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' REPLY BRIEF

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The judgment must be reversed on the following grounds.

No Proof Of Standing To Sue.

In the opening brief, defendants showed that plaintiffs had the burden of proving they were decedent's heirs in order to sue under the wrongful death statute, and that they introduced no evidence at trial to satisfy that burden. For much of the case, plaintiffs insisted they had no such burden. As late as the post-trial motions, Lottie argued that it was "ridiculous" that plaintiffs "had an obligation to prove in any wrongful death [action], I'm the rightful heir" (RT 1563) and Wallace insisted that defendants had an obligation to "do a search" and show that Dwayne had a wife before any burden of proof could be imposed on plaintiffs (RT 1565).

But now plaintiffs make a complete U-turn on the issue.

Lottie Nelson admits that plaintiffs' have the burden of proof on standing. (Lottie's Respondent's Brief ["LRB"] 13, 17, 20.) Rather than contest that issue, she now argues that plaintiffs met that burden – not at trial, but during a pre-trial proceeding defendants brought under Evidence Code section 402 to determine the admissibility of six prison records recording that Dwayne had three children. (LRB 12, 17, 22.)[1/] In that proceeding, Lottie asserts, the trial court "determined that Plaintiff met her burden that she had standing to sue under Code of Civil Procedure § 377.60." (LRB 22.) According to Lottie, "[a]t the pretrial phase, it was

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1/ There were three oral proceedings on defendants' section 402 motion, which we collectively refer to as the 402 hearing.

established that [she] was a surviving parent of Dwayne Nelson, and that there was no surviving issue of Dwayne Nelson." (LRB 12.)

As shown below, this is pure fantasy.

Wallace Nelson also concedes that it is plaintiffs' burden to prove standing, because he argues that defendants assumed plaintiffs' burden by virtue of seeking a preliminary determination on the admissibility of the six prison records, which they intended to use to challenge plaintiffs' standing. (WRB 28-33.) "[O]nce [defendants] joined the issue on standing, based on prison records, then, at that point, [putting on] 'no evidence' [at trial] indeed was an option for Plaintiffs . . . because as far as the trial court was concerned, the issue of standing had been fully litigated. (WRB 30-31.)

Thus, Wallace winds up at the same place as Lottie. He asserts that at the 402 hearing, the standing "question was fully litigated" and "the trial court did, indeed, find that the Plaintiffs were Dwayne's legal heirs." (WRB 30, 33-34.)

This, too, is fantasy.

The sole purpose of a hearing under section 402 "is to decide 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 that is all the trial court litigated here. It did not rule on plaintiffs' standing to sue or decide whether Dwayne died without surviving issue. It held a hearing only on "the admissibility of six documents proffered as Exhibits 1 to 6 to the defense request for determination of preliminary facts." (RT 203, 206.) It asked for briefing only on the issue of "why you think in the plaintiffs' case [the exhibits are] inadmissible and in the defense's case why [they are] admissible." (RT 204.)

It litigated and decided only one point: that the prison records "are not sufficient, not trustworthy enough." (RT 208.) Plaintiffs declined the chance to ask the court to rule on standing. (RT 213.) After which, the court reaffirmed its ruling: "Evidence proffered inadmissible." (RT 213.) That was it. Nothing more was decided.

Nor could it have been. The trial court had no power to decide standing or any other affirmative part of plaintiffs' case in a 402 hearing or to deny defendants a jury trial on disputed factual issues, such as whether Dwayne died leaving children.

In addition, plaintiffs *knew* that the court was *not* litigating the issue of their standing to sue at the 402 hearing. Wallace's counsel confirmed that the only question before the court was "is the substance of the exhibits admissible?" (RT 203.) And Lottie's counsel declined to produce Lottie to testify once the court clarified that defendants, as "the proffering party of an exhibit" had the burden of proof on the section 402 motion, as contrasted with trial where plaintiffs had the burden to prove standing. (RT 200-202.) Thus, Lottie's counsel asked why, "in light of the court's position that [defendants are] the proffering party," he should "present any evidence at this stage." (RT 201-202.)

When trial began, then, plaintiffs knew their obligation to prove standing remained intact. When they chose to introduce no evidence on standing, they made a knowing choice. Plaintiffs now try to fill the gap by citing materials never introduced at trial and, in some cases, not even in the record on appeal. Since all reference to such materials must be stricken, we are left only with the blank trial record.

Because plaintiffs' failed to prove standing at trial, the judgment must be reversed with directions to enter judgment for defendants.

No Proof Of Medical Causation.

The judgment also must be reversed because plaintiffs failed to prove to a medical probability that Dwayne died from positional asphyxia. In the opening brief, defendants showed that plaintiffs' sole medical expert, Dr. John Cooper, failed to prove that positional asphyxia was more likely than not the cause of Dwayne's death. Plaintiffs now attempt to prove that point through non-expert evidence. Indeed, Lottie actually takes defendants to task for "limit[ing] their argument regarding causation to . . . the testimony of [plaintiffs'] medical expert, Dr. John Cooper, on the cause of death." (LRB 33.)

Instead, Lottie insists that the court must consider "the overwhelming evidence of negligence against the Deputy Sheriffs" (LRB 33-47) and the County's supposed failure to train the deputies in the use of the TARP (LRB 37). But none of this can constitute evidence of causation. Medical causation can be proven only by a medical expert "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.) Therefore, for causation to go to the jury, Dr. Cooper had to establish the cause of Dwayne's death to a reasonable medical probability by showing that "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.* (1985) 163 Cal.App.3d 396, 403.)

Here, Cooper gave at least three causal explanations for Dwayne's death – positional asphyxia due to the tarping; sudden death from cocaine use; sudden death from excited delirium. It is undisputed that Dwayne died suddenly while being tarped and, at the time, was high on cocaine and in a

state of excited delirium. Cooper testified without qualification that cocaine use and excited delirium can cause sudden death.

Accordingly, Cooper had to prove that there was "something more than a '50-50 possibility'" that Dwayne died from positional asphyxia rather than from these other causal explanations. (*Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1504.) It is undisputed that Cooper did *not* do so. As Lottie herself *concedes*, Cooper "did not speculate that he believe[d] there was a 50-50 chance that positional asphyxia was the cause of death of [Dwayne], or any other percentage for that matter." (LRB 55.) His failure to do so was a failure of proof by plaintiffs and fatal to their case.

Here, too, plaintiffs' failure to prove an affirmative part of their case requires reversal with directions to enter judgment for defendants.

No Substantial Evidence To Support Damages Award.

Defendants showed that the jury's finding that plaintiffs suffered a $2 million loss from Dwayne's death is excessive, not supported by substantial evidence and the product of jury misconduct. Put simply, it shocks the conscience. Plaintiffs are not able to defend the verdict. Wallace argues at length that a wrongful death plaintiff can "recover for nonpecuniary damages arising from loss of society, comfort, care and protection." (WRB 62-67.) But that is a non-issue. No one disputes that *a* plaintiff can recover for such damages; but there is no evidence that *these plaintiffs* – who had not see Dwayne for over twenty years and knew next to nothing about his life – suffered any appreciable loss of Dwayne's "society, comfort, care and protection," let alone a loss of $2 million.

Plaintiffs point to no such evidence. They rely instead on letters, cards and phone calls received from Dwayne over the years (WRB 67-69;

LRB 63-64) and on the premise that a loss of "emotional and moral support" can be founded on nothing more than the "very existence on this earth of [a] son or daughter" (WRB 69). Such a standard for awarding wrongful-death damages is no standard at all. Recognizing that their evidence is legally insufficient to support the judgment, Lottie cites unpublished trial-court judgments in "wrongful death cases that [her counsel] handled personally" (LRB 66) and Wallace insists that the controlling case law does not reflect our "more enlightened time" (WRB 70-71). Both miss the point: The damages restrictions derive from a statute (Code Civ. Proc., § 377.61) and have been applied as recently as 2001 in *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614.

Plaintiffs continue to defend their naked appeal to the jury to award non-recoverable damages. (See AOB 64-66.) Lottie cites her testimony about "how difficult it was to bury her son . . . and to know that some of [his] brains and internal organs are still in the possession of the Los Angeles County Coroner" as "substantial evidence" supporting the jury's damages finding (LRB 63-64) and Wallace defends that evidence as not "inherently repulsive" (WRB 72). Both miss the point here as well: This evidence relates solely to emotional distress and punitive damages – neither of which can be awarded in this action. And it appears that jurors awarded these impermissible damages, including damages in an amount sufficient to "send a message to the County of Los Angeles." (AOB 64-65.)

For all these reasons, the judgment must be reversed.

I. PLAINTIFFS' BRIEFS ARE REPLETE WITH REFERENCES TO NON-RECORD MATERIALS, AND ALL SUCH REFERENCES AND ARGUMENTS BASED THEREON MUST BE STRICKEN OR DISREGARDED.

Plaintiffs cannot prove that they are Dwayne's heirs based on the record at trial. They blatantly pad their briefs with materials that were not introduced in evidence or even used at trial, and in some cases that are not part of the record on appeal. For example:

- Both plaintiffs cite to the Declaration of Wallace Nelson, submitted to the court *after* entry of judgment in opposition to defendants' *post-trial* motions. (WRB 32, 39; LRB 24.)

- Both plaintiffs cite to Lottie Nelson's Answers to Interrogatories, *not* produced or used at trial and *not* in the appellate record. (WRB 32, 23; LRB 23.)

- Wallace makes frequent use of an undated letter from Dwayne to Lottie Nelson, *not* used or introduced at trial, and *first used* in Lottie's opposition to defendants' post-trial motions. (WRB 12, 17, 32, 34, 37-39.) Though marked as an exhibit, plaintiffs withdrew the letter to ensure there would be no evidence of standing in the trial record for defendants to rebut. (See AOB 23-24; WRB 29, 34-35, 38-39.)

- Both plaintiffs cite to the *post-trial* findings of a detective agency that purportedly searched birth records in Memphis, Tennessee *after* entry of judgment, and *first used* in Wallace's opposition to defendants' post-trial motions. (WRB 38; LRB 24; AA 1263, 1273.)

Similarly, in attempting to defend the judgment against defendants' showing that plaintiffs failed to prove causation, Wallace goes beyond the trial record and the record on appeal. Specifically, he cites and relies on:

- Prison records that are not part of the trial record or the record on appeal, which allegedly discuss Dwayne's health. These particular records were not used at trial or filed in this lawsuit. Wallace admits that the "records played no part in the trial" and are not before this Court, yet he cites them as evidence that Dwayne had no heart problems. (WRB 45, 49.) The records are not identified; they could be anywhere in the nearly 1000 pages of such records produced during discovery. (See WRB 11-12, 17.)

- An entire book chapter written by Dr. Donald T. Reay (discussed at WRB 50-54) that was not introduced into evidence at trial and is not part of the record on appeal. The use of this particular non-record material is especially egregious, because defendants *tried* to introduce Reay's book chapter into evidence, and *plaintiffs successfully kept it out.* (RT 773-776, 789-790, 1391-1393.)

All this non-record material must be stricken or disregarded. (Cal. Rules of Court, rule 14(a)(1)(C), (a)(2)(C), (e); *Petricka v. Department of Motor Vehicles* (2001) 89 Cal.App.4th 1341, 1345, fn. 1 [striking sentence from brief based on matter not in record]; *Connecticut Indemnity Co. v. Superior Court* (2000) 23 Cal.4th 807, 813, fn. 2 [rather than striking non-record matter, court "simply shall ignore all such references"]; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1419, fn. 9 [striking exhibit to writ petition because executed after court made its ruling].)

II. PLAINTIFFS CONCEDE THAT THEY INTRODUCED NO EVIDENCE AT TRIAL TO SHOW THEY WERE DWAYNE'S HEIRS AT LAW. THEREFORE, THIS COURT MUST REVERSE THE JUDGMENT ON THE GROUND THAT PLAINTIFFS FAILED TO PROVE STANDING TO SUE.

In the opening brief, defendants showed that:

- A decedent's parents are not automatically entitled to sue under the wrongful death statute, Code of Civil Procedure section 377.60. They can sue only if they were financially dependent on the decedent or if they were the decedent's heirs at law. And a parent can be an heir at law only if the decedent died without surviving issue. (AOB 14-16.)

- The parents have the burden of proving that decedent died without surviving issue. (AOB 16-19.)

- Lack of standing can be raised at any stage of the proceedings, even on appeal. (AOB 12.)

Defendants also showed that plaintiffs introduced no evidence on standing at trial, and indeed made a conscious decision to keep out all evidence regarding Dwayne's status as a father. (AOB 22-25.)

Plaintiffs now concede nearly all of these points. They make their stand defending the judgment on a different ground: They contend that the court litigated and decided the issue of standing at a pre-trial proceeding under Evidence Code section 402, and in that proceeding, held that Dwayne died without issue.

There is no factual or legal basis for plaintiffs' contention.

A. Plaintiffs Concede They Had The Burden Of Proving Standing In This Lawsuit.

As Dwayne's non-dependent parents, plaintiffs can sue under the wrongful death statute only if they are his heirs – and that status depends on the decedent having died without surviving issue. Proof that plaintiffs are Dwayne's heirs is part of plaintiffs' affirmative case, and plaintiffs have the burden of proof on that issue. That is what the wrongful death statute states. That is what all the pertinent case law holds. And that's what common sense demands: in a wrongful death context, the plaintiff, as decedent's relation, is always in a better position to prove that he is an heir than the defendant – nearly always a perfect stranger – is to disprove it. (See generally AOB 13-19.)

Lottie now admits that plaintiffs carry the burden of proving standing. She states:

- "Plaintiffs proved they had standing to bring a wrongful death action, and *met their burden of proof.* (LRB 13, emphasis added.)
- "Plaintiff fulfilled the burden of proving that she was qualified to sue as the heir of Dwayne Nelson." (LRB 17.)
- "Plaintiff fulfilled the burden of proving that she was qualified to sue as the heir of Dwayne Nelson by submitting sufficient evidence to the trial court to prove that there was no issue of Dwayne Nelson." (LRB 20.)

Wallace appears effectively to do the same. He concedes that the trial court held that plaintiffs had the burden of proof on the issue of standing (WRB 33, quoting RT 201), but insists that defendants somehow relieved plaintiffs of that burden when defendants brought a pre-trial

motion under section 402 to establish the admissibility of six prison records that record that Dwayne had three children. (See, e.g., WRB 28, 30-31, 33.) So, Wallace argues, because defendants "joined the issue on standing" at the 402 hearing, "then, at that point, [putting on] 'no evidence' [at trial] indeed was an option for Plaintiffs" (WRB 30) and the issue of standing "became moot" (WRB 33).

Whatever this argument means, its starting point is that a wrongful death plaintiff has the burden of proving standing.

In any event, with or without their concession on the issue, the legal point is settled: 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." (*Coats v. K-Mart Corp.* (1989) 215 Cal.App.3d 961, 969; see also *Jolley v. Clemens* (1938) 28 Cal.App.2d 55; *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433.) Plaintiffs cite no cases that in any way cast doubt on this principle. Both plaintiffs try to distinguish the leading cases by contrasting their facts with the facts in the present case. (LRB 17-20; WRB 35-37.) That is an empty exercise, however. It is the wrongful death *statute* that makes standing part of a plaintiff's affirmative case; the courts simply enforce the burden of proof on that issue in regard to the particular facts that happen to be before them. Therefore, it is completely beside the point that the facts of *Jolley*, *Coats* and *Chavez* are not identical to the facts in the present case. That does not and cannot affect the issue of plaintiffs' obligation here to prove they are heirs of decedent.

B. Plaintiffs Concede That They Introduced No Evidence At Trial On Standing.

In the opening brief, defendants showed that plaintiffs introduced no evidence of any kind to prove that Dwayne died without children. (See AOB 19-25.) Plaintiffs do not contest this. Rather, they admit that they did not prove standing at trial. Indeed, that admission is the very reason that plaintiffs concoct the argument that the matter was litigated and decided prior to trial. Thus, Lottie states that "[s]tanding was established at the pretrial stage[;] therefore, it was not necessary to re-introduce said evidence at trial" or "to revisit this issue at trial." (LRB 22.) And, in setting out all the evidence that plaintiffs supposedly introduced on the matter of standing, Lottie expressly characterizes it as "[e]vidence introduced by plaintiffs at pre-trial and at post trial proceedings" (LRB 23-24) – that is, none of it was introduced at trial.

Wallace uses almost the identical language, arguing that plaintiffs "were under no obligation to revisist the standing issue" at trial. (WRB 30.) He asserts that introducing no evidence at trial (which defendants had argued was not an option for plaintiffs, AOB 19-20) "indeed *was* an option" because "the issue of standing had been fully litigated" at the 402 hearing. (WRB 30.) Like Lottie, the only evidence Wallace refers to is evidence that was not introduced at trial. (E.g., WRB 38.)[2/]

2/ Thus, Wallace boasts that he "has conducted a search of birth records in Memphis and Shelby County in Tennessee," and no children were found. (WRB 38.) But, as the unsworn and unauthenticated evidence of this so-called search shows on its face (see AOB 25-26 & fn. 25) and as Lottie admits (LRB 23-24), the search was not even made until after entry of judgment.

Defendants also showed that the plaintiffs deliberately chose not to raise the issue of standing at trial. (See AOB 23-25.) They did not introduce any evidence on standing, not even the evidence they claimed to possess during the 402 hearing. (See AOB 23-24; LRB 23-24.) And they did not use a two-month continuance following the 402 hearing to attempt to locate any evidence on Dwayne's family status. (AOB 24-25.) The respondents' briefs now confirm this. (LRB 22, 23-24; WRB 30-31.) As Wallace states:

> And as to the Plaintiffs not raising the issue again – during trial – certainly they were under no obligation to revisit the standing issue, and perhaps risk opening the door to evidence that had now been excluded. In fact, defense counsel stated that he intended to impeach Lottie with the prison records if her counsel asked her whether Dwayne had children. [Citations.] Why would any plaintiff seek exposure to that after successfully litigating the entire issue.

(WRB 30-31.)[3/]

3/ A particularly vivid example of how plaintiffs sought to keep the standing issue out of the trial is their tactical decision to withdraw an exhibit they believed was relevant to standing so as to forestall defendants from calling a witness (Yvonne Parrish) who defendants had designated to lay a foundation for the six prison records reciting that Dwayne had children. (AA 775; AOB 23-24 & fn. 20.) The exhibit plaintiffs' withdrew was an undated letter from Dwayne to his mother; Lottie's counsel agreed to remove the letter "if that is going to take the issue away." (RT 1270-1273.)

Lottie now denies that her motive in withdrawing the letter was to keep out evidence about standing. (LRB 22-23.) Specifically, she claims that "[f]or all [her] counsel knew, Parrish was being called to authenticate Nelson's prison records *prior* to the testimony of Judge Dino Fulgoni, who Defendants intended to call regarding the 'sentencing of decedent for his criminal activities preceding his death.'" (LRB 22-23, emphasis added.)

This won't fly. *First*, Lottie's counsel could not have known any such thing. By the time he agreed to withdraw the letter (RT 1270-1273 [June 7, 2002], Fulgoni had *already testified* (RT 1013-1065) and Parrish had *not* been called as a witness. At that point, it was obvious that Parrish's testimony would relate to the issue of standing, not Dwayne's criminal

(continued...)

Accordingly, there is no dispute on this point: The trial record is blank on the issue of whether plaintiffs were Dwayne's heirs at law – because plaintiffs intended the record to be blank.[4/]

C. Plaintiffs Did Not Fulfill And Could Not Have Fulfilled Their Burden of Proving Standing In The Hearing On Plaintiffs' Section 402 Motion.

1. The issue of standing was not litigated or decided at the 402 hearing.

Given the blank trial record, plaintiffs base their defense of the judgment on the contention that, to use Wallace's words, they "successfully litigat[ed] the entire issue" of standing at the 402 hearing. (WRB 30-31.) This proposition – absurd on its face – is the crux of plaintiffs' argument.

So, Wallace asserts that at the 402 hearing, defendants "took the lead" on standing, "raised the issue, the matter was litigated, Plaintiffs prevailed, and the case went forward." (WRB 33; see also WRB 35 ["Defendants saw to it that the whole matter (of standing) was fully briefed

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3/(...continued)
history.

Second, Wallace confirms what the facts clearly show – the letter "was removed from evidence by Lottie's counsel in the belief that that ended the *standing* issue." (WRB 39, emphasis added.)

4/ Wallace argues that "[t]he real truth here is that everybody knows that Dwayne had no children, and form is being exalted over substance." (WRB 38-39.) Indeed, Wallace goes further, charging that defendants continue to argue "before this Court that Dwayne Nelson had children, knowing it to be false." (WRB 11.) Needless to say, reckless charges of bad faith against defense counsel and assertions that "everybody knows" are not a substitute for evidence.

and litigated, with a separate 402 hearing on the matter"]; WRB 30 ["(O)nce (defendants) joined the issue on standing, based on the prison records . . . as far as the trial court was concerned the issue of standing had been fully litigated"].) And, Wallace concludes: "And there can be no doubt that the trial court did indeed find that the Plaintiffs were Dwayne's legal heirs," since "the trial judge allowed the case to proceed, and the issue was never raised again during the trial by the Appellants." (WRB 30.)

Similarly, Lottie asserts that "[a]t the pretrial phase, it was established that Plaintiff Lottie Nelson was a surviving parent of Dwayne Nelson, and that there was no surviving issue of Dwayne Nelson." (WRB 12; see also LRB 13 ["Evidence was presented (at the 402 hearing) to prove plaintiffs' standing to bring a wrongful death action"].) And, Lottie concludes, when the trial court held that the prison records "are not sufficient, not trustworthy enough" to be admissible (RT 207-208, quoted at LRB 17), "[a]t that point, the issue of standing was established, and Lottie Nelson was given leave to proceed with the case as a wrongful death plaintiff as the heir of Dwayne Nelson" (LRB 17).

These contentions are totally false. The issue of standing was not litigated or decided at the 402 hearing, or at any other time prior to trial. Indeed, Lottie's last-quoted assertion is a virtual non sequitur. How could anyone construe the court's statement that the six prison records defendants' proffered were not trustworthy and therefore inadmissible to constitute a ruling that plaintiffs had proven that Dwayne died without children?

The simple truth is that the trial court never purported to decide the question of whether Dwayne died without issue as part of the section 402 motion. It repeatedly characterized the issue before it as involving the

admissibility of the six prison records proffered by defendants, and nothing more. For example:

- It characterized the hearing "[w]e are going to have" as one "regarding the admissibility of six documents proffered as Exhibits 1 to 6 to the defense request for determination of preliminary facts." (RT 203; see also AA 595.)

- It asked for briefing only on the issue of "why you think in the plaintiffs' case [the exhibits are] inadmissible and in the defense's case why [they are] admissible." (RT 204.)

- It opened the final session of the 402 hearing, at which it made its ruling, by stating "[t]his is a 402 hearing, the subject of which is the admissibility of certain records proffered by the defense." (RT 206.)

- It litigated and decided only one point: that the prison records "are not sufficient, not trustworthy enough." (RT 208.) Later, it reaffirmed its narrow ruling: "Evidence proffered inadmissible." (RT 213.) Plaintiffs did not ask the court to rule on standing. (*Ibid.*)

- It held that while plaintiffs had the burden of proof on the issue of standing (RT 194, 201), the burden on the section 402 motion was on the defense "to validate these documents" (RT 194) because "for purposes of your motion, for determination of the primary fact, I need you to support these documents" (RT 201).

- And after trial, when defendants moved the court to enter judgment notwithstanding the verdict because plaintiffs had failed to prove that they were Dwayne's heirs, and when the court denied the JNOV motion, it did *not* do so on the ground that the issue had been litigated and decided at the pre-trial 402 hearing. Rather, the court denied the motion because it effectively held – mistakenly, as even plaintiffs now concede –

that plaintiffs did not have the burden of proving they were Dwayne's heirs. (E.g., RT 1558-1559; AA 1356-1357.)

It is true that defendants' ultimate goal, if the prison records were ruled admissible, was to challenge plaintiffs' standing to sue and thus if possible avoid the upcoming trial. (See AA 580; RT 136-137.) It is also true that defendants stressed the fact that the question of the admissibility of the six prison records ultimately implicated the issue of standing (if found admissible, the records could then support a jurisdictional challenge) in order to persuade the court to hear the 402 motion directly prior to trial (see RT 192-193) and it appears that it was that link with standing that caused the court to hear the motion over plaintiffs' objections (see RT 198).

But the only relief the motion sought – and the only relief it could have sought – was a ruling that the six prison records were admissible. What would have happened next if that relief had been granted – which it was not – is not clear. Plaintiffs appeared to contemplate some future proceeding in which they would present evidence on the matter. (RT 194, 201-202.) If plaintiffs presented evidence so as to raise disputed factual questions, those questions would of course be for the jury.

These contingencies never arose. Only one thing is clear: The court never litigated or decided the question of whether plaintiffs had standing to sue as part of the section 402 motion.

2. Plaintiffs knew that the court did not litigate or decide standing at the 402 hearing.

Plaintiffs knew full well that the court did not hold a hearing on the question of whether Dwayne died without children, let alone decide the question. For one thing, plaintiffs were present in court when the court

announced that it was deciding only the limited issue of the admissibility of the six prison records. For another, plaintiffs expressly acknowledged that fact on the record.

Lottie acknowledged it in this colloquy between the her counsel (Leo Terrell), defense counsel (Dennis Gonzales) and the trial court:

> Mr. Gonzales: Excuse me, Your Honor, if I can inquire, the court has alluded to the burden, and the court has indicated that the court believes the burden initially is upon the defense. And may I ask the court to respectfully under what law or what cite that --
>
> The Court: As to the proffering party of an exhibit.
>
> Mr. Gonzales: If I had not brought any of those documents before the court, I merely said we need to have proof of the standing and I sat down, would the court then indicate to the plaintiffs that it was their burden? Under the Joley [*sic*] case --
>
> The Court: Sure . . .
>
> Mr. Gonzales: Of course, sir.
>
> The Court: That is what I'm trying to get at.
>
> Mr. Gonzales: I appreciate that.
>
> The Court: Okay. Now, what I'd like to do is I'd like to hear what Ms. Nelson has to say about this limited question of her son's situation.
>
> Mr. Terrell: In light of the court's position, I would ask the court -- I would like to decline my client to testify *because the burden is still over here*. Why should I give -- why should I present any evidence at this stage? *I would respectfully decline in light of the court's position that they're the proffering party*. I don't think it is appropriate at all. I would suggest, you know, in the alternative --
>
> The Court: Well, then, Mr. Terrell, we can go to a briefing schedule *on the evidentiary issues here*, and your client can, you know, do what you want with your client.

(RT 200-202, emphases added.)

Could anything be clearer? As a result of this colloquy, Lottie's counsel declined to produce Lottie to testify. He made that tactical decision because he knew that the only issue being decided was the admissibility of the prison records, and on that issue, his client did not have the burden of proof.

Wallace's counsel (David Frank) also acknowledged the limited scope of the 402 hearing:

> The Court: Okay. We are going to have a hearing regarding the admissibility of six documents proffered as Exhibits 1 through 6 to the defense request for determination of preliminary facts. I want concurrent opening briefs in two days, close of business, which would be the 7th.
>
> Mr. Frank: *The question is is the substance of the exhibits admissible*?
>
> The Court: That's correct.

(RT 203-204.)

In addition, after defendants filed their JNOV motion, Wallace went out and hired detectives to search the public records in Tennessee (AA 1273, 1274) to try to prove Dwayne had no children. These are not the actions of a someone who believed, as Wallace now asserts, that when the prison records "were rejected by the trial court" at the 402 hearing, "legally speaking, the issue [of standing] ceased to exist." (WRB 37.)

In one sense, none of this matters. Plaintiffs cannot escape the consequences of their failure to prove standing at trial even if they genuinely believed that the trial court had litigated and decided the question of whether Dwayne died without issue. What the court did, not what plaintiffs thought it did, is all that's important.

But there should be no doubt that plaintiffs made an informed decision not to introduce evidence on standing at trial. They knew that the

contested issue of standing had not been litigated or decided at the section 402 hearing or at any other time prior to trial.

3. The trial court could not have decided the issue of standing at the 402 hearing.

a. The issue of heirship was not a preliminary fact that the court could determine on a section 402 motion.

A section 402 hearing is solely concerned with the admissibility of evidence. Its purpose "is to decide preliminary questions of fact upon which the admissibility of evidence depends." (*People v. Superior Court (Blakely)*, *supra*, 60 Cal.App.4th at 209, fn. 6.) Typically, such motions are used to determine whether a confession was voluntary (e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 377), a witness was competent to testify (e.g., *People v. Lucas* (1995) 12 Cal.4th 415, 466) or, as here, whether a proffered document satisfies the criteria for admission under the official records exception to the hearsay rule (e.g., *People v. Martinez* (2000) 22 Cal.4th 106, 119-120).

However, the preliminary fact that the court determines must relate to the admissibility of the evidence, and not the other way around. Here, the question of whether Dwayne had children was not a preliminary or foundational fact to the admissibility of the six prison records. Rather, the prison records, if they were admitted, would have been evidence that Dwayne in fact did have children.

Therefore, even if the trial court had purported to decide the issue of standing at the 402 hearing – and it did no such thing – it would have erred

in doing so, because standing was not a preliminary fact that the court was entitled to decide under section 402 and the only preliminary facts at issue were the elements of the particular hearsay exceptions, none of which involved the question of whether Dwayne had children.

b. A section 402 motion cannot be used to decide substantive issues meant to be litigated at trial.

Neither side raised the issue of standing on a motion for summary judgment or summary adjudication. The only pre-trial setting in which standing was mentioned was defendants' section 402 motion. But a section 402 motion cannot be used as a substitute for summary judgment or to decide a substantive issue to be litigated at trial.

In *Blakely*, the trial court used a section 402 motion to decide as a matter of law that a diagnosis of a felon (real party in interest Blakely) did not require his extended commitment. The appellate court issued a writ of mandate directing the trial court to vacate its order and proceed to trial on the question it decided at the 402 hearing. The appellate court noted that while a 402 hearing is used "to decide preliminary questions of fact upon which the admissibility of evidence depends," the trial court "in ruling on Blakely's motion . . . decided the substantive issue to be litigated at trial, namely, whether he suffers from a qualifying mental disorder within the meaning of section 1026.5." (*People v. Superior Court* (*Blakely*), *supra*, 60 Cal.App.4th at 209, fn. 6.) In other words, "the trial court did not simply resolve an issue as to the admissibility of certain evidence. Rather, its ruling concerning the legal significance of Blakely's diagnosis essentially disposed of the entire matter." (*Id.* at 209, fn. 7.)

Had the trial court here decided standing – it did not do so, as we've shown – it would have erred; like the trial court in *Blakely*, it would have improperly disposed of a "substantive issue to be litigated at trial."

c. A section 402 motion cannot be used to decide disputed factual contentions that must be decided by a jury.

Even if the ultimate issue of standing is a question of law for the court, the factual questions on which standing is based, if disputed, are for the jury to decide. (See *Cornelius v. Los Angeles County etc. Authority* (1996) 49 Cal.App.4th 1761, 1779 [trial court granted summary judgment, ruling plaintiff had standing to sue; appellate court reversed, but declined to send standing question back for trial, *only because* parties consistently treated it as pure legal issue and defendant "never asserted that the trial court erred because there was a triable issue of material fact about the question of standing"]; cf. *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1154 ["The question of probable cause is one of law, but if there is a dispute concerning the defendant's knowledge of facts on which his or her claim is based, the jury must resolve that threshold question"]; *Blanchard v. State Farm Fire & Casualty Co.* (1991) 2 Cal.App.4th 345, 350 [only in "the *absence of dispute over some underlying fact*" is the existence of a conflict of interest requiring appointment of independent counsel "a question of law for the trial judge to decide," emphasis added]; *Institute of Athletic Motivation v. University of Illinois* (1980) 114 Cal.App.3d 1, 13-14, fn. 5 ["the jury may be required to determine disputed facts relating to the existence of the privilege" in a defamation action, but

"it is for the court to decide whether the facts found by the jury made the publication privileged"].)

Here, as Dwayne's parents, plaintiffs had standing to sue only if they proved that they were heirs of Dwayne, and they could be heirs only if they proved Dwayne died without issue. That disputed factual issue could not be decided by the court as a matter of law on a section 402 motion.

d. There was no evidentiary record sufficient to have allowed the trial court to have decided that Dwayne died without issue.

The only proper evidentiary record made during the 402 hearing related to the admissibility of the six prison records. There was live testimony by the custodian of records of the Los Angeles County Department of Corrections and Lottie's counsel attached to his declaration what he stated were true and correct copies of other prison documents for the purpose of proving that the six prison records that defendants' proffered should not be admitted. (RT 139-160; AA 613-614.)

In contrast, there was no proper or developed record on standing. The bare bones materials Lottie points to (LRB 23-24) were not even properly put in evidence. For example, plaintiffs read a question and answer from Lottie's deposition (she answered "No" to the question whether Dwayne had any children). (RT 199.) However, Lottie did not attach a copy of the question and answer to her papers, and there is no evidence that she lodged a copy of executed originals with the court. (See 2 Weil & Brown, Cal. Practice Guide, Civil Procedure Before Trial (The Rutter Group 2003) §§ 9:50-9:51.1.)

Worse yet, as Lottie's testimony at trial shows (see AOB 9-10), she was not competent to testify to whether Dwayne had children, since she hadn't seen him for over 20 years and had no personal knowledge of the basic facts of his life. (See Evid. Code, § 702; *General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 442; *Magnecomp Corp. v. Athene Co.* (1989) 209 Cal.App.3d 526, 537; *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 605-606.)

Had there been a hearing on standing, defendants would have objected to the admission of that testimony; certainly, they would have had the chance to impeach Lottie. Indeed, they advised the court that they intended to introduce excerpts from Lottie's deposition to "indicate to the court the lack of competency for her to make any decision as to or any opinion as to whether or not the decedent had children." (RT 202.) They were entitled to do so. (Code Civ. Proc., § 2025, subd. (u)(5).) However, they never were afforded that opportunity, because the court stated its intention to consider only the admissibility of the six documents (RT 203 ["We are going to have a hearing regarding the admissibility of the six documents proffered as Exhibits 1 to 6 to the defense request for determination of preliminary facts"]) and in fact only did consider that issue (RT 206-208).

Obviously, the court could not possibly have decided the standing issue without allowing defendants to impeach Lottie with her deposition testimony. (Code Civ. Proc., § 2025, subd. (u)(5).)

The rest of Lottie's alleged evidence was equally improper and lacking in probative value.[5/]

5/ For example, Lottie's counsel also "informed the Court" that Lottie and Nelson filed declarations in probate court "that indicate under oath that (continued...)

Both Lottie and Wallace cite an undated letter from Dwayne to Lottie to prove Dwayne had no children. (WRB 12, 32, 34; LRB 24.) This takes chutzpah. After all, the letter was not introduced in evidence at trial specifically because plaintiffs chose to withdraw it as an exhibit. Lottie at least admits that the letter was first put before the court *after* trial, in her opposition to defendants' JNOV motion. (LRB 24.) That of course renders it useless as support for the judgment. Wallace, on the other hand, implies that the letter was before the court at the 402 hearing (WRB 32) – which is demonstrably untrue (RT 132-221).[6/]

5/(...continued)
there are no children." (LRB 15, 23-24.) There is no evidence these documents were put in evidence in the trial court. (See RT 171.) They were not made the subject of a request for judicial notice, something Lottie appears to admit. (LRB 15, fn. 5.) Nor would it have mattered: "A court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments." (*Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 22, internal quotes omitted.) Moreover, we know from both plaintiffs' sworn testimony that neither was competent to testify about whether Dwayne had children; and, indeed, Wallace directly testified that he did not know Dwayne's family situation. (AOB 23-24.)

Lastly, plaintiffs appear to have handed the court an interrogatory answer in which Lottie gives the names of Dwayne's siblings. (See RT 161-162.) There is no evidence that this interrogatory answer was properly put in evidence at the hearing (2 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, §§ 9:50-9:51.1), and it appears not to be part of this record on appeal. At any rate, it does not constitute evidence relating to standing; rather, plaintiffs raised it to prove that Dwayne's statements in the prison records were untrustworthy, because the names he gives as the first names of his children were also the first names of three of his six siblings. (RT 161-162; see WRB 12-14, 17.)

6/ Specifically, Wallace asserts that by the date of the section 402 hearing, "the trial court knew about Dwayne's [undated] letter to Lottie" because it "had been listed as an exhibit." (WRB 32.) Wallace does not support that assertion with any record cites. And for good reason. He knows that no exhibit list filed in this case contains the substance of the undated letter. Significantly, the undated letter is not mentioned in oral or
(continued...)

e. The burden of proof on standing cannot shift to defendants as a result of their filing a section 402 motion.

Wallace appears to argue that defendants transferred the burden of proof on standing to themselves merely by filing a section 402 motion. (WRB 28-30.) Not so. The burden of proof does not shift. (See Evid. Code, § 500; *Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 346 ["plaintiff has the burden of proof with respect to all facts essential to his or her claim for relief" and "burden of proof remains with the party who had the burden in the first instance"].) The fact that defendants sought to obtain foa ruling on the admissibility of evidence that could be used to challenge plaintiffs' standing to sue could not shift the burden on that issue away from plaintiffs and onto defendants.

D. Defendants Were Not Required To Rebut Standing Because Plaintiffs Introduced No Evidence On The Matter. Had They Done So, The Prison Records Would Have Been Admissible To Rebut It.

Wallace repeatedly argues that defendants waived the issue of standing by (1) not challenging plaintiffs' standing earlier in the case; (2) not searching public records for proof about Dwayne's family; and (3) not presenting evidence at trial. (WRB 14-15, 28-30, 34-35.) This is nonsense. First, standing may be raised at any stage of the proceedings. (AOB 12.) Second, defendants cannot waive standing by failing to

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6/(...continued)
written argument on the section 402 motion.

challenge it. Plaintiffs have the burden of proof on that issue, and defendants need not present any evidence on it unless and until plaintiffs first make out a prima facie case. (AOB 26.) Lastly, because plaintiffs had the burden of proof on standing (not to mention their obligations as co-administrators of Dwayne's estate), it was their job to search the records. As we've seen, there is no evidence that they made any searches until after entry of judgment. (AOB 24-25.)

Had plaintiffs made a prima facie showing of standing at trial, defendants would have used the six prison records showing that Dwayne fathered three children to rebut it, for which purpose defendants had designated and were prepared to call two witnesses to testify to "[p]rison record foundation." (AA 775.) As shown in the opening brief, the court erred in not admitting the six prison records. (AOB 26-33.) Nothing plaintiffs argue now undercuts the correctness of defendants' showing of error. Plaintiffs' main argument against admissibility is that it "is impossible" to know the ultimate source of the statements that Dwayne had three children. (E.g., LRB 26, 27, 28, 31; WRB 21, 24-26.)

This is a contrived effort to create an issue where none exists. Information regarding Dwayne's family situation could *only* have come from Dwayne. Moreover, Dwayne *actually signed* one of the prison records reciting that he had three children. Incredibly, Wallace tries to bury this fact. Thus, Wallace lists "the *five* documents upon which [defendants] base their standing argument," stressing that none is signed by Dwayne. (WRB 17-19, emphasis added.) Yet, he excludes any mention of the *sixth*

document (AA 586), which *is* signed by Dwayne. Here, too, plaintiffs seem unable to defend the judgment on the basis of the record as it really is.[7/]

III. Plaintiffs' Failed To Prove To A Medical Probability That Dwayne Died From Positional Asphyxia.

A. Causation In A Wrongful Death Or Personal Injury Case Can Be Proved Only By Expert Testimony – Not By Evidence Of Negligence Or By An Appeal To The Jury's Common Sense.

The law is settled that "medical causation can *only* be determined by expert medical testimony." (*Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 385, emphasis added; accord *Jones v. Ortho Pharmaceutical Corp., supra,* 163 Cal.App.3d at 402 ["in a personal injury action causation *must* be proven within a reasonable medical probability *based upon competent expert testimony*," emphasis added].)

A jury cannot infer medical causation from the facts proving negligence. "In California, causation *must* be founded upon expert 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, supra,* 3 Cal.App.4th at 1385, emphasis added.) And a plaintiff cannot prove

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7/ Nor are the six prison records unrepresentative. Out of almost 1000 pages of prison documents (see WRB 11-12), plaintiffs fail to cite a single one that records that Dwayne had no children.

causation based on the jury's "common sense" or "common experience." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 778.)[8/]

B. Plaintiffs' Effort To Use Non-Expert Testimony Or Evidence Regarding Negligence To Prove Causation Cannot Succeed.

Here, plaintiffs introduced only one expert witness, Dr. John Cooper, to prove their contention that Dwayne died from positional asphyxia. However, as we showed in the opening brief, Dr. Cooper failed to prove that contention. He was required to show that positional asphyxia was more likely than not the cause of Dwayne's death. (See AOB 35-37.) However, by his own testimony, Cooper showed that Dwayne was just as likely to have died from causes operating wholly independent of the tarping. (AOB 33-43.)

Plaintiffs now attempt to prove causation by evidence that is neither expert, nor medical, nor even in some instances in the record. Thus, Lottie argues that medical causation can be proved by "the overwhelming evidence of negligence against the Deputy Sheriffs." (LRB 33.) And she proceeds to spend almost 15 pages detailing this "overwhelming evidence of negligence." (LRB 33-47). However, this evidence is, on its face, totally irrelevant to prove that Dwayne died of positional asphyxiation.

8/ As we showed in the opening brief, that is effectively what plaintiffs argued to the jury. (AOB 53-55.) They argue it here again. (WRB 44 ["while medical expertise is required to prove cause of death," neither a doctor, nor a juror, nor judge has "to close his eyes and unplug his common sense"].)

Lottie cites, for example, testimony that Dwayne complied with directions from Deputy Hoodye (LRB 43) and "never threatened [Deputy] Florence" or attempted to strike him (LRB 39). This presumably is relevant to the issue of whether the deputies need to use a TARP at all. Lottie also cites evidence to show that the deputies applied the TARP in a negligent manner. (LRB 38-39, 40, 46-47.)

Above all, Lottie focuses on what she contends is the County's failure to train the deputies in the use of the TARP. Indeed, she actually asserts that failure to train is a prong of the causation issue, arguing that "[c]ausation is a two-pronged question," one prong of which is whether the deputies "were so poorly trained that they failed to understand the dangers posed by the hobble restraint" and whether "the County of Los Angeles was responsible for failing to train these Deputies." (LRB 37.)

None of this evidence is remotely relevant to the issue of causation. The evidence discussed by plaintiffs is not expert testimony or medical testimony. It does not show that Dwayne was more likely to have died from positional asphyxia than from his cocaine high or his excited delirium.

To allow a plaintiff to use evidence of negligence to prove that an injury or death was caused by negligence would effectively do away with causation as a separate element of a wrongful death or personal injury action. At the very least, it would invite the jury to decide medical causation based not on expert testimony but on speculative inferences from the totality of evidence. As we've seen, that is not permitted.

Moreover, plaintiffs' current contention that lack of training is a prong of causation is directly contrary to what they asserted at trial. Thus, in arguing that Lottie's police-tactics expert (David Dotson) should be permitted to testify about the deputies' training, her lawyer made it crystal

clear that the evidence was relevant to the issue of negligence, not to the issue of causation: "As far as *cause* of death, *that is for the doctors*. But David Dotson has a right to testify to talk about what these officers knew, what the materials were available, and how they approached the use of the Ripp hobble. That is tactic[s]." (RT 559, emphasis added; see also RT 583 ["That is the *purpose* of showing a lack of training. The *negligence* on the County's part," emphasis added].)

Wallace's statements at trial also confirm that evidence regarding training had nothing to do with causation. Thus, Wallace's counsel asserted: "The reason it [i.e. the deputies' training] is two-prong *negligence* issue is, your Honor, the one issue was the Ripp Hobble necessary is one . . . and the second prong is assuming it was necessary, did they do it right? That is *the other issue of negligence*." (RT 602, emphasis added.) So, plaintiffs' counsel did indeed argue a two-prong analysis at trial – but both prongs related to negligence, not causation.

The trial court had the same understanding: "The question is in this case is whether or not these agents, officers, acted properly. Properly, negligently, not negligently in this action. That is it. To that extent, training has some relevance, but I don't want to spend a lot of time because this is not the County, the negligent training. It is how these officers acted . . . ." (RT 585.)[9/]

9/ Lottie argues (LRB 35-36) that the County knew that tarping was inherently dangerous by virtue of a Sheriff's Department training document, that was plaintiffs' Exhibit 8 at trial. As we previously showed (AOB 53-54), Exhibit 8 cannot serve as evidence of causation, which must be proven by expert testimony. Moreover, the concept of inherent danger relates to the question of negligence, not to causation. (*Regents of University of California v. Superior Court* (1996) 41 Cal.App.4th 1040.)

Unlike Lottie, Wallace at least acknowledges that "medical testimony is required for proof of cause of death." (WRB 60.) But, like Lottie, he also improperly relies on non-expert evidence as an independent basis for proving causation.[10/]

This effort to use facts regarding negligence to prove causation provides a clue (as did their closing arguments, see AOB 53-55) to what plaintiffs really think of the record made by Dr. Cooper.

10/ Wallace, for example, criticizes the coroner for reaching his conclusion as to the cause of death without considering such wholly irrelevant matters as what the deputies said while they were tarping Dwayne – for example, one deputy stated, "Lots of beef on this one" and another one stated, "Take your time" – and that "sheriff's deputies weighing over 260 pounds kneel[ed] on Dwayne Nelson's head, back and legs," while he "was bowed in the TARP." (WRB 45-46.)

But the law does not permit the jury to infer causation from these facts, which is clearly what Wallace seems to have wanted the coroner to do. Moreover, on these particular assertions, Wallace faces a special problem: Cooper himself downplayed the very facts Wallace stresses, i.e. he expressly refused to draw any firm conclusions from the placement of the deputies' knees (RT 722, 732) or from their weight (RT 732).

Wallace also argues that causation can be inferred from the fact that Dwayne died during or after the tarping. (WRB 58-60.) Not so. Those facts are equally consistent with Dwayne's sudden death from cocaine use, excited delirium, arterial deformity or enlarged heart.

C. Plaintiffs Did Not Prove Causation To A Reasonable Medical Certainty. Their Contention That Dr. Cooper Excluded All Reasonable Causal Explanations For Dwayne's Death Other Than Positional Asphyxia Is Not Supported By The Record.

1. Plaintiffs did not show that Dwayne was more likely to have died from positional asphyxia than from cocaine use or excited delirium.

Lottie argues that Dr. Cooper's "testimony and evidence proved causation by excluding all other reasonable causal exceptions." (LRB 48) Wallace argues that Cooper showed that Dwayne died as a result of positional asphyxia, failing only to negative "totally unrelated causes." (WRB 44.)

Plaintiffs are wrong. It was their job to prove causation "within a reasonable medical probability based upon competent expert testimony." (*Jones v. Ortho Pharmaceutical Corp., supra,* 163 Cal.App.3d at 402.) To meet that standard, plaintiffs had to do more than prove that it was possible that Dwayne died from positional asphyxia due to the tarping. "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." (*Id.* at 403.)

Cooper testified that Dwayne died from positional asphyxia. However, that statement alone was insufficient to prove causation to a

medical probability. "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." (*Ibid.*) And "more likely than not" means "something more than a '50-50 possibility.'" (*Bromme v. Pavitt*, *supra*, 5 Cal.App.4th at 1504.)

Cooper did not testify that there was "something more than a 50-50 possibility" that Dwayne died from positional asphyxia. Lottie effectively concedes that Cooper failed to testify to the required standard of reasonable probability. Specifically, she states that Cooper "did not speculate that he believe[d] there was a 50-50 chance that positional asphyxia was the cause of death of [Dwayne], or any other percentage for that matter." (LRB 55.) If that means that Cooper did not opine that positional asphyxia was only or less than a 50-50 possibility, it also means he failed to opine it was something *more than* a 50-50 possibility either.

That's fatal. Lottie argues that Cooper's opinion was "definitive and clear." (LRB 55.) Wallace argues it was "a concise and clear medical explanation." (WRB 47.) These characterizations are besides the point. Cooper had to show either directly or by necessary implication that Dwayne more likely than not died from positional asphyxia. That is, he had to prove that outcome to a medical probability.

Cooper failed to do so. He did not directly testify that positional asphyxia was more likely than cocaine use or excited delirium to have caused Dwayne's death. And he didn't state a more-likely-than-not conclusion by necessary implication. This is because, contrary to Lottie's contention, Cooper did not exclude "all other reasonable causal exceptions."

On the contrary, he testified that (1) on the night in question Dwayne was high on cocaine and experiencing excited delirium; and (2) each of those conditions can cause sudden death. (AOB 39-40.) Lottie argues that Cooper did not specifically testify that cocaine use or excited delirium could have been a cause of Dwayne's sudden death. (LRB 54.) That is a semantic quibble. The inescapable logic of saying A – that Dwayne was on cocaine and experiencing excited delirium at the time of the incident – and saying B – that either of those conditions can by itself cause sudden death – is to say C – that Dwayne's death could have been caused by the independent operation of either of those conditions. Certainly, Cooper never denied that Dwayne could have died from one of those conditions.

The court cannot ignore any part of Cooper's testimony. (Cf. *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1111 ["*[t]aken as a whole*, the medical expert testimony plaintiffs presented in support of their motion for class certification is too qualified, tentative and conclusionary to constitute substantial evidence," emphasis added]; *Paneno v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 136, 153 [a "'physician's report and testimony must be considered as a whole rather than in segregated parts; and, when so considered, the entire report and testimony must demonstrate the physician's opinion is based upon reasonable medical probability'"].)

Based on his admissions regarding cocaine use and excited delirium, and his failure to state that positional asphyxia was more likely to have caused Dwayne's death than either of those causes, Cooper's testimony fails

the "reasonable probability" test and the causation issue should not have gone to the jury.[11/]

Plaintiffs' failure to show that Dwayne was more likely to have died from positional asphyxia than from either cocaine use or excited delirium requires reversal.

2. Plaintiffs did not show that Dwayne was more likely to have died from positional asphyxia than from either his arterial anomaly or enlarged heart.

While Cooper was totally forthcoming in admitting that cocaine use and excited delirium each in and of itself could have caused Dwayne's death, he was less so in regard to two other reasonable causal explanations for Dwayne's death: (1) Heart disease due to the anomaly in Dwayne's right coronary artery; and (2) Dwayne's enlarged heart. (See AOB 40-43.) However, as we showed (*ibid.*), when Cooper's admissions are linked with undisputed evidence in the record, and his contrary assertions are shown to be logically and factually unfounded, the net effect of the uncontested evidence is that Dwayne's arterial anomaly and enlarged heart also constitute reasonable causal explanations for his sudden death.

Plaintiffs have made no inroads into this showing.

Wallace argues, without record citation, that Dwayne's "pertinent history is reflected in his medical records from the Department of

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11/ There is no merit to Wallace's contention (made without record cites) that cocaine use and excited delirium were "totally unrelated causes." (WRB 44.) There has never been any dispute that they constitute reasonable causal explanations for Dwayne's death; the issue has been whether plaintiffs proved that positional asphyxia was more likely to have caused Dwayne's death than either of those other causes.

Corrections which indicate a total absence of any heart problems whatsoever." (WRB 44-45.) There are two fatal flaws in this argument. First, the medical records on which it is based are not part of the record on appeal. Wallace himself admits that they "played no part in the trial." (WRB 45.) Indeed, only a fraction of Dwayne's prison records (Wallace himself admits that there were nearly 1000 pages, WRB 11-12) are in the record, and none were introduced at trial.

Second, Wallace's argument is wrong. Dr. Cooper himself testified that Dwayne had a deformed artery (RT 735-737) and a mildly enlarged heart (RT 735). Indeed, he reviewed the very medical records Wallace purports to summarize, and, contrary to Wallace's assertion, Cooper states that one of the "two notable things" in those records is that Dwayne "had hypertension." (RT 729.) Hypertension, or high blood pressure, is part of heart disease and can cause enlargement and damage to the heart. (See RT 735, 1234, 1287-1288.) Wallace fails to mention this. (See WRB 49.)

The issue here of course is not whether Dwayne suffered from various heart conditions – no one previously disputed that – but whether he was more likely to have died from positional asphyxia than from one of those conditions. On that point, plaintiffs have little of substance to say. It was undisputed at trial that Dwayne had an anomaly or deformation in his right coronary artery, which, as Cooper noted, "was attributed by the coroner's office as the cause of death." (RT 736.) Cooper conceded the general validity of the coroner's point, because "these coronary anomalies can be associated with sudden death." (RT 736, 786.) However, he denied that it was the cause of death in Dwayne's case, because "we have a known cause of death" in that Dwayne died of positional asphyxia. (AOB 40-41.)

That reasoning is circular, because there is no "known cause of death" until plaintiffs proved that positional asphyxia was more likely the cause of death than the arterial anomaly. (*Ibid.*) Thus, having admitted that "these coronary anomalies can be associated with sudden death," Cooper had to show why here positional asphyxia more likely caused Dwayne's death – other than simply asserting that it did.

But Cooper failed to do so, and thus failed to exclude sudden death from a coronary anomaly as a reasonable causal explanation for Dwayne's death. Wallace makes no serious effort to show otherwise. First, he argues that Cooper can rely on the videotape of the incident, and "analyze it medically." (WRB 49.) Wallace is wrong. Even if the events on the tape are not inconsistent with sudden death from positional asphyxia, they also are not inconsistent with sudden death from an arterial anomaly (or, for that matter, from cocaine use, excited delirium or enlarged heart). The tape does not show that Dwayne's death was more likely caused by positional asphyxiation than any of these other causes. Second, Wallace restates his assertion that the Department of Corrections records "did not indicate any instance of heart trouble." (*Ibid.*) We have already shown that this assertion is wrong as well as dependent on evidence not in the record.[12/]

12/ Lottie does not make an argument on the issue, but merely summarizes Cooper's testimony. (LRB 51, 52-53.) Yet, defendants have already shown why that testimony was insufficient. (AOB 40-41.) Lottie mentions one fact not previously addressed – an exchange in which Cooper declined defense counsel's invitation to compare Dwayne's anomaly to a kink in a hose, noting that "[b]asically the vessel is normal," though "angled differently," but "it is still an open artery." (RT 749-750, cited at LRB 51.) But Lottie never explains how this testimony bears on the question of whether Dwayne's sudden death was caused by that anomaly. We know Cooper admitted that "these coronary anomalies can be associated with sudden death" but insisted Dwayne's anomaly was not a factor in his death because, as Lottie summarizes it, "the cause of death was restraint

(continued...)

It was also undisputed at trial that Dwayne had an enlarged heart. (AOB 41-42.) Cooper conceded that an enlarged heart can independently cause sudden death, if it is significantly enlarged. However, Cooper opined that Dwayne's heart was only "mildly enlarged," and therefore it "did not play[] a factor" in his death. (*Ibid.*) In the opening brief, we showed that Cooper's testimony on the degree of enlargement of Dwayne's heart was not reliable and therefore not sufficient to go to the jury. (AOB 42-43.)

Lottie does not contest any part of defendants' showing on this point. She simply summarizes Cooper's testimony, without comment or argument. (LRB 52.) Wallace does not discuss the issue at all.

We showed in the opening brief that Cooper failed to prove that positional asphyxia was even a possible cause of Dwayne's death. (AOB 44-56.) We further discuss this below in light of plaintiffs' responses to that argument. However, the Court need not reach that issue. Plaintiffs' failure to prove that Dwayne died of positional asphyxia to a reasonable medical probability requires reversal; it does not matter if plaintiffs successfully showed that it was one of many possible causes of his death.

12/(...continued)
asphyxia" and Dwayne had lived 41 years without "having symptoms specific to an abnormal coronary artery." (LRB 52-53; see AOB 40-41), but Cooper did not list among those reasons that Dwayne's anomaly was open and not kinked like a hose. (RT 736-737.) If there is a connection, Cooper never claimed it, and Lottie fails to discuss or prove it.

D. Plaintiffs Did Not Show By Expert Testimony That Positional Asphyxia Was Even A Possible Cause Of Dwayne's Death.

Plaintiffs' expert witness failed to prove that positional asphyxia was even a possible cause of Dwayne's death. (AOB 44-56.) As we've seen, in trying to fill this gap, plaintiffs rely on non-expert evidence relating to negligence. We have already shown why they cannot do so. Here, we address plaintiffs' discussion of Cooper's evidence.

In the opening brief, we showed that Cooper's conclusion that Dwayne died from positional asphyxia had no value as an expert opinion because it was not based on facts in the record, reliable sources or special expertise. (AOB 44-53.)[13/] In addition, Cooper repeatedly failed to show that his generalizations about positional asphyxia and CPR applied to the concrete situation involving Dwayne. (AOB 49-52.) In particular, he failed to show a nexus between his general comments about tarping and positional asphyxia and what in fact happened in Dwayne's case. (AOB 51.)

In other words, much of Cooper's testimony comes down to what our Supreme Court has called mere "hindsight." (*Saelzler v. Advanced Group 400, supra,* 25 Cal.4th at 778.) Plaintiffs effectively argue that the mere fact that Dwayne died during the application of a law enforcement

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13/ Contrary to Lottie's assertion (LRB 48), defendants are not precluded from raising Cooper's lack of special expertise at the appellate stage. Defendants are not arguing that the court erred in allowing Cooper to testify, but that his lack of special expertise (as disclosed by his testimony), among other things, made it insufficiently reliable to go to the jury or to constitute substantial evidence to support the judgment. (See *Cortez v. Macias* (1980) 110 Cal.App.3d 640, 654.)

procedure that, according to Cooper, can cause positional asphyxia must mean that Dwayne died because of the application of that procedure. But no such inference is permitted. "[T]o demonstrate actual or legal causation, the plaintiff must show that the defendant's act or omission was a 'substantial factor' in bringing about the injury. [Citations.] In other words, plaintiff must show some substantial link or nexus between omission and injury." (*Ibid.*)

Plaintiffs recite long stretches of Cooper's testimony, but that by itself does not supply the missing nexus. (WRB 46-47; LRB 49-53.) Thus, Cooper gave a lengthy description of "what positional asphyxia is in this restraint context." (RT 720-724; see AOB 50.) But he did not connect his claimed general manifestations of asphyxia to Dwayne's situation.

Indeed, he wasn't even asked to do so. Thus, Lottie's counsel asked Cooper to explain his opinion regarding Dwayne's death, but to "tell us, first of all, what is positional asphyxia." (RT 720.) In response, Cooper gave a general description of positional asphyxia. (RT 720-724.) Thus, the testimony that plaintiffs rely on is not only not connected to Dwayne, but it was in response to a question asking only for such general observations.

Faced with this fact, Wallace tries some subtle re-writing. In paraphrasing Cooper's testimony, Wallace adds the words "as here," thus suggesting that Cooper was connecting his general testimony about asphyxia to Dwayne's situation. (WRB 47.) But that is demonstrably not the case. (Compare WRB 47 with RT 724.)

Moreover, plaintiffs' few efforts to make that connection are contradicted by Cooper's own testimony. Thus, Lottie argues that "[t]he elements which caused Dwayne Nelson's positional asphyxia were that [he] was in a face down, prone position with his face against the ground with the

face pressed on the pavement . . . one of the officer's has a knee on [his] head, and his chest is unable to expand and contract." (LRB 50-51; see also WRB 46.) Yet, in regard to these very facts, Cooper testified that there "is probably some small elements in this case of actual obstruction of the airways," but that "that is not the main problem here." (RT 722.) Wallace considers it "significant evidence" of causation that "sheriff's deputies weighing over 260 pounds [were] kneeling on Dwayne Nelson's head, back and legs" (LRB 46), but Cooper was unable to support that speculation. He admitted that he could not tell from the videotape "how much weight is actually being applied." (RT 732; see AOB 51.) That cannot constitute substantial evidence tying Dwayne's tarping to his sudden death.[14/]

Plaintiffs failed as a matter of law to prove causation. That requires reversal of the judgment with directions to enter judgment for defendants.

IV. THE DAMAGES AWARD SHOCKS THE CONSCIENCE.

In the opening brief, defendants showed that the jury's finding that plaintiffs suffered a $2 million loss from Dwayne's death is not supported by substantial evidence, is excessive and is the product of jury misconduct. (AOB 57-66.) Even if the award is supported by substantial evidence – and here it is not – a court will overturn it "when the award is so disproportionate to the injuries suffered that it shocks the conscience and

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14/ Wallace attempts to "validate[] Dr. Cooper's testimony on cause of death in this case" by purporting to summarize a "medical article by Dr. Donald T. Reay." (WRB 50-54.) This article is not in the record on appeal, was not before the jury and was kept out of evidence by plaintiffs who successfully objected to its admission. (See p. 8, ante.)

Because the chapter is not in the record, defendants make no response to Wallace's argument based on it.

virtually compels the conclusion the award is attributable to passion or prejudice." (*Rufo v. Simpson, supra,* 86 Cal.App.4th at 615.) It will also overturn an award when "inflammatory evidence . . . or improper argument by counsel . . . would suggest the jury relied on improper considerations." (*Ibid.*)

All these factors are present here.

A. The Jury's Finding That Plaintiffs Suffered A $2 Million Loss By Reason Of The Death of A Son Neither Had Seen For Over Twenty Years Is Not Supported By Substantial Evidence And Is Excessive As A Matter Of Law.

The parties are in agreement that a wrongful death plaintiff may recover for loss of a decedent's society, companionship and moral and financial support. (*Garofalo v. Princess Cruises, Inc.* (2000) 85 Cal.App.4th 1060, 1072 [wrongful death damages "can include recovery for pecuniary losses like lost monetary support, and for non-pecuniary losses like loss of society"]; see WRB 62-67; LRB 62.) Plaintiffs never claimed Dwayne gave them any financial support; if anything, it was the other way around. (AOB 9-10, 19, 59-60.) That meant they had to show a loss of Dwayne's society, companionship and moral support.

Plaintiffs did not and could not do so. Any such society, companionship and moral support was essentially nonexistent. There is no dispute that Dwayne had not seen either parent for over twenty years. They knew little if anything about his life. (AOB 9-10, 19, 59-60.) They base their entitlement to the jury's seven-figure damages award chiefly on the

fact that plaintiffs and Dwayne communicated with each other over the years by letters, cards and phone calls. (LRB 63-65; WRB 68-69.)

In stressing the limited nature of this relationship, defendants inevitably open themselves to the charge that they are de-valuing the decedent and depreciating the feelings of his parents. Thus, Wallace characterizes defendants' damages argument as "predicated on the notion that when Wallace Nelson and Lottie Nelson lost their son Dwayne, they really lost nothing at all." (WRB 67-68.) And, in her closing argument at trial, Lottie took defense counsel to task for trying "to measure someone's love. I think Mr. Gonzales is trying to measure someone's love and loss of a son by no – by trying to find out if the mother recalled a phone number or the friends." (RT 1434.)

But the wrongful death statute compels the court to make such distinctions because the statute contemplates that some losses will not be compensable, no matter how deep the personal love of the plaintiff for the decedent or the grief at his loss. That is why a plaintiff cannot recover for his grief or sorrow, or for sad emotions, or for the decedent's pain and suffering, but only for the loss of the decedent's services, support and society. (*Westfield Ins. Co. v. DeSimone* (1988) 201 Cal.App.3d 598, 603 ["'California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action'"]; see AOB 58-59.)

But there is no showing of "support and society" here. The cards, letters and phone calls are not enough to show loss of companionship and society, let alone to support a seven-figure judgment. Thus, plaintiffs are forced to argue matters that cannot be the basis of a wrongful-death damages award. Wallace, for example, defends the damages award on the

basis of assertions that are not merely irrelevant but wholly inimical to the damages scheme of the wrongful death statute. He argues that Dwayne died "a horrible death caused by professionals who should have known better." (WRB 67.) But that assertion plainly has nothing to do with showing Dwayne's support and society. Nor does Wallace's assertion that a loss of support and society can be premised merely on the "very existence on this earth of [a] son or daughter." (WRB 69.) If that were the standard, it would be futile for courts to limit wrongful-death damages to the loss of society and support. Every loss of a child would entitle a plaintiff to a potentially huge damages award in every case, no matter the real nature of the relationship or loss. That is clearly not the law.

B. The Jury Engaged In Misconduct By Effectively Awarding Emotional Distress And Punitive Damages When Neither Type Of Damages Is Permitted.

We showed in the opening brief that plaintiffs effectively encouraged the jury to award damages not permitted under the wrongful death statute. (AOB 60-61.) This encouragement was of two types. First, plaintiffs presented evidence and made references in closing arguments that were clearly inflammatory and were intended to encourage and had the effect of encouraging the jury to award damages for emotional distress – both Dwayne's and their own. (*Ibid.*)

Plaintiffs seem to have no regrets. Thus, Lottie cites as "substantial evidence" supporting the jury's finding that plaintiffs suffered a $2 million loss her testimony about "how difficult it was to bury her son, and . . . to

know that some of [his] brains and internal organs are still in the possession of the Los Angeles County Coroner." (LRB 63, 64.) And Wallace defends that evidence as not "inherently repulsive." (WRB 72.) The point, however, is that the evidence was irrelevant to any issue in the case. Its sole utility was to show Lottie's emotional distress – and that is improper.

Second, plaintiffs encouraged the jury to award damages against the County, although all claims against it (except on the basis of respondeat superior) had been dismissed at the summary judgment stage. (AA 68-73.) That's why, as we've seen, Lottie attempted to make the County's alleged failure to train the deputies an issue at trial. (RT 582-586.) Worse yet, in closing argument, Lottie's counsel told the jury that one of the issues in the case was "whether the County of Los Angeles was responsible for failing to understand that these officers were not trained" (RT 1415), although that was patently not true. And Lottie's counsel asked the jury to "hold the County of Los Angeles responsible" (RT 1437), even though, as shown by the special verdict form (AA 809-811), that was not their job.

It was perhaps not surprising, then, that four jurors urged an award in an amount sufficient to "send a message to the County of Los Angeles," after which 10 of the jurors specifically agreed to award "plaintiffs one million dollars each without offering any other rational[e]." (AOB 64-65.) This constitutes misconduct. Lottie insists that no juror "ever told another how to vote or what to vote for" or expressly directed another to vote to "send a message." (LRB 71, 72.) So what? Jury misconduct is not limited to instances where jurors are strong-armed to vote in a particular way; a voluntary agreement to award impermissible damages is enough to show misconduct. (AOB 65-66.) Wallace argues that "'Lets send the County a message' can mean many things" having nothing to do with punitive

damages. (WRB 77.) But his suggested meanings are totally far-fetched. (*Ibid.*) Moreover, the phrase has been definitively construed to refer to punitive damages. (AOB 65.)

C. Plaintiffs' Cases Do Not Support The Judgment.

The case law does not permit this runaway seven-figure judgment to stand. In particular, wrongful-death verdicts have been overturned where, as here, plaintiffs had little or no personal contact with the decedent, so that there could be no loss of support or society. (AOB 61-63.) Plaintiffs recognize this fact. That is why Wallace is forced to argue that the cases are too old and do not reflect legal changes that have "taken place in a more enlightened time." (WRB 71.)

Wallace is wrong. All cases, whether older or quite recent, bar emotional distress and punitive damages in a wrongful death case, and all demonstrate that appellate courts will reverse awards that are excessive or not supported by substantial evidence. Indeed, in the very case Wallace cites as evidence of a "more enlightened" attitude, the court reversed a wrongful-death damages award on the ground that "[t]he sizable verdict in favor of . . . plaintiffs ($300,000) may very well have included a substantial award for their grief and suffering," and it noted that this was "a fair assumption" given, among other things, "the extensive evidence of decedent's injuries." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72-73.) Thus, not only did the court reverse an award, but it recognized the likely

effect on a jury of emotionally-charged evidence not related to a permissible type of damages.[15/]

Lottie takes a different tack. First, she essentially invents her own case law by citing unpublished trial-court judgments in "wrongful death cases that [her counsel] handled personally." (LRB 66.) Obviously, these have no precedential value whatsoever. Indeed, even their persuasive value is nil; we have only Lottie's self-interested description of each case.

Lottie's published cases only underscore why reversal is required here. In *Rufo v. Simpson, supra*, the high profile civil case against O.J. Simpson, the court affirmed an $8.5 million compensatory damages award to Ronald Goldman's parents. The court held that the verdict was not excessive. In explaining why, it highlighted exactly what is missing in this case: Ronald's father "testified about his close and affectionate relationship with Ronald, which continued to the time of the death. He testified they saw each other often and Ronald attended family gatherings regularly, particularly enjoying his role of big brother to his sister and extended family." (86 Cal.App.4th at 615.)

Lottie (LRB 67) emphasizes the fact that Ronald's mother's "relationship with Ronald was much less close and regular"; indeed, she had not seen him for 12 years and had only a few phone calls and letters. (*Rufo, supra*, 86 Cal.App.4th at 615.) However, the court did not say this relationship on its own could support a multi-million dollar award or that such an award would not be excessive. Rather, it pointed out that "[t]he jury award, however, was in the aggregate with no allocation between the

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15/ *Krouse* itself relies on one of defendants' "old" cases. (19 Cal.3d at 68, 69, 72, citing *Ure v. Maggio Bros. Co., Inc.* (1938) 24 Cal.App.2d 490, cited at AOB 62.)

father and mother." (*Ibid.*) The court therefore was unable to say how much of the award was allocable to the mother alone.

Plaintiffs here do not have that fortuitous circumstance. Its not just that the jury awarded each a separate amount, its that *neither* Lottie nor Wallace had the kind of close relationship with decedent that could support the seven-figure award.

In *Rufo*, the court declined to find that the jury had not followed the instructions, acted from passion or awarded damages not permitted under the statute solely on the basis that "the verdict is very large." (*Ibid.*) And, it noted, that "Simpson points to no other factor in the record to support the claim that the award must have been produced by passion or prejudice" other than its size in relation to the contacts decedent had with his mother. (*Ibid.*)

Here, however, defendants do not argue that the size of the award without more means that it is excessive or the product of passion and misconduct; rather, they rely on additional matters that pointedly distinguish the present case from *Rufo*. First, there is *no* evidence of loss of society or companionship on the part of either parent that could support this seven-figure award. A long-distance correspondence between parent and child is not the kind of loss that the Legislature contemplated as compensable under the wrongful death statute. Second, there *is* evidence that plaintiffs stressed to the jury matters that could only have been intended to encourage it to award damages for plaintiffs' grief and decedent's suffering, contrary to the instructions. Third, there *is* evidence that the jury effectively awarded punitive damages, and that is the reason for the seven-figure verdict. That could not have happened in *Rufo*, because the jury made a separate punitive damages award on a different cause of action.

The cases defendants cite in the opening brief (AOB 61-63, 65-66) show that courts will reverse damages awards that are not supported by substantial evidence or are excessive or result from misconduct. Each of those reasons independently requires reversal here.

CONCLUSION

For all the foregoing reasons, and the reasons set out in the opening brief, defendants urge the court to reverse the judgment and direct the trial court to enter judgment for defendants.

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Respectfully submitted,

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