DANNY BLACK, etc., et al., Plaintiffs and Appellants, v. RAOUF E. YUJA et al., Defendants and Appellants.

B152979

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

2003 Cal. App. Unpub. LEXIS 2809

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PRIOR HISTORY: APPEALS from a judgment of the Superior Court of Los Angeles County, Los Angeles County Super. Ct. No. BC221448. James R. Dunn, Judge.

DISPOSITION: Judgment Reversed, remanded, and dismissed.

COUNSEL: Binder & Associates, Delores A. Yarnall and Richard C. Binder for Plaintiffs and Appellants.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Mark Connely, Vangi Johnson; Greines, Martin, Stein & Richland, Irving H. Greines and Cynthia E. Tobisman for Defendants and Appellants.

JUDGES: CURRY, J. We concur: VOGEL (C.S.), P.J., HASTINGS, J.

OPINION BY: CURRY

OPINION

Appellants Raouf E. Yuja, M.D., and Raouf E. Yuja, M.D., Inc., challenge a judgment in favor of Danny and Jacob Black on the Blacks' complaint for the wrongful death of Glori Black, who died of cancer. In a cross-appeal from the same judgment, the Blacks contend that the trial court erroneously declined to permit them [*2] to present an alternative theory of recovery to the jury. We reverse the judgment, remand for further proceedings, and dismiss the cross-appeal.

RELEVANT PROCEDURAL HISTORY

On December 10, 1999, the Blacks filed their complaint for the wrongful death of Glori Black against Dr. Yuja, as well as numerous other doctors and health care providers. The complaint asserted several claims, including a claim for medical malpractice against Dr. Yuja. In pertinent part, the complaint alleged that Glori Black was the wife of Danny Black and the mother of Jacob Black, and that she died on December 12, 1998, as the result of the negligence of Dr. Yuja and other defendants. Raouf E. Yuja, M.D., Inc., was named as a Doe defendant on September 6, 2000.

Before trial, the Blacks' action against the defendants other than Dr. Yuja and his professional corporation were submitted to arbitration or resolved in other ways. Trial

by jury on their remaining claim against Dr. Yuja and his professional corporation began on May 30, 2001.

At trial, the Blacks presented evidence that in October 1997, Dr. Yuja, who is a pathologist, misclassified an ovarian tumor that was removed from Glori Black, and [*3] as a result, she did not begin aggressive cancer therapy until April 1998, when the cancer had spread throughout her body. On June 8, 2001, the jury returned a special verdict in favor of the Blacks and awarded them $ 835,025 in damages. Judgment was entered in accordance with this verdict on June 19, 2001, and the trial court subsequently denied a motion for a new trial by Dr. Yuja and his professional corporation.

DISCUSSION

I.

Appellants contend that (1) the trial court failed to give appropriate instructions concerning causation, (2) the special verdict form was defective, and (3) the trial court erred in dismissing a juror during the jury's deliberations. [1]

1 Appellants' opening brief also contends that the trial court erroneously allowed the Blacks to present certain evidence to the jury, but they abandoned this contention in their reply brief, and thus we do not examine it.

A. *Instruction on Causation*

Appellants contend the trial court failed to instruct the jury adequately [*4] on causation when the jury requested clarification on this issue during its deliberations.

Generally, "it is the responsibility of the trial court to instruct the jury on the controlling legal principles applicable to the case" (*Roberts v. City of Los Angeles (1980) 109 Cal. App. 3d 625, 632, 167 Cal. Rptr. 320*), and "a litigant is entitled to instructions on every theory advanced by [the litigant] which is supported in the pleadings and evidence. [Citations.]" (*Anderson v. Latimer (1985) 166 Cal. App. 3d 667, 674, 212 Cal. Rptr. 544*.) However, "if the court gives an instruction correct in law, but the party complains that it is too general, lacks clarity, or is incomplete, he must request the additional or qualifying instruction in order to have the error reviewed." (7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 272, p. 319, italics deleted.) "In deciding whether the trial court erred in refusing [a party's] requested instruction, the evidence should be viewed in a light most favorable to [the party]. [Citation.] If the evidence so viewed supports the instruction, then not to give it is error." (*Anderson v. Latimer, supra, 166 Cal. App. 3d at p. 674*.) [*5]

1. *Governing Principles of Causation*

Here, the issue of instructional adequacy concerns the principles of causation applicable to the Blacks' negligence claim against Dr. Yuja and his professional corporation. Their right to assert this claim does not rest upon any cause of action that Glori Black could have maintained had she survived, but stems solely from *Code of Civil Procedure section 377.60*, [2] which provides that "[a] cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by" enumerated persons. (*Horwich v. Superior Court (1999) 21 Cal.4th 272, 282, 980 P.2d 927*.) As the court observed in *Bromme v. Pavitt (1992) 5 Cal.App.4th 1487, 1497*, "the wrongful death cause of action was both created and limited by the Legislature," and thus it is "'a creature of statute . . . .'" (Quoting *Justus v. Atchison (1977) 19 Cal.3d 564, 575, 139 Cal. Rptr. 97, 565 P.2d 122*, disapproved on another ground in *Ochoa v. Superior Court (1985) 39 Cal.3d 159, 171, 216 Cal. Rptr. 661, 703 P.2d 1*.)

2 All further statutory citations are to the Code of Civil Procedure, unless otherwise indicated.

[*6] The principles of causation applicable to wrongful death actions predicated upon medical negligence were addressed in *Bromme*. In *Bromme*, a husband initiated an action for the wrongful death of his wife, alleging that her doctor negligently failed to detect his wife's colon cancer. (*Bromme v. Pavitt, supra, 5 Cal.App.4th at p. 1492*.) At trial, the evidence indicated that the wife's cancer could have been successfully treated had it been detected before June 1981, but that after that time, "successful treatment became medically improbable, i.e., the chance of success was less than 50 percent." (*Ibid*.) The trial court granted a motion for partial nonsuit that barred the jury from considering any negligence after June 1981, and the jury returned a verdict in favor of the doctor on allegations of negligence up to June 1981. (*Ibid*.)

Following a lengthy examination of case authority,

the court in *Bromme* affirmed the partial nonsuit. (*Bromme v. Pavitt, supra, 5 Cal.App.4th at pp. 1498-1499*.) It reasoned that in a wrongful death action predicated on medical negligence, the plaintiff must show that the negligent act is a substantial factor [*7] in the causation of the death, that is, that there was "'a reasonable medical probability' that the negligence was sufficient of itself to bring about the death," or equivalently, that "the death was 'more likely than not' the result of the negligence. (*Id. at p. 1499*, quoting *Jones v. Ortho Pharmaceutical Corp. (1985) 163 Cal. App. 3d 396, 402-403, 209 Cal. Rptr. 456*.)

The *Bromme* court thus concluded that partial nonsuit was proper because the evidence unequivocally established that after June 1981, "even with proper medical intervention, it was more likely than not [the wife] would die from the cancer." (*Bromme v. Pavitt, supra, 5 Cal.App.4th at p. 1499*.) It stated: "California does not recognize a cause of action for wrongful death based on medical negligence where the decedent does not have a greater than 50 percent chance of survival had the defendant properly diagnosed and treated the condition." (*Id. at pp. 1504-1505*, fn. omitted.)

In reaching this conclusion, the court in *Bromme* rejected *Pulvers v. Kaiser Foundation Health Plan, Inc. (1979) 99 Cal. App. 3d 560, 160 Cal. Rptr. 392*. [*8] In *Pulvers*, which involved a wrongful death action, the court held that the jury had been properly instructed that even if the plaintiff did *not* establish that prompt diagnosis and treatment would have cured the decedent, the plaintiff could nonetheless recover damages by showing a reasonable medical possibility that prompt diagnosis and treatment would have *extended* the decedent's life for several months or years. (*Id. at pp. 565-566*.) The *Bromme* court declined to follow *Pulvers*, reasoning that *Pulvers* had ignored the statutory language limiting wrongful death claims to situations in which "'the death of a person *is caused by* the wrongful act or neglect of another.'" (*Bromme v. Pavitt, supra, 5 Cal.App.4th at p. 1501*.) As the court in *Bromme* put the matter, "*Pulvers* extended wrongful death liability beyond the bounds set by the Legislature." (*Bromme, at p. 1501*.)

2. *Underlying Proceedings*

At trial, the jury heard conflicting expert testimony regarding the likelihood that Glori Black's cancer was susceptible to successful treatment had Dr. Yuja properly identified her tumor in October 1997.

The Blacks [*9] submitted testimony from several experts. Dr. Philip DiSaia, a gynecological oncologist, stated that Dr. Yuja had misclassified the tumor as a dysgerminoma, an easily identifiable and nonaggressive form of cancer that is treated solely by removal when it is found in its early stage of growth. Dr. DiSaia opined that the tumor was an epithelial carcinoma, a dangerous cancer requiring aggressive treatment. He indicated that had treatment for this cancer been initiated in October 1997, when the cancer was in its earliest stage, the probability of success was greater than 50 percent.

However, Dr. DiSaia also conceded that instead of epithelial carcinoma, the tumor may have been a small cell carcinoma of the endocrine type or of the hypercalcemic type, each of which is also a form of dangerous cancer that requires aggressive treatment. Because these cancers are rare, Dr. DiSaia was unable to state a probability of successful treatment, although he believed that it was more probable than not that early treatment would "prolong survival months to years."

In addition, Dr. Edward Wolin, an oncologist who treated Glori Black after April 1998, opined that she had some form of small cell ovarian [*10] carcinoma. Dr. Wolin stated that it was more probable than not that prompt and aggressive chemotherapy would have resulted in a cure, given available statistics regarding similar forms of cancer, Glori Black's youth, and other factors.

Two witnesses presented by the Blacks disagreed with Dr. DiSaia's classification of Glori Black's tumor as an epithelial carcinoma. Dr. Scott Binder, the pathologist who examined tissue removed from Glori Black's body after a surgery in April 1998, testified that her body was then riddled with cancer. He then believed that her cancer was a "large cell type" of small cell hypercalcemic carcinoma. Dr. Denise Barbuto, a gynecological tumor pathologist, agreed with Dr. Binder.

Appellants also submitted testimony from expert witnesses on these matters. Dr. Robert Young, a pathologist, opined that Glori Black's tumor was a small cell hypercalcemic carcinoma of "the large cell variant," and indicated his apparent agreement on this diagnosis with Drs. Binder and Barbuto. He estimated that the odds of successful treatment of this cancer, even if initiated at an early stage, were only one in three. Dr. Richard

Nalick, a gynecological oncologist, concurred with [*11] Dr. Young on the probability of successful treatment for this form of cancer.

Following the presentation of evidence, the trial court instructed the jury with *BAJI No. 3.76*, which states: "The law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm." In addition, the jury received a special verdict form, which asked it to determine whether Dr. Yuja was negligent, and requested an answer to the following question: "2. Was such negligence a substantial cause of death of Gloria Black?"

During closing argument, Delores Yarnall, counsel for the Blacks, addressed the question of causation of damages, and stated: "Substantial causation, substantially caused is *not 50 percent. We don't know in the law what the number is*." (Italics added.) After the trial court rejected a request for a bench conference from Mark Connely, appellants' counsel, who indicated that Yarnall's argument was confusing the jury, Yarnall recited the language of *BAJI No. 3.76*, and stated: "A substantial factor in bringing about the loss. So something not insignificant, something that really [*12] matters; right? He did something that really matters. Something that was not insignificant. Something not insubstantial. Something substantial. Okay? More probably than not, something he did *substantially* caused Glori Black's death. That's not an easy concept. That's the law." (Italics added.)

Connely's closing argument presented an alternative characterization of the legal principles governing causation. He indicated that there was a requirement for a showing "to a reasonable degree of medical probability that there be a cure," and added: "You have to prove to a reasonable degree of medical probability which is greater than 50 percent, and it could be that 50 percent plus a grain."

Shortly after the jury began its deliberations, it sent the trial court the following note: "Please define substantial cause of death as outlined in Question # 2." During the subsequent conference, Yarnall and Connely indicated that they could not agree on clarifying language to send to the jury. Citing *Bromme v. Pavitt, supra, 5 Cal.App.4th 1487*, Connely stated: "In a wrongful death action [Yarnall] has to prove with greater than 50 percent probability that . . . my negligence [*13] was the cause of death, not -- not cancer." Yarnall responded that she was obligated only to show that it was more likely than not that there was "factor of nexus" between the negligence and the harm. She stated: "The quantum of proof is over 50 percent. But his conduct in terms of the nexus to the actual death *is something less than that*." (Italics added.)

Rather than providing additional clarifying instructions, the trial court proposed that it would strike the word "substantial" in question No. 2 of the special verdict and direct the jury to consider *BAJI No. 3.76*. Connely objected to this resolution of the jury's inquiry because *BAJI No. 3.76* did not clarify the application of the term "substantial factor" in a wrongful death action.

After the trial court indicated that it would implement its proposal, it asked the lawyers to think about the matter overnight, and it asked Connely to prepare a special instruction should the jury seek further clarification. The next morning, Connely submitted a proposed special instruction that reflected the principles stated in *Bromme*. [3] The trial court did not give this instruction. Instead, it struck the word "substantial" from [*14] the special verdict form, and it referred the jury to *BAJI No. 3.76*.

> 3 The proposed instruction states: "In a wrongful death action, such as this, Dr. Yuja's negligence would be the cause of death if it were determined by you to be a substantial factor in causing the death. A 'substantial factor' in this case means that, with greater than 50% probability, Ms. Black would have been cured had she been diagnosed and treated at the time the pathology tests were conducted by Dr. Yuja. [P] If, but only if, you find by a preponderance of the evidence that there was a greater than 50% probability that Ms. Black would have been cured had she been diagnosed and treated earlier, then you have found the element of causation as asked in Question No. 2 of the Special Verdict."

3. *Inadequate Clarifying Instructions*

In our view, the trial court erred in declining to instruct the jury on the principles in *Bromme*. We recognize that the propriety of giving instructions proposed after the presentation of evidence [*15] is generally consigned to the trial court's discretion. (*Wilson v. Gilbert (1972) 25 Cal. App. 3d 607, 613, 102 Cal. Rptr. 31*.) However, under the circumstances of this case,

the refusal to give a clarifying instruction was an abuse of discretion.

The trial court's responsibility to instruct the jury "becomes particularly acute when,"as here, "the jury asks specific guidance." (*Trejo v. Maciel (1966) 239 Cal. App. 2d 487, 498, 48 Cal. Rptr. 765*; see *Roberts v. City of Los Angeles, supra, 109 Cal. App. 3d at p. 634*.). Although *BAJI No. 3.76* is an adequate general instruction on causation (*Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1049, 819 P.2d 872*), it was insufficient to guide the jury in the present case, given the conflicting evidence regarding the probability that Glori Black's cancer could be cured, and the conflicting closing arguments regarding the meaning of "substantial factor" in the circumstances of this case. Furthermore, Connely objected to the trial court's response to the jury, indicated the content of an adequate instruction, and submitted a proposed instruction at the trial court's urging. Because [*16] substantial evidence supports an instruction based on *Bromme*, the trial court erred in failing give such an instruction. (*Anderson v. Latimer, supra, 166 Cal. App. 3d at p. 674*.)

The Blacks disagree on several grounds, none of which have merit. First, they argue that appellants waived their contention of instructional error because Connely failed to propose a special instruction in a timely manner. We disagree. To begin, requests for special instructions are timely when, as here, they address issues that arise after closing arguments. (7 Witkin, Cal. Procedure, *supra*, Trial, § 274, p. 322.) Moreover, to avoid a waiver, the party must propose an instruction, "or in some way make known to the court the lack of a clearer instruction and his desire for a better definition of the rule." (*Townsend v. Butterfield (1914) 168 Cal. 564, 569, 143 P. 760*.) Here, Connely indicated the need for an instruction based on *Bromme* and supplied a proposed instruction.

Second, the Blacks launch a broad attack on *Bromme*, contending that it misstates the principles of causation applicable in this case. In their view, to establish that Dr. Yuja's negligence [*17] was a "substantial factor" in Glori Black's death, it was unnecessary to demonstrate that had he correctly classified her tumor, the probability of a cure upon prompt treatment exceeded 50 percent. Rather, they were required only to show, on the preponderance of the evidence, that Dr. Yuja's negligence had an unquantifiable -- albeit significant -- nexus with her death.

The crux of the Blacks' argument is that *Pulvers v. Kaiser Foundation Health Plan, Inc., supra, 99 Cal. App. 3d 560*, and not *Bromme*, was correctly decided. They argue that *Pulvers* properly held that plaintiffs in a wrongful death action can recover damages for the decedent's *loss of an extended period of life*, even though the plaintiffs cannot show that the probability of a cure upon prompt treatment exceeded 50 percent. Furthermore, they contend that this holding supports a conclusion relevant here, namely, that they may recover damages for the *death* of Glori Black, without showing that the probability of a cure upon prompt treatment exceeded 50 percent.

Again, we disagree. To begin, *Bromme* correctly explains the "substantial factor" test of causation as it applies in negligence [*18] actions predicated upon a failure by a professional, landlord, or other responsible party to prevent an impending harm. (E.g., *Williams v. Wraxall (1995) 33 Cal.App.4th 120, 133*; *Sandoval v. Bank of America (2002) 94 Cal.App.4th 1378*.) As the court recently indicated in *Sandoval v. Bank of America, supra, at pages 1386-1389*, in such cases, the requisite nexus between the negligent act and the harm must meet a quantifiable standard that is *distinct* from the burden of proof.

In *Sandoval*, a bank customer was killed in the bank's parking lot, and a wrongful death action followed. (*Sandoval v. Bank of America, supra, 94 Cal.App.4th at pp. 1381-1383*.) After a jury returned a verdict in favor of the bank on the allegations of negligent security, the plaintiffs appealed, contending that the trial court had given an erroneous supplemental instruction after the jury requested clarification of the questions regarding causation in the special verdict form. (*Id. at p. 1383*.) The court in *Sandoval* agreed, stating: "The jury should have been told that if *a preponderance of the evidence* showed it [*19] was *more likely than not* that proper security by the Bank would have prevented the harm . . ., the Bank's negligence in not providing such security would constitute a substantial factor in bringing about [the] harm and thus form the requisite cause in fact of such harm." (*Id. at p. 1387*, italics added.)

Furthermore, as the *Bromme* court indicated, *Pulvers* overlooks the statutory language limiting wrongful death actions to acts or neglect that *cause* a death. [4] We therefore follow *Bromme*, rather than *Pulvers*, and we

reject the Blacks' view of causation. [5]

> 4 The Blacks suggest that *Bromme* is no longer good law because it addressed wrongful death actions under former section 377, the predecessor of *section 377.60*, which now controls such actions. However, there is no material difference in the language of the two provisions.
>
> 5 We recognize that section 377.61 provides (with exceptions not relevant here) in broad terms that in wrongful death actions, "damages may be awarded that, under all the circumstances of the case, may be just . . . ." However, under the canons of statutory interpretation, this language must be interpreted in light of *section 377.60*, which contains the limiting language discussed in *Bromme*. (*Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735, 248 Cal. Rptr. 115, 755 P.2d 299*.) Accordingly, damages may not be recovered under section 377.61 absent a showing that an act or neglect caused the death.

[*20] Third, the Blacks cite three cases in support of their view that to establish that Dr. Yuja's negligence caused Glori Black's death, they need only show a nexus between his conduct and her death, without demonstrating that the chances of a cure upon prompt treatment were greater than 50 percent. However, these cases are factual distinguishable, and do not address the issues of causation presented here. (*Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953, 968-983, 941 P.2d 1203* [in action involving asbestos-related injuries against numerous suppliers of asbestos products, trial court erred in using burden-shifting instruction on causation]; *Mitchell v. Gonzales, supra, 54 Cal.3d at pp. 1048-1056* [instruction on concurrent causes stated in terms of "but for" causation is erroneous]; *Hughey v. Candoli (1958) 159 Cal. App. 2d 231, 323 P.2d 779* [in wrongful death action, doctor is liable for death of infant who had two fatal medical conditions, only one of which flowed from doctor's negligence, because this negligence was an accelerating cause of death].)

In sum, the trial court erred in failing to instruct the jury under [*21] the causal principles found in *Bromme*.

4. *Prejudice*

The remaining issue is whether this instructional error was prejudicial. On this matter, we view the evidence in the record favorably to appellants (*Mock v. Michigan Millers Mutual Ins. Co. (1992) 4 Cal.App.4th 306, 322)*, and assess whether there is a reasonable chance the jury would have returned a more favorable verdict had they been properly instructed on causation (*College Hospital Inc. v. Superior Court (1994) 8 Cal.4th 704, 715, 882 P.2d 894*). Our inquiry is guided by several factors: (1) the degree of conflict in the evidence; (2) the existence of an inquiry from the jury; (3) the closeness of the verdict; (4) the extent to which closing argument enhanced the misleading effect of the instructional error; and (5) the extent to which other instructions remedied the error. (*Mitchell v. Gonzales, supra, 54 Cal.3d at pp. 1054- 1056*.)

These factors mandate reversal in the present case. The Blacks' own experts provided considerable evidence indicating that Glori Black suffered from a form of cancer for which successful treatment was improbable, even if Dr. Yuja had [*22] not misclassified her tumor, and this evidence was reaffirmed by appellants' experts. As we have indicated (see pts. A.2. & A.3., *ante*), the Blacks' counsel misstated the pertinent principles of causation during closing argument, and an inquiry on causation followed from the jury. *BAJI No. 3.76*, to which the trial court referred the jury, could not rectify the error present here, and the jury subsequently split (10 to 2) on the matter of causation. In view of these factors, it is reasonably likely that the jury would have returned a verdict more favorable to appellants had it been properly instructed.

We therefore conclude that the judgment must be reversed and remanded for further proceedings.

B. *Remaining Contentions*

In view of our conclusion that there was reversible instructional error, it is unnecessary to address appellants' other contentions.

II.

The Blacks have noticed a cross-appeal from the trial court's rulings barring them from presenting an alternative theory of recovery for Glori Black's loss of an extended life predicated on *Pulvers*.

We dismiss this cross-appeal because they are not parties "aggrieved" by the judgment from which they have [*23] noticed their cross- appeal. (§ 902; *Continental Airlines, Inc. v. McDonnell Douglas Corp.*

(1989) 216 Cal. App. 3d 388, 399, fn. 2, 264 Cal. Rptr. 779.) Their opening brief does not challenge the judgment as entered, and their sole contention concerns a theory of recovery that would have supported a smaller award of damages than they obtained through the existing judgment. In view of these facts, their cross-appeal is improper. (*City of Huntington Beach v. City of Westminster (1997) 57 Cal.App.4th 220, 224, fn. 2*; *In re Marriage of Brockman (1987) 194 Cal. App. 3d 1035, 1042, 240 Cal. Rptr. 96*.)

Although we dismiss the cross-appeal, the Blacks are not prejudiced because we discuss and reject *Pulvers*, the principal basis of their contentions, in the context of our review of the appeal. (*Jones v. Los Angeles Community College Dist. (1988) 198 Cal. App. 3d 794, 814, 244 Cal. Rptr. 37*.)

DISPOSITION

The judgment is reversed, and the matter is remanded for further proceedings in accordance with this opinion. The cross-appeal is dismissed. Appellants are awarded their costs.

CURRY, J.

We concur:

VOGEL [*24] (C.S.), P.J.

HASTINGS, J.