2d Civ. No. B318956

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

MARIA NARANJO, et al.,

Plaintiffs and Respondents,

v.

JOSE R. INZUNZA, et al.,

Defendants and Appellants.

Appeal from Los Angeles County Superior Court
Case No. BC678942
Honorable Mel R. Recana

APPELLANT JOSE R. INZUNZA'S OPENING BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: B318956

Case Name: Naranjo, et al. v. Inzunza, et al.

[X] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

[ ] Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Even in a default circumstance, damages must be reasonable and supported by the evidence. The statutory mandate is clear: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." (Civ. Code, § 3359.)

Likewise, California law expressly limits wrongful death damages. Those limitations include who may recover, and what they may recover. Adult stepchildren may not recover unless they are *actually* financially dependent on the decedent at the time of death. And, in all cases, noneconomic damages may only include the loss of actual services and society provided by the deceased and must exclude the sentimental value of the loss, i.e., recovery for grief and sorrow.

Somewhere during this wrongful death litigation, defendant/appellant Jose R. Inzunza disappeared. His counsel lost all contact with him. Taking full advantage of the situation, plaintiffs/respondents obtained deemed admissions as to liability. What was left was a trial on damages.

The fact that a defendant is absent does not mean that anything goes as to damages. But that is what the trial court allowed. The court allowed irrelevant testimony by a nonparty, a non-heir granddaughter as to her sentimental loss. It allowed repeated accusations that the defense denied liability but

presented no evidence, even though liability had been deemed admitted and only damages were at issue. It misinstructed the jury as to the legal standard for stepchild standing in a wrongful death action.

These errors were prejudicial. They led to excessive, multi-million-dollar noneconomic damages to widow Maria Naranjo that could not possibly be supported by the evidence. They also resulted in recovery by adult stepchildren Carla Silva-Naranjo and Luis R. Naranjo who supported the decedent, not vice versa.

The noneconomic damages awarded to Maria Naranjo should be vacated and the matter remanded to retry those damages. The noneconomic damages awarded to Carla Silva-Naranjo and Luis R. Naranjo should be vacated, with instructions to the trial court to enter a defense judgment as to them.

STATEMENT OF THE CASE

A. The Parties.

Defendant/appellant Jose R. Inzunza ("Inzunza") was involved in a motor vehicle accident in Washington State while driving for defendant/appellant CRGTS, Inc. ("CRGTS"), an interstate motor carrier based in Washington. (1-AA-16 ¶¶ 5, 7; 1-AA-18 ¶ 14.)

Jose I.V. Naranjo ("Jose"), who lived in Washington, died in the accident. (1-AA-15 ¶ 1.) Plaintiff/respondent Maria Naranjo is his widow, suing individually and as his successor in interest.[1] (1-AA-14-15 ¶ 1.) Plaintiffs/respondents Carla Silva-Naranjo and Luis R. Naranjo are Jose's adult stepchildren. (1-AA-15 ¶ 2.) Plaintiffs/respondents Griselda I. Naranjo, Araceli Gonzalez-Naranjo, Jose M. Naranjo ("Jose M."), and Oscar N. Naranjo are Jose's adult children.[2] (*Ibid.*)

B. The Complaint.

Plaintiffs sued Inzunza, CRGTS, and Kershaw Fruit & Cold Storage, Inc. (who is not a party to this appeal), alleging one count of negligence. (1-AA-14.)

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[1] For purposes of clarity, we refer to plaintiffs/respondents collectively as "plaintiffs" and individually by their first names. We intend no disrespect.

[2] At the time of Jose's death, six years before trial, Carla was 41 years old, Luis 38, Griselda 37, Araceli 35, Jose M. 29, and Oscar 22. (3-RT-950-951; 4-RT-1567).

They alleged that on December 22, 2015, Inzunza was driving a tractor trailer while working for CRGTS in Yakima County in Washington State. (1-AA-17-18 ¶¶ 11-13.) Jose was driving in the same area, and his vehicle collided with the tractor trailer. (1-AA-18 ¶¶ 12, 14.) Plaintiffs claim that the collision caused Jose to sustain serious injuries from which he died. (1-AA-18 ¶ 14.)

C. The Trial Court Deems Admitted Requests For Admission Against Inzunza, Finding Liability Admitted And Excluding Contrary Evidence And Arguments.

Maria served requests for admissions as to liability on Inzunza. (3-AA-407-412.) Having received no responses, Maria moved to have the admissions deemed admitted. (3-AA-398-399.) Inzunza's counsel explained they had lost contact with Inzunza despite multiple attempts to reach him, including hiring two private investigators. (3-AA-423-425.) The trial court deemed the requests for admission admitted as to Inzunza. (3-AA-451-452.)

Given the deemed admissions, plaintiffs moved in limine, and the trial court agreed, to "exclude any and all evidence and argument contrary to defendants' liability admissions." (3-AA-456, 509.) This Court summarily denied CRGTS and Inzunza's petition for writ of mandate seeking review of the trial court's ruling. (*Inzunza v. Superior Court Los Angeles County et el.*, Case No. B300836.)

D. At Trial, Plaintiffs Raise Irrelevant Arguments In Their Opening Statement.

None of Jose's grandchildren is a party to this action. Nevertheless, plaintiffs' counsel began his opening statement describing the night Jose died from the perspective of Jose's grandchildren. (3-RT-941-942.) Counsel described in detail the grandchildren's grief, their close relationships with Jose, and their fond memories of him. (*Ibid.*)

Although the trial court had deemed liability admitted, plaintiffs' counsel repeatedly emphasized that defendants denied all responsibility—e.g., that they denied "the losses," "the value of the losses," "everything," and "any responsibility, zero"—and told the jury that plaintiffs would prove liability. (3-RT-943.)

E. The Trial Court Allows Proffered Evidence Over Defense Objections As To Relevance And Propriety.

Again, Jose's granddaughter is not a party to this action. She is not an heir at law. Nonetheless, plaintiffs had her testify in detail about Jose's plans for her quinceañera. (3-RT-971-972.) Over defense counsel's repeated objections that the testimony was irrelevant and beyond the scope, Jose's granddaughter testified about how excited Jose was to dance with her and buy her a dress. (3-RT-971.) She testified about the tribute to Jose she made at the quinceañera, which occurred after his passing, and described the song she sang, highlighting the lyric "feels like everything good is missing." (3-RT-972.) She testified that she sang the same song at Jose's funeral. (*Ibid.*)

When plaintiffs' counsel proffered as evidence a photo of Jose's granddaughter standing over Jose's casket at the funeral, defense counsel objected and requested a sidebar discussion. (3-RT-972.) He argued that while Jose's granddaughter "did give very limited testimony as to her observations of the decedent with the plaintiffs," the focus had shifted to Jose's relationship with his granddaughter, who was a nonparty. (3-RT-973.) The testimony and photo were irrelevant and "just seeking to obtain sympathy because none of this testimony relates to the damages of any of the named Plaintiffs in this case." (*Ibid.*) Plaintiffs' counsel responded that the testimony was "specifically about her aunts and uncles" because he planned to ask the granddaughter whether her aunts and uncles—who were named plaintiffs in the case—attended the quinceañera and funeral, to see "[i]f she's an eyewitness to what they exhibited as the loss and to the relevant facts related to it." (*Ibid.*) The trial court accepted this explanation. (3-RT-974-975.) As to the photo of Jose's granddaughter standing over his casket, the trial court ruled: "Over the objection of the defense, it is admitted." (3-RT-974-975.)

After this testimony concluded, defense counsel again objected that "this line of questioning is simply triggered to evoke sympathy with regard to the grandchildren who are not parties." (3-RT-979.) He pointed out that Jose's granddaughter "was repeatedly questioned about her and her siblings who are not parties and how she felt." (*Ibid.*) While defense counsel would stipulate that Jose's granddaughter "had severe sadness because

of the passing of her grandfather," her sadness was "not actionable in this case" and three-quarters of the questioning related to her as an individual. (3-RT-980.) Her testimony about her feelings, personal experience, and her siblings' personal experiences, were not relevant to plaintiffs' claims. (3-RT-981.) Plaintiffs' counsel argued the testimony was relevant as to Jose's demeanor, which in turn was relevant as to plaintiffs' losses. (3-RT-980.) It also was relevant as to Jose's relationships with his children, who were plaintiffs. (3-RT-980-981.)

The trial court noted: "Defense made a good point about the quinceanera, what does it have to do with anything?" (3-RT-981-982.) Plaintiffs' counsel responded that it was evidence of Jose's kindly demeanor, good nature, and relationships. (3-RT-982.) The court agreed with defense counsel that three-quarters of the granddaughter's testimony had nothing to do with any plaintiff's interactions with Jose and ordered plaintiffs' counsel not to ask the next witness—Jose's grandson, another nonparty—"the same questions as the previous one." (3-RT-981, 983.) Nonetheless, the court did not revisit its overruling of the defense objections to the granddaughter's testimony.

F. Plaintiffs Testify As To Damages.

1. Widow Maria's relevant testimony.

a. Testimony regarding Jose.

Maria testified that she was 65 years old when Jose passed away. (4-RT-1564.) At the time of the trial, she was 68 years old,

and Jose would have been 67 years old. (*Ibid.*) She had two children, Carla and Luis, when she met Jose in 1975. (4-RT-1554.) Maria and Jose got married in California and moved to Washington state. (4-RT-1556-1557.) They had four more children together. (4-RT-1557.)

Jose had two businesses: a drywall company called Jose and Sons Drywall, where he worked during the week, and a used car lot called Naranjo Auto Sales, where he worked on weekends. (4-RT-1566-1567.) He left the house after Maria did in the mornings, and returned around 6:00 p.m. (4-RT-1567.) Jose's help around the house was limited to outside the house. (4-RT-1568.) For example, he cleaned ice off the porch steps, driveway, and walkway. (4-RT-1558.) Oscar and Luis—two of their sons—also consistently helped with the chores outside. (4-RT-1568.)

Maria did not have to hire anyone to help with household chores since Jose passed. (4-RT-1568.) Her children took care of most of the things Jose used to do, such as cleaning ice off the steps, driveway, and walkway. (4-RT-1560.) Araceli lived nearby, and Luis lived about ten minutes away. (4-RT-1566.) Oscar had lived his entire life at home, except for a year when he was at college. (4-RT-1567-1568.) Griselda, Jose M., and Oscar were living with Maria when Jose passed away (Oscar was home for winter break). (4-RT-1569.)

At one point during Maria's testimony, her counsel listed certain elements in the noneconomic damages jury instruction and asked her whether Jose provided each element to her and to

their children. (4-RT-1558-1559.) Counsel omitted two of the jury instruction elements from this line of questioning: "love" and "the enjoyment of sexual relations." (4-RT-1558-1559, 1891; 4-AA-933.) As to the remaining elements (e.g., companionship, care, assistance, affection), Maria simply answered "Yes" to each element without explanation. (4-RT-1558-1559.)

Counsel also asked Maria questions such as "Who is the person during your life who would get up in the middle of the night when something happened to take care of it and respond to it?" and "Who is the person who would provide protection to you at night to make you feel comfortable and secure?" (4-RT-1558.) To each question, Maria simply responded, without explanation, "My husband." (*Ibid.*)

Maria testified that on one occasion since Jose passed, she heard a knock in the middle of the night and "was in a little fear because [she] was alone." (4-RT-1559.) She did not answer the door. (*Ibid.*)

Her only other testimony regarding Jose and her relationship with him was very limited. Jose would arrange parties and family gatherings, and while the family still did so after he passed, it was not the same. (4-RT-1561-1563.) While Jose at times drove Maria to appointments, she also drove herself and continued to do so after Jose passed. (4-RT-1558, 1560, 1566.) She had taken herself to doctor's visits for the last six years. (4-RT-1560.)

b. Testimony regarding adult stepchildren Carla and Luis.

Maria testified about Carla and Luis, who were her children and Jose's stepchildren. She testified that Carla provided her financial help "whenever [Carla] could." (4-RT-1575.) In deposition read at trial, Maria testified that Carla "would send us money. She would send us $100 every month, 100 to each of us." (4-RT-1576.) Specifically, "she sent [Jose] 100. She would send me also 100." (*Ibid.*)

Maria testified at trial that Luis earned his income by working at Jose and Sons Drywall and was able to pay for his house in 2010 with that income. (4-RT-1572.) She responded, "Well, my children help me when they can" when asked whether Luis contributed to her and Jose's living expenses. (*Ibid.*) The parts of Maria's deposition testimony read into the record at trial included testimony that Luis "has always helped me" financially before Jose passed away. (4-RT-1574.) She explained:

> He would give me money. He would give me 100, 200. He gave me as much as 300. He would always give me money when I went to California to see my parents, he would give me 200.

(*Ibid.*) While Luis did not give Maria money every month, he did so when he could, depending on how much he was earning. (4-RT-1574-1575, 1578.)

2. Adult stepchild Carla's relevant testimony.

Carla, Jose's stepdaughter, was 46 years old and had been married for 24 years at the time of trial. (3-RT-950, 994, 1004.)

She married her husband in the 1990s, around the time Maria and Jose moved from California to Washington state. (3-RT-1004.) Carla and her husband, who works as a baker, remained in California. (3-RT-994, 1004-1005.) Carla was a preschool teacher and had worked "mostly continuously" as a teacher for the past 25 years. (3-RT-991, 1005.)

Carla testified that Jose helped her with tuition and books while she was in college (necessarily decades ago). (3-RT-996-997.) He also helped her out at unspecified times when he sensed "things were a little off financially or whatever it was." (3-RT-994.) He helped her with her mortgage, bills, car repairs, and her children's sports registration and school supplies. (3-RT-994, 996.) Jose surprised Carla with a used car at some point. (3-RT-995.) She did not recall when this happened and testified that "it might [have been]" more than ten years ago. (3-RT-1006.) She no longer had the car. (*Ibid.*)

According to Carla's testimony, Jose also financially assisted her in 2015, before he died in December. (3-RT-997.) Before 2015, Carla "had been off [from work] for about three years" and her husband's job reduced his hours. (*Ibid.*) Her job fluctuated between full time and part time, and Jose would help when she worked part time. (3-RT-999.) Plaintiffs' counsel showed her a bank statement allegedly reflecting cash deposits on it, but never offered the bank statement into evidence. (3-RT-998.) Carla testified that the bank statement refreshed her memory regarding financial contributions Jose made to her in 2015. (3-RT-999.) She could not recall how exactly she used the

cash deposits—*possibly* for the mortgage, bills, and children's sports registration and school supplies. (*Ibid.*)

Carla testified that in 2015, she also would provide Maria with 100 dollars and Jose with 100 dollars whenever she was able to do so. (3-RT-1006-1007.)

3. Adult stepchild Luis's relevant testimony.

Luis, Jose's stepson, was 45 years old at the time of trial. (3-RT-1210.) He worked full time for Jose and Sons Drywall and operated the business after Jose passed. (3-RT-1215.) If Luis's income from the drywall business was insufficient for rent, mortgage, or utilities, there were times when Jose would supplement Luis's income. (3-RT-1214.) Luis testified that business fluctuated and slowed down in the winter. (3-RT-1213.) During those times, Jose had money saved up in the business account and continued to pay Luis and Luis's stepsiblings who also worked for the drywall business. (*Ibid.*) Jose did this in his last year of life. (3-RT-1214.)

Luis also testified that in the years before Jose's passing in December 2015, he would give Jose and Maria money. (3-RT-1242.) He would give them $100 at times. (*Ibid.*) He testified that he, Carla, and their stepsiblings "would all just help" contribute money to Jose and Maria before Jose passed. (3-RT-1243.) He did not know the amounts everyone contributed, but they gave Jose and Maria money whenever they could. (*Ibid.*) "It was just being grateful for what [Jose] did for us." (*Ibid.*)

An excerpt from Luis's deposition was read into the record at trial, in which he was asked whether Carla contributed to their mother's household expenses in any way. (3-RT-1243.) Luis responded: "As far as I know she helps." (*Ibid.*)

4. Adult daughters Araceli and Griselda's relevant testimony.

Araceli—Luis and Carla's stepsister and Jose's adult daughter (she was 35 at the time of the accident)—testified that she helped her parents financially whenever she could. (3-RT-1261, 1264.) She was aware that all her siblings except Jose M. helped Jose and Maria financially "when they could." (3-RT-1264-1265.)

Griselda—who also was Luis and Carla's stepsister and Jose's adult daughter (she was 37 at the time of the accident)—lived with her parents when Jose died. (3-RT-950, 1314.) An excerpt from her deposition was read into the record at trial, in which she testified that while she gave Jose and Maria money for rent and utilities, she also gave each of them a weekly allowance of $50 to $100. (3-RT-1311-1313.)

G. The Trial Court Denies A Directed Verdict On Adult Stepchildren Carla's and Luis's Standing to Recover Damages.

After the close of evidence, Inzunza moved for a directed verdict on the basis that neither Carla nor Luis had standing to recover damages for Jose's death, as they had not shown that they were financially dependent for any necessaries of life from Jose at the time of his death, or in the two years before his death.

(4-AA-829-832.) In particular, Carla and Luis had both testified that they assisted Jose financially, i.e., they had not shown that there was any *net* cash flow from Jose to them. (4-AA-832.)

Plaintiffs opposed the motion, arguing that even minor contributions that helped defray costs or assist an individual in making ends meet is sufficient to support "dependency." (4-AA-839.) They argued that Carla and Luis provided ample evidence that they relied on Jose's aid, at least to some extent, for life's necessities. (4-AA-839-840.)

The trial court denied the motion. (4-RT-1841.)

H. Plaintiffs Again Raise Irrelevant and Improper Arguments In Their Closing Argument.

In his closing argument, again despite the fact that the trial court had deemed liability admitted, plaintiffs' counsel told the jury that the defense "had not brought you a single witness to deny or dispute any fact in the case." (4-RT-1847.) He reiterated that "CRGTS has been here every day but not a word in defense. Not a word under oath. No evidence, but they still deny." (4-RT-1848.) Plaintiffs' counsel repeatedly claimed that defendants continued to deny liability—even after defense counsel objected and the trial court (again) deemed liability admitted. (4-RT-1844, 1845, 1847, 1848, 1849.)

Plaintiffs' counsel told the jury (incorrectly) that, in the face of defendants' denial, plaintiffs had to prove liability. (4-RT-1847.) He declared: "I believe we proved it. I know it's true. I spent years with this family in their own—" and defense

counsel objected that the argument was beyond the scope of the evidence. (*Ibid.*) The trial court overruled the objection. (*Ibid.*)

In summarizing noneconomic damages, plaintiffs' counsel argued: "The family is here for justice. After six years, they beg you for justice." (4-RT-1853.) The trial court sustained defense counsel's objection as to the six years being imputed on the defense.

In his rebuttal argument, plaintiffs' counsel again declared: "It's up to you to see that justice is done for all of us." (4-RT-1880-1881.) The trial court sustained defense counsel's golden rule objection, and did so again when plaintiffs' counsel immediately attempted the same argument. (4-RT-1881.)

I. In Closing Plaintiffs Seek $55 Per Hour For Every Waking Hour As Maria's Noneconomic Damages.

As for noneconomic damages, plaintiffs' counsel contended in his closing argument that Maria should recover $5 per hour for every waking hour (16 hours a day) whether she was with Jose or (as in the vast majority of time) not. (4-RT-1856-1857.) He argued that California law recognizes that each noneconomic damages element (love, companionship, comfort, etc.) is separate and that the jury "must decide the damages of each of the elements of loss." (4-RT-1852.) He calculated $5 per hour for *each* of the 11 noneconomic damages elements, so it was really $55 per hour. (4-RT-1856 [$5 an hour for "each of these elements"]; 4-AA-910 [listing 11 noneconomic damages elements for Maria].) From this he sought $1,927,000 for six years in past

damages and $4,496,000 for fourteen years in future damages (which appeared to be rounded down from $4,496,800), for a total of $6,473,000.[3] (4-RT-1856-1857.)

J. The Trial Court Instructs The Jury With Plaintiffs' Proposed Instruction Regarding Carla's And Luis's Standing As Adult Stepchildren.

Over defense objections, the trial court gave plaintiffs' proposed jury instruction on adult stepchild standing:

> Under California law, a stepchild is permitted to bring a claim for wrongful death if they are dependent, to some extent, upon the decedent for the necessaries of life. No strict formula can be applied to determine this. If a stepchild received financial support from their parent which helped them in obtaining the things which one cannot and should not do without, then that stepchild is dependent upon their parent and is qualified to bring a wrongful death claim. Such things may include, but are not limited to, shelter, clothing, food, utilities, car payments, medical treatment and other customary living expenses.

(4-RT-1833; 4-AA-935.)

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[3] Similarly, as to the other plaintiffs—i.e., Jose's adult children and stepchildren—plaintiffs' counsel calculated $5 per hour for *each* of 10 noneconomic damages elements so it was really $50 per hour. (4-RT-1856 [$5 an hour for "each of these elements"]; 4-AA-911-913 [listing 10 noneconomic damages elements for each adult child and stepchild].) From this he sought $1,752,000 for six years in past damages and $4,088,000 for fourteen years in future damages, for a total of $5,840,000 for each adult child and stepchild. (4-RT-1857.)

Defendants objected to the examples plaintiffs listed, arguing that they cherry-picked language to fit their facts. (4-RT-1833.) For example, plaintiffs added in transportation (i.e., car payments) as an example of things one cannot and should not do without, due to Carla's testimony that Jose gave her a car ten or more years ago—an incident "not even in the time frame of this." (*Ibid.*)

At the same time, defendants proffered their own proposed special jury instruction regarding Carla's and Luis's standing to recover damages as Jose's stepchildren, which the trial court rejected:

> Individuals such as Carla Silva-Naranjo and Luis Naranjo are stepchildren of the decedent Jose I.V. Naranjo, in order for you to award damages to either Carla Silva-Naranjo or Luis Naranjo, you must find that either stepchild was dependent on the decedent. Dependence is defined as financial support, "a*ctually dependent*, to some extent, upon the decedent for the necessaries of life . . . which aids them in obtaining the things, such as shelter, clothing, food and medical treatment which one cannot and should not do without."

(4-AA-856, italics added.) Defendants cited Code of Civil Procedure section 377.60, *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1445-1447 (*Chavez*), and *Hazelwood v. Hazelwood* (1976) 57 Cal.App.3d 693, 697-698 (*Hazelwood*). (4-AA-857.)

K. The Jury Verdict, Including $6.25 Million In Noneconomic Loss Of Society Damages To Maria, And Judgment.

The jury awarded Maria $1.36 million in economic damages and $3.625 million in loss of society damages. (4-AA-956-957.)

The jury found that both Carla and Luis were financially dependent, to some extent, on Jose for the necessaries of life. (4-AA-957.) As to each of Jose's four children and two stepchildren, the jury awarded an identical $439,000 in noneconomic damages, totaling $2.634 million. (4-AA-957-959.)

The trial court entered judgment, finding CRGTS and Inzunza jointly and severally liable for a total of $7.619 million in damages. (4-AA-961.)

L. The Trial Court Denies Motions For Judgment Notwithstanding The Verdict And New Trial.

CRGTS and Inzunza both timely moved for new trial and a motion for partial judgment notwithstanding the verdict. (4-AA-962, 966.)

They based their motion for new trial on the following arguments: (1) The trial court erroneously prohibited CRGTS and Inzunza from challenging liability or raising comparative fault; (2) Carla and Luis did not have standing to assert a wrongful death claim because they failed to demonstrate financial dependence on Jose as unadopted stepchildren; and (3) the jury awarded excessive noneconomic damages to Maria that were unsupported by evidence. (4-AA-975.)

They based their motion for judgment notwithstanding the verdict on Carla's and Luis's lack of standing to assert a wrongful death claim. (5-AA-1101, 1104-1105.)

The trial court denied the motions. (5-AA-1410.) As to the motion for new trial, the court was "convinced from the entire record including reasonable inferences therefrom, that the jury could not have reached a different verdict." (5-AA-1411.) As to the motion for partial judgment notwithstanding the verdict, the court found that Carla and Luis "have standing to sue and there is evidence sufficiently substantial to support the jury verdict." (*Ibid.*)

STATEMENT OF APPEALABILITY

The judgment entered on November 10, 2021, resolved all issues as to all parties and is therefore appealable under Code of Civil Procedure section 904.1, subdivision (a)(1).

The January 11, 2022, order denying the motion for judgment notwithstanding the verdict is separately appealable under Code of Civil Procedure section 904.1, subdivision (a)(4).

The January 11, 2022, order denying the motion for new trial is reviewable "on appeal from the underlying judgment." (See *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19.)

CRGTS and Inzunza each filed a timely notice of appeal on February 8, 2022, within 30 days of the denial of their timely new trial motion. (5-AA-1414-1415, 1418-1419.)

STANDARD OF REVIEW

The jury's award of damages is reviewed for substantial evidence. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 (*Bigler-Engler*).) That review, however, is informed by whether the jury might have been influenced by improper factors such as "inflammatory evidence, misleading jury instructions, improper argument by counsel," or "overheated, emotional rhetoric." (*Id.* at pp. 299, 304; accord *Briley v. City of West Covina* (2021) 66 Cal.App.5th 119, 143 (*Briley*).)

Whether sufficient evidence exists to support a finding that the adult stepchildren had standing to obtain wrongful death damages is a question of law after construing the evidence in the light most favorable to them. (See *Brown v. City of Sacramento* (2019) 37 Cal.App.5th 587, 598.)

So, too, potential instructional error is reviewed as a matter of law. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573-574.) In determining whether any error was prejudicial, this Court reviews the entire record, including the evidence, to make an independent determination whether there was a reasonable chance, more than an abstract possibility, of a different result. (*Ibid.*; see *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 (*College Hospital*) [prejudice means "merely a *reasonable chance*, more than an *abstract possibility*" of a different outcome, original italics].)

ARGUMENT

I. The $3.625 Million In Noneconomic Damages Awarded To Widow Maria Was Excessive As A Matter Of Law.

A. The Evidence Could Not Support The $3.625 Million In Noneconomic Damages Awarded To Maria.

In a wrongful death action, noneconomic damages are limited to the pecuniary value of loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support, loss of enjoyment of sexual relations, and training and guidance. (CACI No. 3921; see also *Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 198 (*Soto*) [noneconomic damages are intended to provide the monetary equivalent of loss of elements such as comfort, society, and protection].) But plaintiffs "may *not* recover for such things as the grief or sorrow attendant upon the death of a loved one, or for [their] sad emotions, or for the sentimental value of the loss." (*Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783, 793 (*Nelson*), original italics.)

The evidence supporting Maria's noneconomic damages was largely conclusory as to most elements, and nonexistent as to others. Her testimony on the subject primarily consisted of one-worded, affirmative responses to a series of conclusory questions. (4-RT-1558-1559.) Counsel asked Maria whether Jose provided her and her children some—but not all—of the elements listed in the noneconomic jury instruction: companionship, comfort, care, assistance, protection, affection, society of family, moral support,

and training and guidance. (4-RT-1558-1559; 4-AA-933.) Maria simply responded "Yes" after each one, without any explanation, elaboration, or detail. (4-RT-1558-1559.) That cannot be a basis for an open-ended, anything-goes award.

Counsel did not ask Maria whether Jose provided her with two of the jury instruction elements: "love" and "the enjoyment of sexual relations." (4-RT-1558-1559, 1891; 4-AA-933.) As to those elements, which are often the most substantial components, there was not even a conclusory "Yes" response as to whether they existed. In closing argument, plaintiffs' counsel claimed that California law recognizes each element listed in the noneconomic damages jury instruction as separate and distinct—e.g., "[l]ove and companionship are two different things"—and the factfinder "must decide the damages for each of the elements of loss." (4-RT-1852.) But there was no evidence whatsoever regarding the elements of "love" and "the enjoyment of sexual relations" because plaintiffs' counsel did not ask Maria about them. (4-RT-1558-1559.) And while counsel's aggregation of separate and overlapping items in calculating noneconomic damages was improper and misleading—as discussed in section I.C.2. below—plaintiffs had to provide at least *some* evidence of the noneconomic damages factors overall. Instead, they presented no evidence as to some elements, and entirely conclusory evidence—i.e., Maria's "Yes" responses—as to the others. (4-RT-1558-1559.)

Counsel posed other conclusory questions to Maria—e.g., "Who is the person during your life who would get up in the middle of the night when something happened to take care of it

and respond to it?" and "Who is the person who would provide protection to you at night to make you feel comfortable and secure?"—to which Maria simply responded, "My husband." (4-RT-1558.) While these questions could be relevant to loss of comfort or protection, such nonspecific responses cannot not support an award of over $3 million. If they could, vagueness could support any award.

The evidence did not show *how* Jose provided comfort or protection. At most, it showed that Jose would be the one to get up "when something happened" in the middle of the night, but there was no evidence of when or how often this happened. (4-RT-1558.) Maria testified about *one* occasion since Jose's death when she heard a knock in the middle of the night and "was in a little fear because [she] was alone" and did not answer the door. (4-RT-1559.) That is it. At the same time, she testified that her children (Araceli and Luis) lived just minutes away, and that Griselda, Jose M., and Oscar were living with her when Jose passed away. (4-RT-1566, 1569.)

In fact, the evidence showed that Jose did not spend much time at home. He worked at Jose and Sons Drywall during the week and at Naranjo Auto Sales on weekends. (4-RT-1566-1567.) On weekdays, Maria left the house before Jose did in the mornings, and Jose did not return until evening. (4-RT-1567.)

The evidence also showed that while Jose at times drove Maria to work or appointments, she also walked or drove herself, and continued to do so after his death. (4-RT-1558, 1565-1566.) She had been driving for over two decades and had taken herself

to doctor's visits for the last six years. (4-RT-1560, 1566.) Maria also testified that her children stepped in to help with most of what Jose used to do around the home. (4-RT-1560.) She did not need to hire additional help since Jose's death. (4-RT-1568.) The evidence thus did not demonstrate a loss of elements such as assistance, training and guidance, or companionship amounting to over $3 million. Certainly, it did not show assistance, training and guidance, or companionship over and above the household services for which the jury awarded $1.36 million in *economic* damages to Maria. (4-AA-956.) In determining whether noneconomic damages are excessive, whether they are duplicative of economic damages for the same services is clearly relevant.

It is true that "'[f]actors relevant when assessing a claimed loss of society, comfort, and affection may include the closeness of the family unit, the depth of their love and affection, and the character of the deceased as kind, attentive, and loving.'" (*Fernandez v. Jimenez* (2019) 40 Cal.App.5th 482, 489, quoting *Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 721 (*Mendoza*).) But evidence of Jose's kindly demeanor towards Maria was vague, indefinite and insufficient to demonstrate any *quantifiable* loss of society, comfort, affection—or any other noneconomic damages element. Maria testified that Jose would plan surprises for her on her birthday and would plan family celebrations. (4-RT-1561-1563.) But that is it. Maria also testified that her family still held parties and gatherings after Jose passed, "but he's missed, his chair is empty." (4-RT-1562.)

This testimony focused "on the understandable but noncompensable emotional distress she suffered as a result of [Jose]'s death." (*Nelson*, *supra*, 113 Cal.App.4th at p. 794.) Evidence of emotions or the sentimental value of the loss is irrelevant for this analysis. (*Id.* at p. 793.) What is absent is evidence of any significant level of *society*, *comfort*, or *affection*.

Maria's testimony that Jose stayed with her in the hospital when Luis had gotten sick *as a child* also was irrelevant to demonstrate her loss of comfort, care, or protection at the time of Jose's death because that instance occurred 40 years ago. (4-RT-1554-1555.) (See *Nelson*, *supra*, 113 Cal.App.4th at p. 794 [assessing the plaintiffs' *present* relationship with the decedent and concluding the evidence—occasional phone calls and about a half-dozen cards over several years—was insufficient to support the noneconomic damages award]; see also *Mendoza*, *supra*, 206 Cal.App.4th at p. 720 ["Damages for wrongful death are measured by the financial benefits the heirs were receiving *at the time of death*, those reasonably to be expected in the future, and the monetary equivalent of loss of comfort, society, and protection," italics added].) Similarly, her testimony about their first date—that Jose invited her mother and children to join them at Disneyland and showed kindness toward her children—was irrelevant to her present loss, as their first date also occurred decades ago. (4-RT-1555-1556.) This evidence in no way pertained to Maria's present relationship with Jose.

The relevant inquiry is not whether Jose had a kindly demeanor or whether love and affection existed between Jose and

Maria at any point in their relationship. The relevant inquiry is whether any trial evidence suggested a level of Maria's loss of elements such as comfort, care, and protection *at the time of Jose's death*. The answer is no and certainly not enough to justify a multi-million-dollar award.

In closing argument, plaintiffs' counsel posited awarding $55 per hour in noneconomic damages to Maria for every waking hour, i.e., for 16 hours a day. (4-RT-1856-1857.) The jury's award of $3.625 million in noneconomic damages represented about $31 for every waking hour—whether Jose would have been around or not. And the evidence showed that Jose and Maria spent most of their days—including weekends—apart. (4-RT-1566-1567.)

The only evidence of Maria and Jose's present relationship was Maria's testimony that Jose organized family gatherings and celebrations (4-RT-1561-1563), and that he was the person "who would get up in the middle of the night when something happened." (4-RT-1558.) While such evidence may justify *some* recovery, it cannot justify a $3.625 million award for loss of elements such as comfort, care, and protection.

B. The $3.625 Million Award Was So Grossly Disproportionate As To Raise A Presumption That It Resulted From Passion or Prejudice.

One measure by which a damage award is excessive is if it "is so disproportionate to the injuries suffered that it shocks the conscience and virtually compels the conclusion the

award was based on passion or prejudice." (*Mendoza*, *supra*, 206 Cal.App.4th at p. 721.)

The evidence of Maria's pecuniary loss of society, affection, and protection was extraordinarily thin. It could not support the multi-million-dollar noneconomic damages award. Maria's one-word "Yes" responses simply told the jury that Jose provided these elements, without providing any basis to quantify the pecuniary value of what he did. And the remaining evidence regarding her relationship with Jose at the time of his death is that he planned family gatherings (4-RT-1561-1563) and "would get up in the middle of the night when something happened" (4-RT-1558). Those two, limited things could not possibly justify a $3.625 million award.

Nelson v. County of Los Angeles is instructive. There, the Court of Appeal held excessive the jury's award of $2 million in loss of society damages to the parents of an adult son who had died. (113 Cal.App.4th at p. 794.) The parents testified that they occasionally spoke with their son and offered a half-dozen cards that they had received over the last several years. (*Ibid.*) That was not good enough to support $2 million (just over 55 percent of the amount awarded here) in loss of society damages. (*Ibid.*)

The Court of Appeal in *Nelson* did "not doubt the parents' expressions of love, but [was] unable to say that a rational person would value their lost 'comfort, society, and companionship' at $2 million." (*Nelson*, *supra*, 113 Cal.App.4th at p. 794.) Rather, in such a circumstance "[t]he inescapable conclusion is that the jury included in its calculations some measure of damages for the

parents' emotional distress, or some amount intended to punish the [defendant] for its conduct. In either event, the damage award simply cannot stand." (*Ibid.*)

That is because "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," "'compensation [f]or sad emotions and injured feelings,'" or the sentimental value of the loss. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 68-69, italics omitted; see also *Don v. Cruz* (1982) 131 Cal.App.3d 695, 707 [even on default, a damage award "so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice" is not supported by substantial evidence].) Comparably, "it has long been established in California that punitive damages may not be recovered in a wrongful death action." (*Ford Motor Co. v. Superior Court* (1981) 120 Cal.App.3d 748, 751.)

The lack of evidence here is no less. Testimony that Jose organized family gatherings and was the one to get up "when something happened" in the middle of the night in a house where other adult children also lived (4-RT-1558, 1561-1563, 1569)—does not come close to justifying a $3.625 million award.

C. Improper Evidence And Arguments At Trial Prejudiced Defendants.

The excessive damage award is explained and illustrated by improper inflammatory evidence and argument. A reviewing court will not defer to the jury's discretion as to a damages award if "the record shows inflammatory evidence, misleading

instructions, or improper argument by counsel that would suggest the jury relied on improper considerations." (*Mendoza*, *supra*, 206 Cal.App.4th at pp. 720-721.) "'In making [a damages excessiveness] 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.'" (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 299, accord *Briley*, *supra*, 66 Cal.App.5th at p. 143.) "The relevant considerations include inflammatory evidence, misleading jury instructions, improper argument by counsel, or other misconduct." (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 299.) Lack of evidence supporting the jury's award suggests that the jury failed to base its award on the evidence but instead was influenced by improper factors. (*Id.* at p. 304.)

Here, two such factors stand out. First, the trial court allowed plaintiffs' counsel to introduce irrelevant and highly prejudicial sympathy evidence. Second, it allowed plaintiffs' counsel to make arguments that were irrelevant, improper, and inflammatory throughout trial. These prejudicial errors resulted in the excessive $3.625 million in noneconomic damages awarded to Maria.

1. The trial court prejudicially erred in admitting, over objection, the granddaughter's testimony which is reasonably probable to have contributed to the excessive verdict.

Plaintiffs' counsel elicited completely irrelevant, emotional testimony by Jose's granddaughter (a non-party) regarding her

quinceañera to garner sympathy towards plaintiffs, over defense counsel's repeated objections. (3-RT-971-972.) Jose's granddaughter testified about how excited Jose was to dance with her and buy her a dress. (3-RT-971.) She testified about the tribute to Jose she made at the quinceañera, which occurred after his passing, and described the song she sang, highlighting the lyric "feels like everything good is missing." (3-RT-972.) She testified that she sang the same song at Jose's funeral. (*Ibid.*) None of this testimony was remotely relevant to plaintiffs' claims.

When plaintiffs' counsel proffered a photo of Jose's granddaughter standing over his casket, the trial court ruled: "Over the objection of the defense, it is admitted." (3-RT-975.) After Jose's granddaughter testified, the trial court appeared to reconsider the relevance of her testimony and agreed with the defense that three-quarters of the questioning had nothing to do with any plaintiff's interactions with Jose. (3-RT-983.) The trial court also wondered how the quinceañera was at all relevant. (3-RT-981-982.) But by then, it was too late. While the trial court ordered plaintiffs' counsel not to ask the next witness—Jose's grandson, another nonparty—"the same questions as the previous one," Jose's granddaughter's testimony remained in the record. (3-RT-981.)

As defense counsel noted, and the trial court agreed, the vast majority of the granddaughter's testimony was about her feelings, her personal experience, and her siblings' personal experiences with their grandfather. (3-RT-981, 983.) And even if she were a party, it still would be irrelevant as plaintiffs may not

recover "for such things as the grief or sorrow attendant upon the death of a loved one, or for [their] sad emotions, or for the sentimental value of the loss." (*Nelson*, *supra*, 113 Cal.App.4th at p. 793.) Her testimony simply had nothing to do with plaintiffs' damages and was seemingly offered to evoke the jury's sympathy.

This is a classic case of evidence improperly admitted over objection that garnered improper sympathy for the plaintiffs, resulting in an excessive verdict. At a minimum, there is a substantial probability that the outcome would have been different without the granddaughter's emotional testimony. (*College Hospital*, *supra*, 8 Cal.4th at p. 715 [setting out standard for trial error prejudice; "'probability' in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility*," original italics].)

2. Plaintiffs' counsel's improper, over-the-top advocacy contributed to the excessive verdict.

It was not just the witness testimony that improperly elicited passion and prejudice. Counsel's improper, extreme advocacy sparked those same emotions as well.

Accusing the defense of denying and failing to disprove liability in an admitted liability case. All parties fully understood that damages was the only issue to be decided at trial. At plaintiffs' request, the trial court prohibited defendants from offering any evidence or making any arguments regarding liability. (3-AA-456, 509.) Defense counsel complied with this

order and informed the jury in his opening statement that the scope of the evidence was limited to damages. (3-RT-949.)

Nevertheless, plaintiffs' counsel emphasized in his opening statement that defendants denied all responsibility—e.g., that they denied "the losses," "the value of the losses," "everything," and "any responsibility, zero"—and told the jury that plaintiffs would prove liability. (3-RT-943.) And during closing argument, plaintiffs' counsel repeatedly accused CRGTS and Inzunza of continuing to deny liability—even after defense counsel objected and the trial court (yet again) deemed liability admitted in the middle of the argument. (4-RT-1844-1849.) Despite the trial court's order expressly precluding defendants from doing so, plaintiffs' counsel reiterated that the defense "had not brought you a single witness to deny or dispute any fact in the case." (4-RT-1847.) This was improper and misleading.

Implying that the defense was responsible for litigation delay. Plaintiffs' counsel blamed defendants for the six years it took for trial to occur, repeatedly emphasizing that plaintiffs waited six years for justice and accusing defendants of denying liability for six years. (4-RT-1844, 1845, 1853, 1856, 1858, 1872, 1878.) In summarizing plaintiffs' claim for noneconomic damages, counsel argued: "The family is here for justice. After six years, they beg you for justice." (4-RT-1853.) While the trial court sustained defense counsel's objection as to the six years being imputed on the defense at that point, the bell had already been rung and every other reference to six years

remained in the record. (4-RT-1844, 1845, 1856, 1858, 1872, 1878.)

Personally vouching for the plaintiffs. Plaintiffs' counsel declared: "I believe we proved it. I know it's true. I spent years with this family in their own—" and was interrupted by defense counsel's objection that the argument was beyond the scope of the evidence. (4-RT-1847.) The trial court overruled the objection. (*Ibid.*) This too was entirely improper. Counsel may not assert personal knowledge or personal belief in their client. (*People v. Tyler* (1991) 233 Cal.App.3d 1456, 1459-1460 [neither prosecutor nor defense counsel may assert personal belief in the righteousness of their client's cause]; *Garden Grove School Dist. of Orange County v. Hendler* (1965) 63 Cal.2d 141, 143 [counsel's misconduct denying defendants a fair trial included alluding to personal knowledge in summation to the jury].)[4]

Golden rule violation—putting himself in plaintiffs' shoes. Plaintiffs' counsel improperly asked the jurors to put themselves in the plaintiffs' position. In his rebuttal argument, plaintiffs' counsel again declared: "It's up to you to see that

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[4] See also Rules Prof. Conduct, rule 3.4(3)(g) [A lawyer shall not, "in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused"]; Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2022) ¶ 13:130 ["**Claiming personal knowledge of facts:** It is improper for counsel to allude to their personal knowledge of facts in dispute in argument to the jury. . . . For example: . . . 'I knew the decedent before he died and I know the warmth and love he felt for his family . . .'"].)

justice is done for all of us." (4-RT-1880-1881.) The trial court sustained defense counsel's golden rule objection and did so again when plaintiffs' counsel immediately attempted the same argument. (4-RT-1881; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 797 [counsel makes an improper "golden rule argument" when asking "jurors to put themselves in the plaintiff's shoes"]; *Horn v. Atchison, Topeka and Santa Fe Railway Co.* (1964) 61 Cal.2d 602, 609 ["it was improper to appeal to the jurors to fix damages as if they or a loved one were the injured party"]; *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 599 [counsel's remarks "telling the jury that its verdict had an impact on the community and that it was acting to keep the community safe were improper"].) But again, the bell had already been rung.

Arguing a legally improper damages formula.

Plaintiffs' counsel misled the jurors with an improper, inflated noneconomic damages formula. He told the jurors that they "must decide the damages of *each* of the elements of loss." (4-RT-1852, italics added.) As to Maria's noneconomic damages, counsel calculated $5 per hour for *each* of 11 noneconomic damages elements, which amounted to $55 per hour. (4-RT-1856 [$5 an hour for "each of these elements"]; 4-AA-910 [listing 11 noneconomic damages elements for Maria].) The severable elements damages theory that he argued was wrong as a matter of law.

The wrongful death noneconomic factors inherently overlap—for example, there is no genuine difference between

"comfort," "care," "love," "affection," "companionship," and "society." (CACI No. 3921.) The instruction identifies matters that should be *collectively* considered in determining noneconomic damages. It is "the *unitary* concept of 'pain and suffering'" damages: "In general, *courts have not attempted to draw distinctions* between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, . . . 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal." (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893, fn. omitted, italics added.) The wrongful death noneconomic factors are no less overlapping and no less represent a single, *unitary* noneconomic loss.

"'Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited.'" (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 702.) Yet that is what results when counsel seeks separate damages calculations for overlapping noneconomic damages factors. (See, e.g., *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 769 (*Loth*) [reversing judgment based on such arguments: "Because loss of enjoyment of life is simply one component of pain and suffering damages, presenting the jury with a formula for separately calculating hedonic damages created a risk of double recovery for pain and suffering and loss of enjoyment of life"].)

The inflated total amounts counsel sought as to Maria's noneconomic damages—$1,927,000 for six years in past damages and $4,496,000 for fourteen years in future damages—therefore were based on an improper and inherently duplicative theory. (4-RT-1856-1857.) Reversal for a new trial is required where, as here, a plaintiff's proposed damages formula would likely yield duplicative or overlapping—and thus excessive—noneconomic damages. (*Loth*, *supra*, 60 Cal.App.4th at p. 769.)

* * *

Separately and together these improper arguments appealed to and ignited sympathy, passion, and prejudice in the jury. Its effect was as undoubtedly intended and might well have been expected: to generate an excessive verdict.[5] (See *Bigler-Engler*, *supra*, 7 Cal.App.5th at pp. 294, 304-305 [improper argument is basis for finding damages excessive, even without objection]; *Briley*, *supra*, 66 Cal.App.5th at p. 143 [same].)

The bottom line is that by whatever measure, the verdict in Maria's favor is excessive and must be reversed and remanded for a retrial.

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[5] In opposing a new trial as to Maria's excessive damages, her counsel argued that her damages could not have been excessive because defendants had not challenged the children's damages as excessive. (5-AA-1172.) But each child's loss of society damages was only about 12 percent of Maria's. (4-AA-957-959.) A party does not have to challenge all plaintiffs' damages as excessive to demonstrate that one plaintiff's damages are excessive.

II. The Verdicts In Favor Of Adult Stepchildren Carla And Luis Cannot Stand.

A. Carla And Luis Lacked Standing To Bring A Wrongful Death Claim.

"A plaintiff seeking to bring a wrongful death claim bears the burden of pleading and proving his or her standing to do so." (*Soto*, *supra*, 239 Cal.App.4th at p. 188.) Neither Carla nor Luis—as Jose's stepchildren—met this burden because the evidence did not show that they met the statutory standard: actual dependence at the time of his death on Jose for the necessaries of life.

1. California case law is clear that a plaintiff must have depended on the decedent for the necessaries of life at the time of death or, at most, in the two years before death.

A decedent's surviving stepchildren may recover wrongful death damages "if they were dependent on the decedent." (Code Civ. Proc., § 377.60, subd. (b)(1).) The term "dependence" in the wrongful death statute refers to financial support. (*Chavez*, *supra*, 91 Cal.App.4th at p. 1445.) Although no strict formula determines dependence, certain principles govern the meaning of dependence in Code of Civil Procedure section 377.60, subdivision (b)(1). (*Chavez*, *supra*, 91 Cal.App.4th at p. 1446.)

First, an individual claiming dependence must be "'*actually dependent*, to some extent, upon the decedent for the necessaries of life.'" (*Chavez*, *supra*, 91 Cal.App.4th at p. 1446, italics added.) For example, if a stepparent provided financial support which

aids "'in obtaining the things, such as shelter, clothing, food and medical treatment, which one cannot and should not do without, the [stepchild] is dependent upon their [stepparent].'" (*Ibid.*) By contrast, if financial support "'merely makes available to them some of the niceties of life they might not otherwise be able to afford,'" the stepchild cannot claim dependence within the meaning of Code of Civil Procedure section 377.60, subdivision (b)(1). (*Ibid.*)

Financial dependency is measured at the time of the decedent's death. (*Hazelwood*, *supra*, 57 Cal.App.3d at p. 698; see also *Chavez*, *supra*, 91 Cal.App.4th at p. 1446.) At most, a plaintiff's dependence in the two years before the decedent's death might suffice as a surrogate. (*Chavez*, *supra*, 91 Cal.App.4th at pp. 1436 [decedent died in 1996], 1447 [considering evidence of decedent's contributions for necessities in 1994].)

2. The evidence could not support a finding that Carla presently depended on Jose for the necessaries of life.

Carla was not the sole income earner in her family. She had been married for 24 years and her husband also worked. (3-RT-994, 1004.) Carla was a preschool teacher and had worked "mostly continuously" as a teacher for the past 25 years. (3-RT-991, 1005.)

Carla testified that Jose provided her with financial assistance in 2015 when "times were a little difficult." (3-RT-997.) Before 2015, Carla "had been off [from work] for

about three years" and her husband's job reduced his hours. (*Ibid.*) Her job fluctuated between full time and part time, and Jose would help when she worked part time. (3-RT-999.)

Nevertheless, Carla provided no evidence that Jose aided her "'in obtaining the things, such as shelter, clothing, food and medical treatment, which one cannot and should not do without'" during that time. (*Chavez*, *supra*, 91 Cal.App.4th at p. 1446.) Plaintiffs' counsel showed her a bank statement allegedly reflecting cash deposits on it, but never offered the bank statement into evidence. (3-RT-998.) There was no evidence of the amount of cash, or how Carla received the cash when Jose lived in a different state and only made trips down to Los Angeles once a year. (3-RT-995-996.) There was *no* evidence that she depended on the cash allegedly provided by Jose for the necessaries of life rather than just niceties. Carla could not recall how exactly she used the cash deposits—and testified that she *possibly* used them for the mortgage, bills, or children's sports registration and school supplies—but provided no evidence. (3-RT-999.) At least some of that list—children's sports registration and school supplies—do not meet the definition of necessaries of life.

While Carla testified about other instances in which Jose provide financial assistance, those examples irrelevantly occurred more than a decade before Jose's passing. (See *Hazelwood*, *supra*, 57 Cal.App.3d at p. 698 [financial dependency should be measured at the time of the decedent's death].) Jose allegedly gave Carla a used car more than ten years ago, which Carla no

longer had at the time of trial. (3-RT-995, 1006.) Carla testified that Jose would take care of car repairs but did not testify as to when the repairs were made. (3-RT-996.) While Jose also helped Carla with school expenses such as books and tuition, Carla had not been in school for 25 years. (3-RT-996-997, 1005.) This evidence was insufficient to show that Carla was actually dependent on Jose for the necessaries of life at the time of his death.

Nearly every plaintiff—including Carla—testified that the financial support actually flowed the other way. Carla regularly provided Jose and Maria financial support. Carla testified that in 2015, the year of Jose's death, she provided $100 to Maria and $100 to Jose whenever she was able to do so. (3-RT-1006-1007.) Luis testified at his deposition, read at trial, that Carla contributed to their mother's household expenses. (3-RT-1243.) Maria testified that Carla would provide her financial help "whenever she could." (4-RT-1575-1576.) Maria also testified at her deposition that Carla would send Maria and Jose money: "She would send us $100 every month, 100 to each of us." (4-RT-1576.)

At most, the evidence demonstrated that Carla had a reciprocal relationship with Jose, in that they helped each other out when they could. But this is insufficient to show actual *dependence* on Jose for the necessaries of life. Put another way, there is no evidence of any net support from Jose—without which there could be no dependence.

3. The evidence could not support a finding that Luis presently depended on Jose for the necessaries of life.

As for Luis, the only evidence of any financial dependence on Jose was Luis's testimony that Jose—as the owner of Jose and Sons Drywall, where Luis worked full time—would pay him and other employees when business was slow. (3-RT-1213-1215.) But the fact that Jose "always had money saved up in his business account for slow times, and he made sure we were taken care of" (3-RT-1213) was irrelevant as to whether *Jose* provided Luis financial support aiding "'in obtaining the things, such as shelter, clothing, food and medical treatment, which one cannot and should not do without.'" (*Chavez*, *supra*, 91 Cal.App.4th at p. 1446.) The drywall company was an entirely separate entity from Jose, and financial support from the company to an employee was not financial support from Jose to his stepson.

While Luis responded "Of course" to his counsel's question of whether Jose would supplement his income if it was insufficient for rent, mortgage, or utilities, there was no evidence that Jose actually did so, let alone at the time of his death. (3-RT-1214.) To the contrary, Luis testified that he regularly provided his parents money in the years before Jose's passing in December 2015. (3-RT-1242.) He sometimes would give his mother $100 and his father $100. (*Ibid.*) Maria also testified at her deposition read at trial that Luis would give her money in the years prior to Jose's passing. (4-RT-1574-1575, 1578.) He would give her $100 to $300 regularly, whenever he could. (*Ibid.*) Similarly, Luis's stepsister Griselda—who lived with Maria and

Jose when Jose died—testified at her deposition read at trial that she gave her parents a weekly allowance of $50 to $100. (3-RT-1313.) Luis's stepsister Araceli testified that all of her siblings except Jose M. would help their parents out "when they could." (3-RT-1264-1265.)

Luis failed to show that he actually depended on Jose for the necessaries of life at the time of Jose's death. As with Carla, the evidence at most demonstrated that Luis had a reciprocal relationship with Jose, rather than any net support from Jose. The evidence as to both stepchildren was insufficient to establish standing under Code of Civil Procedure section 377.60, subdivision (b)(1).

B. The Trial Court Misinstructed The Jury Regarding The Necessary Elements For Stepchild Standing.

There is another reason the verdicts as to Carla and Luis cannot stand: The trial court prejudicially erred by giving plaintiffs' proposed jury instruction on stepchild standing over defendants' objections that the instruction contained the wrong standard. The trial court gave the following instruction:

> Under California law, a stepchild is permitted to bring a claim for wrongful death if they are dependent, to some extent, upon the decedent for the necessaries of life. No strict formula can be applied to determine this. If a stepchild received financial support from their parent which helped them in obtaining the things which one cannot and should not do without, then that stepchild is dependent upon their parent and is qualified to bring a wrongful death claim. Such things may include, but are not limited to, shelter, clothing,

> food, utilities, car payments, medical treatment and other customary living expenses.

(4-RT-1833; 4-AA-935.)

This instruction presented the wrong standard for adult stepchild standing. It erroneously implied that dependence could occur at any point in the stepchild's life—i.e., so long as a stepchild "received financial support from their parent which helped them in obtaining the things which one cannot and should not do without," *regardless of when this occurred*, the stepchild had standing under the wrongful death statute. (4-RT-1833; 4-AA-935.)

To the contrary, California case law is clear that for purposes of construing dependence in the context of a stepchild's wrongful death claim, financial dependency should be measured at the time of the decedent's death (*Hazelwood*, *supra*, 57 Cal.App.3d at p. 698) or at most, in the two years before the decedent's death (*Chavez*, *supra*, 91 Cal.App.4th at pp. 1436, 1447). In other words, the standard must be *present* dependence. Otherwise, all adult stepchildren would having standing simply by having depended on a stepparent at some point in their lives, even if they did so as children decades ago.

Defendants raised this issue in their objection arguing that plaintiffs cherry-picked language to fit their facts by, for example, adding in transportation as an example of things one cannot and should not do without, due to Carla's testimony that Jose gave her a car ten or more years ago—an incident "not even in the time frame of this." (4-RT-1833.)

And plaintiffs' instruction expanded "necessaries of life" to include car payments and "other customary living expenses." (4-AA-935.) But a car—or what may be an additional car—is not something that a person necessarily cannot do without and "customary living expenses" may include all sorts of items that are not necessities of life, e.g., movies or amusement park visits, dining out, or dry cleaning.

By contrast, defendants unsuccessfully proffered their own jury instruction with the correct standard for financial dependence:

> Individuals such as Carla Silva-Naranjo and Luis Naranjo are stepchildren of the decedent Jose I.V. Naranjo, in order for you to award damages to either Carla Silva-Naranjo or Luis Naranjo, you must find that either stepchild was dependent on the decedent. Dependence is defined as financial support, "actually dependent, to some extent, upon the decedent for the necessaries of life . . . which aids them in obtaining the things, such as shelter, clothing, food and medical treatment which one cannot and should not do without."

(4-AA-856-857, citing *Chavez*, *supra*, 91 Cal.App.4th at pp. 1445-1447, and *Hazelwood*, *supra*, 57 Cal.App.3d at pp. 697-698.)

By defining dependence as "actually dependent," as cabined by *Chavez* and *Hazelwood* to dependence at the time of death or, at most, the two years before death, defendants' proposed instruction contained the necessary temporal restriction. A stepchild who only depended on a stepparent several years ago could not be "actually dependent" on that stepparent at the time of death.

Even if defendants had not objected to the erroneous legal standard in the jury instruction, parties are deemed to have objected to the trial court's decisions to give, refuse, or modify proposed jury instructions. (Code Civ. Proc., § 647; see also *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 333-334 ["To hold that it is the duty of a party to correct the errors of his adversary's instructions . . . would be in contravention of section 647, Code of Civil Procedure, which gives a party an exception to instructions that are given. . . . While the exception will be of no avail where an instruction states the law correctly but is deficient merely by reason of generality, in other cases he will not be foreclosed from claiming error and prejudice," internal quotation marks omitted].) Inzunza may "challenge on appeal an erroneous instruction without objecting at trial." (*Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 7.) He was only required to request a clarifying instruction at trial when the instruction "is legally correct but is 'too general, lacks clarity, or is incomplete.'" (*Ibid.*) On its face, the instruction given is legally erroneous by having no temporal element—i.e., no requirement of dependence at the time of death. Instructing the jury with the wrong standard for adult stepchild dependence was undoubted legal error.[6]

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[6] Even if instructing the jury with an erroneous standard for adult stepchild dependence somehow was legally correct but too general, lacking clarity, or incomplete, defendants preserved this argument by objecting to plaintiffs' instruction as including factors "not even in the time frame of this." (4-RT-1833.)

"Instructional error is prejudicial where it seems probable that the error affected the verdict." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 531.) "'[P]robab[le]' in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility*." (*College Hospital*, *supra*, 8 Cal.4th at p. 715, original italics.)

Here, the evidence of Carla's and Luis's "dependence" was very thin. Much of the evidence relied on events long in the past. The jury instruction expressly included transportation as an example of things one cannot and should not do without, thus referencing Carla's testimony that Jose gave her a car ten or more years ago. (3-RT-995, 1006.) It is more than reasonable to infer that, based on the erroneous instruction, the jury considered Carla's testimony as to the car and other examples of Jose's financial assistance decades ago, such as when he helped with her school tuition. (3-RT-996-997.) It therefore is more than reasonable to infer that the erroneous instruction affected the jury's verdict as to Carla and Luis, given the complete lack of evidence of their present *actual* dependence.

The portions of the judgment awarding Carla and Luis $439,000 each in noneconomic damages must be vacated and those awards stricken.

III. If This Matter Is Retried As To CRGTS, The Judgment Against Inzunza Must Be Set Aside Pending The Outcome Of That Trial.

Co-defendant CRGTS will be arguing that it is entitled to a retrial on liability. If it prevails on appeal and the matter is

retried as to CRGTS, the judgment against Inzunza—the defaulting defendant—must be set aside to await the outcome of that trial. "The rule is definitely established that where there are two or more defendants and the liability of one is dependent upon that of the other the default of one of them does not preclude his having the benefit of his codefendants establishing, after a contested hearing, the nonexistence of the controlling fact; in such case the defaulting defendant is entitled to have judgment in his favor along with the successful contesting defendant." (*Adams Mfg. & Engineering Co. v. Coast Centerless Grinding Co.* (1960) 184 Cal.App.2d 649, 655 (*Adams*).)

Here, CRGTS's liability is wholly dependent on that of Inzunza. If upon retrial CRGTS establishes that the controlling fact of liability does not exist, CRGTS's victory will "enure to the benefit of the defaulting defendant, and final judgment must therefore be entered not only in favor of the answering defendant, but in favor of the defaulting defendant as well." (*Adams*, *supra*, 184 Cal.App.2d at p. 656.)

It therefore would be improper for any judgment to remain against Inzunza. Indeed, "if the action is still pending against a party which may be jointly liable with the defaulting [defendant], it is improper to enter judgment against the defaulting defendant while the action remains pending against the other defendant." (*Western Heritage Ins. Co. v. Superior Court* (2011) 199 Cal.App.4th 1196, 1210, fn. 18.)

CONCLUSION

The evidence at trial does not possibly justify a $3.625 million award to Maria for the pecuniary value of loss of comfort, care, and protection at the time of Jose's death. The record is devoid of any evidence of what Jose did for her or of their relationship at the time of his death other than that he organized the occasional family gathering and would be the one to get up in the event "something happened" in the middle of the night. That is it. That does not add up to $3.625 million. Rather, the only plausible explanation is that this astounding sum results from jury passion and prejudice engendered by erroneously permitted evidence and improper argument.

Nor did the evidence possibly show that Carla and Luis depended on Jose at the time of his death for *necessaries* of life as required to confer standing under Code of Civil Procedure section 377.60, subdivision (b)(1).

This Court should vacate the noneconomic damages awards as to Maria, Carla, and Luis.

As to Maria, this Court should vacate the award for $3.625 million in pecuniary loss of society damages and remand the matter for a new trial as to those damages.

As to Carla and Luis, this Court should vacate the awards for $439,000 each in loss of society damages and direct entry in Inzunza's favor as to them.

Further, if the Court reverses the judgment as to CRGTS and remands the matter for a new trial, the Court must reverse the judgment as to Inzunza pending the outcome of that trial.

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this Appellant Jose R. Inzunza's Opening Brief contains **11,346 words**, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: October 27, 2022 *s/ Robert A. Olson*

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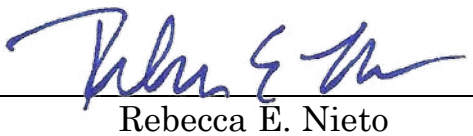

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