No. 15-56891

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH AARON SHINEDLING et al.,
Plaintiffs—Appellees,

v.

SUNBEAM PRODUCTS, INC.,
a Delaware Corporation,
Defendant—Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
CORMAC J. CARNEY, DISTRICT JUDGE • CASE NO. 5:12-CV-00438-CJC-SP

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Sunbeam Products, Inc. is a wholly owned, indirect subsidiary of Newell Brands Inc., a publicly traded company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Miscellaneous

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JURISDICTIONAL STATEMENT

Plaintiffs[1] filed this action in a California state court (2 ER 21, 26-27), and defendant Sunbeam Products, Inc. ("Sunbeam"), removed it to the Central District of California under 28 U.S.C. § 1441(b) (2 ER 21-22). The district court had diversity jurisdiction under 28 U.S.C. § 1332 because plaintiffs are citizens of California, Sunbeam is a Delaware corporation

[1] Plaintiffs are Kenneth Aaron Shinedling and his three minor daughters Addison Shinedling, Alexia Shinedling, and Ava Shinedling. For convenience and clarity, this brief sometimes refers to the three minor plaintiffs as "the girls."

with its principal place of business in Florida, and the amount in controversy exceeded $75,000.[2] (2 ER 22, 25.)

The district court entered judgment on June 30, 2015 (1 ER 1-8) and denied Sunbeam's timely motions for new trial and for judgment as a matter of law on November 9, 2015 (1 ER 20). Sunbeam filed its notice of appeal from the judgment and from the order denying its posttrial motions on December 8, 2015. (2 ER 138-39.)

This Court has jurisdiction under 28 U.S.C. § 1291 because Sunbeam appeals from a final judgment that disposes of all claims between the parties.

STATEMENT OF ISSUES PRESENTED

1. Did the district court err by denying Sunbeam's motion for judgment as a matter of law on plaintiffs' claims that Sunbeam failed to warn that its space heater posed a risk of fire, where Sunbeam repeatedly and clearly warned about the very risk that occurred, Mr. Shinedling read

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[2] Sunbeam's notice of removal alleged that two nondiverse defendants, County of San Bernardino and Phelan Pinon Hills Community Services District, were fraudulently joined to defeat diversity jurisdiction. (2 ER 22-25.) The district court later dismissed those defendants with no opposition from plaintiffs. (2 ER 36:23-24, 37:6-8.)

and understood the warnings, and no fire would have occurred had the warnings been heeded?

2. Did the district court err by denying Sunbeam's motion for judgment as a matter of law on the girls' claims of emotional distress under a bystander theory, where plaintiffs presented no evidence that the girls perceived their mother's injury when it happened or knew Sunbeam's heater had caused it?

3. Should the emotional distress awards to the girls, totaling $38,080,000, be reversed or remitted as excessive?

(The addendum contains copies of pertinent statutes and rules.)

STATEMENT OF THE CASE

A. The heater and the warnings

During the early morning hours of January 5, 2011, two portable space heaters were operating in the master bedroom at the home of Kenneth and Amy Shinedling in Pinon Hills, California. One was a GE convection heater; the other was a Holmes quartz radiant heater, model

HQH307.[3] (2 ER 245, 277-78, 280; 3 ER 305, 307:23-308:5, 316-18; *see* 3 ER 445.)

Convection heaters and radiant heaters employ different technologies to generate heat. Convection heaters rely on a fan, which draws air over a heated wire coil or ceramic heating element and blows the heated air into the room. (2 ER 223-24, 228-29.)

Radiant heaters, in contrast, rely on electricity to warm an internal heating element. The heating element generates infrared radiation that heats nearby persons or objects without heating the surrounding air, much like the sun heats a person or object on which its rays fall. (2 ER 225-26, 228-29.)

One type of radiant heater, the type at issue here, is called a quartz heater. The heating element is enclosed within a quartz tube, and the infrared radiation emanates from the tube. (2 ER 215:16-20, 216:5-12, 235:22-236:2.) The heating element glows red. (3 ER 306:4-6, 307:7-17.)

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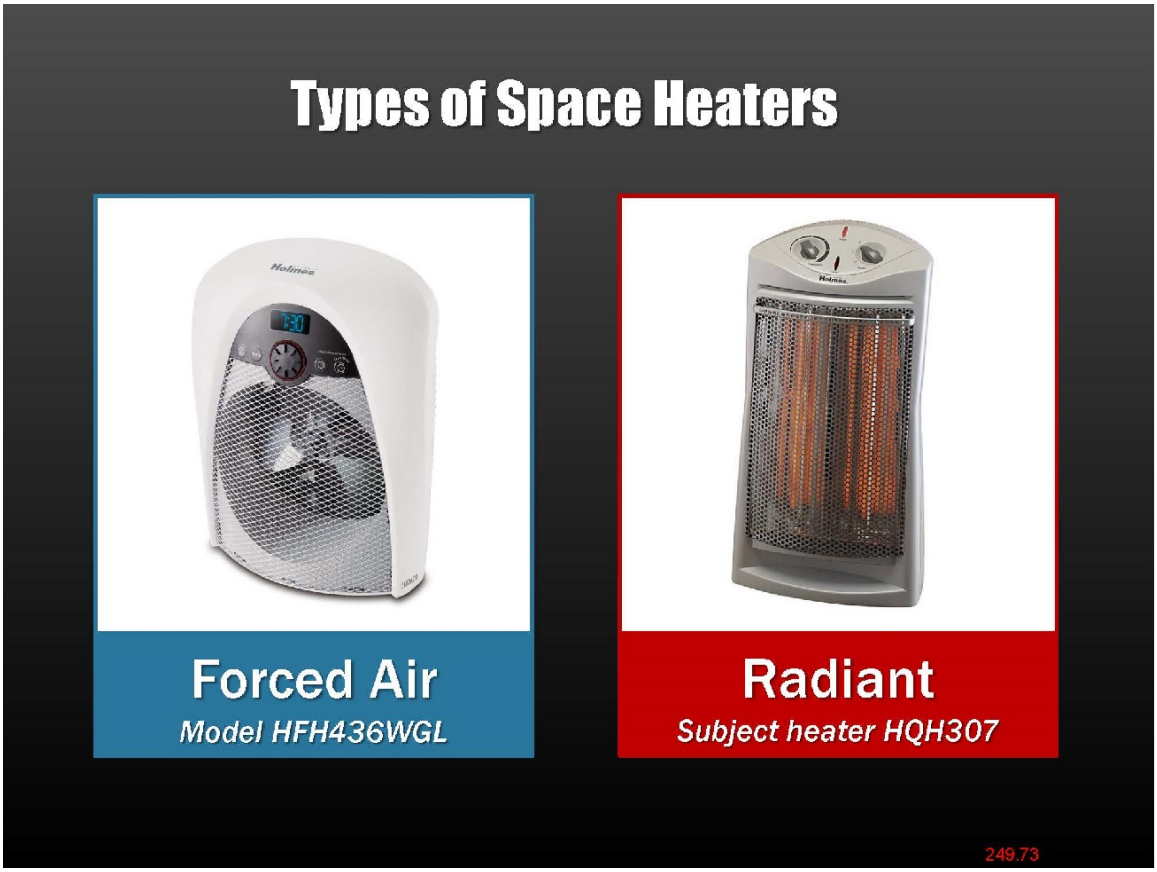
[3] Holmes designed the HQH307 heater. Sunbeam and Holmes merged in 2006. Sunbeam manufactured the heater at issue here on October 10, 2006. (2 ER 221.) The parties stipulated that Holmes and Sunbeam are the same. (2 ER 220.)

Below is a photograph of an exemplar Holmes HQH307 radiant heater and a convection (forced air) heater.



(3 ER 449.)

Over the years, Sunbeam has sold more than 10 million radiant quartz heaters. (2 ER 240:22-25.)

Radiant heaters generate high temperatures and pose a risk of fire under certain conditions. (2 ER 226, 228-29, 264-65; 3 ER 396, 425-27.) Sunbeam included with the Holmes HQH307 heater multiple warnings

about this risk of fire and how to avoid it. The warnings appeared in the instruction manual that accompanied the heater and on the heater itself.

The following warning appeared on the front base of the heater:

> **WARNING**: Risk of Fire – Keep combustible material such as furniture, papers, clothes, and curtains at least 3 feet (0.9 m) from the front of the heater and away from the sides and rear.

(3 ER 428; *see* 3 ER 313:6-10, 399:19-25.)

In addition, a tag attached to the heater's power cord displayed the following warning (the first line of the warning was printed in large white letters on a black background):

> **WARNING—TO REDUCE RISK OF FIRE:**
>
> 1) Do not place any objects such as furniture, papers, clothes, and curtains closer than 3 feet (0.9 m) to the front of the heater and keep them away from the sides and rear when the heater is plugged in.
>
> 2) Do not place the heater near a bed because objects such as pillows or blankets can fall off the bed and be ignited by the heater.

(3 ER 431; *see* 2 ER 237, 239; 3 ER 400:11-20.) The warning on the tag concluded with the following admonition to the user: "**DO NOT REMOVE THIS TAG!**" (3 ER 431.)

In addition, the instruction manual that accompanied the heater included the following warnings:

> **PLEASE READ AND SAVE THESE IMPORTANT SAFETY INSTRUCTIONS**
>
> When using electrical appliances, basic safety precautions should always be followed to reduce the risk of fire, electric shock, and injury to persons, including the following:
>
> . . . .
>
> 3. The heater is hot when in use. To avoid burns, DO NOT let bare skin touch hot surfaces. If provided, use handles when moving this heater. Keep combustible materials, such as furniture, pillows, bedding, papers, clothes, and curtains at least 3 ft (0.9 m) from the front of the heater and keep them away from the sides and rear.
>
> . . . .
>
> 6. Extreme caution is necessary when any heater is used by or near children or invalids, and whenever the heater is left operating and unattended.

(3 ER 434; *see* 3 ER 312.)

Before Mr. Shinedling used the Holmes heater, he read and understood the warnings on the heater and the power cord, and those included in the instruction manual. (2 ER 272; 3 ER 308-12.)

B. The fire

On the morning of January 5, 2011, Mr. Shinedling was sleeping with his wife Amy and three-year-old daughter Ava in the master bedroom of their home. (2 ER 220-21, 279-80.) Two other daughters, twelve-year-

old Addison and nine-year-old Alexia, were sleeping in another bedroom on the far side of the house away from the master bedroom. (2 ER 220, 273, 282-83; 3 ER 304:14-22, 443, 446.)

The Holmes heater was operating about four to five feet beyond the foot of the bed on Mrs. Shinedling's side. (2 ER 278; 3 ER 321-22, 445.)

Shortly before 6:15 a.m., Mr. Shinedling was awakened by a smoke detector alarm and his wife's scream that there was a fire. (2 ER 280-81.) Mr. Shinedling grabbed Ava and ran around to his wife's side of the bed. (2 ER 280.) He saw a fire in the area of the heaters. (2 ER 250:2-7, 281; 3 ER 325:20-21.)

Mrs. Shinedling was half-seated, half-lying on the floor next to the bed. (3 ER 328.) She suffered from psoriatic rheumatoid arthritis and a bad knee, which made walking difficult. (2 ER 276-77, 300:1-2; 3 ER 314:3-4.) At his wife's insistence, Mr. Shinedling ran from the master bedroom to the bedroom of his other two daughters. (2 ER 282-83; 3 ER 327:13-18, 329:5-8.) He carried Ava with him. (3 ER 323:1-5, 330:25-331:2.)

He then rushed the three girls out the front door and into a recreational vehicle parked in the front driveway. (2 ER 283-84; 3 ER

330:3-333:18, 334:10-13, 383-387; *see* 3 ER 447 (depicting Mr. Shinedling's path from the girls' bedroom to the vehicle).) The girls were screaming. (2 ER 285:24-25.) They wanted to know where their mother was. (2 ER 285:19-21.) To give the girls hope and to distract them, Mr. Shinedling reassured them "[t]hat mom is going to meet us in the back." (2 ER 285:17-18.)

After placing the girls in the vehicle, Mr. Shinedling called 911 on his cell phone. (2 ER 285:4-8; 3 ER 334:12-16.) He was standing outside the vehicle when he placed the call, and he closed the vehicle's door to prevent the girls from hearing the conversation. (3 ER 333:21-23, 333:25-334:2.)

Mr. Shinedling then reentered the house through the front door. (2 ER 247:16-20, 286:1-23; 3 ER 334:21-22.) But fire and smoke prevented him from approaching the master bedroom, where he had left his wife. (2 ER 286:24-287:4; 3 ER 335:3-336:15.)

Mr. Shinedling heard a voice behind him. (2 ER 287:5-6; 3 ER 336:21-24.) His oldest daughter, twelve-year-old Addison, was standing in the front door area. (2 ER 247:21-23, 287:7-13; 3 ER 337:7-9.) He turned around, took Addison back to the RV, and told the girls not to leave the vehicle. (2 ER 247, 248:16-17, 287:14-15, 288:3-4.)

Mr. Shinedling then ran around the garage, at the end of the house opposite the fire, into the back patio area, from where he had a view through French doors into the master bedroom. (2 ER 247:9-14, 287:19-23; *see* 3 ER 443 (depicting Mr. Shinedling's path around the garage), 448 (same).) The room was in flames. (2 ER 269-71; 3 ER 339:18-19.) He thought he saw his wife on the floor in the bedroom. (2 ER 288:8-11, 289:5-9.) While looking at the bedroom, his call to the 911 operator became disconnected. (3 ER 338:20-339:24.)

Mr. Shinedling then ran to a neighbor's house. (2 ER 288:12-16; 3 ER 340:16-19.) After confirming that the neighbor was at home, Mr. Shinedling retrieved his daughters from the RV and took them to the neighbor's house where he stayed with them. (2 ER 288:20-23; 3 ER 340:23-341:2, 394:16-17.) He placed another call to 911. (2 ER 249:14-21.)

Mr. Shinedling and the girls remained at the neighbor's house for about thirty minutes, at which point Mrs. Shinedling's best friend, Amanda Lutz, arrived. Mr. Shinedling and the girls left the neighbor's house with Ms. Lutz. (2 ER 289:13-19; 3 ER 342:21-343:3.) They walked back past their own home, which was still burning. (2 ER 290:3-8; 3 ER

343:17-24.) The girls were placed in an ambulance. (2 ER 289:25-290:1; 3 ER 343:21-23, 362:12-14.)

At about that time, Mr. Shinedling's brother-in-law, who had arrived at the scene, informed Mr. Shinedling that his wife had perished in the fire. (2 ER 221, 289:13-290:2; 3 ER 362-63.)

C. The lawsuit and trial

Mr. Shinedling and the three girls sued Sunbeam on theories of negligence and strict products liability. (2 ER 27-34.)

At the pretrial conference and again at trial, the parties agreed the fire started when the Holmes heater ignited combustible clothing very close to the front of the heater. (2 ER 144:24-145:2, 222:12-13; 3 ER 315:23-316:6.) Plaintiff's "origin and cause" expert testified to the same effect: "The first fuel ignited was clothing in immediate proximity to the Holmes space heater, so within inches or in contact with the base of the heater. And the ignition source was the normally-operating Holmes heater." (2 ER 244:24 to 244-A:2; *see* 2 ER 246:1-18.)

But the evidence was in conflict on *how* combustible clothing came to be "within inches or in contact with the base of the heater." (2 ER 244:25 to 244-A:1.)

Mr. Shinedling testified that when he went to bed on the night before the fire, the area in front of the heater was clear of clothing. (3 ER 316:12-317:11, 326:8-12.) On the morning of the fire, Mr. Shinedling told a sheriff that a laundry basket or hamper full of clean garments fell over. (3 ER 324:5-7, 324:20-25.) He speculated that Mrs. Shinedling may have gotten out of bed during the night and accidentally knocked over the hamper, spilling clothing in front of the heater. (3 ER 395:12-15.) But Mr. Shinedling did not claim he saw that occur; in fact, he did not know how the clothes came to be in front of the heater. (3 ER 326:13-16.)

Sunbeam presented evidence that, after the fire, the remains of a black plastic trash bag were found under remnants of clothing right in front of the heater. (3 ER 388:15-390:2, 391:22-392:8; *see* 3 ER 422 (drawing depicting location of bag of clothes).) A County of San Bernardino investigator concluded that a plastic bag filled with clothing within three feet of the heater had ignited and started the fire. (3 ER 393:4-5, 422.) Mr. Shinedling acknowledged that a pile of clothes or a plastic bag containing clothes was on the floor at the foot of his side of the bed on the night of the fire. (2 ER 274:8-11, 275:10-276:2; 3 ER 319:23-320:6; *see* 3 ER 445.)

D. The instructions and verdicts

The court instructed the jury on five theories: strict liability—design defect; strict liability—failure to warn; negligent design; negligent failure to warn; and negligent failure to recall the heater. (2 ER 39-46; 3 ER 379:6-8; 3 ER 412 to 412-G.)

The jury returned a verdict for Sunbeam on the claim for strict liability—design defect. (2 ER 47-48.) The jury decided that the product's design was not "a substantial factor in causing harm to Plaintiffs[.]" (2 ER 48:2-4.)

The jury returned verdicts for plaintiffs on the remaining four claims.[4] (2 ER 48-51.) The jury allocated eighty percent of the fault to Sunbeam and twenty percent to Mr. Shinedling. (2 ER 54.)

Plaintiffs sought three categories of noneconomic damages: (1) damages for the loss of Mrs. Shinedling's care, comfort, and society (wrongful death damages); (2) damages for emotional distress suffered as direct (though physically uninjured) victims of Sunbeam's conduct (direct

[4] The claim for negligent failure to recall was not listed on the verdict form. But the parties stipulated that the recall claim would be "subsumed" in the other negligence claims, meaning that, if the jury found negligence, then plaintiffs would be deemed to have prevailed on the recall claim as well. (3 ER 378:21-379:5.)

victim damages); and (3) damages for emotional distress suffered in perceiving Mrs. Shinedling's demise (bystander damages). The jury awarded damages in all three categories, in the following amounts:

Wrongful death damages			
Party	**Past Damages**	**Future Damages**	**Total**
Mr. Shinedling	$300,000	$2,775,000	$ 3,075,000
Addison	$300,000	$3,225,000	$ 3,525,000
Alexia	$300,000	$3,225,000	$ 3,525,000
Ava	$300,000	$3,225,000	$ 3,525,000
Damages for emotional distress as direct victims			
Party	**Past Damages**	**Future Damages**	**Total**
Mr. Shinedling	$80,000	$740,000	$ 820,000
Addison	$80,000	$1,340,000	$1,420,000
Alexia	$80,000	$1,400,000	$1,480,000
Ava	$80,000	$1,500,000	$1,580,000
Damages for emotional distress as bystanders			
Party	**Past Damages**	**Future Damages**	**Total**
Mr. Shinedling	$600,000	$5,500,000	$ 6,100,000
Addison	$600,000	$10,050,000	$10,650,000
Alexia	$600,000	$10,500,000	$11,100,000
Ava	$600,000	$11,250,000	$11,850,000

The verdicts totaled $58,650,000.

The district court reduced all awards by twenty percent to account for the jury's finding of comparative fault, then entered judgment for plaintiffs in the following amounts, plus costs: Mr. Shinedling, $7,996,000; Addison, $12,476,000; Alexia, $12,884,000; and Ava, $13,564,000. (1 ER 7-8.) The judgment totaled $46,920,000. (*Id.*)

Sunbeam filed motions for new trial and for judgment as a matter of law on multiple grounds, including each ground Sunbeam now raises on appeal. (2 ER 55-95, 102-31.) The district court denied both motions. (1 ER 19:11-13, 20.) This appeal followed.

SUMMARY OF THE ARGUMENT

1. *Sunbeam is entitled to judgment as a matter of law based on what remained of the jury's findings after the district court reconciled an inconsistent verdict*. The jury returned apparently inconsistent verdicts. In response to a question in the Strict Liability—Design Defect section of the verdict form, the jury found that the heater's design was *not* a substantial factor in causing harm to plaintiffs. Then, in response to a question in the Negligent Design section of the verdict form, the jury found that Sunbeam's negligence in designing the heater *was* a substantial factor in causing harm to plaintiffs. The district court reconciled the verdicts by explaining that the jury's response to the Negligent Design question was supported by evidence that Sunbeam's *warnings* were deficient. (We explain this reconciliation in more detail in Part I.A. of the Argument section below.)

Thus, under the court's interpretation of the verdict, the jury made no finding that the heater's *design* caused harm to plaintiffs. Rather, every claim on which the jury found Sunbeam liable was grounded on allegedly deficient *warnings*.

Because Sunbeam's warnings were adequate as a matter of law, judgment should be entered in favor of Sunbeam. Warnings are adequate when they alert the user to the possibility of danger. When a warning explicitly alerts the user to the very hazard that later causes harm, and when compliance with the warning would have eliminated the risk of harm, the manufacturer cannot be liable for failing to warn.

Here, Sunbeam repeatedly warned the user not to allow clothing or other combustible materials to come within three feet of the front of the heater. Mr. Shinedling read and understood the warnings. Yet the fire started because clothing was allowed to come within three feet—in fact, within inches—of the front of the heater. Had Sunbeam's multiple warnings been heeded, no fire would have occurred.

While other warnings (such as, "do not sleep with the heater on"), if heeded, also could have prevented the fire, the law does not require a manufacturer to give a perfect warning, or even the best warning. The law

requires only an adequate warning—one that alerts the user to the possibility of danger. Sunbeam's multiple warnings more than satisfied that standard.

2. *The girls are not entitled to recover bystander damages*. Under California law, a plaintiff not physically harmed by a defendant's conduct may recover damages for the emotional distress of witnessing serious harm to a close relative from the defendant's conduct. But recovery under this "bystander" theory is strictly limited. The plaintiff must prove she perceived her relative's injury at the moment it happened. Proof that the plaintiff could mentally picture the injury, or that she could mentally reconstruct the injury after the fact, is not sufficient. Thus, a plaintiff who learns of a relative's injury from a third party after the fact, even just moments later, cannot recover under a bystander theory.

Moreover, when the source of injury is a product, the plaintiff must prove she perceived the product's role in causing the injury.

Plaintiffs here presented no evidence the girls perceived their mother's injury at the moment it happened, or that they knew or suspected Sunbeam's heater had caused the injury. Ava, who was three years old at

the time of the fire, did not testify. The two older girls testified, but neither supplied the evidence essential to recover as a bystander.

Nor did any other witness supply the essential evidence. To the contrary, the evidence showed that Mr. Shinedling quickly whisked the girls from their bedroom to the RV parked in the driveway, and from there to their neighbor's house. They later learned about their mother's demise. Though the exact time when they learned about it, and the source of their information, is unclear on the record, Mr. Shinedling himself did not learn about his wife's fate until after he and his daughters left the neighbor's house, when the girls were being placed in an ambulance. No evidence suggests the girls learned about it any sooner than their father.

On these facts, the district court erred by denying Sunbeam's motion for judgment as a matter of law on the girls' claims for emotional distress under a bystander theory, which account for $26,880,000 of the judgment.

3. *The girls' emotional distress awards are excessive and should be reversed or remitted.* This Court may reverse a jury's determination of the amount of damages when the amount is grossly excessive or when the evidence does not support the amount awarded.

The jury here awarded each girl $3,525,000 for the loss of her mother. Sunbeam does not challenge those awards as excessive.

But the jury further awarded the girls $38,080,000 ($12,070,000 to Addison, $12,580,000 to Alexia, and $13,430,000 to Ava) for emotional distress under the direct victim and bystander theories. These emotional distress awards are grossly excessive and not supported by evidence. They can only be explained as the product of the jury's sympathy for the girls, which is an impermissible basis for a verdict under California law.

With no guidelines to assist them, and no economic damages to serve as benchmarks, the jurors faced two near-impossible tasks. First, they had to distinguish and separately quantify the girls' claimed distress as direct (though physically uninjured) victims, their claimed distress as bystanders, and the intangible loss of their mother's care and companionship. Second, the jurors had to distinguish the girls' grief over the loss of their mother (not compensable) from their grief over being exposed to the fire (compensable), a task made particularly difficult because plaintiffs and their expert blurred the distinction.

The difficulty of the jury's task was compounded by plaintiffs' evidentiary shortcomings. As noted above, the damages awarded under

the bystander theory find no evidentiary support. No evidence supported a finding that the girls perceived their mother's injury, or the heater's role in causing the injury, when it happened. Plaintiffs did present evidence that the fire caused them distress (which we summarize in Part III of this brief), but the Court will see that this evidence does not justify the astronomical amounts the jury awarded.

This is a sad case. Plaintiffs suffered real loss, and the jury was understandably sympathetic. But "[d]amages must, in all cases, be reasonable . . . ." Cal. Civ. Code § 3359 (West 2016). With no meaningful guidelines to limit their emotional distress awards, the jury improperly allowed their sympathy to determine the verdicts. The jury's emotional distress awards dwarf the $3,525,000 each girl received for the loss of her mother. The emotional distress awards are grossly excessive and unsupported by evidence. They cannot stand.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DENYING SUNBEAM'S MOTION FOR JUDGMENT AS A MATTER OF LAW. SUNBEAM REPEATEDLY WARNED ABOUT THE FIRE RISK. HAD THE WARNINGS BEEN HEEDED, NO FIRE WOULD HAVE STARTED.

A. The court interpreted the verdict to find Sunbeam liable for failing to warn but not for defective design.

The district court instructed the jury on two design defect claims (negligence and strict liability), two failure-to-warn claims (negligence and strict liability), and a negligent recall claim derivative of other negligence claims. (2 ER 38-46; 3 ER 412 to 412-G.)

The jury returned apparently inconsistent verdicts on plaintiffs' two design defect claims. Specifically, in resolving the strict liability design defect claim, the jury found that the heater's design was *not* a substantial factor in causing harm. (2 ER 48:2-5.) Yet in resolving the negligent design claim, the jury found Sunbeam's negligence in designing the heater *was* a substantial factor in causing harm. (2 ER 49:11-19.)

Sunbeam requested a new trial because of the inconsistent verdicts. (2 ER 90-91.) "[T]he jury was instructed the same way on causation for both the strict liability and negligence claims. The jury's finding in strict liability that the alleged defects were *not* a substantial factor in Plaintiffs'

damages cannot be reconciled with its finding in negligence that the same defects did cause Plaintiffs' damages." (2 ER 91:1-5 (footnotes omitted).)

The district court recognized that, in resolving plaintiffs' strict liability design defect claim, the jury found that any defect in the heater's design did *not* cause the fire. (1 ER 11:8-20.) To reconcile that finding with the jury's finding that Sunbeam's negligent design *did* cause harm to plaintiffs, the court cited evidence that, but for its negligent product design process, Sunbeam would have recognized the importance of warning consumers not to operate the heater while sleeping:

> The jury's findings on negligent design are also straightforwardly reconcilable. The first question asked the jury whether Sunbeam was negligent in designing the heater. The jury found that it was and it had ample reason to do so. Evidence was presented at trial that Sunbeam wholly failed to perform important safety testing of the radiant heater, that it neglected to keep records of incidents, including injuries and property damage involving the heater, and that it failed to abide by the design hierarchy that would have generated sufficient warnings of the dangers caused by using the heater while sleeping.
>
> The jury concluded that each or all of these failures constituted negligence on Sunbeam's part. The jury then could have concluded that these failures were a substantial factor in causing the harm to plaintiffs. Specifically, had Sunbeam conducted an adequate and thorough design process, *it would*

> *have realized the importance of warning the consumer not to use the radiant heater while sleeping* as explicitly recommended by the CPSC.

(1 ER 11:21-12:14) (emphasis added).

The court thus interpreted the jury's negligent design verdict as a failure-to-warn verdict. That is, because its design process was negligent, Sunbeam failed to warn consumers not to operate the heater while sleeping, and that failure could have caused plaintiffs' harm.

As reconciled by the district court, the jury's verdicts contain no finding that any defect in the heater's *design* caused harm to plaintiffs. Consequently, the judgment must stand or fall based on plaintiffs' failure-to-warn theories. As we next explain, those theories fail as a matter of law.[5]

[5] Plaintiffs have not cross-appealed and thus may not challenge the district court's reconciliation of the verdict. In any event, unless reconciled, the inconsistent verdict itself would require a complete new trial. *See Toner v. Lederle Labs*, 828 F.2d 510, 512 (9th Cir. 1987).

B. Sunbeam's warnings were adequate as a matter of law.

1. Issue and standard of review

In its motion for judgment as a matter of law, Sunbeam argued the multiple warnings that accompanied the Holmes heater were adequate as a matter of law. (2 ER 103, 111-22.) The district court denied the motion. (1 ER 19:11-13, 20.) That was error.

The Court reviews de novo an order denying a motion for judgment as a matter of law. *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1005 (9th Cir. 2004). Judgment as a matter of law is appropriate when a party has been fully heard on an issue and the evidence does not provide a sufficient basis for a reasonable jury to find for that party. *Id.*

2. Courts in California and around the nation have held that manufacturers are entitled to judgment as a matter of law on failure-to-warn claims when the evidence shows they furnished adequate warnings alerting users to possible dangers.

"[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger." *Aguayo v. Crompton & Knowles Corp.*, 183 Cal. App. 3d 1032, 1042 (1986). "[W]hen a sufficient warning is given, 'the seller may reasonably assume that it will be read and heeded; and a product bearing

such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.'" *Johnson v. Am. Standard, Inc.,* 43 Cal. 4th 56, 65 (2008) (citation omitted).

In other words, a manufacturer cannot be liable on a failure-to-warn theory when the manufacturer actually gave a warning, compliance with which would have prevented the accident. *Oakes v. E. I. Du Pont de Nemours & Co.*, 272 Cal. App. 2d 645, 649 (1969) ("[W]here a specific manner of use or caution is prescribed but not complied with, no liability will attach."); *accord, e.g., Cansler v. Grove Mfg. Co.*, 826 F.2d 1507, 1511 (6th Cir. 1987) (reversing judgment for plaintiff after jury trial on failure-to-warn theory and ordering judgment for manufacturer based in part on expert testimony that, had the plaintiff complied with the warnings given, he would not have been injured); *Quattlebaum v. Hy-Reach Equip. Inc.*, 453 So. 2d 578, 586 (La. Ct. App. 1984) ("An adequate warning is one which, if followed, would make the product safe for the user, that is, had the injured person complied with the warning, there would have been no accident.").

Though the adequacy of a warning is typically a question of fact, it can be determined as a matter of law under certain circumstances.

LeBeau v. Roxane Labs., Inc., No. D039956, 2003 WL 21054640, at *21 n.30 (Cal. Ct. App. May 12, 2003) ("[T]he issue of the adequacy of a warning may properly be determined as a matter of law on summary judgment."); *Temple v. Velcro USA, Inc.*, 148 Cal. App. 3d 1090, 1095 (1983) (affirming summary judgment for manufacturer on failure-to-warn claim where "[t]he warning was very clear, understandable and completely unambiguous" and "[i]t forcefully brought home the intended message").

Indeed, in *Oswalt v. Resolute Industries, Inc.*, 642 F.3d 856 (9th Cir. 2011), this Court affirmed a summary judgment for a manufacturer in a failure-to-warn case on the ground the warnings were legally adequate. A boat owner hired Resolute to repair a heater, and Resolute's employee neglected to disconnect the power to the heater before removing the burner unit from the heater. *Id.* at 859. The power flowing to the burner unit enabled the unit to emit a flame, which resulted in a fire on the boat. *Id.* The boat owner sued Resolute, which in turn filed a third-party complaint against the heater's manufacturer for products liability. Resolute contended "the warnings on the heater and the instructions in its user's manual were inadequate to inform the user of the proper means of

disconnecting power to the unit before repair." *Id.* at 860. The district court granted summary judgment for the manufacturer. *Id.* at 861.

This Court affirmed: "Resolute failed to establish a genuine issue that the heater's warnings and instructions were inadequate." *Id.* The Court noted that "a warning on the outside of the burner unit advised the user to '[d]isconnect the current before opening . . . .'" *Id.* at 862. The Court also quoted the heater repair manual's instructions for "Removing the burner unit," which if followed would have disconnected the power to the unit and prevented the fire. *Id.* "Thus, read together with the warning on the outside of the burner unit, the manual advised [the employee] to disconnect the power before removing the burner unit, and provided for disconnection of the power, . . . in the process of removing the burner unit." *Id.*

Similarly, in *Farias v. Mr. Heater, Inc.*, 684 F.3d 1231 (11th Cir. 2012), the plaintiff alleged the manufacturer of a propane gas portable heater failed to adequately warn that the heater should not be used indoors. The plaintiff used two heaters indoors and neglected to close the valve on one of the gas tanks before going to sleep. The gas ignited and

her home caught fire. *Id.* at 1233. The district court granted summary judgment for the manufacturer. *Id.*

On appeal, the plaintiff "argue[d] that the district court erred by resolving as a matter of law, rather than leaving for the jury's determination, the question of the adequacy of the warnings and instructions provided with the propane gas heaters." *Id.* The manufacturer responded that its warnings were adequate as a matter of law, thus the district court correctly resolved the question without submitting it to a jury. *Id.* at 1233-34.

The Eleventh Circuit, applying Florida law (but discussing principles common to California law), agreed with the manufacturer and affirmed the summary judgment. The court explained that "the question of the adequacy of the warnings accompanying the . . . propane gas heater can properly be resolved as a matter of law so long as the warnings are objectively accurate, clear, and unambiguous." *Id.* at 1234. The court found the heater's warnings were adequate as a matter of law because they repeatedly informed the consumer "of the 'apparent potential harmful consequences' of the indoor use of the . . . propane gas heater, including the risk of fire." *Id.* at 1234-35 (citation omitted). After quoting numerous

warnings contained in the heater's instruction manual, the court concluded:

> The warnings . . . adequately convey the message that misuse of the heater runs a serious risk of not only fire, but explosions, asphyxiation, carbon monoxide poisoning, electrical shock, and personal injury, loss of life and property damage. Those warnings are provided in bold and capital letters and contain the headings "WARNING." We find these warnings to be "of such intensity as to cause a reasonable man to exercise for his own safety caution commensurate with the potential danger" of fire that occurred due to Farias's misuse of the heater.

Id. at 1236 (citation omitted).

Another warning was deemed adequate as a matter of law in *Oza v. Sinatra*, 575 N.Y.S.2d 540 (App. Div. 1991). There, an electric space heater ignited the decedent's gasoline-soaked clothes when he came close to the heater. *Id*. at 542. The decedent's representatives sued the heater's manufacturer for wrongful death on a failure-to-warn theory. *Id*. The following warning was "emblazoned on the space heater[ ] in white letters on a black background: 'CAUTION: SOURCE OF POSSIBLE IGNITION. HIGH TEMPERATURE. KEEP COMBUSTIBLE MATERIAL AWAY FROM FRONT OF HEATER.'" *Id*. The district court denied the manufacturer's motion for summary judgment. *Id*. at 541.

The appellate court reversed and ordered summary judgment for the manufacturer on the ground, among others, that the warning was adequate as a matter of law: "Cleary, this warning was adequate to alert a consumer to any risks or hazards inherent in the product that are related to its intended and reasonably foreseeable use as a room space heater." *Id.* at 542; *see Yarbrough v. Sears, Roebuck & Co.*, 628 So. 2d 478, 481-82 (Ala. 1993) (affirming summary judgment for heater manufacturer in failure-to-warn case based on heater-caused fire, where owner's manual, safety tips brochure, labels, decals, instructions, and hang tag alerted consumer to risk of fire from using gasoline, instead of kerosene, as fuel: "These warnings, included with the kerosene heater, were specific, comprehensive, and detailed in notifying potential consumers of the possibility of the danger associated with the use of gasoline or gasoline-contaminated kerosene as fuel for the heater.").

3. Sunbeam issued multiple warnings about the risk of fire. If heeded, the warnings would have prevented the fire in the Shinedlings' home.

Multiple and prominent warnings accompanied the Holmes heater. Those warnings accurately, clearly, and unambiguously alerted plaintiffs

to the risk of fire if clothing came within three feet of the front of the heater while it was operating.

First, the following warning appeared on the front base of the heater, in both English and Spanish: "**WARNING:** Risk of Fire – Keep combustible material such as furniture, papers, clothes, and curtains at least 3 feet (0.9 m) from the front of the heater and away from the sides and rear." (3 ER 428.)

Second, a tag attached to the heater's power cord displayed following warning (the first line of the warning was printed in large white letters on a black background):

> **WARNING—TO REDUCE THE RISK OF FIRE:**
>
> 1) Do not place any objects such as furniture, papers, clothes, and curtains closer than 3 feet (0.9 m) to the front of the heater and keep them away from the sides and rear when the heater is plugged in.
>
> 2) Do not place the heater near a bed because objects such as pillows or blankets can fall off the bed and be ignited by the heater.

(3 ER 431; *see* 2 ER 237, 239.) The cord tag further instructed the user: "**DO NOT REMOVE THIS TAG!**" (3 ER 431.)

Third, the instruction manual that accompanied the heater included the following warnings:

> **PLEASE READ AND SAVE THESE IMPORTANT SAFETY INSTRUCTIONS**
>
> When using electrical appliances, basic safety precautions should always be followed to reduce the risk of fire, electric shock, and injury to persons, including the following:
>
> . . . .
>
> 3. The heater is hot when in use. To avoid burns, DO NOT let bare skin touch hot surfaces. If provided, use handles when moving this heater. Keep combustible materials, such as furniture, pillows, bedding, papers, clothes, and curtains at least 3 ft (0.9 m) from the front of the heater and keep them away from the sides and rear.
>
> . . . .
>
> 6. Extreme caution is necessary when any heater is used by or near children or invalids, and whenever the heater is left operating and unattended.

(3 ER 434; *see* 3 ER 312.)

Mr. Shinedling acknowledged that he read and understood these warnings. (2 ER 272; 3 ER 308-12.) He thus understood that the heater posed a fire hazard; that clothing and other combustible materials should always be kept at least three feet away from the front of the heater; that the heater should not be placed near a bed; and that "[e]xtreme caution" was necessary "whenever the heater [was] left operating and unattended." (3 ER 434, at ¶ 6.)

The parties agreed that the fire started because the heater ignited combustible clothing that was on the floor within three feet of the front of the operating heater. (2 ER 144:24-145:2, 222:12-13; 3 ER 315:23-316:1.) Indeed, plaintiff's expert opined that the clothing was *inches* away from the front of the heater. (2 ER 244:24-25.) Sunbeam warned against *that very risk*—three times. (2 ER 239; 3 ER 313, 428, 431, 434; *see* 2 ER 237.)

It is undisputed that, had the multiple warnings been heeded, the fire would not have started:

> Q. If this heater was used in accordance with the warnings and instructions, was it possible for this fire to have occurred?
>
> A. No. This fire could not have occurred if it was used in accordance with its instructions and warnings.
>
> Q. Based upon your review of the deposition testimony of the other experts in the case, including plaintiffs' experts as well as their expert report, do they agree with that opinion as well?
>
> A. Yes, they do.

(3 ER 404:3-12 (testimony of Sunbeam's electrical engineering expert John D. Loud); *accord* 2 ER 251:6-10 (plaintiff's expert Joseph Romig agreeing that "if the combustibles had not been within three feet of the heater, this fire would not have occurred").

But the warnings were not heeded; clothing came within inches from the front of the operating heater, and the heater ignited the clothing:

> Q. Now, you would agree with me that -- from everything that we've heard, that apparently combustibles ignited that were within inches of the heater; correct?
>
> A Yes.
>
> Q Okay. So you would agree with me that that warning and instruction was not -- was not complied with because combustible materials ignited within that range, within that area?
>
> A Yes.

(3 ER 315:23-316:6 (testimony of Mr. Shinedling).)

In addition, plaintiffs' electrical engineering expert agreed that Mr. Shinedling was not exercising "'[e]xtreme caution'" when he left the heater "'operating and unattended'" while he and his family slept. (*See* 2 ER 238:4-18 (testimony of John Palmer).)

In short, Sunbeam's multiple warnings were adequate as a matter of law. Sunbeam anticipated and warned about the very risk that led to the fire. Yet its warnings were not heeded. Had they been heeded, the fire would not have occurred. In light of these undisputed facts, plaintiffs' failure-to-warn theories (the only viable theories after the district court's reconciliation of the inconsistent verdict) fail.

C. Plaintiffs' counter-arguments that Sunbeam was required to give additional specific warnings have no merit.

1. No separate sleeping warning was required.

At trial, plaintiffs presented evidence that in 2004, the Consumer Product Safety Commission issued "safety tips" advising consumers "[n]ever leave a space heater on when you go to sleep," and "[n]ever place a space heater close to any sleeping person." (3 ER 423-24; *see* 2 ER 262:25-263:8; 3 ER 406:16-18, 407:3-13). Citing this evidence, plaintiffs argued the multiple warnings Sunbeam gave were inadequate because none included a specific warning not to use the heater while sleeping. (2 ER 233:3-9, 234:20-25, 262:25-263:19.) The district court accepted this argument when it denied Sunbeam's motion for judgment as a matter of law. (1 ER 12:7-14.) But plaintiffs' argument was legally unsound, and the district court erred by accepting it.

The law does not require manufacturers to warn of every iteration of every risk—that "would place an onerous burden on them and "'would invite mass consumer disregard and ultimate contempt for the warning process.'"" *Johnson*, 43 Cal. 4th at 70 (citations omitted). The legal standard is whether the warning actually given was *adequate*, *see supra* pages 24-30, not whether, with the benefit of hindsight, a different

warning might have been better. "Product warnings and instructions can rarely communicate all potentially relevant information, and the ability of a plaintiff to imagine a hypothetical better warning in the aftermath of an accident does not establish that the warning actually accompanying the product was inadequate." Restatement (Third) of Torts: Products Liability § 2 cmt. i (Am. Law Inst. 1998).

The warnings Sunbeam gave were more than adequate because they fully informed Mr. Shinedling of the fire hazard and, had they been heeded, the heater would have operated safely through the night and no fire would have occurred. Evidence that another, different warning, if given and heeded, *also* would have prevented the fire does not justify a finding that the warnings actually given were inadequate.

2. No separate shut-off switch warning was required.

Plaintiffs also built an argument based on the instruction manual's description of the heater's automatic safety shut-off switch. The shut-off switch was designed to shut off the heater when its *internal* temperature reached a dangerous level, thereby preventing the heater itself from overheating. (3 ER 397:3-23.) Because the shut-off switch was not designed to detect and did not detect the temperature of materials *outside*

the heater (2 ER 260:23-261:4; 3 ER 405:18-406:7), the switch would not necessarily shut off the heater when materials in the surrounding room reached ignition temperatures (2 ER 257:13-258:3, 258:14-20, 259:8-13; 3 ER 398:14-25).

The instruction manual described the shut-off switch as follows:

> **AUTO SAFETY SHUT-OFF WITH INSTANT TIP-OVER PROTECTION**
>
> This heater is equipped with a patented, technologically-advanced safety system that requires the user to reset the heater if there is a potential overheat situation. When a potential overheat temperature is reached, the system will automatically shut the heater off. It can only resume operation when the user resets the unit.

(3 ER 434.)

Plaintiffs presented no evidence that the Holmes heater itself overheated, or that the shut-off switch failed to operate as designed. On the contrary, as previously noted, the parties agreed the fire resulted from combustion of clothing in front of the heater.

Plaintiffs nevertheless faulted Sunbeam for not expressly warning that the shut-off switch might not shut off the heater when materials outside the heater reached ignition temperatures. (2 ER 221:18-24, 227:5-

14, 256:8-22, 257:13-25.) This argument cannot support the judgment for two reasons.

First, the jury found that the heater's design, which included the shut-off switch, *did not cause* plaintiffs' harm. (2 ER 47-48.) It follows that any deficiency in the warnings about the shut-off switch likewise could not have caused plaintiffs' harm.

Second, the user was repeatedly warned not to allow clothing or other combustibles to come within three feet of the front of the heater—*because of the risk of fire*. Sunbeam had no duty to add that, if the consumer failed to heed that warning, the consumer could not rely on the shut-off switch to *eliminate* the risk of fire. No reasonable consumer, reading Sunbeam's warning to keep combustibles away from the front of the heater, could have believed that he could disregard that warning because the heater itself, through the shut-off switch, would somehow prevent the clothing from igniting.

II. THE DISTRICT COURT ERRED BY DENYING SUNBEAM'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE GIRLS' CLAIMS OF EMOTIONAL DISTRESS AS BYSTANDERS.

A. The legal requirements for recovering bystander damages are strictly enforced.

1. The plaintiff must prove she perceived her relative's injury when it happened.

If this Court does not order entry of judgment for Sunbeam for the reasons discussed in Part I above, the Court should at least strike from the judgment the damages awarded to the three girls for emotional distress allegedly suffered as bystanders.

A plaintiff not physically harmed by a defendant's conduct may recover damages for the emotional distress of witnessing serious harm to a close relative from the defendant's conduct. *See, e.g., Dillon v. Legg*, 68 Cal. 2d 728 (1968). But recovery under this bystander theory is limited. The plaintiff must prove she "(1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." *Thing v. La Chusa*, 48 Cal. 3d 644, 647 (1989).

These prerequisites to recovery are strictly enforced. In *Thing*, for example, the defendant's vehicle struck and injured a boy. *Id*. at 647. The boy's mother learned about the accident, rushed to the scene, found him bleeding and unconscious, and believed he was dead. *Id*. Though the mother's emotional distress was no doubt real, the Supreme Court disallowed recovery of damages for emotional distress under a bystander theory. The court explained that, although the mother was nearby when the defendant's vehicle struck her child, she did not actually see or hear the injury when it occurred; she learned about it from her daughter. *Id.* at 647-48.

Likewise, in *Bird v. Saenz*, 28 Cal. 4th 910 (2002), the Supreme Court disallowed recovery of bystander damages to a hospital patient's adult daughter, who was in the hospital's waiting room when doctors negligently injured her mother in the operating room. The daughter did not see or hear the doctors injuring her mother; the daughter learned about the injury from another doctor. *Id*. at 916. Though the daughter "saw some of the injurious consequences" of the negligence when the doctors rushed the mother from the operating room to another room in the hospital, *id*., those perceptions did not satisfy the contemporaneous

awareness requirement for recovery established in *Thing*, *id.* at 921-22. The daughter could not recover damages for emotional distress under the bystander theory because she "had no sensory perception whatsoever of the [injury to her mother] at the time it occurred." *Id.* at 917.

Both *Thing* and *Bird* establish that, to recover damages under a bystander theory, the plaintiff must show she was contemporaneously aware that the defendant was causing injury to her relative. That is, the plaintiff must prove she perceived—through her senses, not through her imagination or mental imagery—the injury inflicted by the defendant at the moment it occurred. *Wilks v. Hom*, 2 Cal. App. 4th 1264, 1271 (1992) (plaintiff must be "sensorially aware" her relative is suffering injury); *see Scherr v. Hilton Hotels Corp.*, 168 Cal. App. 3d 908, 910 (1985) (denying recovery under bystander theory to wife who watched live news coverage of hotel fire and knew her husband was in the hotel but did not perceive husband's injury; to recover, plaintiff must prove she "received a sudden and severe shock *by* actually and contemporaneously witnessing *not just the fire but the infliction of injuries* upon her husband") ("What the *Dillon* court tried to do was recognize the severe and sudden shock that

undoubtedly accompanies the *perception* of the infliction of traumatic physical injuries upon a loved one.") (emphases added and omitted).

Accordingly, proof that the plaintiff learned of the injury after the fact, even just "moments later," and mentally reconstructed what must have happened is *not* sufficient to support damages under a bystander theory. *Bird*, 28 Cal. 4th at 917 n.3; *see Thing*, 48 Cal. 3d at 657, 668 (disapproving *Nazaroff v. Superior Court*, 80 Cal. App. 3d 553 (1978), in which the court had permitted a mother to seek damages under a bystander theory when she did not perceive her child's injury when it occurred but came to the scene moments later and "mentally reconstructed" what must have happened); *Ra v. Superior Court*, 154 Cal. App. 4th 142, 144, 149-53 (2007) (denying recovery of bystander damages to wife of store patron who was struck by falling sign; though wife was present at the scene, heard the sign fall, and immediately believed her husband "more likely than not" had been struck, she did not perceive the injury when it occurred but only moments later, when she turned and saw her injured husband).[6]

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[6] In 1992, this Court affirmed a judgment awarding bystander damages to a woman who returned home after a shopping trip to find her home in (continued...)

2. Additionally, in a products liability case, the plaintiff must prove she contemporaneously knew the defendant's product was causing her relative's injury.

A plaintiff seeking to recover damages under a bystander theory must show not only that she suffered a sudden and severe shock from perceiving the injury at the moment it occurred, *Scherr*, 168 Cal. App. 3d at 910, but also that she perceived *the defendant's* link to the injury. *See Golstein v. Superior Court*, 223 Cal. App. 3d 1415, 1427 (1990) (holding that to recover damages under bystander theory, plaintiff must "experience a contemporaneous sensory awareness of *the causal connection* between the negligent conduct and the resulting injury") (emphasis added); *cf. Ochoa v. Superior Court*, 39 Cal. 3d 159, 170 (1985) ("[W]hen there is observation of the defendant's conduct and the child's injury *and*

(...continued)
flames and knew her husband and children were inside the home. *In re Air Crash Disaster Near Cerritos, California, On Aug. 31, 1986*, 967 F.2d 1421, 1425 (9th Cir. 1992). But as explained above, California courts require the plaintiff to prove she actually perceived the injury to her relative, not merely that she could mentally picture the injury. This Court need not follow a prior circuit decision applying California law when intervening developments in California law show that the prior decision was wrong. *See In re Watts,* 298 F.3d 1077, 1078-79 (9th Cir. 2002). The decisions in *Bird* and *Ra* show that this Court's 1992 decision was wrong.

contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child, recovery is permitted.") (emphasis added).

This requirement applies with particular force in products liability actions. For example, in *Fortman v. Förvaltningsbolaget Insulan AB*, 212 Cal. App. 4th 830 (2013), the plaintiff and her brother were scuba diving when the brother experienced difficulty breathing. The plaintiff observed him in distress and assumed he was having a heart attack. She helped him to the surface, where he died. An investigation later revealed that scuba gear manufactured by the defendant had malfunctioned in a way that blocked the brother's air supply. *Id*. at 832-33.

The plaintiff sued the manufacturer and sought damages under a bystander theory for the distress of witnessing her brother's death. The trial court granted summary judgment for the manufacturer. *Id*. at 834.

The court of appeal affirmed. Although the plaintiff had been present at the scene and had witnessed her brother's injury at the moment it occurred, the court disallowed damages under a bystander theory because she "did not have a contemporaneous, understanding awareness *that the company's defective product was causing her brother's injury*." *Id*. at 843 (emphasis added). The court emphasized that "the plaintiff must

have a contemporaneous awareness of *the causal connection between the defendant's product* as causing harm *and the resulting injury* to the close relative." *Id.* at 844 (emphases added); *accord Monigan v. Nat'l Presto Indus., Inc.*, No. 12-3698 SI, 2013 WL 6662319, at *6 (N.D. Cal. Dec. 17, 2013) (granting summary judgment for defendant manufacturer where plaintiff's sleeping wife heard husband scream, ran to kitchen, and discovered he had been burned by hot oil from defendant's product, but wife was not aware at the moment of husband's injury that defendant's product was the cause).

In sum, to recover bystander damages in this products liability action, the girls were required to prove they suffered a sudden and severe shock from contemporaneously perceiving their mother's injury and knew that Sunbeam's heater was causing the injury. As we explain below, their proof fell short in both respects.

B. The girls did not satisfy the legal requirements for recovering bystander damages.

1. Plaintiffs presented no evidence that the girls suffered a sudden and severe shock from perceiving their mother's injury when it occurred.

Sunbeam showed it was entitled to judgment, under Fed. R. Civ. P. 50, on the girls' claims of bystander damages because they failed to prove they were contemporaneously aware their mother was perishing in the fire. (2 ER 126-30.) The district court rejected Sunbeam's argument. (1 ER 18-20.) That was error.[7]

The evidence at trial, viewed most favorably to plaintiffs, established that, after discovering the fire, Mr. Shinedling quickly removed his daughters from the home and placed them in an RV parked in the front driveway. (2 ER 283-84; 3 ER 330-333, 334:10-13, 383-87; *see* 3 ER 447.) There is no evidence the girls could see the master bedroom (or any part of the house) from the RV. The girls were screaming. (2 ER 285:25.) They wanted to know where their mother was. (2 ER 285:19-21.) To give the girls hope and to distract them, Mr. Shinedling reassured them "[t]hat mom is going to meet us in the back." (2 ER 285:17-18.) Thus, up to that

[7] The district court's ruling is reviewed de novo. *Hangarter*, 373 F.3d at 1005.

point, the girls had not seen their mother in peril and were reassured she was alive.

The girls learned of their mother's fate "a little bit later," after they left the neighbor's house with family friend Ms. Lutz. (2 ER 289:10-14.) The precise time when each girl learned what happened to her mother, and the source of that information, is unclear from the record. Mr. Shinedling testified *he* first learned about his wife's fate after the girls were placed in the ambulance. (2 ER 289:21-290:2; 3 ER 343:21-24.)

Mr. Shinedling's recollection was confirmed by his brother-in-law, Greg Lomenick, the first family member to arrive at the scene. (3 ER 361:15.) On arriving, Mr. Lomenick saw the two older girls in the ambulance. (3 ER 362:12-14.) Mr. Lomenick learned from the firemen at the scene that Mrs. Shinedling's body had been found in the house. (3 ER 362:23-25.) Mr. Lomenick then informed Mr. Shinedling. (3 ER 363:1-5.) Until that moment, Mr. Lomenick could see Mr. Shinedling "still had his hope and you could see it. He had this hope in his eyes that Amy had made it somehow . . . . I had to explain that to him. He asked if I knew, and I told him that I knew." (3 ER 362:21-363:2.)

This undisputed evidence established that the girls did not perceive and could not have perceived the injury to their mother when it was occurring. Rather, they learned about it *after* it occurred—sometime after they were placed in the ambulance. Until then, Mr. Shinedling himself did not know about his wife's death.

The two older girls testified at trial. Neither testified that she suffered a sudden or severe shock from contemporaneously perceiving her mother's injury. (*See* 3 ER 347-53 (testimony of Addison Shinedling); 3 ER 354-60 (testimony of Alexia Shinedling). The youngest girl, Ava, did not testify.

Despite the lack of evidence that the girls perceived their mother's injury when it happened, the district court denied Sunbeam's motion for partial judgment as a matter of law on the issue. The court offered the following explanation:

> Sunbeam asserts there is no evidence in the record that the daughters were aware at the time the fire was going on that their mother was trapped inside the house. That assertion is contrary to the evidence presented at trial. Mr. Shinedling, when asked whether "the fire was still going on *when you and your children learned what happened to your wife and mother*," answered "yes." Mr. Shinedling also added

> that his daughters were screaming wanting to know where their mother was during the fire.
>
> There's no contrary evidence on the record. The jury, therefore, had sufficient evidence to conclude that Mr. Shinedling and his daughters *learned of their mother's tragic death* at the time the fire was still raging in their home.

(1 ER 18-19 (emphases added).)

This ruling inadvertently shows why Sunbeam should prevail. The girls could not have perceived the harm to their mother if, as the district court put it, they "want[ed] to know where their mother was during the fire." (1 ER 19:4-5.)

Moreover, the district court focused on the wrong question—whether "the fire was still raging" when the girls "learned of" their mother's fate. (1 ER 19:8-10.) Under *Thing* and the other authorities discussed in the previous section, a plaintiff who "learns of" a relative's harm, even moments after it occurs, cannot recover damages under a bystander theory. The plaintiff must suffer shock from perceiving the harm *at the moment it occurs*.

No evidence established that the girls perceived their mother's harm when it happened. On the contrary, the evidence establishes they did not learn of their mother's demise until "a little bit later" (2 ER 289:14), no

earlier than when they were placed in the ambulance to be transported from the scene. The girls became aware of their mother's demise not from *perceiving* it when it occurred, but *second-hand*, after the fact, from someone else. The district court so recognized; it referred to the time "'when you [Mr. Shinedling] and your children *learned* what happened to your wife and mother.'" (1 ER 19:1-2) (emphasis added).

Whether the girls learned about the injury moments after it occurred, while the fire was still raging, or sometime later, no recovery is permissible under a bystander theory because they did not personally perceive the injury at the moment it occurred.

In sum, plaintiffs bore the burden of proving the girls suffered sudden and severe shock from perceiving their mother's injury at the moment it happened, but their proof fell short.

2. Plaintiffs presented no evidence the girls contemporaneously knew Sunbeam's heater was responsible for the fire or for their mother's injury.

There is no dispute the girls were present at the scene of the fire. (2 ER 220:5-221:3; 3 ER 410:20-411:7.) But plaintiffs presented no evidence that the two older girls were in the master bedroom, where they could observe the Sunbeam heater, when the fire broke out. The evidence

showed they were sleeping in a bedroom on the opposite side of the house. (2 ER 220, 273, 282-83; 3 ER 304:14-22, 443, 446.) Nor did plaintiffs present any other evidence to support an inference that the two older girls were aware, while present at the scene, that Sunbeam's heater was causing injury to their mother. Indeed, plaintiffs presented no evidence that the two older girls *ever* learned that the heater caused the fire.[8]

The youngest girl, Ava, was sleeping in the master bedroom when the fire started in that room, but Mr. Shinedling quickly whisked her out of the room and ran to retrieve his older daughters. (2 ER 281:25-282:5, 284:5-8; 3 ER 327:13-25 (Mr. Shinedling spoke with his wife "momentarily" before rushing out of the bedroom with Ava).) Plaintiffs presented no evidence that Ava perceived the Holmes heater was the source of the fire or even that she was awake when Mr. Shinedling carried her out of the bedroom. Moreover, Ava was only three years old at the time. (2 ER 220:22-25 (Ava was born July 31, 2007; the fire occurred on January 5,

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[8] The oldest girl, Addison, left the RV and stood in the front door of the house when Mr. Shinedling attempted to reenter the hallway leading to the master bedroom. (2 ER 247:21-23, 287:7-13; 3 ER 337:7-9.) From her vantage point near the front door, Addison could not have seen the master bedroom, where her mother was located. (*See* 3 ER 335:24-336:1, 336:21-337:6, 446 (diagram of house).)

2011). She did not testify at trial, and plaintiffs presented no evidence that she or any three-year-old would have been capable of understanding that Sunbeam's heater caused the fire.[9]

C. The proper remedy for the girls' failure to prove entitlement to bystander damages is to reduce the judgment by $26,880,000.

The jury awarded combined past and future bystander emotional distress damages to the girls in the following amounts: $10,650,000 to Addison; $11,100,000 to Alexia; and $11,850,000 to Ava. (2 ER 52-53.) The court reduced all awards by twenty percent, to account for the fault allocated to Mr. Shinedling, and then entered judgment reflecting the reduced awards. (1 ER 7-8; 3 ER 419:2-8 (plaintiffs' counsel agrees judgment will reflect twenty percent reduction of all damages).) Thus, the lump sum awards to the girls in the judgment necessarily include awards

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[9] This Court evaluates the legal sufficiency of the evidence under applicable law, not under the jury instructions in the case. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 513-14 (1988); *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 182-83 n.5 (9th Cir. 1989). Accordingly, though the district court here instructed the jury that "'Plaintiffs need not have been then [at the time of the fire] aware that Sunbeam Products, Inc., had caused the fire" (3 ER 416:24-25), California law provides otherwise, *see supra* Part II.A.2., so this Court should evaluate the evidence under California law.

of bystander emotional distress damages totaling $8,520,000 to Addison (80% of $10,650,000 = $8,520,000), $8,880,000 to Alexia (80% of $11,100,000 = $8,880,000), and $9,480,000 to Ava (80% of $11,850,000 = $9,480,000).

Plaintiffs failed to prove their entitlement to those damages. This Court should therefore modify the judgment to omit those awards.

III. THE GIRLS' EMOTIONAL DISTRESS DAMAGES ARE GROSSLY EXCESSIVE AND SHOULD BE REMITTED OR RETRIED.

A. Legal standard and standard of review

"Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." Cal. Civ. Code § 3359 (West 2016).

A plaintiff seeking damages for emotional distress must present evidence sufficient to support the jury's award. The jury may not base its award on sympathy. *McGrory v. Pacific Elec. Ry. Co.*, 22 Cal. App. 671, 672-73 (1913). Nor may the jury base its award on an assumption that any person in plaintiff's position with plaintiff's characteristics probably would have suffered distress. *See Watson v. City of San Jose*, 800 F.3d

1135, 1140 n.8 (9th Cir. 2015) ("Although Plaintiffs on appeal argue that damages [for emotional distress] could be inferred based upon the age and vulnerability of the victims, damages must be supported by evidence, not merely inferences based upon characteristics of the victims.").

In its new trial motion, Sunbeam argued that the girls' emotional distress awards were excessive. (2 ER 67, 92-94.) The district court's ruling rejecting that argument (1 ER 13:18-17:15) is reviewed for an abuse of discretion. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 419, 434-38 (1996). "In reviewing the district court's denial of a motion for a new trial for abuse of discretion, we defer to a jury's finding of the appropriate amount of damages unless the award is 'grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork.'" *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 957 (9th Cir. 2011) (citation omitted); *see Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1216 (9th Cir. 1983) (holding this Court may reverse if "the evidence clearly does not support the damage award").

B. The jury generously compensated the girls through the wrongful death awards. Their additional, astronomical emotional distress awards are unjustifiably high.

The jury's wrongful death awards—$3,525,000 to each girl—compensated them for the loss of their mother's care, comfort and companionship. Accordingly, the jury's additional awards of emotional distress damages ($12,070,000 to Addison, $12,580,000 to Alexia, and $13,430,000 to Ava) cannot be justified as compensation for the loss of their mother. Instead, each girl's massive emotional distress award must be evaluated based solely on the evidence of that girl's distress.

Below, we summarize the evidence pertinent to each girl's claim of emotional distress. (For the reasons discussed above, we omit the evidence of the girls' relationships with their mother and the loss of her care, comfort and companionship, for that evidence is pertinent only to the wrongful death damages, which this argument does not challenge.)

Addison Shinedling.

Addison was sixteen at the time of the trial. (2 ER 297:16-17; 3 ER 347:24-25.) Before the fire, she earned mostly As and Bs in school. (2 ER 297:20.) Immediately after fire, her grades dropped: "C's, D's, F's, maybe one A because it was soccer." (2 ER 297:21-22.) But she has been going to

therapy since the fire (2 ER 221:6-7, 297:22) and, according to Mr. Shinedling, "there's been a lot of improvement there" (2 ER 297:23).

Before the fire, Addison was "well behaved." (2 ER 298:12-13.) She did her homework, went to practice, helped with meals and laundry, and helped around the house. (2 ER 298:12-17.) She was permitted to wear eyeliner. (2 ER 298:18-19.)

By the time of trial, according to Mr. Shinedling, "she has a boyfriend, and she thinks she can go out on dates with him whenever. She wears too much makeup. I can't complain about her clothes because honestly that is what her mom would have probably been wearing, too, but I do complain about her clothes. She thinks she's an adult." (2 ER 298:2 7.)

Addison "used to be very outgoing" but now likes to keep to herself. (3 ER 352:10.) She can't tell anyone how she feels; she's "just not happy." (3 ER 352:11-12.) It's hard keeping everything inside. (3 ER 352:18-19.)

Sometimes, she thinks about the night of the fire. She still has nightmares. (3 ER 353:8-11.) When she sees a fire or an ambulance, it reminds her of that night. (3 ER 353:14-15.)

As the oldest child, Addison feels the need to act like a mom to her sisters, which puts pressure on her. (3 ER 350:7-15; *see* 3 ER 356:24-357:12 [Alexia describing Addison].) She also knows to be strong for her father. (3 ER 350:18.) She's "really mature" for her age. (3 ER 350:23-24.)

Plaintiffs' expert psychologist, Dr. Anthony Reading, interviewed Addison and had her "complete[ ] an adolescent form of the MMPI [Minnesota Multiphasic Personality Inventory] and some specific scales." (3 ER 365:15-16.) Addison experienced a change in her sense of herself and her environment, a loss of safety, control and predictability. (3 ER 366:6-10, 368:13-18.) Addison showed "an elevation on the depression scale . . . unusual for a . . . normal teenager." (3 ER 366:23-25.)

Addison is fearful of something happening to her dad, a sign that she was exposed to "unfortunate aberrant events and having enduring changes in how [she] perceive[s] the world and [her] ability to recover a sense of security." (3 ER 370:5-11.)

Dr. Reading's diagnosis for Addison "was PTSD in partial remission and complex persistent bereavement reaction." (3 ER 369:4-5.) She did not display "the full constellation of symptoms" of PTSD, and her condition

"doesn't fulfill criteria for a depressive disorder, but it hasn't resolved for understandable reasons." (3 ER 369:7-16.)

Dr. Reading's prognosis for Addison "depends on her receiving treatment. She will need treatment for some time at intervals in her life. I think she is at risk . . . for relationship issues. . . . I think with treatment it would be improved, but that treatment would have to be available at different junctures in her life." (3 ER 371:9-14.)

Based on the foregoing evidence, the jury awarded Addison $12,070,000 in emotional distress damages. This total comprises direct-victim damages of $80,000 (past) and $1,340,000 (future) plus bystander damages of $600,000 (past) and $10,050,000 (future). (2 ER 52.) The evidence summarized above, while supporting an award in some amount, cannot support $12,070,000 in emotional distress damages.

Alexia Shinedling.

Alexia was thirteen years old at the time of trial. (3 ER 354:13-14.) She has nightmares and bad dreams. (2 ER 295:18-19.) She has nightmares about the fire. (3 ER 358:19-20.) She can't forget; it was a terrible night. (3 ER 358:21-24.) Alexia has undergone therapy since the fire. (2 ER 221:6-7.)

Mr. Shinedling described Alexia's lack of confidence, memory problems, and struggles in sports and in school. (2 ER 295:22-296:17.) When conversation turns to her feelings, Alexia will "shut down, or she'll start talking about something else." (2 ER 296:21-25.) "She pretty much has a hard time facing problems. She would rather avoid it than solve it." (2 ER 296:25-297:2.) Mr. Shinedling did not attribute these issues to the fire.

Alexia "has a small group of friends. Everybody loves her." (2 ER 297:6-7.)

Alexia is doing "okay" in school but finds it difficult to concentrate on homework or get good grades because her mother is not here to push her. (3 ER 355:24-356:9.) Now, her dad tries to push her. (3 ER 355:10-13.)

Alexia worries about her dad; she wants him to be happy. She worries about losing him. (3 ER 359:7-15.) She keeps her feelings inside because she does not like to make other people sad. (3 ER 360:10-13.)

Dr. Reading testified that he interviewed Alexia and administered testing. His diagnosis for Alexia "was the same as for Addison. She is trying similarly to contain her emotions, to deny them, to suppress them.

She's had some greater difficulties at school in terms of academics, but she had some of those prior." (3 ER 372:7-10.)

Dr. Reading's prognosis for Alexia is the same as for Addison, which is discussed above. (3 ER 373:15-18.)

Based on the foregoing evidence, the jury awarded Alexia $12,580,000 in emotional distress damages. This total comprises direct-victim damages of $80,000 (past) and $1,400,000 (future) plus bystander damages of $600,000 (past) and $10,500,000 (future). The evidence summarized above, while perhaps supporting an award in some amount, cannot support $12,580,000 in emotional distress damages under any theory.

Ava Shinedling.

Ava was seven years old at the time of the trial. (2 ER 292:14-15.) She did not testify.

Ava has nightmares. "She's terrified of fire." (2 ER 293:19-23.) She has undergone therapy since the fire. (2 ER 221:6-7.)

Ava "worries a lot" and "needs to be reassured frequently." (2 ER 292:4-8; 3 ER 375:18-21.) Mr. Shinedling has seen Ava check to make sure her father, sister and grandmother are alive by poking their cheeks while

they sleep. (2 ER 291:16-19, 291:23-292:3.) Ava and her sisters are worried Mr. Shinedling "might take off somewhere." (2 ER 294:15-16.) He explained: "They don't have their mom, so I'm all that they have. . . . I need to be here for them." (2 ER 294:17-20.)

Ava's feelings are easily hurt; she is easily embarrassed; she has strong fears and refuses to sleep alone. (2 ER 292:16-24.) "She had . . . an imaginary friend that she would play with." (2 ER 293:6-9.) Once, Mr. Shinedling heard Ava say, "'I wish I was dead.'" She explained she wanted to be with her mother. (2 ER 293:12-18.)

She had to repeat kindergarten because she was behind, which Mr. Shinedling attributed to worry and stress. (2 ER 294:1-5.) She's doing "[a] lot better now" in school. (2 ER 293:24-25.)

Before the fire, three-year-old Ava was "a little sweet thing" who got along well with others. (2 ER 299:14-17.) Now, she is "[v]ery bossy" and "gets in a lot of arguments. (2 ER 299:20-22.)

Family friend Ms. Lutz, however, testified that Ava was "so little" at the time of the fire that Ms. Lutz doesn't "see a difference" in Ava. (3 ER 364:5-6.)

Dr. Reading reported that intrusive dreams or thoughts of fire wake Ava. (3 ER 374:7-10.) "She's very aware of fires." (3 ER 374:9-10.) "Her fears and the content of her concerns certainly . . . go beyond what is normative, and . . . are distinctive and they reflect what happened to her." (3 ER 376:7-9.)

Dr. Reading testified that with all the girls, a formative childhood event can "compromise or distort behavior perception fears," affecting "the ability to form relationships, to feel secure in relationships, and to handle what happens in relationships—loss, separation . . . ." (3 ER 374:22-375:4.) "So we see that very commonly people have difficulty extricating themselves from relationships which are counterproductive, if not worse." (3 ER 375:5-7.) Dr. Reading diagnosed Ava as follows:

> For her I diagnosed another stressor and trauma-related disorder, meaning that I wasn't sure that she fulfilled all of the criteria. It's hard to diagnose PTSD with children because their symptoms are manifested in very different ways in terms of changes in the way they play, fantasy, and such like. But she certainly showed symptoms indicating that there is continuing impact in terms of the symptoms we talked about earlier -- fear of fires and such like, being unsafe.

(3 ER 373:23-374:5.)

Dr. Reading's prognosis for Ava is "probably more guarded due to the younger age. Addison had more foundation with her mother. Ava does not have that, so it's poorer." (3 ER 377:2-4.)

Based on the foregoing evidence, the jury awarded Ava $13,430,000 in emotional distress damages. This total comprises direct-victim damages of $80,000 (past) and $1,500,000 (future) plus bystander damages of $600,000 (past) and $11,250,000 (future). The evidence summarized above, while supporting an award in some amount, cannot support $13,430,000 in emotional distress damages under any theory.

* * *

The jury's awards of emotional distress damages cannot be squared with the evidence summarized above and should therefore be reversed or remitted. *See Gasperini*, 518 U.S. at 433 ("'[I]f it should clearly appear that the jury . . . have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.'") (citation omitted).

For one thing, the jury awarded each girl the identical amount of past direct victim and bystander damages, despite the variation in the evidence of each girl's exposure to the fire and its impact on her. Much of

Mr. Shinedling's anecdotal evidence concerning Addison's and Alexia's current emotional conditions could describe many teenage girls; he did not purport to attribute those conditions to the fire.

Regarding future damages, plaintiffs' expert psychologist testified that Addison's and Alexia's emotional conditions "would be improved" with time, provided treatment is available. (3 ER 371:9-14.) Based on this evidence, the future damage awards should have been *lower*, not many times *higher*, than the past damages. The future damage awards to Ava are particularly inexplicable, given that she was only three years old at the time of the fire, and no evidence suggested she understood the event or its impact. The expert was not even sure that Ava fulfilled all the criteria for a diagnosis of PTSD. (3 ER 373:23-374:5.) His prognosis was guarded. (3 ER 377:2-4.)

Plaintiffs claimed damages for intangible injuries under three different theories: wrongful death; emotional distress under a direct victim theory; and emotional distress under a bystander theory. The jury surely struggled to separately quantify these intangible injuries. The district court itself recognized the difficulty of the jury's task:

> Take one of the daughters. She's got serious mental-health problems because of this. It's very difficult to apportion, okay,

> you have nightmares; you're not sleeping; you're depressed; you're not doing well in school . . . .
>
> Okay. How much is that due to perceiving your mom dying in the fire? How much of that is because you were involved in the fire and you had that direct impact? How much of that is attributable to losing the future love, comfort, companionship [of your mother]? And how much of that is, to that one factor that we talked about [mental anguish, grief and sorrow] that I don't think is recoverable, any of this, just you lost your mom? She's dead, you know. I'm sad.
>
> I'm not sure. I'm not sure how you apportion that and you quantify it.

(2 ER 252:1-15.)

Further complicating the jury's task, plaintiffs and their experts made little effort to distinguish between the damages they claimed under each theory, if such a distinction was even possible. The testimony frequently blurred the lines between the emotional impact on the girls of losing their mother and the emotional impact of the fire on them. (*See*, *e.g.*, 3 ER 367:1-12 (expert testimony that Addison tries "not to think about what happened, but . . . she would end up thinking about her mom every day"; Addison experiences "intrusive thoughts" about her mother, which have "an emotional effect"); 3 ER 353:3-19 (testimony concerning

intermingled memories of the fire and thoughts of mother); 3 ER 358:19-359:6 (same).)

Under these unusual circumstances, duplicative and excessive emotional distress awards were all but inevitable. This Court should reverse the excessive awards or remit them to a reasonable level.

CONCLUSION

For the reasons discussed in Part I, this Court should reverse the judgment and direct the district court to enter judgment as a matter of law in favor of Sunbeam.

If the Court does not direct entry of judgment as a matter of law for Sunbeam, then we request two forms of relief: (a) for the reasons discussed in Part II, the Court should modify the judgment to remove bystander damages of $8,520,000 for Addison Shinedling, $8,880,000 for Alexia Shinedling, and $9,480,000 for Ava Shinedling; and (b) for the reasons discussed in Part III, the Court should order a new trial on, or remit, the amount of each minor plaintiff's emotional distress damages.

September 19, 2016

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ADDENDUM CONTAINING REPRODUCTION OF STATUTES, RULES, REGULATIONS, AND SIMILAR MATERIALS
[Circuit Rule 28-2.7]

TABLE OF CONTENTS

Page

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

28 U.S.C.A. § 1291, 28 USCA § 1291
Current through P.L. 114-219.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

Currentness

<Notes of Decisions for 28 USCA § 1332 are displayed in two separate documents. Notes of Decisions for subdivisions I to X are contained in this document. For Notes of Decisions for subdivisions XI to end, see second document for 28 USCA § 1332.>

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title--

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against

the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of--

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection--

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which--

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

(A)(i) over a class action in which--

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which--

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim--

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which--

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply--

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub.L. 100-702, Title II, §§ 201(a), 202(a), 203(a), 102 Stat. 4646; Oct. 19, 1996, Pub.L. 104-317, Title II, § 205(a), 110 Stat. 3850; Feb. 18, 2005, Pub.L. 109-2, § 4(a), 119 Stat. 9; Pub.L. 112-63, Title I, §§ 101, 102, Dec. 7, 2011, 125 Stat. 758.)

Footnotes

1 So in original. Reference to "16(f)(3)" probably should be preceded by "section".

2 So in original. Probably should be "77p(f)(3)".

28 U.S.C.A. § 1332, 28 USCA § 1332

Current through P.L. 114-219.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 89. District Courts; Removal of Cases from State Courts (Refs & Annos)

28 U.S.C.A. § 1441

§ 1441. Removal of civil actions

Currentness

(a) Generally.--Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal based on diversity of citizenship.--(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Joinder of Federal law claims and State law claims.--(1) If a civil action includes--

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) Actions against foreign States.--Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) Multiparty, multiforum jurisdiction.--(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if--

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) Derivative removal jurisdiction.--The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 937; Oct. 21, 1976, Pub.L. 94-583, § 6, 90 Stat. 2898; June 19, 1986, Pub.L. 99-336, § 3(a), 100 Stat. 637; Nov. 19, 1988, Pub.L. 100-702, Title X, § 1016(a), 102 Stat. 4669; Dec. 1, 1990, Pub.L. 101-650, Title III, § 312, 104 Stat. 5114; Dec. 9, 1991, Pub.L. 102-198, § 4, 105 Stat. 1623; Nov. 2, 2002, Pub.L. 107-273, Div. C, Title I, § 11020(b)(3), 116 Stat. 1827; Pub.L. 112-63, Title I, § 103(a), Dec. 7, 2011, 125 Stat. 759.)

28 U.S.C.A. § 1441, 28 USCA § 1441
Current through P.L. 114-219.

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 50

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

Currentness

(a) Judgment as a Matter of Law.

(1) ***In General.*** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) ***Motion.*** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment--or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged--the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) ***In General.*** If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) ***Effect of a Conditional Ruling.*** Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 27, 1995, effective December 1, 1995; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

Fed. Rules Civ. Proc. Rule 50, 28 U.S.C.A., FRCP Rule 50
Including Amendments Received Through 8-1-16

End of Document

West's Annotated California Codes
Civil Code (Refs & Annos)
Division 4. General Provisions (Refs & Annos)
Part 1. Relief
Title 2. Compensatory Relief
Chapter 2. Measure of Damages
Article 4. General Provisions

West's Ann.Cal.Civ.Code § 3359

§ 3359. Reasonableness of damages

Currentness

Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

Credits
(Enacted in 1872.)

West's Ann. Cal. Civ. Code § 3359, CA CIVIL § 3359
Current with urgency legislation through Chapter 344 of 2016 Reg.Sess., Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

End of Document

STATEMENT OF RELATED CASES

Sunbeam knows of no related cases within the meaning of Circuit Rule 28.2.6.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 32(a)(7)(C)]

☒ 1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- ☒ this brief contains 12,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or
- ☐ this brief uses monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

☒ 2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- ☒ this brief has been prepared in a proportionally spaced typeface using MS-Word in 14-point Century Schoolbook font type, or
- ☐ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

September 19, 2016	s/ Mitchell C. Tilner
Date	Mitchell C. Tilner

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signature: s/ Caryn Shields