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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

SHAWN J. PAREGIEN et al.,

Plaintiffs and Respondents,

v.
EMILIANO PEREZ et al.,

Defendants and Appellants.

F067517

(Super. Ct. No. S-1500-CV-272703)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Murchison & Cumming, Edmund G. Farrell, Adrian J. Barrio; Robinson & Kellar and Michael C. Kellar for Defendants and Appellants.

Shernoff Bidart Echeverria Bentley, Ricardo Echeverria, Danica Dougherty; Young Wooldrige, Scott D. Howry, Nathan M. Hodges; The Ehrlich Law Firm and Jeffrey Isaac Ehrlich for Plaintiffs and Respondents.

Defendants appeal from a \$15 million judgment against them in a wrongful death action that arose out of an incident in which a semitruck owned and operated by defendants collided with plaintiffs' decedent and her mother as they crossed the street in the crosswalk on a green light. Defendants seek reversal of the judgment, challenging the exclusion of evidence the decedent was under the influence of methamphetamine at the time of death and contending the damages awarded were excessive. The exclusion of evidence was proper and we cannot say the award of damages was so disproportionate to the injuries suffered as to shock the conscience and compel a conclusion the award was based on passion, prejudice, or corruption of the jury. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant, Antonio Oliva, acting within the course and scope of his employment for Emiliano Perez, doing business as E&M Trucking, was driving a semitruck pulling two trailers northbound on South Union Avenue in the right lane on the evening of December 27, 2010. When he reached the intersection with Panama Road, he stopped the truck with the front over the first limit line, within the crosswalk. Oliva intended to make a right turn, but did not activate his turn signal. Observing two female pedestrians, Tiffany Paregien and her mother, Cynthia Paregien, crossing South Union Avenue from west to east, he backed the truck out of the crosswalk to give them room to pass. He saw them safely reach the southeast corner; the pedestrians waited there approximately 18 seconds for the light to change. While they did so, the truck pulled forward into the crosswalk again. When the light for northbound traffic turned green, the pedestrians began to walk northbound across Panama Road in the crosswalk. At about the same time, the truck moved forward into the intersection. It proceeded directly forward about 30 to 40 feet, then began a right turn onto Panama Road. The front of the truck struck the pedestrians from behind; the tires of the second trailer rolled over them.

Salvador Cendejas, whose vehicle was stopped on the west side of the intersection waiting to proceed eastbound on Panama Road, witnessed the accident; he honked his

horn and flashed his lights at the truck, trying to get the driver's attention. The truck kept going. When the light turned green for him to proceed, Cendejas drove across the intersection and stopped to help the women and call the police. Cynthia¹ was dead at the scene; Tiffany died later at the hospital.

Officers investigating the accident obtained a surveillance video from a camera at a bank's automatic teller machine (ATM) nearby. From it, they were able to identify the truck as coming from E&M Trucking; their investigation also identified the driver as Oliva. When officers spoke with Oliva, he initially denied driving through the intersection of South Union Avenue and Panama Road that night. When told officers had a video from which they were able to identify the truck, Oliva indicated he remembered going through the intersection, but was not aware of any collision with pedestrians.

Tiffany's two minor children, Shawn and Lacey Paregien, through their guardians ad litem, sued Oliva and Emiliano Perez, doing business as E&M Trucking, for the wrongful death of their mother.² The coroner's report indicated both Cynthia and Tiffany had methamphetamine in their blood systems at the time of death; defendants' toxicology expert declared Tiffany "was under the influence of toxic amounts of methamphetamine at the time of her death." At trial, defendants attempted to show Tiffany was comparatively negligent; they sought to demonstrate Tiffany was under the influence of methamphetamine and it made her inattentive and caused her to fail to notice the truck coming toward her and take evasive action.

At the start of trial, plaintiffs filed a motion in limine to exclude any evidence of Tiffany's blood test results or her ingestion of methamphetamine prior to the accident. They also filed motions in limine to exclude evidence of Tiffany's use of drugs at any

¹ Because they share a last name, we refer to the Paregiens by their first names for clarity and convenience. No disrespect is intended.

² Cynthia's daughter, Heather Edwards, also sued for the wrongful death of Cynthia, but she settled her claim prior to trial.

time, to exclude testimony by defendants' toxicology expert, Dr. Vina Spiehler, suggesting decedents were engaging in conduct consistent with being under the influence of methamphetamine at the time of the accident, and to exclude certain opinions of plaintiffs' accident reconstruction expert, Dr. Kenneth Solomon.

The trial court granted the motion to exclude evidence of decedents being under the influence of methamphetamine at the time of the accident, concluding that, while they had tested positive for the drug, there was "absolutely no demonstration on the video that there is any aberrant sort of behavior, negligent type of behavior on the part of either pedestrian"; the pedestrians did not demonstrate a lack of concern for their own safety. The trial court denied the motion to exclude evidence of methamphetamine use in general, finding the evidence of lifestyle would be relevant to the loss of society and comfort. Consistent with those rulings, the trial court also granted plaintiffs' motion in limine to exclude Spiehler's opinion that Tiffany was under the influence of methamphetamine at the time of the accident, but allowed her testimony regarding the general effects of methamphetamine on a person.

Plaintiffs initially moved to exclude Solomon's opinions that Cynthia and Tiffany did not react to the presence of the truck until its initial impact with Cynthia, and that Cynthia and Tiffany exhibited intrepid behavior³ while crossing South Union Avenue by not being attentive to their surroundings. Solomon concluded decedents' inattentiveness and failure to react were the result of methamphetamine intoxication, and caused them to fail to take evasive action to avoid the collision; therefore he opined that intoxication was a substantial factor in causing the collision and the pedestrians' deaths. When the trial court excluded all evidence that the decedents were under the influence at the time of the accident, plaintiffs withdrew the portion of their motion in limine relating to

³ Solomon defined intrepid behavior as a combination of inattentiveness, risk-taking, and unpredictable-type behavior.

inattentiveness, permitting Solomon to testify to decedent's lack of reaction and intrepid behavior, but not permitting him to attribute those behaviors to methamphetamine intoxication.

At the start of the trial, defendants admitted Oliva was negligent and his negligence was a cause of the accident. Defendants wished to call Edward Worthy, the father of plaintiff, Lacey Paregien, to testify to Tiffany's use of methamphetamine on other occasions and to the relationship between Tiffany and her children. Worthy was unavailable at the time of trial, however. Defendants sought to introduce his testimony via his deposition transcript, but the trial court found no foundation of personal knowledge had been laid for that testimony; it excluded Worthy's deposition testimony. In light of the lack of evidence of methamphetamine usage, the trial court excluded Spiehler's testimony regarding the general impact of methamphetamine on a person.

Plaintiffs did not seek economic damages for the death of Tiffany; they sought only noneconomic damages for loss of the love, companionship, comfort, care, assistance, protection, affection, society, moral support, training and guidance of their mother. Shawn, who was 11 years old at the time of the accident, testified he was raised by Tiffany and Cynthia. He lived and attended school in Niland from preschool to fifth grade. He received straight As every year and had perfect attendance almost every year. His mother was supportive of him in school and helped him with his homework. In fourth grade, child protective services took Shawn from his mother and put him in a receiving home and a foster home for seven months. He was removed from his mother's care because they lived in a place with no electricity or plumbing.

Tiffany, Cynthia, and Shawn moved to Bakersfield at the end of Shawn's fifth grade year⁴; they had to move because they got kicked out. They lived about five different places in Bakersfield. They stayed in motels or with relatives or friends. At one

⁴ Tiffany was pregnant with Lacey at the time.

time they lived with friends of Worthy; Shawn did not like it there because one of the people did drugs. At the time of the accident, Shawn, Tiffany, Cynthia, and Lacey lived in a trailer with Shawn's aunt Heather and uncle Mark and their three children. Tiffany enrolled Shawn in sixth grade in Oildale.

Shawn described the many activities in which he engaged with Tiffany and Cynthia. He testified that, even though it was hard to find a place to live, his mother made sure he and Lacey had food, clothing, and a roof over their heads. He stated he loved his mother and misses her, and his mother told him she loved him.

After Tiffany's death, Shawn went to live with Mike and Sandy Dudley; Sandy is Cynthia's sister. Lacey lives with her second cousin, Chad Paregien, and his wife, Michelle, who are in the process of adopting her.

In closing argument, plaintiffs' counsel argued Tiffany had a life expectancy of 53 more years and asked the jury to compensate each child by awarding an amount equal to the minimum wage (\$8 per hour) times 24 hours, times 365 days per year, for the remaining 53 years of life expectancy (approximately \$3.7 million), then double that amount, which would be approximately \$7.5 million for each child. The jury found in favor of plaintiffs and awarded each child \$3.75 million for past noneconomic damages and \$3.75 million for future noneconomic damages, a total of \$7.5 million for each child.

Defendants moved for a new trial, asserting the damages awarded were excessive. The motion was denied. Defendants appeal from the judgment, contending evidence of Tiffany's methamphetamine intoxication was improperly excluded and the award of damages is excessive.

DISCUSSION

I. Exclusion of Evidence of Methamphetamine Intoxication

In their first motion in limine, plaintiffs sought to exclude all evidence of Tiffany's alleged use of methamphetamine prior to or at the time of the accident. They asserted there was no foundation for any relevance of the evidence to the issues in the case, and

the evidence was highly prejudicial and inflammatory, such that the potential for undue prejudice and inflaming the jury outweighed any probative value. The trial court granted the motion, noting Spiehler expressed no opinion regarding causation, and the video did not demonstrate any aberrant or negligent behavior by the decedents. Although they might have been under the influence of methamphetamine, the decedents were in the crosswalk, well into the street, the truck was not signaling a turn, and the truck turned right and ran over them as they crossed. The trial court noted decedents had stopped on the corner and waited for the green light. They did not display any risk-taking activity. The jury could only speculate regarding whether the drug influenced them while they were crossing in the crosswalk.

“The trial court is ‘vested with broad discretion in ruling on the admissibility of evidence.’ [Citation.] ‘[T]he court’s ruling will be upset only if there is a clear showing of an abuse of discretion.’ [Citation.] “‘The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.’” [Citation.]’ [Citation.] Moreover, even where evidence is improperly excluded, the error is not reversible unless “‘it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.]” [Citation.]’ [Citations.]” (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432.)

“A person who qualifies as an expert may give testimony in the form of an opinion if the subject matter of that opinion ‘is sufficiently beyond common experience that the opinion of [the] expert would assist the trier of fact.’ [Citations.]” (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1116-1117 (*Jennings*)). “However, even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert’s opinion based on assumptions of fact without evidentiary support

[citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence. [Citations.] Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests.' [Citation.]" (*Id.* at p. 1117.)

In opposition to plaintiffs' motion in limine, defendants argued their experts would present evidence Tiffany was under the influence of methamphetamine at the time of her death, and the methamphetamine in her system was a substantial factor in causing the accident. Tiffany's blood tested positive for 2100 nanograms per milliliter of methamphetamine. Spiehler opined that, within a reasonable scientific certainty, Tiffany was under the influence of toxic amounts of methamphetamine at the time of her death. Further, the cognition of any person under the influence of methamphetamine would be affected by the drug. A person of Tiffany's weight who is under the influence of 2100 nanograms per milliliter of methamphetamine "would exhibit altered time and environmental perception behaviors, impulsivity behaviors, and risk-taking behaviors." Tiffany "would have had exaggerated and nonrational 'fight or flight' responses as a result of the toxic overdose of methamphetamine." Spiehler declined, however, "to testify as to whether the methamphetamine ... was a cause of the subject accident and [the decedents'] deaths."

In reaching his opinions, defense expert Solomon relied in part on the opinion of plaintiffs' toxicology expert, Dr. Naresh Jain, as expressed in his deposition, that the cognitive functions of a person who tested positive for 2100 nanograms per milliliter of methamphetamine would be affected by the drug. He also relied on Spiehler's opinions that, with such a level of methamphetamine in her system, Tiffany would exhibit altered time and environmental perception behaviors, impulsivity behaviors and risk-taking behaviors. Solomon viewed the bank's ATM video and opined that Tiffany was

negligent in failing to make any movement indicating she was aware of the presence of the truck and failing to react to the auditory cues from the sound of the truck as it accelerated toward her. Tiffany did not deviate from her path of travel or change her walking speed in an attempt to avoid the collision. Solomon concluded Tiffany was exhibiting altered time and environmental perception behaviors, impulsivity behaviors and risk-taking behaviors consistent with being under the influence of methamphetamine, as a result of which she “failed to be cognizant of her surroundings, failed to appreciate the harm posed by the truck/trailers that was accelerating toward her, and failed to take any evasive action in an attempt to avoid being struck by the truck/trailers.”

The video did not show any of the kind of conduct Spiehler opined would result from methamphetamine intoxication. The decedents displayed no impulsivity or risk-taking behavior; their perceptions of the environment seem fully grounded in reality. Decedents crossed South Union Avenue in the crosswalk, proceeding in front of the truck after it backed out of the crosswalk. They reached the southeast corner and stepped onto the curb. They waited there 18 seconds for the light to change to green for northbound traffic across Panama Road. When the light turned green, they began to walk across Panama Road in the crosswalk at a typical walking pace. When they stepped off the curb, the truck was behind and to the left of them; it remained behind and to the left of them as they walked across the intersection.

There is no evidence the truck was signaling a right turn; the video and the eyewitness suggest it was not. Decedents had every reason to believe the truck driver was aware of their position, since he had just backed up to allow them to cross in front of him to reach the southeast corner. When the light turned green and the truck began to move, it moved forward 30 to 40 feet before it began its right turn. Solomon testified the accelerating truck would have been very noisy and, as it moved closer to the pedestrians, the noise would have increased. Additionally, the headlights would have begun to shine on decedents. Solomon testified 4.7 seconds elapsed between the time decedents stepped

off the curb and the time they reached the point of impact, which he opined was sufficient time for them to react and take evasive action, given the slow acceleration of the truck. There was no reason to take evasive action, however, until the truck began to turn right. Plaintiffs' expert, David King, testified the truck began its right turn only one second before impact. He stated the truck would have been making the same amount of noise whether it proceeded directly northbound through the intersection or moved forward and then to the right.

The impact of the truck with the pedestrians is not depicted in the video.⁵ The camera that recorded the video was a motion detection based camera, which records at a lower resolution and slower frame rate when it does not detect motion. Just prior to impact, the camera was recording at the slower frame rate, so the time between images being captured was longer; the exact moment of impact occurred between two frames being recorded. It is not known whether decedents attempted to take evasive action in the interval before impact that was not recorded.

Defendants' experts presented no evidence regarding when the truck began its right turn, when the "auditory cues" would have alerted decedents that the truck was turning right and coming toward them, rather than proceeding straight ahead through the intersection, or how much time decedents had to react and take evasive action between the time they should have been aware the truck was coming toward them and the time of impact. The experts presented no analysis and expressed no opinions regarding how much time decedents would have needed to move out of the truck's path and to a point of safety, or whether decedents had time to take such actions after the auditory or visual cues should have alerted them to the truck's approach.

⁵ The jury was shown three pieces of video: the original video taken from the ATM camera, a version of that video enhanced by plaintiffs' expert, and an animated simulation created by plaintiffs' expert based on the original and enhanced versions and measurements taken of the truck and the scene.

The trial court did not abuse its discretion by excluding evidence that Tiffany was under the influence of methamphetamine at the time of the accident. The trial court found no evidence to tie the methamphetamine use or intoxication to any behavior that contributed to the accident. Defendants failed to demonstrate the evidence was relevant to the issues in the case; they did not show a causal connection between Tiffany's methamphetamine intoxication and the occurrence of the accident. Solomon's opinions were not supported by the evidence or were "unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion." (*Jennings, supra*, 114 Cal.App.4th at p. 1117.) Accordingly, the trial court properly excluded both the evidence of Tiffany's methamphetamine intoxication and the expert testimony attempting to relate it to the occurrence of the accident.

II. Excessive Damages

In a wrongful death action, "damages may be awarded that, under all the circumstances of the case, may be just." (Code Civ. Proc., § 377.61.) "A plaintiff in a wrongful death action is entitled to recover damages for his own pecuniary loss, which may include (1) the loss of the decedent's financial support, services, training and advice, and (2) the pecuniary value of the decedent's society and companionship—but he may *not* recover for such things as the grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss. [Citations.]" (*Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783, 793.) "Factors 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. [Citation.]" (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 721 (*Mendoza*)).

The amount of damages to be awarded is a question of fact for the trier of fact. (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 691.) This question of fact is "first committed to the discretion of the jury and next to the discretion of the trial judge

on a motion for new trial.” (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506 (*Seffert*)). “The trial judge sits as a thirteenth juror with the power to weigh the evidence and judge the credibility of the witnesses. If he believes the damages awarded by the jury to be excessive and the question is presented it becomes his duty to reduce them. [Citing cases.] When the question is raised his denial of a motion for new trial is an indication that he approves the amount of the award.” (*Id.* at p. 507.) The determinations of the jury and the trial court are entitled to great weight. (*Id.* at p. 506.)

The appellate court cannot weigh the evidence or pass on the credibility of witnesses. (*Seffert, supra*, 124 Cal.App.4th at p. 507.) “[W]hen a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court (citations omitted).’ [Citation.]” (*DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1240 (*DiRosario*)). “[T]he appellate court must consider the whole record, view the evidence in the light most favorable to the judgment, presume every fact the trier of fact could reasonably deduce from the evidence, and defer to the trier of fact’s determination of the weight and credibility of the evidence. [Citations.]” (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614 (*Rufo*)).

“The amount to be awarded is ‘a matter on which there legitimately may be a wide difference of opinion’ [citation].” (*Seffert, supra*, 124 Cal.App.4th at p. 508.) “An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.” (*Id.* at p. 507.) “There is no fixed standard by which the appellate court can determine whether the jury’s award for this intangible loss [of comfort and society] is excessive. The appellate court usually defers to the jury’s discretion in the absence of some other factor in the record, such as

inflammatory evidence, misleading instructions or improper argument by counsel, that would suggest the jury relied upon improper considerations. [Citations.]” (*Rufo, supra*, 86 Cal.App.4th at p. 615.) The fact that the verdict is very large does not alone compel the conclusion the award was attributable to passion or prejudice. (*Ibid.*)

A. Awards in published cases

Defendants contend that, compared with the amounts awarded in prior cases for similar injuries, the amount awarded in this case appears so grossly excessive as to shock the moral sense and raise a reasonable presumption the jury was under the influence of passion or prejudice. Regarding such an argument, the California Supreme Court has stated:

“Defendants have compiled a lengthy list of judgments awarding damages which have been reversed on appeal as excessive. Those cases do not, in and of themselves, mandate a reversal here. The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury’s factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding. [Citations.] Thus, we adhere to the previously announced and historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice on the part of the jurors.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, fn. 12.)

Thus, even when the published cases are factually similar to the case before the reviewing court, and the court in the published case rejected the award of damages as excessive, the prior decisions do not compel a finding that the verdict in the case before the reviewing court was excessive. Here, defendants have not demonstrated that the cases cited are even comparable to the instant case. In *Cabral v. Ralph’s Grocery Co.* (2011) 51 Cal.4th 764, a widow sued for the wrongful death of her husband. She was awarded \$480,000 for economic damages and \$4.33 million for noneconomic damages;

the damages were reduced by 90 percent, however, because the jury found the decedent to be 90 percent at fault. (*Id.* at p. 770.) The case presented an issue of duty; it did not present an issue of excessive damages.

In *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, three members of a family were killed and three were injured in a vehicle rollover accident. The surviving members sued the vehicle manufacturer for their own injuries, for the wrongful deaths of the decedents, and, on behalf of the estates of the decedents, for the decedents' injuries. (*Id.* at p. 756.) The plaintiffs were awarded nearly \$5 million in compensatory damages, after adjustments by the trial court for comparative fault and fault of a third party, and \$290 million in punitive damages. (*Id.* at pp. 744, 757-758.) In a prior appeal, the judgment had been affirmed; in this appeal, the issue was whether the punitive damage award was excessive. In light of a recent United States Supreme Court precedent, the court reduced the punitive damage award to \$23.7 million. (*Id.* at p. 763.)

In *Rufo*, the plaintiffs sued for the wrongful death of their murdered adult son, who was living independently away from the parents; the plaintiffs recovered \$8.5 million in compensatory noneconomic damages. (*Rufo, supra*, 86 Cal.App.4th at pp. 613-614.) The court found the award was not excessive, rejecting the defendant's argument that the damages were excessive because the largest prior award defense counsel could find in California for noneconomic damages for the wrongful death of an adult child was \$2 million. (*Id.* at pp. 615-616.)

In *Wright v. City of Los Angeles* (1990) 219 Cal.App.3d 318, the plaintiffs sued for the wrongful death of their adult son and obtained a judgment for \$2 million. (*Id.* at p. 354.) Comparing that amount with the evidence presented and with the judgments in other reported cases, the court concluded the award was not "so disproportionate to [the plaintiffs'] loss as to shock the conscience and warrant interference with the jury's verdict. [Citation.]" (*Id.* at p. 356.)

In *Wilks v. Hom* (1992) 2 Cal.App.4th 1264, a mother and two minor daughters were injured, and a third minor daughter was killed, in an explosion. (*Id.* at p. 1267.) The survivors sued for their injuries and for the wrongful death of the decedent. Their damages totaled almost \$3 million; the decision did not state how much was allocated to the wrongful death cause of action. (*Id.* at pp. 1267-1268.) The issue in the case was whether the mother could recover damages for negligent infliction of emotional distress as a result of witnessing the injuries to her daughters. There was no question of excessive damages.

In *Shore v. Gurnett* (2004) 122 Cal.App.4th 166, a bicyclist was killed by a drunk driver; his wife and sons sued for wrongful death. The jury awarded the plaintiffs \$7.5 million in compensatory damages and \$35,000 in punitive damages. (*Id.* at p. 170.) The defendant challenged only the award of punitive damages. (*Id.* at pp. 170-176.)

In *DiRosario, supra*, 196 Cal.App.3d 1224, the plaintiffs sued for the wrongful death of their minor daughter who was hit by a car while crossing the street. The jury awarded them approximately \$2 million, but found the decedent 40 percent at fault. (*Id.* at p. 1228.) The court concluded the judgment was not, as a matter of law, so excessive as to warrant interfering with the finding of the jury. (*Id.* at pp. 1241-1242.)

In *Mendoza, supra*, 206 Cal.App.4th 702, the decedent died while in police custody and his two sons sued for wrongful death. The jury awarded them \$750,000 each, reduced by 30 percent for the decedent's comparative fault. (*Id.* at p. 706.) There was evidence the decedent left Mexico without telling his family and never returned for a visit, and his sons never visited him; there was no evidence he provided financial support for them and no evidence of his life expectancy. (*Id.* at p. 720.) The decedent however, had lived with his sons until he came to the United States, and the plaintiffs testified to the love and affection they shared with their father, and his continued emotional support through frequent phone conversations. The court concluded the jury's award was not excessive or the result of passion or sympathy. (*Id.* at p. 721.)

In *Fagerquist v. Western Sun Aviation* (1987) 191 Cal.App.3d 709 (*Fagerquist*), the decedent's mentally disabled minor daughter sued for wrongful death after he was killed in a plane crash. The jury awarded her \$1.5 million. (*Id.* at p. 713.) The court concluded the award was not excessive; the plaintiff had shown she had a special relationship with her father despite her disabilities. (*Id.* at p. 727.)

These cases illustrate the difficulty of attempting to determine the appropriate level of damages based on past damage awards. The factual situations in the cases presented are too varied to permit generalizations or to glean from them any sort of upper limit for noneconomic wrongful death awards. None of the cases cited involved minor children suing for the wrongful death of their mother. Only the last two, *Mendoza* and *Fagerquist*, involved a minor child suing for the wrongful death of a parent, and in those cases, the court simply found the damage award was not excessive. Nothing in these cases establishes or even suggests there is some upper limit on wrongful death damages for loss of the decedent's love, society, and companionship, regardless of the facts of the particular case. We note also that the cases range in time from 1987 to 2012, and defendants have not attempted to convert the damage awards to a common value, for example by adjusting them for inflation to express them all in current dollars. We conclude defendants have not demonstrated by their citation of other wrongful death cases that the award in this case "is so disproportionate to the injuries suffered that it shocks the conscience and virtually compels the conclusion the award is attributable to passion or prejudice." (*Rufo, supra*, 86 Cal.App.4th at p. 615.)

B. Life expectancy

Defendants contend plaintiffs offered no evidence of Tiffany's life expectancy, so the jury's apparent adoption of the amount of damages suggested by plaintiffs' counsel, which was based on a 53-year life expectancy, was purely speculative.

In his closing argument, plaintiffs' counsel suggested that, to decide the value of a mother's love, companionship, and society to her children, one should first ask what is its

magnitude and how long will it last. He then referred to the life tables in vital statistics published by the National Center for Health Statistics, and stated the average life expectancy of a 28-year-old female is 53 years. Plaintiffs' counsel suggested a mother's love continues all her life, and in Tiffany's case, that would have been about 53 years. He proposed calculating damages by using the minimum wage (\$8 per hour) and applying it 24 hours a day, 365 days a year, for 53 years, then doubling that amount. He represented the total would come out to about \$7.5 million and he asked for that amount for each plaintiff. The jury's total award to each plaintiff was \$7.5 million.

Defendants assert the trial court instructed the jury with CACI No. 3921 as follows:

“In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle and occupation. According to the Life Tables and Vital Statistics of the United States, published by the National Center of Health Statistics, a 28 year old female is expected to live another 53 years. This is the average life expectancy. Some people live longer and others die sooner. The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive.”⁶

The directions for use of CACI No. 3921 state: “Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.)” The Life Expectancy Table—Female indicates the average life expectancy for a 28-year-old woman is 53.5 years. Defendants do not challenge the use of this instruction in this case; they do not assert the information

⁶ We quote the instruction from defendants' opening brief because the text of the jury instructions was not made a part of the record. The record indicates plaintiffs requested, and the trial court intended to instruct with, CACI No. 3921, but the language of the instruction as it was given does not appear in the record.

contained in the instruction or in the life expectancy table is incorrect or that it was not appropriately used to instruct the jury in this case. Their argument seems to be that there was no evidence, other than the life expectancy information contained in the instruction, concerning Tiffany's life expectancy, so the verdict on damages, which appears to be based on a life expectancy of 53 years, is not supported by the evidence.

“Life expectancy figures from mortality tables are admissible but are not conclusive” in determining the life expectancy of a decedent. (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424.) Other relevant factors, including the decedent's health, lifestyle, and occupation may also be considered. (*Ibid.*) The jury instruction given provided the applicable life expectancy statistics from what is considered to be a reliable source. It described the 53-year figure as the average life expectancy for a 28-year-old woman, and instructed the jury to determine the actual life expectancy of the decedent, considering other factors that might affect the determination, including the decedent's health, lifestyle and occupation. Defendants had the opportunity to present any appropriate evidence to show Tiffany's life expectancy was shorter than the average. Plaintiffs had the opportunity to present evidence of a longer than average life expectancy. If, as defendants assert, no other evidence was presented, the jury acted properly in accepting evidence of the average life expectancy and basing its award of damages on that figure. Accordingly, defendants' argument that plaintiffs failed to present any evidence to support a 53-year life expectancy, and consequently failed to support counsel's argument for calculating damages per diem for 53 years, is without merit.

Defendants add a brief argument that Lacey, because she was only four months old at the time of her mother's death, could not comprehend the loss of her mother's love, companionship, comfort, care, assistance, protection, affection, society, and moral support; therefore, they conclude, the award of \$3.75 million for her loss during the first approximately two years after Tiffany's death was unsupported by proof and

outrageously excessive. There are those who would argue an infant bonds immediately with her mother and recognizes, and may resist, a substitute. Arguably also, a child is much in need of her mother's training and guidance, as well as her love, comfort, and care, during the first two to three years of the child's life, perhaps even more than later in life. Suffice it to say no evidence was presented to support defendants' assumption that, because of her limited comprehension, an infant is not in need of, or will not miss, her mother's love, companionship, comfort, care, assistance, protection, affection, society, moral support, training and guidance early in life.

C. Inflammation of the jury

Defendants argue the jury's large award of damages was the product of passion, sympathy, and prejudice engendered by plaintiff counsel's appeal to the jury's emotions during closing argument. They contend plaintiff counsel urged the jury to punish defendants with a large award of damages. Defendants assert "plaintiffs' counsel improperly told the jury that they should 'punish defendant Oliva in this civil case by rendering a large monetary award.'" Although defendants placed the language purportedly used by plaintiffs' counsel in quotation marks, as if it were a direct quotation, they failed to cite to the portion of the record where any such language appeared, and we were unable to locate it. Likewise, defendants assert plaintiffs' counsel "argued that the size of the jury award would be sending a message that the actions of Mr. Oliva would not be tolerated in the community." Again, defendants do not point to any place in the record where such a statement may be found. (See *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 96, fn. 2, which states: "Each and every statement in a brief regarding matters that are in the record on appeal, whether factual or procedural, must be supported by a citation to the record. This rule applies regardless of where the reference occurs in the brief. [Citations.]")

As defendants point out, plaintiffs' counsel did argue to the jury that, in criminal cases, the punishment must fit the crime, and the same concept applies in civil cases. He

explained that the jury must first figure out what harm was caused, then match the damages to that harm, “not a penny more and not a penny less.” After defense counsel argued the jury should award Shawn a total of \$265,000 and Lacey a total of \$230,000, and should allocate responsibility for the accident 50 percent to Oliva and 50 percent to Tiffany, plaintiffs’ attorney responded: “They want to just say, award them a couple hundred thousand bucks, oh, and then cut it in half ‘cause we’re going [to] let 50 percent fall upon Tiffany, that’s just wrong. [¶] You folks are the conscience of this community. And as a good, solid community, by your verdict, you need to tell all of us that we’re not going to put up with that. We’re not going to tolerate that. And I ask you to simply do this, let your verdict speak the truth.”

Plaintiff counsel’s closing argument did not exhort the jury to award plaintiffs a large amount of damages in order to punish defendants. While he made an impassioned argument for the value of a mother’s love to her children and maintained the children would feel the loss for the 53 years of Tiffany’s life expectancy, he did not inflame the jury with improper argument. A reviewing court will generally defer to the jury’s discretion in setting the amount of damages for wrongful death, “unless 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.) There was no showing the jury in this case was influenced by inflammatory evidence, misleading instructions, or improper argument by counsel.

““In measuring the damages suffered ... [in a wrongful death action,] the jury ... [is] entitled to consider the loss of society and comfort suffered There is no fixed and absolute yardstick by which a court on appeal can measure the value of these elements of damage, it being sufficient if the amount awarded appears to bear a reasonable relation to the elements of loss entitled to be considered by the jury, and the fixing of the amount is committed first to the sound discretion of the jury and second to the like discretion of the trial judge in passing on a motion for new trial. [Citation.]’ [Citations.]” (*Fagerquist,*

supra, 191 Cal.App.3d at p. 728.) The evidence indicated Shawn lived with his mother his entire life, with the exception of seven months when he was placed in foster care. Tiffany was loving and supportive, helped Shawn with his homework, played games with him, and took him to the fair and other places for entertainment. Although they sometimes had difficulty finding a place to live, Tiffany made sure he and Lacey had food to eat, clothing to wear, and a roof over their heads. Shawn loved his mother, misses her, and cried for two days after she died. His guardian testified Shawn was sad, had trouble sleeping, and cried at night after he came to live with her; at the time of trial, he still missed his mother and talked about her all the time.

Although the amount of damages awarded was high and our award might have been different if we had acted as the trier of fact, we cannot say “the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.” (*Seffert, supra*, 56 Cal.2d at p. 507.) Defendants have not established that the damages awarded were excessive, warranting reversal of the judgment.

DISPOSITION

The judgment is affirmed. Plaintiffs are entitled to their costs on appeal.

HILL, P. J.

WE CONCUR:

GOMES, J.

DETJEN, J.