Filed 5/30/03

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JONATHAN D. ARRIETA BUSTAMONTE, a Minor, etc., Plaintiff and Appellant, v. CARLOS FLORES, Defendant and Appellant, THE DIRECTOR OF THE STATE DEPARTMENT OF HEALTH SERVICES, Claimant and Respondent.	B156613 (Los Angeles County Super. Ct. No. PC026227)

APPEAL from a judgment and a postjudgment order of the Superior Court of Los Angeles County, Randy Rhodes, Judge. Judgment affirmed; postjudgment order reversed with directions.

Thon, Beck, Vanni, Phillipi & Nutt and Brian C. Nutt for Plaintiff and Appellant.

Horvitz & Levy, S. Thomas Todd, Holly R. Paul; Bonne Bridges, Mueller, O'Keefe & Nichols and Ted O'Leary for Defendant and Appellant Carlos Flores.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 1 and 2 of the Discussion section.

Bill Lockyer, Attorney General, John H. Sanders, Supervising Deputy Attorney General, Karen Ackerson-Brazille, Deputy Attorney General, for Respondent Director of the State Department of Health Services.

Defendant and appellant Carlos Flores, M.D. (Dr. Flores) appeals a judgment in favor of plaintiff and respondent Jonathan D. Arrieta Bustamonte, by and through his guardian ad litem Roque Arrieta (Jonathan or plaintiff) following a jury trial of a wrongful death action.

Jonathan also appeals, seeking review of a postjudgment order denying his motion to extinguish a Medi-Cal lien by lien claimant and respondent Director of the State Department of Health Services (the Department).

We affirm the judgment but reverse the postjudgment order, concluding the Medi-Cal lien on Jonathan's recovery is improper. Welfare and Institutions Code section 14124.72 provides in relevant part at subdivision (c): "*When an action or claim is brought by persons entitled to bring such actions or assert such claims against a third party who may be liable for causing the death of a beneficiary*, any settlement, judgment or award obtained is subject to the director's right to recover from that party the reasonable value of the benefits provided to the beneficiary under the Medi-Cal program . . . ." (Italics added.) Jonathan was *not* a person entitled to bring an action or assert a claim to recover decedent's medical expenses. The person who was so entitled was the decedent's personal representative. (Code Civ. Proc., §§ 377.30, 377.34.) The Department's lien on Jonathan's recovery is predicated on the assumption that Jonathan had the right and therefore the obligation to sue for decedent's medical expenses. Because the right to sue for decedent's medical expenses rested in the personal representative, not in Jonathan, the judgment which Jonathan obtained is not subject to the Department's right to recover Medi-Cal benefits it paid on behalf of decedent's care.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.* [1]

Dr. Flores failed to diagnose preeclampsia in Jonathan's mother, Avelina Bustamonte (decedent), ultimately causing her death. Preeclampsia is not rare. It is one of the most common causes of maternal death in the United States.

Decedent first saw Dr. Flores on March 23, 1999, when she was 32 weeks pregnant, with an expected delivery date of May 13. Dr. Flores again saw decedent on May 4, 11 and 13.

As of May 4, 1999, decedent had protein in her urine. By definition, she had proteinuria, which is 1+ protein or greater. As of May 11, 1999, her protein had risen to 2+. Immediately following each of those office visits, blood pressure studies were conducted on decedent. All of these blood pressure readings were abnormal. By May 11, 1999, decedent had preeclampsia, and Dr. Flores should have realized it on account of the 2+ proteinuria finding. Once preeclampsia is diagnosed, delivery of the baby is essential to protect the health of the mother.

On May 13, 1999, decedent arrived at the hospital with elevated blood pressure. Immediately prior to delivery, decedent suffered an intercerebral hemorrhage. She spent five months in a coma and died on October 29, 1999, at age 32.

Delivery of the child on May 4 or 11 would have saved decedent's life.

2. *Proceedings.*

On September 28, 2000, Jonathan filed suit against Dr. Flores and Granada Hills Community Hospital (the hospital). The operative first amended complaint, filed February 2, 2001, pled a single cause of action against Dr. Flores and the hospital for

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[1] Pursuant to the usual rule, the evidence is set forth in the light most favorable to the judgment. (*Gyerman v. United States Lines Co*. (1972) 7 Cal.3d 488, 492, fn. 1.) Dr. Flores does not challenge the sufficiency of the evidence to support the verdict.

wrongful death. [2]

The matter came to trial on November 1, 2001. The witnesses included Jonathan's medical expert, Dr. Asrat, who opined Dr. Flores should have figured out by May 11, 1999 that decedent had preeclampsia due to the finding of proteinuria of 2+, the baby should have been delivered immediately at that juncture, and the failure to do so was a substantial factor in decedent's death.

The jury found in favor of Jonathan, based upon a finding of professional negligence on the part of Dr. Flores, which negligence resulted in the death of decedent. The jury awarded Jonathan $22,000 for past loss of household services, $130,000 for future loss of household services, and $225,000 for loss of love, companionship, comfort, affection, society, solace or moral support.

Dr. Flores moved for a new trial on various grounds, including the failure of the trial court to properly instruct the jury as to how to proceed following the seating of two alternate jurors, and the trial court's permitting Jonathan's expert, Dr. Asrat, to testify that his partner, Dr. Nageotte, agreed with his conclusion concerning when the baby should have been delivered.

The trial court denied Dr. Flores's motion for new trial. Dr. Flores filed a timely notice of appeal from the judgment.

3. *Proceedings relating to the Medi-Cal lien*.

On July 24, 2001, about three months before the action came to trial, the Department filed a notice of Medi-Cal lien, claiming a lien of $118,274 upon the proceeds of any judgment or settlement, to recover the amount expended by the State for Medi-Cal benefits provided to decedent.

On December 14, 2001, after obtaining the verdict against Dr. Flores, Jonathan filed a motion to extinguish the lien, arguing that because his action did not include a

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[2] Following the presentation of plaintiff's case, the trial court granted the hospital's motion for nonsuit.

claim for medical expenses, and no monies were awarded for medical expenses, the lien was invalid.

In response, the Department argued it is entitled to have its lien satisfied from *any* judgment or settlement proceeds obtained by the plaintiff.

On January 28, 2002, the motion was heard, argued and denied.

Jonathan filed a timely notice of appeal from the postjudgment order denying his motion to extinguish the lien.

CONTENTIONS

Dr. Flores contends the trial court committed prejudicial error (1) in replacing two jurors with alternates without instructing the jury to disregard its past deliberations and begin anew, and (2) in allowing Dr. Asrat, plaintiff's medical expert, to give hearsay testimony that Dr. Nageotte agreed with his opinion that Dr. Flores violated the standard of care.

Jonathan contends the trial court erred in denying his motion to extinguish the Med-Cal lien because no claim was made in the wrongful death action, and no monies were awarded, for medical expenses relating to decedent's care and treatment.

DISCUSSION

[[Begin nonpublished portion.]]

[[1. *No prejudicial error in the manner in which the jury was instructed to begin its deliberations anew*.

a. *Factual background.*

On the first day of deliberations, Friday, November 9, 2001, the jurors deliberated from 1:30 p.m. to 4:15 p.m. They were told to return on Tuesday, November 13, at 9:00 a.m.

On Tuesday, November 13, before 9:00 a.m., Juror No. 1 informed the court that her husband had suffered a medical emergency. The trial court replaced her with Alternate Juror No. 1. When plaintiff's counsel and defense counsel arrived, the trial court informed them of the change.

By 10:30 a.m., Juror No. 5 still had not arrived. The trial court, in the presence of both counsel, replaced said juror with Alternate Juror No. 2. There was no objection by defense counsel to the manner of substitution of the alternates. At that time, the newly configured jury went into the jury room to deliberate.

After the jurors returned to the jury room, the bailiff, at the request of the court clerk, advised the jurors "that they should begin their deliberations all over again, starting fresh with the alternates."

The jurors deliberated from 10:40 a.m. until noon and from 1:30 p.m. until 3:10 p.m., when they advised the court that they had reached a verdict. The verdict was nine to three, and the alternates provided two of the nine votes needed to reach the verdict.

b. *General principles*.

BAJI No. 15.56, the pertinent BAJI instruction which was not given, states: "Ladies and Gentlemen of the Jury: [¶] A juror has been excused for legal cause and replaced with an alternate juror. [You are not to speculate or consider for any purpose the reasons for such excuse.] [¶] The law grants each party in this case the right to a verdict reached only after full participation of all jurors who ultimately return the verdict. [¶] This right may be assured in this case only if the jury begins its deliberations again from the beginning. [¶] You are therefore instructed to disregard and put out of your mind all past deliberations and begin deliberating anew. This means that each remaining juror must set aside and disregard the earlier deliberations as if they had not taken place. [¶] You shall now retire for your deliberations in accordance with the instructions previously given."

The trial court's failure to give a proper "disregard and begin anew" instruction is a matter of correct jury procedure. Therefore, a party's failure to request such an instruction does not bar him from asserting error in the trial court's failure to duly instruct the jury in this regard. (*Vaughn v. Noor* (1991) 233 Cal.App.3d 14, 19-20.)

Reversal is required if the failure of the trial court to give an adequate "disregard and begin anew" instruction is prejudicial. (*Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 585, fn. 6, overruled on other grounds by *Privette v. Superior Court* (1993) 5 Cal.4th 689, 696.)

c. *The trial court's failure to give the instruction was nonprejudicial*.

In denying the motion for new trial, the trial court found the failure to give BAJI 15.56 was harmless error. Viewing this record in light of the applicable case law, we agree.

In *Griesel*, rather than instructing the jury to "disregard and begin anew" upon the substitution of the alternate juror, the trial court instructed the jury "to 'continue with your efforts' and to 'continue your consideration of the case.' " (*Griesel, supra*, 23 Cal.3d at p. 583.) On review, the Supreme Court used three factors to determine prejudice: the closeness of the case, whether the alternate juror's vote was essential to reach the verdict, and the amount of time spent deliberating before and after the substitution of the alternate juror. (*Id.* at p. 585.) *Griesel* held the error was prejudicial given (1) the closeness of the case (based on a review of the evidence and the length of the deliberations), (2) the composition of the nine jurors returning the verdict (the recently seated alternate was one of the nine), and (3) a comparison of the time spent deliberating before and after the substitution of the alternate juror (the jury deliberated seven days before the substitution and four hours thereafter). (*Id*. at pp. 583, 585.)

Griesel is totally distinguishable. There, the jury was erroneously instructed "to 'continue with [their] efforts' and to 'continue [their] consideration of the case.' " (*Griesel, supra*, 23 Cal.3d at p. 583.)

Vaughn likewise is distinguishable. There, the trial court told the jury " 'any vote that you may have taken on liability up to this point . . . has to be disregarded by the court and you're going to have to tackle that issue anew.' " (*Vaughn, supra*, 233 Cal.App.3d at p. 21.) That instruction did not specifically call for deliberations anew – it merely

directed the jurors to disregard their "vote," and thus did not ensure the full participation of the newly seated juror. (*Ibid*.)

Here, unlike in *Griesel* and *Vaughn*, the jury was not given an incorrect instruction. Although the trial court failed to give the jury the required instruction at the time of the substitution, a correct instruction was transmitted by the bailiff, who told them "that they should begin their deliberations all over again, starting fresh with the alternates." This instruction was proper in substance and conveyed the essence of BAJI No. 15.56.

Further, on the motion for new trial, Dr. Flores did not present any evidence that the jurors did not in fact comply with the bailiff's instruction to begin their deliberations anew. Dr. Flores offered only the bailiff's declaration, which stated he told the jurors "that they should begin their deliberations all over again, starting fresh with the alternates." There was no declaration from any juror stating the jury failed to comply with the bailiff's instruction. In the absence of a declaration from any of the jurors that the jury failed to follow the bailiff's instruction to begin anew, Dr. Flores's claim of prejudice rests on mere speculation.

Further, in this case, the issues were relatively simple. The testimony was presented over a four-day period, with one medical expert for each side. The jury deliberated two hours and forty-five minutes on November 9, 2001, before the substitution, as contrasted with three hours on November 13, 2001, following the substitution.

In view of the above, we agree with the trial court's analysis at the time it denied Dr. Flores's motion for new trial. The trial court admittedly erred in failing to give the "disregard and begin anew" instruction but, under the circumstances of this case, the error was nonprejudicial.

2. *No merit to Dr. Flores's claim of evidentiary error.*[3]

Dr. Flores contends the trial court committed prejudicial error in allowing Dr. Asrat, Jonathan's expert, to testify over hearsay objection that Dr. Asrat's partner, Dr. Nageotte, agreed with him that Dr. Flores violated the standard of care.

In denying the motion for new trial, the trial court found the admission of testimony by Dr. Asrat concerning the opinion of Dr. Nageotte was proper because Dr. Nageotte had given his opinion earlier at deposition.

a. *Pertinent testimony by Dr. Asrat*.

The claim of evidentiary error arises out of the following colloquy, which occurred at the very end of Dr. Asrat's direct examination:

"Q. You relied on depositions of -- you reviewed the depositions of other experts taken in this case, did you not?

"A. Yes, I did.

"Q. You reviewed the deposition of your partner Michael Nageotte as well?

"A. Yes, I did.

"Q. With respect to the failure of Dr. Flores to deliver [decedent] before or on May 11th, 1999, did Dr. Nageotte agree with you?

"[Defense counsel]: Can I get my objection on the record, the same as before?

"The Court: Overruled.

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[3] Our review is guided by Evidence Code section 353, which provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

"[Dr. Asrat]: Yes, *Dr. Nageotte agrees with my assessment of when the patient should have been delivered*. Dr. Nageotte couldn't get away with doing something like this in my practice.

"Q. By [plaintiff's counsel]: Is Dr. Nageotte one of the most respective perinatologists on the west coast?

"A. One of the best.

"[Plaintiff's counsel]: I don't have anything further." (Italics added.)

b. *General principles.*

Under Evidence Code section 801, subdivision (b), expert witnesses are entitled to consider otherwise inadmissible hearsay evidence, including the opinion of other experts, in formulating their own opinions. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-618; *People v. Campos* (1995) 32 Cal.App.4th 304, 307-308.) And "an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*People v. Gardeley, supra,* at p. 618.) The expert witness may testify that reports prepared by other experts were a basis for his or her opinion. (*People v. Campos, supra,* at p. 308.)

However, an expert witness may not, *on direct examination*, reveal the content of reports prepared or opinions expressed by *nontestifying* experts. (*People v. Campos, supra*, 32 Cal.App.4th at p. 308.) " ' " 'The reason for this is obvious. The opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse.' " ' (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 894 [112 Cal.Rptr. 540, 519 P.2d 588] [quoting *Lynch Meats of Oakland, Inc. v. City of Oakland* (1961) 196 Cal.App.2d 104, 112 (16 Cal.Rptr. 302)]; see also *People v. Reyes* (1974) 12 Cal.3d 486, 503 [116 Cal.Rptr. 217, 526 P.2d 225].)" (*People v. Campos, supra*, 32 Cal.App.4th at p. 308.)

Thus, in *Campos*, although a psychiatrist was properly allowed to testify that she relied upon the reports of nontestifying experts in forming her own opinions, the trial

court erred "when it allowed her to reveal their content on direct examination *by testifying that each prior medical evaluation agreed with her own opinion*. '[D]octors can testify as to the basis for their opinion (see Witkin, Cal. Evidence (2d ed. 1966) § 410, pp. 368-369), but this is not intended to be a channel by which testifying doctors can place the opinion of innumerable out-of-court doctors before the jury.' [Citations.]" (*People v. Campos, supra*, 32 Cal.App.4th at p. 308, italics added.)

c. *Trial court erred in allowing Dr. Asrat to testify on direct examination regarding Dr. Nageotte's opinion but the error was harmless.*

By way of background, at the time Dr. Asrat testified regarding Dr. Nageotte's opinion, on November 6, 2001, the hospital was still a defendant in the case and Dr. Nageotte was expected to testify as its designated expert. The hospital remained in the case until the following day, November 7, when it obtained a grant of nonsuit at the conclusion of plaintiff's case. Thus, at the time Dr. Asrat testified regarding Dr. Nageotte's opinion, it was expected that Dr. Nageotte would take the stand and would be subject to cross-examination.

Although Dr. Nageotte was a designated expert for the hospital and had been deposed by Dr. Flores's counsel, Dr. Nageotte ultimately did not testify at trial and thus was a nontestifying expert. Although Dr. Flores's counsel had the opportunity *before trial* to question Dr. Nageotte regarding the basis of his opinion concerning Dr. Flores's care of decedent, that did not make Dr. Nageotte a testifying expert *at trial*. Because Dr. Nageotte was not a testifying expert at trial, Dr. Asrat was not entitled on direct examination to testify as to Dr. Nageotte's opinion. As explained, the rationale for precluding an expert witness from testifying on direct examination regarding an opinion expressed by a *nontestifying* expert, is that the opportunity of cross-examining the nontestifying expert as to the basis of his or her opinion is denied the party as to whom the testimony is adverse. (*People v. Campos, supra*, 32 Cal.App.4th at p. 308.) Here,

because Dr. Nageotte did not testify at trial, Dr. Flores lacked the opportunity to cross-examine him before the jury as to the basis of his opinion.

Nonetheless, the error in admitting Dr. Asrat's testimony regarding Dr. Nageotte's opinion clearly was nonprejudicial. Dr. Asrat's extremely brief reference to Dr. Nageotte's opinion, coming as it did at the very end of Dr. Asrat's highly specific testimony, was merely cumulative and it is not reasonably probable that a result more favorable to Dr. Flores would have been reached in the absence of this evidence.]]

[[End nonpublished portion.]]

3. *The trial court erred in denying Jonathan's motion to extinguish the Medi-Cal lien; Jonathan did not have the right and therefore did not have the obligation to pursue a claim against Dr. Flores for decedent's medical expenses.*

a. *Proceedings.*

The operative first amended complaint, filed February 2, 2001, pled a single cause of action by Jonathan for wrongful death/medical practice for the loss of his mother. Jonathan sought damages for "pecuniary loss resulting from the loss of the society, comfort, attention, services, and support of decedent in an amount to be ascertained at trial," as well as funeral and burial expenses. No claim was made for decedent's medical expenses.

On March 20, 2001, attorney Brian C. Nutt and his firm associated in as counsel for Jonathan. On May 9, 2001, Nutt was served by the Department with notice that Medi-Cal would be asserting a lien for medical expenses it paid on behalf of decedent. An itemization followed on May 22, 2001, indicating the lien amount was $118,274.40.

Because the Department insisted on recovering decedent's medical expenses in this action, Jonathan's counsel attempted to accommodate the Department while at the same time trying to protect Jonathan's rights. On June 11, 2001, about four months before trial, Jonathan's counsel filed a motion for leave to file a second amended

complaint, adding the personal representative of decedent's estate as a plaintiff, and a proposed second cause of action for recovery of decedent's medical expenses.

On July 24, 2001, the trial court denied leave to amend, finding "the proposed amendment to the complaint was time-barred by California Code of Civil Procedure Section 366.1, and that the proposed amendment did not relate back to the filing of the original complaint."

Jonathan's counsel advised the Department of the trial court's ruling and requested that the Department pursue an independent action against defendants for reimbursement of the medical expenses. [4]

The Department responded that it would continue to assert its lien on any recovery by Jonathan in this action, whether by judgment or settlement.

Thereafter, the case was tried to a jury, which awarded Jonathan $225,000 for "loss of love, companionship, comfort, affection, society, solace, or moral support," and $152,000 for past and future loss of household services. No monies were awarded for medical expenses incurred for decedent's care.

On December 14, 2001, Jonathan filed a motion to extinguish the lien, arguing the lien was invalid because the instant action did not include a claim for medical expenses and no monies were awarded for medical expenses. The Department, in turn, reiterated that it is entitled to have its lien satisfied from *any* judgment or settlement proceeds obtained by the plaintiff. In a postjudgment order, the trial court denied Jonathan's

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[4] As Jonathan's counsel indicated, the Department could have sued Dr. Flores directly. Welfare and Institutions Code section 14124.71 states in relevant part: "When benefits are provided or will be provided to a beneficiary under this chapter because of an injury for which another person is liable, . . . the director shall have a right to recover from such person . . . the reasonable value of benefits so provided." The statute gives the Department a direct cause of action against a third party who is liable for a Medi-Cal beneficiary's injury or illness, a right that is not derivative or dependent upon any right the beneficiary may have. (*State of California v. Superior Court* (*Bolduc*) (2000) 83 Cal.App.4th 597, 603.)

motion to extinguish the lien. We now review that ruling.

b. *Trial court erred in denying Jonathan's motion to extinguish the Department's lien on his recovery; Jonathan lacked standing to sue for decedent's medical expenses and therefore the Department is not entitled to reimbursement of Medi-Cal benefits out of Jonathan's recovery.*

Welfare and Institutions Code section 14124.72 provides in relevant part at subdivision (c): "When an action or claim is brought *by persons entitled to bring such actions or assert such claims* against a third party who may be liable for causing the death of a beneficiary, any settlement, judgment or award obtained is subject to the director's right to recover from that party the reasonable value of the benefits provided to the beneficiary under the Medi-Cal program . . . ." (Italics added.) Jonathan was *not* a person entitled to bring an action or assert a claim to recover decedent's medical expenses, and therefore the judgment obtained by Jonathan is not subject to the Department's right to reimbursement of Medi-Cal benefits.

A cause of action "that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, . . . and an action may be commenced by the decedent's *personal representative* or, if none, by the decedent's successor in interest." (Code Civ. Proc., § 377.30.) With respect to the damages that are recoverable, Code of Civil Procedure section 377.34 provides: "In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to *the loss or damage that the decedent sustained or incurred before death* . . . ." (Italics added.) Thus, under the statutory scheme pertaining to a decedent's cause of action, it is the role of the personal representative to recover the damages that a decedent sustained or incurred before death, such as medical expenses.

Here, the trial court denied leave to file a second amended complaint. As a result, this lawsuit did not include a cause of action by the personal representative to recover

decedent's medical expenses. Had this action included a cause of action by the personal representative for recovery of medical expenses, the Department would have been entitled to assert a lien on such recovery to recoup the value of the Medi-Cal benefits provided to decedent. However, Jonathan lacked standing to sue Dr. Flores for decedent's medical expenses because Jonathan was not decedent's personal representative. Therefore, the Department is not entitled to recoup the Medi-Cal benefits it paid on behalf of decedent's care out of Jonathan's recovery.

The Department's lien on Jonathan's recovery presupposes that Jonathan had the right and therefore the obligation to sue for decedent's medical expenses. Because the right to sue for decedent's medical expenses rested in the personal representative, not in Jonathan, the judgment which Jonathan obtained is not subject to the Department's right to recover Medi-Cal benefits it paid on behalf of decedent's care. Accordingly, the trial court erred in denying Jonathan's motion to extinguish the lien. [5]

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[5] *Evans v. Select Products Company* (Apr. 18, 2003, No. E028592, ordered published May 14, 2003) ___ Cal.App.4th ___ [03 D.A.R. 5183] reached the opposite conclusion, holding that irrespective of the fact that medical expenses are not recoverable in a wrongful death action, the Department is entitled under Welfare and Institutions Code section 14124.72, subdivision (c), to recover the value of Medi-Cal expenses it provided for decedent's care. We respectfully disagree with *Evans*. It appears that decision failed to give due consideration to the qualifying phrase: "When an action or claim is brought *by persons entitled to bring such actions or assert such claims* against a third party who may be liable for causing the death of a beneficiary . . . ." (Welf. & Inst. Code, § 14124.72, subd. (c), italics added.) A plaintiff who is not entitled to bring an action for recovery of a decedent's medical expenses should not have his or her recovery reduced by the amount of the Medi-Cal benefits provided for a decedent's care. Further, to read the statute as *Evans* did, allowing the Department to obtain recoup Medi-Cal benefits it provided to a decedent out of monies recovered by a plaintiff in a wrongful death action, raises constitutional issues that, in view of our holding, we need not reach.

DISPOSITION

The judgment is affirmed. The postjudgment order denying Jonathan's motion to extinguish the lien is reversed with directions to grant the motion. Jonathan shall recover costs on appeal.

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KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.