pertinent inquiry – whether "[t]he record supports the court's ruling" – this part of the judgment must be affirmed.

B. Section 1021.5 Does Not Apply To Lottie's Lawsuit.

Under section 1021.5, a fee award cannot be made unless the plaintiff's lawsuit has "has resulted in the enforcement of an important right affecting the public interest" that confers "a significant benefit . . . on the general public or a large class of persons" and "the necessity and financial burden of private enforcement . . . make the award appropriate." Lottie has the burden of proving each statutory element. (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 30, disapproved on another ground in *Pettus v. Cole* (1996) 49 Cal.App.4th 402.)

Lottie did not and cannot satisfy the statute.

1. Section 1021.5 was not intended to reward litigants, like Lottie, whose lawsuits were motivated by their own interests.

Section 1021.5's distinctive purpose precludes an award of attorneys' fees here. The statute "is intended as a 'bounty' for pursuing public interest litigation, not a reward for litigants motivated by their own interests who coincidentally serve the public." (*California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570.) Its "purpose is to provide some incentive for the plaintiff who acts as a true private attorney general, prosecuting a lawsuit that enforces an important public right and confers a significant benefit, despite the fact that his or her own financial stake in the outcome would not by itself constitute an adequate incentive to litigate." (*Weeks v. Baker & McKenzie*, *supra*, 63 Cal.App.4th at 1170, internal quotes omitted.)

Lottie did not prosecute a lawsuit in order to enforce an important right or confer a significant public benefit. She sued for one purpose – to obtain a seven-figure damages award. Her financial stake in the litigation was plainly an adequate incentive to litigate. (*Luck v. Southern Pacific Transportation Co.*, *supra*, 218 Cal.App.3d at 30-31 [plaintiff's "act of seeking substantial damages demonstrated a significant financial incentive for her to bring the underlying action"].) Thus, Lottie's damages action is not what the Legislature had in mind when it enacted section 1021.5 as an exception to the general rule that parties are responsible for their own attorneys fees. Unsurprisingly, we have found no case awarding private attorney general fees in a wrongful death case.

2. Courts consistently deny section 1021.5 fees where the successful party had a substantial economic stake in the outcome of the action.

"The purpose of an award of attorney fees pursuant to section 1021.5 is to encourage suits that enforce common interests of significant societal importance, but which do not involve any individual's financial interest to the extent necessary to encourage private litigation to enforce the right." (*Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 77, internal quotes omitted.) Thus, its not enough to benefit the public as an incidental by-product of a suit "motivated by [a litigant's] own pecuniary interests." (*Beach Colony II v. California Coastal Com.*, supra, 166 Cal.App.3d at 114.)

We show below that Lottie's lawsuit did not "enforce common interests of significant societal importance." However, even if the facts were otherwise, Lottie *still could not qualify for attorney's fees* given her personal stake in the lawsuit. Courts deny section 1021.5 fees in such cases even where the lawsuit has served the public interest and indeed even where the plaintiff obtained no monetary recovery. For example:

- *California Licensed Foresters Assn. v. State Bd. of Forestry*, *supra*, 30 Cal.App.4th at 570: Court reversed section 1021.5 fees award. It was not enough that plaintiff obtained an injunction barring an agency's enforcement of emergency regulations and spurred their replacement, because plaintiff "had a significant pecuniary interest in eliminating the emergency regulations."

- *Planned Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 691, 692: Court affirmed the denial of section 1021.5 fees. Planned Parenthood successfully sued to enjoin the City from requiring, as a condition for a construction grant, that no abortions be performed at a new clinic. The court held: "There is no doubt that the

controversy touched upon the constitutional right of privacy. However, the interests of the clinic patients and general public were incidental to Planned Parenthood's primary objective of obtaining grant money." Moreover, the fact that the "litigation costs far outstrips the $60,000 grant Planned Parenthood may one day get" is "a financial risk inherent in any litigation where Code of Civil Procedure section 1021.5 fees are sought." (Internal quotes omitted.)

These principles apply with even greater force to a lawsuit seeking only personal damages. Courts almost *never* award fees in that kind of case.

- *Weeks v. Baker & McKenzie*, *supra,* 63 Cal.App.4th at 1170-1171: *Weeks* is directly on point. There, plaintiff recovered damages in a sexual harassment lawsuit. The court held that section 1021.5 "does not authorize an award of fees in cases such as this." The court conceded that the case possessed a public-benefit veneer, but that made no difference: "The notoriety of this case may have brought the issue of sexual harassment in employment into the public eye, and the verdict may have sent the message that sexual harassment in the workplace will not be tolerated; however, this action was brought not to benefit the public, but as a means of vindicating Weeks's own personal rights and economic interest."

- *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 636, 637: Plaintiff successfully sued for harassment and wrongful termination, obtaining damages and injunctive relief. The court held that she did not qualify for section 1021.5 fees. It wasn't enough that her lawsuit "sent a message" to government agencies that sexual discrimination and harassment "will not be tolerated" or that it "was based on the important right to be free from unlawful discrimination." Its "primary effect was the vindication of her own personal right and economic interest."

- *Satrap v. Pacific Gas & Electric Co.*, *supra*, 42 Cal.App.4th

at 78-79: Affirming the denial of section 1021.5 fees, because plaintiff's "personal financial stake in the outcome was not so disproportionate to the cost of litigation that the lawsuit would not have been brought without the additional incentive of an award of attorney fees." Significantly, the court considered not only the jury verdict, but what plaintiff's counsel asked the jury to award: "It is appropriate in such cases for the trial court to rely on evidence of appellant's realistic expected recovery, rather than the amount actually recovered."

Here, Lottie's counsel urged the jury to award her *$5 million*. (RT 1438.) The jury determined that she suffered losses in the amount of $1 million, then reduced that amount to $650,000 to account for Dwayne's contributory negligence. Her attorney is claiming $258,660.50 in fees. By any reckoning, Lottie did not need a statutory bounty as an incentive to bring her lawsuit.

C. Lottie's Lawsuit Was Not The Causal Agent For Any Revision In TARP Procedures.

Lottie argued in her fees motion that her lawsuit induced the Sheriff's Department to make revisions to its restraint procedures. Her attorney Leo Terrell testified that the revisions were made "[a]s a result of Dwayne's death and the above referenced litigation" and that it was "only through the efforts of this litigation" that the Sheriff's Department made the "changes in their policies regarding Hobble Restraints." (CT 1020-1021.)

As we show below, that assertion is not supported by the facts. That is fatal to Lottie's fee request. "[T]here must be a causal connection between the plaintiffs' lawsuit and the relief obtained in order to justify a fee award under section 1021.5 to a successful party." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1291.) No such causal connection was shown here.

In any event, to the extent the issue involves the resolution of disputed fact questions, the trial court's ruling must be affirmed if supported by substantial evidence. (E.g., *Ciani v. San Diego Trust & Savings Bank* (1994) 25 Cal.App.4th 563, 577 [under section 1021.5, "whether a party's actions are causally linked to the benefits created is a factual question for the trial judge (citation), whose determination will not be disturbed if supported by substantial evidence"]; *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship, supra,* 146 Cal.App.3d at 444 ["'where there is a conflict in the declarations, resolution of the conflict by the trial court will not be disturbed on appeal if the determination of that court is supported by substantial evidence'"].)

1. The evidence before the trial court did not support an attorneys' fees award.

The evidence in the trial court shows no connection between the lawsuit and the revisions made by the Department. For example:

(a) *An undated, internal Sheriff's Department memorandum.* The memorandum states that in response to the incident resulting in Dwayne Nelson's death, "the Office of the Undersheriff directed the Advanced Training Bureau to experiment with alternative methods of applying the Ripp Hobble to accomplish TARPing a suspect." (CT 1102.) Then, "[a]s a result of that study, the Field Operations Training Unit developed a modified application of the TARP that appears to be equally effective in restraining a suspect." (*Ibid.*)

Since the memorandum is undated, it could have been prepared at anytime during the 10 month hiatus between Dwayne's death on September 13, 1998 and the filing of the lawsuit on July 19, 1999. Yet, Lottie offered no evidence as to *when* "the Office of the Undersheriff Department directed the Advanced Training Bureau to experiment with alternative methods of

applying the Ripp Hobble" or *when* "the Field Operations Training Unit developed a modified application of the TARP." Those events could have occurred before the lawsuit was even filed.

The memorandum doesn't mention the lawsuit at all. It only mentions the incident resulting in Dwayne Nelson's death. (CT 1101-1104.)

(b) *A November 5, 1999 newspaper article.*[44/] The article reports that the Sheriff's Department, "facing criticism of its treatment of suspects, has changed its policy to prohibit a controversial form of restraint known by critics as hogtying." (CT 1106.)[45/] The article does not state that the policy change was induced by the pendency of Lottie's lawsuit. Indeed, it proves the contrary. Lt. (now Captain) Mike McDermott is quoted as stating that "[i]n the wake of the LAPD's policy change, the Sheriff's Department began reviewing its restraint procedures about 21 months ago" and they were "put in place earlier this week" after "receiving approval from department officials and union representatives." (CT 1107.)

Lottie's lawsuit was filed a mere four months before the changes were "put in place." The study, development and approval of the changes clearly did not happen in four months.[46/]

(c) *Michael McDermott's deposition.* From February 1998 until January 2000, Michael McDermott was the lieutenant in charge of the unit that reviewed the Ripp Hobble procedure and developed the revisions thereto. (CT 1214, 1222.) He testified that the review began around May

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44/ Although the copy of the article Lottie produced did not bear a date, Mr. Terrell, without explanation, gave it a November 5, 1999 date. (CT 1021.)

45/ This is in fact incorrect. As the article itself shows, the restraint procedure was modified, not prohibited. (See CT 1106, 1250-1251.)

46/ The article notes that "'[t]he policy has been under review for quite a while.'" (CT 1106.)

or June of 1998, which resulted in the development of a new training videotape incorporating revisions to the restraint procedures, and while that all occurred before the lawsuit was filed, its final implementation had to await union and departmental approvals. (CT 1230-31, 1242-1247.) The whole process "[f]rom start to finish, finish being the signed implementation of the policy, probably [lasted]14 months, 15 months." (RT 1248.)

2. The evidence did not permit an attorneys' fees award.

In *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, our Supreme Court held that "in order to justify a fee award, there must be a causal connection between the lawsuit and the relief obtained." (*Id.* at 353.) Thus, plaintiff's action must be a "material factor or have contributed in a significant way to the result achieved." (*Ibid.*, internal quotes omitted.) But "[w]here there is no causal connection between the plaintiff's action and the relief obtained, an attorney fee award is not proper." (*Ibid.*)

In *Westside Community*, plaintiffs sued to compel a government official to issue final regulations implementing a civil rights statute. Just before a scheduled hearing, defendant released proposed regulations to the public; final regulations were issued prior to another court hearing. The trial court granted plaintiff's section 1021.5 motions.

The Supreme Court reversed. It held that plaintiff's suit was completely superfluous in achieving the issuance of either the proposed or final regulations. "The record demonstrates that at the time the lawsuit was filed, defendant had already approved a final draft of the proposed regulations. Statutory requirements mandated a lengthy process of

consultation with other state agencies, notice to the public, and public hearings before the proposals could be finalized." (*Ibid.*)

The Court held that "there is no evidence in the record to indicate that the issuance of final regulations occurred even a day earlier than it otherwise would have as a result of plaintiffs' lawsuit." (*Ibid.*)

As we've shown, the Sheriff's Department began reviewing its restraint procedures even before the incident that resulted in Dwayne's death. His death, not the lawsuit, induced the development of the modified procedures. The new procedures were developed before the lawsuit was filed. They could not be finalized until consultation with and approval by departmental officials and union representatives. They were put in place a few months after the lawsuit was filed.

To allow attorneys' fees under those circumstances would, as the Supreme Court held in *Westside Community*, "ignore the requirement of section 1021.5 that the lawsuit '*resulted* in the enforcement of an important right' that benefitted the public." (33 Cal.3d at 355, fn. 7.)

Indeed, Lottie's lawsuit could not have "resulted" in conferring a public-interest benefit, because that benefit had to be part of "'the primary relief sought'" (*id.* at 353), while Lottie's lawsuit sounded only in damages.

That defeats her fees claim. *Leiserson v. City of San Diego* (1988) 202 Cal.App.3d 725 is on point. There, the appellate court issued a comprehensive opinion defining the rights of the press at disaster sites, by virtue of which the plaintiff claimed to have conferred a significant benefit on the public. The court disagreed, holding that its opinion did not result from the lawsuit plaintiff pleaded: "Leiserson confined his tort action prayer to civil damages for himself, never requesting a declaration of the access rights of the press at disaster sites." (*Id.* at 738.) Given "the narrow focus of Leiserson's tort pleadings, it is clear our published opinion was simply fortuitous. It would be patently absurd for entitlement to attorney's

fees under section 1021.5 to be predicated upon our fortuitous decision to use Leiserson's appeal as a tool to communicate with the bench and bar certain legal guidelines and order its publication where the plaintiff himself does not request such a declaration." (*Ibid.*)

D. Lottie's New Theories For Recovering Attorneys Fees Should Not Be Considered. Moreover, Neither Entitles Lottie To A Fee Award.

For the first time on appeal, Lottie identified two new benefits she claims were conferred by her lawsuit: (1) an order from this Court, after the filing of a writ petition, that required that the County and the Sheriff's Department to "change their policies and procedures regarding the preservation and/or destruction of evidence"; and (2) protecting "the rights of African-American plaintiffs to have a representative and impartial jury" by making a motion under *People v. Wheeler* (1978) 22 Cal.3d 258. (AOB 27-28, 31; RT 404-408.)

These points do not and cannot constitute grounds for reversing the trial court's denial of fees. First, neither can be raised for the first time on appeal. "Under familiar general rules, theories not raised in the trial court may not be raised for the first time on appeal." (*McDonald's Corp. v. Board of Supervisors* (1998) 63 Cal.App.4th 612, 618.) "'To permit [a party] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.'" (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.)

An appellate court has discretion to consider a new point "when the issue presented involves purely a legal question, on an *uncontroverted record and requires no factual determinations*" (*ibid.*); however, here, the question of whether these alleged accomplishments support a section

1021.5 motion is honeycombed with factual disputes. In any event, there is no equitable reason for this Court to consider these new points. *(In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1303, fn. 15.) They were well known to Lottie when she made her fees motion, and she chose not to raise them. Her appeal brief contains no explanation as to why she made that choice.

Second, these "benefits" were no part of the relief sought in the lawsuit, and were sought only to further the ability of Lottie Nelson to obtain a damages award. For example, Lottie sought writ relief against the County in connection with its reuse of audio tapes as part of a then legal procedure of reusing such tapes after 120 days. The writ petition sought an order directing the trial court to reconsider Lottie's motion for evidentiary, terminating and/or jury instruction sanctions pursuant to section 2023 "to determine if defendants have caused plaintiffs any prejudice . . . and, if so, impose any sanctions that it deems appropriate to remedy the prejudice." (Petition for Writ of Mandate (B147607), p. 30.) In other words, the petition sought relief intended to facilitate Lottie's ultimate monetary recovery.[47/]

Lottie's Wheeler motion had the same objective. Moreover, the mere making of a Wheeler motion cannot possibly constitute conferring an important public benefit within the meaning of section 1021.5. The benefit was conferred in the Wheeler case itself, not in every subsequent case where a party avails herself of that benefit.[48/]

47/ The record contains no evidence showing that Lottie was a successful party on her sanctions motion; in fact, she obtained no sanctions of any kind – in particular, the court refused to give a jury instruction on wilful destruction of evidence. (E.g., RT 1345-1358.)

48/ Any fee award here would go entirely to Lottie's counsel Leo Terrell. (See CT 1109.) According to his own co-counsel David Frank, an award to Mr. Terrell would be unjust. (CT 1125.) A court may deny

(continued...)

CONCLUSION

For all the foregoing reasons, defendants urge the court to affirm (1) the summary judgment on the second through fourth causes of action of the complaint; and (2) the denial of Lottie Nelson's motion for section 1021 fees.

Dated: August 1, 2003

Respectfully submitted,

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48/(...continued)
attorneys fees where an award would be inequitable or unjust, even if the plaintiff has otherwise satisfied the statutory criteria. (*Bartling v. Glendale Adventist Medical Center* (1986) 184 Cal.App.3d 97, 104 [court may deny fees if "special circumstances render an award unjust"].) A lawsuit brought or conducted with "personal animosity extrinsic to the issues" may constitute such a "'special circumstance.'" (*Hammond v. Agran* (2002) 99 Cal.App.4th 115, 134.)