S250734

IN THE
Supreme Court
OF THE STATE OF CALIFORNIA

B.B., a Minor, etc., et al.,
Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES et al.,
Defendants and Appellants.

T.E., a Minor, etc., et al.,
Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES et al.,
Defendants and Appellants.

D.B., a Minor, etc., et al.,
Plaintiffs and Respondents,

v.

COUNTY OF LOS ANGELES et al.,
Defendants and Appellants.

After a Decision by the Second Appellate District, Division 3
Case No. B264946

Appeal from Los Angeles County Superior Court
Case Nos. TC027341, TC027438, and BC505918
Hon. Ross M. Klein

AMICI CURIAE BRIEF OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS AND APPELLANTS

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ISSUE PRESENTED

> May a defendant who commits an intentional tort invoke Civil Code section 1431.2, which limits a defendant's liability for non-economic damages "in direct proportion to that defendant's percentage of fault," to have his liability for damages reduced based on principles of comparative fault?

This is the question presented by Plaintiffs in their Petition for Review. The reference to "comparative fault" in that question assumes there is more than one tortfeasor, *i.e.,* that there were other persons who acted concurrently with the single defendant to whom the question refers. The question does not reflect, however, that in this case one of those other tortfeasors, plaintiffs' decedent, was found by the jury to be twice as culpable as the defendant referenced in the question. Indeed, decedent's percentage of fault was twice that of any other individual tortfeasor.

INTRODUCTION

Given the procedural status of the case now, after the Court of Appeal decision applying the principle of comparative fault, the question could be stated in the alternative:

> May Plaintiffs, whose decedent was found by the jury to be the most culpable person responsible for his own wrongful death, nevertheless avoid application of Civil Code section 1431.2 to reduce their recovery of $8,000,000 noneconomic damages because one of the tortfeasors was found to have committed battery?

That way, in addition to the statutory interpretation of Section 1431.2, the purpose of comparative fault to promote the *equitable* allocation of loss will be considered.

Whether the question is framed broadly, as Plaintiffs did in petitioning for review, or more narrowly to reflect the factual and procedural background of the case, the question requires the Court to determine the role of willful misconduct in comparative fault.

Plaintiffs argue that it has no role whatsoever, insisting that an intentional tortfeasor can never be less culpable than other tortfeasors, which means that Plaintiffs disagree with the jury's analysis of comparative fault in this case. Defendants argue that intentional conduct does have a role in comparative fault, generally, and Defendants agree with the jury's allocation of fault in this case, specifically.

Amici Curiae California Medical Association, California Dental Association, and California Hospital Association go one step further and argue that **the jury allocation of fault in this case illustrates the role intentional misconduct can have in California's comparative fault system**. That is significant to California health care providers who, like the

Deputy Sheriff Defendants in this case, are sometimes named as defendants in combined claims of professional negligence and intentional torts. The reason why plaintiffs pursue such hybrid claims against health care providers is to avoid the noneconomic damages limitation of the Medical Injury Compensation Reform Act ("MICRA"). Similarly, Plaintiffs in this case are determined to avoid application of the noneconomic damage limitation of Section 1431.2.

Amici submit that the Court of Appeal's analysis was correct for many reasons, but most importantly, because it follows the trend toward comparison of fault for intentional torts that began even before the 1986 election that led to the enactment of Section 1431.2. (See, *e.g.*, Dear & Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations* (1984) 24 Santa Clara L.Rev. 1, 20-36 ["Recent Cases: The Trend Toward Comparison"], citing *Sorensen v. Allred* (1980) 112 Cal.App.3d 717, *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, as well as decisions from other jurisdictions.) The Court of Appeal correctly held that the one Defendant in this case who was found to have committed a battery when all the deputies were trying to subdue decedent nevertheless can invoke Section 1431.2 to limit that Defendant's liability for noneconomic damages "in direct proportion to that defendant's percentage of fault." (Civ. Code, § 1431.2.) As such, the recovery of noneconomic damages by the plaintiffs in this case should be reduced by the trial court, based on principles of comparative fault, because Plaintiffs' decedent was found by the jury to be 40% responsible for his own wrongful death.

In analyzing the question of whether and how comparative fault applies to battery, *Amici* urge the Court to consider the implications for

medical battery, that is, claims against surgeons for lack of patient consent to perform procedures. As *Amici* will explain in this brief, there have been many such cases, a significant number of which have arisen in the context of the surgeon's mistaken assumption – due to miscommunication between the surgeon and the patient – that the patient did consent. In those cases, it would be unfair and inequitable not to compare the surgeon's fault in proceeding without consent with that of the patient.

INTERESTS OF *AMICI* IN THE ISSUE

The California Medical Association ("CMA") is a non-profit, incorporated, professional association of more than 44,000 member-physicians practicing in the State of California, in all specialties. The California Dental Association ("CDA") represents over 27,000 California dentists, more than 70 percent of the dentists practicing in the State. CMA's and CDA's membership includes most of the physicians and dentists engaged in the private practices of medicine and dentistry in California. The California Hospital Association ("CHA") represents the interests of more than 400 hospitals and health systems in California, having approximately 94 percent of the patient hospital beds in California, including acute care hospitals, county hospitals, non-profit hospitals, investor-owned hospitals, and multi-hospital systems. Thus, *Amici* represent much of the health care industry in California.

CMA, CDA, and CHA have been active before this Court in all aspects of litigation affecting California health care providers. Such cases have included *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, *Barme v. Wood* (1984) 37 Cal.3d 174, *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, *Delaney v. Baker* (1999) 20 Cal.4th 23, *Bird v. Saenz* (2002) 28 Cal.4th 910, *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, and *Rashidi v. Moser* (2014) 60 Cal.4th 718. Most recently, CMA, CDA, and CHA filed briefs in *Flores v.*

Presbyterian Intercommunity Hospital (2016) 63 Cal.4th 75, and *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148.

CMA, CDA, and CHA have long been concerned that a wide variety of health care providers and hospitals face the potential for unreasonably large and unpredictable awards in professional negligence actions. That was one of the reasons why MICRA was enacted. CMA, CHA, and CDA provided substantial input to the legislative process that led to MICRA's enactment, and they continue to support MICRA's ongoing viability. In doing so, CMA, CDA, and CHA have contributed to improved decision-making by judges and juries, primarily in personal injury litigation, where medical care is an important consideration. The MICRA statutes, for example, require damages to be assessed according to their various characteristics: economic damage versus noneconomic damages, past damage versus future damage, medical expense damage versus loss of earnings damage, and insurance-compensated damage versus uncompensated damage. MICRA requires lawyers, judges, jurors, arbitrators, and all others involved in the resolution of medical malpractice cases to think more precisely about the reasons and the methods for calculating damages. In other words, MICRA has resulted in improved decision-making and fairness, particularly with regard to the assessment of damages during jury trials, which, in turn, has improved the administration of justice in tort litigation generally.

The issue in this case is significant to California health care providers because they, like the Deputy Sheriff Defendants in this case, are sometimes named as defendants in combined claims of professional negligence and intentional torts so that plaintiffs can avoid the noneconomic damage limitation of MICRA. Battery for alleged lack of

consent to perform a medical procedure is one of the intentional tort theories that are pursued against physicians. Such claims are pursued by patients when there are poor outcomes from the procedures, after which the patients deny having given consent. Even where patients admit they gave consent, they claim it was conditional in some fashion. Many medical battery claims arise because the physicians thought they had consent but, for some technical reason, did not. The usual explanation is negligence on the part of the physician or her staff in failing to secure the patient's formal consent, but the "technical battery" is pursued as an intentional tort, nevertheless.

By 1986, after ten years of experience implementing MICRA, *Amici* were very much aware of this strategy to defeat MICRA, particularly the limitation on noneconomic damages. (Civ. Code, § 3333.2, subd. (b).) CMA, CDA, and CHA became members of the coalition supporting Prop. 51.

In summary, *Amici* are interested in *B.B. v. County of Los Angeles* (2018) 25 Cal.App.5th 115, review granted October 10, 2018, No. S250734 because of the implications that it has for professional liability litigation.

Some funding for this brief was provided by organizations and entities that share *Amici*'s interests, including physician-owned and other medical and dental professional liability organizations and non-profit entities engaging physicians, dentists, and other health care providers for the provision of medical services, specifically: The Cooperative of American Physicians, Inc., The Dentists Insurance Company, The Doctors Company, Kaiser Foundation Health Plan, Inc., Medical Insurance Exchange of California, Norcal Mutual Insurance Company, and The Regents of the University of California.

Finally, *Amici* reassure the Court that this brief was not authored, either in whole or in part, by any party to this litigation or by any counsel for a party to this litigation. No party to this litigation or counsel for a party to this litigation made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE CASE AS IT RELATES TO THE ISSUE

The Court of Appeal opinion (at *B.B. v. County of Los Angeles, supra,* 25 Cal.App.5th at 120-122) sets forth the following factual and procedural background of the case at the end of trial.

This is a wrongful death case in which Plaintiffs alleged both negligence and intentional torts against multiple defendants who, along with Plaintiffs' decedent, were found by the jury to have all acted concurrently with decedent to cause his death. All County Defendants except one were found to have acted negligently. The claim against Defendant Deputy David Aviles ("Deputy Aviles") (and, therefore, also the claim against the Defendant County under a theory of vicarious liability for his actions) was a "hybrid" of negligence and intentional tort, and he was found to have acted intentionally. Specifically, he was found to have committed battery.

The jury determined the comparative responsibility of the Defendants, as well as that of Plaintiffs' decedent. The jury assessment of decedent's fault, stated in percentage terms, was twice or more than that of any of the other tortfeasors. The jury attributed 40 percent of the fault to Plaintiffs' decedent for his own death, 20 percent to Defendant Deputy Aviles, 20 percent to Defendant Deputy Paul Beserra ("Deputy Beserra"), and the remaining 20 percent presumably to Defendants Deputies Fernandez, Celaya, and LeFevre, combined. The jury awarded $8,000,000 noneconomic damages for decedent's wrongful death.

The issue before this Court relates to what happened after the jury completed its task, and the trial court was required to fashion the remedy. As the Court of Appeal described it, "Plaintiffs filed a proposed judgment,

which Defendants opposed on the ground that it failed to apportion damages for the two liable deputies according to their percentages of fault. After a hearing on apportionment, the court entered judgment against Deputy Beserra and the County for $1.6 million (20 percent of the damages award) and against Deputy Aviles and the County for the full $8 million award." (25 Cal.App.5th at 122.)

The Court of Appeal reversed the judgment with respect to the noneconomic damages award against Defendant Deputy Aviles. "On remand, the trial court is directed to vacate the judgment and enter a separate judgment against Deputy Aviles and the County and a separate judgment against Deputy Beserra and the County allocating noneconomic damages to each defendant and the County in direct proportion to each individual defendant's percentage of fault, as found in the jury's comparative fault determinations. (Civ. Code, § 1431.2, subd. (a).)" (25 Cal.App.5th at 134.) Thus, the liability of Defendant Deputy Aviles is 20% of $8,000,000: $1,600,000. Since the Superior Court already assessed Defendant Deputy Beserra and Defendant County for their 20%, Plaintiffs will recover 60% of the $8,000,000: $4,800,000.

Both briefs filed by Plaintiffs argue statutory interpretation (Opening Brief on the Merits by Plaintiffs B.B. and B.B. ("OBM/BB&BB"), pp. 15-22; Opening Brief on the Merits by Plaintiffs T.E., D.B., and D.B. ("OBM/TE,DB&DB"), pp. 14-18), but the majority of their arguments are devoted to analyzing the principle of comparative fault (OBM/BB&BB, pp. 22-36; OBM/TE,DB&DB, pp. 18-33). Both sets of Plaintiffs argue that intentional torts should have no role whatsoever in comparative fault because an intentional tortfeasor can never be less culpable than other tortfeasors. Plaintiffs T.E., D.B., and D.B. argue that the behavior of

Plaintiffs' decedent is irrelevant to the comparative fault analysis of Defendant Deputy Aviles and Defendant County. (OBM/TE,DB&DB, pp. 30-33.) Plaintiffs T.E., D.B., and D.B. admit their case against Defendants was for "*both* negligence and intentional tort" (*id.* at p. 32; emphasis by italics added) and further explain in their Reply Brief on the Merits ("RBM/TE,DB&DB") "that a wrongful death claim can be based *either* on negligent or on intentional conduct, and Plaintiffs here proceeded on *both* types of claims" (RBM/TE,DB&DB, p. 38; emphasis by italics in original). In other words, they pursued a "hybrid" claim.

As to public policy, Plaintiffs argue for "deterrence and punishment" of intentional tortfeasors who are concurrent tortfeasors (OBM/BB&BB, pp. 30-36; see Reply Brief on the Merits by Plaintiffs B.B. and B.B. ("RBM/BB&BB"), pp. 44-52; RBM/TE,DB&DB, pp. 35-43), but they completely ignore the vicarious liability implications in this case. While plaintiffs strongly imply that the intentional tortfeasor Defendant Deputy Aviles, will shift his culpability to the less culpable Defendants that Plaintiffs characterize as "relatively blameless" (OBM/BB&BB, p. 36), Plaintiffs say nothing about the one Defendant that is truly "blameless," the County. Plaintiffs know that, by being held vicariously liable, the County will pay the full $8 million if the Court agrees with Plaintiffs' arguments.

Defendants, on the other hand, argue the express public policy of Prop. 51: "supplying fairness and equality to all defendants by apportioning noneconomic damages." (Answer Brief on the Merits ("ABM"), p. 42.)

SUMMARY OF ARGUMENT BY *AMICI CURIAE*

Although the facts of this case have little or nothing to do with health care, the procedural background is similar in many ways to the hybrid litigation pursued against California health care providers.[1] Usually, in such cases, the same set of facts that are alleged by those plaintiffs to be professional negligence also are alleged by them to be intentional torts. Plaintiffs simply add a conclusory allegation that one of the defendant health care providers acted or failed to act intentionally.

Similarly, in this case, Plaintiffs pursued such hybrid litigation against the Defendant Deputy Sheriffs and the County of Los Angeles. Now, based on the finding of intentional tort against just one of those Defendants, Plaintiffs argue that the jury finding of battery allows them to avoid the limitation on noneconomic damages in Prop. 51, Civil Code section 1431.2, subdivision (a), altogether. They do so because, otherwise, the effect of the Court of Appeal decision will be to reduce their recovery of the $8 million noneconomic damages awarded by the jury.

Plaintiffs' arguments for avoiding the limitation on noneconomic damages are "that intentional wrongdoers should not benefit at the expense of merely negligent ones" which they claim is "fully consistent with the statute's language, purpose, and historical context." (OBM/BB&BB, p. 34.) Plaintiffs' unstated assumption is that there is no role whatsoever for intentional torts in the California scheme of comparative fault, which Prop.

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[1] The reason why some plaintiffs who sue health care providers for personal injury or wrongful death claims add intentional torts to their claims for professional negligence is to avoid the limitation of noneconomic damages in MICRA, Civil Code section 3333.2, subdivision (b).

51 incorporates. Thus, according to Plaintiffs, the jury finding of Defendant Deputy Aviles to be only 20% comparatively at fault for the death was wrong. Plaintiffs claim the fault of Deputy Aviles was far greater (OBM/BB&BB, p. 35 ["someone whose fault is off-the-charts"]), which means Plaintiffs also believe the jury finding decedent to be twice at fault as Deputy Aviles was wrong.

Plaintiffs' assumption that, because Deputy Aviles was found to have committed battery rather than negligence he does not deserve to be treated equitably, is wrong. Their arguments are wrong for other reasons, as well. (1) Intentional wrongdoers cannot "benefit at the expense of merely negligent ones" because, as Plaintiffs themselves point out (at OBM/BB&BB, p. 31; OBM/TE,DB&DB, pp. 7, 18), Code of Civil Procedure section 875, subdivision (d), provides that intentional wrongdoers have no right of contribution from negligent ones. That is because (2) Prop. 51 operates as a limitation on noneconomic damages, by application of Civil Code section 1431.2, subdivision (a), when the judge fashions the remedy. It is not a shift of responsibility from one defendant to another, by application of Code of Civil Procedure section 875. (3) Prop. 51 should operate in a way that achieves equity and improves the decision-making that results in compensation for tortiously caused injuries. (4) Prop. 51's "language, purpose, and historical context" all are consistent with its application to intentional torts as well as negligence. (5) The jury's determination of the percentages in this case is an illustration of the role intentional tort has in comparative fault. (6) Precisely because the focus of Prop. 51 is on compensatory damages, not punitive damages, Plaintiffs' argument for punishing Deputy Aviles by denying him equitable treatment is misplaced.

Plaintiffs' approach to the issue erroneously assumes that only negligent tortfeasors are entitled to equitable consideration; intentional tortfeasors are not. Thus, whether the judgment a court enters against a defendant is based on the jury's allocation of that defendant's responsibility will depend on one fact, *the characterization* of the defendant's conduct as negligent or intentional. No other consideration enters into the analysis, according to Plaintiffs.

Amici submit that such a one-dimensional approach is inconsistent with the whole idea of Prop. 51: to achieve a more fair and equitable allocation of responsibility among the tortfeasors who concurrently caused the harm. A better approach is two-dimensional, where the analysis takes into consideration not just the characterization of the defendant's conduct as negligent or intentional but also *the context* in which that conduct caused harm. The best approach also takes into consideration such things as *the proportion* to which the conduct contributed to the harm in comparison to the causal contribution of the other tortfeasors. The "percentage of fault" is a factual determination that a jury is well equipped to decide.

To repeat the point that *Amici* already have stated in this brief, and will continue to state, the jury determination of fault in this case is an illustration that such a multi-dimensional approach can work, even in a complex situation where there was both negligence and intentional misconduct and where the intentional misconduct was both by one of Defendants and by Plaintiffs' decedent.

LEGAL ANALYSIS

I. THE JURY APPORTIONMENT OF RESPONSIBILITY IN THIS CASE IS AN ILLUSTRATION OF THE ROLE INTENTIONAL TORT CAN HAVE IN CALIFORNIA'S COMPARATIVE FAULT SYSTEM

The unstated assumptions of Plaintiffs' arguments are that there is no role for intentional tort in Prop. 51 and comparative fault, generally, and that the jury findings of comparative fault in this case were wrong, specifically. Plaintiffs are wrong in both assumptions.

A. The Jury Correctly Found Not Only That Plaintiffs' Decedent Shared Responsibility For His Own Death, But That He Was Twice As Culpable As Defendant Deputy Aviles

The Court of Appeal summarized the facts from which the jury found Plaintiffs' decedent to be 40% at fault, Deputy Aviles to be 20% at fault, Deputy Becerra to be 20% at fault, and the remaining deputies combined to be 20% at fault. (*B.B. v. County of Los Angeles, supra,* 25 Cal.App.5th at 120-122.) Citations to the appellate record for the factual detail regarding the conduct of Plaintiffs' decedent has been provided by Defendants. (ABM, pp. 11-14, 43-46.)

Plaintiffs, with no citation to the record, argue that the jury found Plaintiffs' decedent 40% responsible "based on his own negligence." (OBM/BB&BB, p. 13.) Notably, Plaintiffs' statements of fact say nothing about decedent's behavior. (See OBM/BB&BB, pp. 9-12; OBM/TE,DB&DB, pp. 9-11.)

Plaintiffs never try to explain why the jury found decedent to be 40% at fault and yet Deputy Aviles only half of that, 20%. Instead, they simply declare "that intentional wrongdoers should not benefit at the

expense of merely negligent ones." (OBM/BB&BB, p. 34.) "Aviles is at the opposite extreme of section 1431.1(b)'s intended beneficiaries, i.e., someone whose fault is off-the-charts." (*Id.* at p. 35.)

Plaintiffs' unstated assumption is that those jury findings were wrong. *Amici* submit the jury findings not only were correct; the findings were logical.

It is quite easy to understand how the jury was able to compare the behavior of decedent with that of the deputies, even though there were elements of intentional conduct on both sides to seemingly confuse the issue. The episode began with Plaintiff's decedent straddling a woman in the street and ended with the deputies straddling decedent. As to Plaintiffs' decedent, when the deputies first tried to subdue him and the woman reappeared claiming decedent tried to kill her, decedent lunged after her, apparently to resume his attack on her. The jury found one deputy liable for battery and the other deputy liable for negligence. (25 Cal.App.5th at 121-122.)

It is apparent from the jury's comparative fault allocations that they felt decedent was twice as culpable as that of Defendant Deputy Aviles. The jury was able to find decedent to be more at fault than Deputy Aviles presumably by comparing their respective degrees of culpability for and contribution to the death.

The jury reasonably could have found from the facts that Plaintiffs' decedent knowingly created a situation which required a response from the Sheriff's Department. Simply stated, his behavior consisted of threatening a woman with harm and then, when confronted by the deputies, threatening them with harm. That the response by the deputies was excessive was substantially if not entirely due to decedent's behavior. That his aberrant

behavior probably was attributable to drugs does not make it negligence, as Plaintiffs imply. To the contrary, it is more reasonable to characterize his behavior as motivated by a very real intention to harm someone, either the woman or the deputies or all of them.

B. The Jury's Comparative Fault Analysis Probably Would Have Been The Same Even If Plaintiffs' Decedent Was A Co-Defendant, Rather Than The Victim

Imagine a hypothetical variation on this case in which the woman who Plaintiffs' decedent threatened to kill was the plaintiff who sued decedent and the deputies. Assume that, after the "[t]wo residents confronted Burley and pushed him off the struggling woman" (*B.B. v. County of Los Angeles, supra,* 25 Cal.App.5th at 121), the woman was not able to flee as she was able to do in the real factual pattern in this case. Further assume that Burley continued to straddle her when the deputies arrived, and she (not Burley, as in the real factual pattern) was the one who was injured in the "struggle" between him and the deputies. Finally, assume that she was the one who sued, naming Burley, the deputies, and the County, claiming that in attempting to restrain Burley, Deputy Aviles accidentally struck her, and assume that she alleged intentional and negligent torts against them all.

In that hypothetical, it would not at all be surprising if the jury found decedent to be twice as responsible for the woman plaintiff's injuries as any one of the deputies, including Deputy Aviles. Indeed, a jury allocation of Burley's responsibility as twice that of Deputy Aviles after the jury deliberated on that hypothetical case, comparing fault of the intentional and

negligent tortfeasor Defendants, not only would be understandable, it would be reasonable.

More to the point of Prop. 51, it would be fair and equitable.

C. The Example Provided By The Proponents of Prop. 51 For The 1986 Voter Ballot Pamphlet Essentially Was A Hybrid Of Intentional And Negligent Torts

Another hypothetical example can be found in the ballot pamphlet materials regarding Prop. 51, the "Argument in Favor of Proposition 51," which gave a hypothetical example of a drunk driver and a city who were named co-defendants in a lawsuit for the harm caused to the hypothetical plaintiff when the drunk driver sped through a red light and crashed with plaintiff. (Ballot Pamp., Primary Elec. (June 3, 1986) argument in favor of Prop. 51, p. 34.)[2] The example was drawn from a decision of this Court, during the decade prior to the 1986 election, in *Taylor v. Superior Court* (1979) 24 Cal.3d 890, where this Court authorized punitive damages against drunk drivers who cause injury. The Court held that "one who voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle demonstrates, in the words of Dean Prosser, 'such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.'" (24 Cal.3d at 899.)

The *Taylor* decision was well publicized, and the basic message about the liability consequences for driving while under the influence of

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[2] The ballot pamphlet for the June 3, 1986, primary election was reproduced, in relevant part, in an "Appendix" to the Court's opinion in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1226 (hereafter *Evangelatos*).

alcohol was not lost on Californians, particularly those who drink. That message probably was refreshed eight years later, when Voters read the ballot pamphlet containing the example of a drunk driver going through an intersection where there was a defective traffic light.

Plaintiffs argue the ballot pamphlet supports their version of the statutory history (OBM/BB&BB at pp. 29-30), but the opposite is true. The example in the ballot pamphlet is of a case in which one defendant committed willful misconduct by drunk driving and the other defendant was negligent.

This case, *B.B. v. County of Los Angeles*, is one short step beyond that example in the ballot pamphlet, in that the Defendants are all governmental employees and their employer, the County. More significantly, the plaintiff in the example in the ballot pamphlet has no culpability, and Plaintiffs' decedent in this case has substantial culpability.

D. Allocation Of Fault In This Case For Wrongful Death, Between Plaintiffs' Decedent And Defendants Who Were Found To Have Acted Both Intentionally And Negligently, Not Only Is Fair, It Probably Is What The Jury Intended

This lawsuit and the two hypothetical lawsuits described in the foregoing three subsections of this brief are hybrid proceedings, *i.e.,* cases in which plaintiffs alleged both negligence and intentional torts. In all three cases, the jury could determine the comparative responsibility of the parties. The only difference is that in the two hypothetical cases, the plaintiff was not culpable, whereas in this lawsuit, there is culpability on the Plaintiffs' side.

Prop. 51 applies if only because this is an action for wrongful death. The liability of Defendants, therefore, should be based upon principles of comparative fault. Specifically, Section 1431.2, subdivision (a), requires the court to assess the liability of Defendant Deputy Aviles at "the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault." Since the jury found his fault to be 20%, the assessment is $1,600,000. Although there is no way to know for sure, it is possible that is what *the jury itself intended* when the jury calculated that percentage. It is hard to believe the jury made those calculations of fault completely in the abstract, with no consideration of the likely significance of those findings.[3]

While the absolute dollar amount of the reduction on Plaintiffs' noneconomic damages recovery is substantial, $3,200,000 (40% of $8,000,000), such reduction for decedent's 40% comparative responsibility is fair. Even after the reduction of the $8,000,000 award, which the Court of Appeal characterized in the unpublished portion of its opinion as "very large" (Slip Opn., p. 41), decedent's estranged wife and each of his five children will receive an average of $800,000.

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[3] The same can be said for the jury apportionment in *Burch v. CertainTeed Corp.* (Apr. 15, 2019, Nos. A151633, A152252, A153624) __ Cal.Rptr.3d __ [2019 WL 1594460]: "62 percent fault to defendant; 25 percent fault to Johns-Manville; 10 percent fault to J.C. Plumbing; 1 percent fault to Valley Engineers; 1 percent fault to Kubota; and 1 percent fault to Nipponite." (*Id.* at *2.) The Court of Appeal essentially rejected that jury finding and concluded "that the trial court erred in apportioning plaintiffs' noneconomic damages according to defendant's allocated proportion of fault under section 1431.2." (*Id.* at *15.)

E. Allocation Of Fault For A Wrongful Death, Between Tortfeasors Who Acted Intentionally And Negligently, Is Probably What The Voters Intended

More to the statutory purpose of Section 1431.2, that assessment probably is what *the Voters intended.*

Section 1431.2 broadly applies to "tort actions." (See, *e.g.*, Civ. Code, § 1431.1, subd. (c).) There is nothing in the statutory language nor in the ballot materials that demonstrates an intention to limit its application to negligence. To the contrary, as this Court explained in *Evangelatos, supra,* 44 Cal.3d 1188, "the 'findings and declaration of purpose' included in the proposition clearly indicate that the measure was proposed to remedy the perceived inequities resulting under the preexisting joint and several liability doctrine and to create what the proponents considered a fairer system under which 'defendants in tort actions shall be held financially liable in closer proportion to their degree of fault.'" (*Id.* at 1213, citing Civ. Code, § 1431.1.)

To summarize, Prop. 51 broadly applies to all tort actions "for personal injury, property damage, or wrongful death" (Civ. Code, § 1431.2, subd. (a)), and that includes proceedings such as this where plaintiffs pursue *both* negligence *and* non-negligence theories.

II. CALIFORNIA'S COMPARATIVE FAULT SYSTEM ALSO COULD HAVE A ROLE IN APPORTIONMENT OF RESPONSIBILITY IN HYBRID CASES OF MEDICAL NEGLIGENCE AND MEDICAL BATTERY

Plaintiffs pursue hybrid claims of negligence and battery against California health care providers, particularly surgeons. Published appellate decisions in which such hybrid claims of negligence and battery were pursued against health care providers include *Stewart v. Superior Court*

(2017) 16 Cal.App.5th 87, *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, *So v. Shin* (2013) 212 Cal.App.4th 652, *Massey v. Mercy Medical Center Redding* (2009) 180 Cal.App.4th 690, *Dennis v. Southard* (2009) 174 Cal.App.4th 540, *Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, *Steward v. United States* (9th Cir. 2008) 282 Fed.Appx. 595, *Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, *Perry v. Shaw* (2001) 88 Cal.App.4th 658, *Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, *Szkorla v. Vecchione* (1991) 231 Cal.App.3d 1541 (review dism. and cause remanded (1992) 838 P.2d 781), *Ashcraft v. King* (1991) 228 Cal.App.3d 604, *Bommareddy v. Superior Court* (1990) 222 Cal.App.3d 1017 (disapproved in *Central Pathology Service Medical Clinic, Inc. v. Superior Court, supra,* 3 Cal.4th 181, 191), *Freedman v. Superior Court* (1989) 214 Cal.App.3d 734, *Noble v. Superior Court* (1987) 191 Cal.App.3d 1189, *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, *Rains v. Superior Court* (1984) 150 Cal.App.3d 933, *Herrera v. Superior Court* (1984) 158 Cal.App.3d 255, and *Depenbrok v. Kaiser Foundation Health Plan, Inc.* (1978) 79 Cal.App.3d 167. There are many unpublished decisions, as well. Comparative allocation of responsibility is particularly appropriate in such cases.

The following hypothetical, which is loosely based on *Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.* (2003) 107 Cal.App.4th 1260, is an illustration.

A patient who had pain in his shoulder following a motorcycle accident was convinced he had a fracture and went to the emergency room. The ER physician was unable to confirm the fracture and told the patient to follow up with his primary care physician. That physician referred the patient to an orthopedic surgeon. The surgeon examined the patient,

ordered the appropriate scans, and diagnosed the problem as a "possible" fracture to be ruled out.

The surgeon then informed the patient of the diagnostic and treatment alternatives, as well as the potential risks and complications of each of those alternatives. The patient chose to undergo what the surgeon called "exploratory" surgery to confirm the "suspected" fracture and, if confirmed, to repair it. The patient was given a consent form to sign but decided not to do so when he saw the form included the sentence, "I further authorize the doctor to do any procedure that his judgment may dictate to be advisable for my well-being." He was convinced there was a fracture, and he was determined to have it repaired. He said nothing to the surgeon, to the assisting surgeon, or to any of their staff who participated in his care.

No one on the surgical team noticed that the patient had failed to sign the consent form. They all proceeded as if the patient had fully consented. The surgery was performed, during which the surgeon decided that "it was best to leave things alone." As the surgeon later explained, "I didn't want to make him any worse."

The patient was "astounded and upset" when he learned that his shoulder had not been repaired. He attempted to find another doctor to perform the shoulder repair surgery, but by the time his HMO had approved an appointment with another orthopedic surgeon it was too late. Worse, there was a complication.

The patient sued the surgeon, the assisting surgeon, and their medical group for professional negligence and for battery. The case was tried to a jury, which found the surgeon liable for battery and the assisting surgeon and the medical group staff liable for negligence in allowing the surgery to be terminated without repair of the fracture. The jury also found the patient negligent for failing to tell the staff that he decided not to

consent to "any procedure that [the surgeon in] his judgment may dictate to be advisable."

The jury found the surgeon 20% responsible, the assisting surgeon 20% responsible, the medical group staff 20% responsible, and the patient 40% responsible. Since all of the medical expenses were covered by the patient's HMO and there was no loss of income, the patient only was awarded noneconomic damages, $100,000. The trial judge applied Prop. 51 and entered judgment against the surgeon for $20,000, against the assisting surgeon for $20,000, against the medical group staff for $20,000, and for the plaintiff in the total amount of $60,000.

Amici submit that would be fair and equitable. 100% against the surgeon would not be fair and equitable.

First, the surgeon's medical battery was "intentional" only in the sense that, technically speaking, battery is an intentional tort. The surgeon did not intend to harm the patient; to the contrary. The surgeon did not intentionally deviate from the procedure he described to the patient; to the contrary. At most, the surgeon failed to notice the patient's failure to understand what the surgeon meant by "exploratory" surgery and failed to note the patient's subsequent refusal to agree to the sentence in the consent form that would have given the surgeon discretion to do what the surgeon thought best for the patient.

Second, the patient was twice as culpable as the surgeon, even though, technically speaking, the patient was found to have been "negligent." The surgeon's decision "to leave things alone" rather than perform the "open reduction with internal fixation" he had discussed with the patient was based on the sentence in the consent form that the patient refused to sign. But for the patient's failure to explain to the surgeon why he would not agree to that sentence, the surgeon would not have done the operation in the first place. The patient would have been able to arrange for

another HMO-approved surgeon to operate. The complication may have been avoided.

It is a question of comparing the fault of the concurrent tortfeasors, in particular the surgeon and the patient, for the patient's refusal to consent to the surgeon's discretion to do what he thought was best.

III. THIS COURT HAS APPLIED PROP. 51 IN CASES WHERE PLAINTIFFS PURSUE BOTH NEGLIGENCE AND NON-NEGLIGENCE THEORIES, ALTHOUGH THIS COURT HAS YET TO DO SO IN THE CONTEXT OF WILLFUL MISCONDUCT

There is another reason why the unstated assumption of Plaintiffs' arguments, that there is no role for intentional tort in Prop. 51, is wrong. Even before the election of 1986, the trend was toward comparison of fault for intentional torts. That trend was documented in the 1984 law review article cited by Plaintiffs (at RBM/TE,DB&DB, p. 32), entitled *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations,* in which the authors analyzed "Recent Cases: The Trend Toward Comparison." (Dear & Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations, supra,* 24 Santa Clara L.Rev. 1, 20-36.) The first group of cases cited by the authors as evidence of that trend were the strict tort liability decisions of this Court, *Sorensen v. Allred, supra,* 112 Cal.App.3d 717, *Daly v. General Motors Corp., supra,* 20 Cal.3d 725, and *Safeway Stores, Inc. v. Nest-Kart, supra,* 21 Cal.3d 322. (Dear & Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations, supra,* 24 Santa Clara L.Rev. at pp. 21-23.)

Consistent with that trend, two years after enactment of Prop. 51, the Court decided *Evangelatos, supra*, 44 Cal.3d 1188. The plaintiff in that

case also pursued a hybrid claim, for negligence and strict liability. (*Id.* at 1195.) The Court described the application of Prop. 51 in broad terms and held that it applied to both theories, emphasizing that the purpose of Prop. 51 was to prevent the unfairness of requiring a tortfeasor who is only minimally culpable to bear all of the plaintiff's damages. (*Id.* at 1198.)

Four years after that, in *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, this Court decided another such hybrid case. The Court again described the application of Prop. 51 in broad terms and explained "Proposition 51 thus retains the joint liability of *all tortfeasors*, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damage were limited by Proposition 51 to a rule of strict proportionate liability." (*Id.* at 600. Emphasis by italics added.)

With regard to statutory intent, the Court noted in a footnote,

> The placement of [Civil Code] section 1431.2 within the group of statutes defining "Joint or Several Obligations" supports, rather than contradicts, our reading of the statute. Nor do the ballot materials suggest a contrary legislative intent. Brief official synopses of the complicated joint and several liability doctrine could hardly be expected to describe every situation in which the former rule, or its proposed amendment by Proposition 51, would apply. The proponents of the initiative simply argued that it reached a "FAIR COMPROMISE" by eliminating the "unfair" application of the "'deep pocket' law" to "noneconomic" damages while retaining the right of "injured victims" to fully recover their "actual" losses. (Ballot Pamp., Gen.Elec. (June 3, 1986), *supra,* argument in favor of Prop. 51, p. 34, rebuttal to argument against Prop. 51, p. 35.) Nothing in the ballot materials suggested a specific purpose to distinguish workers'

> compensation cases or other cases involving persons immune from suit.

(*DaFonte, supra,* 2 Cal.4th at 602, fn. 5. Emphasis in original.) The same can be said here, with respect to Plaintiffs' claim of intentional tort.

In *DaFonte,* the Court explained, "a 'defendant['s] liability for noneconomic damages cannot exceed his or her proportionate share of fault as compared with all fault responsible for the plaintiff's injuries, not merely that of 'defendant[s]' present in the lawsuit." (*DaFonte, supra*, 2 Cal.4th at 603. Emphasis by italics omitted.) That is the source of the reference to "nonparty tortfeasor(s)" in the standard jury instruction on "Apportionment of Responsibility," CACI 406. As the "Directions for Use" of CACI 406 explain (citing *DaFonte, supra,* 2 Cal.4th at 603), "'Nonparties' include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors."

Neither *Evangelatos* nor *DaFonte* were limited to negligent tortfeasors.

The point is, the apportionment of fault that is required by Prop. 51 should apply in all personal injury and wrongful death actions and it should apply to all persons at fault. It should apply to intentional torts. (Hollister, *Using Comparative Fault to Replace the All-or Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault* (1993) 46 Vand. L.Rev. 121.) *Amici* acknowledge that there is ongoing controversary, particularly as it relates to criminal conduct (see, *e.g.,* Green & Powers, *Apportionment of Liability* (2000) 10 Kan. J.L. & Pub. Pol. 30, 32; Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts* (2003) 78 Notre Dame L.Rev. 355, 361), but most intentional torts are not criminal conduct.

IV. CONTRARY TO WHAT PLAINTIFFS HAVE ARGUED, "THE STATUTORY LANGUAGE, PURPOSE, AND HISTORICAL CONTEXT" OF CIVIL CODE SECTION 1431.2 IS TO APPLY THE LIMITATION TO ALL TORT ACTIONS, NOT JUST TO CLAIMS OF NEGLIGENCE

A. It Is Reasonable To Interpret Civil Code Section 1431.2 As Applying To All Personal Injury And Wrongful Death Tort Actions; It Would Be Unreasonable To Interpret Section 1431.2 As Applying Only To Negligence Claims

Plaintiffs claim their interpretation of Civil Code section 1431.2 is "consistent" with the statutory "language" (OBM/BB&BB, p. 34), but that is not true.

Civil Code section 1431.1, subdivision (c) ("Findings and Declaration of Purpose") makes the statutory purpose very clear, that "defendants *in tort actions* shall be held financially liable in closer proportion to their degree of fault." (Emphasis by italics added.) Otherwise, "To treat them differently is unfair and inequitable." So too does the plain meaning of Section 1431.2, subdivision (a), which requires "[s]everal liability for non-economic damages."

> *In any action for personal injury, property damage, or wrongful death,* based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(Emphasis by italics added.)

The word "negligence" does not appear in either Section 1431.1 or Section 1431.2. Nor did the word "negligence" appear in the election

materials for Prop. 51. (See Ballot Pamp., Primary Elec. (June 3, 1986) pp. 32-35; see also *Evangelatos, supra,* 44 Cal.3d 1188, 1227 ["Appendix"].)

The statutory language of both Section 1431.1 ("tort actions" generally) and Section 1431.2, subdivision (a) ("any action for personal injury, property damage, or wrongful death" specifically) are consistent. More importantly, they mutually reinforce that the statutory purpose is to apply to all tort actions, regardless of theory. The only limitation in the statutory language is to torts for those harms identified as "personal injury, property damage, or wrongful death." That includes harms that were intended.

To be clear, it must be emphasized that the statutory language does not support a limitation to just one type of personal injury, property damage, or wrongful death tort, as Plaintiffs propose. (See, *e.g.,* OBM/TE,DB&DB, p. 7 ["fault among culpable, *negligent* actors"]; OBM/BB&BB, pp. 7 ["those who are merely negligent"], 8 ["merely negligent parties"], 30 ["Proposition 51 was intended to limit the liability of relatively blameless, *negligent* tortfeasors"]. Emphasis by italics in original.) Plaintiffs are wrong to claim the statute's purpose is limited to claims of negligence. Prop. 51 applies more broadly than that.

It is reasonable to interpret Section 1431.2 as applying to all personal injury and wrongful death tort actions, such as this. It would be unreasonable to read into Section 1431.2 a limitation to negligence claims, as Plaintiffs propose.

B. There Was Little Or No Reason In 1986 To Doubt Prop. 51 Applied To All Torts, But If There Was, The Voters' Approval Of Prop. 51 Clarified That Comparative Fault Applied To All Personal Injury And Wrongful Death Tort Actions, Not Just Negligence Claims

Plaintiffs claim their interpretation of Civil Code section 1431.2 is "consistent" with the statutory "purpose" (OBM/BB&BB, p. 34), but that is not true.

The Voters' understanding of Section 1431.2, based on what appeared in the proposed language, was consistent with this Court's decisions up to 1986 which decisions broadly applied the comparative fault principle. For example, in *Daly v. General Motors Corp., supra,* 20 Cal.3d 725, the Court considered "whether the principles of comparative negligence expressed by us in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393], apply to actions founded on strict products liability. We will conclude that they do." (20 Cal.3d at 730.) The Court suggested that the term "comparative negligence" was a misnomer, and that "equitable apportionment or allocation of loss" was a more accurate description. (*Id.* at 736.) The Court concluded its decision,

> It is readily apparent that the foregoing broad expressions of principle do not establish the duties of the jury with that fixed precision which appeals to minds trained in law and logic. Nonetheless, rather than attempt to anticipate every variant and nuance of circumstance and party that may invoke comparative principles in a strict products liability context, we deem it wiser to await a case-by-case evolution in the application of the broad principles herein expressed.

> By extending and tailoring the comparative principles announced in *Li, supra*, to the doctrine of strict products liability, we believe that we move closer to the goal of the equitable allocation of legal responsibility for personal injuries. We do so by relying on what Professor Schwartz aptly terms a "predicate of fairness." In making liability more commensurate with fault we undermine neither the theories nor the policies of the strict liability rule. In *Li* we took "a first step in what we deem to be a proper and just direction, . . ." (13 Cal.3d at p. 826, 119 Cal.Rptr. at p. 874, 532 P.2d at p. 1242.) We are convinced that the principles herein announced constitute the next appropriate and logical step in the same direction.

(20 Cal.3d at 747.)

For another example, in *Safeway Stores, Inc. v. Nest-Kart, supra,* 21 Cal.3d 322, this Court considered "whether the comparative fault principle . . . should be utilized as the basis for apportioning liability between two tortfeasors, one whose liability rests upon California's strict product liability doctrine and the other whose liability derives, at least in part, from negligence theory." (*Id.* at 325.) The Court determined that principles of strict liability were compatible with apportionment according to fault. (*Id.* at 330.)

Even though strict liability and negligence theories are doctrinally very different, the Court noted, any difficulties apportioning liability "are more theoretical than practical, and experience in other jurisdictions demonstrates that juries are fully competent to apply comparative fault principles between negligent and strictly liable defendants." (*Safeway Stores, Inc. v. Nest-Kart, supra,* 21 Cal.3d at 331.) The Court also concluded that a policy of apportionment avoided unfair and inequitable results:

> Thus, if we were to hold that the comparative indemnity doctrine could only be invoked by a negligent defendant but not a strictly liable defendant, a manufacturer who was actually negligent in producing a product would frequently be placed in a better position than a manufacturer who was free from negligence but who happened to produce a defective product, for the negligent manufacturer would be permitted to shift the bulk of liability to more negligent cotortfeasors, while the strictly liable defendant would be denied the benefit of such apportionment.

(*Id.* at 332.)

Notwithstanding what the Court said about the principle of comparative fault during the decade prior to Prop. 51, if there was any doubt whether the principle of comparative fault applied to *all* personal injury and wrongful death torts, the election brought the debate to an end. Prop. 51 is a virtual declaration by the Voters of their understanding that "tort actions" generally mean the same thing as "any action for personal injury, property damage, or wrongful death," specifically. The principle of comparative fault was not limited to just one type of tort, negligence. It applied to all torts, including intentional torts.

C. Prop. 51 Was Inspired By MICRA, California's First Tort Reform That Addressed Inflated Noneconomic Damage Awards, But Prop. 51 Was Written More Broadly Than MICRA

Plaintiffs claim their interpretation of Civil Code section 1431.2 is "consistent" with the "historical context" of the statute (OBM/BB&BB, p. 34), but that is not true.

Prop. 51 was inspired by MICRA. That was noted by this Court in *Evangelatos, supra,* 44 Cal.3d 1188. Prop. 51 was "tort reform legislation" (*id.* at 1194) enacted for the purpose of "modifying the common law rule

governing the potential liability of multiple tortfeasors" (*id.* at 1193). "[T]he tort reform measure instituted by Proposition 51 paralleled somewhat similar tort reform legislation – MICRA – which was enacted in the mid-1970's in response to a liability insurance crisis in the medical malpractice field." (*Id.* at 1211.) The Court relied heavily upon its prior decisions regarding MICRA in ruling on both the Prop. 51 constitutional issue (*id.* at 1200-1205) and the Prop. 51 retroactivity issue (*id.* at 1205-1227), and the Court noted that "at least one of the principal institutional proponents and drafters of Proposition 51 was very much involved in the post-MICRA litigation" (*id.* at 1211-1212; fn. omitted).[4]

The proponents of Prop. 51 had ten years of experience with MICRA, and they saw that there was a problem. One of the many ways in which MICRA was challenged was by pursuit of so-called "hybrid" proceedings in which the defendant health care provider defendant's actions were characterized as both negligence and intentional tort.

Indeed, during the year immediately prior to the election in which the Voters approved Prop. 51, this Court addressed precisely such a "hybrid" case, in *Waters v. Bourhis* (1985) 40 Cal.3d 424, where the issue was the MICRA limitation on attorneys' fees, Business and Professions Code section 6146. The intentional tort theory was found to be a way around MICRA. "[W]hen MICRA and non-MICRA causes of action are

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[4] In a footnote, the Court further explained, "The Association for California Tort Reform (ACTR) is one of numerous organizations that have filed amici curiae briefs in this case. In its brief, ACTR states that it sponsored the legislation that was 'the precursor to and model for Proposition 51' and that its chairman 'was the official proponent who filed Proposition 51 with the California Attorney General requesting preparation of a title and summary for placement on the ballot.' ACTR participated as an amicus in many of the leading MICRA cases." (44 Cal.3d at 1212, fn. 16.)

properly joined in one proceeding we can find no basis for limiting the fee that an attorney may permissibly obtain *for successfully litigating the non-MICRA claim.*" (*Id.* at 436-437. Emphasis by italics in original.)

V. PROP. 51 HAS BEEN AND SHOULD CONTINUE TO BE APPLIED IN WAYS THAT IMPROVE DECISION-MAKING IN ALL PERSONAL INJURY TORT LITIGATION, JUST AS MICRA HAS DONE IN MEDICAL MALPRACTICE LITIGATION

A. Prop. 51 Reflects Two Modern Developments In California Tort Litigation, Both Of Which Occurred In 1975, When This Court Decided *Li v. Yellow Cab Co.* And When The Legislature Enacted MICRA

Proposition 51 modified the common law rule governing liability of multiple tortfeasors. It built on the foundation laid by MICRA regarding noneconomic damages and reflected a more modern approach to the apportionment of liability and fault.

The Legislature enacted MICRA, tort reform for medical negligence actions, in 1975. That same year, the California Supreme Court issued the *Li* decision, further modifying the tort landscape, but this time, adopting comparative liability in the form of comparative negligence. Three years later, the Court expanded the application of comparative liability to analyzing damages in torts other than negligence. (*Daly, supra,* 20 Cal.3d 725, 741 [extending comparative fault application to strict liability cases]; *Safeway Stores, Inc., supra,* 21 Cal.3d 332 [applying comparative fault to an indemnity case].)

As comparative liability has evolved over the last forty years, courts have moved away from assessing comparative fault on the negligence standard and toward an evaluation of fault based on concerns of equity.

The former method of determining allocation of damages has made way for a more reasoned analysis that takes into consideration the varying degrees of fault of each wrongdoer.

A jury's task in determining fault in a comparative liability case centers around the equitable apportionment of loss. (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1160 ["Comparative fault 'is a flexible, commonsense concept' adopted to enable juries to reach an 'equitable apportionment or allocation of loss'"].) "California's system of 'comparative fault' seeks to distribute tort damages proportionately among all who caused the harm." (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 367.) Because the goal is to equitably assess fault, juries should be able to assign fault to joint tortfeasors accused of different forms of tort liability. "Distinctions between 'active' and 'passive' fault, 'primary' and 'secondary' liability, and similar characterizations of the relationship between or among concurrent tortfeasors served as the theoretical underpinnings of equitable indemnification and guided its application." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hosp.* (1994) 8 Cal.4th 100, 108.)

Comparative fault reflects improvements in tort decision-making because it permits the trier of fact to consider all relevant information in allocating loss and apportioning liability. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285.) The jury "may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an 'equitable apportionment or allocation of loss.'" (*Ibid.*)

B. Like MICRA, Prop. 51 Had The Effect Of Requiring More Reasoned Analysis Of The Responsibility To Pay Noneconomic Damages

MICRA was the first tort reform in California to draw the distinction between economic and noneconomic damages, and ten years later, Prop. 51 followed that lead when it explained to the Voters the two general categories of damages.

> (1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.
>
> (2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

(Civ. Code, § 1431.2, subd. (b).)

Subdivision (b)(1) of Section 1431.2, corresponded to Code of Civil Procedure section 667.7, subdivision (a), of MICRA,

> In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty thousand dollars ($50,000) in future damages.

MICRA further explained,

> As used in this section: [¶] (1) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(Civ. Code, § 667.7, subd. (e)(1).)

Subdivision (b)(2) of Civil Code section 1431.2 of Prop. 51, regarding noneconomic damages, corresponded to Civil Code section 3333.2, subdivision (a), of MICRA, which provided,

> In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

It was in MICRA that the Legislature first delineated different ways in which damages should be evaluated in terms of their "economic" and "noneconomic" nature, and then in terms of their "past" and "future" components, and finally as to economic damages in terms of the type of harm, whether it be "medical," "earnings," "bodily function," or "pain and suffering." As such, MICRA required judges to use special verdict forms by which jurors answered a number of questions about damages, not just one question in a general verdict form.

In summary, the Legislature made clear in MICRA that lawyers, judges, and juries in medical malpractice litigation should evaluate, measure, prove, and decide damages in terms of these new dimensions, economic versus noneconomic, past versus future. In other words, lawyers, judges, and juries were then required to think about damages in new, more sophisticated ways. Prop. 51 followed that lead, and the Voters approved the basic idea of Prop. 51 that any reduction was limited to noneconomic

damages. Economic damages were not to be reduced by the mathematical reduction required by Prop. 51.

In both MICRA and Prop. 51, the reduction is accomplished by the trial court, not the jury, when the court fashions plaintiff's remedy. What Prop. 51 adds to the reasoned analysis of the responsibility to pay noneconomic damages is that the jury analyzes the various factors *collectively.* As reflected in the Restatement Third of Torts,

> Factors for assigning percentages of responsibility to each person whose legal responsibility has been established include
>
> (a) The nature of the person's risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct; and
>
> (b) the strength of the causal connection between the person's risk-creating conduct and the harm.

(Rest.3d Torts, Apportionment of Liability, § 8, p. 86.) As noted in the Comment to Section 8, ¶

> *a. Assigning shares of responsibility.* . . . [¶] . . . [¶] Of course, it is not possible to precisely compare conduct that falls into different categories, such as intentional conduct, negligent conduct, and conduct governed by strict liability, because the various theories of recovery are incommensurate. However, courts routinely compare seemingly incommensurate values, such as when they balance safety and productivity in negligence or products liability law. "Assigning shares of responsibility" may be a less confusing phrase because it suggests that the factfinder, after considering the relevant factors, *assigns* shares of responsibility rather than *compares* incommensurate

> quantities. Nevertheless, the term "comparative responsibility" is used pervasively by courts and legislatures to describe percentage-allocation systems.

(*Id.* at com. a, pp. 86-87. Emphasis by italics in original.)

> *c. Factors in assigning shares of responsibility.* The relevant factors for assigning percentages of responsibility include the nature of each person's risk-creating conduct and the comparative strength of the causal connection between each person's risk-creating conduct and the harm. The nature of each person's risk-creating conduct includes such things as how unreasonable the conduct was under the circumstances, the extent to which the conduct failed to meet the applicable legal standard, the circumstances surrounding the conduct, each person's abilities and disabilities, and each person's awareness, intent, or indifference with respect to the risks. The comparative strength of the causal connection between the conduct and the harm depends on how attenuated the causal connection is, the timing of each person's conduct in causing the harm, and a comparison of the risks created by the conduct and the actual harm suffered by the plaintiff.

(Rest.3d Torts, Apportionment of Liability, § 8, com. c, p. 87.) Admittedly, as explained in the Reporters' Note, "It is not possible to articulate an algorithm by which a factfinder can determine percentages of responsibility. See Comment *a*. All that can be done is to instruct the jury about the relevant factors." (*Id.* at § 8, reporters' notes, com. c, p. 90.)

The jury apportionment in this case, the jury apportionment in *Burch v. CertainTeed Corp., supra,* and the jury apportionment in the hypothetical case of medical battery previously described in this brief (under point heading II, *supra*) all reflect a more reasoned analysis of the responsibility to pay noneconomic damages.

C. Past Experience Applying Comparative Fault To Hybrid Actions Of Strict Liability And Negligence Demonstrates That It Can Be Done In Hybrid Actions Of Intentional Tort And Negligence, As Well

The same principles of equity that warranted the application of comparative liability to strict liability and indemnity actions warrant its application in cases where there are intentional tortfeasors and negligent tortfeasors.

Juries already have demonstrated that they can apply comparative principles of liability in evaluating different forms of tort liability in the same case. In *Safeway Stores, Inc., supra*, 21 Cal.3d 322, the jury allocated fault according to comparative liability principles when one defendant was strictly liable and the other was negligent. There, the plaintiff sued two defendants, asserting that Nest-Kart was liable under strict liability and that Safeway was liable under both strict liability and negligence. The jury assigned 80% of fault to Safeway and 20% to Nest-Kart after determining that the product was defective and that the store had not used due care in maintaining the product. (*Id.* at 326, 330-332.) This Court permitted the application of comparative liability when one defendant was liable under negligence (which requires fault) and one was liable under strict liability (which requires no fault). The Court noted that "juries are fully competent to apply comparative fault principles between negligent and strictly liable defendants." (*Id.* at 331.)

Similarly, in *Pfeifer v. John Crane, Inc., supra,* 220 Cal.App.4th 1270, the Court of Appeal explained that "the jury was permitted to consider the relative culpability of the parties in assessing comparative fault." (*Id.* at 1289.) The defendant had challenged a jury's comparative

liability finding, arguing that another party should have been apportioned a higher percentage of fault. (*Id.* at 1284.) In affirming the jury's findings, the Court held that:

> the jury could properly adjust its determinations of comparative fault to reflect Pfeifer's period of service in the Navy. [¶] Furthermore, the jury was permitted to increase JCI's share of liability because it determined that JCI's misconduct was more egregious than the Navy's misconduct. [Citation.] As we explain further below, the evidence supported the inference that JCI was consciously indifferent to the dangers that its products posed to consumers [], while the Navy was merely negligent regarding those dangers during Pfeifer's period of service []. The evidence was thus sufficient to support the jury's allocation of comparative fault, in view of the differences in the length and gravity of JCI's and the Navy's misconduct.

(*Pfeifer*, *supra*, 220 Cal.App.4th at 1289; see also *Baird v. Jones* (1993) 21 Cal.App.4th 684, 692-693 [affirming a comparative equitable indemnification award between two intentional tortfeasors by assessing the conduct of each tortfeasor and applying principles of fairness].)

D. Plaintiffs' Narrow Approach Limiting Prop. 51 To Negligence, Like The Old System Of Contributory Negligence To Which Comparative Fault Was An Answer, Will Lead To One-Dimensional Analysis And Will Create Inequitable If Not Harsh Results

Plaintiffs' approach to the issue assumes that only negligent tortfeasors are entitled to equitable consideration; an intentional tortfeasor is not. Thus, whether the judgment a court enters against a defendant is based on the jury's allocation of that defendant's responsibility will depend on one fact, *the characterization* of the defendant's conduct as negligent or

intentional. No other consideration enters into the analysis. That is a one-dimensional analysis. It will create inequitable results, the first of which will be the result Plaintiffs seek, that Deputy Aviles (and, therefore, his employer County of Los Angeles) will be deprived equity.

The intent behind the initial introduction of comparative fault principles to California was to transition away from the harsh results of contributory negligence. That old system was one-dimensional and created inequitable results as it deprived the trier of fact of the ability to allocate liability by evaluating the conduct of the parties.

Comparative fault was seen as a remedy to this problem. Comparative fault encourages a multidimensional inquiry that permits the trier of fact to consider all facts, inferences, and evidence to distribute liability among all wrongdoers. The trier of fact may evaluate any other consideration that will help it allocate fault such as the relative degrees of fault of the parties, the nature of each parties' conduct, and even intentionality or lack thereof.

Nothing about the apportionment of liability according to fault is inconsistent with intentional tort liability. In intentional torts, there are different types of intentional conduct. Some are recognized as more abhorrent than others, for example, sexual battery compared to trespass. There also are varying degrees of intentionality and in some instances, such as in this case, multiple tortfeasors, where one is more blameworthy than the others.

The evolution of tort reform has embraced other non-negligent tortfeasors as able to receive a comparative allocation of fault. Thus, the application of comparative fault must be extended to instances when there

are intentional tortfeasors and negligent tortfeasors, in order to achieve the goals of equity.

E. A Better Approach Is To Apply Prop. 51 Broadly, That Is, To "Any Action For Personal Injury, Property Damage, or Wrongful Death," So That Even In Hybrid Actions Such As This The Calculation Of Each Defendant's Share Of Noneconomic Damages Will Be Based On Comparative Fault Principles

Plaintiffs apply Prop. 51 narrowly, by emphasizing the word "negligence" that is not to be found in Prop. 51 and by arguing for a narrow interpretation of the language "any action for personal injury, property damage, or wrongful death" that does appear in Prop. 51. The better approach is to apply Prop. 51 exactly as it is written. If nothing else, that would avoid the problem in this case, a hybrid action of negligent and intentional conduct where the distinctions between the conduct characterized as negligence and that characterized as intentional is arbitrary. That also would be consistent with the shift long ago from characterizing the new system as one of "comparative negligence" to one of "comparative fault" and then to one of "comparative responsibility."

In *Li v. Yellow Cab Co., supra*, which rejected the old system of contributory negligence, this Court used the phrase "comparative negligence" to describe the new system. Over the short period of time that followed, the Court replaced that phrase with the phrase "comparative fault." (*E.g., American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 583; *Daly, supra,* 20 Cal.3d 725; *Safeway Stores, Inc., supra,* 21 Cal.3d 322, 333.) In *Daly,* the Court explained that "comparative negligence" was a misnomer, and that "equitable apportionment or

allocation of loss" was a more accurate description. (*Daly, supra,* 20 Cal.3d at 736.) The phrase "comparative fault" came to dominate because many of the cases after *Li v. Yellow Cab Co.* were hybrid cases involving multiple theories, usually against multiple tortfeasors, some strictly liable and others negligent.

Later, when the Court held Prop. 51 was constitutional, the Court used the phrase "comparative fault" to describe the controlling principle. For example, "Proposition 51 is the first legislative modification of the joint and several liability doctrine to be enacted in California, in recent years analogous statutory alterations of the traditional common law joint and several liability rule have been adopted by many states throughout the country, often as part of a comprehensive legislative implementation of *comparative fault* principles." (*Evangelatos, supra*, 44 Cal.3d at 1199. Emphasis by italics added.)

There is an alternative phrase, "comparative responsibility," that can be used interchangeably with "comparative fault." For example, in *Safeway Stores, Inc., supra,* 21 Cal.3d 322, the Court explained, "With the advent of the common law comparative indemnity doctrine, we achieve a more precise apportionment of liability in circumstances such as the instant case by allocating damages on a *comparative fault* or a *comparative responsibility* basis, rather than by fixing an inflexible pro rata apportionment pursuant to the contribution statutes." (*Id.* at 331, citing *Gardner v. Murphy* (1975) 54 Cal.App.3d 164, 166, fn. 2. Emphasis by italics added.) Similarly, in *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, the Court referred in the alternative to "the *comparative fault* or *comparative responsibility* doctrine[.]" (*Id.* at 415. Emphasis by italics added.)

That same year *Kransco* was decided by the Supreme Court, the Court of Appeal noted in *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847,

> If "strict liability" is recognized as a somewhat imprecise term, "comparative fault" may be even more misleading. (See *Arena* [*v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178], 1194, 74 Cal.Rptr.2d 580 [describing "comparative negligence" as a "misnomer"].) The doctrine allocates liability not simply on the relative blameworthiness of the parties' conduct, but on the proportion to which their conduct contributed to the plaintiffs' harm. A more accurate label might well have been something like "*comparative responsibility*." (See Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure* (1988) 21 U.C. Davis L.Rev. 1141, 1145.)

(*Id.* at 854. Emphasis by italics added.)

VI. CONTRARY TO THE COURT OF APPEAL'S ANALYSIS IN *THOMAS V. DUGGINS CONSTRUCTION CO., INC.*, UPON WHICH PLAINTIFFS PRIMARILY RELY, THE NONECONOMIC DAMAGES AWARDED AGAINST INTENTIONAL TORTFEASORS ARE COMPENSATORY, NOT PUNITIVE, JUST AS THE NONECONOMIC DAMAGES FOR NEGLIGENT TORTFEASORS ARE COMPENSATORY, NOT PUNITIVE

Plaintiffs rely heavily upon the *Thomas v. Duggins Construction Co., Inc.* (2006) 139 Cal.App.4th 1105 (at OBM/BB&BB, *passim*; OBM/TE,DB& DB, *passim*) decision which is heavily flawed. The greatest of those flaws is the *Thomas* court's rationale for refusing to reduce the award of noneconomic damages in the context of intentional tort. Although the *Thomas* court acknowledged "that comparative fault principles are equally applicable to intentional torts as well as negligence"

(139 Cal.App.4th at 1112), the court nevertheless applied "[t]he same policy considerations of deterrence and punishment that bar a reduction of an intentional tortfeasor's liability to reflect the plaintiff's contributory negligence also support the conclusion that an intentional tortfeasor's liability to the plaintiff is not subject to apportionment (i.e., reduction) where the negligence of one or more third party tortfeasors contributed to the injuries." (*Id.* at 1112. Citations omitted.) In other words, the court disregarded the compensatory function of noneconomic damages identified in Section 1431.2, subdivision (b)(2), "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation," and assumed a punitive function.

The *Thomas* court did so in the context of vicarious liability of an employer for such compensatory damages.

> Applying the foregoing principles, Duggins' vicarious liability for the intentional torts of one of its employees is not subject to reduction under Proposition 51 based on the jury's finding that Bentley's negligence also contributed to the plaintiffs' injuries. Thus, although Duggins' liability in negligence would have otherwise entitled it to an apportionment of the plaintiffs' noneconomic damages, its vicarious liability for intentional tort was not subject to such a reduction even though the jury concluded that Dhalliwal's intentional misconduct constituted only a 10 percent contributing factor to the plaintiffs' injuries.

(*Thomas, supra,* 139 Cal.App.4th at 1113.)

The *Thomas* court's view of noneconomic damages to be a means of punishing wrongdoers is precisely the kind of analysis that Justice Traynor

condemned as "primitive" in his dissenting opinion to *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, where he noted,

> There has been forceful criticism of the rationale for awarding damages for pain and suffering in negligence cases. [Citations.] *Such damages originated under primitive law as a means of punishing wrongdoers* and assuaging the feelings of those who had been wronged. [Citations.] They become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. Ultimately such losses are borne by a public free of fault as part of the price for the benefits of mechanization. [Citations.]

(56 Cal.2d at 511. Emphasis by italics added.)

The Court of Appeal in this case, *B.B. v. County of Los Angeles, supra,* 25 Cal.App.5th 115, identified that flaw and the many other shortcomings in the *Thomas* court's analysis: (a) failure to discuss or even cite this Court's decision in *DaFonte, supra,* 2 Cal.4th 593, and worse, (b) holding in conflict with this Court's statement in *DaFonte* that Section 1431.2 is unambiguous, by effectively (c) reading an ambiguity into the statutory text, which ambiguity is addressed by (d) relying upon authorities predating Section 1431.2, in order to (e) invoke principles of deterrence and punishment that are contrary to the statutory purpose of Section 1431.2 that is expressly stated in Section 1431.1. (*B.B. v. County of Los Angeles, supra,* 25 Cal.App.5th at 125-127.)

In rejecting the *Thomas* court's analysis, the Court of Appeal in this case noted that "*Thomas* conflicts with the plain text of section 1431.2" (*B.B. v. County of Los Angeles, supra,* 25 Cal.App.5th at 124), that "[t]he *Thomas* court's holding conflicts with our Supreme Court's interpretation

of section 1431.2 in *DaFonte*" (*id.* at 126), and that "[t]he *Thomas* court's reliance on 'policy considerations of deterrence and punishment' [citation] is similarly problematic" (*id.* at 127). Finally, and most importantly, the court in this case correctly quoted from Section 1431.2 and then ruled consistently with this Court's decision in *DaFonte*. (*Id.* at 128.)

VII. EVEN IF THE COURT AGREES WITH PLAINTIFFS' STATUTORY CONSTRUCTION, THAT SECTION 1431.2 IS LIMITED TO ACTIONS "BASED UPON PRINCIPLES OF COMPARATIVE FAULT," PLAINTIFFS' RECOVERY OF NONECONOMIC DAMAGES SHOULD BE REDUCED

Plaintiffs argue that Section 1431.2, subdivision (a), only applies to *negligence actions* because the only actions that are "based upon principles of comparative fault" are negligence actions. (OBM/BB&BB, pp. 15-27; OBM/TE,DB&DB, pp. 14-17; RBM/BB&BB, pp. 12-30; RBM/TE,DB& DB, pp. 10-27.) Defendants argue that Section 1431.2 applies to *all actions for personal injury, property damage, and wrongful death* and that the phrase "based upon principles of comparative fault" refers to the manner for calculating liability percentages. (ABM, pp. 17-31.) *Amici* submit that Plaintiffs' interpretation of Civil Code section 1431.2, subdivision (a), is unreasonable and that Defendants' interpretation is reasonable.

As Defendants point out, however, even if the Court agrees with Plaintiffs' statutory construction (that "based upon principles of comparative fault" refers to the phrase "any action" rather than the phrase "the liability"), the outcome is the same. (ABM, pp. 30-31 ["the results in this case would not change"].) Defendants argue "the comparative fault doctrine does not exclude intentional tortfeasors." (*Id.* at p. 31. Emphasis in heading deleted.)

A. The Trend Is For The Comparative Fault Doctrine To Be Applied To Intentional Torts

Amici admit (as they previously stated in this brief at point heading III, *supra*) that there has been a controversy in the legal literature about comparative responsibility for intentional torts and that controversy continues. The trend, however, has been toward more states apportioning responsibility between intentional and negligent tortfeasors. As Professors Dobbs, Hayden, and Bublick explain in their torts treatise,

> The most controversial question concerning the types of tortious conduct to be considered in apportionment systems is whether one defendant's intentional tortious activity can and should be compared with another defendant's negligence. Most jurisdictions do not make such comparisons. However, the number of states that apportion responsibility between intentional and negligent tortfeasor defendants has grown significantly. Similar issues arise with respect to reckless conduct.

(Dobbs et al., The Law of Torts (2d ed. 2011) vol. 3, § 496, p. 100. Fns. omitted.)

That continuing controversy explains the mixed approach of the Restatement Third of Torts: Apportionment of Responsibility, which provides for apportionment in all personal injury claims regardless of the basis of liability (Rest.3d Torts, Apportionment of Liability, § 1), but "does not take a position" on whether to permit intentional tortfeasor defendants to invoke plaintiff's negligence. (*Id.* at § 1, com. c.) The Restatement retains joint and several liability of intentional tortfeasors (*id.* at § 12), provides that an intentional tortfeasor is entitled to contribution from a negligent tortfeasor, but is not obligated to indemnify a negligent tortfeasor. (*Id.* at § 23.)

That continuing controversy also explains the mixed approach of the Uniform Apportionment of Tort Responsibility Act, which does not include intentional fault in its definitions (at § 2) but which does permit an adopting state "to resolve these issues in any manner that it wishes." (*Id.* at § 2, Comment.)

Although the approaches of both the Restatement and the Uniform Act are mixed, reflecting the split in the various states' positions on the issue, the trend is toward comparison.

B. This Court Should Follow The Trend Toward Comparison Of Fault Even Where One Or More Of The Tortfeasors Was Found To Have Acted Intentionally

Amici urge the Court to join the trend toward apportionment of responsibility between intentional and negligent tortfeasors. Although such a holding by this Court in this case would signal a new development in the evolving system of comparative fault in California, it need not be dramatic. If limited to the context of hybrid actions for negligence and battery, *Amici* submit, the change would be relatively minor.

The common law evolves in response to statutory developments, including tort reform legislation, particularly where the statute relates to the courts' role in the process. MICRA is an example. The noneconomic damages limitation in MICRA, Civil Code section 3333.2, subdivision (b), is applied by the court, after the jury has rendered its decision, when the court enters judgment against the defendant. The same is true of Prop. 51.

An example of common law evolution following tort reform is *Western Steamship Lines, Inc. v. San Pedro Peninsula Hosp., supra,* 8

Cal.4th 100, where this Court broadened the application of Section 3333.2 to apply to equitable indemnification actions. The Court noted,

> As a common law doctrine, equitable indemnity not only accommodates but anticipates judicial contouring whenever necessary to effectuate some overarching public policy. (See *AMA, supra,* 20 Cal.3d at pp. 603-604 & fn. 9, 146 Cal.Rptr. 182, 578 P.2d 899; cf. *California Home Brands, Inc. v. Ferreira* (9th Cir. 1989) 871 F.2d 830, 834 [in applying limitation contained in congressional enactment, "the *absence* of an immunizing provision alone should not be decisive as to the availability of indemnity"].) Our holding is fully consistent with this continuing role.

(*Id.* at 114. Emphasis by italics in original. Citation omitted.) The Court explained its reasoning, and in doing so illustrated the process by which the common law evolves to make the operation of statutes better.

> Notwithstanding its equitable character, implied indemnity necessarily operated as an all-or-nothing shifting of loss, and thus did not always rectify the injustice at which it aimed. (See *Ford Motor Co. v. Robert J. Poeschl, Inc.* [(1971)] 21 Cal.App.3d [694,] 699, 98 Cal.Rptr. 702.) In the wake of *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226, this court recognized the need to reevaluate the concept and to conform its application to principles of comparative fault. Accordingly, 20 years after its incorporation into state law, we concluded "that the long-recognized common law equitable indemnity doctrine should be modified to permit, in appropriate cases, a right of partial indemnity, under which liability among multiple tortfeasors may be apportioned on a comparative negligence basis." (*AMA, supra,* 20 Cal.3d at p. 583, 146 Cal.Rptr. 182, 578 P.2d 899.)

(*Western Steamship Lines, Inc. v. San Pedro Peninsula Hosp., supra,* 8 Cal.4th at 109.) In other words, the Court conformed application of a tort reform statute to principles of comparative fault in a way that achieved the equitable character of indemnity.

Another illustration of the process is the Court's discussion in *Far West Financial Corp. v. D & S Co.* (1988) 46 Cal.3d 796, of Code of Civil Procedure section 877.6, subdivision (c), relating to the effect of comparative fault on settlements where there are multiple tortfeasors. (*Far West Financial Corp., supra,* 46 Cal.3d at 805-814.) Moreover, the Court explained how the process works in both directions, where the courts act, then the Legislature acts, then the courts act, and so on.

> In light of the clear explanation in *People ex rel. Dept. of Transportation* that the *American Motorcycle* decision did not create a new, separate and distinct subclass of equitable indemnity claims but simply modified the traditional doctrine to permit a sharing of loss on a comparative fault basis, it appears reasonable to interpret the reference to claims for "equitable comparative contribution, or partial or comparative indemnity" in section 877.6, subdivision (c), as embodying the entire spectrum of potential equitable indemnity claims. Thus, the background and legislative history of the provision support the interpretation of the statute adopted in the majority of past Court of Appeal decisions.

(*Id.* at 809. Fn. omitted.) In this way, the courts and the Legislature worked together to update and improve settlement procedure in tort litigation.

Amici urge this Court to rule that, in tort actions where there are multiple tortfeasors (for example, Defendants and Plaintiffs' decedent here) and multiple tort theories (for example, Plaintiffs' theories of negligence

and battery) that are based on the same set of facts, comparative fault principles should apply. The determination of whether the theories are based on the same set of facts would be made by the trial judge, after hearing all the evidence. If the judge determines the theories are based on the same set of facts, the fact-finder will allocate fault between the tortfeasors, by percentage allocation. Thereafter, the court will follow Civil Code section 1431.2, subdivision (a), when rendering judgment.

The Court and the Voters would be working together, to the same end.

CONCLUSION

In summary, even accepting Plaintiffs' argument that Section 1431.2 is limited to actions "based upon principles of comparative fault," Section 1431.2 applies to this action nevertheless. Comparative fault applies to intentional torts.

Dated: April 26, 2019

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By: _____

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CERTIFICATION

Appellate counsel certifies that this document contains 13,956 words. Counsel relies on the word count of the computer program used to prepare the document.

Dated: April 26, 2019

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PROOF OF SERVICE

I am a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 2295 Huntington Drive, San Marino, California 91108.

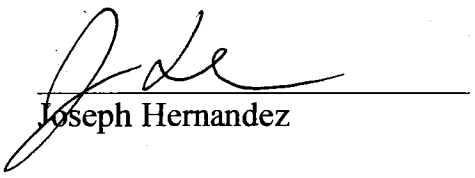
On this date, I served the ***AMICI CURIAE*** **BRIEF OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS AND APPELLANTS** on all persons interested in said action in the manner described below and as indicated on the service list:

See Attached Service List

By United States Postal Service – I am readily familiar with the business's practice for collecting and processing of correspondence for mailing with the United States Postal Service. In that practice correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, with the postage thereon fully prepaid, in San Marino, California. The envelope was placed for collection and mailing on this date following ordinary business practice.

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

Executed this 26th day of April, 2019.



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