Not Reported in Cal.Rptr.2d, 2003 WL 356867 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2003 WL 356867 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 7, California.
Karla Marie FUERST, et al., Plaintiffs and Appellants,
v.
Lorrie TUCCINARDI, Defendant and Respondent.

No. B134560.
(Los Angeles County Super. Ct. Nos. BC173762, BC173763).
Feb. 19, 2003.

After jury acquitted husband of all criminal charges for the stabbing death of his wife, the couple's children brought suit against husband, alleging claims for wrongful death, intentional infliction of emotional distress, and negligent infliction of emotional distress. The Superior Court, Los Angeles County, Super.Ct.Nos.BC173762 and BC173763,Joseph Kalin, J., entered defense verdict, and children appealed. The Court of Appeal, Johnson, J., held that: (1) children's cross-examination of husband properly was limited to new matters husband raised on direct examination; (2) trial court properly refused to provide instructions on wrongful death on negligence theory; and (3) coroner properly was precluded from testifying that the cuts wife received to the palm side of all her fingers were, in his expert opinion, "defensive wounds."

Affirmed.

West Headnotes

[1] Witnesses 410 ⇨275(5)

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k275 Cross-Examination of Party in General
410k275(2) Particular Subjects of Inquiry
410k275(5) k. Limitation to Subjects of Direct Inquiry. Most Cited Cases

Children's cross-examination of husband, who was acquitted of criminal charges for stabbing death of wife, properly was limited to new matters husband raised on direct examination in connection with children's action against husband for wrongful death and emotional distress; children expressly agreed in advance to limitations court imposed on their cross-examination of husband, and the three hours of husband's videotaped deposition, hour long videotape of his police interrogation, plus his live testimony at trial, placed before jury more than enough evidence of every conceivable version of how husband had explained the stabbing.

[2] Appeal and Error 30 ⇨883

30 Appeal and Error
30XVI Review
30XVI(C) Parties Entitled to Allege Error
30k881 Estoppel to Allege Error
30k883 k. Assent to Proceeding. Most Cited Cases

Whether trial court properly limited children's cross-examination of husband, who was acquitted of criminal charges for stabbing death of wife, to new matters husband raised on direct examination, in connection with children's action against husband for wrongful death and emotional distress, was not preserved for review on appeal since children had expressly agreed in advance to the limitations trial court had imposed on their cross-examination of husband.

[3] Death 117 ⇨104(2)

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117 Death
117III Actions for Causing Death
117III(I) Trial
117k104 Instructions
117k104(2) k. Cause of Death and Negligence. Most Cited Cases

Death 117 ⚿105

117 Death
117III Actions for Causing Death
117III(I) Trial
117k105 k. Verdict and Findings. Most Cited Cases

Because couple's children had presented no evidence to suggest that wife's stabbing death was result of negligent act, could not at close of evidence articulate theory for negligent wrongful death, and had essentially abandoned this theory of wrongful death in presenting their case, the trial court properly refused to provide instructions on wrongful death on negligence theory in connection with children's action against husband, who was acquitted of criminal charges for stabbing death of wife, and for these same reasons, it was not error to provide jury a verdict form which omitted negligence theory of wrongful death as option for speculation by jury.

[4] Appeal and Error 30 ⚿1068(3)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)18 Instructions
30k1068 Error Cured by Verdict or Judgment
30k1068(3) k. Appellant Not Entitled to Favorable Determination in Any Event. Most Cited Cases

Any alleged confusion with respect to negligence instructions which were expressly limited to cause of action for negligent infliction of emotional distress to bystanders did not prejudice children in connection with children's action for wrongful death and intentional and negligent infliction of emotional distress against husband, who was acquitted of criminal charges for stabbing death of wife; because jury found husband was not primarily liable for wife's death, there was no legal basis for jury to consider whether husband had secondary liability to children for negligent infliction of emotional distress in any event.

[5] Evidence 157 ⚿359(1)

157 Evidence
157X Documentary Evidence
157X(C) Private Writings and Publications
157k359 Photographs and Other Pictures; Sound Records and Pictures
157k359(1) k. Photographs in General. Most Cited Cases

Photographs of wife's body that police took either at the scene while paramedics rendered medical aid or at the hospital after wife was pronounced dead properly were excluded in connection with children's action for wrongful death and emotional distress against husband, who was acquitted of criminal charges for stabbing death of wife; children presented no evidence any of them present in the house actually saw wife's bloody body, some of photos were duplicative and others were unduly inflammatory, and photos lacked probative value to show either wife's wounds or their likely cause inasmuch as all visible areas of her body in photos were completely covered in blood. West's Ann.Cal.Evid.Code § 352.

[6] Damages 115 ⚿178

115 Damages
115IX Evidence
115k164 Admissibility
115k178 k. Mental Suffering and Emotional Distress. Most Cited Cases

Death 117 ⚿64

117 Death
117III Actions for Causing Death
117III(G) Evidence

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117k59 Admissibility of Evidence
117k64 k. Loss or Injury Resulting from Death. Most Cited Cases

Trial court's evidentiary order limiting description of the cash assets husband controlled after wife's stabbing death to "life savings accumulated over 27 years of marriage" and/or to state the amount was "substantial," instead of admitting evidence of fact that assets totaled approximately $2,800,000, was a reasonable exercise of discretion in connection with children's action for wrongful death and emotional distress against husband, who was acquitted of criminal charges for stabbing death of wife; there was sufficient evidence to convey to jury that husband had sought to control virtually all of couple's cash. West's Ann.Cal.Evid.Code § 352.

[7] Evidence 157 ⚿506

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k506 k. Matters Directly in Issue. Most Cited Cases

Coroner properly was precluded from testifying that the cuts wife received to the palm side of all her fingers were, in his expert opinion, "defensive wounds" in connection with children's action for wrongful death and emotional distress against husband, who was acquitted of criminal charges for stabbing death of wife; coroner's opinion came dangerously close to telling the jury wife received her wounds responding in self-defense, and by extension, telling the jury husband was the aggressor, and this question of who was the initial aggressor was the crucial issue in case, a question of fact reserved exclusively for jury.

[8] Damages 115 ⚿177

115 Damages
115IX Evidence
115k164 Admissibility
115k177 k. Expenses. Most Cited Cases

Death 117 ⚿64

117 Death
117III Actions for Causing Death
117III(G) Evidence
117k59 Admissibility of Evidence
117k64 k. Loss or Injury Resulting from Death. Most Cited Cases

In children's action for wrongful death and emotional distress against husband, who was acquitted of criminal charges for stabbing death of wife, evidence of child's medical expenses, past or future, became irrelevant once the jury found husband not liable for wife's wrongful death, and thus by extension not liable for negligent infliction of emotional distress to bystanders.

[9] Trial 388 ⚿39

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k39 k. Introduction of Documentary and Demonstrative Evidence. Most Cited Cases

Although children alleged that they were deprived of fair trial because trial court did not admit exhibits as evidence until the end of trial, it was trial court's duty and prerogative to control timing and admission of evidence in children's action for wrongful death and emotional distress against husband, who was acquitted of criminal charges for stabbing death of wife, and thus, there was no error; trial was lengthy, and court was concerned about wasting precious time while the jurors and alternates reviewed each of the hundreds of exhibits, and court did not want to waste jurors' time while hearing objections to admissibility of challenged exhibits.

[10] Pretrial Procedure 307A ⚿45

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions

307Ak45 k. Facts Taken as Established or Denial Precluded; Preclusion of Evidence or Witness. Most Cited Cases

With respect to children's action for wrongful death and emotional distress against husband, who was acquitted of criminal charges for stabbing death of wife, it was error for trial court to permit attorney to give his expert opinion regarding legality of his advice to husband, namely that his advice to husband to transfer couple's life savings into account in his name alone for purpose of preventing dissipation of assets was legally acceptable and that it would be legal malpractice for matrimonial lawyer to fail to give client such advice, given that husband had not designated attorney as expert on his expert witness list.

[11] Appeal and Error 30 ⚿1050.1(12)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1050 Prejudicial Effect in General
30k1050.1 Evidence in General
30k1050.1(8) Particular Types of Evidence
30k1050.1(12) k. Opinions and Conclusions. Most Cited Cases

Trial court's error in permitting attorney to give his expert opinion regarding legality of his advice to husband when husband had not designated attorney as expert on his expert witness list was not prejudicial in connection with children's action for wrongful death and emotional distress against husband, who was acquitted of criminal charges for stabbing death of wife; because attorney gave his opinions regarding his own personal advice, any reasonable juror would recognize his likely bias and self-interest in telling jury what he did was legal, and thus, it was unlikely his testimony had impact such testimony might have had had it come from a truly disinterested witness.

[12] Evidence 157 ⚿146

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 k. Tendency to Mislead or Confuse. Most Cited Cases

Evidence 157 ⚿359(5)

157 Evidence
157X Documentary Evidence
157X(C) Private Writings and Publications
157k359 Photographs and Other Pictures: Sound Records and Pictures
157k359(5) k. Sound Records in General. Most Cited Cases

Trial 388 ⚿56

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k56 k. Cumulative Evidence in General. Most Cited Cases

Recordings of telephone conversations between husband and several of his siblings while husband was incarcerated in jail and after husband had consulted with counsel properly were excluded in connection with children's action for wrongful death and emotional distress against husband, who was acquitted of criminal charges for stabbing death of wife; recordings of conversations were cumulative, and court was striking a balance between the children's need for relevant and probative evidence against the risk of impinging on husband's right to remain silent once charged with a crime and counseled to remain silent. West's Ann.Cal.Evid.Code § 352.

[13] Privileged Communications and Confidentiality 311H ⚿323

311H Privileged Communications and Confidentiality
311HV Counselors and Mental Health Professionals

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311Hk323 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(1))

Husband did not put his mental state in issue and, thus, did not waive patient/psychotherapist privilege, and thus, documentary evidence of husband's medical treatments and deposition testimony of his treating psychiatrist properly was excluded in children's action for wrongful death and emotional distress against husband, who was acquitted of criminal charges for stabbing death of wife.

[14] Appeal and Error 30 ⚿230

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k230 k. Necessity of Timely Objection. Most Cited Cases

Children's claim that trial court erred by limiting the time for closing arguments to three and one half hours, equally divided between the parties, was not preserved for appeal since it was not until the next day when the jury had begun their deliberations that children complained the time provided for closing arguments was inadequate with respect to children's action for wrongful death and emotional distress against husband, who was acquitted of criminal charges for stabbing death of wife.

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph Kalin, Judge. Affirmed.Samuel Salmon, Wiezorek, Rice & Dieffenbach and Steven Rice, for Plaintiffs and Appellants.

Leslie H. Abramson, Law Offices of Linda S. Marks, Linda S. Marks, Dunn **Koes** LLP (formerly Robie & Matthai), Pamela E. Dunn and Daniel J. **Koes**, for Defendant and Respondent.

JOHNSON, J.

***1** A jury acquitted the defendant of all criminal charges for the stabbing death of his wife. The couple's four children then brought suit against their father, alleging claims for wrongful death, intentional infliction of emotional distress and negligent infliction of emotional distress. After a several week trial, involving dozens of witnesses and hundreds of exhibits, a civil jury returned a unanimous defense verdict. The children appeal, asserting numerous evidentiary, instructional and other trial errors. We affirm.

FACTS AND PROCEEDINGS BELOW

Defendant and respondent, Lorrie Tuccinardi was married to Karen Tuccinardi for 27 years. It was a second marriage for both. Lorrie [FN1] had two children from a prior marriage. Karen's daughter, plaintiff and appellant, Karla Marie Fuerst, was five years old when Karen and Lorrie married.[FN2] She always called Lorrie "Dad." The children of Lorrie and Karen's marriage are plaintiffs and appellants, Jason, Daniel and Jennifer Tuccinardi.

FN1. To remain consistent with the trial record in this case this opinion will refer to Mr. and Mrs. Tuccinardi by their first names. No disrespect is intended.

FN2. Karla is developmentally disabled with mental capabilities of those of a young child. She did not testify at the civil trial.

After they married Lorrie and Karen purchased a modest home in Torrance, California. As the children arrived, they added a second story to the house. Years later they purchased a second home overlooking a golf course and lake in Palm Desert. All witnesses who knew them agreed Lorrie and Karen had no history of any kind of physical violence or abuse.

Lorrie worked in his family business manufacturing wood products. His father, who had immigrated from Italy, initially made furniture. In later years Lorrie and his brothers, Philip and Louie, expanded the family business into wood bending for such items as skateboards. Karen worked for years

at TRW on top-secret projects and was a much respected and valued employee.

Lorrie and Karen were very close to Karen's parents who lived nearby in Inglewood. Lorrie, Karen and their children socialized almost exclusively with Karen's parents. On two or three occasions Lorrie and Karen invited Lorrie's siblings and spouses for Thanksgiving or Christmas dinner. Otherwise, Lorrie and Karen rarely saw Lorrie's extended family socially.

Shortly after Karen's father died her mother became gravely ill. Karen stayed at her mother's home to care for her for the better part of a year. Lorrie cared for the children and cooked the meals in her absence. As often as possible Lorrie and the children went to Karen's mother's house so they could have meals together as a family.

Lorrie was devastated by his mother-in-law's death. He had considered her his best friend. Sometime thereafter, Lorrie became physically and mentally unwell. As Lorrie explained it, he felt anxious, depressed, lethargic and useless all the time. He started experiencing what he called "panic attacks." He consulted with a psychiatrist who prescribed various medications for anxiety and depression. Lorrie did not find the medication particularly useful. Some drugs were effective for only a short period. Some of the drugs left an unpleasant metallic taste in his mouth and others gave him an upset stomach. On more than one occasion, Lorrie voluntarily checked into, or attempted to check himself into, the hospital for psychiatric treatment.

***2** Apparently, Lorrie complained regularly to his family either about how he was feeling or the problems he was having with his medications. In time, his condition and/or complaining completely alienated his wife and children. They attempted to avoid him. About this time, Karen began sleeping on the couch in the downstairs den. The children came and went as they pleased. Karen told Lorrie she did not think he was doing enough to treat his problems. Lorrie decided to undergo electroshock treatments at his doctor's suggestion. Lorrie had three such treatments. Karen drove Lorrie to the hospital for each session. However, she refused to stay with him despite the doctor's orders Lorrie not be left alone for 24 hours after the treatment. After treatments he would be very weak and suffer uncontrollable shaking. It thus fell to Lorrie's siblings to provide Lorrie's follow-up care. Lorrie's siblings could not understand Karen's cold response and lack of concern for her husband's welfare. They told her as much and became personae non grata in Karen's and the children's lives.

After one particular argument with Lorrie's family members Karen moved to the house she inherited from her mother with Jason and Jennifer. She did not want Lorrie visiting her there and refused to answer or return Lorrie's phone calls. Lorrie was apparently too ill to care for himself and his sisters and brothers permitted him to live with them for the next several months.

While staying at his sister Eileen Longo's house Lorrie attempted suicide by overdosing on her prescription drugs. He was hospitalized and eventually recovered. He told his siblings not to tell Karen or his children he had attempted suicide, fearful they would never let him live with them again if they knew.

Lorrie returned home on June 19, 1996, his 59th birthday. Shortly thereafter, Karen and Jennifer returned to the family home. Karen told Jason she had had it with Lorrie and the next time something happened Lorrie would have to be the one to leave.

In the meantime, Karen had planned a several week trip to Boston to visit her sister. Lorrie believed Karen actions indicated she wanted to leave him, divorce him, or have him committed. He consulted a matrimonial lawyer at his brothers' urging. The lawyer explained the concept of community property and suggested Lorrie transfer his and Karen's life savings to an account in his name alone to prevent dissipation of assets in the event of com-

mitment or divorce proceedings. Lorrie transferred the money into a different account at the same bank in his name alone. Afterward he felt he had made a mistake because he knew it would make Karen even angrier with him. Lorrie gave a power of attorney to his brother Philip and directed him to transfer the money back. [FN3]

> FN3. After Lorrie's arrest Philip placed half the money in a trust account naming the children as beneficiaries.

After Lorrie met with the attorney he and Karen went out to dinner to discuss their future. Lorrie told Karen if she did not want to live with him any more they should just go their separate ways and split everything "50/50." Karen did not respond.

*3 On June 28, 1996, Karen and Lorrie returned home and watched television with Karla after going out to dinner. Jason still lived in his grandparents' house in Inglewood. Daniel was spending the weekend at the family's Palm Dessert house to be near his girlfriend. Jennifer was out with friends. At some point Lorrie and Karla went to their respective bedrooms upstairs. As she had for the past two years, Karen slept on the couch in the den downstairs. Jennifer returned home after midnight with a girlfriend who spent the night.

Lorrie testified he woke up between 3:00 and 4:00 a.m. thinking he was having a "panic attack." He had stomach pains, he had difficulty breathing and was sweating profusely. He felt like he was having a heart attack. He went downstairs to wake Karen so she could take him to the hospital.

What occurred thereafter was the subject of dispute.

According to Lorrie, Karen's death was an accident: Karen fell during a struggle and impaled herself on a knife.

Lorrie testified after he awakened Karen she got up, went through the kitchen to the garage, and returned with a ball-peen hammer. She tried to hit Lorrie with the hammer but he yanked it from her hand.[FN4] Karen got an eight-inch butcher knife from the kitchen and started swinging it at Lorrie. He reflexively put up his hand and the knife cut him. He grabbed Karen's right hand which held the knife and hit her twice on the head with the hammer before he got control of the knife. The hammer blow did not damage her skull but it did cut her skin which caused bleeding. At some point Karen started screaming and yelling for Jennifer to "call 911."

> FN4. This was not the first time Karen had acted violently toward Lorrie. Just the week before Karen hit him with her purse as he followed her down the street. A year or so before she threw an ashtray at him when she tired of listening to Lorrie speak of how he felt about her mother's death.
>
> The autopsy report noted Karen had an enlarged heart and an abnormal thyroid. Based on these findings, microscopic analysis of tissue samples of Karen's thyroid gland, her recent severe weight loss, and evidence of her thinning hair, an endocrinologist opined it was medically probable Karen suffered from hyperthyroidism, a symptom of which is irritability.

According to Lorrie, Karen tried to regain control of the knife by grabbing it with both hands by the blade. During this struggle Karen managed to retake the knife and the two then struggled over the hammer. Karen grabbed the hammer from Lorrie and she threw it over her shoulder. It landed nearby in a small bathroom off the hallway. In the throw, Karen lost her balance and fell. Lorrie, who had been holding on to her, fell on top of her onto the floor. Karen fell on her right side and onto her right hand which held the knife. The weight of their two bodies forced the knife straight through her neck, severing the carotid artery and cutting the jugular vein. The force of the fall left an impression in the right side of her neck, consistent with what was

likely a hilt mark left by the knife handle.

Lorrie pulled himself back onto his knees and saw the knife in Karen's neck. Karen was lying on her right side. He turned Karen's head and pulled the knife out. While still on his knees in the hallway where they fell, Lorrie reached over, opened Jennifer's door, and said "Call Jason. I think I hurt your mom," and closed the door. Through the partially opened door, Jennifer could see her mother's legs from her knees down.

Jennifer and her girlfriend testified they were awakened by Karen's screams and a lot of banging noises outside their bedroom door. Jennifer called 911 as directed, thinking an intruder was in the house. The girls heard a huge bang and then silence until Lorrie told Jennifer to call Jason.

*4 Police officers arrived within minutes. Karla met them at the door. Lorrie told the first officer inside the house, "I did it. It was me. She was going crazy." The officer noted Karen on the floor in the hallway, lying on her right hip with her upper torso lying somewhat flatter to the floor. Officers handcuffed Lorrie and placed him in a squad car outside.

Paramedics arrived and transported Karen to the hospital. The emergency physician probed Karen's neck wound and noted her carotid artery had been entirely severed. Karen had already bled to death from her wounds.

The paramedics' report stated Karen had sustained a "stab wound entering her neck on the right side, approximately a two-inch cut and a small exit wound on the left side of her neck, approximately three quarters of an inch." The emergency room physician similarly opined Karen had sustained a through and through knife wound to the right side of her neck.

A crime scene investigation revealed the blood evidence in the house consisted almost exclusively of a large pool of blood in the carpet directly underneath Karen's neck area. Later expert testimony explained the carotid artery pumps an ounce of blood every three seconds, and had Karen and Lorrie been upright when the stabbing occurred, one would have expected to find sprays of blood on the hallway walls, and on the front of Lorrie's T-shirt. Yet, police investigators collected no such evidence, and police photographs and a police video taken at the scene showed no such blood evidence. The expert also testified if Lorrie held the knife during the stabbing Karen's severed carotid artery would have sprayed blood onto the back of his hand. However, Polaroid pictures taken by police of Lorrie at the scene showed no evidence of blood on the back of either of his hands. The officers recovered the hammer from the bathroom floor. Officers also noted the eight-inch knife was covered in blood up to its hilt.

When officers learned Karen had died, they transported Lorrie to the Torrance police station for questioning. The police interrogation was both videotaped and audiotaped.[FN5] During this interview Lorrie told the officers when he woke up during the night and could not get back to sleep, he took additional doses of medication for his anxiety. Lorrie could not remember much of what he did after that. Lorrie claimed he started "going wierdo, hallucinating or something." He recalled lying in bed and repeatedly stabbing a blue towel. He remembered going downstairs and fighting with his wife, but he did not remember retrieving either a hammer or a knife, and had no recollection of stabbing his wife. He recalled asking Jennifer and Karla to call 911. He told the officers he wanted emergency help because he and Karen were both bleeding.

> FN5. At the children's request the videotape of Lorrie's police interrogation was played for the jury at trial.

Police officers then took Lorrie to the hospital where he received stitches for his hand wound. Once booked at the Los Angeles County jail Lorrie made several telephone calls to his brothers and sisters. Each of his telephone calls was recorded. Ex-

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cerpts from several of these recorded telephone calls were played for the jury at trial at the children's request. In these telephone calls Lorrie makes such statements as, "They say I killed Karen," "it was the knife, and I don't know nothing about it," "Yeah, remember, I don't know nothing about this," "I might have done it," "I don't know. That medication really went to my head," "I don't remember [ ], I took extra medication last night. I don't remember what I did," "I know I'm just telling you, but you know I never said I was ever going to do anything to her, remember."

***5** After posting bail, Lorrie checked into the psychiatric ward of Cedars-Sinai Medical Center and stayed there for over a month. Lorrie testified this treatment helped to restore his health, as well as his memory about the incident.

The children believed Lorrie had deliberately murdered Karen for financial gain based on the evidence he had transferred their parents' life savings into his name alone, and the fact he had "profited" from her death as the sole beneficiary of Karen's will. The children's theory, as suggested to the jury in closing argument, was Lorrie planned her death: he had the hammer and butcher knife with him in his upstairs bedroom that night; when he knew the household was asleep he came downstairs; he hit Karen in the head with the hammer intending to render her unconscious before slitting her throat. Instead they struggled, and during the struggle, Lorrie stabbed Karen numerous times until she bled to death.

The children relied on the coroner's testimony and autopsy report to support their theory. The autopsy report noted a cut to Karen's eyebrow, a nick in her Adams apple, a nick on the back of her neck, a cut to her inner arm and cuts across all her fingers. At the civil trial the coroner testified he did not believe Karen had sustained a single track, right-to-left stab wound, but three separate stabs wound to her neck. He believed the wound on the right side of Karen's neck and the wound on the left side of her neck were both entry wounds. He formed this belief when manually manipulating Karen's neck wounds. When he inserted his index fingers simultaneously into the wounds on each side of Karen's neck the coroner noted his fingers did touch in the middle. However, the coroner could not conclude the two wounds were definitely connected because he felt a small piece of tissue between his fingertips. He also noted the exterior of the left side wound had a circular flap of skin, as well as knife drag marks around its opening. He found it was these characteristics which prevented a clear finding the left side was strictly an exit wound, although he could not rule out the possibility either Karen's body movements after the stabbing, or Lorrie moving the knife around after the stabbing, created the drag marks and circular flap. The coroner also acknowledged he could not rule out the possibility the small piece of tissue he felt separating the right and left side wounds was the result of the reported manipulation by the emergency room physicians, tissue decomposition due to the lapse of time between her death and her autopsy, or the result of his own digital manipulation.

The coroner also opined Karen had sustained an additional right to left stab wound, six inches deep, which unlike the other wound, went on an upward slant and into her jawbone. However, the coroner had no photographs or X-rays to document this particular knife track.

Lorrie presented the testimony of Dr. Michael Baden who testified as an expert pathologist as well as an expert in accident reconstruction. Based on his review of the autopsy report, the abrasion to the right side of her neck suggesting a hilt mark, the fact the eight-inch knife was entirely covered in blood, the lack of blood splatter evidence in the house, and other evidence, Dr. Baden concluded Karen had sustained a single through and through stab wound. Because her neck was approximately five inches across, he testified the eight-inch knife necessarily had to exit the left side of her neck. Dr. Baden disagreed with the coroner's opinion Karen

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had also sustained a separate six-inch knife wound going right to left but at upward angle ending in her jawbone. He claimed it was physically impossible to have a slanting cut through the neck without also severing organs in close proximity, such as the larynx and esophagus. Yet, the autopsy revealed none of Karen's neck organs was damaged in any way.

***6** Similar to the criminal jury which acquitted Lorrie of murder and lesser-included offenses, the civil jury returned a unanimous defense verdict. The children appeal.

DISCUSSION [FN6]

FN6. Lorrie moved to strike portions of the children's reply brief under California Rules of Court, rule 14(a)(1)(C) for misstating the factual record and for failing to provide proper citations to the record to support their factual assertions. The children filed opposition, conceding certain flaws and purporting to correct erroneous record citations by inappropriately citing to their opening brief rather than the relevant portions of the record. Under California Rules of Court, rule 14(e)(2)(C) this court elects to disregard these noncomplying portions of the children's reply brief.

I. *IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO LIMIT THE CHILDREN'S CROSS-EXAMINATION OF LORRIE TO NEW MATTERS RAISED ON DIRECT EXAMINATION.*

[1][2] As a matter of trial strategy, the children did not want to call Lorrie as a witness in their case-in-chief under Evidence Code section 776. In lieu of his live testimony, they instead wanted to introduce Lorrie's videotaped deposition testimony in which he explained how Karen accidentally impaled herself on the knife when they fell during their struggle over the knife. Then to impeach this testimony, the children sought to introduce Lorrie's hour-long videotaped police interrogation describing how he remembered being in his bedroom stabbing and hammering a blue towel, but not much else, and his recorded police station telephone calls to his siblings, claiming he had taken too many drugs, could not remember much, and did not know how the stabbing occurred.

The court considered this a very unorthodox manner of presenting evidence in a civil trial. The court requested briefing from counsel, and consulted other bench officers for guidance whether to permit the children to present their case in this fashion, and if so, under what, if any, limitations. The children ultimately won their lengthy pretrial battle, subject to the trial court's discretionary power under Evidence Code section 352 [FN7] to avoid duplicative testimony and waste of judicial time. The court made it clear as a part of its ruling that when Lorrie testified on direct in his defense case, the children would be limited in their cross-examination during the defense case to new matters he raised on direct. The court ruled the recorded evidence the children requested was the essential equivalent to both direct and cross-examination, and thus further cross-examination regarding the same subject matters would be cumulative, and a waste of time.[FN8]

FN7. Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

FN8. The court explained the procedure to the jury: "[P]laintiffs under the law and under the Code of Civil Procedure, have a right to use deposition testimony of the party. That's what's being done here instead of calling him as a live witness. However, for the benefit of counsel and the jury, under these circumstances after the plaintiff rests, the defense counsel, of course, has the right to call her own client to testify and ask questions. Plaintiffs'

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> counsel will be limited at that time, because I will not permit the reasking by plaintiffs' counsel of anything that's on the tape, nor will I permit cross-examination of anything that has been cross-examined on the tape. So the plaintiffs' questions, if the [defense] chooses to call the defendant on the stand, will be limited to cross-examination of new testimony given by the defendant at that time, otherwise we'd be hearing the testimony two or three times."

On appeal, the children claim the court violated their right to due process of law by repeatedly sustaining defense objections to their questions to Lorrie on cross-examination on the ground the subject matter had already been covered in his deposition testimony. The children complain they did not explore every conceivable detail during Lorrie's deposition and had intended to reserve a few questions for cross-examination at trial.

We certainly agree the opportunity to cross-examine adverse witnesses is an important aspect of ensuring fair trials.[FN9] However, it is also true that when a party agrees to a trial court's ruling as a necessary part of a deliberate trial strategy, the party forfeits the right to object to the ruling on appeal. [FN10]

> FN9. See, e.g., *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (1994) 26 Cal.App.4th 789, 804, 32 Cal.Rptr.2d 293 [among other things, due process requires all parties be given the opportunity to cross-examine witnesses]; *Fidelity & Cas. Co. v. Workers' Comp. Appeals Bd.* (1980) 103 Cal.App.3d 1001, 1015, 163 Cal.Rptr. 339 [same].

> FN10. See, e.g., *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166, 143 Cal.Rptr. 633 [an appellant may waive his or her right to attack the trial court's decision on appeal by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal]; *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686, 12 Cal.Rptr.2d 279 ["where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error."].

In the present case the children expressly agreed in advance to the limitations the trial court imposed on their cross-examination of Lorrie during the defense case. In pretrial discussions the children urged the court to permit them to introduce Lorrie's deposition testimony. The court pointed out various problems with the children's trial strategy. It also warned the children it would not permit them to have "two bites of the apple" by using live cross-examination as well as its videotaped cross-examination. Counsel for the children concurred with the court's ruling, stating "I agree with that. Your Honor certainly has control over the cross-examination, and ... if the defendant [sic] calls their client as a witness and he testifies, and we have already presented evidence that is contrary to what he has said, Your Honor may very well say, 'Mr. Salmon, that question's been asked and answered under 352. I'm controlling this court, and I'm not wasting any more time.' ... [¶][¶][ ] I wouldn't be doing that. I understand that when we put on our evidence on [sic] in our case in chief that we're not going to be able to use the same information over again. We wouldn't be asking that. We believe that we have capsulized in approximately two hours, if not a little bit less, the totality of information that we want from the defendant on video."

*7 As the foregoing makes clear, the children expressly consented to the procedure they now challenge. This issue is thus not preserved for review on appeal.[FN11] Moreover, sustaining defense objections to repetitive testimony was clearly a proper exercise of the trial court's discretion under Evidence Code section 352 to prevent an undue consumption of time and the presentation of duplic-

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ative evidence. As it was, the three hours of Lorrie's videotaped deposition, the hour long videotape of his police interrogation, the nearly 30 minutes of his recorded phone calls to family members, plus his live testimony at trial, placed before the jury more than enough evidence of every conceivable version of how Lorrie had explained the stabbing in this case.

> FN11. *Redevelopment Agency v. City of Berkeley, supra,* 80 Cal.App.3d 158, 166, 143 Cal.Rptr. 633; *Mesecher v. County of San Diego, supra,* 9 Cal.App.4th 1677, 1686, 12 Cal.Rptr.2d 279.

In sum, we find no error.

II. *BECAUSE THE CHILDREN HAD PRESENTED NO EVIDENCE TO SUGGEST THE DEATH WAS THE RESULT OF A NEGLIGENT ACT, AND COULD NOT AT THE CLOSE OF THE EVIDENCE ARTICULATE A THEORY FOR NEGLIGENT WRONGFUL DEATH, IT WAS NOT ERROR TO REFUSE INSTRUCTIONS ON WRONGFUL DEATH ON A NEGLIGENCE THEORY.*

[3] The children's complaint alleged causes of action for both intentional and negligent wrongful death. Lorrie moved for nonsuit on all causes of action after the children presented their case-in-chief. The court observed the children had proceeded on the theory the stabbing death was intentional and had presented no evidence Karen's death may have been the result of a negligent act. Court and counsel also discussed the apparent inconsistency between the children's causes of action for negligent wrongful death and their claim for intentional infliction of emotional distress. The parties revisited the issue several more times before the close of all the evidence. The court never expressly ruled on Lorrie's motion for nonsuit.

In finalizing jury instructions the court reiterated its view the children had presented no evidence of negligent wrongful death to warrant instructions on the theory. In the court's view if Lorrie was the aggressor then his acts were intentional. If Karen was instead the aggressor, then Lorrie had the right to defend himself, and in addition, had the right not to retreat. The court observed: "She came after him with a knife. Now once that occurs, he has a right to defend himself. If the jury believes that, if the jury believes he was the aggressor, and then we don't even have to worry about any of this; it's all over as far as negligence. If they believe that she was the aggressor, where is his negligence? What did he do at that point, other than defend himself? You're saying that he took the knife off her, then intentionally stabbed her. If he did that, then, again, we don't have negligence. We have a he killed her, it was intentional. [¶][¶] ... How are you going to argue they shouldn't have fallen down together if the jury believe[s] that theory they fell and the knife went through her neck, what was his negligence?"

The court solicited the children's counsels' views of the evidence and/or theory of how the death could have been caused by a negligent act to support instructions on negligent wrongful death. The children's counsel attempted to articulate theories of negligent conduct, such as continuing the struggle after initially disarming Karen, or that his response to Karen's attack may have been disproportionate to the danger he faced. Counsel ultimately informed the court the children did not intend to argue a negligence theory to the jury. Counsel explained, "I mean it's hard for me to stand up here and argue negligence. I don't intend to argue negligence to the jury." Nevertheless, counsel stated his belief that even if several factual issues were resolved adversely to the children's position, "there could still be a negligence theory made out of various bits and pieces that the jury accepts and, and parts they don't accept." However, counsel reiterated, "We're not going to specifically argue negligence. We're going to specifically argue it was intentional...." [FN12]

> FN12. In closing argument, the children in fact argued Karen's stabbing death constituted premeditated, deliberate murder.

> Counsel told the jury, "To prove the plaintiffs' case of wrongful death of Karen, we must prove ... Karen was attacked and killed by a knife-wielding and hammer-wielding assailant. That is the defendant, her husband, Lorrie Tuccinardi." Later in their argument, counsel proposed the theory Lorrie had planned the entire attack. Counsel argued he prepared by taking the knife and hammer upstairs to his bedroom; he went downstairs and hit Karen on the head with the hammer as she slept on the couch; he believed the hammer blows would render her unconscious; "and then he would be able to quietly cut her throat with the knife."

***8** In its final ruling, the trial court stated it would not give instructions on negligent wrongful death if counsel did not even intend to argue the theory to the jury. "Counsel, I waited all through this to find the negligence, and I asked you yesterday before we went home, and I took the jury instructions on the basis that there was going to be argument of negligence, but to leave the jury to speculate as to negligence without arguing negligence, I can't instruct them on it." [FN13]

> FN13. For the first time on appeal, the children propose a theory of negligent wrongful death-nearly five years after Karen's death, and years after both trials of this matter, despite being represented by the same counsel for nearly this entire time. The children's new theory is as follows: even if Karen accidentally fell and impaled herself on the knife, Lorrie's negligence was his act of twisting the knife while removing it from Karen's neck thereby severing her carotid artery at a time when she was still alive and breathing. We will, for sake of argument, assume this theory of negligence is plausible and that the children might have found a witness to testify to a medical probability removing the knife caused or contributed to her death. It is, however, of no consequence because the children may not alter their theory of the case on appeal.
>
> "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." (*Ernst v. Searle* (1933) 218 Cal. 233, 240-241, 22 P.2d 715.)
>
> This is especially true where "the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial [because] the opposing party should not be required to defend against it on appeal ." (*Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341, 303 P.2d 738.)
>
> Because the children did not propose this new theory in the trial court, they may not now attribute the lack of negligence instructions to trial court error.

The children nevertheless assert the court's refusal to instruct on negligence was erroneous, claiming litigants are entitled to present alternative and conflicting theories of relief.

The children correctly assert a trial court cannot compel a plaintiff to make an election between inconsistent causes of action before submitting the case to the jury or court. As explained in *Tanforan v. Tanforan,*[FN14] "[s]ince, then, inconsistent causes of action may be pleaded, it is not proper for the judge to force upon the plaintiff an election between those causes which he has a right to plead. Plaintiff is entitled to introduce his evidence upon each and all of these causes of action, and the elec-

tion, or in other words, the decision as to which of them is sustained, is, after the taking of all the evidence, a matter for the judge or the jury. There is, of course, a corresponding right in the defendant to move for a nonsuit upon any of these causes which may not have been adequately supported by the evidence." [FN15]

FN14. *Tanforan v. Tanforan* (1916) 173 Cal. 270, 159 P. 709.

FN15. *Tanforan v. Tanforan, supra,* 173 Cal. 270, 274, 159 P. 709; see also, *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586, 86 Cal.Rptr. 465, 468 P.2d 825 ["There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent."].

It is the latter situation which occurred in the case at bar. The reason the court did not instruct the jury on a theory of negligent wrongful death is not because it had forced the children to elect between their theories of wrongful death, but because they had presented no evidence of negligence, substantial or otherwise, to support a finding of negligent wrongful death. This is made evident by counsels' inability to even suggest a theory of negligent wrongful death in response to the court's question. Because of the lack of evidence of negligence, and the fact the children essentially abandoned this theory of wrongful death in presenting their case, the trial court properly refused to provide instructions on the theory.[FN16] For these same reasons, it was not error to provide the jury a verdict form which omitted a negligence theory of wrongful death as an option for speculation by the jury.

FN16. See, e.g., *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572, 34 Cal.Rptr.2d 607, 882 P.2d 298 ["A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence."]; see also, *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548, 138 Cal.Rptr. 705, 564 P.2d 857 ["As in other applications of the 'substantial evidence' principle, the requisite standard cannot be met by mere speculation or conjecture."].

[4] The children next claim the court's instructions misled and confused the jury because negligence instructions were given regarding (but were expressly limited to) the cause of action for negligent infliction of emotional distress to bystanders. To clarify its instructions, the trial court informed the jury the negligence instructions applied only to the negligent infliction of emotional distress to bystanders cause of action. The court reiterated this distinction in its response to a juror's question. A juror inquired whether California was a contributory negligence state. The court told the jury, "The jury instructions do not contain an allegation of negligent conduct regarding the death of Karen Lea Tuccinardi, thus contributory negligence is not an issue in this trial. The allegation of wrongful death is based upon alleged intentional conduct of the defendant."

***9** The children claim the court's contradictory instructions and commentary regarding negligence confused the jury as evidenced by the juror's question, and in addition, prevented the jury from considering their claim for negligent infliction of emotional distress.

Contrary to the children's argument, the alleged confusion in the instructions did not have the effect of precluding the jury from considering the cause of action for negligent infliction of emotional distress to bystanders. Instead, the jury's own factual finding made their consideration of this cause of action unnecessary. The first interrogatory on the special verdict form inquired, "Did Lorrie Tuccinardi intentionally commit a battery against the decedent?" If their answer was "no," they were to sign and return the form. Under existing law, a defendant may only be liable for negligent infliction of emotional distress to bystanders once his primary liability to

the direct victim is established based on his intentional or negligent acts.[FN17] Thus, because the jury found Lorrie was not primarily liable for Karen's death, there was no legal basis for them to consider whether he had secondary liability to the children for negligent infliction of emotional distress in any event. Accordingly, the children can identify no prejudice from the allegedly confusing instructions.

> FN17. *Dillon v. Legg* (1968) 68 Cal.2d 728, 733, 69 Cal.Rptr. 72, 441 P.2d 912 ["In the absence of the primary liability of the tortfeasor for the death of the [family member], we see no ground for an independent and secondary liability for claims for injuries by third parties. The basis for such claims must be the adjudicated liability and fault of defendant; that liability and fault must be the foundation for the tortfeasor's duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma."]; *Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, 53, footnote 1, 72 Cal.Rptr.2d 337 ["Because we hold primary assumption of risk bars Balthazor's negligence action, his mother's claim for negligent infliction of emotional distress is similarly barred."].

III. *THE CHILDREN FAIL TO DEMONSTRATE THE TRIAL COURT'S EVIDENTIARY RULINGS CONSTITUTED AN ABUSE OF DISCRETION, OR RESULTED IN PREJUDICIAL ERROR.*

The children challenge several of the court's evidentiary rulings. After a review of the entire record we conclude their claims lack merit.

A. *It Was Not Error to Exclude Certain Photographs of Karen Covered in Blood.*

[5] The trial court did not permit the children to introduce into evidence photographs of Karen's body the police took either at the scene while paramedics rendered medical aid, at the hospital after being pronounced dead, and similar photographs. The children claim these photographs were relevant, material and crucial to proving their case "in that they showed the condition of decedent's gory body that appellants Karla Fuerst and Jennifer Tuccindari saw that was a substantial factor in the cause of their emotional injuries,...."

The record does not support the children's factual assertion regarding the photographs' relevance. Jennifer testified she only saw her mother's legs from the knees down when her father opened the door to ask her to call Jason for help. Thereafter police officers kept Jennifer and her girlfriend in her bedroom with the door closed until paramedics removed Karen from the house. The children presented no evidence any of them present in the house actually saw Karen's bloody body.

Moreover, "[t]rial courts have 'broad discretion' under Evidence Code section 352 to weigh the probative value of gruesome or inflammatory photographs against their prejudicial impact. Appellate courts will not disturb this determination on appeal unless one factor clearly outweighs the other. [Citation.]" [FN18]

> FN18. *Akers v. Miller* (1998) 68 Cal.App.4th 1143, 1147, 80 Cal.Rptr.2d 857.

***10** This court has reviewed the challenged photographs. Some the court properly excluded under Evidence Code section 352 because they were duplicative. Others the trial court properly excluded as unduly inflammatory. For example, the photos of Karen taken at the hospital show her bare-breasted and literally covered in blood. These particular photos lack probative value to show either her wounds or their likely cause inasmuch as all visible areas of her body in the photos are completely covered in blood. Other photos of Karen presented her in such a gruesome fashion any probative value the photos might have had was clearly outweighed by the risk, indeed likelihood, they would disturb and thus prejudice the jury. In short, we find no abuse in the court's discretionary decision to exclude these particular photographs.[FN19]

FN19. *Akers v. Miller, supra,* 68 Cal.App.4th 1143, 1147, 80 Cal.Rptr.2d 857.

B. *The Children Fail to Demonstrate How Specifying the Precise Amount of Assets Lorrie "Received" as a Result of Karen's Death Could Have Changed the Outcome.*

[6] To recall, Lorrie transferred money from a joint account into another account in his name alone after discussions with an attorney regarding the parties' rights in the event Karen divorced him or decided to have him committed. Over the children's objections, the trial court only permitted the parties to refer to the account as the couple's "life savings accumulated over 27 years of marriage" and/or to state the amount was "substantial." The court's order controlled until or unless further proceedings were necessary to determine punitive damages. Similarly, the court did not permit the children to refer to other monies Lorrie inherited as sole beneficiary of Karen's will from insurance policies, bank accounts, pension plans and the like. The children argue the jury would have learned the total amount of assets involved over $2,800,000 absent the court's rulings. This evidence, in turn, would have furthered their theory Lorrie had a financial motive to kill Karen.

The court's order limiting the description of the cash assets Lorrie controlled after Karen's death was a reasonable exercise of discretion under Evidence Code section 352. During pretrial proceedings the children issued numerous subpoenas duces tecum to financial institutions and others, making it clear they intended to present detailed evidence-documentary and testimonial-regarding at least 21 specified assets in order to establish their claim Lorrie benefited by Karen's death. The court expressed concern their presentation of financial evidence would be the equivalent of a separate trial within what was already promising to be a lengthy and contentious trial. Ultimately the court precluded the children from presenting detailed evidence of financial matters in order to avoid an undue consumption of time and to avoid confusing the jury with details of tangential matters. The children, however, as noted, were permitted to explore Lorrie's transfer of funds just before Karen's death, and were permitted to state the funds were the parties' "life savings" and amounted to a "substantial" sum.

***11** This was sufficient to convey to the jury Lorrie had sought to control virtually all of the couple's cash, even though it was not an essential element of proof in this wrongful death action. [FN20] Reinforcing this concept, the jury also heard evidence the couple owned the two-story house in Torrance, the mother-in-law's house in Inglewood, as well as the family vacation home in Palm Desert overlooking the golf course and lake. The jury also heard evidence the parents purchased a car for Daniel in cash; evidence Lorrie was part-owner of a thriving, established business; and other evidence of the couple's comfortable financial situation. This was adequate evidence for the average juror to find a financial motive for the killing.

FN20. Compare, *Rawnsley v. Superior Court* (1986) 183 Cal.App.3d 86, 227 Cal.Rptr. 806 where discovery of the defendants' financial information was necessary and proper because it went to the heart of the plaintiff's claims the defendants had siphoned profits from the limited partnerships; failed to distribute profits to the limited partners; and received excessive and undisclosed compensation.

C. *Precluding The Coroner From Giving His Expert Opinion the Knife Cuts On Karen's Hands Were "Defensive Wounds" Did Not Constitute an Abuse of Discretion in the Context of This Case.*

[7] The children argue it was an abuse of discretion for the trial court to preclude the coroner from testifying the cuts Karen received to the palm side of all her fingers were, in his expert opinion, "defensive wounds." We review the court's exclusion of this expert testimony for abuse of discretion, to determine whether the court's ruling "exceeded the bounds of reason." [FN21]

FN21. *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972, 105 Cal.Rptr.2d 88.

Expert opinion testimony is admissible when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact...." [FN22] Additionally, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." [FN23] "However, the admissibility of opinion evidence that embraces an ultimate issue in a case does not bestow upon an expert carte blanche to express any opinion he or she wishes." [FN24] In *Summers,* the court held that even if an expert opinion does not embrace an issue of law, it is not admissible if it invades the province of the jury to decide a case. " 'Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided.... There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision.' (1 McCormick on Evidence (4th ed.1992) § 12. p. 47, fn. omitted.) Notwithstanding Evidence Code section 805, an 'expert must not usurp the function of the jury....' [Citations.]" [FN25]

FN22. Evidence Code section 801, subdivision (a).

FN23. Evidence Code section 805.

FN24. *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178, 82 Cal.Rptr.2d 162.

FN25. *Summers v. A.L. Gilbert Co., supra,* 69 Cal.App.4th 1155, 1182-1183, 82 Cal.Rptr.2d 162.

The coroner's testimony was not objectionable solely because it happened to embrace the ultimate issue in the case.[FN26] Instead, the court exercised its discretion to exclude the coroner's opinion because his opinion came dangerously close to telling the jury Karen received her wounds responding in self-defense, and by extension, telling the jury Lorrie was the aggressor. This question of who was the initial aggressor was the crucial issue in the case, a question of fact reserved exclusively for the jury. [FN27] Thus, in the context of this particular case we cannot find the court's ruling constituted an abuse of discretion.

FN26. Evidence Code section 805.

FN27. For the same reason, the trial court sustained a defense objection to the question whether Daniel believed his mother had "an aggressive personality." On the other hand, Daniel was permitted to testify to specific instances of conduct for the purpose of showing her normally reserved and mild manner. Whether Karen behaved aggressively in this instance was the decisive factual issue in the case.

D. *The Lack of Evidence of Jennifer's Probable Future Medical Expenses is the Direct Result of Her Doctor's Lack of Expertise to Give an Expert Opinion, and The Lack Of Evidence Of Jennifer's Past Medical Expenses is the Result of Counsel's Failure to Ask Properly Phrased Questions, Not the Result of Any Evidentiary Ruling.*

***12** [8] The children claim the trial court erroneously disallowed testimony from Jennifer's psychologist regarding the costs of Jennifer's medical care. They are mistaken.

On direct-examination, Dr. Baltazar testified she did not have an opinion whether Jennifer would suffer increased mental problems as a result of her mother's death. The doctor explained she was not a posttraumatic distress disorder expert so she could not predict Jennifer's future medical condition with any certainty. The doctor similarly refused to predict Jennifer's future medical expenses, stating "[t]hat would have to be done by a forensic or dis-

ability specialist. That's a specific area."

On rebuttal, the children wanted to recall Dr. Baltazar for the express purpose of inquiring regarding Jennifer's probable future medical expenses. The court denied the children's request, noting Dr. Baltazar herself disclaimed any ability to provide the desired information.

The children do not explain how the court's ruling constituted error, and in our view, the record discloses none.

Regarding Jennifer's past medical expenses the children's counsel asked the doctor on direct-examination "approximately how many sessions [had Jennifer] had with [her] since her mother's death?" The court sustained an objection to the *form* of the question for the purpose of proving medical expenses. Counsel did not rephrase the question and the doctor never answered a similar question. Thus, any error in failing to adduce evidence of Jennifer's past medical expenses is one of counsel's own making.

Moreover, evidence of Jennifer's medical expenses, past or future, became irrelevant once the jury found Lorrie not liable for wrongful death, and thus by extension not liable for negligent infliction of emotional distress to bystanders.[FN28]

> FN28. *Dillon v. Legg, supra,* 68 Cal.2d 728, 733, 69 Cal.Rptr. 72, 441 P.2d 912; *Balthazor v. Little League Baseball, Inc., supra,* 62 Cal.App.4th 47, 53, footnote 1, 72 Cal.Rptr.2d 337.

E. *It Was the Trial Court's Duty and Prerogative To Control the Timing of the Admission of Evidence.*

[9] The children complain the trial court did not admit exhibits as evidence until the end of trial except by stipulation of the parties. They assert the court's ruling deprived them of a fair trial because the trial was so lengthy that by the time the jury saw the several hundred exhibits ultimately admitted at trial, the evidence was too "stale" to have the necessary impact.

The children have failed to carry their burden of proving prejudicial error. It is the trial court's responsibility to "provide for the orderly conduct of proceedings before it...." [FN29] Moreover, "[i]t is beyond dispute that Courts have inherent power ... to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council. That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation ... in order to insure the orderly administration of justice." [FN30]

> FN29. Code of Civil Procedure section 128 , subdivision (a)(3).
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> FN30. *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967, 67 Cal.Rptr.2d 16, 941 P.2d 1203, internal citations and quotation marks omitted.

From the beginning the trial court knew the trial would be lengthy. It was thus concerned about wasting precious court time while the jurors and alternates reviewed each of the hundreds of exhibits. It also did not want to waste the jurors' time while hearing objections to the admissibility of challenged exhibits. The court had both the power and authority to impose these reasonable controls over the pending litigation. In short, we find no error.

F. *Error In Permitting Legal Expert Testimony Was Not Prejudicial.*

***13** [10][11] During the defense case attorney Robert Jonas testified as a fact witness to his consultation with Lorrie. Over the children's objection, the trial court also permitted Mr. Jonas to give his expert opinion the advice he gave Lorrie to transfer the couple's life savings into an account in his name alone for the purpose of preventing dissipation of assets was legally acceptable and appropriate. He further testified it would be legal malpractice for a

matrimonial lawyer to fail to give a client such advice.

The children do not object to Mr. Jonas's testimony as a percipient, or fact, witness. Instead, they point out the court should not have permitted Mr. Jonas to testify as an expert on legal matters because Lorrie had not designated him as such on his expert witness list the parties exchanged pretrial as is required by statute.[FN31]

> FN31. Code of Civil Procedure section 2034, subdivision (a)(1) provides: "Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial."

No witness declaration is required for an expert who testifies regarding his personal knowledge of relevant facts acquired independently of the litigation. [FN32] On the other hand, the proponent of the witness is still required to list the expert's name and address in any exchange of expert witness lists pretrial.[FN33] This Lorrie did not do. Accordingly, it was error to permit attorney Jonas to give his expert opinion regarding the legality of his advice to Lorrie.[FN34]

> FN32. *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 39, 91 Cal.Rptr.2d 293, 989 P.2d 720 [a treating physician is not a "retained" expert within the meaning of Code of Civil Procedure section 2034; thus an expert witness declaration for such a witness is not required]; *Huntley v. Foster* (1995) 35 Cal.App.4th 753, 756, 41 Cal.Rptr.2d 358 [disclosure requirements apply only to "retained" experts and not to treating doctors even if they provide expert opinion testimony at trial].
>
> FN33. *Schreiber v. Estate of Kiser, supra,* 22 Cal.4th 31, 35, 91 Cal.Rptr.2d 293, 989 P.2d 720 [Code of Civil Procedure section 2034, subdivision (a)(1) requires the designation of any expert the parties to the exchange intend to call, " 'even if the expert's knowledge and opinion has been acquired independently of the trial preparation activities of the side designating him." '].
>
> FN34. Code of Civil Procedure section 2034, subdivision (j) specifies the penalty for failing to list the name and address of any expert expected to provide expert opinion testimony at trial is for the trial court to exclude the witness's testimony on objection of any party who has made a complete and timely compliance with the discovery statute.

We nevertheless find there is no reasonable probability the children would have achieved a more favorable result in the absence of the error. [FN35] Because Mr. Jonas gave his opinions regarding his own personal advice any reasonable juror would recognize his likely bias and self-interest in telling the jury what he did was legal, appropriate and within the standard of care of matrimonial lawyers. Thus, it is unlikely his testimony had the impact such testimony might have had had it come from a truly disinterested witness.

> FN35. *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243.

G. *It Was Not An Abuse of Discretion to Restrict Admission of Recorded Jail Telephone Conversations to Those Lorrie Made Prior to Consulting With Counsel.*

[12] As noted, the children introduced into evidence as part of their case-in-chief recordings of telephone conversations between Lorrie and several of his siblings while incarcerated at the Torrance jail. However, prompted by defense objections, the court did not admit recorded conversations Lorrie had with family members after having consulted

with counsel. The trial court listened to the tapes and agreed Lorrie's conversation sounded unusually stilted and evasive after having received advice from counsel to remain silent. The court determined the probative value of these particular taped conversations was substantially outweighed by their potential for undue prejudice and of misleading the jury and thus excluded these recordings under Evidence Code section 352.

Some recorded jail conversations are admissible as evidence.[FN36] That is not the same as saying they may never be excluded. In this case, the trial court attempted to strike a balance between the children's need for relevant and probative evidence against the risk of impinging on a defendant's right to remain silent once charged with a crime and counseled to remain silent. It is within a trial court's inherent powers and thus one of its unique functions to make these types of decisions in light of the court's familiarly with the evidence as the case unfolds. It is thus immaterial this particular ruling was not expressly based on some preexisting precedent authorizing the procedure.

> FN36. See, e.g., *People v. Hines* (1997) 15 Cal.4th 997, 1043, 64 Cal.Rptr.2d 594, 938 P.2d 388 [inmate is not entitled to suppress evidence of his recorded conversations with fellow cell mates]; see also, *People v. Loyd* (2002) 27 Cal.4th 997, 1010, 119 Cal.Rptr.2d 360, 45 P.3d 296 [California law permits law enforcement officers to monitor and record unprivileged communications between inmates and their visitors to gather evidence of crime.].

***14** In any event, the evidence the children sought to admit was cumulative and properly excludable on that ground alone.[FN37] They wanted to impeach Lorrie's testimony now claiming full recall of the "accident" with his statements on those recordings saying "I don't know what happened," "I don't remember ... It's all blurred up," and a statement he did not even realize his finger was cut. The jury had already heard these statements from the videotape of Lorrie's police interrogation and from the jail conversations made and recorded prior to consulting with counsel. Thus, because the evidence was already before the jury any error would clearly be harmless.

> FN37. Evidence Code section 352.

H. *Because the Trial Court Found Evidence of Lorrie's Medical Treatments and Records Privileged and Excludable under The Psychotherapist/Patient Privilege Exception, It Properly Prevented the Children from Arguing Lorrie's Claims of Panic Attacks, Hospitalizations and the Like Were Not Substantiated Because He Did Not Produce His Doctors as Witnesses and Did Not Produce Documentary Evidence of His Hospitalizations and Treatments.*

[13] Lorrie testified he had a "panic attack" the night of Karen's death. He testified to hospitalizations for panic attacks, a suicide attempt, treatment by a psychiatrist for depression and anxiety, prescription medications for his depression and anxiety, electro-shock therapy and the like. Thus from the beginning of the case the children's position was Lorrie had put his mental state in issue in this case such that he had waived the privilege for confidential communications between patient and psychotherapist.[FN38]

> FN38. Under Evidence Code section 1014 a patient has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between himself and his psychotherapist. This "psychotherapist-patient privilege is to be liberally construed in favor of the patient." (*Roberts v. Superior Court* (1973) 9 Cal.3d 330, 337, 107 Cal.Rptr. 309, 508 P.2d 309.)

Although the discovery referee expressly deferred any ruling regarding the admissibility of the evidence, it did permit the children to depose Lorrie's treating psychiatrist and to subpoena Lorrie's medical records.

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At trial, the children sought to introduce a videotape of Lorrie's psychiatrist's deposition testimony. The trial court found Lorrie had not put his mental state in issue, had thus not waived his psychotherapist-patient privilege, and accordingly ruled inadmissible the doctor's videotaped deposition testimony, as well as all documentary evidence bearing on Lorrie's various treatments and hospitalizations.

Throughout the trial, as well as on appeal, the children have challenged the propriety of the trial court's ruling.[FN39]

> FN39. On Lorrie's motion, this court struck a portion of the children's opening brief on appeal because it incorporated material ruled privileged and excludable in the trial court. The children filed an amended and then a corrected brief which deleted their argument the trial court had abused its discretion by refusing to admit Lorrie's psychiatrist's taped deposition testimony. Lorrie objected to the children's amended and corrected brief and moved for sanctions. Lorrie argued no reasonable attorney would file an amended and corrected opening brief which continued to rely on material which was both privileged and previously stricken by the court. The children filed opposition, arguing the material was not privileged. They noted the discovery referee had ordered Lorrie to produce his doctor for deposition, and ordered discovery of the doctor's medical records regarding the prescription medications Lorrie claimed the doctor had prescribed. The children also argued the order striking their opening brief signed only by the presiding justice violated their constitutional right to plenary review of the issue. (Citing, Cal. Const. art. VI, § 3 [the Court of Appeal "shall conduct itself as a 3-judge court"].) In light of the protracted and contentious litigation between these parties, and especially our findings after an independent review of the challenged evidence and briefing in this case, we decline Lorrie's invitation to impose sanctions on appeal for perceived violations of court orders. (Code Civ. Proc., § 907; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, 183 Cal.Rptr. 508, 646 P.2d 179.)

Having independently reviewed the challenged evidence, it appears to this court the evidence could have only served to corroborate Lorrie's testimony and thus reinforce the view he was weak, sickly and deeply concerned about his wife's waning interest as a result of his illness. The children, however, wanted to impeach Lorrie's claim of having had a "panic attack" with his doctor's statements he had not specifically treated Lorrie for panic attacks, but had treated Lorrie instead for anxiety and depression. At best, this evidence merely provided an opportunity for a battle of semantics, or in the alternative, raised the question whether Lorrie used the term "panic attack" as a lay term for anxiety.

***15** In any event, we agree with the trial court Lorrie did not put his mental state in issue and thus waive the patient/psychotherapist privilege. This was not a case where Lorrie testified, for example, that because of his mental delusions, or because his medications made him hallucinate, he thought Karen was instead some hideous monster he had to stab to death before it could kill him.

The evidence Lorrie said he was having a panic attack and for this reason came downstairs to wake Karen so she could drive him to the hospital similarly did not put his mental state in issue. What motivated him to awaken Karen is immaterial. It is what did or did not occur thereafter which determined whether he should be liable for Karen's death. In other words, if "bothering" her was the trigger as the evidence suggested at trial, then the case might have been the same if instead Lorrie had come downstairs, awakened Karen, said he was having trouble sleeping, and asked her if she wanted to join him for milk and cookies.

In short, we find no error in the trial court's ruling excluding the documentary evidence of Lorrie's medical treatments and the deposition testimony of his treating psychiatrist. It thus follows it was improper for the children's counsel to refer to the excluded evidence in closing argument by telling the jury they should regard Lorrie's claim of mental problems with suspicion because he produced no expert or documentary evidence to substantiate his claim of illness and treatments.

IV. *THE CHILDREN HAVE FORFEITED THEIR RIGHT TO CLAIM THE TRIAL COURT DID NOT PROVIDE THEM ADEQUATE TIME FOR CLOSING ARGUMENT.*

[14] The trial court limited the time for closing arguments to three and one half hours, equally divided between the parties. It was not until the next day when the jury had begun their deliberations the children complained the time provided for closing arguments was inadequate.

This objection came too late. Accordingly, the issue is not preserved for review on appeal.[FN40]

> FN40. See, e.g., *People v. Stout* (1967) 66 Cal.2d 184, 200, 57 Cal.Rptr. 152, 424 P.2d 704 [court found nonmeritorious the defendant's claim the trial court had unduly limited closing argument because the record showed defense counsel had not objected "except on motion for a new trial and on this appeal."]; *Wilson v. Kopp* (1952) 114 Cal.App.2d 198, 208, 250 P.2d 166 [the plaintiff's contention closing argument was unduly restricted had no merit because the plaintiff had neither objected nor requested additional time.].

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

We concur: PERLUSS, P.J., and WOODS, J.

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