Filed 1/27/17 Olvera v. Ruiz CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CASENOTE: COURT PROVIDES LENGTHY DISCUSSION AS TO ADEQUACY OF SPECIFICATIONS FOR NEW TRIAL. REJECTS PLAINTIFFS' CLAIM OF INADEQUATE WRONGFUL DEATH DAMAGES FOR DEATH OF FATHER WORKING IN CALIFORNIA WHEN FAMILY IN MEXICO

LAWATYOURFINGERTIPS ®
BY JAMES GRAFTON RANDALL, ESQ.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

MA GUADALUPE OLVERA et al., Plaintiffs and Appellants, v. ENRIQUE CASTILLO RUIZ et al., Defendants and Respondents.	D068875 (Super. Ct. No. ECU07709)

APPEAL from a judgment of the Superior Court of Imperial County, Brooks L. Anderholt, Judge. Affirmed.

Law Offices of Gary A. Dordick and Gary A. Dordick, Douglas Shaffer, for Plaintiffs and Appellants.

Horton, Oberrecht, Kirkpatrick & Martha and Kimberly S. Oberrecht, Carolyn A. Mush, for Defendants and Respondents.

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Plaintiffs and appellants Ma Guadalupe Olvera and her children filed a personal injury and wrongful death action against defendants and respondents Enrique Castillo Ruiz, Maria S. Castillo individually and doing business as E&M Castillos Transport, and Castillo Transport, following the death of Ma's husband Jose Gonzalez Hernandez (Gonzalez) that occurred when Enrique Castillo's tractor-trailer collided with Gonzalez's vehicle. The matter proceeded to a jury trial in which the jury found both parties negligent and apportioned 42.5 percent of the fault to defendants but awarded plaintiffs zero damages. Thereafter, the trial court conditionally granted defendants' motion for a new trial with an additur, determining plaintiffs' wrongful death damages were $121,125 after being reduced based on the jury's liability apportionment. Plaintiffs appeal, contending (1) the trial court issued an insufficient specification of reasons in granting a conditional new trial, requiring reversal of the order and reinstatement of the judgment; and (2) the award of zero damages is insufficient as a matter of law. Plaintiffs further contend that if the judgment is not reversed, a new trial on damages is required because additur was either inapplicable or an abuse of discretion. Finally, plaintiffs contend that assuming the new trial order is valid, the additur is inadequate as a matter of law. They ask us to remand the matter for a retrial on damages. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of March 9, 2012, Enrique Castillo, a commercial truck driver, was driving a tractor trailer along a straight section of California State Route 86 after picking up a load in Fontana. He was using cruise control at the time. The sun had broken and visibility was clear when at about 6:25 a.m., Castillo impacted the rear of a pickup truck driven by then 63-year-old Gonzalez. At the time of the impact, Gonzalez's vehicle was entirely within the number two lane of the highway. Castillo had had about two hours of sleep before leaving Fontana.

Plaintiffs filed a personal injury and wrongful death lawsuit against defendants alleging a cause of action for negligence. The matter was tried to a jury in two phases: liability and damages. As to liability, the jury returned a special verdict finding both Castillo and Gonzalez negligent and that their negligence was a substantial factor in causing the harm. It assigned Castillo 42.5 and Gonzalez 57.5 percent responsibility. During the damages phase, the jury heard evidence as to the losses suffered due to Gonzalez's death through testimony by Ma, Benjamin, Arnulfo, Veronica, Juana and Evangelina. At the time of trial, Ma and the children lived where they grew up: La Poza Corregidora Queretaro, a small rural town in Mexico. There, Ma and Gonzalez maintained animals and crops to feed the family, and from a young age the children either

[1] Plaintiffs and appellants are Ma (individually and as successor in interest to Jose Gonzalez Hernandez), Aaron Gonzales Olvera, Arnulfo Gonzalez Olvera, Antonio Gonzalez Olvera, Jose Miguel Gonzalez Olvera, Miguel Angel Gonzalez Olvera, Evangelina Gonzalez Olvera, Carlos Gonzalez Olvera, Juana Gonzalez Olvera, Veronica Gonzalez Olvera and Benjamin Gonzalez Olvera. We refer to the plaintiffs by their first names for clarity, not out of disrespect.

helped plant the land with their father or followed along while he planted. In 1986 or 1987, when the children were very young, Gonzalez came to the United States to work, eventually getting a job climbing palm trees at a date farm in La Quinta, California. He would return to La Poza for periods of time, and also came to La Poza for weddings, holidays and other special occasions. During his time in the United States, Gonzalez stayed in touch with the family via letters.[2]

The court instructed the jury that plaintiffs were not seeking to recover economic damages for Gonzalez's financial support, loss of gifts or benefits, funeral expenses, or the reasonable value of his household services. The court instructed, and counsel made clear in their closing arguments, that plaintiffs sought only noneconomic damages: the loss of Gonzalez's love, companionship, comfort, care, assistance, protection, affection, moral support, training and guidance, or sexual relations as to Ma. The jury was additionally instructed that Gonzalez's life expectancy was 19.8 years. The court instructed the jury not to consider plaintiffs' grief, sorrow, or mental anguish; decedent's pain and suffering; or plaintiffs' poverty or wealth in making its award. It instructed the jury not to include any damages to punish the defendants.[3]

Following the damages phase, the jury awarded plaintiffs zero noneconomic damages.

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[2] Benjamin testified that his father would stay in the United States for six months to a year then return to La Poza. Ma testified her husband lived for months at a time in the United States and would return for three or four weeks at a time.

[3] There is no dispute as to the nature of wrongful death damages. In an action for wrongful death, "damages may be awarded that, under all the circumstances of the case, may be just." (Code Civ. Proc., § 377.61.) Damages may include the monetary equivalent of loss of comfort, society and protection. (*Corder v. Corder* (2007) 41 Cal.4th 644, 661; *Dirosario v. Havens* (1987) 196 Cal.App.3d 1224, 1239.) Factors relevant in assessing such a loss is "the closeness of the family unit at issue, the warmth of feeling between the family members, and the character of the deceased as ' "kind and attentive" ' or ' "kind and loving." ' " (*Corder*, at p. 662, quoting *Krouse v. Graham* (1977) 19 Cal.3d 59, 68; see also *Dirosario v. Havens*, at p. 1239.)

Plaintiffs moved for a new trial on damages, arguing the award of zero damages was inadequate as a matter of law and the evidence insufficient to support the jury's verdict. In opposition, defendants pointed out in part that five of the plaintiffs chose not to testify at trial, and that Ma had stated in discovery that during the last five years of his life, Gonzalez's residence was in La Quinta, California. They argued that given the absence of evidence of any recent ongoing relationship between Gonzalez and his family, it was within reason for the jury to find the family did not meet their burden of proof on damages and award nothing. Defendants characterized the plaintiffs' testimony about their relationship with Gonzalez as vague, uncertain and conflicting. They argued that if the court did not grant a new trial on all issues, it should issue an additur.

The trial court conditionally granted plaintiffs a new trial on the stated ground of inadequate damages. It determined that damages for plaintiffs' wrongful death claim was $285,000, then reduced that amount by the jury's liability apportionment to $121,125 and gave defendants time to accept or reject the added damages or have a new trial on damages. Defendants consented to the additur. The court thereafter entered an amended judgment on special verdict in plaintiffs' favor in the amount of $121,125.[4]

Plaintiffs filed this appeal.

DISCUSSION

I. *Legal Principles and Standard of Review*

"The authority of a trial court in this state to grant a new trial is established and circumscribed by statute." (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633; *Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1227.) Code of Civil Procedure[5] section 657 identifies seven grounds for a new trial motion, including, as relevant here, excessive or inadequate damages and insufficiency of the evidence. (*Ibid*.)

If the court grants a new trial motion, "additional requirements are imposed by statute. . . . [S]ection 657 provides that whenever the motion is granted 'the court shall specify the ground

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[4] Plaintiffs' September 14, 2015 notice of appeal identifies the original July 17, 2015 judgment, not the July 30, 2015 amended judgment on special verdict. Both judgments award plaintiffs the same damages. Defendants do not challenge the sufficiency of the notice of appeal, and we construe it to include both the original and the amended judgment. (Cal. Rules of Court, rule 8.100(a)(2); *ECC Const., Inc. v. Oak Park Calabasas Homeowners Ass'n.* (2004) 122 Cal.App.4th 994, 1003, fn. 5.)

[5] Statutory references are to the Code of Civil Procedure.

or grounds upon which it is granted and the court's reason or reasons for granting the new trial . . . .' The section goes on, however, to distinguish between grounds and reasons. While the order passing upon and determining the motion '*must* state the ground or grounds relied upon by the court,' the order '*may* contain the specification of reasons.' . . . If the order stating the grounds does not also specify the reasons for the new trial, then 'the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk.' Thus, under section 657, the grounds for the new trial must be stated in the order. The reasons may also be stated in the order, but the trial court has the option of filing a statement of the reasons at a later time." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 899.) Further, the court must prepare the statement of grounds or specification of reasons (§ 657; *Mercer v. Perez* (1968) 68 Cal.2d 104, 113), which " 'must be the product of the judge's mental processes and not that of the attorney for the moving party.' " (*Eltolad Music, Inc. v. April Music, Inc.* (1983) 139 Cal.App.3d 697, 707.)

"California courts have consistently required strict compliance with section 657 . . . . Substantial compliance with the statute is not sufficient." (*Oakland Raiders v. National Football League*, *supra*, 41 Cal.4th at p. 634; *Linhart v. Nelson* (1976) 18 Cal.3d 641, 644.) A new trial order in violation of statutory procedures will be void as in excess of jurisdiction. (*Neal v. Montgomery Elevator Co.* (1992) 7 Cal.App.4th 1194, 1198.)

We review the trial court's order granting a new trial on the ground of inadequate damages under the abuse of discretion standard. (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 411-412; *Jiminez v. Sears, Roebuck & Co*. (1971) 4 Cal.3d 379, 387; see *Mercer v. Perez*, *supra*, 68 Cal.2d at pp. 112-113.) On appeal, we reverse " 'only if there is no substantial basis in the record for any of such reasons.' " (*Lane*, at p. 412, italics omitted.) Thus, we must sustain the order unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on the trial court's theory. (*Ibid.*) "So long as a reasonable or even fairly debatable justification under the law is shown for the order" it will not be set aside. (*Jiminez*, at p. 387.) "Moreover, '[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached . . . .' [Citation.] In other words, 'the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order.' [Citation.] [¶] The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.' [Citation.] Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations." (*Lane*, at p. 412.)

The court in *Lane v. Hughes Aircraft Co.* further explained the reasons for such deference: "The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial, and there must be substantial evi-

dence in the record to support those reasons." (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal.3d at p. 412.)

Thus, our review is limited to the inquiry whether there was any support for the trial judge's ruling, and the order will be reversed only on an affirmative showing of a manifest and unmistakable abuse of discretion. (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 112; *Romero v. Riggs* (1994) 24 Cal.App.4th 117, 121-122.)

II. *Adequacy of Statement of Reasons*

Plaintiffs first contend the trial court's order cannot be sustained because it does not contain a sufficient specification of reasons. They characterize the order as essentially nothing more than a restatement of the grounds, comparing the court's order to those found deficient in *Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51 (*Stevens*) and *Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359 (*Scala*). The contention is without merit.

" '[N]o hard and fast rule can be laid down as to the content of . . . a specification [of reasons], and it will necessarily vary according to the facts and circumstances of each case.' " (*Stevens*, *supra*, 9 Cal.3d at p. 60, quoting *Mercer v. Perez*, *supra*, 68 Cal.2d at p. 115.) The court " 'is not necessarily required to cite page and line of the record, or discuss the testimony of particular witnesses,' nor need he undertake 'a discussion of the weight to be given, and the inferences to be drawn from each item of evidence supporting, or impeaching, the judgment.' " (*Scala*, *supra*, 3 Cal.3d at p. 370.) But the order "must briefly identify the portion of the record which convinces the judge 'that the court or jury clearly should have reached a different verdict or decision.' " (*Mercer v. Perez*, at p. 116, *Stevens*, at p. 60; *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 696-697; *Bigboy v. County of San Diego* (1984) 154 Cal.App.3d 397, 404; *Smith v. Moffat* (1977) 73 Cal.App.3d 86, 92.) The court should refer to the evidence, record or proof rather than merely the issues or the ultimate facts. (*Scala*, at p. 367.) Ultimately, the trial judge "must supply the reviewing court with information such as to enable it to review in a meaningful way the order granting the new trial." (*Aronowicz v. Nalley's, Inc.* (1972) 30 Cal.App.3d 27, 39; see *Scala*, at p. 370.)

The court's new trial order in this case set out both the grounds and reasons as follows: "The court specified the grounds for granting the motion as those contained in section 657(5), specifically inadequate damages. [¶] The court heard from six plaintiffs[:] the decedent's widow and five children during trial. Five other plaintiffs, who were children of the decedent, failed to come to court and testify. The court found that there was sufficient evidence of loss of care, comfort, and society as to all six witnesses who testified as well as evidence of loss of consortium as to the widow. There was sufficient evidence for the jury to have considered and the award of zero damages was clearly insufficient. [¶] The defendants' request for a complete new trial, including liability, is denied as it was clear from the 12-0 verdict the jury understood the liability issue." This order plainly points to the plaintiffs' testimony in the record as to their losses, without simply referring to ultimate issues or facts. It was sufficient in that it "briefly identif[ied] the portion of the record" the court relied upon (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 116); it "directs [our] attention to some aspect of the record," namely the plaintiffs' testimony about their relationship with Gonzalez, that "convince[d] the trial judge the jury clearly should

have reached a different decision." (*Bigboy v. County of San Diego*, *supra*, 154 Cal.App.3d at p. 405.)

The trial court's order here is unlike the order granting a new trial on the ground of excessive damages found deficient in *Stevens*, *supra*, 9 Cal.3d 51. In *Stevens*, the trial court's specification of reasons stated: " '[T]he Court finds that the verdict is excessive, that it is not sustained by the evidence, and that it is based upon prejudice and passion on the part of the jury.' " (*Stevens*, at p. 59, fn. 9.) *Stevens* held the statement was inadequate because "[i]t does not indicate the respects in which the evidence dictated a less sizable verdict, and fails even to hint at any portion of the record that would tend to support the judge's ruling." (*Id.* at p. 62; see also *Mercer v. Perez*, *supra*, 68 Cal.2d at pp. 108, 116 [court failed to state any reasons by order providing: "The court is of the definite opinion, after analyzing the evidence in this case, that there has been a definite miscarriage of justice. . . . [T]he jury trying this case should have rendered a verdict for the plaintiffs . . ."].) Here, to the contrary, the trial court's reference to plaintiffs' testimony is a direct reference to the portions of the record that support its ruling that a zero damage award was inadequate. (Accord, *Romero v. Riggs*, *supra*, 24 Cal.App.4th at pp. 123-124 [trial court's order stating, "The medical evidence was overwhelming that the early onset and the severity of the effect upon the plaintiff and his early deterioration of eyesight was a direct and proximate result of the negligent failure of the defendant doctor to diagnose and treat the plaintiff's condition" held sufficient statement of reasons because it "more than adequately 'directs the appellate court's attention' to the aspects of the record which support the order; here the 'overwhelming' medical evidence of six experts"].)

Nor does the court's order in this case—which identifies the six trial witnesses and briefly summarizes the nature of their testimony—merely state that plaintiffs had proved some ultimate fact. (Compare, *Van Zee v. Bayview Hardware Store* (1968) 268 Cal.App.2d 351, 358, 360 [specification of reasons stating: " '[T]he evidence is insufficient to support the verdict in that the evidence does not establish that the Zynolyte aerosol paint can was defective at any time prior to the delivery of said can to the possession of the Plaintiff' " held deficient because it merely stated the failure to prove the ultimate fact in the case]; *Miller v. Los Angeles County Flood Control Dist.*, *supra*, 8 Cal.3d at p. 698 [statement that "the District completely and adequately discharged any obligation it had in the maintenance of the basin and dam as demonstrated by the overwhelming preponderance of the evidence" deficient because it merely said that plaintiffs had failed to prove the ultimate fact they were required to establish].)

Plaintiffs point to this court's statement in *Bigboy* that "it is helpful if the court declares what witnesses it believed, what testimony was to be disregarded or the value of any impeachment." (*Bigboy v. County of San Diego*, *supra*, 154 Cal.App.3d at p. 404; see also *Montoya v. Barragan*, *supra*, 220 Cal.App.4th at p. 1227.) In reply, they complain that the court's order "makes no mention of [Gonzalez's] life expectancy, his earnings abilities, or the actual events which knit the family together." As for Gonzalez's earnings, plaintiffs sought noneconomic damages having nothing to do with those abilities, and as for the other matters they point to no authority requiring the court to undertake such a detailed factual or legal analysis. It was enough for the trial court to say that it believed identified witnesses, and this is precisely what it did when it credited the testimony of plaintiffs that they had suffered loss of care, companionship,

and comfort as a result of Gonzalez's death. No more is required. (*Romero v. Riggs*, *supra*, 24 Cal.App.4th at p. 124.)

III. *Application of* Jehl v. Southern Pacific Company

"Section 662.5 grants the trial court discretion to exercise its additur powers to determine, upon its review of the entire record, an addition which is fair and reasonable. The Law Revision Commission comment on this section states that: 'The exercise of additur authority . . . is limited to cases where "an order granting a new trial limited to the issue of damages would . . . be proper." This limitation prevents the use of additur where the inadequate damages are the result of a compromise on liability.' " (*Gerard v. Ross* (1988) 204 Cal.App.3d 968, 984.)

Plaintiffs contend additur was either inapplicable to this case or was an abuse of discretion. They maintain generally that when damages are highly discretionary and unliquidated, as in wrongful death cases or where the damages are for pain and suffering, a court's use of additur violates the constitutional right to a jury trial. Though plaintiffs acknowledge that the California Supreme Court appeared to hold otherwise in *Jehl v. Southern Pacific Company* (1967) 66 Cal. 2d 821, they characterize its statement as dicta and distinguish it, arguing its rationale does not apply when a jury is "misguided or otherwise off-track and awarded zero damages."

Jehl involved a personal injury action under the Federal Employers' Liability Act (FELA) and Safety Appliance Act by a plaintiff who had been rendered a paraplegic and whose leg was amputated after he fell while working at a railroad yard. (*Jehl v. Southern Pacific Company*, *supra*, 66 Cal.2d at pp. 824-827.) The jury returned a verdict awarding him $100,000, and the trial court granted his motion for a new trial on grounds of inadequate damages. (*Id*. at pp. 825, 826.) The defendant appealed, contending the trial court should have given it the option of consenting to an additur before granting a new damages trial. (*Id*. at p. 827.) The California Supreme Court agreed, overruling its prior decision holding additur would deny a plaintiff's right to a jury trial guaranteed by the article 1, section 7 of the California Constitution. (*Id*. at pp. 827-829, overruling *Dorsey v. Barba* (1952) 38 Cal.2d 350.) The court found its prior reasoning unpersuasive when considered in light of the demands of fair and efficient administration of justice. (*Jehl*, at p. 828.) The court further concluded that defendants should not be denied the advantages of additur when they were required to submit to remittitur. (*Ibid.*)

In reaching its conclusion, the *Jehl* court explained that article 1, section 7's jury trial guarantee " 'does not require adherence to the letter of common law practice, and new procedures better suited to the efficient administration of justice may be substituted *if there is no impairment of the substantial features of a jury trial*.' . . . [¶] . . . The guarantee of jury trial in the California Constitution operates at the time of trial to require submission of certain issues to the jury. Once a verdict has been returned, however, the effect of the constitutional provision is to prohibit *improper interference* with the jury's decision." (*Jehl v. Southern Pacific Company*, *supra*, 66 Cal.2d at pp. 828-829, italics added; see *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 375-376.) The court held additur was such a procedure. (*Jehl*, at p. 829.) It conceded that additur's practical effect would give the plaintiff an award based on a finding made ultimately by a trial court, but emphasized that courts often determine fact issues, and acceptance of that practice over the years refuted any argument that the jury was the only competent fact finder. (*Id*. at p. 830.) In particular, the court pointed out that "instances of judicial or quasi-judicial fact-finding were found in equity, admiralty, probate, divorce, bankruptcy, and

administrative proceedings." (*Ibid*.) Thus, even though the additur reflected a factual finding by the trial court, the court held an additur did not impair the right to a jury trial. (*Id*. at pp. 823-833; see also *Chan v. Curran* (2015) 237 Cal.App.4th 601, 630, fn. 14.)

The court in *Jehl* further observed that the acceptance of additur extended to unliquidated damages: "The issue of additur was not presented until modern times, but it is a logical step in the growth of the law relating to unliquidated damages as remittitur was at an earlier date. . . . [Additur] should not be treated differently from other modern devices aimed at making the relationship between judge and jury as to damages as well as to other matters, one that preserves the essentials of the right to jury trial without shackling modern procedure to outmoded precedents. Additur does not detract from the substance of the common law trial by jury. Like its fraternal twin remittitur . . . it promotes economy and efficiency in judicial proceedings." (*Jehl v. Southern Pacific Company*, *supra*, 66 Cal.2d at p. 831, fns. omitted.) The court then outlined the procedures for additur, stating in part that where conditions for additur exist, the court's power "ex-

tends to all . . . cases [in which it would be proper to grant a motion for new trial limited to damages]." (*Id*. at p. 832.)[6]

Jehl turned to whether the trial court could use the procedure in the present case arising under FELA, in which substantive rights were controlled by the federal law and procedural matters under the law of the forum. (*Jehl v. Southern Pacific Company*, *supra*, 66 Cal.2d at p. 833.) It observed that the degree to which the judge-jury relationship was governed by federal law turned not on the Seventh Amendment, which forbid federal courts from increasing the amount of damages awarded by the jury (*Dimick v. Schiedt* (1935) 293 U.S. 474, 482, 487), but on the Supreme Court's interpretation of FELA, and the high court in so doing had insisted plaintiffs

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6 More fully, it said: "Upon a motion for new trial grounded on insufficiency of the evidence because the damages are inadequate, the court should first determine whether the damages are clearly inadequate and, if so, whether the case would be a proper one for granting a motion for new trial limited to damages. [Citation.] If both conditions exist, the court in its discretion may issue an order granting the motion for new trial unless the defendant consents to an additur as determined by the court. The court's power extends to all such cases. It is not limited to those cases in which an appellate court would sustain either the granting or denial of a motion for new trial on the ground of insufficiency of the evidence. . . . [¶] If the court decides to order an additur, it should set the amount that it determines from the evidence to be fair and reasonable. In this respect it should exercise its completely independent judgment. It need not fix either the minimum or maximum amount that it would have sustained on a motion for new trial or the minimum or maximum amount that would be supported by substantial evidence and therefore sustainable on appeal. If the defendant deems the additur excessive, he may reject it and seek to sustain the jury's award on an appeal from the order granting a new trial. If the plaintiff deems the additur insufficient, he may raise the issue on an appeal from the judgment as modified by the additur." (*Jehl v. Southern Pac. Company*, *supra*, 66 Cal.2d at pp. 832-833.)

have a broad primary right to go to the jury on factual issues. (*Jehl*, 66 Cal.2d at p. 834.) *Jehl* concluded: "Additur does not deprive a plaintiff of the right to go to the jury on any issue or impair the substance of the right to trial by jury. It operates only in the event a plaintiff is dissatisfied with the jury's verdict. It will have no effect on the activities of railroads and their employees and no substantial effect on the outcome of litigation between them. At the same time, it will help implement this state's strong interest in the fair and efficient administration of a voluminous amount of litigation. [Citation.] Moreover, since the Seventh Amendment is not applicable we are not bound by *Dimick* or the amendment's reexamination clause, which carries the federal Constitution beyond the substance of the common law right to trial by jury. [Citation.] The California Constitution contains no such clause, and neither it nor the federal act forbid additur just as they do not forbid remittitur." (*Jehl*, at p. 835.)

We reject plaintiffs' characterization of *Jehl*'s above-summarized conclusions as dicta; the court squarely resolved the question of whether a trial court may order an additur in a claim involving unliquidated damages and engage in factfinding to do so. (*Jehl v. Southern Pacific Company*, *supra*, 66 Cal.2d at pp. 827-829, 831.) Its holding was an essential part of the decision in the case, thus we are bound to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450; compare *Alberton v. Superior Court of City and County of San Francisco* (1968) 265 Cal.App.2d 812, 817 [stating *Jehl*'s discussion of the time limit within which a defendant must accept additur was obiter dictum].) Plaintiffs otherwise attempt to distinguish *Jehl* by pointing out the jury in that case "fulfilled its function" by awarding $100,000, but here, the jury's zero damage award was the result of the jury's complete misunderstanding of or refusal to follow the instructions, depriving them "of any fair and impartial jury determination of their damages." In reply, they argue that wrongful death damages are the subject of intense factual disputes, and "[n]o judge, without the consent of the parties, should be allowed to make such a determination reserved for the collective wisdom of a jury."

These arguments provide no basis to reject *Jehl*'s application or deem the court's grant of additur unfair and as somehow impairing the plaintiffs' right to the jury's damages decision. Indeed, the process was fair and in accord with *Jehl*: the jury heard the evidence, passed on the issue of wrongful death noneconomic damages, and elected to award nothing; the trial court recognized the inadequacy of the result and independently assessed the evidence to reach what it felt was a fair and reasonable amount. (*Jehl v. Southern Pacific Company*, *supra*, 66 Cal.2d at pp. 832-833.) Though plaintiffs did not consent to the additur, they are entitled to challenge the award on appeal as they have done. (*Id*. at p. 833.) The process does not unjustifiably usurp the function of juries, and as in *Jehl*, there is no contention that the jury's verdict was the result of passion or prejudice, or that it was tainted by prejudicial error occurring at trial. (*Id*. at p. 832, fn. 14.)

IV. *Court's Knowledge of Settlement Discussions*

Plaintiffs contend use of additur was an abuse of discretion because the trial court was aware of some of the parties' settlement discussions, and should have disqualified itself due to its personal knowledge of those discussions. They argue they had no meaningful opportunity to challenge the court's decision to proceed with additur, and their silence should not be construed as a waiver.

To support these contentions, plaintiffs rely only on cases from the State of Connecticut. Even if on point, these authorities are not binding on us. (*Century National Ins. Co. v. Garcia* (2011) 51 Cal.4th 564, 571; *Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 447, fn. 2.) We decline to consider them. Plaintiffs' contentions are absent any reasoned discussion of California statutory or legal grounds for disqualification of a trial judge in general, much less as related to its power to issue an additur. Such bare assertions fail to affirmatively demonstrate bias or other error (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116 [appellant must affirmatively demonstrate error through reasoned argument and discussion of legal authority]; Cal. Rules of Court, rule 8.204(a)(1)(C)), and they forfeit the appellate contention in any event. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

V. *Claim of Arbitrary Award*

Asserting that wrongful death damages for loss of care, comfort and society defy easy measurement, plaintiffs contend the court's additur was "wholly arbitrary and capricious" and without any factual basis. They point out the trial court's order offered no explanation as to how it calculated the $285,000 award, and citing a law review article, maintain that "[i]f not derived in consideration of the defense statutory offer, it is a wholly arbitrary number." Plaintiffs point to that law review article for the proposition that when a court reduces an award on the basis of a "conclusory statement" that gives the parties and reviewing court "no clue how the court reached its decision," it makes the trial judge "a jury of one, rendering a general verdict, with no responsibility to explain the basis for this verdict." They assert based on another law review article that appellate review is no cure, proposing that such review merely substitutes the subjective opinion of some judge for the equally subjective opinion of another judge. Plaintiffs conclude their argument by reiterating that "[n]o judge, without the consent of the parties, should be allowed to usurp the fact-finding function of the jury and place a number on unliquidated wrongful death damages."

We have already concluded, contrary to plaintiffs' arguments, that the trial court's order was not conclusory but included a sufficient statement of reasons for its additur, plainly relying on the testimony of Ma and her five children as to their relationship with the decedent. Plaintiffs' contentions otherwise as to the arbitrary nature of the award is at bottom an iteration of their argument that additur should not be authorized when damages are unliquidated. Indeed, this was the very argument made by the court in *Dorsey v. Barba*: that a court may not increase an inadequate award in a case involving conflicting, unliquidated or speculative and uncertain damages. (*Dorsey v. Barba*, *supra*, 38 Cal.2d at p. 358.) As *Dorsey v. Barba* was rejected by *Jehl v. South-*

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Plaintiffs rely on Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation With Suggested Alternatives* (1988) 38 Case W. Res. L.Rev. 157, 218 and Barbara Lerner, *Remittitur Review: Constitutionality and Efficiency in Liquidated and Unliquidated Damage Cases* (1976) 43 U.Chicago L.Rev. 376, 391.

ern Pacific Company, *supra*, 66 Cal.2d at page 833, we reject plaintiffs' claim that the trial court reached an arbitrary and capricious result.

VI. *Adequacy of Additur*

Plaintiffs urge us to reverse the trial court's $285,000 wrongful death award as inadequate as a matter of law. They point to the length of Ma and Gonzalez's marriage and the fact Gonzalez fathered 10 children, the closeness of the family, and Gonzalez's efforts to work seasonally in the United States to support them, which they say showed unselfish devotion, love, and compassion. They assert they were clearly devastated and suffered enormous compensable losses, and the court's additur award was "shockingly low by contemporary standards." Plaintiffs point to a report that the average award for a victim of the 9/11 attack with zero income was $788,022, and another study of wrongful death nursing home awards showing a median $440,000 award.

A. *Plaintiffs' Testimony*

At trial, Ma testified that she and Gonzalez met when she was 15 years old and were married when she was 16. They lived in Mexico City for four years, then returned to La Poza, where he built their house. Ma explained that her husband worked, so she mostly took care of the children. When Gonzalez returned from planting, he would play with one of the children and then bring her wood so she could cook. She helped him work the land and feed their animals. He would wake up in the morning and head straight out to their plot to prepare the land. Ma testified that their family was her and her husband's whole life, and he loved their children "very well." They visited other cities in Mexico to see sites and eat, and prepared meals together on Sundays.

Ma testified that when the children were very young Gonzalez left to work in the United States due to the economy. The children missed him. She remembered her husband taking her out to eat carnitas as a special moment. They maintained a physical relationship in the months before he passed away. During the first 10 years he was in the United States, he communicated once or twice a month by mailing letters written by someone for him, as he could not read or write. She and the children all looked forward to her husband's letters. Ma testified she loved her husband and he was the only man in her life that loved her. When asked what she missed about him, she said "his way of being there . . . everything," and she missed his affection at night. She felt protection and moral support from him, and tenderness when he brought her ice cream or a lollipop. Ma testified she missed him every day and felt loneliness at times. She identified her husband in pictures from some of their children's weddings.

Benjamin testified he also worked in the United States, returning to Mexico three or four times a year. He lived in the same area of La Quinta, California as his father, but only sometimes worked with him at the date farm. When his father returned to La Poza, he would go to the family home where Ma lived. Benjamin's brothers Jose Miguel and Miguel Angel also grew up in La Poza and at the time of trial worked in the United States, but not with their father. According to Benjamin, Gonzalez lived with Miguel Angel.

Though his father never came to his elementary school, Benjamin recalled playing soccer with him as a teen and the family attending church together. He testified his father attended weddings and walked his sisters down the aisle, and they spent holidays with him. He testified

he loved his father and found it very difficult to go through his death; Benjamin described how he felt a loss of love and companionship: "All of my brothers and myself, we have always got along so well with him. We never had any issues with him." Benjamin felt he could talk to his father about personal things, as did his other brothers. Benjamin identified his father in family wedding photographs. He had two children and it gave him joy to see his father interact with them and the other grandchildren. Gonzalez was happy that his children and grandchildren would visit him at Ma's house. Benjamin stated his feelings of loss were difficult to describe, but that he missed his father "terribly, because we would always talk about his plans . . . . He was, in fact, thinking to just work and retire and go to Mexico to buy land to raise livestock to devote himself to planting his plot. [¶] And he would always tell us about his plans. And he would tell us if any of us, if any of you want to buy animals, I will look after them. I will make pens to keep them safe. And those were his plans. Unfortunately, it could not be done." Benjamin described how difficult it was for him to visit his father's gravesite, and he did not believe he or his brothers would get over it.

Arnulfo testified he came with his father to work in the United States in 1986, and they worked together for about three years. His favorite memories from childhood growing up were going with his father when he was not in school and playing while his father worked the land. He played soccer with his father and enjoyed playing against him. When he was 15, he would hunt with his father and joked around with him. As an adult, Arnulfo continued to joke with his father and give him a hard time. Arnulfo testified he and his siblings meant a lot to his father. Arnulfo considered his father his "idol" as he taught him how to work, which was "sacred" and he felt "blessed to have a job and to be self-sufficient." Arnulfo was sad when his father left for the United States, but experienced "immense joy" when he returned to La Poza, and Arnulfo felt safer and protected with his father around. Arnulfo testified he saw his father two or three times a week to talk about work. He identified wedding pictures showing his father in attendance, and he recalled the family gathered for Christmas and shared nuts and candies or oranges. Arnulfo missed his father "terribly" and found it sad and difficult to go back to La Poza. He missed his father's companionship and conversation, and the happiness it gave him to see his father work the land. It brought him happiness to see his father interact with his own children. Arnulfo testified he found it difficult to accept his father's death.

Veronica recalled having a very happy childhood with her father and brothers, and they would be very happy when he returned from the United States. They planted maize and beans on the land, and she recalled her father being merry and singing songs. She sang with him, but could not remember the songs because she was so young. As a teenager, she remembered her father returning from the United States, which made her extremely happy and Ma "very very happy." Her father taught her how to plant, and they would go for rides to other cities in Mexico. Veronica's children enjoyed seeing their grandfather, which brought Veronica happiness. Her father attended her wedding and the family got together for birthdays and holidays. She testified she missed him, and felt that the holidays were what she remembered the most about him. Veronica thought about him daily but tried to carry on. She described her lost companionship as so painful that it was difficult to express. Her father comforted her and gave her advice. He gave affection to her and her brothers, and she felt protected. She felt "very strong pain" from the loss of his love.

Juana testified about her early childhood memories of her father, when he brought her clothing or went on trips, and when he put her to bed after she fell asleep. Juana was seven years old in 1987 when Gonzalez left for the United States to work. As she got older, she remembered going to soccer matches with her father, working and planting on their land, feeding their animals and sometimes riding horses with him for about an hour. Juana testified when she was a small child her father made her feel safe and protected, and as she got older, he hugged her and she was happy. She missed talking to him and receiving his advice, and she felt his loss when she visited her mother. On Father's Day they would prepare a meal and spend time talking and singing. Juana last spent Father's Day with her father a year before he passed away. They also spent Christmas and New Year's Eve together, and she remembered him being happy and joyful.

Evangelina testified about her childhood memories of her father, as when he bought her a dress. He would bring her and her sisters presents when he came back from the United States, and as the youngest, she would get to pick first. Evangelina identified a photograph of her father at her wedding. She mostly missed seeing him at her mother's house working and sitting in his chair.

B. *Analysis*

The measure of damages suffered, particularly for intangible interests of loss of comfort, society and protection, is a factual question particularly for the trier of fact that we will not disturb on appeal if supported by substantial evidence. (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal. 4th at p. 423; *Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 64; *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 691; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 615.) " 'We have a very narrow appellate review of the [trier of fact's] determination of the amount of compensation for [the plaintiffs'] loss of comfort and society.' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 199.) " 'An appellate court may interfere with [the determination of damages] only where the sum awarded is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption [citations] or where the award is so out of proportion to the evidence that it shocks the conscience of the appellate court.' " (*Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361; see also *Bertero*, at p. 64; *Soto v. BorgWarner Morse TEC Inc.*, at p. 199.) "The evidence is insufficient to support a damage award only when no reasonable interpretation of the record supports the figure." (*Toscano*, at p. 691.) Applying these standards, we do not discern error.

As a threshold matter, it is significant that five of the 10 plaintiff children did not appear at trial to testify about their loss, including Miguel Angel, the only son who lived with Gonzales in the United States at the time of his death. The court was well within reason to take this into account in determining the closeness of the relationship, and depth of love and affection between Aaron, Carlos, Antonio, Jose Miguel and Miguel Angel and their father. Though some of the testifying plaintiffs generally described the other children's relationship with their father as affectionate and characterized their father as providing guidance or advice to all of them, it was within reason for the trial court to conclude that at least as to the absent children, plaintiffs established only nominal, if any, damages amounting to the pecuniary value of the loss of their father's comfort, society and protection. (*Corder v. Corder*, *supra*, 41 Cal.4th at p. 661; *Dirosario v. Havens*, *supra*, 196 Cal.App.3d at p. 1239.)

It is likewise significant that the evidence showed Gonzalez had moved to the United States in about 1986 or 1987 to work for months at a time, and kept his residence in La Quinta, California during the five years before his death. Indeed, the evidence is undisputed that for many years while the children were young he communicated only by letter, and returned to Mexico only for several weeks at a time, or for holidays and special occasions such as weddings and baptisms. We do not minimize the importance of such visits or the evidence of the happiness and joy Ma and the children felt when he returned to La Poza, but such extended absences temper the evidence of the closeness of the family relationship or significance of their loss of society.

The record shows Ma and Gonzalez married at a young age, loved each other and maintained a physical relationship over the course of their lengthy marriage. It is clear that Gonzalez was a thoughtful husband, taking Ma to eat, getting her treats when he returned home, and giving her moral support. She testified he loved their children and they looked forward to his letters when he was in the United States. But Ma also testified she mostly took care of their children while he worked. And she and her husband lived apart for long periods of time.

As for Benjamin, Arnulfo, Veronica, Juana and Evangelina, much of their testimony focused on their childhood relationship and early contacts with their father. There is little evidence that the children maintained significant common interests or activities with him in their adulthood. The record shows they missed him and felt sadness or difficulty accepting his death. But the law is settled that they could not recover for the grief or sorrow attendant on their father's death. (*Corder v. Corder*, *supra*, 41 Cal.4th at pp. 661-662.)

Having considered all of this evidence on the issue of Ma's and the other plaintiffs' loss of companionship and society, the trial court elected to increase the wrongful death damage award to plaintiffs from zero to $285,000. It is a significant amount in a case where the plaintiffs' compensatory losses are tempered by the circumstances that we have described above, and cannot be described as "enormous." On this record, we cannot say the award is either grossly disproportionate to or unsupported by the evidence.

We are unpersuaded by plaintiffs' comparison to other wrongful death damage awards. "The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. . . . 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." (*Bertero v. National General Corp.*, *supra*, 13 Cal.3d at p. 65; see also *Rufo v. Simpson*, *supra*, 86 Cal.App.4th at p. 616.)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.