Civil No. B152979

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DANNY BLACK & JACOB BLACK, minor,
through his guardian ad litem, Danny Black,

Plaintiffs, Respondents and Cross-Appellants,

v.

RAOUF E. YUJA, M.D. & RAOUF E. YUJA,
M.D., INC.

Defendants, Appellants and Cross-Respondents.

Appeal from the Los Angeles County Superior Court
Honorable James R. Dunn, Judge
No. BC 221448

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This case arises out of sad circumstances. Glori Black, the wife of Danny Black and mother of Jacob Black, died of cancer at age 22. Danny and Jacob Black sued pathologist Dr. Yuja for negligence in failing to diagnose Glori Black's tumor. Trial ensued and the jury awarded Danny and Jacob Black $835,025.

The judgment must be reversed. It is infected with prejudicial errors in multiple respects:

- Dr. Yuja was denied his constitutional right to a jury trial because liability was imposed without obtaining jury resolution of a controlling issue (perhaps *the* controlling issue) in the case – the issue of causation.
- The trial court failed to respond to the jury's request that the word "substantial," as used in the "substantial factor" test, be defined. This defied controlling appellate authority.
- The trial court improperly permitted the introduction of inadmissible evidence and allowed improper argument regarding the possible prolongation of decedent's life, even in the absence of a cure. This is irrelevant in a wrongful death action; which deals only with improperly-caused death, not with prolongation of life.

- The trial court dismissed a juror where there were no facts showing any reality – let alone the required "demonstrable reality" – that he was unable or unwilling to deliberate or that he could not be fair and impartial.

Each of these prejudicial defects undermines the judgment in fundamental ways. Reversal is required.

STATEMENT OF FACTS [1/]

A. The Parties.

Plaintiff Danny Black was the husband of decedent Glori Black. (RT 310.)[2/] They had a son, plaintiff Jacob Black, who was five years old at the time of his mother's death. (RT 304 [Jacob was age seven in 2001].)

Defendant is Dr. Raouf Yuja, the chief pathologist at Community Memorial Hospital. (RT 603-604.)

B. Glori Black Experiences Symptoms.

Glori Black experienced pain in her abdomen and lower back. (RT 312.) She visited a gynecologist who performed tests. (*Ibid*.) The results suggested she might have cancer. (*Ibid*.) The gynecologist recommended surgery and advised Mrs. Black that a full hysterectomy might be necessary. (*Ibid*.)

C. Glori Black's First Surgery: Dr. Yuja Diagnoses Dysgerminoma.

During abdominal surgery at Community Memorial Hospital, Mrs. Black's surgeon discovered a tumor on her right ovary. (RT 313.) He sent

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[1/] References to the Clerk's Transcript are "CT [page no.]" and to the Reporter's Transcript are "RT [page no.]"

[2/] Since instructional error is asserted, we recite the evidence in the light most favorable to appellant, Dr. Yuja.

tissue samples to Dr. Yuja, whose diagnosis was dysgerminoma, a relatively non-aggressive malignancy. (RT 313, 655.) Based on this information, the surgeon removed Mrs. Black's right ovary. (RT 314.)

The day after the surgery, Dr. Irwin Clahassey, the associate pathologist at Community Memorial Hospital, concurred with Dr. Yuja's diagnosis of dysgerminoma. (RT 622-623, 635-636, 1069.)

D. Follow-Up Tests Performed After The Surgery Reveal No Further Malignancy.

Follow-up tests, conducted about a month after the surgery, revealed no further malignancy. (RT 315.)

E. Abdominal Pain Recurs And A Mass Is Found.

Several months later, Mrs. Black again experienced abdominal pain. (RT 315.) An ultrasound revealed a large mass in her abdominal area and she was admitted to Cedars Sinai Medical Center for a second surgery. (RT 315-317.)

F. At The Second Surgery, The Doctors Have Difficulty Diagnosing The Tumor, But Conclude It Is Not Dysgerminoma.

Surgical oncologist, Dr. Ron Lutern, conducted the second surgery. General surgical anatomical pathologist, Dr. Scott Binder, attended to help diagnose the tumor. (RT 317, 468, 473.) Dr. Binder took tissue samples

from the tumor, which had spread throughout the lining of Mrs. Black's abdominal cavity. (RT 473-474.)

It was concluded the abdominal tumor was the same one that had first appeared in the right ovary. (RT 483.) However, the evidence conflicted as to whether the ovarian tumor had already extended into the abdomen at the time of the prior surgery. (See, e.g., RT 1232 [Dr. Binder confirms that there was "no way [the tumor] was 1(a) at that time"]; 719 [Dr. Felix testifies that Dr. Yuja's pathology report contained "no indication that there was any spread beyond the ovary"].)

While Dr. Binder believed the tumor's growth pattern demonstrated the tumor was not dysgerminoma, he had a difficult time coming to a precise diagnosis. (RT 476 ["it was clear . . . that the tumor was a malignant epithelial tumor . . . but . . . I would not say that the specific diagnosis was particularly straightforward, once [we] arrived at the general category"]; 1024 [the aggressive spread of the tumor indicated it was not dysgerminoma because "dysgerminomas don't do that"].) In the end, he concluded that it was an undifferentiated carcinoma of the small cell hypercalcemic type. (RT 482, 1013.)

After the surgery, Dr. Binder showed the tissue samples to pathologist Dr. Denise Barbuto, who wrote a comprehensive report attempting to diagnose the tumor. (RT 907, 918, 920, 975-979.) Ultimately, she agreed with Dr. Binder that the tumor was not

dysgerminoma, but rather was a small cell, large cell variant hypercalcemic type. (RT 993, 1013.) She confirmed the tumor was the same as that earlier diagnosed by Dr. Yuja. (RT 483.)

G. Glori Black Dies.

Dr. Lutern referred Mrs. Black to medical oncologist, Dr. Edward Wolin, who treated Mrs. Black with chemotherapy. (RT 319-320, 761-762.)

On December 12, 1998, Mrs. Black died. (CT 5; RT 321-322.)

STATEMENT OF THE CASE

A. The Lawsuit.

Danny and Jacob Black (collectively, "Plaintiff") brought a wrongful death action against Dr. Yuja and Dr. Yuja's professional corporation (collectively, "Dr. Yuja" or "Defendant"). (CT 1.)

Plaintiff alleged that Dr. Yuja failed to diagnose the tumor and that this resulted in improper treatment and that was a substantial factor in causing the death. (CT 4-6.) Dr. Yuja contended his diagnosis was not negligent and, in any case, that any negligence was not a legal cause of Mrs. Black's death because she never had a greater than 50% chance of survival. (RT 159.)

B. The Evidence At Trial.

The trial lasted a little over a week. Not surprisingly, it involved conflicting expert testimony.

Plaintiff called two experts and three treating doctors. These doctors collectively testified that Dr. Yuja had misdiagnosed Mrs. Black's tumor and that this fell below the standard of care. (See, e.g., RT 384-385, 988.) One of Plaintiff's witnesses testified that, assuming the tumor was of the hypercalcemic or neuroendocrine type,[3/] Mrs. Black would have had a

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[3/] Plaintiff's pathology expert and treating pathologists agreed Mrs. Black's tumor was of the hypercalcemic or neuroendocrine type.

greater than 50% chance of survival had she been correctly diagnosed by Dr. Yuja. (RT 785-787.) However, the same doctor conceded he had never treated this type of tumor before. (RT 790, 796, 802-803.)

Defendant called two experts who testified that Dr. Yuja's misdiagnosis was not negligent and that even if Dr. Yuja had correctly diagnosed Mrs. Black, her chance of survival would never have exceeded 50%. (RT 1226, 1245, 1325-1326.)

C. The Jury Instructions And Special Verdict Form.

The jury received standard negligence instructions requiring Plaintiff to prove that Defendant was negligent, and that his negligence legally caused the harm. (RT 1598; CT 246.) The jury was also instructed, pursuant to BAJI No. 3.76, that "The law defines 'cause' in its own particular way. A cause of injury . . . is something that is a substantial factor in bringing about [the harm]." (RT 1598; CT 245.)

The special verdict form initially submitted to the jury included the word "substantial" in the causation inquiry. It read: "Was [Dr. Yuja's] negligence a substantial cause of death of Gloria [*sic*] Black?" (CT 276.)

After beginning deliberations, however, the jury sent the trial court a note asking: "Please define substantial cause of death as outlined in question no. 2 [of the special verdict form]." (RT 1828-1829; CT 221.)

(See RT 482, 715, 993.)

Defendant requested that the trial court respond to this inquiry by instructing the jury that "a substantial cause is one that is greater than 50%." (See, e.g., RT 1830; see also RT 1834, 1857.) The trial court refused to so instruct. (RT 1851; CT 271, 273-274.) Instead, it responded curiously. Rather than define what the term "substantial" meant, it eliminated the word from the special verdict form. Thus, the revised special verdict form ultimately answered by the jury did not contain the word "substantial," but instead read as follows: "Did the negligence of Dr. Yuja cause the death of Glori Black?" (RT 1851; CT 274.)

D. Removal of Juror.

During deliberations, one juror expressed concern to the court that other jurors were rushing to judgment and were not letting him express his views. (RT 1860, 1870-1874, 1881-1883.) The court questioned the juror. (RT 1860-1864, 1869-1887.) Rather than instruct the jury to listen to each other and to not to rush to judgment, the trial court removed the juror for failure to be fair and impartial. (RT 1895, 1898-1899.) The details of what occurred will be discussed in detail in section IV, *infra*.

E. The Verdict And Judgment.

At the close of Plaintiff's evidence, Defendant moved for a directed verdict on causation, arguing that there was no evidence that Mrs. Black

ever had a greater than 50% chance of cure. (RT 1583.) The court denied the motion. (RT 1587.)

By 10-2 vote, the jury returned a verdict for Plaintiff and judgment for $835,025 was entered on June 19, 2001. (RT 1905-1906; CT 278-285, 379, 500-501.) Notice of entry of judgment was mailed on June 19, 2001. (CT 289-295.)

F. Post Judgment Motion And Appeal.

Defendant timely moved for a new trial on July 5, 2001. (CT 325.) On August 15, 2001, the motion was denied. (CT 758-763.) On September 6, 2001, Defendant timely appealed from the judgment. (CT 822.)

STATEMENT OF APPEALABILITY

The judgment finally disposes of all issues between the parties and from all orders or rulings necessary to, incorporated in or made final by that judgment. (Code Civ. Proc., § 904.1, subd. (a)(1); CT 822-824.) The appeal is timely as it was filed within 30 days of the trial court's denial of Defendant's timely motion for a new trial. (Cal. Rule of Court, rule 3(a).)

LEGAL DISCUSSION

I.

THE JUDGMENT MUST BE REVERSED BECAUSE THE SPECIAL VERDICT FORM DEPRIVED DR. YUJA OF HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL BY FAILING TO OBTAIN JURY RESOLUTION OF A CONTROLLING ISSUE IN THE CASE – THE ISSUE OF WHETHER DR. YUJA'S NEGLIGENCE WAS A "SUBSTANTIAL FACTOR" IN CAUSING THE DEATH.

A. A Central Issue In This Case Was Whether Dr. Yuja's Negligence Was A "Substantial Factor" In Causing Mrs. Black's Death.

A central -- perhaps the central -- issue in this wrongful death case was whether Dr. Yuja's negligence was a "substantial factor" in causing Mrs. Black's death. If it was a substantial causative factor of death, Dr. Yuja can properly be subjected to liability; however, if it was not, Dr. Yuja cannot be held liable. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1048, 1052-1053 [causation requires proof that the defendants' conduct was a "*substantial factor*" in bringing about plaintiff's harm (emphasis added)]; *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1507, ["plaintiff must prove the defendant's conduct was a *substantial factor* in causing the decedent's death. The Legislature has not extended the statutory cause of action (for

wrongful death) to permit recovery where this predicate is not established" (emphasis added and omitted)]; BAJI No. 3.76 (9th ed. 2002).)

B. The Special Verdict Form Failed To Obtain Effective Resolution Of The Fundamental Causation Issue.

As originally phrased and submitted to the jury, the special verdict form embodied the substantial factor test. It asked: "Was [Dr. Yuja's] negligence a substantial cause of death of Gloria [sic] Black?" (CT 276.)

During deliberations, the jury expressed confusion over the meaning of the word "substantial." It sent the trial court the following note: "Please define substantial cause of death as outlined in question no. 2 [of the special verdict form]." (RT 1828-1829; CT 221.)

Defendant requested that the trial court respond to this inquiry by defining "a substantial cause" as "one that is greater than 50%." (RT 1830; see also RT 1834, 1857.) The trial court refused; indeed, it refused to furnish *any* definition. Even worse, it struck the word "substantial" from the special verdict form altogether. (RT 1851; CT 274.) In the end, the special verdict form asked only, "Did the negligence of Dr. Yuja cause the death of Glori Black?" (RT 1851; CT 274.) This forced the jury to answer the causation question without addressing the "substantial factor" threshold for imposing liability.

This was no solution! This was worse – far worse – than doing nothing.

The jury answered the truncated question, "Yes." But the answer was meaningless; it did not reveal whether the jury found that Dr. Yuja's negligence was found to be a "substantial factor" in Mrs. Black's death. Unless Dr. Yuja's negligence was a substantial factor in causing Mrs. Black's death, liability could not be imposed. The jury never answered the controlling question.

As we now demonstrate, this was a non-decision. It precludes anyone from knowing whether the jury ever found facts sufficient to subject Dr. Yuja to liability. This alone requires reversal.

C. The Special Verdict Form Was Prejudicially Erroneous.

As demonstrated above, the special verdict form omitted a decisive part of the liability test, namely, whether Dr. Yuja's negligence was a legal cause of – a substantial factor in causing – Mrs. Black's death.

Instead of instructing the jury as to the meaning of the word "substantial," the trial court improperly eliminated the "substantial factor" test from the special verdict inquiry. This erroneously allowed the trial court to enter judgment against Dr. Yuja even if the jury found that Dr. Yuja's negligence was an insignificant cause of death. By striking the crucially-important term "substantial" after the jury had asked about its

significance, the trial court effectively informed the jury that it needn't decide whether Dr. Yuja's negligence was a substantial cause. This error rises to constitutional dimensions because the jury's affirmative answer to Question No. 2 of the special verdict form left the controlling factual issue undecided. Dr. Yuja has been held liable, but no one knows whether the jury ever found his negligence was a substantial factor in causing Mrs. Black's death.

Dr. Yuja was constitutionally entitled to jury resolution of this case. (*Ceriale v. Superior Court* (1996) 48 Cal.App.4th 1629, 1634-1635 ["there is a jury trial right in a negligence action"; citing Cal. Const., art. I, § 16].) That never happened.

Although a jury was present and returned a special verdict, the jury didn't lawfully resolve this case. The jury didn't decide whether Dr. Yuja's negligence was a legal cause of death.

The purpose of a special verdict is to obtain jury resolution of all controverted factual issues. (Code Civ. Proc., § 624.) "Unlike a general verdict (which merely implies findings on all issues in favor of the plaintiff or defendant), a special verdict presents to the jury *each ultimate fact* in the case. The jury must resolve *all* of the ultimate facts presented to it in the special verdict, so that 'nothing shall remain to the court but to draw from

them conclusions of law.'" (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 854-855, emphasis added, citing Code Civ. Proc., § 624.)[4/]

Here, the effect of Dr. Yuja's negligence as a cause of death was the most hotly contested factual issue in the case. Experts dueled over the issue. Yet the ultimate question – whether Dr. Yuja's negligence was a substantial factor in causing Mrs. Black's death – was never decided. The jury's special verdict that Dr. Yuja's negligence was *a* cause of death does not answer the controlling question whether liability could properly be imposed. Since the jury did not decide that Dr. Yuja's negligence was a "substantial factor" in Mrs. Black's death, there is no way a court can draw a conclusion of liability.

The law on this issue is crystal clear. A verdict that does not decide a material issue "cannot be used to fix the occurrence of past events." (*In re Bell* (1942) 19 Cal.2d 488, 500.) Thus, if a controlling factual issue is ambiguously decided, the decision cannot form a constitutionally-permissible basis for imposing liability. (See, e.g., *In re Bell, supra*, 19 Cal.2d at p. 500 (opn. of Traynor, C.J.) ["A purported conclusion that either

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[4/] See also *Contreras v. Goldrich* (1992) 10 Cal.App.4th 1431, 1433, emphasis omitted ["[A] special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law"].

one or both of two events occurred is a mere restatement of the problem, not a decision as to which event actually occurred"; held the ambiguity of the judgment compelled reversal]; *Industrial Indemnity Co. v. Worker's Comp. Appeals Bd.* (1983) 145 Cal.App.3d 480, 485 [in worker's compensation case, "[A]n award which fails to make a finding on a material issue cannot stand"]; *Pierson v. Industrial Acc. Com*. (1950) 98 Cal.App.2d 598, 601 [where the court fails to find on a material issue, the award is annulled and the cause is remanded]; cf. *Falls v. Superior Court, supra,* 194 Cal.App.3d at p. 855 ["[t]he requirement that the jury must resolve <u>every</u> controverted issue is one of the recognized pitfalls of special verdicts," emphasis added].)

In re Bell, *supra*, 19 Cal.2d 488 is controlling here and compels reversal. There, the members of a labor union were found to have violated "any one 'and/or' any other provision" of an anti-picketing ordinance. (*Id.* at p. 491.) The problem was that some of the provisions of the ordinance were unconstitutional. (*Id*. at pp. 497-498.) The Supreme Court reversed, noting that "[i]t cannot . . . be determined from the face of the record whether or not [defendants] were found guilty of violating the one valid provision of [the ordinance]." (*Id*. at p. 499.) Thus, the "and/or" finding "cannot intelligibly be used to fix the occurrence of past events." (*Id*. at p. 500.) The Court held: "the ambiguity of the judgment . . . warrant[ed] a reversal . . . ." (*Ibid*.)

Cal. Shipbuilding Corp. v. Industrial Acc. Com. (1948) 85 Cal.App.2d 435 also illustrates our point. There, the Industrial Accident Commission found an employee's injury "was proximately caused by the serious and wilful misconduct of the employer *and/or* his managing representative." (*Id*. at p. 436, emphasis added.) Concluding that the "*and/or*" finding was fatally uncertain, the Court of Appeal annulled the award. It held: "Such a finding . . . is indefinite, uncertain and unintelligible. From the finding there is not any way of determining whether the injury was caused by the serious and wilful conduct (1) of the employer, (2) of the managing representative, or (3) of the employer and the managing representative working together." (*Id*. at pp. 436-437.)

Lundy v. Ford Motor Co. (2001) 87 Cal.App.4th 472 also proves our point. There, a car buyer sued for breach of warranty under Civil Code section 1790, which requires a plaintiff to show the vehicle contains a nonconformity that "substantially impaired" its use. (*Id*. at pp. 475-476.) The trial court instructed the jury that "substantially" "means that the nonconformity was not imaginary and actually impaired the use, value or safety of the vehicle." (*Id*. at p. 476.) Defendants argued this definition did not describe the "degree, quantity or extent of an object or condition," and rendered the defined term meaningless. (*Id*. at p. 477.) The Court of Appeal held the trial court's incorrect definition of "substantially" rendered the verdict fatally uncertain because it could not be determined whether the

verdict was based on an alleged transmission defect which, if it existed, was substantial, or on an air conditioning defect defendant argued was not substantial. (*Id*. at p. 480.)

These cases govern. Because the word "substantial" was eliminated from the special verdict form, it cannot be ascertained whether the jury decided that Dr. Yuja's negligence was a *substantial factor* in causing Mrs. Black's death (in which case liability can be imposed) or was merely *a factor* in the death (in which case liability cannot be imposed). Exactly as in *In re Bell, Cal. Shipbuilding* and *Lundy*, there is simply no way of determining whether the jury found sufficient causation to warrant the imposition of liability on Dr. Yuja.

Since it cannot be ascertained whether the jury decided that Dr. Yuja's negligence satisfied the "substantial factor" causation test necessary to justify the imposition of liability, the jury's finding, like those in *In re Bell, Cal. Shipbuilding* and *Lundy*, is fatally uncertain and must be vacated. (See also *Cobbs v. Grant* (1972) 8 Cal.3d 229, 234 [where a court is "unable to ascertain upon which of the two concepts the jury relied," it "must reverse the judgment and remand for a new trial"].)

The error here is not merely prejudicial. It is unconstitutional. It resulted in the effective denial of Dr. Yuja's constitutional right to a jury trial. (See *Fireman's Fund Ins. Companies v. Younesi* (1996) 48 Cal.App.4th 451, 459 ["'The right to a trial by jury is a right to have the

jury try and determine issues of fact'" (citation omitted and emphasis omitted)].) Indeed, "[t]he liability issue as it now stands is like a puzzle with pieces missing; the picture is not complete." (*Falls, supra,* 194 Cal.App.3d at p. 855; *Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 125 ["'denial of a trial by jury to one constitutionally entitled thereto constitutes a miscarriage of justice and requires a reversal of the judgment'" (quoting *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 300)]; Cal. Const., art. I, § 16.) Here, Dr. Yuja was subjected to liability even though the jury never found that his negligence was sufficiently substantial to permit the imposition of liability.

The trial court did nothing to dispel the jury's apparent confusion regarding the proper test of causation. By striking the word "substantial" from the special verdict form, the trial court assured that the jury's special verdict would be without legal significance. It left the special verdict hopelessly uncertain. It precluded anyone from knowing whether the jury found there was sufficient evidence to conclude that Dr. Yuja's negligence was a legal (i.e., "substantial") cause of Mrs. Black's death. No judgment can constitutionally be imposed on such an uncertain verdict. The judgment must be reversed for this reason alone.

II.

JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT WAS OBLIGATED – BUT FAILED – TO INSTRUCT

THE JURY THAT "SUBSTANTIAL," AS USED IN THE CAUSATION INSTRUCTION, MEANT GREATER THAN 50%.

When the jury asked what "substantial" meant, the trial court was obligated to define the term – not strike it from the special verdict form. The trial court's failure to define "substantial" was error because controlling appellate authority furnished a definition: "Substantial" means greater than 50%. The error was prejudicial because, if the jury had been given the appropriate definition, there is a "reasonable chance, more than an abstract possibility" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis omitted) that it would have found that Mrs. Black never had a greater than 50% chance of being cured.

A. The Definition Of "Substantial" In A Wrongful Death Action Is Well-Settled. It Means "More Probable Than Not."

In a wrongful death action such as this one, a plaintiff is required to prove the defendant's negligence was a "substantial factor" in bringing about the harm. (*Bromme v. Pavitt*, *supra*, 5 Cal.App.4th at pp. 1498, 1504; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052-1053.)

The "substantial factor" test assures that liability for negligence cannot be imposed for insignificant causes, but only for causes that substantially cause the harm. "No matter how inexcusable a defendant's act

or omission might appear, the plaintiff must nonetheless show the act or omission caused, or substantially contributed to, her injury." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780; *Bromme, supra,* 5 Cal.App.4th at p. 1492-1493 ["[A] plaintiff who alleges a statutory cause of action for wrongful death arising from medical negligence must prove by reasonable medical probability based on competent expert testimony that a defendant's acts or omissions were a substantial factor in bringing about the decedent's death"].)

The meaning of the word "substantial" in the specific context of a wrongful death action is settled. It means that there was a greater probability than not (i.e., a greater than 50-50 probability) that the death was caused by the negligent act. (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1657-1658; *Bromme*, *supra*, 5 Cal.App.4th at pp. 1498-1499 ["in order to show Bromme's death was 'caused by' defendant's medical negligence . . . , plaintiff had to establish . . . the death was '*more likely than not*' the result of the negligence" (emphasis added)]; *Simmons v. West Covina Medical Center* (1989) 212 Cal.App.3d 696, 702-703 ["A less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause"]; *Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1603 ["causation must be proven within a reasonable medical probability"; "[m]ere possibility alone is insufficient to establish a prima facie case"; "[a] possible cause only

becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action" (citations omitted)].)

As squarely held in *Bromme,* liability may not be imposed in a wrongful death malpractice case unless there is proof that a doctor's negligence was more than a 50% cause of death. Here's how the court put it:

- "California does not recognize a cause of action for wrongful death based on medical negligence where the decedent did not have a greater than 50 percent chance of survival had the defendant properly diagnosed and therefore treated the condition." (*Bromme, supra*, 5 Cal.App.4th at pp. 1504-1505.)

- "Where the alleged negligence relates to the failure to diagnose and treat a potentially terminal condition, a plaintiff fails to satisfy the requisite causation if the evidence shows the decedent did not have a greater than 50 percent chance of survival had the defendant properly diagnosed and treated the condition." (*Id*. at p. 1493.)

B. The Trial Court Abused Its Discretion When It Declined To Respond To The Jury's Inquiry By Instructing As To The Established Definition of "Substantial."

In response to the jury's request for a definition of the word "substantial," Dr. Yuja specifically requested that the trial court instruct, in accordance with settled law, that "a substantial cause is one that is greater than 50%." (RT 1830, 1834, 1855, 1857.) The trial court refused. It also declined to give a jury instruction requested by Defendant that would have defined "substantial" as "greater than 50% probability." (CT 271, 273.)

Where, as here, there is controlling legal authority on a point, a trial court has no discretion to ignore it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state . . . Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court"].)

Bromme v. Pavitt is once again controlling. There, a woman died of cancer and her husband brought a wrongful death action against a physician who had negligently failed to detect the cancer. The Court of Appeal held that a nonsuit was proper where the evidence demonstrated that the deceased had a less than 50 percent chance for survival when she first saw the defendant physician. (*Bromme v. Pavitt*, *supra*, 5 Cal.App.4th 1487.) Since it was more probable than not that the decedent would have died from the cancer irrespective of the defendant's negligence, the plaintiff failed to prove, with reasonable medical probability, that the physician's negligence had caused the death. (*Id*. at pp. 1499-1500.)

Exactly as in *Bromme*, this case involves a wrongful death action against Dr. Yuja for negligently failing to detect decedent's cancer. The theory of liability – precisely as in *Bromme* – depended on the establishment of a sufficient causal link (one that met the "substantial

factor" test) between the doctor's alleged negligence and the death. Under *Bromme*, the trial court was required to respond to the jury's specific inquiry as to the meaning of "substantial factor" by instructing that "substantial factor" meant "more than 50% of the cause of the death." It failed to do this.

To make matters worse, the court's failure to apprise the jury as to the correct legal meaning of the word "substantial" prompted Plaintiff's counsel to prejudicially and incorrectly argue to the jury that "substantial" meant "something that was not insignificant . . . [or] not insubstantial." (RT 1624, 1834.) As discussed above, this is the precise opposite of the definition required under controlling law.

A very recent case, *Sandoval v. Bank of America* (2002) 94 Cal.App.4th 1378, bears striking similarities to the present case. There, a man was killed in a bank parking lot. His heirs brought a wrongful death action against the bank for negligence in failing to provide sufficient security personnel. (*Id.* at pp. 1382, 1385.) There, as here, the central issue was whether the defendant's negligence was the legal cause of death. (*Ibid*.)

The jury received instruction on the elements of negligence and causation. (*Id.* at p. 1382, fn .2.) It also received a special verdict form that asked: "If the defendant had not been negligent in the management of the premises, *would* the criminal assault on [decedent] have been prevented."

(*Id.* at p. 1383 fn. 3, emphasis added [question 3 of special verdict form].) During deliberations, the jury sent the court the following question: "Regarding question 3 [of the special verdict form], we have a question as to the meaning and/or intent of the use of the word *would.* In this question, we are assuming the use of the word *would* is an absolute. Meaning, if [defendant] had not been neglegent [*sic*], [decedent] would not have been assaulted, would not have been shot, would not have been killed. . . . Is this the meaning of this question[?]" (*Id.* at pp. 1382-1383.)

The trial court responded by saying "yes." (*Id.* at p. 1383.) In effect, this answer negated the "substantial factor" test and, instead, told the jury that the plaintiff had to prove to a virtual certainty that decedent would have survived, had the bank acted non-negligently.

The Court of Appeal reversed. It held the trial court should have instructed that the "substantial factor" test meant a greater than 50% probability that defendant's negligence caused the death: "[I]nstead of telling the jury that, for purposes of imposing liability on the Bank, *the test of causation required that it be more likely than not* that the criminal assault on . . . decedent would have been prevented absent the Bank's negligence, the court effectively contradicted its proper instruction on the substantial factor standard and left the jury in its state of confusion." (*Id.* at p. 1388, emphasis added.)

Here, exactly as in *Sandoval*, the jury expressed confusion regarding the substantial factor test. As in *Sandoval*, the trial court was obligated – but failed – to answer the jury's question by instructing that, "for purposes of imposing liability," "the test of causation required that it be more likely than not" that the negligence caused the death. (*Ibid*.)

Despite Dr. Yuja's repeated objections, the jury received *no* definition -- let alone the correct definition -- of this crucially-important term. Even worse, as demonstrated in section I, *supra*, the jury was allowed to decide the case without even addressing the "substantial factor" test.

C. The Trial Court's Error In Failing To Give The Jury The Required Definition Of "Substantial" Was Prejudicial.

Since there could be no liability unless there was a greater than 50% likelihood that Dr. Yuja's negligence caused the death, it was prejudicial error for the trial court not to respond to the jury's question by instructing as *Bromme* commanded.

Here, there was expert evidence that Dr. Yuja's negligence was not a substantial factor in causing Mrs. Black's death. Specifically, Defendant's experts testified that Mrs. Black never had a greater than 50% chance of survival. (See, e.g., RT 1325-1326, 1351.) Had the jury credited this testimony and been told that liability could not be imposed unless it found that the likelihood was greater than 50% that Dr. Yuja's negligence caused

Mrs. Black's death, the jury may have returned a verdict in favor of Dr. Yuja on the issue of causation. The error was prejudicial, as there is a "reasonable chance, more than abstract possibility" (*College Hospital, Inc. v. Superior Court, supra*, 8 Cal.4th at p. 715, emphasis omitted.) that Dr. Yuja would have prevailed in this lawsuit had the proper instruction been given.

Once again, *Sandoval v. Bank of America* is on all fours. There, the Court of Appeal noted that "[a]mong the factors properly considered in assessing the prejudice of the court's error are the jury's request for 'clarification' of the special verdict form . . . , the 'effect of other instructions in remedying the error' and 'the closeness of the jury's verdict.'" (*Sandoval, supra*, 94 Cal.App.4th at p. 1388.) Applying these factors, *Sandoval* concluded that the trial court's "erroneous answer to the jury's inquiry during deliberation was prejudicial to plaintiff" because "the jury's inquiry reflected the jurors' confusion on the test of the causation element." (*Ibid*.) Moreover, this confusion was not remedied either by the court's answer in response to the jury's query or by other instructions. (*Ibid*.; see also section II.C, *infra*.) Further, "the jury's verdict was close, with three jurors answering in [plaintiff's] favor question No. 3 of the special verdict form." (*Sandoval, supra*, 94 Cal.App.4th at p. 1389.) Thus, it was "more likely than not" that an outcome more favorable to plaintiff

would have resulted at trial absent the court's erroneous answer to the jury's inquiry during deliberation. (*Ibid*.)

Here, exactly as in *Sandoval*, the jury expressed confusion about and requested clarification of the causation question in the special verdict form. (See RT 1828-1829; CT 221 ["Please define substantial cause of death as outlined in question no. 2"].) As in *Sandoval,* the jury's confusion was not remedied by the trial court's answer to its query. Rather than instruct the jury in accordance with settled law defining "substantial" as greater than 50%, the trial court magnified its error by striking "substantial" from the special verdict form altogether, thereby minimizing the causation hurdle, allowing the jury to find causation even in the absence of the requisite 50% probability. (See section I, *supra*.)

Further, as in *Sandoval,* the verdict was close, with two jurors answering in Defendant's favor on the causation issue posed by question No. 2 of the special verdict form. (RT 1906.) An additional juror who appeared to be at odds with the majority was improperly discharged. (See section IV, *infra*.)

Finally, Plaintiff's counsel argued to the jury that "substantial" meant "something that was not insignificant . . [or] not insubstantial." (RT 1624.) This, of course, is not a test which ever permits liability to be imposed. The argument enhanced the likelihood that liability might be

imposed even if the jury had concluded that Dr. Yuja's negligence was a less than probable cause of the death.

Here, as in *Sandoval*, reversal is compelled.

III.

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING EVIDENCE REGARDING THE POSSIBLE PROLONGATION OF DECEDENT'S LIFE.

A. Over Repeated Objections, Plaintiff Was Wrongly Allowed To Introduce Extension Of Life Testimony.

Over repeated objections, Plaintiff was allowed to introduce evidence that defendant could be liable if proper treatment (even if it did not result in a cure) would have prolonged decedent's life.[5/] The trial court deferred ruling on Defendant's motion in limine to exclude such evidence until after the conclusion of the trial. After both sides rested, the trial court granted Defendant's motion and instructed the jury to disregard the

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[5/] Defendant objected early and often to Plaintiff's evidence and arguments regarding extension of life. (See, e.g., RT 336-337 [Defendant argues the wrongful death cause of action does not permit compensation for lost extension of life]; 342, 367 [Defendant has a standing objection to extension of life testimony].) In addition, Defendant made a motion in limine (Motion in Limine #9) to preclude such testimony. While the motion itself could not be found in the trial court's file (and, thus, is not in the Clerk's Transcript), Plaintiff filed an opposition to such motion on June 4, 2001 (CT 199-206) and the trial court ruled on the motion on June 6, 2001. (RT 1559-1563.)

testimony regarding whether Mrs. Black could have lived longer had she received earlier treatment. (RT 1559-1563 [on June 6, after the close of Defendant's evidence, the court granted Defendants' Motion in Limine No. 9 "to exclude evidence of extension of life"], 1572, 1582, 1597.) This was too little, too late.

B. Evidence Concerning Possible Extension Of Life Is Improper And Irrelevant In A Wrongful Death Action.

Evidence of a loss of additional life is improper and irrelevant in a wrongful death action. *Bromme* squarely so held:

> [T]he issue is not whether Bromme's life might have been prolonged or her suffering lessened if defendant had diagnosed her cancer in June of 1981. Rather, the issue is whether defendant's failure to discover the cancer after that time was a substantial factor in causing Bromme's death.

(*Bromme v. Pavitt*, *supra*, 5 Cal.App.4th at p. 1503.)

The reason for the rule lies in the wrongful death statute. The statute authorizes a lawsuit by a decedent's heirs for a person's death; it affords the heirs with compensation for the death, whenever it might occur. (See Code Civ. Proc., § 377.60; *Fraizer v. Velkura* (2001) 91 Cal.App.4th 942, 945 ["The purpose behind the wrongful death statute is to provide compensation for the loss of companionship and other losses resulting from decedent's death"].) Since death is the trigger of a wrongful death action, evidence as to the possible prolongation of a decedent's life is immaterial. Indeed, only

the decedent would have had standing to claim that his or her life should have been longer. But the decedent is not the complaining party in a wrongful death action. (*Wilson v. John Crane, Inc*. (2000) 81 Cal.App.4th 847, 860 ["A cause of action for wrongful death belongs 'not to the decedent [or prospective decedent], but to the persons specified' in Code of Civil Procedure section 377.60, i.e., qualifying heirs and dependents"].)

For these reasons, the wrongful death statute simply does not authorize recovery unless there is proof that decedent had a greater than 50% chance of being cured absent defendant's negligence. (*Bromme v. Pavitt, supra*, 5 Cal.App.4th at pp. 1504-1505.)

C. The Erroneous Admission Of Extension Of Life Testimony Was Inflammatory And Prejudicial; It Necessitates Reversal.

The impact of the improperly-admitted evidence was inflammatory because it told the jury that Defendant could be liable to the heirs even in the absence of sufficient evidence to prove Defendant's negligence substantially caused the death. The point was made by Plaintiff during opening remarks to the jury and was driven home on an almost daily basis through repeated testimony at trial.[6/]

[6/] The jury heard argument and extensive testimony that even if no cure was available, Glori Black's life could have been extended through proper treatment. (See, e.g., RT 143 [On May 30, during plaintiff's opening statement: "at the minimum, she could have had many

The wrongly-admitted testimony and argument confused the jury regarding the true issue – whether Dr. Yuja's negligence was a substantial factor in causing Mrs. Black's death. It prompted the jury to focus on a non-issue relating to whether Plaintiff might have lived longer. This aroused sympathy because no one likes to see a person's life shortened. But that sympathy-producing element was completely irrelevant in this wrongful death suit.

The court's instruction, at the end of trial, to disregard the evidence did not cure the error or its prejudice. While an instruction to disregard previously-admitted inadmissible evidence may sometimes cure the prejudicial effect of an error, it cannot do so where the inadmissible evidence and argument pervades the trial. (*Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 356 [discussing the effectiveness of admonition after improper argument by counsel, the Court

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years added to her life"]; 415-416 [On May 31, Dr. DiSaia testified that with proper treatment, Glori Black's life could have been prolonged "months to years"]; RT 456-457 [plaintiff's expert, Dr. DiSaia confirmed that Glori Black's life "would have been extended"]; 767-768 [On June 1, Dr. Wolin testified that early treatment would very likely have extended Mrs. Black's life by some significant period of time]; 789-790; 1373 [On June 5, during cross examination of Dr. Richard Nalick: "Question: "Isn't it true, Doctor, that you told me at your deposition that she almost certainly would have lived some amount of time longer had she had an institution of therapy at that time?" Answer: "I believe she would've." Question: "She would have lived longer, would she not?" Answer: "I believe she would have." Question: "And, at least months; Is that right?" Answer: "At least, months"].)

stated: "'As for curing error by admonishing a jury, while this may be possible when error is isolated and unemphasized, an attempt to rectify repeated and resounding misconduct by admonition is, as counsel here has expressed it, like trying to unring a bell'" (citation omitted, emphasis omitted)].)

Here, the jury heard days of inadmissible and totally irrelevant testimony about the possible prolongation of Mrs. Black's life. There is simply no way the instruction to disregard days of emotionally-charged evidence could possibly cure the prejudice of its improper admission.

For these reasons, too, the judgment must be reversed.

IV.

IT WAS PREJUDICIAL ERROR TO DISMISS JUROR 5, THERE BEING NO FACTS SHOWING A "DEMONSTRABLE REALITY" THAT HE WAS UNABLE OR UNWILLING TO PARTICIPATE IN DELIBERATIONS OR TO BE FAIR AND IMPARTIAL.

A. The Pertinent Facts.

Juror No. 5, Otis Thompson, was dismissed from the jury because, according to the court, "this juror has told the court . . . that he cannot be fair and impartial." (RT 1893.) This conclusion is utterly unsupported by the record; the dismissal was prejudicial error.

During deliberations, Juror 5 sent the trial court a note expressing concern about the way deliberations were proceeding. (RT 1860.) After receiving the note, the trial court interviewed Juror 5 and learned that he had two complaints: The other jurors would not allow him to express his views and they were trying to rush deliberations. (RT 1870-1874, 1881-1883.)

Juror 5 told the court he had been trying to deliberate but had been silenced by the foreperson (a former employee of Juror 5, whom Juror 5 believed had unresolved feelings of hostility towards him) and by other jurors. (RT 1881-1884.) Among other things, he told the court, "I can't voice my opinion without everybody jumping and saying something . . . And I can't get my views out" (RT 1883); "when I start voicing my opinion, the [foreperson] tells me . . . 'let [the other jurors] finish.' I say well, why don't you say that to other people and allow me to finish what I have to say, instead of letting everyone attack me at one time, when I can't get my views out on how I feel about . . . the deliberation process and evidence.[']" (*Ibid*.) Juror 5 confirmed he had views on the case, but could not express them because, "I feel like I'm gonna be attacked." (RT 1886.)

Juror 5 also expressed concern that several jurors wanted to rush the deliberative process. (RT 1870, 1872, 1874-1875.) Specifically, Juror 5 stated that four different jurors had said they "hoped that we'll hurry up and get this deliberation done, because his job doesn't pay for him . . . And I'm

saying, 'But you're not supposed to take that into consideration.'" (RT 1870.) When the trial court asked Juror 5 whether he was concerned that "people wanna hurry up and you believe that that's gonna cause the jury to rush to judgment or something like that," Juror 5 answered, "yes . . . and I don't want to be no part of that. I really don't." (RT 1885.)

Juror 5 requested that he be removed from the jury for these reasons. (RT 1875-1876, 1881-1885.) At no point did Juror 5 ever state (or even hint) that he could not be fair or impartial or that he was not prepared to deliberate. To the contrary, from the beginning of the trial, Juror 5 stated that he *wanted* to deliberate and that he *could* be impartial. (RT 119.)

Although the reasons Juror 5 gave for wanting to be removed from the jury had nothing to do with his ability to be fair and impartial or his willingness to deliberate, the trial court asked Juror 5 a leading question which, by its phrasing, unilaterally interjected previously unmentioned issues of fairness and impartiality into the discussion. Specifically, out of the blue, the trial court asked whether Juror 5 could be fair and impartial if the trial court instructed the jury that it should deliberate fully without regard to time constraints. (RT 1885.) Juror 5 answered "no." Without any further investigation, Juror 5 was dismissed. (RT 1895.)

It was the trial court, not Juror 5, who first raised an issue concerning fairness and impartiality. Juror 5's complaints had nothing to do with whether he felt he could be fair and impartial; rather, they dealt solely with

the improper influence of *other jurors* on the deliberative process. Fairly construed, Juror 5's "no" response to the trial court's inquiry simply meant that the judge's proposal to instruct the jury that the jurors must deliberate fully without regard to time constraints would not solve the other mentioned problem (i.e., that he felt like he was being attacked) that undermined Juror 5's ability to participate freely and meaningfully in deliberations.

B. The Governing Law.

Under the law, Juror 5 should not have been removed. Rather, the jury should have been (but was not) instructed that each juror has a right to express his or her views without impediment during deliberations. (See, e.g., *People v. Cleveland* (2001) 25 Cal.App.4th 466, 480 [noting "it often is appropriate for a trial court that questions whether all of the jurors are participating in deliberations to reinstruct the jurors regarding their duty to deliberate and to permit the jury to continue deliberations"].)

The authorities uniformly hold that in order for a juror to be dismissed, there must be a "demonstrable reality" that the juror cannot perform his duty. (*People v. Compton* (1971) 6 Cal.3d 55, 60 ["Since our decision in *People v. Hamilton* (1963) 60 Cal.2d 105, 124-127 . . . , the trial court has at most a limited discretion to determine that the facts show an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality"]; *Cleveland, supra,* 25 Cal.4th at

p. 484 [discharge of a juror is appropriate only "if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate"].)

The "demonstrable reality" standard applies to allegations that a juror cannot be fair and impartial, as well as to allegations that a juror is unable or unwilling to deliberate. (*Compton*, *supra*, 6 Cal.3d at pp. 59-60 [where juror told his barber that it would "be hard to keep an open mind on a case such as this," there was still no "demonstrable reality" that juror would be biased; held, dismissal of juror was reversible error]; *Cleveland*, *supra*, 25 Cal.4th 466 [no "demonstrable reality" that a juror had refused to deliberate where the juror's method of deliberation and his failure to agree with the majority frustrated his fellow jurors; held, judgment reversed].)[7/]

Under the "demonstrable reality" standard, there must be facts showing a juror will be unable to be fair and impartial and/or unable or unwilling to deliberate.[8/] For instance, in *Cleveland*, *supra*, 25 Cal.4th 466,

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[7/] In *Cleveland*, the complaints about the excused juror included: (1) he "employed faulty logic," (2) "reached an 'incorrect' result," (3) explained his position "inarticulately," and (4) listened to the contrary views of other jurors "less than sympathetically." (*Cleveland, supra*, 25 Cal.4th at pp. 485-486.)

[8/] See, e.g., *Cleveland, supra*, 25 Cal.4th at p. 486 [no "demonstrable reality" juror could not perform his duty where "the juror simply viewed the evidence differently from the way the rest of the jury viewed it"; held, judgment reversed]; *People v. Bowers* (2001) 87 Cal.App.4th 722, 726-728, 735 [trial court abused its discretion in discharging a juror for failure to deliberate (i.e., the juror was said to have made up his mind at the beginning of deliberations and had thereafter been inattentive, uncommunicative and unwilling to change his opinion), where

our Supreme Court held there was no "demonstrable reality" that a juror had refused to deliberate merely because the juror's method of deliberation and his failure to agree with the majority frustrated his fellow jurors.[9/] (*Id.* at pp. 485-486.) The court defined a "refusal to deliberate" as follows: "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views." (*Id.* at p. 485.) The court held it was prejudicial error to dismiss the juror because there were no facts showing a demonstrable reality that the juror had refused to deliberate. (*Id.* at pp. 485-486.)

C. Juror No. 5 Did Not Refuse To Deliberate.

Here, there were no facts showing a "demonstrable reality" that Juror 5 was incapable of doing his duty. Indeed, there was no evidence – let alone the required "demonstrable reality" – that Juror 5 ever expressed an unwillingness to engage in the deliberative process or ever refused to participate in discussions with fellow jurors or listen to their views. On the

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the evidence showed that the discharged juror had participated in deliberations, had expressed the reasons for his decision, and remained willing and able to vote concerning a verdict; held, no "demonstrable reality" he was unable to perform as a juror].)

[9/] See, *supra*, fn. 7.

contrary, the record shows only that Juror 5 *wanted* to deliberate without improper interference.[10/]

Nor is there an iota of evidence that Juror 5 was unable or unwilling to be fair and impartial. He revealed no prejudice against either litigant. He made no statements suggesting he was unable or unwilling to weigh the evidence and come to a fair and impartial result.

At most, the record shows nothing more than that Juror 5 desired and attempted to assure that the deliberative process not be rushed to premature conclusion and that he be allowed to express his views without being badgered. Juror 5 *wanted* to deliberate. The solution was not to disqualify Juror 5, but to address the problems that were interfering with his ability to participate in deliberations.

D. The Exclusion Of Juror No. 5 Was Prejudicial Error.

There being no "demonstrable reality" that Juror 5 was unable to perform as a juror, the dismissal was improper and prejudicial, requiring a reversal. (See cases cited at pp. 38-40, *supra*, including fn. 7.) It deprived Defendant of his right to have each of the jurors participate in deliberations so as to inform and perhaps influence the outcome.

[10/] The record also shows that Juror 5 had successfully served as a juror on no less than *three* earlier cases. (RT 87 [Juror No. 5 had prior jury experience in civil court where he was on a jury that deliberated and reached a verdict. He was also a juror on two criminal cases in which verdicts were reached].)

The purpose of deliberation is for *each juror* to fully participate in working towards a just result. (*People v. Collins* (1976) 17 Cal.3d 687, 693 ["Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of *each member*. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any *individual juror* attempts to persuade others to accept his or her viewpoint" (emphasis added)]; cf., *Moles v. Regents of University of California* (1082) 32 Cal.3d 867, 870 [decision was invalid when presiding justice of the Court of Appeal substituted one justice of a panel for another after oral argument; "both the law and sound policy lead to one conclusion — a judge who has not participated in all the stages of the decision-making process may not be permitted to participate in the final decision and sign the opinion issued by that panel" (emphasis omitted)].) Disqualification of a deliberating juror interferes with the dynamics of the deliberative process.

When Juror 5 was dismissed notwithstanding the absence of any evidence showing he was unable or unwilling to deliberate or could not be fair and impartial, Defendant was deprived of his participation and views in deliberations and, thus, was denied the opportunity that Juror 5 might persuade the other jurors and perhaps alter the outcome. Reversal is required. (See *Cleveland*, *supra*, 25 Cal.4th at p. 486 [abuse of discretion in dismissing juror was prejudicial and required reversal of judgment]; *People v. Hohensee* (1967) 251 Cal.App.2d 193, 204 [any error in the manner in

which the trial court dismissed the juror is cured by reversal of the judgment].)

CONCLUSION

The judgment in this case cannot stand. Prejudicial error occurred in multiple ways. The jury did not decide the key causation issue in the case: Whether Dr. Yuja's negligence more probably than not caused Mrs. Black's death. The trial court erroneously failed to respond to the jury's request for a definition of what was meant by "substantial factor" in a wrongful death case. The jury was improperly allowed to hear irrelevant, but highly inflammatory testimony that, even if Mrs. Black could not have been cured, her life could have been extended through earlier treatment. Finally, Juror 5 was improperly removed from the jury panel.

For all these reasons, reversal is required.

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance Pursuant to Rule 14(c)(1) for Appellants' Brief, pertaining to Case No. B152979. I certify that:

X Pursuant to California Rules of Court rule 14(c)(1), the attached Appellants' Brief is

X Proportionately spaced, has a typeface of 13 points or more, and contains 8,969 words.

DATED: May 24, 2002

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