Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
2007 WL 1683617
Only the Westlaw citation is currently available.

Court of Appeal, Fourth District, Division 2, California.

Cruz MEDINA et al., Plaintiffs and Appellants,
v.
CITY OF FONTANA, Defendant, Cross-complainant, and Appellant,
Yader Hernaldo Castro et al., Cross-defendants and Respondents.

No. E037446. | (Super.Ct.No. SCVSS094904). | June 12, 2007.

APPEAL from the Superior Court of San Bernardino County. Tara Reilly, Judge. Affirmed in part and reversed in part.

Attorneys and Law Firms

Pine & Pine, Norman Pine, Beverly Tillett Pine; The **Homampour** Law Firm, Arash **Homampour** and Reza Mirroknian for Plaintiffs and Appellants.

Horvitz & Levy, Peter Abrahams, Julie L. Woods; Lynberg & Watkins and Dana Alden Fox for Defendant, Cross-complainant, and Appellant.

No appearance for Cross-defendants and Respondents.

Opinion

OPINION

RICHLI, J.

***1** Yader Castro Rivas (Castro), an unlicensed 15-year-old driver, was on Cypress Avenue in Fontana when he decided to pass the car ahead of him. Even though Cypress was a key route to and from A.B. Miller High School, the particular portion he was on had no sidewalks. As he swerved to the left, he realized that he was about to hit a student walking on the pavement. He therefore accelerated to about 60 miles an hour and swerved to the right. He went into a skid, shut his eyes, locked his brakes, and hit two other students walking on the right side of the street. One of them-Karen Medina-was killed.

Karen Medina's parents, Cruz Medina and Agueda Miranda (plaintiffs), filed this wrongful death action against the City of Fontana (the City). They dismissed other named defendants-including Castro and his parents, Walter Grande and Claudia Rivas-before trial. The City, however, cross-complained against Castro and his parents.

A jury, by special verdict, found the City liable on a theory of a dangerous condition of public property. (Gov.Code, § 835.) It further found both Castro and his parents liable on a theory of negligence. It fixed the amount of plaintiffs' damages at $37.5 million. It apportioned 75 percent of the liability for these damages to the City, 25 percent to Castro's parents, and zero percent to Castro.

The trial court denied the City's motion for new trial with respect to liability but granted it with respect to the amount and the apportionment of damages.

Plaintiffs appeal, contending:

1. The trial court erred by granting the City's motion for new trial with respect to the apportionment of damages.

2. The trial court erred by granting the City's motion for new trial with respect to the amount of damages.

The City cross-appeals, contending:

1. The City, as a matter of law, cannot be held liable for the failure to make capital improvements such as sidewalks.

2. Plaintiffs failed to prove that the lack of sidewalks created a substantial risk of injury when the street was used with due care.

3. The trial court erred by allowing plaintiffs' expert to testify that a dangerous condition existed.

4. The jury's apportionment of damages is unsupported by the evidence.

5. The jury's award of damages is excessive as a matter of law.

We find no error with respect to the finding that the City is liable. We also find no error with respect to the order granting

a new trial on the apportionment of damages. We do agree with plaintiffs that the trial court erred in granting a new trial on the amount of damages, because it failed to file a timely statement of reasons. Nevertheless, we agree with the City that the amount of damages is excessive as a matter of law.

I

FACTUAL BACKGROUND

A. *The Accident.*

As of December 2001, Castro was 15 years old and a student at A.B. Miller High School. He lived with his mother, Claudia Rivas, and his (step)father, Walter Grande.

In September 2001, with his parents' permission, Castro had begun driving their car to and from school. His father went to work too early to drive him, and his mother did not know how to drive. He did not have a driver's license or permit. He had learned to drive in his native Nicaragua, where he had driven perhaps 20 times. He had taken the classroom portion of a driver's education class but not the behind-the-wheel portion.

***2** After a couple of months, Castro was called into the school office. His car keys were taken away from him, and he was told that he was not authorized to drive in California. He had to call an adult cousin to come and get the car. Although he told his parents about this incident, they continued to let him drive their car to school; he simply parked at the home of a friend who lived a couple of blocks away from school.

On December 3, 2001, when Castro got out of school, he was in a hurry to get home. His route took him south on Cypress Avenue. Cypress was a two-lane street in a residential neighborhood. The speed limit was 35 miles per hour. Castro had driven on Cypress before; he knew that there were no sidewalks and that students sometimes walked in the street.

At the intersection of Cypress and Baseline Road, Castro found himself behind a green Ford Taurus. They both continued south on Cypress, going 25 to 35 miles an hour. When the Taurus seemed to be stopping, however, Castro decided to pass it. He swung left and accelerated. The Taurus was “playing around” and did not seem to want to let him pass, which made him mad.

At that point, there were three students walking down the left (east) side of Cypress; at least one of them was walking in the street. Castro claimed that he looked to make sure there were no cars coming but did not see the students; he did not realize they were there until he had already pulled up alongside the Taurus. To avoid hitting them, he “floored it” and swerved back to the right. He was going about 60 miles an hour.

Castro went into a skid. He hit the brakes as hard as he could, with both feet. Because he “felt that something bad was going to happen,” he closed his eyes and put his head down. His car hit a tree on the right (west) side of Cypress. Then, as it spun away from the tree, it hit two students who had been walking down the right side of the street, Karen Medina and Victor Isanoa. Isanoa survived; Medina was killed.

Isanoa and a second eyewitness testified that Medina was in the dirt shoulder, not in the street.

Castro pleaded guilty to vehicular manslaughter. He served four months in juvenile hall and almost eight months in boot camp, then completed probation.

B. *The Evidence Regarding a Dangerous Condition.*

In 1979, the City annexed an unincorporated area including the subject portion of Cypress. Portions of Cypress immediately north and south of Baseline Road did not have sidewalks. Instead, there were unpaved dirt and gravel shoulders.

In 1991, A.B. Miller High School opened. Cypress was one of the main north-south routes for both pedestrians and vehicles going to and from the high school. In 2000, on an average weekday, 3,400 cars traveled on Cypress. Due to the lack of sidewalks, students often walked in the paved roadway.

There are approximately 1,000 miles of streets in Fontana; 20 to 30 percent do not have sidewalks. It was the City's practice not to install sidewalks itself; under the municipal code, it was a condition of any new development that the developer install sidewalks.

***3** The City owned and controlled the dirt shoulders of Cypress. Installing sidewalks on both sides of Cypress would have cost not more than $20,000. The City had enough money to install sidewalks on Cypress, although as a result it probably would have had to “cut something else.” Alternatively, it could have raised the money through a bond issue or an assessment district.

In 1996 or 1997, Emory James, a well-known local pastor and the father of an A.B. Miller High School student, spoke at a city council meeting. He was concerned that students walking on Cypress might get hurt due to the absence of sidewalks. At the time, the council was considering making capital improvements to streets in northern Fontana. James argued that it would be cost effective to install sidewalks in the high school area at the same time. Later, James also spoke to the city traffic engineer about the need for sidewalks.

In 1997, Toi Bolton, a local community activist, appeared at a city council meeting and complained that the lack of sidewalks in the area around the high school was "hazardous" for the students.

In 1999, Mayor Pro Tem Manuel Mancha commented at a city council meeting: "I drive by A.B. Miller all the time. I think it's a very dangerous situation, the kids walking on the street." He asked city staff to look into installing a temporary asphalt sidewalk on one side of the street. He testified, however, that city staff would have known that he was referring to Walnut Avenue, not Cypress.

In 2000, the City applied for a grant under the state's "Safe Routes to School Program" that would have included the installation of sidewalks on the east side of Cypress, on the south of Baseline, and also on Oleander Avenue. In its application, the City stated: "Students attending A.B. Miller High School ... must deal with ... potentially hazardous conditions due to the lack of all-weather sidewalks outside the travel lane of the adjacent arterials on two of the primary pedestrian routes to school." It also stated: "The state of disrepair of the shoulder areas[ ] and vehicle parking blocking pedestrian traffic cause potential safety problems for students, as they are forced to share the travel lanes on the adjacent roadway with motorist[s]." Part of the grant was funded but not the part for sidewalks on Cypress.

According to Harry Krueper, plaintiffs' traffic engineering and accident reconstruction expert, if there had been sidewalks on Cypress, the accident would never have happened. He explained that the students on the east side of the street would have been safely out of Castro's way; he would not have had to swerve to avoid them.

Krueper testified that the City should have installed sidewalks on Cypress when the high school opened, because at that point Cypress began carrying "a high concentration" of both vehicles and pedestrians. Sidewalks enhance safety by providing for separation between the pathway for vehicles and the pathway for pedestrians and thus reducing the potential for conflict. Other than on "side streets, ... local streets that do not connect to other streets," sidewalks are a "standard item." The absence of sidewalks on Cypress created a dangerous condition.

***4** Peter Francis, plaintiffs' human factors expert, agreed that sidewalks separate pedestrians from traffic and thereby "reduce the likelihood of contact." He also agreed that the absence of sidewalks on Cypress was a substantial factor in causing the accident.

In the preceding five years, there had been only one accident on the subject portion of Cypress, and it was not similar to the one in this case.

II

GOVERNMENTAL TORT LIABILITY FOR A DANGEROUS CONDITION OF PUBLIC PROPERTY

The City contends that, on the facts of this case, it cannot be held liable on a theory of a dangerous condition of public property. (Gov.Code, § 835.)

A. *General Legal Principles.*

Government Code section 835 provides: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either:

"(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

"(b) The public entity had actual or constructive notice of the dangerous condition ... a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

In this context, " '[d]angerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov.Code, § 830, subd. (a); see also Gov.Code, § 830.2.)

"The existence of a dangerous condition is ordinarily a question of fact [,] but it can be decided as a matter of law if reasonable minds can come to only one conclusion. [Citation.]" (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148.)

B. ***Liability for Failure to Make a Capital Improvement.***

First, the City contends that it has no duty to make capital improvements such as sidewalks. As an abstract proposition, this may well be true. For example, we may assume, without deciding, that a municipality could not be held liable for failure to make a capital improvement on a theory of breach of a mandatory duty. (See Gov.Code, § 815.6.) That is a different question, however, than whether a municipality's failure to make a capital improvement has resulted in a dangerous condition of public property, for which it *can* be held liable.

Antenor v. City of Los Angeles (1985) 174 Cal.App.3d 477 illustrates this distinction nicely. There, the court observed: " '[I]t is generally held that a municipality is under no duty to light its streets even though it is given the power to do so, and hence, that its failure to light them is not actionable negligence, and will not render it liable in damages to a traveler who is injured solely by reason thereof. [Fn. omitted.] *A duty to light, and the consequent liability for failure to do so, may, however, arise from some peculiar condition rendering lighting necessary in order to make the streets safe for travel.* [Fn. omitted.]' " (*Id.* at p. 483, italics added, quoting 39 Am.Jur.2d, Highways, Streets & Bridges, § 405, at pp. 803-804.)

***5** In *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, the California Supreme Court held that the state could be held liable for failure to install a barrier in a freeway median, on the theory that the lack of a barrier created a dangerous condition. (*Id.* at pp. 716-718; accord, *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 68.) There, the state argued "that as a matter of financial reality it cannot afford to construct median barriers on all freeways on which such barriers are needed...." (*Ducey*, at p. 720.) The high court responded, however, that under Government Code section 835.4, [1] the state had the opportunity to show, as an affirmative defense, that its failure to install a barrier was reasonable. "[T]he jury was instructed as to the provisions of section 835.4 ..., and the jury's ultimate verdict demonstrates that it concluded that the state had not established that its failure to provide a median barrier in the vicinity of the accident was reasonable in light of the practicability and cost of such a safeguard. The state has not identified anything in the record which would justify disturbing the jury's determination on this point." (*Ducey*, at p. 720.)

1 Government Code section 835.4, subdivision (b), as relevant here, provides: "A public entity is not liable ... for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury."

Possibly to avoid any apparent conflict with *Ducey*, the City has couched its contention in terms of whether a *municipality* has a duty to make capital improvements. Government Code section 835, however, does not distinguish between the state, a city, or any other governmental entity. If the state can be held liable for failure to make a capital improvement, we see no reason why a city cannot. (See also *Constantinescu v. Conejo Valley Unified School Dist.* (1993) 16 Cal.App.4th 1466, 1475 [school district's failure to install barrier between parking lot and waiting area created dangerous condition].)

The last nail in the coffin of the City's contention is *Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789. There, a vehicle allegedly went through a parking lot to get onto a beach; it then ran over the plaintiffs, who were lying on the beach. (*Id.* at pp. 795-796.) A city, along with other entities, owned and operated both the parking lot and the beach. (*Id.* at p. 795.) The appellate court held that the city could be held liable on the theory that it failed to install a barrier between the parking lot and the beach. (*Id.* at pp. 806-808.) Clearly, under *Swaner*, a municipality can be held liable for a failure to make a capital improvement, if the absence of that capital improvement results in a dangerous condition.

On the other hand, none of the cases that the City has cited actually held that a municipality has no duty to make capital improvements. For example, in *Plattner v. City of Riverside* (1999) 69 Cal.App.4th 1441, an elderly woman was hit by a car while crossing the street at a crosswalk; apparently there was a streetlight nearby, but it was not working. (*Id.* at pp. 1443-1444.) Both at trial and on appeal, the plaintiff *conceded* that the city had no duty to install streetlights. (*Id.* at pp. 1444-1445.) Nevertheless, this court *acknowledged* that, under *Antenor*, a municipality may have a "duty to light" when, due to some peculiar condition, lighting is necessary to make the street safe. (*Plattner*, at p. 1444.) We then held that: "[T]he crosswalk was not dangerous in the abstract and therefore did not constitute a peculiar condition rendering lighting necessary. [Citation.] Plaintiff does not claim and consequently has not shown there was anything dangerous about the crosswalk other than the absence of light. But darkness is a naturally occurring condition that the city is under no duty to eliminate. Thus, the fortuity of locating the streetlight at a spot where it illuminates the crosswalk does not render the crosswalk dangerous without the light." (*Id.* at p. 1445.)

***6** The other cases on which the City relies predate *Ducey*. Thus, to the extent that they are inconsistent with *Ducey*, they are no longer good law. Indeed, they predate the enactment of the Tort Claims Act in 1963; they were therefore decided under the Public Liability Act of 1923 instead. (Stats.1923, ch. 328, § 2, p. 675, later codified as former Gov.Code, § 53051.) Their precedential value is limited, at best.

The City relies in particular on *Stang v. City of Mill Valley* (1952) 38 Cal.2d 486. There, the court noted that "in the absence of statute, neither a municipality nor its officers are liable in tort for failure to discharge a duty arising from a governmental function. [Citations.]" (*Id.* at p. 488.) It then held that the Public Liability Act of 1923 was not intended to impose liability on a city for failure to maintain the fire hydrant next to the plaintiffs' house, contrary to the governmental function doctrine. (*Stang*, at pp. 489-491.) It recognized, however, that liability could be imposed "where the injured person is *using* some type of city property that is dangerous or defective, and which he had a legal right to use, such as public streets [citation]...." (*Id.* at p. 489.) In any event, the governmental function doctrine was overruled in *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, which in turn was superseded by the enactment of the Tort Claims Act.

The City has also cited a number of out-of-state cases. Once again, however, to the extent that these are inconsistent with *Ducey*, we must follow *Ducey*.

The City seems to be asking us to apply some kind of discretionary immunity. The discretionary immunity statute, however, Government Code section 820.2, applies only to a governmental entity's derivative liability for the acts and omissions of its employees. (See Gov.Code, § 815.2.) As the comments to Government Code section 835 expressly state: "The section is not subject to the discretionary immunity that public entities derive from Section 815.2, for this chapter itself declares the limits of a public entity's discretion in dealing with dangerous conditions of its property." (Legis. Com. com., 32 West's Ann.Code Civ. Proc. (1995 ed.) foll. § 835, p. 350.)

Moreover, as the court reasoned in *Ducey*, under Government Code section 835.4, it is an affirmative defense that the public entity's action or inaction was reasonable in light of "the probability and gravity of potential injury" as well as "the practicability and cost of protecting against the risk of such injury." The jury here rejected this defense; the City does not argue that this determination was affected by error in any way.

We therefore conclude that the fact that the dangerous condition in this case involved the absence of a potential capital improvement does not relieve the City of liability.

C. *Use with Due Care.*

Second, the City contends that plaintiffs failed to prove that the lack of sidewalks created a substantial risk of injury when used with due care.

***7** "Reasonably foreseeable use with due care ... refers to use by the public generally, not the contributory negligence of the particular plaintiff who comes before the court; the particular plaintiff's contributory negligence is a matter of defense." (*Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1384.) "So long as a plaintiff-user can establish that a condition of the property creates a substantial risk to *any* foreseeable user of the public property who uses it with due care, he has successfully alleged the existence of a dangerous condition regardless of his personal lack of due care. If, however, it can be shown that the property is safe when used with due care and that a risk of harm is created *only* when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a). [Citation.]" (*Fredette v. City of Long Beach*

(1986) 187 Cal.App.3d 122, 131, fn. omitted, second italics added.)

"No shortage exists of cases recognizing a dangerous condition of public property in some characteristic of the property that exposed its users to increased danger from third party negligence...." (*Bonanno v. Central Contra Costa Transit Authority, supra,* 30 Cal.4th at p. 152.) "[H]owever, ... liability is imposed only when there is some defect in the property itself and a causal connection is established between the defect and the injury." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1135.) " 'If the risk of injury from third parties is in no way increased or intensified by any condition of the public property ... courts ordinarily decline to ascribe the resulting injury to a dangerous condition of the property. In other words, there is no liability for injuries caused *solely* by acts of third parties. [Citations.] Such liability can arise only when third party conduct is coupled with a defective condition of property.' [Citation.]" (*Id.* at p. 1137, quoting 2 Cal. Government Tort Liability Practice (Cont.Ed.Bar 4th ed., May 2001 update) Dangerous Condition of Public Property, § 12.19, p. 732.)

The City does not seem to be claiming that Karen Medina failed to use due care. There is substantial evidence that she was walking on the dirt shoulder and not in the paved street. The City *is* claiming, however, that *Castro* failed to use due care; it asserts that it can be liable only if the dangerous condition "*invites* the negligent or wrongful activity of a third party," then argues that the lack of sidewalks did not invite Castro to be negligent. Whether the condition invited negligent conduct, however, is not the test. Rather, the test is whether the condition "increased or intensified" "the risk of injury from [negligent] third parties." (*Zelig v. County of Los Angeles, supra,* 27 Cal .4th at p. 1137.)

For example, in *Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, a 13-year-old child was hit by a car while crossing the street at a marked crosswalk that led to an open schoolyard gate. The school district was held liable on the theory that an open schoolyard gate that led to a marked crosswalk at a wide, busy intersection was a dangerous condition. (*Id.* at pp. 295, 299.) The court noted: "[The d]istrict defended on the theory that [the child] and the motorist were negligent. But concurrent negligence does not defeat its own maintenance of a dangerous condition or the standard of care owed. [Citations.]" (*Id.* at p. 305.) It would appear that, exactly like the absence of sidewalks in this case, the gate in *Joyce* in no way encouraged or invited motorists to drive negligently; it merely placed children in the way of such motorists.

***8** Separately and alternatively, the fact that *Castro* was negligent does not prove that there was *no* substantial risk of injury in the *absence* of negligence. As the City itself argues, it is not necessarily negligent or illegal for a pedestrian to walk on a paved road. Moreover, a vehicle can go out of control in circumstances not involving negligence at all-a tire can pick up a nail and blow out; a driver can have a heart attack. The expert testimony demonstrated that sidewalks enhance safety by separating pedestrians from vehicles when they go out of control for *any* reason. Accordingly, the jury could find that the lack of sidewalks created a substantial risk of injury even in the absence of negligent conduct. (See *Ducey v. Argo Sales Co., supra,* 25 Cal.3d at pp. 719-720.)

In a related contention, the City also argues that Krueper essentially testified that sidewalks protect pedestrians against negligent motorists. He did not specifically testify that the absence of sidewalks would create a substantial risk of harm in the absence of negligence. The City concludes that there was insufficient evidence of a dangerous condition. As already discussed, we do not agree that this was something that plaintiffs had to prove. However, even assuming the City is correct and that this was the legal standard, the jurors could properly so find, even without expert testimony on the point. "[T]he jurors were free to draw upon their own common driving experiences which might well have suggested to them that many traffic accidents ... occur without the negligence of any party." (*Ducey v. Argo Sales Co., supra,* 25 Cal.3d at p. 720.)

We therefore conclude that there was sufficient evidence that the lack of sidewalks constituted a dangerous condition of public property.

III

EXPERT TESTIMONY ABOUT THE EXISTENCE OF A "DANGEROUS CONDITION"

The City contends that the trial court erred by allowing plaintiffs' expert Harry Krueper to testify that there was a dangerous condition on Cypress Avenue.

A. *Additional Factual and Procedural Background.*

Plaintiffs called Craig Neustaedter, a traffic engineer who had worked on the City's "Safe Routes to School" application. Neustaedter was forced to admit that the application had described the lack of sidewalks on Cypress as "a potentially hazardous condition[ ]." Accordingly, during his cross-examination, counsel for the City asked:

Q [I]s there a difference in the terms 'potentially hazardous condition' on the one hand and 'dangerous condition' on the other?

A Well, I never use the term dangerous, but I will use the term hazardous...."

Later, when plaintiffs called Krueper, he was asked:

"Q (BY [PLAINTIFFS' COUNSEL]:) [D]id you have an opinion as to whether or not the path between the trees and the homes, whether that constituted a dangerous condition prior to December 3, 2001, based on your review of the city's own documents and your expertise?

***9** "[CITY'S COUNSEL]: Calls for legal conclusion. Invades the province of the jury.

"THE COURT: Sustained."

He was also asked:

"Q (BY [PLAINTIFFS' COUNSEL]:) Do you have an opinion that the lack of sidewalks on the east side and the west side of Cypress Avenue constituted a dangerous condition as of December 3, 2001?

"[CITY'S COUNSEL]: Objection. Legal conclusion. Asked and answered.

"THE COURT: Sustained."

Finally, he was asked:

"Q Do you have an opinion as to whether the lack of sidewalks created a reasonably foreseeable risk to the City of Fontana prior to December, 2001, ... that a ... pedestrian would get hurt of killed?

"[CITY'S COUNSEL]: Objection. Calls for legal conclusion. Invades the province of the jury.

"THE COURT: Sustained."

In a sidebar conference, the trial court indicated that Krueper could not "use the magic words" (presumably meaning "dangerous condition"), but otherwise he could testify to the "ultimate issues."

The next day, plaintiffs' counsel asked the trial court to reconsider this ruling. He argued that the City's counsel had "opened the door" by eliciting testimony from Neustaedter that there was a distinction between a "potentially hazardous condition" and a "dangerous condition."

The trial court was persuaded. It ruled: "You opened the door to the line of questioning using the terminology 'potentially hazardous dangerous condition.' [Plaintiffs' counsel] has the right to ask Mr. Krueper the ultimate issue question. My concern yesterday was how we were going to phrase that. I didn't want the legal terms of art being used.... Since he's going to be able to ask the ultimate question anyhow, I'm going to let him use the terms of art."

Accordingly, Krueper was allowed to testify that Cypress Avenue was in a "dangerous condition" and, in addition, to list the factors that, in his opinion, caused it to be in a "dangerous condition."

B. *Analysis.*

Preliminarily, plaintiffs respond-much as they did at trial-that the City "opened the door" by its cross-examination of Neustaedter. "Th[is] so-called 'open the door' or 'open the gates' argument is 'a popular fallacy.' [Citations.]" (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192, quoting *People v. Johnson* (1964) 229 Cal.App.2d 162, 170.) "Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony" (*People v. McDaniel* (1943) 59 Cal.App.2d 672, 677)-and vice versa. If the City's question to Neustaedter was improper, plaintiffs' remedy was to object and move to strike; it was not to lie doggo in the hope of getting to ask improper questions of their own.

We therefore turn to the merits.

Expert testimony must be "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact...." (Evid.Code, § 801, subd. (a).) " '[I]t is thoroughly established that experts may not give opinions on matters which are essentially within

the province of the court to decide.' [Citations.]" (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884, quoting *Carter v. City of Los Angeles* (1945) 67 Cal.App.2d 524, 528.) "Even experts may not opine on pure questions of law. [Citation.]" (*Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 602.)

***10** " 'The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion. [Citation .]' [Citation.]" (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841, quoting *Ferreira v. Workmen's Comp. Appeals Bd.* (1974) 38 Cal.App.3d 120, 126.) For example, "[e]xpert opinion on whether there is probable cause to file suit has been ruled inadmissible in malicious prosecution actions.... Expert opinion on the legal interpretation of contracts has also been found to be inadmissible." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1179-1180.) "Such legal conclusions do not constitute substantial evidence. [Citation.]" (*Downer*, at p. 841.)

"Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid.Code, § 805.) But "[n]otwithstanding Evidence Code section 805, an 'expert must not usurp the function of the jury....' [Citations.] [¶] Expert opinions which invade the province of the jury are not excluded because they embrace an ultimate issue, but because they are not helpful (or perhaps too helpful). '[T]he rationale for admitting opinion testimony is that it will assist the jury in reaching a conclusion called for by the case. "Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates." [Citation.]' [Citations.] In other words, when an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them." (*Summers v. A.L. Gilbert Co., supra*, 69 Cal.App.4th at p. 1183, quoting *People v. Humphrey* (1996) 13 Cal.4th 1073, 1099 and quoting *People v. Torres* (1995) 33 Cal.App.4th 37, 47 quoting *Lampkins v. United States* (D.C.App.1979) 401 A.2d 966, 969.)

Kennemur v. State of California (1982) 133 Cal.App.3d 907 applied these principles in a case involving an alleged dangerous condition under Government Code section 835. (*Kennemur*, at p. 926.) There, the trial court had barred any expert from testifying as to whether a dangerous condition existed at the accident site. The appellate court upheld this ruling; it explained: "We cannot find the trial court abused its discretion in prohibiting the expert witnesses for both parties from expressing their opinions on the ultimate fact." (*Ibid.*)

"[W]e review a trial court's decision to admit expert testimony using an abuse of discretion standard. [Citation.]" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 663.) We are forced to conclude that the trial court abused its discretion here. It appears to have relied exclusively on the "opening the door" rationale, without actually considering whether the expert testimony was reasonably calculated to assist the jury. Indeed, plaintiffs do not even try to argue that its ruling was correct.

***11** There was no particular reason why Krueper had to phrase his opinions in terms of a dangerous condition. For example, he was allowed to testify that the lack of sidewalks contributed to a dangerous condition because it meant that Cypress failed to provide separate "movement pattern[s]" for vehicles and pedestrians. He had already testified, however, that when the high school opened, the City "should" have done something to Cypress Avenue to provide pedestrians with "a reasonable route of travel in their own separate motion pattern." He had also testified that one of the "safety enhancements that [he] would expect the city to implement" would be sidewalks, which would provide pedestrians with a separate route of travel. He could even have testified that the absence of sidewalks was "hazardous," or that sidewalks would have "reduced" the risk of injury. (See *Becker v. Johnston* (1967) 67 Cal.2d 163, 170, overruled on other grounds in *Baldwin v. State of California* (1972) 6 Cal.3d 424, 438-439.)

For much the same reasons, however, the City cannot show that the error was prejudicial. (See Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) Krueper could have given practically the same testimony; all he had to do was avoid using certain "magic words" (as the trial court put it). The City failed to call any expert witnesses. Thus, Krueper's opinions would have been uncontradicted, no matter how he phrased them. The jury was instructed, "You may believe all, part, or none of an expert's testimony. In deciding whether to believe an expert's testimony, you should consider the expert's training and experience, the facts the expert relied on, and the reasons for the expert's opinion." (CACI No. 219.) Precisely because the jury was as well equipped as Krueper to determine the ultimate fact of a dangerous condition, there was no reason for it to be overawed by his opinions on this point.

We therefore conclude that, even though the trial court erred by allowing Krueper to testify that a dangerous condition existed, the City has not shown that the error was prejudicial.

In a subsidiary contention, the City also contends that Krueper's testimony was not substantial evidence that can support the verdict. Even if we eliminate his legal conclusion that Cypress Avenue was in a "dangerous condition," however, there remains ample expert testimony-not only from Krueper, but also from Peter Francis and Craig Neustaedter-to support a finding that the absence of sidewalks constituted a dangerous condition of public property.

IV

THE AMOUNT AND APPORTIONMENT OF DAMAGES

A. ***Additional Factual and Procedural Background.***
On October 21, 2004, the City filed a notice of intention to move for a new trial.

On October 29, 2004, the City filed its motion for a new trial, arguing, among other things, that the special verdict finding Castro negligent but allocating no responsibility to him was inconsistent and not supported by the evidence and that the damages were excessive.

***12** The hearing on the motion was set for December 6, 2004. On that date, after hearing argument, the trial court indicated that it would grant a new trial based on inconsistency of the verdict; however, it took the issue of excessive damages under submission and set a further hearing.

At the further hearing, on December 20, 2004, the trial court initially indicated that it was granting a limited new trial, on "the apportionment percentage of liability and the amount of damages." It found that the verdict was inconsistent: "[A]ccording to the verdict form and the instructions of the Court, Yader Castro and his parents admitted their negligence and their liability for the death of Karen Medina. The jury found that was a substantial factor and then awarded Mr. Castro zero percent. To suggest that there is no logic in that finding is an absolute minimum comment the Court can make. It is not a legal verdict."

It also found that the damages were excessive. It indicated that it would issue a remittitur, reducing the total damages to $10 million. "The [C]ity's portion thereof would be 7.5 million dollars. [¶] If plaintiffs wish to accept that remittitur, because the motion for new trial is conditional, there would be no new trial."

Counsel for the City objected that a remittitur could cure the amount problem but not the apportionment problem; once the trial court found that the apportionment was improper, it had to either (1) issue a remittitur that, even if accepted, would merely serve as the basis for a new trial on apportionment, or (2) order a new trial on both amount and apportionment.

The trial court disagreed: "The purpose of giving the conditional grant ... is to avoid the new trial on both sides. While I obviously agree with you we've got problems with the apportionment, I've got problems with the apportionment on one side of the equation. The 25 percent. The jury was very clear in fixing the 75 percent as to the city." It added: "[T]he purpose of granting this conditionally is to end it here. If they accept it, we're done."

After a break, however, counsel for the City cited *Schelbauer v.. Butler Manufacturing Co.* (1984) 35 Cal.3d 442. As he pointed out, *Schelbauer* held that "the procedural device of remittitur is to be utilized *only* when a new trial is warranted solely on the grounds of excessive damages" (*id.* at pp. 452-453); it cannot be utilized to reapportion liability among the parties. (*Id.* at p. 454.)

After reading *Schelbauer*, the trial court agreed that, under *Schelbauer*, it could not issue a remittitur. Accordingly, it ruled that it would grant a limited new trial, with respect to both the amount and apportionment of damages, based on inconsistency of the verdict and excessive damages. It indicated that it would prepare a written order. Also on December 20, 2004, it entered a minute order granting a limited new trial.

On February 7, 2005, the trial court entered a written order. It provided:

***13** "The Motion for New Trial was granted on the ground that the jury rendered an illegal verdict by apportioning 0% of the liability to Yader Castro after finding him negligent, and a substantial factor in causing the death of ... Karen Medina.

"The court further found that damages awarded to the plaintiffs in the amount of $37.5 million were the result of passion and intended to 'send a message' to the defendant, City of Fontana, and thus in direct contravention of the court's instructions to the jury and the laws of the State of California. The court based this finding on the comments and demeanor of the jury at the time of the taking of the verdict, and on a fair and reasoned comparison of similar jury verdicts in the State of California."

B. *Apportionment.*

Plaintiffs contend that the trial court erred by allowing the City a new trial on apportionment.

1. *Waiver or Forfeiture.*

As a procedural matter, plaintiffs contend that the City waived the asserted error by not asking the trial court to send the jury back to reconsider its verdict.

Plaintiffs correctly note that, if the jury renders an inconsistent verdict, the trial court can require it to deliberate further. (Code Civ. Proc., § 619; *Mizel v. City of Santa Monica* (2001) 93 Cal.App.4th 1059, 1070-1073 [inconsistent verdict]; see also *Crowe v. Sacks* (1955) 44 Cal.2d 590, 595-597 [verdict not in conformity with the instructions].) The issue before us, however, is not whether the trial court could have required the jury to deliberate further, but whether the City's failure to demand that it do so constituted a waiver.

"Failure to object to a verdict before the discharge of a jury and to request clarification or further deliberation precludes a party from later questioning the validity of that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected." (*Henrioulle v. Marin Ventures, Inc.* (1978) 20 Cal.3d 512, 521, fn. omitted.) However, "[t]his principle does not apply when the verdict itself is inconsistent." (*Id.* at p. 521, fn. 11.)

In *Lambert v. General Motors* (1998) 67 Cal.App.4th 1179 [Fourth Dist., Div. Two], the respondents argued that the appellant waived the asserted inconsistency of the verdicts by failing to object before the jury was discharged. This court responded: "This is not the law in California. [N]o objection was required to preserve the issue for review. [Citations.]" (*Id.* at p. 1182; accord, *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 187; *Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, 105-106; *Morris v. McCauley's Quality Transmission Service* (1976) 60 Cal.App.3d 964, 971-972; *Campbell v. Zokelt* (1969) 272 Cal.App.2d 315, 320; *Remy v. Exley Produce Express, Inc.* (1957) 148 Cal.App.2d 550, 554-555.)

Plaintiffs rely on *Brown v. Regan* (1938) 10 Cal.2d 519, which held that "when a verdict is not in proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition failed to make any request that its informality or uncertainty be corrected. [Citations.]" (*Id.* at pp. 523-524.) Plaintiffs claim that the verdict in *Brown* was not merely informal or uncertain but actually inconsistent, much like the verdict here. (See *id.* at pp. 521-523.) Even if so, however, *Brown* has been superseded by *Henrioulle*, which teaches that the waiver rule does not apply to an inconsistent verdict. We also note that in *Brown*, the appellant "not only did not seek to have the jury returned for further deliberation in an effort to clear up the apparent ambiguity, but vigorously opposed the efforts of the [respondent] to secure such clarification of the verdict." (*Brown*, at p. 524.) Later cases seem to regard *Brown* as applying only when the verdict is uncertain but not inconsistent (*Cavallaro v. Michelin Tire Corp., supra*, 96 Cal.App.3d at p. 105) or when the appellant affirmatively resisted any clarification (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960, fn. 8). Neither is the case here. "Inconsistent verdicts are' "against the law," ' and the proper remedy is a new trial. [Citation.]" (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344, quoting *Morris v. McCauley's Quality Transmission Service, supra*, 60 Cal.App.3d at p. 970.) We conclude that the City was entitled to challenge the apportionment verdict in its new trial motion.

2. *Analysis.*

***14** On the merits, plaintiffs argue that the City was not entitled to a new trial on apportionment. According to plaintiffs, the trial court found that the jury had properly allocated 75 percent of the liability to the City and that the only error was as to the apportionment of the remaining 25 percent as between Castro and his parents.

We do not perceive any such finding by the trial court. At first, it is true, the trial court indicated that the jury had properly allocated 75 percent of the liability to the City and that the only problem was its allocation of the remaining 25 percent. Accordingly, the trial court felt that it could properly issue a remittitur reducing the damages to $10 million, leaving

the City liable for $7.5 million of this amount. As it frankly conceded, it was trying to find some way to end the litigation. Eventually, however, the trial court realized that this was wrong; under *Schelbauer*, precisely because the allocation was erroneous, it could not issue a remittitur at all.

Even aside from *Schelbauer*, the trial court's initial position did not make sense. Absent an ability to read minds, it simply had no way of knowing how the jury would have allocated liability *if it had known* that it *had* to allocate some to Castro. The jury had never actually made that decision. Certainly one could speculate that the jury started by allocating the liability as between the City, on the one hand, and the entire Castro-Grande-Rivas family, on the other, then broke it down further as between Grande and Rivas. It is equally possible, however, that it started by taking Castro out of the picture, then allocated the liability as between the City, on the one hand, and Grande and Rivas, on the other hand. In sum, because the trial court never found that the allocation to the City was proper, and because there was no evidence to support such a finding, it correctly ordered a new trial on allocation.

C. *Amount.*

Plaintiffs contend that the trial court erred by allowing the City a new trial on the amount of damages, because its statement of reasons was untimely and inadequate. The City therefore contends that the amount of damages was excessive as a matter of law.

When the trial court grants a new trial, it must not only specify grounds, but also state reasons under each ground. (Code Civ. Proc., § 657.) If the order granting the motion does not include a statement of reasons, the trial court must file a separate statement of reasons within 10 days. (*Ibid.*)

On appeal, the order cannot be sustained on the ground of excessive damages unless the trial court specified excessive damages as a ground. (Code Civ. Proc., § 657.) In addition, to the extent that the order was based on excessive damages, it is conclusively presumed that the only reasons for the order are those that the trial court stated. (*Ibid.*) As a result, if the statement of reasons is untimely or inadequate, the order *cannot be sustained* on the ground of excessive damages. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 896, 900.) It can be sustained-if at all-only " 'on some *other* ground stated in the motion.' [Citation.]" (*Id.* at p. 900, quoting *In re Marriage of Beilock* (1978) 81 Cal.App.3d 713, 727.)

***15** Here, the trial court's minute order granting a limited new trial, entered on December 20, 2004, did not include a statement of reasons. The trial court did not file a statement of reasons until February 7, 2005-far beyond the 10-day deadline. Accordingly, as the City concedes, we cannot sustain the new trial order on the ground of excessive damages.

The City asks us to sustain the order based on asserted misconduct committed by counsel for plaintiffs in closing argument. The rather glaring problem with this is that the City did not raise attorney misconduct as a ground in its motion for new trial.

We conclude that, to the extent that the trial court ordered a limited new trial on the issue of the amount of damages, its order must be reversed, and the judgment must be reinstated. (See *La Manna v. Stewart* (1975) 13 Cal.3d 413, 425; *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 63.) If the case were to remain in this procedural posture, all that the City would be entitled to would be a new trial with respect to the apportionment, but not the amount, of damages. (*O'Kelly v. Willig Freight Lines* (1977) 66 Cal.App.3d 578, 583.) The City, however, has filed a protective cross-appeal. As a result, it is entitled to appellate review of the reinstated judgment. (See generally Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2006) ¶¶ 3:169-3:171.1, pp. 3-66.2-3-66.3; cf. *Sanchez-Corea v. Bank of America, supra,* 38 Cal.3d at p. 910["[b]ecause defendant has failed to file a protective cross-appeal, reinstatement of the judgment will automatically be final"].)

Moreover, in its cross-appeal, the City is free to argue that the amount of damages is excessive. This is true even though we must reverse the trial court's order granting a limited new trial based on excessive damages. For example, in *Smith v. Moffat* (1977) 73 Cal.App.3d 86 (Fourth Dist., Div. Two), the jury awarded the plaintiff $5,000 against one of the defendants. (*Id.* at p. 89.) The trial court granted the plaintiff's motion for new trial on several grounds, including inadequate damages. Much as in this case, however, it failed to file a timely statement of reasons. (*Id.* at pp. 89-91.) This court concluded that it could not uphold the order based on the inadequacy of the damages. (*Id.* at pp. 92-93.) The plaintiff, however, had filed a protective cross-appeal, in which he argued that the damages awarded were inadequate as a mater of law. (*Id.* at p. 93.) We agreed. Accordingly, we reversed the judgment. (*Id.* at pp. 94-95; see also *Alhino v. Starr* (1980) 112 Cal.App.3d 158, 176-177, 179 [reversing order granting new trial based

on excessive punitive damages, due to failure to state reasons; on defendant's protective cross-appeal, reversing award of punitive damages due to insufficiency of the evidence]; *Zhadan v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 493-501 [reversing order granting new trial based on excessive punitive damages, due to failure to state adequate reasons; on defendant's protective cross-appeal, reversing award of punitive damages as excessive].)

***16** Admittedly, there is a different standard of review. "[W]hen a trial court grants a new trial on the issue of excessive damages, ... the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the order." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 932.) "[T]he question on appeal ... is simply 'whether a verdict for an amount considerably less than that awarded [by the jury] would have had reasonable and substantial support in the evidence.' [Citation.]" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 379, quoting *Ona v. Reachi* (1951) 105 Cal.App.2d 758, 762.) By contrast, in an appeal from the judgment, "we may overturn the award of damages only if the award is excessive as a matter of law or if after reviewing the record favorably to the judgment, we conclude that the award is so grossly disproportionate to the harm suffered as to raise the presumption that it resulted from passion or prejudice. [Citations.]" (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 419.)

" '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.]' [Citation.]" (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1264, fn. omitted, quoting *Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783, 793.) Here, plaintiffs expressly disclaimed any economic damages. Accordingly, the entire award went to compensate them for the loss of their daughter's society and companionship.

This amount "is peculiarly within the discretion of the jury. There is no fixed standard by which the appellate court can determine whether the jury's award for this intangible loss 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.] The appellate court will interfere with the jury's determination only when the award 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. [Citation.]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 615.)

In *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, the California Supreme Court cautioned that a reviewing court should not "upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases...." (*Id.* at p. 65, fn. 12; see also *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1067-1068, fn. 17 ["citation to awards in other cases is of no value to the court in assessing the propriety of damages in this case"].) At the same time, however, *Bertero* cited *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, in which the court had said, "Although excessive damages is 'an issue which is primarily factual and is not therefore a matter which can be decided upon the basis of the awards made in other cases' [citations], awards for similar injuries *may be considered* as one factor to be weighed in determining whether the damages awarded are excessive. [Citations.]" (*Id.* at pp. 512-513, italics added, quoting *Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 356.)

***17** We therefore concur with *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, vacated on other grounds sub nom. *Ford Motor Co. v. Buell-Wilson* (2007) --- U.S. ---- [2007 WL 321178],[2] which reconciled *Bertero* and *Seffert* as follows: "[A] verdict may not be held to be excessive as a matter of law simply because it exceeds the amount awarded in other cases. Courts of Appeal must make their decisions based on the evidence in the case being reviewed. However, evidence of other verdicts is still relevant as a point of reference, to provide context to the award by establishing a range of values for similar injuries." (*Buell-Wilson*, at p. 551.)

2 At oral argument, plaintiffs' appellate counsel asserted that *Buell-Wilson* no longer has any precedential value because it has been vacated by the United States Supreme Court. We disagree. "[T]he decision retains the ordinary precedential value of a published opinion of an intermediate appellate court and it remains the law of the case on all points other than the federal

constitutional issue. [Citations.]" (*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 744, fn. 1, disapproved on other grounds in *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1205-1207, 1213; accord, *Occidental Life Ins. Co. v. State Bd. of Equalization* (1982) 135 Cal.App.3d 845, 848, fn. 1 ["we refer to the [vacated] decision ... for the continuing value of its reasoning in *nonfederal* aspects"]; *DeCamp v. First Kensington Corp.* (1978) 83 Cal.App.3d 268, 279-280; *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 470; see also *Guidi v. Superior Court* (1973) 10 Cal.3d 1, 13, fn. 11.) The California Supreme Court routinely cites and relies on cases of its own, even when, as it notes, they have been "vacated on other grounds." (E.g., *People v. Griffin* (2004) 33 Cal.4th 536, 598; *People v. Thomas* (1992) 2 Cal.4th 489, 518; *People v. Allison* (1989) 48 Cal.3d 879, 898-899.)

Here, the parties' research in connection with the motion for a new trial revealed that recent comparable California jury awards-for the death of a minor child-ranged from $50,000 to $50 million; most were between $500,000 and $2 million.

In addition, it is apparent that this jury was, in fact, overcome by emotion. The trial court stated: "... I watched that jury very closely throughout. Quite bluntly, [plaintiffs' counsel, you] had them eating out of your hand from about five minutes into your opening statement. They watched your every move. They hung on your every word." Plaintiffs' counsel admitted that some jurors "wouldn't, couldn't look at" plaintiffs' "day in the life" video. The trial court added: "During your closing argument I watched the jurors' faces.... Had the jury been able to ... leave the jury box and come over and pummel [defense counsel], they would have. The looks on their faces could have killed." The jurors had not wanted to return their verdicts in the absence of plaintiffs' counsel. When they were polled, they said " 'yes' ... underscored, punctuated with emotion...." The court also noted that, "[o]nce the verdict was taken ... every single juror went to [plaintiffs] and ... there were tears. There was hugging. There was truly an outpouring of emotion." [3] Finally, we know that the jury was willing to violate both logic and the instructions by assigning zero responsibility to Castro.

3 Because we must reverse the trial court's order granting a new trial based on excessive damages, we accord no deference to its discretionary determinations on that issue. However, to the extent that it stated, on the record and without contradiction, that a certain event occurred, we may take that event as established. Thus, it is as if the trial court had said, "Let the record reflect that the jurors are crying."

In closing argument, plaintiffs' counsel proved to be a master of paralipsis-the rhetorical device, for which Cicero was famous, of drawing attention to something by pretending to dismiss or pass over it. [4] For example, he said, "[I]f anyone was wondering why I didn't ask questions of the plaintiff, [it's] because I'm a big baby. I mean[,] I have three kids. I can't handle it.... [¶] But like I told you in voir dire ..., I don't want your sympathy." Similarly, he said, "I'm not asking you to send a message. But with your verdict you're going to make a difference in our cities." He kept pushing the boundaries of permissible argument; the trial court sustained 11 separate objections. Of course, it also granted a motion to strike each time the City made one. Ordinarily, we would presume that the jury followed the trial court's directive and ignored the stricken argument. However, it appears that this jury found itself unable to do so.

4 We were already aware of this rhetorical device, but for purposes of this opinion, we did have to look up its name.

***18** In his closing argument, plaintiffs' counsel implied that the jury should award damages in the $15-20 million range. He noted that "we as a society" will let "a 15 million, 20 million dollar plane crash into the ground" if necessary to save the pilot, or save a person from a burning room rather than save "a 15, 20 million dollar painting...." (True to form, however, he added later, "I'm not going to give you a number.")

If the trial court could have issued a remittitur, it would have set the amount at $10 million, although it conceded that even this was "at the high end...." It indicated that, during the trial, "I really felt that this would be a 7 to 12 million dollar verdict."

For all these reasons, we are convinced that the jury's award of $37.5 million is insupportable.

Plaintiffs have asked us, if we hold that the damages award was excessive, to modify the judgment by reducing the damages "to the highest number which, given this record, would not have 'shocked' the [c]ourt's conscience...." (See *Deevy v. Tassi* (1942) 21 Cal.2d 109, 120-121; see also *Conger v. White* (1945) 69 Cal.App.2d 28, 43.) It is one thing, however, to say that $37.5 million is excessive; it is quite another to declare that some particular dollar amount is the absolute cut-off. Assuming, without deciding, that the

trial court's figure of $10 million would not be excessive, why not $10,000,001? Moreover, even if we could arrive at a maximum figure, we have no way of knowing whether that is what a jury untainted by passion and prejudice would award. The evidence permitted conflicting inferences as to how much plaintiffs benefited, or were likely to continue to benefit, from the victim's society and companionship. Last, but not least, there must be a new trial with respect to the apportionment of damages in any event.

V

DISPOSITION

The order granting a new trial is affirmed with respect to the apportionment of damages but reversed with respect to the amount of damages. The judgment is affirmed with respect to liability but reversed with respect to the amount of damages. In the interest of justice, all parties shall bear their own costs.

We concur: RAMIREZ, P.J., and MILLER, J.