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
Case No. BC 221448

COMBINED APPELLANTS' REPLY AND CROSS-RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS

(Continued) Page

TABLE OF CONTENTS

(Continued) Page

TABLE OF CONTENTS

(Continued)

TABLE OF AUTHORITIES

Page

State Cases

TABLE OF AUTHORITIES

(continued)

TABLE OF AUTHORITIES

(continued)

TABLE OF AUTHORITIES

(continued)

State Statutes

APPELLANTS' REPLY BRIEF

INTRODUCTION

As our Opening Brief demonstrates, the judgment in this case is infected with multiple prejudicial errors. The Respondents' Brief filed by Danny and Jacob Black (collectively, "Plaintiff") does not demonstrating otherwise.

I.
PLAINTIFF MISPERCEIVES THE GOVERNING STANDARDS OF REVIEW.

Plaintiff argues that this appeal is governed by an abuse-of-discretion standard of review and, therefore, that each ruling under scrutiny must be afforded deference. (Respondent's Brief ("RB") 14.) Plaintiff is wrong. He analyzes the appellate issues under an inapplicable standard.

Dr. Yuja's Opening Brief challenges the trial court's decision on four separate grounds:

1. The special verdict form erroneously failed to obtain jury resolution of a controlling issue: Legal causation.
2. The trial court erroneously declined to honor the jury's request for a definition of the word "substantial," as used in the "substantial factor" causation test, even though controlling appellate authority supplied and required such a definition.
3. The trial court erroneously allowed the jury to consider inadmissible evidence and improper argument regarding the possible prolongation of decedent's life, prejudicial errors that were not cured by later admonition. For reasons explained

below, we are abandoning this appellate issue. (See pp. 30-31, *infra*.)

4. The trial court improperly dismissed a juror where there were no facts permitting an inference—let alone the required "demonstrable reality"—that he was unable or unwilling to deliberate or that he could not be fair and impartial.

A. The De Novo Standard Of Review.

The first two of these issues present pure questions of law, subject to no deference on appeal. (See *In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 928-929 [legal conclusions are reviewed de novo]; *National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 427, 439 [applying de novo review to determine whether instruction erroneously stated law]; *People v. Shaw* (2002) 97 Cal.App.4th 833, 838 ["assertions of instructional error are reviewed de novo"]; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111 ["a claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo"].)

B. The Abuse Of Discretion Standard Of Review.

The sole appellate ground reviewable on an abuse-of-discretion standard is Dr. Yuja's last argument—that the trial court erred in dismissing Juror No. 5. (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) In order for a court to exercise discretion on this issue, there must be proof that there was no "demonstrable reality" that the disqualified juror was unable or unwilling to perform his duties in a fair and impartial way. (*People v. Cleveland* (2001) 25 Cal.4th 466, 474 ["a juror's inability to perform as a juror 'must appear in the record as a demonstrable reality'"].) Here, there

was no substantial evidence that satisfied this standard. Accordingly, there was no factual basis on which an exercise of discretion could be founded. (See, e.g., *Dawson v. East Side Union High School Dist*. (1994) 28 Cal.App.4th 998, 1041 [an exercise of discretion "must be sufficiently supported by the evidence of record"; "If the evidence is insufficient to justify [an exercise of discretion], the trial court simply had no discretion to exercise"].)

C. The Substantial Evidence Rule.

Plaintiff contends that each of Dr. Yuja's challenges is governed by the substantial evidence rule and, thus, that the record must be viewed in the light most favorable to Plaintiff. (RB 14.) This is untrue.

First, in evaluating the trial court's failure to instruct the jury on the meaning of the word "substantial," the evidence must be viewed in the light most favorable to Dr. Yuja. (See *Townsend v. Turk* (1990) 218 Cal.App.3d 278, 280 fn. 1 ["in determining whether a refusal to instruct the jury as requested is erroneous, the reviewing court must examine the evidence in the light most favorable to the appellant"]; *Bernal v. Richard Wolf Medical Instruments Corp*. (1990) 221 Cal.App.3d 1326, 1337-1338, overruled on another ground in *Soule v. General Motors Corp*., 8 Cal.4th 548 ["In reviewing the propriety of a requested instruction, we view the evidence in the light most favorable to the party proposing it"].)

Second, except for his challenge to the juror dismissal, Dr. Yuja's contentions raise only *issues of law* involving the legal sufficiency of the special verdict and the correctness of the jury instructions. As to these points, there is no factual question at issue and thus the substantial evidence rule does not apply. (*Ali v. City of Los Angeles* (1999) 77 Cal.App.4th 246, 250 [only findings of fact are "subject to substantial evidence review"].)

The trial court's "selection of the applicable legal principles" and "application of those legal principles to the facts" are subject to no deference. (*Ibid*.)

Because Plaintiff's brief analyzes two of the three issues raised under the wrong standard of review, it offers no meaningful assistance in resolving those issues. Since none of the trial court's determinations are supported, they are entitled to no deference.[1/]

II.

THE JUDGMENT MUST BE REVERSED BECAUSE THE SPECIAL VERDICT FORM ON CAUSATION ERRONEOUSLY AND PREJUDICIALLY OMITTED THE KEY WORD, "SUBSTANTIAL," AND THUS FAILED TO ELICIT THE JURY'S DECISION ON A CENTRAL ISSUE IN THE CASE—LEGAL CAUSE.

As we demonstrated (AOB 12-21), the special verdict form failed to elicit the jury's resolution of a central issue in the case: Legal causation.

Instead of determining whether Dr. Yuja's negligence was a "substantial factor" in causing Mrs. Black's death, which is the *sin qua non* for imposing liability, the jury here determined only that "the negligence of Dr. Yuja cause[d] the death." (RT 1851; CT 274.) This determination doesn't answer the controlling legal question whether Dr. Yuja's "cause"

[1/] Plaintiff's argument that Dr. Yuja somehow waived the standard of review is untenable. (See RB 15.) Unlike the situation involved in the cases cited by Plaintiff, Dr. Yuja properly recited the governing standard of review. (See AOB 3 fn. 2.) It is Plaintiff who misperceives the correct standard.

was found by the jury to be sufficiently substantial so as to lawfully permit fastening him with liability for Mrs. Black's death.

Absent a jury finding that Dr. Yuja's negligence was a *substantial* cause—that it more probably than not caused Mrs. Black's death—no liability can be imposed. (See AOB 12-21.) There is no such finding here.

Plaintiff fails to meaningfully respond. Plaintiff argues that Dr. Yuja wasn't entitled to a special verdict. (RB 16.) But that's not the point. Regardless whether the trial court was required to use a special verdict, here the court *did* use one. It elected to require the jury to specifically decide—by special verdict—the causation issue.

Where, as here, a special verdict form is employed, the law requires that it must obtain the jury's resolution of each of the controverted issues submitted. Here, the special verdict form did not obtain sufficient resolution of the causation issue, making it impossible to determine whether liability was lawfully imposed on Dr. Yuja. Stated otherwise, no one can tell from the special verdict whether the jury ever concluded that Dr. Yuja's negligence met the "substantial factor" test.

A. Unlike A General Verdict, A Special Verdict Form, If Employed, *Must* Resolve Every Controverted Issue.

Plaintiff states that Dr. Yuja was not statutorily entitled to a special verdict and thus there was no need for the special verdict to obtain an answer to the core issue of causation. (RB 16.) Plaintiff is wrong. While the trial court wasn't required to use a special verdict form, once it decided to use one, the form had to be correct. (See AOB 15-16.) This one wasn't.

The special verdict form did not comply with Code of Civil Procedure section 624, which provides:

> 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.*

(Code Civ. Proc., § 624, emphasis added.)

Here, the special verdict did not sufficiently elicit "conclusions of fact" so that "nothing [] remain[ed] to the Court but to draw from them conclusions of law." The jury's determination that Dr. Yuja "caused" the death does not permit a conclusion of law that his negligence was a substantial factor in causing Mrs. Black's death. Unless the jury determined that Dr. Yuja's negligence was a "substantial" factor in causing Mrs. Black's death, a legal conclusion imposing liability on Dr. Yuja cannot be drawn.

The sole case Plaintiff cites does not undermine these principles. *Gorman v. Leftwich* (1990) 218 Cal.App.3d 141 (RB 16) involved a *general verdict*, not a special verdict. This makes all the difference in the world. Indeed, the law pertaining to general and special verdicts is very different. While a "general verdict on negligence 'pronounces generally upon all or any issues" (*Gorman, supra*, 218 Cal.App.3d at p. 149) and, thus, permits an inference of supporting findings (*Gordon v. Strawther Enterprises, Inc*. (1969) 273 Cal.App.2d 504, 511), the same is *not* true for special verdicts. Where a special verdict form is used, it must resolve all ultimate facts in a manner that suffices to permit the drawing of related conclusions of law. (Code of Civ. Proc., § 624; *Myers Building Industries, Ltd. v. Interface Technology, Inc*. (1993) 13 Cal.App.4th 949, 959-960 ["The jury must resolve all of the ultimate facts presented to it in the special verdict"].)

Here, there was no general verdict from which this Court might infer the missing finding, and the special verdict did not resolve a key ultimate

fact. (See CT 274-275.) For this reason, liability cannot be imposed on Dr. Yuja.

B. The Failure Of The Special Verdict Form To Resolve The Key Causation Issue Violated Dr. Yuja's Constitutional Right To A Jury Trial.

Plaintiff claims that the special verdict form comported with constitutional mandates because it "obviously addressed every ultimate fact required—negligence, causation, and damages—and the jury ruled on every question presented." (RB 18.) The problem with this statement is that the jury did not meaningfully answer the causation question.

While the special verdict did purport to address each of the issues Plaintiff mentions, it did not answer the causation question in a manner that would permit liability to be imposed. The causation issue could not properly be resolved without a jury determination as to whether Dr. Yuja's negligence was a "substantial" cause of Mrs. Black's death. The jury's finding that Dr. Yuja's negligence "caused" the death decided nothing. (See AOB 13-14.)

Without resolution of a factual question that governs the determination of liability, the jury's special verdict is effectively a non-decision. Without jury resolution of the facts essential to the imposition of liability, liability cannot constitutionally be imposed. This is because Dr. Yuja has a "constitutional right to have a jury determine the disputed facts." (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*"].) Here, one of the central disputed facts was causation, and Dr. Yuja had a right to have the jury resolve the causation issue. (*Gordon v. Havasu Palms, Inc*. (2001) 93 Cal.App.4th 244, 252 [causation is a question of fact reserved for jury determination].)

Dr. Yuja's right to a jury trial on the causation issue was violated because the jury never determined whether Dr. Yuja's negligence was of sufficient causative consequence to permit the imposition of liability.

This error is not cured, as Plaintiff contends (RB 27), by the fact that the jury was instructed as to the "substantial factor" test pursuant to BAJI No. 3.76. Although that instruction informed the jury that Plaintiff had to prove that Dr. Yuja's negligence was a "substantial" factor in causing Mrs. Black's death, the fatal defect is that we don't know from the jury's special verdict whether it found that Plaintiff sustained his burden on that issue.[2/] Moreover, the jury expressed confusion regarding the meaning of the word "substantial," as used in the causation question, and was never given an explanation of that key legal standard. (See section III, *infra*.)

C. Plaintiff Fails To Effectively Respond To Controlling Authority.

Plaintiff fails to overcome the authorities, cited in our Opening Brief (AOB 14-20), that compel reversal. Here, exactly as in *In re Bell* (1942) 19 Cal.2d 488 and *Cal. Shipbuilding Corp. v. Ind. Acc. Com*. (1948) 85 Cal.App.2d 435 (AOB 16-19), there is no way of determining whether the jury found sufficient facts to warrant entry of judgment against Dr. Yuja. Here, exactly as in those cases, the judgment must be reversed. (AOB 14-20.) Plaintiff fails to respond to these cases in any meaningful way. (RB 21-22.)

As our Supreme Court held in *Ito v. Watanabe* (1931) 213 Cal. 487, a trial court has no power to enter a judgment on a special verdict that fails

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[2/] While the special verdict form elicited answers on issues of negligence, causation and damages (CT 274), the jury was never asked whether it believed Dr. Yuja should be held liable.

to decide facts essential to the imposition of liability. In *Ito*, a defendant claimed that he had been fraudulently induced to sign a contract. The jury was given a special verdict form that "did not include the essential elements of materiality and reliance, so that the jury found merely that plaintiff made certain false representations with the intent to deceive defendant." (*Ito, supra,* 213 Cal. at p. 489.) Since liability could not be imposed in the absence of findings that the representations were material and induced reliance, the special verdict form was held to be "insufficient to support a judgment." (*Ibid*.)[3/]

The present case compels an identical conclusion. Here, exactly as in *Ito*, *In re Bell* and *Cal. Shipbuilding*, the special verdict form did not resolve the fundamental issue of legal causation. Dr. Yuja could not be held liable if his negligence was *a* cause; he could only be held liable if the jury found that his negligence was a *substantial* cause of Mrs. Black's death. On its face, the special verdict does not answer this determinative question. No judgment can be imposed based on this non-verdict.

D. Plaintiff Effectively Concedes That Striking The Word "Substantial" From The Special Verdict Form Was Prejudicial.

Plaintiff contends that the jury undoubtably paid "heightened attention" to the handwritten word "substantial," as used on the special verdict form initially submitted to the jury. (RB 19-20.) But, the jury was

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[3/] Regarding the verdict's uncertainty and incompleteness, *Ito* observed that "[i]t was for this reason that the District Court of Appeal, Third District, denied a petition for a writ of mandate to compel the court to enter judgment on the verdicts." (*Ito, supra,* 213 Cal. at p. 489 [citing *Watanabe v. Superior Court* (1929) 280 P. 135].)

supposed to pay attention to the word. Indeed, BAJI No. 3.76 instructed the jury that Plaintiff had to prove that any negligence by Dr. Yuja was a "substantial" cause of Mrs. Black's death. During deliberations, the jury focused on that term. (See p. 20 fn. 10, *infra*.) It specifically asked the court to tell it what the term meant. (CT 221; RT 1828.)

Instead of offering further explanation, the trial court simply struck the term from the special verdict form. This effectively told the jury that its special verdict need not take "substantial" into consideration. "Heightened attention" was transformed into "no attention." The result: The jury returned a meaningless verdict.

E. Dr. Yuja Neither Invited The Error, Nor Waived His Objections To The Improper Deletion Of The Word "Substantial" From The Special Verdict Form.

Plaintiff argues that Dr. Yuja somehow invited or waived the error in deleting the word "substantial" from the special verdict form. (RB 25.) Not so. Dr. Yuja vigorously objected to the deletion.

1. It was Plaintiff's burden to make sure that the special verdict form resolved every material factual issue essential to the imposition of liability.

The party attempting to enforce the judgment—here, Plaintiff—bears the burden of assuring that the special verdict form answers every material factual question. The party "attempting to enforce the judgment based on the special verdict . . . must bear the responsibility for a special verdict submitted to the jury on its own case." (See *Myers Building Industries, Ltd., supra,* 13 Cal.App.4th at pp. 961-962 [rejecting plaintiff's contention

"that it was [defendant's] responsibility to obtain special verdict findings on the fraud cause of action and that [defendant] has waived its right to assert the deficiency in the verdict form by failing to object"].)[4/]

Plaintiff failed to assure that the special verdict form sufficed to permit the imposition of liability on Dr. Yuja. Indeed, as we demonstrate at pp. 12-13, below, it is Plaintiff who invited the error.

2. Dr. Yuja objected to the striking of the word "substantial" from the special verdict form.

Contrary to Plaintiff's repeated assertions (see RB 18-20), Dr. Yuja objected to the deletion of the word "substantial" from the special verdict form. Dr. Yuja's counsel said he did not agree to the deletion; he said he could not agree *unless* the trial court agreed to instruct the jury as to the meaning of the word "substantial." (See RT 1857 [*Defendant's counsel*: "If we're going to do this (delete "substantial" from the special verdict form), I still think we need to give (the jury) the special instruction of what the 'substantial' means that I proposed"].) The trial court declined to so instruct.

Plaintiff suggests that Dr. Yuja somehow acquiesced in the trial court's revision of the special verdict form. (RB 17-20, 28.) This is disingenuous. While Dr. Yuja prepared the revised special verdict form *pursuant to the trial court's request*, he objected again to its being used without also instructing the jury in accordance with Dr. Yuja's requested

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[4/] "The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts," it is the plaintiff, not the defendant, who bears the risk of this pitfall. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.*, *supra*, 13 Cal.App.4th at pp. 959-960.) Plaintiff bore the risk here.

instruction defining the word "substantial." (RT 1855 ["At the Court's request, I did prepare the amended verdict form . . . I don't think it's proper to change [the special verdict form] without giving a specific instruction of what 'substantial' means as I proposed"]; RT 1857 [same effect].)[5/]

3. If anyone invited the error, it was Plaintiff.

From the beginning, the deletion of the word "substantial" from the special verdict form was *Plaintiff's* idea.

After deliberating for four hours, the jury sent a note to the court stating: "Please define 'substantial' cause of death as outlined in [special verdict] question No. 2." (RT 1828.) The trial court asked the attorneys for suggestions. (RT 1829.) Plaintiff's counsel responded by asking the court to strike the word "substantial" from the special verdict form.[6/] Defense counsel declared that he did not think it was right to delete "substantial" without simultaneously defining "substantial" in BAJI No. 3.76. (RT 1830, 1834.) Citing *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, defense

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[5/] Dr. Yuja proffered a proposed "Special Instruction In Response To Jury Question" defining "substantial" as meaning "greater than 50% probability." (CT 271, 273.) Although the trial court at one point stated that "no special instructions are proffered by either party on this issue" (RT 1859), it immediately corrected this misperception, acknowledging that "[Dr. Yuja's counsel,] Mr. Connely has proposed a solution." (RT 1859.) Even Plaintiff concedes that "Dr. Yuja wanted the court simultaneously to add a new . . . special jury instruction." (RB 28; 34 n. 9 ["Dr. Yuja asked the court to instruct the jury that 'a substantial cause is one that is greater than 50%'"].)

[6/] See, e.g., RT 1836 [*Plaintiff's counsel*: "If I could recommend that we change the verdict form to say 'a cause." And then also refer them to 3.76, which defines the word 'cause.' So that the verdict form says 'cause,' instead of 'substantial cause.' And then refer them to the BAJI which refers to what 'cause' is"].

counsel reminded the court that the word "substantial" is crucial because, "in [a] wrongful death action [plaintiff] has to prove with greater than 50% probability that—my negligence was the cause of death, [] not cancer." (RT 1830, 1834.)

F. The Erroneous Special Verdict Form Error Was Highly Prejudicial.

Plaintiff argues that even if the trial court erred by striking the word "substantial" from the special verdict form, the error was harmless. (RB 27-28.) Absurd!

How can it conceivably be harmless error when the effect of the erroneous special verdict form is to permit the imposition of liability on Dr. Yuja without anyone being able to ascertain whether the jury ever found that his negligence was a legal cause of death?

Plaintiff argues that because BAJI No. 3.76 and BAJI No. 16.00 use the words "a cause" and because "such is approved in *Mitchell v. Gonzalez* (1991) 54 Cal.3d 1041," the error is somehow harmless.[7/] (RB 27.) Plaintiff's argument is refuted by these very authorities. Both BAJI No. 3.76 and *Mitchell v. Gonzalez* define a legal cause as "something that is a *substantial factor* in bringing about an injury." (See CT 245, emphasis added [BAJI No. 3.76].) These authorities demonstrate that the word omitted from the special verdict form—"substantial"—is critical to the causation test.[8/]

[7/] BAJI 16.00 was not given in this case and thus is irrelevant.

[8/] As discussed at pp. 21-22, *infra*, the error in deleting "substantial" from the special verdict form was not cured (as Plaintiff claims) by instructing the jury pursuant to BAJI 3.76 because at no time was the jury's question about the meaning of the word "substantial"

The special verdict form used in the present case was prejudicially erroneous. It omitted a word that both *Mitchell* and BAJI No. 3.76 declare is essential. It allowed the imposition of liability even though the jury may not have decided that Dr. Yuja's negligence was a substantial factor in causing Mrs. Black's death. The judgment cannot stand.

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answered. The jury was never instructed in accordance with settled law defining "substantial" in a wrongful death case as "greater than 50% probability."

III.

THE COURT'S FAILURE TO INSTRUCT THE JURY AS TO THE MEANING OF "SUBSTANTIAL" WAS PREJUDICIAL ERROR.

The jury told the trial court it was confused about the meaning of the word "substantial." The trial court's response? It refused to define the word, even though decisional law furnished a definition. Even worse, it struck the word from the special verdict form.

These acts left the jury guessing as to which of the diametrically opposed definitions offered by the attorneys was correct. They left the jury without guidance as to a controlling issue in the case. This allowed the jury to pick its own definition rather than the one compelled by settled law.

This was *triple* prejudicial error: The court omitted an essential word from the special verdict form; the court refused to define the word even though controlling appellate precedent afforded a definition; and the court, by striking the word after the jury knew of its existence, effectively told the jury that *any* cause would suffice.

Where, as here, controlling authority mandated that "substantial" means a greater than 50% likelihood that Dr. Yuja's negligence caused the death, the trial court was obligated to tell the jury as much. Its failure to do so was prejudicial error.

A. In Order To Prove "Within A Reasonable Medical Probability" That Dr. Yuja's Negligence Legally Caused Mrs. Black's Death, Plaintiff Was Required To Show That, At The Time Of Dr. Yuja's Negligence, Mrs. Black Had A Greater Than 50% Chance Of Surviving Her Cancer.

As demonstrated in our Opening Brief, Plaintiff was required to show that Dr. Yuja's negligence was a "substantial" factor in causing Mrs. Black's death. Controlling authority defines a "substantial" cause as a probable cause—a greater than 50% cause. If it is reasonably probable that a person is going to die of a preexisting disease regardless of treatment, it cannot be said that a negligent failure to diagnose is a substantial factor in causing the death. (See authorities discussed at AOB 21-23.)

Plaintiff argues that "substantial" means "something not insignificant" (RB 34; RT 1624.) Plaintiff is wrong.

It is well settled that, in order to prevail in any medical malpractice case, a plaintiff is required to prove a "reasonable medical probability" that the doctor caused the harm. (See, e.g., *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 [in cases "presenting . . . medical causation issues, the standard of proof ordinarily required is 'a reasonable medical probability based upon competent expert testimony that the defendant's conduct contributed to [the] plaintiff's injury'"].) Numerous authorities so hold.[9/]

[9/] See also, *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 477 ["causation must be proven within a reasonable medical probability based on expert testimony; a mere possibility is insufficient"]; *Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1603 ["causation must be proven within a reasonable medical probability"]; *Espinosa v. Little Co. of Mary Hosp.* (1995) 31 Cal.App.4th 1304, 1314-1315 ["In a medical

This principle was recently reaffirmed by our Supreme Court. It specifically held that unless "it was 'more probable than not'" that different action by the defendant could have averted the harm, the plaintiff cannot show that the defendant's negligence "was a substantial factor in causing her injuries." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 776.)

Within the specific context of wrongful death actions based on alleged failures to properly treat cancer patients, courts have given the "reasonable medical probability" standard a very specific meaning. (*Espinosa v. Little Co. of Mary Hosp.*, *supra*, 31 Cal.App.4th at p. 1319.) They hold that in order to show a "reasonable medical probability" that the doctor caused the death, a plaintiff must show that at the time the patient received treatment, the patient had a greater than 50% chance of survival. (*Ibid*.; see also *Bromme v. Pavitt*, *supra*, 5 Cal.App.4th at pp. 1504-1505 ["California does not recognize a cause of action for wrongful death . . . where the decedent did not have a greater than 50 percent chance of survival had the defendant properly diagnosed and treated the condition"].) Where there is no such proof, "the defendant's alleged negligence could not be a substantial factor in bringing about the death of the patient."

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malpractice action the element of causation is satisfied when a plaintiff produces sufficient evidence 'to allow the jury to infer that in the absence of the defendant's negligence, there was a *reasonable medical probability* the plaintiff would have obtained a better result'"]; *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 216 [same]; *Simmons v. West Covina Medical Clinic* (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"]; *Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1657-1658 ["negligent conduct was not a cause in fact of an injury 'where the evidence indicates that there is less than a probability, i.e., a 50-50 possibility or a mere chance,' that the injury would have ensued"].

(*Espinosa, supra,* 31 Cal.App.4th at p. 1319; *Bromme v. Pavitt, supra*, 5 Cal.App.4th at pp. 1499-1500.)

This specific causation standard stems from recognition of a reality (unpleasant though it may be) that in cancer cases, "the result complained of in the lawsuit [i.e., the death] is one which would normally have been expected to follow from the original injury or disease, rather than from any effects of misdiagnosis or mistreatment." (*Espinosa v. Little Co. of Mary Hosp., supra,* 31 Cal.App.4th at p. 1319 [citing *Dumas v. Cooney* (1991) 235 Cal.App.3d 1593]; *Bromme v. Pavitt, supra*, 5 Cal.App.4th at p. 1498 ["This case involves two forces: Bromme's cancer and defendant's alleged failure to diagnose and treat the disease in a timely manner. Therefore, in order to establish that defendant's negligence was a 'substantial factor' in causing Bromme's death, plaintiff had to prove the negligence was of itself sufficient to bring about that harm"].)

For these reasons, the word "substantial" in the context of a wrongful death cancer case, has a specific meaning. It requires Plaintiff to prove that it was probable that the patient would have lived but for the misdiagnosis. (See, e.g., *Bromme, supra,* 5 Cal.App.4th at pp. 1499-1500, 1503; see also *Espinosa, supra,* 31 Cal.App.4th at p. 1319 [discussing same].)

B. The Trial Court Erred In Refusing To Define The Word "Substantial" In Response To The Jury's Specific Inquiry As To The Meaning Of That Term.

Plaintiff says that Dr. Yuja cited no authority for the proposition that a trial court is obligated to define a term whose meaning is well-settled under circumstances where a jury requests a definition. (RB 29.) Plaintiff ignores our brief. (AOB 24-27.)

As we have shown, the word "substantial" in a wrongful death case is settled. (AOB 21-23; see also pp. 16-17, *supra*.) As in *Sandoval v. Bank of America* (2002) 94 Cal.App.4th 1378, cited in our Opening Brief (AOB 26-27), the trial court was obligated to further explain the causation standard where the jury expressed confusion regarding its meaning. (*Sandoval, supra,* 94 Cal.App.4th at p. 1387 ["the court prejudicially erred in not correctly explaining causation in replying to the jury's inquiry"]; *People v. Hill* (1992) 3 Cal.App.4th 16, 24-25, disapproved on another ground in *People v. Nesler* (1997) 16 Cal.4th 561 ["When a deliberating jury desires to be informed 'on any point of law arising in the case,' the jury must be returned to court and 'the information required must be given"; "[t]he court has a primary duty to help the jury understand the legal principles it is asked to apply"].)

Plaintiff suggests that a court need not specifically define words used in "standard instructions." (RB 29.) But the cases just discussed belie that contention, where, as here, the jury specifically requests a definition and a definition exists.

Nor is Plaintiff's position buttressed by *People v. Hill, supra,* 3 Cal.App.4th 16. (RB 29.) There, the jury received standard instructions regarding the crime of conspiracy. During deliberations, the jury asked the trial court for explanation of the law having nothing to do with the case before it. The Court of Appeal held that it was proper to refuse to give clarification on an issue that is *irrelevant* to the resolution of the case. (*Id.* at pp. 23, 26.) In our case, unlike *Hill*, the jury's query went to the heart of the case: The meaning of substantial factor causation.

Here, the trial court's failure to respond to the jury's inquiry left the jury without any guidance as to the law that governed its decision. This let the jury make up the law, as demonstrated by the declaration of juror Rodney Tong, showing that the jurors argued about whether substantial

meant less than or greater than 50%. (CT 371.)[10/] This wasn't something the jury should have been arguing about.

C. None Of Plaintiff's Other Arguments Excuses The Trial Court's Failure To Define The Causation Standard.

1. Dr. Yuja need not have proffered his special instruction defining "substantial" any sooner than he did.

After the jury asked for a definition of the word "substantial," Dr. Yuja promptly submitted a "Special Instruction In Response To Jury Question" that would have instructed, consistent with the authorities cited above, that "[a] 'substantial factor' in this case means that, with greater than 50% probability, Ms. Black would have been cured had she been diagnosed

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[10/] Juror Tong reported: "I expressed my belief that a 'substantial cause' meant one that exceeded 50%. Two other jurors at that time, Mr. Swallow and Mr. Thompson, agreed with me." (CT 371.) However, "[a] number of other jurors voiced a belief that 'substantial' did not mean greater than 50%." (*Ibid*.) Thereafter, "the jury discussed the fact that the two lawyers had argued different meanings for the word 'substantial,'" and "asked the clerk for a dictionary to hopefully define the word 'substantial,'" but that was refused (*Ibid*.)

Because juror Tong's declaration contains statements of fact as to what he heard and observed, and *not* the state of mind of the jurors, it is admissible. Evidence Code section 1150 distinguishes "between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 349.) "Only declarations of the former can properly be considered. Thus, improper influences 'open to sight, hearing, and the other senses and thus subject to corroboration,' can be proved under this section." (*Moore v. Preventive Medicine Medical Group, Inc*. (1986) 178 Cal.App.3d 728, 740 fn. 8.)

and treated at the time the pathology tests were conducted by Dr. Yuja." (CT 271-273.)

Plaintiff argues that Dr. Yuja's request for a special instruction cannot be considered because it was submitted after the first witness was sworn. (RB 30.) This is specious.

Until the jury inquired during deliberations as to the meaning of "substantial," there was no way of knowing that the jury required definitional guidance. The trial court solicited input from the attorneys as to how to respond. (RT 1829.) Dr. Yuja complied, proffering his proposed special instruction. (CT 271, 273.) He could not have been expected to do any more than this.

2. BAJI No. 3.76 does not cure the error in refusing to define "substantial."

Plaintiff argues that the failure to instruct as to the meaning of "substantial" was remedied by the trial court's instructing pursuant to BAJI No. 3.76. (RB 31.) This begs the question. BAJI No. 3.76 refers to, but does not define, "substantial." It did nothing to answer the jury's question.

3. The fact that BAJI No. 3.76 does not furnish a definition of "substantial" does not excuse the trial court from furnishing one.

Plaintiff contends that because "substantial" is not defined in BAJI No. 3.76, the trial court was not required to furnish a definition. (RB 45.)[11/] Plaintiff is wrong.

Plaintiff ignores the governing authorities requiring the trial court to respond to the jury's inquiry. (See pp. 18-19, *supra*; AOB 24-27.) Such a response was especially required here, where the case law dealing with the subject of failure to diagnose cancer in a wrongful death setting affords a specific definition. (See discussion at pp. 17-18, *supra*; AOB 21-23.)

4. The cases relied upon by Plaintiff do not support applying a lesser causation standard here.

The fact that "substantial" has been defined to mean "something which is more than slight, trivial, negligible, or theoretical" *in other contexts* does not trump the settled decisional law defining "substantial" in a preexisting condition, wrongful death context as greater than 50%. (See *Bromme, supra*, 5 Cal.App.4th at pp. 1499-1500; pp. 17-18, *supra*.)

a. The *Rutherford* and *Hughey* cases are inapplicable to a preexisting condition, wrongful death case.

Plaintiff's reliance on *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 and *Hughey v. Candoli* (1958) 159 Cal.App.2d 231 (RB 35-37) is misplaced. While *Rutherford* declares that "the term 'substantial factor'

[11/] Plaintiff argues that BAJI 3.76 is "presumptively sufficient" because it was prepared by the Los Angeles Superior Court's Committee on Standard Jury Instructions. (RB 45.) Plaintiff cites no authority for such a presumption and indeed there is none.

has not been judicially defined with specificity" (16 Cal.4th at p. 969), neither *Rutherford* nor *Hughey* is a preexisting condition wrongful death cancer case. (See, e.g., *Espinosa* , *supra*, 31 Cal.App.4th at pp. 1317-1319 [describing difference between definitions of "substantial" in the "cancer cases" and in traditional concurrent cause cases]; *Bromme, supra*, 5 Cal.App.4th at p. 1493 ["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"].)[12/]

Here, the trial court's failure to honor the jury's request to define the word "substantial" defied specifically applicable authority. It left the jury to guess what the law requires and which of the diametrically opposed

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[12/] *Rutherford* is distinguishable from our case for other reasons as well. *Rutherford* is multi-defendant asbestos case. There, nineteen separate defendants' products acted together to create a single illness. (*Rutherford, supra,* 16 Cal.4th at p. 960.) Under such circumstances, it would not have made sense to require proof that each of the nineteen separate defendants' products was a greater than 50% cause of the illness. This is so because it would be impossible to disengage the cause attributed to each product from its interaction with the other products. It is not surprising then that *Rutherford* is, by its terms, limited to the arena of asbestos litigation. (See, e.g., *Id.* at pp. 976-977, emphasis added ["plaintiffs may prove causation *in asbestos-related cancer cases* . . ."]; *Id*. at p. 977, emphasis added ["*in asbestos-related cancer cases*, a particular asbestos-containing product is deemed to be a substantial factor in bringing about the injury if its contribution to the plaintiff or decedent's risk or probability of developing cancer was substantial"].)

Hughey v. Candoli, *supra*, 159 Cal.App.2d 231 (cited at RB 36), is additionally inapplicable because it fails to cite, let alone discuss Code of Civ. Proc., section 377, and because it is premised on the outmoded "proximate cause" test rejected in *Mitchell v. Gonzalez*. (See *Mitchell v. Gonzalez* (1991) 54 Cal.3d 1041, 1054, fn. 10.)

definitions proffered by each side might be controlling. This isn't how our justice system is supposed to work.

b. *Pulvers v. Kaiser Foundation Health Plan, Inc.* Does Not Present A Viable Alternative To *Bromme v. Pavitt.*

Plaintiff also misperceives *Pulvers v. Kaiser Foundation Health Plan, Inc.* (1979) 99 Cal.App.3d 50 which, Plaintiff erroneously claims, is in conflict with *Bromme v. Pavitt.* According to Plaintiff, *Pulvers* establishes that liability in a wrongful death case may be imposed even in the absence of a greater than 50% chance of survival. (See RB 34.)

Pulvers doesn't specifically address the issue. Indeed, its language supports our view that the governing test is "reasonable medical probability." (See *Pulvers, supra*, 99 Cal.App.3d at pp. 565-566.) Since *Pulvers* did not consider the meaning of the word "substantial" or the requirements for establishing causation under Code of Civil Procedure, section 377 et seq., it affords no guidance here.[13/] (See *People v. Harris* (1989) 47 Cal.3d 1047, 1071 ["It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court"].)

5. Sound public policy supports the causation standard articulated in *Bromme v. Pavitt.*

[13/] See *Bromme, supra*, 5 Cal.App.4th at p. 1501 [noting that *Pulvers* never considered the language of Code of Civil Procedure section 377].

Plaintiff argues that "*Pulvers* articulates a better public policy for causation than the substantial factor standard [in *Bromme*]." (RB 37.) As just seen, *Pulvers* articulates no policy on the issue here involved.

The standard Plaintiff suggests is not consonant with California law. It would allow the imposition of liability whenever a defendant's negligence had anything more than a negligible relationship to the death. This is not what "substantial" means or should mean. (See discussion at pp. 16-18, *supra*.)

Our Supreme Court has put this debate to rest. As it recently held, unless a plaintiff can prove "it was 'more probable than not'" that different action by defendant could have averted the harm, the plaintiff has not shown defendant's negligence "was a substantial factor in causing her injuries." (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 776 [when "the probabilities are at best evenly balanced, *it becomes the duty of the court to direct a verdict for the defendant*"].)

This rationale applies here. If it was not reasonably probable that Mrs. Black would have lived, then her death could not have been prevented by non-negligent intervention.

This approach makes perfect sense. It requires that the defendant's acts or omissions have a probable impact on the decedent's prognosis. (See *Saelzler*, *supra*, 25 Cal.4th at p. 780.) "To allow a lesser standard for establishing causation would "open the proverbial floodgates of our overburdened judicial system" (*Simmons v. West Covina Medical Clinic*, *supra*, 212 Cal. App. 3d at pp. 705-706.)

6. The fact that Dr. Yuja jointly proffered BAJI No. 3.76 does not waive the instructional error.

Plaintiff argues that because Dr. Yuja proffered BAJI No. 3.76, he invited the trial court's erroneous refusal to define the word "substantial." (RB 41.) But Dr. Yuja does not take issue with BAJI No. 3.76. It was correctly given. The question here is whether, faced with the jury's stated confusion about the meaning of the word "substantial," the trial court was required to define the term in accordance with settled law. It was.

D. The Erroneous Failure To Instruct The Jury As To The Meaning Of The Word "Substantial" Was Prejudicial And Mandates Reversal.

Plaintiff argues that any error in refusing to define "substantial" is harmless. (RB 42.) Nothing could be further from the truth.

The failure to define "substantial" was a miscarriage of justice. Indeed, under the standards articulated in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, it is reasonably "probable" that the error "'prejudicially affected the verdict.'" (See *Soule, supra*, 8 Cal.4th at pp. 580-581.)

1. The nature of the alleged error went to the heart of the case.

Plaintiff attempts to justify the trial court's refusal to instruct by proclaiming that "the term 'substantial' is self-evident to a layman juror." (RB 47.) Plaintiff's speculation is contradicted by the record. Here, the jury said it did not understand the term. Moreover, the lawyers from each side gave the jury two very different definitions for "substantial." One argued that substantial meant "something not insignificant," (RT 1623-1624) and the other stated that "a substantial cause is one that is greater than

50%" (RT 1830). As demonstrated above (*supra* at pp. 19-20), the jury did not have any way of knowing which definition was the correct one.

It was the trial court's job to tell the jury what the law defined the word to mean. It failed to do so. This allowed the jury to decide the case based on each juror applying his or her own personal definition, rather than the one compelled by settled authority.

Where, as here, the instructions failed to give the jury the tools it needed to resolve the factual issues in the case, reversal is necessary. (See *Marment v. Castlewood Country Club* (1973) 30 Cal.App.3d 483, 486 [reversal required where "the instructions . . . left the jury without any understanding of the true rule and afforded no basis for any verdict based upon the law"].)

2. The court's remedial admonition on extension of life did nothing to cure its failure to define "substantial."

Plaintiff contends the trial court's admonition at the end of trial on "lost years" cured the erroneous refusal to define "substantial." (RB 48.) This is untrue. The trial court's admonition on the "lost years" evidence had nothing whatsoever to do with the meaning of the word "substantial."

3. When the evidence is viewed under the standard of review applicable to claims of instructional error—in the light most favorable to Dr. Yuja—the trial court's failure to instruct on the meaning of "substantial" was highly prejudicial.

Where there is a failure to instruct, prejudice is determined based on a view of the evidence in the light most favorable to the party claiming error. (See discussion at p. 3, *supra*.) For this reason, Plaintiff's reliance on evidence favorable to Plaintiff is beside the point. (See RB 49.)

When the evidence is properly viewed, the jury could easily have determined that Dr. Yuja's negligence was *not* a legal cause of death. For example, two medical experts testified that earlier treatment would *not* have resulted in a cure for Mrs. Black. (RT 1209, 1226, 1337, 1339.) They testified that even assuming the tumor was at its most curable stage when Dr. Yuja failed to diagnose, Mrs. Black still only had a 33% chance of survival. (*Ibid*.)

The evidence supports a finding that Mrs. Black never had a greater than 50% chance of survival. Had the jury been properly instructed consistent with the principles set forth in *Bromme* and ensuing decisions, the jury could well have found that Dr. Yuja's negligence was not a substantial causative factor in Mrs. Black's death.[14/]

4. Counsel argument did not remedy the error.

The jury's confusion about the meaning of the word "substantial" was not remedied by counsel's argument. Despite Dr. Yuja's efforts to focus the jury on the controlling standard, Plaintiff argued just as strongly for his view of the "substantial factor test." He argued that "substantial causation" simply meant "something not insignificant." (RT 1623-1624.)

[14/] Here, it is possible—by reason of the inconclusive special verdict form—that the jury *did* find in favor of Dr. Yuja on the issue of causation because it only found that his negligence "caused" the death. No one can tell whether the jury decided his negligence was or was not a "substantial factor" in causing the death. (AOB 12-21; see discussion at Section II, *supra*.)

Plaintiff suggests that his argument as to the inapplicable standard is not a ground for reversal because Dr. Yuja failed to object and seek admonishment. (RB 55.) This is untrue. Dr. Yuja's counsel did attempt to stop Plaintiff from arguing that "substantial" meant "something not insignificant." (RT 1623.) He interrupted Plaintiff and asked to approach the bench, but was refused. (*Ibid*.)

The fact that counsel for each side argued strenuously about conflicting standards of causation demonstrates exactly why the error was prejudicial. A jury can't be allowed to guess about what law applies. It is the trial court that must instruct the jury on the law. The trial court abdicated its responsibility here.

5. The jury's question demonstrated the jury's confusion.

Plaintiff argues that the jury gave no indication that it continued to be confused about the meaning of the "substantial factor" test after the trial court struck the word "substantial" from the special verdict form and refused to define it. (RB 56-58.) Striking a term required by law was no way to resolve the jury's confusion. Indeed, despite the jury's specific request for a definition of the word "substantial," nothing the trial court did ever supplied it with one. (RT 1828-1829; CT 221.) The jury was confused and remained confused, as demonstrated by its discussions during deliberations. (See discussion at p. 20 fn. 10, *supra*.)

IV.

DR. YUJA WITHDRAWS THE ARGUMENT THAT THE TRIAL COURT'S ERRONEOUS ADMISSION OF "LOST YEARS" EVIDENCE WAS REVERSIBLE ERROR NOT CURED BY LATER ADMONISHMENT.

In section III of our Opening Brief, we argued that the trial court erroneously allowed the jury to hear inadmissible evidence that even if no cure was available, Mrs. Black's life could have been extended. We have now had occasion to examine the Respondents' Brief and have conducted further research on this issue. We have decided to withdraw this argument as one of our appellate contentions. (See discussion at pp. 35-37, *infra*.) In all other respects, we continue to assert there was reversible error.

V.

THE COURT'S DISMISSAL OF JUROR NO. 5 WAS PREJUDICIALLY ERRONEOUS.

A. Juror No. 5 Was Improperly Dismissed.

As shown in the Opening Brief, Juror No. 5 was dismissed from the jury because, according to the trial court, he could not be fair and impartial. (AOB 35.) But there was no evidence to support this determination. The record reveals that Juror No. 5's concerns had nothing to do with his fairness or impartiality. (AOB 36-38 [Juror No. 5's only expressed concerns were that the other jurors were trying to rush the deliberative process and that the foreman would not let him express his views].)

B. None Of Plaintiff's Arguments Refute That Juror No. 5 Was Improperly Excused.

1. Juror No. 5 said nothing suggesting that he was biased against either litigant.

Plaintiff relies on *People v. Abbott* (1956) 47 Cal.2d 362 (cited at RB 65-66), where the court dismissed a juror who worked at the same office as a litigant's brother. (RB 65-66.) This has nothing to do with our case.

Here, there is no suggestion that Juror No. 5 knew the litigants or their relatives. There is no suggestion that he had any bias or that he was partial or unfair. It is the trial court, not Juror No. 5, who unilaterally injected fairness and partiality into the discussion in the form of a loaded question. The record plainly reveals this is so. (RT 1881-1887.)

2. Dr. Yuja did not waive his objection to Juror No. 5's removal.

Plaintiff argues that Dr. Yuja cannot complain because he agreed to Juror No. 5's removal. (RB 67.) This isn't correct. Dr. Yuja objected to the removal and asked for a mistrial.[15/] (RT 1887-1891.) Dr. Yuja never agreed that Juror No. 5 could not be fair and impartial.

[15/] Dr. Yuja maintained, "there's nothing that [Juror No. 5] said that indicates he cannot be a juror in a normal case, nor in this case." (RT 1888.) He stated: "I don't think the solution is that we just get rid of [Juror No. 5] and leave the [remaining jurors] that aren't being proper on to decide the case." (RT 1889.) While the trial record has an isolated reference reporting Dr. Yuja's comment, "he can't stay" (RT 1889), this reference is inconsistent with Dr. Yuja's other statements.

3. Plaintiff fails to distinguish the cases cited in our opening brief.

Plaintiff tries to distinguish the cases cited in our Opening Brief. (See AOB 38-40.) Those cases hold that there must be a "demonstrable reality" that a juror cannot perform his duty. (AOB 38-40.)

Plaintiff compares the present case to *People v. Hecker* (1990) 219 Cal.App.3d 1238. But there, bias was demonstrated because the juror actually had contact with the defendant outside of the court and admitted that defendant's presence at her church removed her ability to dispassionately consider the case. (*Hecker, supra*, 219 Cal.App.3d at pp. 1243-1245.) In short, the juror had a real bias issue *with the defendant*.

Here, in decisive contrast, Juror No. 5's issues had nothing to do with the litigants. His issues pertained solely to the integrity of the deliberative process. His comments focused exclusively on his problems with *the other jurors*.

There were no facts, let alone a "demonstrable reality," that Juror No. 5 couldn't be fair and impartial. Answering "yes" to the trial court's leading question did not demonstrate otherwise.

4. The close vote on causation demonstrates the prejudice of Juror No. 5's removal.

Plaintiff suggests the 10-2 vote on causation indicates that Juror No. 5's absence was harmless. (RB 69-70.) But Plaintiff never addresses the cases cited in our Opening Brief (AOB 41-42), showing that disqualification of a juror interferes with the *deliberative process*. Nor does Plaintiff distinguish the cases holding that deliberations are intended to

provide each juror with the opportunity to persuade others to accept his or her viewpoint. (AOB 42.)

The fact that the verdict was 10-2 on the question of causation (even without Juror No. 5's vote) shows that there was a split of opinion among the jurors—one that Juror No. 5 may have influenced. It is possible that Juror No. 5 would have voted for Dr. Yuja and persuaded at least one other juror to do so as well.

Once again, reversal is required.

CONCLUSION

The judgment is infected by prejudicial error.

Both individually and in the aggregate, the trial court's mistakes created a likelihood that liability was imposed even though Dr. Yuja's negligence may not have been found by the jury to rise to the requisite level of legal cause. The trial court struck "substantial" from the special verdict form, thus precluding anyone from knowing whether the jury really decided the key issue in the case in a way that would legally permit the imposition of liability. The trial court failed to define "substantial," even though the jury said it was confused and the word's meaning in a wrongful death cancer case is well settled. And the trial court improperly dismissed a properly deliberating juror.

The judgment should be reversed.

CROSS RESPONDENT'S BRIEF

In this case, Plaintiff was awarded wrongful death damages for decedent's full life expectancy—65 years.[16/] In his protective cross-appeal, Plaintiff argues that the trial court erred in excluding evidence as to an alternative damages theory. That theory—asserted as an alternative to Plaintiff's theory that Mrs. Black would have been fully cured if there had been no negligence—was that even if no cure was available, Mrs. Black's life could have been extended by additional months or years but for Dr. Yuja's negligence.

We believe the cross-appeal has merit. It is our view that if a wrongful death claimant can establish causation by proving that a doctor's negligence was a substantial factor—a greater than 50% cause—in causing a cancer patient's death, then the wrongful death claimant can permissibly seek damages for the further shortening of an already shortened life expectancy. However, the amount of damages in such a case should reflect the amount of time by which the cancer patient's already diminished life expectancy was further shortened by reason of the doctor's negligence.

This view is consistent with *Bromme v. Pavitt* and the other authorities cited in sections III, *supra*. *Bromme* held that in a wrongful

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[16/] Plaintiff's expert assumed Mrs. Black would have lived and worked until age 65. (RT 1036, 1045, 1062.) He estimated that the present value of the loss of support to Mrs. Black's family plus the present value of her household services was $915,000, assuming she did not go to college. (RT 1053.) Had Mrs. Black gone to college, this estimate would be $1,299,000. (RT 1053.) Had Mrs. Black become a computer operator, Plaintiff's expert estimated that the present value loss to the family would be $1,579,000. (RT 1054.) The jury awarded future economic damages of $900,000, the present value of which was $250,000. (CT 275.) It found that future household services were worth $1,762,675, the future value of which was $325,425. (*Id.*)

death case stemming from a negligent failure to treat cancer, a doctor cannot legally cause the death unless the patient had a greater than 50% chance of survival when he or she first saw the doctor. (See *Bromme*, *supra*, 5 Cal.App.4th at pp.1492-1493 [defendant's acts or omissions are not a "substantial factor in bringing about the decedent's death" "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"].)

Damages in such a situation should be premised on a comparison between (a) whatever life expectancy or diminished life expectancy the patient has immediately prior to the malpractice and (b) how many less years of survival the patient has as a result of the negligence. If, at the time of the negligent treatment, a cancer patient had a greater than 50% chance of living for a certain number of years (assuming that the patient received non-negligent treatment), and if that potential life span is adversely impacted by the doctor's negligence, then the wrongful death heirs ought to be able to recover for the damages they suffer as a result of the negligently diminished life span.

If the trier of fact has determined the threshold issue—that the doctor's negligence was a "substantial factor" in shortening the decedent's life—the trier of fact should then be asked to calculate damages based on the difference between what the decedent's life expectancy would have been had her cancer been treated non-negligently, and what the decedent's life expectancy was *after* the negligent treatment. Damages should be awarded based on the difference between the two.

The amount of damages should be offset, however, by the extent to which non-negligent treatment would have impaired the decedent's quality of life. For example, a defense attorney could present evidence that while non-negligent treatment may have extended a terminal cancer patient's life,

that same treatment (i.e., aggressive chemotherapy) would also have diminished the quality of decedent's life and the decedent's ability to provide love, comfort, society, earnings, etc.

If this Court reverses and remands this case for a new trial, it should do so with directions consistent with these principles.

DATED: November ___, 2002

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance Pursuant to California Rules of Court, rule 14(c)(1) for Combined Appellants' Reply and Cross-Respondents' Brief, pertaining to Case No. B152979. I certify that:

- √ Pursuant to California Rules of Court rule 14(c)(1), the attached Combined Appellants' Reply And Cross-Respondents' Brief is
- √ Proportionately spaced, has a typeface of 13 points or more, and contains 9,390 words.

DATED: November 6, 2002

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5700 Wilshire Boulevard, Suite 375, Los Angeles, California 90036.

On **November 6, 2002**, I served the foregoing document described as: **COMBINED APPELLANTS' REPLY AND CROSS-RESPONDENTS' BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **November 6, 2002**, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

_____
Leanna Sun