No. S192768

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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| AIDAN LEUNG by and through his Guardian ad Litem NANCY LEUNG<br><br>Plaintiff, Appellant and Respondent<br><br>vs.<br><br>VERDUGO HILLS HOSPITAL<br><br>Defendants, Respondent, Appellant and Petitioner | B204908<br><br>(Los Angeles County Super. Ct. No. BC343985) |



# ANSWER TO PETITION FOR REVIEW INCLUDING CONDITIONAL ADDITIONAL ISSUES FOR REVIEW

California Court of Appeal, Second District, Division Four
Case No. B204908
Los Angeles Superior Court Case No. BC343985
Honorable Laura A. Matz

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## TABLE OF CONTENTS

**TABLE OF CONTENTS**
(Continued)

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES
(Continued)

## TABLE OF AUTHORITIES
(Continued)

## TABLE OF AUTHORITIES
(Continued)

**Page**

**Other Authorities:**

## INTRODUCTION

The petition posits an issue of academic and perhaps legislative interest, but of limited practical significance in California. It is not an issue deserving of this Court's time and attention. The reason is simple. The Legislature by enacting Code of Civil Procedure section 877 to encourage *good faith* settlements has occupied much of the field. Given section 877's success in generating good faith settlements, the issue of non-good faith prejudgment settlement offsets rarely arises. Indeed, in the more than 50 years since section 877's enactment this is only the second published appellate decision to address the offset effect of a non-good faith settlement. The reason why is clear: As the Legislature intended, section 877 has channeled settlement efforts into the good faith realm.

The plaintiff and his counsel here chose to knowingly flout section 877. They decided to proceed with a settlement that they knew had been determined not to be in good faith, a determination that had withstood an appellate writ challenge. They took a knowing gamble. Now they ask this Court to relieve them of the consequences of their ignoring the balance that the Legislature consciously struck in enacting section 877. But that is not this Court's role. Indeed, to fairly revisit the issue posited this Court would have to revisit the Legislature's enactment of section 877. That would usurp the Legislature's role. Review, thus, is inappropriate and should be denied.

But if this Court grants review (it shouldn't), it should review the issues comprehensively and as a whole – both that posited in plaintiff's

petition and the other important review-worthy issues in this case. The petition posits a stark choice between a release-of-one/release-of-all rule and a pro tanto (dollar-for-dollar) offset. Certainly, those are the two poles that the Legislature set up to encourage good faith settlements in enacting section 877. But if, ignoring the legislative balance, this Court is to look at only one side of the equation – that applicable to non-good faith settlements – it should look at the whole array of possible options. Most prominently, it should consider the modern, post-comparative fault, common law rule applicable to all types of settlements that a prejudgment settlement effects a release of the settling defendant's fault-allocated proportional share of liability.

And review, should it be granted, should not skip the other important issues on which this Court's direction is necessary for cases beyond this one. This case has already lingered in the appellate courts for three and one half years. Its review-worthy issues should be decided all at once, not piecemeal over the better part of a decade. The Court of Appeal skipped over two issues that ultimately will be necessary to the outcome of this case on appeal. Both present key unresolved issues that crop up repeatedly in healthcare professional liability cases. Both issues ultimately will demand this Court's attention no matter how the Court of Appeal might resolve them.

The first is whether Civil Code section 3333.1's abrogation of the collateral source rule applies only to past damages (as the trial court held) or also applies to future damages. That issue is critical both to how many

medical malpractice claims are tried and to whether future healthcare payors may have subrogated entitlements to a portion of a periodic payments judgment. It is related to the issue of measuring medical expense damages covered by plaintiff's health insurance pending in *Howell v. Hamilton Meats & Provisions*, review granted Mar. 10, 2010, No. S179115. And if the hospital is right on the section 3333.1 issue, then plaintiff's posited settlement offset issue is not even ripe, as damages will have to be retried.

The second issue is how section 3291 interest (available to a plaintiff obtaining a better result than a Code of Civil Procedure section 998 offer) is calculated on a periodic payments judgment. Again, this issue crops up repeatedly in healthcare professional liability cases. The law on the subject is confused. A decision of this Court in a non-periodic payments context suggests one result, but a later published Court of Appeal decision suggests another in the periodic payments judgment context. Only this Court can clear up the confusion.

One additional issue that the Court of Appeal addressed also deserves review: causation in the medical malpractice context. Here, the Court of Appeal ventured into storm-tossed waters. Causation in the medical malpractice context is the subject of conflicting and frankly irreconcilable approaches. One approach requires a showing of actual, but for causation. Another approach, exemplified in this case, allows causation to be inferred from a reasonable expectation that a better outcome was available. Layered on top of this legal standard uncertainty is the tension

between imposing advice duties on hospitals and the bar on hospitals practicing medicine, e.g., by having to provide information that interferes with the doctor-patient relationship. How can a hospital not practice medicine yet at the same time be liable as a matter of proximate cause for failing to educate a patient to disagree with a treating physician's medical advice?

The bottom line is that review should not be granted. That would put an end to this case. But if review is granted, this Court should review the full scope and range of issues involved so that this appeal can be resolved in something less than a near decade.

## QUESTION PRESENTED

1. In enacting Code of Civil Procedure section 877, the Legislature provided for a pro tanto (dollar-for-dollar) offset of *good faith* settlements, consciously inserting the good faith requirement and knowing that the alternative for non-good faith settlements would be the existing common law release-of-one/release-of-all rule. Should this Court intervene to upset the careful legislative balance between the offset effect of good faith and non-good faith settlements or is that a matter best left to the Legislature?

## ADDITIONAL ISSUES IF REVIEW IS GRANTED

2. If this Court is to intervene without the Legislature, should it adopt the modern, post-comparative fault common law rule that a prejudgment settlement, of whatever nature, releases the settling defendant's proportionate liability?

3. Is Civil Code section 3333.1's abrogation of the collateral source rule in healthcare provider professional liability cases limited to past expenses or does it apply equally to future expenses?

4. Does the rule announced in *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 532, that Civil Code section 3291 interest runs only on the judgment as entered and does not create "prejudgment" interest, apply to medical malpractice periodic payments judgments or is section 3291

interest on such judgments to be calculated twice, once on the verdict's present value up until the time of judgment and then solely on the periodic payments amounts as they become due as suggested post-*Hess* in *Deocampo v. Ahn* (2002) 101 Cal.App.4th 758, 775?

5. By what standard must causation be proven in a medical malpractice case? Is proof required that but for the alleged omission, there is a reasonable medical probability the patient, in fact, would have obtained a better outcome, as held in cases such as *Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1314-1316? Or does a gestalt substantial factor test apply as held in this case, requiring merely that the plaintiff introduce evidence sufficient to support the expectation that had more exacting care been provided there might have been a better result? And given the ban on hospitals practicing medicine, can a hospital's allegedly inadequate medical advice have proximately caused a patient to accept a physician's later erroneous medical advice?

## STATEMENT OF THE CASE

### B. The Nature Of The Case And The Judgment.

This is a medical malpractice action against a hospital and an independent pediatrician. The plaintiff claims that after his discharge from the hospital as a newborn, the pediatrician's failure to adequately diagnose and treat his jaundice resulted in severe injuries. (Opn. 6-12.) As to the hospital, he claims that it failed to adequately warn his parents about the dangers of jaundice, even though the hospital's warnings sufficed to cause his mother to call the pediatrician about the jaundice but the pediatrician thereafter gave inadequate medical advice. (Opn. 9-10, 12-15.)

The jury returned a verdict finding the pediatrician 55% at fault, the hospital 40% at fault, and the parents 5% at fault. (Opn. 3, 26.) It found present value economic damages of $15.237 million and $250,000 in noneconomic damages. (Opn. 3 & fn. 1.) The trial court entered a periodic payments judgment calling for immediate payment of $1.505 million (plus an additional $1.1 million in Civil Code section 3291 "prejudgment interest") and varying monthly payments over the ensuing 57 years. (*Ibid.*)

### C. The Plaintiff's Prejudgment Non-Good Faith Settlement With The Doctor.

Before trial, plaintiff and the pediatrician agreed to settle plaintiff's claims against the pediatrician for $1 million. (Opn. 28.) The settlement was conditioned on a determination that the settlement was in "good faith." (Opn. 28-29; IV AA 15:900.) The trial court denied the good faith

determination. (Opn. 29.) The doctor (but not the plaintiff) sought writ relief. (Opn. 29, fn. 16.) The Court of Appeal denied writ relief. Plaintiff and the doctor then modified the settlement to delete the good faith determination requirement. (Opn. 29.) At trial, the court instructed the jury that the plaintiff had settled with the doctor, although the settlement had not yet been confirmed by the court as a minor's compromise. (Opn. 20, fn. 9.)

Post-verdict but before judgment, the trial court held a minor's compromise hearing. (Opn. 29-30.) Both before and at that hearing, the hospital expressly argued that approving the non-good faith settlement would release all or part of its liability beyond the amount paid in settlement. (Opn. 30-31; AOB 37, VII AA 68:1741; see VIII AA 79:1990-1992; 2 RT 611-612; see also 2 RT 902-903.) Plaintiff's counsel, nonetheless, insisted upon going forward with the settlement. (Opn. 29-30; 2 RT 905; see VII AA 1681; see 2 RT 648; 2 RT 929-930.) The trial court approved the minor's compromise. (Opn. 30.)

### D. The Trial Court Precludes Evidence Of Likely Insurance Coverage For Future Medical Expenses.

Insurance had paid most of plaintiff's past medical expenses. The parties stipulated to limit past medical expense recovery to the amount (about $78,000 out of $405,000) not covered by insurance. (Opn. 5, fn. 2; 9 Aug.RT 3042.)

The trial court, however, precluded defendants from introducing evidence that plaintiff's future medical expenses would likewise be paid by

(or reduced due to) medical insurance. It read Civil Code section 3333.1's abrogation of the collateral source rule in medical malpractice cases as limited to *past* expenses and not applying to *future* expenses. (8 Aug.RT 2771; 11 Aug.RT 3905.) The trial court instructed the jury that it was *not* to consider any insurance *any* of the parties might have. (12 Aug.RT 4275; 13 Aug.RT 5102-5103, 5106, 5413-5415.)

### E. The Trial Court Awards $1 Million In "Prejudgment Interest" Under Civil Code Section 3291.

Plaintiff made a Code of Civil Procedure section 998 demand. The judgment as entered exceeded the section 998 demand. (X AA88:2477-2478.) The hospital argued that Civil Code section 3291 interest ran from the date of the settlement demand only on those amounts immediately due as of the date of the judgment. (2 RT 927, 1203-1206.) The trial court, following *Deocampo v. Ahn*, *supra*, 101 Cal.App.4th 758, however, awarded interest on the jury's total present value determination from the offer date to the judgment date, incorporating that amount into the judgment as "prejudgment interest under Civil Code section 3291." (X AA88:2477-2478, 2481.) The trial court ruled that after entry of judgment, interest would run only on unpaid amounts.

The trial court found the result puzzling, but felt compelled by *Deocampo*:

> [I]t looks strange to me. I don't understand why you get prejudgment interest on the entire judgment but then say you

don't get it after the judgment because some of it is not due. That makes no sense to me, but it made sense to [the Court of Appeal in *Deocampo* and] I am bound. (2 RT 1205-1206; see also 2 RT 1507 ["(F)rankly, the prejudgment interest calculation escapes me. . . . I don't know how we reconcile periodic payments and prejudgment interest"].)

**F. The Causation Evidence.**

The causation evidence came from a single expert, plaintiff's expert, Dr. Bhutani. The basic facts were undisputed. Plaintiff was discharged from the hospital (with no indication of jaundice and within the standard of care) on Tuesday. (Opn. 7; 3 Aug.RT 1294, 1356, 1365; 4 Aug.RT 1654; 5 RT 1837, 1887, 1920-1921; IV AA29:1137.) His mother called the pediatrician's office on Thursday to report his jaundice and was advised that there was no need to bring him in to be seen. (Opn. 9-10.) By Saturday night/Sunday morning his condition had deteriorated to the point that he suffered injury. (Opn. 11-12.)

The Court of Appeal summarized what it thought was the relevant causation evidence.

"Had Dr. Nishibayashi actually examined Aidan on Thursday, substantial evidence proved that he would have diagnosed Aidan's hyperbilirubinemia. He reasonably could be expected to have observed Aidan's progression of jaundice (it was already recognizable to the Leungs in Aidan's eyes). He

would have observed Aidan's chapped lips (as noted at Huntington Memorial Hospital, that condition was not normal and was related to dehydration). He would have learned that Aidan had lost weight (Julie Donnelly testified that infants are weighed when examined at Dr. Nishibayashi's office, and Dr. Bhutani opined, based on Aidan's weight loss of two pounds when admitted to Huntington Memorial on Sunday, that Aidan had lost weight by Thursday). Such a weight loss was a danger sign suggesting a need for intervention -- according to Dr. Bhutani, by that date Aidan should have been gaining, not losing, weight. It is also reasonable to expect that Dr. Nishibayashi would have inquired of Nancy Leung and obtained accurate first-hand information from her on the topics Julie Donnelly inquired about: whether Aidan was feeding properly and his stools were adequate to expel bilirubin. He also may have done a bilirubin test (according to Dr. Nishibayashi, it would have been "good medical practice," though not required). Thus, it is certainly probable that a pediatrician of 26 years' experience such as Dr. Nishibayashi would have detected Aidan's hyperbilirubinemia and treated it. As Dr. Bhutani testified, if Dr. Nishibayashi had seen Aidan on Thursday, "there would have been a recognition of a need for further testing [and] there would

have been a finding that [Aidan] had a high level of bilirubin and he needed treatment."

(Opn. at 48-49.)

The last two statements, however, are not borne out by the record. Dr. Bhutani did *not* testify that, "'there would have been a recognition of a need for further testing [and] there would have been a finding that [Aidan] had a high level of bilirubin and he needed treatment.'" The Opinion quotes the question asked, *not* Dr. Bhutani's answer. (5 RT 1917-1918.) Dr. Bhutani's answer was "I already testified to that." (5 RT 1918.)

What Dr. Bhutani previously testified was:

- "[I]n all the babies the bilirubin is rising for the first three to five days [i.e., up until between Thursday and Saturday]." (5 RT 1818.)
- "If at the age of about 48 hours [i.e., Wednesday], that [bilirubin] level is about 14, that is a level of concern. At the age of 72 hours [i.e. Thursday], if the level is about 17, that is above concern." (5 RT 1820.)
- "What I'm interested as a clinician is what is the bilirubin level. And I can't judge a bilirubin level based on the level or absence or presence of jaundice." (5 RT 1827-1828.)
- "Q: From your perspective, had the baby being [sic] brought in, he [the pediatrician] would have been able to do those things

[e.g., assess weight and skin color] and you believe we wouldn't be here today; is that fair?

A: I -- hopefully not. *Depends on what the bilirubin level was on that day* [i.e., Thursday].

Q: We don't know what it was 'cause it wasn't taken; right?

A: That's right." (5 RT 1868, emphasis added.)

- "Q: [O]n Thursday, isn't it true that at that point in time it is more probable than not that child could have been cured?

  A: . . . [Normally,] bilirubin values are rising fairly linearly, steadily, progressively, for the first 72 hours [i.e., through Thursday] and then they flatten out . . . . And so more likely than not the bilirubin was elevated on Thursday, Friday, Saturday and reached the level of 41 on Sunday. *The question really is as to what that number is.* And *without a measurement we can only guess.* (5 RT 1904, emphasis added.)

- "Q: Applying the retrospectus [sic] from Sunday back, isn't it true that you're of the opinion that on Thursday the child *was diagnosable as having high level of bilirubin and need of treatment* and, if it had been rendered, he would have been cured?

  A: Again, I think you're making multiple jumps *because it depends on getting the bilirubin value, then reacting to the bilirubin value, and it depends on what the bilirubin value was.*

If the bilirubin value was already very high, then there would have been a different response to hyperbilirubin value of 17.

Q: Don't you think it's more reasonably probable that it was high on Thursday than not?

A: *I cannot speculate either way.* I can only give my best estimate as that it was rising. *I don't think I can give you an estimate what the number was and where the number was.*

(5 RT 1915-1916, emphasis added.)

Thus, Dr. Bhutani's testimony was that treatment depended on bilirubin level that was itself speculative. All of this was brought to the Court of Appeal's attention in a rehearing petition. (See Cal. Rules of Court, rule 8.500(c)(2).)

In an extended footnote (Opn. at 21-23, fn. 10), the Opinion dismisses Dr. Bhutani's testimony as "confused" and focused only on whether aggressive Thursday treatment would have prevented plaintiff's injury, not on *what treatment*, if any beyond the existing breastfeeding and placing the plaintiff in the sun, would have been prescribed.

The Opinion also recites that Dr. Bhutani opined that plaintiff's mother did not receive sufficient breastfeeding coaching *once her milk came in.* (Opn. 50-51.) Plaintiff was discharged (within the standard of care, 5 RT 1837) *before* his mother's milk came in. (5 RT 1824, 1837-1839, 1883.) Thus, at the relevant time neither the plaintiff nor his mother was under the hospital's care. As the Opinion recognizes, his mother *did*

receive coaching. She was instructed. She was evaluated. (See Opn. 50.) There is *no* evidence that the instruction at that time was not entirely proper, appropriate and abundant.[1]

### G. The Court Of Appeal Opinion.

The Opinion held that as the settlement and release were not in good faith, Code of Civil Procedure section 877 did not apply. (Opn. 32.) It further held that plaintiff executed a release, not a covenant not to execute. (Opn. 43, fn. 23.) Plaintiff challenges neither holding. Following *Bee v. Cooper* (1932) 217 Cal. 96, the Opinion held that, therefore, the plaintiff's release of the doctor also released his joint and several claims against the hospital. (Opn. 33, 42.)

The Opinion suggested, however, that this Court revisit *Bee v. Cooper* and reject the common law release-of-one/release-of-all rule. (Opn. 4, 28, 42-43.) In doing so, it explicitly declined to express an opinion whether this Court should replace that rule with a pro tanto (dollar-for-dollar) or release of proportionate fault offset rule. (Opn. 44.)

As to causation, the Opinion found sufficient evidence of causation. Critically, it asserted, ipse dixit, that it was probable that an experienced pediatrician, such as here, would have treated the plaintiff differently had he seen him. (Opn. 49.) It described Dr. Bhutani's testimony tying the treatment decision to an admittedly speculative bilirubin number as

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[1] Again the omitted facts were brought to the Court of Appeal's attention by rehearing petition.

"confusing" and characterized by "his refusal to state which specific treatment option (continued breast feeding [what the pediatrician, in fact, prescribed], phototherapy or exchange transfusion) should have been used because a specific bilirubin reading was not done." (Opn. 21, fn. 10.)

The Opinion did not reach the collateral source rule as to future damages or the section 3291 interest issues.

**H. The Rehearing Petition.**

The hospital sought a limited rehearing.

First, it urged the Court of Appeal as a matter of judicial efficiency to decide the future collateral source and Civil Code section 3291 interest issues, which will *still* have to be decided if this Court grants review and remands for further proceedings. It noted that this case is now eight years after the occurrence and three and one-half years on appeal.

Second, the hospital pointed out that the opinion omitted the two most crucial causation facts:

1. Plaintiff's expert – the only causation expert – testified that had the pediatrician seen plaintiff on Thursday whether he would have prescribed a different course of treatment depended upon the plaintiff's bilirubin level, a level that the expert testified was speculative.

2. There was no evidence that the breastfeeding instruction in the hospital was inadequate and by the time the mother's milk did come in (when the expert claimed that there needed to be additional coaching)

plaintiff had (within the standard of care) been discharged from the hospital and was no longer under its care.

The Court of Appeal denied rehearing.

## ARGUMENT

### I. There is No Reason For Review.

#### A. Regardless Of Its Academic Interest, The Issue Presented Is Of Little Practical Import, Arising Only On Exceedingly Rare Occasion, And Here Only Because Of Plaintiff's Counsel's Knowing Gambit.

In a pristine academic world, how settlement offsets should work for non-good faith settlements in a post-comparative fault world might be of some interest, especially if one could write on a clean slate. But this Court is not an academic institution. It is a real world entity with limited resources. Its efforts necessarily and properly are directed towards pressing legal problems and issues.

In the more than 50 years since the Legislature enacted Code of Civil Procedure section 877 in 1957, there has been only one other reported decision addressing the issue in this case – the offset against a plaintiff's claim to be afforded a settlement that does not meet section 877's good faith requirement. (*River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986.) Two cases in 50-plus years strongly suggests that this is not an area of the law requiring this Court's attention.

Why haven't there been other cases? The answer is simple. Because counsel and litigants understand that if they are to obtain the benefits of Code of Civil Procedure section 877 – including limiting offsets to pro tanto amounts – they must comply with its good faith requirement. Parties either comply or they make their settlements conditional on a good faith

determination. That's what the plaintiff and the doctor attempted to do here.

What is remarkable about this case is that *after* the good faith determination was rejected, the plaintiff and the doctor decided to go ahead with their settlement anyway. Plaintiff consciously undertook the gamble in order to obtain an immediate settlement payment. He and his counsel knew full well the risk. The hospital specifically warned them. Now, he asks this Court to save him from a conscious once-in-five-decades gamble. That is not this Court's function. An issue that comes up only once or twice every fifty years is hardly a pressing question of law.

Even the Court of Appeal opinion recognizes that the issue is not unresolved. Rather, it asks this Court to intervene to change an existing, workable, well-known legal principle in order to support a party's and counsel's gamesmanship in a circumstance that rarely arises. That's no ground for review.

### B. Given Code Of Civil Procedure Section 877's Central Role And Its Careful Balance Of Competing Interests, The Legislature, Not This Court, Is The Proper Forum To Address Any Remake Of The Law Governing Prejudgment Settlement Offsets.

There's another problem with plaintiff's review request. It would be one thing if this Court could write on a blank canvas. But the canvas is far from blank. The Legislature has occupied a substantial portion of the field

with Code of Civil Procedure section 877. Section 877 affords a one-sided, pro-plaintiff rule – a nonsettling defendant only gets credit for a pro tanto (dollar for dollar) amount. But it also comes with a substantial qualification. The settlement has to be good faith and pre-verdict or pre-judgment.

In enacting section 877, the Legislature specifically added the good faith requirement. (See Request for Judicial Notice in the Court of Appeal, tab 4, p. 2.) It limited any pro tanto offset rule to *good faith* settlements. The Legislature consciously created a two-tier system – one for "good faith" settlements, one for other settlements. It necessarily understood that the existing, contrasting rule for non-good faith settlements was and would be release-of-one/release-of-all. It created a balance – an extreme pro-plaintiff (pro tanto offset) result for a good faith settlement and a countervailing extreme pro-nonsettling defendant result (release of all) for a non-good faith settlement. This Court can't address one side of the equation (a non-good faith settlement offset) without affecting the overall balance that the Legislature expressly sought to achieve in section 877. Adopting the approach that plaintiff advocates effectively rewrites section 877. It excises the good faith prerequisite that the Legislature inserted for a pro tanto settlement offset. It would eliminate the two-tier offset system that the Legislature thought important to encourage good faith offsets.

And there is another problem. The Legislature enacted section 877 before the advent of comparative fault. Any current reevaluation of the

rules for settlement offsets (including of section 877) necessarily needs to take into account the comparative fault landscape.

The only realistic solution is that the issue here – the offset effect of a settlement (especially a non-good faith settlement) in the post-comparative fault world – is one the *the Legislature* needs to revisit. The issue is necessarily entwined with section 877. This Court cannot revisit section 877. Only the Legislature can. The Legislature, not this Court, is the proper place for the concerns raised in the Opinion and the petition.

## II. If Review Is Granted, This Court Should Review The Whole Panoply Of Important, Unresolved Issues In This Case.

### A. The Petition Fails To Fairly Pose The Alternatives To Be Considered If This Court Decides To Review The Offset Effect Of A Non-Good Faith Settlements.

The petition reads as if the only alternative to the current release-of-one/release-of-all rule is a pro tanto offset rule. To begin with, whatever the merits of a release-of-one/release-of-all rule in the abstract, that rule makes sense when viewed in context as part of the balance that the Legislature created with section 877, as just demonstrated. The countervailing good faith/non-good faith settlement offset rules provide a strong incentive for what the Legislature sought to encourage: *good faith* settlements. They equally provide a strong disincentive for what the Legislature sought to *discourage*: non-good faith settlements (as here).

But were the release-of-all-rule to be rejected even in its context as a section 877 counterweight, the natural solution is not the pro tanto rule that plaintiff seeks. Rather, the modern, post-comparative fault common law rule is that a joint tortfeasor's settlement completely releases the settling defendants' *proportionate liability share*. A jointly and severally liable tortfeasor's liability is "reduced by *the comparative share* of damages attributable to a settling tortfeasor who otherwise would have been liable for contribution to jointly and severally liable defendants who do not settle." (Rest.3d Torts: Apportionment of Liability §16, emphasis added; see *id.*, com. c, p. 133.) That is the federal common law rule (e.g., in admiralty). (See *McDermott, Inc. v. AmClyde* (1994) 511 U.S. 202 [adopting comparative share approach to effect of settlement in admiralty case]; see also *Franklin v. Kaypro Corp.* (9th Cir. 1989) 884 F.2d 1222, 1231-1232 [applying proportional offset as matter of federal common law].) And that is the modern rule in many states.[2]

That's essentially the result reached in *River Garden Farms, Inc. v. Superior Court*, *supra*, 26 Cal.App.3d 986, the one other Court of Appeal decision in the last five decades to address the same issue. Decided before the advent of comparative fault, *River Garden Farms* concluded that a pro rata (i.e., per defendant) offset rather than a pro tanto offset should apply.

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[2] E.g., *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.* (Ala. 1993) 627 So.2d 367; *Petrolane Inc. v. Robles* (Alaska 2007) 154 P.3d 1014; *Whalen v. Kawasaki Motors Corp.* (N.Y. 1998) 703 N.E.2d 246; *Tadros v. City of Omaha* (Neb. 2007) 735 N.W.2d 377.

(*Id.* at p. 1001.) With the advent of comparative fault, *River Garden Farms* logically translates into the fault-allocated test that represents the modern common law rule.

The proportional offset rule simply holds the plaintiff to the very bargain that he made – releasing the settling defendant's share of liability. The pro tanto rule that plaintiff promotes, in fact, undermines encouraging settlements in *good faith* – that is, that are fair to plaintiff, settling defendant, and nonsettling parties alike – as it affords the plaintiff no incentive to treat all defendants fairly, and instead encourages gamesmanship (as here). (See Comment, *Good Faith Settlements: The Inequitable Result of the Evolving Definition of Equity* (1986) 22 Cal. Western L.Rev. 362, 368 ["The good faith requirement is [] designed to limit the opportunity for an unscrupulous plaintiff to hand pick the best defendant to proceed against – the one whose deep pockets will satisfy his judgment or whose evil disposition will ensure a sympathetic judgment at trial – by dismissing the other defendants from the case"].)

Plaintiff's references to other pre-section 877, pre-comparative fault rules (e.g., for covenants not to sue) ignore these developments in the law. Section 877 treats equally all mechanisms for resolving cases – so long as, unlike here, the settlement is in good faith. (See Code Civ. Proc., § 877.) So, too, does the modern common law proportional liability release rule. (Rest.3d, Torts: Apportionment of Liability, § 24.) If this Court is going to revisit various settlement offset rules, it should do so in a comprehensive manner. If it is not to follow the precedent establishing the release-of-

one/release-of-all rule, it should equally revisit precedents creating countervailingly one-sided pro tanto offset rules for covenants not to sue and the like and address whether, instead, the modern release of proportionate liability rule should apply across the board (excluding, of course, "good faith" settlement arena where the Legislature has already occupied the field with section 877).

### B. This Court Should Review Whether Civil Code Section 3333.1's Abrogation Of The Collateral Source Rule In Medical Professional Liability Cases – Which Undoubtedly Applies To Past Damages – Applies To Future Damages, An Important Unresolved Recurring Legal Question.

Civil Code section 3333.1 abrogates the collateral source rule in healthcare professional liability cases. Section 3333.1 directs that a professional negligence healthcare provider defendant "may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to" a healthcare insurance policy or similar contractual or government benefit. The trial court ruled that "any amount payable" was limited to *past* medical expenses and did not apply to future medical expenses (here covering some 57 years) that might be covered by insurance or similar benefits. (8 Aug.RT 2771-2772; see 11 Aug.RT 3904 [court responding to the reiteration of the section 3333.1 argument, "that battle is over" and "you lost"]; 11 Aug.RT 3905-3906.)

There is little doubt that a jury could have concluded that at least some future medical expenses were going to be paid by insurance and similar benefits. The trial court itself thought so: "[T]he testimony was at trial that there is insurance that's paid all of these expenses. I have no reason to believe it isn't currently continuing to do that." (2 RT 604; see 2 RT 605 [plaintiff's counsel conceding insurance was still paying for medical expenses almost 3 months after trial].) Plaintiff's insurance was through his father's position as a partner in the law firm that represented him. (7 Aug.RT 2463.) Insurance continuation rights would exist under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and the Health Insurance Portability and Access Act (HIPAA) (e.g., 42 U.S.C. §§ 300gg, 300gg-1, 300gg-41, 300gg-42) and Cal-COBRA, Health & Saf. Code, § 1366.20, et seq.; see also Health & Saf. Code, § 130301, et seq. [implementing HIPAA in California].) Additionally, California statutory programs permit purchase of medical insurance by persons who otherwise are unable to obtain it. (E.g., The California Major Risk Medical Insurance Program, Health & Saf. Code, § 1270, et seq.) And, of course, federal law will soon *require* individuals to have health insurance.

This issue is huge in medical malpractice cases, such as here, involving substantial amounts of economic damages for ongoing medical care. It will arise in virtually every birth injury case and many other cases as well. And it directly affects whether such future health insurance and other benefits payors have a subrogated claim to periodic payments judgment proceeds: If section 3333.1 applies, future payors have no

subrogated rights; if it does not apply, future payors may be subrogated to a portion of the periodic payments judgment. The issue is related to that pending before this Court in *Howell v. Hamilton Meats & Provisions*, *supra*, No. S179115. (See No. S179115, Supplemental Letter Brief of Howell filed May 5, 2011, at p. 9 [addressing whether evidence should be admitted of reduced ongoing medical expenses due to health insurance].)

The law, we believe, suggests that the collateral source rule is abrogated as much as to future damages as to past. (See *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 146, 164-165 & fn. 21 [affirming judgment directing health provider "defendant to pay the first $63,000 of any future medical expenses *not covered by medical insurance*," emphasis added]; *Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499, 505-506 [no employer credit against workers compensation liability for future medical expense damages in injured employee's medical malpractice claim, i.e., medical malpractice damages would not include future workers compensation collateral source payments].) But plaintiff disagrees. (See RB 82-91 citing *Rollins v. Pizzarelli* (Fla. 2000) 761 So.2d 294 [interpreting Florida no-fault auto insurance payments statute; offset for other "payable" benefits limited to currently payable amounts, not contingently payable future amounts]; *Carlsen v. Unemployment Ins. Appeals Bd.* (1976) 64 Cal.App.3d 577 [unemployment insurance trigger requiring that employee have no wages "payable" does not include contingent or unliquidated wage claims];

*Burkett v. Continental Cas. Co.* (1969) 271 Cal.App.2d 360 [same re workers compensation insurance policy offset for wages payable].)

The Court of Appeal did not reach the issue. On rehearing, the hospital urged it to do so for reasons of judicial economy. Those reasons apply as much now as in the Court of Appeal. This case has been on appeal for three and one half years. If this Court grants review on the release issue and reverses, the Court of Appeal would then need to reach the section 3333.1 collateral source issue. No matter how that issue might be determined, there likely would be another petition for review given the issue's importance. This case could spend nearly a decade in the appellate courts. It is better to determine all issues at once. Indeed, if the judgment must be reversed based on an improper section 3333.1 ruling, then, at a minimum, damages need to be retried and the settlement offset issue posed in the petition is not even ripe.

The bottom line is that, should it grant review, this Court should consider all of the review-worthy issues at once rather than fracturing the appeal into multiple components and consigning it to a decade's long odyssey in the appellate courts.[3]

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[3] Alternatively, this Court could grant review and retransfer to the Court of Appeal directing the Court of Appeal to decide the remaining issues before this Court considers review on the offset issue.

### C. This Court Should Review How Civil Code Section 3291 Interest Is To Be Calculated In Periodic Payments Cases, An Important, Unresolved Issue Affecting Countless Cases And On Which Precedent Is At Odds.

This case includes another critical healthcare professional liability issue. In such cases, a defendant can opt for a periodic payments judgment. (Code Civ. Proc., § 667.7.) That happened here. Such periodic payments judgments direct future payments. Here, that period stretches out for 57 years. If the plaintiff dies prematurely, the payment obligation ceases. (*Ibid.*)

At the same time, healthcare professional liability defendants are as subject to Code of Civil Procedure section 998 and Civil Code section 3291 as other defendants. Under those sections, if a party declines a pre-trial settlement offer and the offering party receives a more favorable judgment, the offering party obtains, under Civil Code section 3291, interest on the judgment running from the section 998 settlement offer date. The issue in healthcare professional liability cases is how that section 3291 interest is calculated on periodic payment judgments.

Again, this important, unresolved issue affects a broad swath of cases. Unfortunately, it is also an issue where the case law is confused. *Hess v. Ford Motor Co.*, *supra*, 27 Cal.4th at p. 532, *not* a periodic payments case, held that section 3291 interest is *not* prejudgment interest, is *not* to be incorporated in the judgment and is to run on a single amount, the amount of the judgment as entered. Six months after *Hess*, however, the

Court of Appeal, arguably in dicta, stated in a periodic payments case that the trial court properly applied a "two-step process" in splitting the section 3291 calculation into a prejudgment component with interest on the verdict's full present value amount and a post-judgment component with interest only on such amounts as might be unpaid. (*Deocampo v. Ahn*, *supra*, 101 Cal.App.4th at pp. 781-782.)

The tension between *Hess* and *Deocampo* confuses the section 3291 interest calculation in a periodic payments case. The trial court here expressed confusion and exasperation on this very issue: "I don't understand why you get prejudgment interest on the entire judgment but then say you don't get it after the judgment because some of it is not due. That makes no sense to me." (2 RT 1205-1206.) But it felt bound to follow *Deocampo*. (*Id.*; see also 2 RT 1507 ["(F)rankly, the prejudgment interest calculation escapes me. . . . I don't know how we reconcile periodic payments and prejudgment interest"].)

Unless and until this Court intervenes, the confusion over calculating section 3291 interest in periodic payments cases will persist. The issue affects *every* periodic payments judgment where a section 998 offer has been exceeded such that section 3291 interest is owed.

Again, the Court of Appeal declined to address this issue, necessitating a fractured appellate process if review is granted on the offset issue. It would be grossly inefficient to remand this case to the Court of Appeal to address the section 3291 interest only to have another petition for

review. It is massively unfair to the parties to require such a procedure in a case that has already languished three and one half years on appeal.

If review is granted, this Court should review the section 3291 interest issue as well.

### D. This Court Should Clarify The Standard For Establishing Causation In A Medical Malpractice Case – Including The Extent To Which A Hospital Must Provide Medical Advice To Patients Under The Treatment Of A Physician, An Issue Of Broad Impact And Potentially Great Confusion.

Causation often is a pivotal issue in medical malpractice cases; it certainly was here. But the Court of Appeal's decision exposes apparent confusion in California law concerning what it takes to establish causation in a medical malpractice case.

Some cases hold that the evidence must "'allow the jury to infer that in the absence of the defendant's negligence, there was a reasonable medical probability the plaintiff would have obtained a better result.'" (*Espinosa v. Little Co. of Mary Hospital*, *supra*, 31 Cal.App.4th at pp. 1314-1315, quoting *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 216.) Under this approach, a reasonable medical *probability* means more likely than not: "'A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, *it becomes more likely than not that the injury was a result of its action*. This is the outer limit of

inference upon which an issue may be submitted to the jury.'" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118, quoting *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-403, emphasis added by *Jennings*.) Thus, it must be more likely than not that a better outcome *would have*, in fact, resulted had the defendant's conduct not been negligent.

The Opinion here exemplifies a different, much looser approach. According to the Opinion, a plaintiff need only produce evidence that in "'ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that a causal relation exists.'" (Opn. 46, quoting *Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029-1030.) This approach subtracts from the causation equation the requirement to demonstrate to a reasonable medical probability that there was an actual nexus between the defendant's negligence and the outcome. It endorses establishing causation based on speculation or something very close to it. It replaces a more-probably-than-not causation test with a reasonably foreseeable result test akin to that for determining duty.

It was only by applying such an amorphous formulation that the Opinion strained to find plaintiff's evidence sufficient to support a verdict against the Hospital on causation. The expert evidence on causation, fairly analyzed, falls notably short of the "reasonable medical probability" standard. Dr. Bhutani's expert opinion was consistent and unvarying: (1) Whether more aggressive treatment would have been prescribed (the

physician prescribed continued breastfeeding and sunlight) depended on what the bilirubin level was, (2) the critical level on Thursday would have been 17, (3) he could *not* say what the bilirubin level was on Thursday; indeed, it would be "speculation." Thus, what Dr. Bhutani had "already testified to" was that he could *not* say that there "'would have been a finding that [Aidan] had a high level of bilirubin and he needed treatment.'" (Opn. 49; 5 RT 1917-1918.)

To the extent that Dr. Bhutani was nonresponsive, evasive, and misfocused on prevention rather than treatment, as the Opinion characterized his testimony (Opn. 21, fn. 10), the evidence failed to satisfy *plaintiff's burden of proof* to show causation. (See Evid. Code, § 500.) Causation, particularly what treatment would or would not have been undertaken was not in the jury's knowledge but could only be proven by expert testimony. It was plaintiff's burden to show that had plaintiff been seen, he would have been differently treated. If he needed to do that under a more probably than not standard, then the *absence* of evidence, e.g., Dr. Bhutani's testimony that he couldn't tell, would be fatal to plaintiff's causation proof.

If, on that other hand, causation in a medical malpractice case only requires "a reasonable expectation" based on "ordinary experience" then the supposition – the retrospective lay hope – that an experienced pediatrician, as here, would have recognized jaundice and treated the condition differently than with the continued breastfeeding and sunlight advice that was, in fact, given might suffice as the Opinion found.

The Opinion's reasonable-expectation-based-on-ordinary-experience standard is irreconcilably contrary to the stated causation test in other cases requiring expert testimony, not lay expectation: "'[c]ausation must be proven within a reasonable medical probability *based upon competent expert testimony*.'" (*Miranda v. Bomel Const. Co., Inc.* (2010) 187 Cal.App.4th 1326, 1336, emphasis added, quoting *Jones v. Ortho Pharmaceutical Corp., supra*, 163 Cal.App.3d at pp. 402-403.) In this case, that meant Dr. Bhutani – the only expert who testified on this subject. His testimony was not of medical probability, but expressly stated that the medically critical factor – the observable bilirubin level – was speculative.

At least as troubling as the Opinion's "expectation of ordinary experience" causation formulation is its holding that the Hospital's failure to educate plaintiff's parents sufficiently to spur them to challenge the pediatrician's medical advice proximately caused plaintiff's unfortunate outcome. (Opn. 51-52.) A hospital cannot practice medicine; its liability for medical malpractice is necessarily vicarious. (E.g., *Ermoian v. Desert Hosp.* (2007) 152 Cal.App.4th 475, 501 [hospital cannot practice medicine; its medical malpractice liability must be based on vicarious liability]; see *Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 166 [hospital liable for medical malpractice only if negligent physicians were its agents].) The jury here *rejected* any vicarious liability, though.

The notion that plaintiff's injury was caused by a hospital's failure to lead its patients (here, a *former* patient by the time his parents telephoned the pediatrician) to second-guess a physician's treatment effectively creates

*direct* hospital medical malpractice. At the least, it comes dangerously close to crossing the line into that territory. It raises serious questions of proximate cause, touching whether as a matter of public policy hospitals are or should be responsible for interfering with and affecting the doctor-patient relationship and, specifically, doctor-supplied advice.

In sum, this case muddies the waters of medical malpractice causation, both cause-in-fact ("but for" causation) and proximate causation. If this Court grants review, it should review the causation issues as well. In so doing, the Hospital urges the Court to clarify that causation in the medical malpractice context, as in negligence law generally, requires evidence sufficient to establish a "more likely than not" causal connection between negligence and damages, not just a reasonable foreseeable result that happens to come to pass. The Court should also make plain that a hospital cannot proximately cause a patient's injury where the only issue is the patient's failure to question or disagree with a physician's mistaken medical advice.

## CONCLUSION

Review should be denied. To the extent that the offset issue posited is of any widespread, real-world, practical significance, it is one the Legislature, not this Court, should address given how intertwined it is with Code of Civil Procedure section 877.

If review is not denied (it should be), this Court should broadly review the rules for settlement offsets, including considering leaving the

legislative balance intact or adopting a proportional offset rule. Equally, if, and only if, review is otherwise granted this Court should review whether section 3333.1's abrogation of the collateral source rule in medical malpractice cases applies to future damages, how Civil Code section 3291 interest applies to a periodic payments judgment, and the standard by which causation is to be determined in a medical malpractice case, especially one cojoining the allegedly negligent acts of doctors and hospitals.

Dated: May 23, 2011 Respectfully submitted,

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## CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this **ANSWER TO PETITION FOR REVIEW INCLUDING CONDITIONAL ADDITIONAL ISSUES FOR REVIEW** contains **7,726** words, not including the tables of contents and authorities, the caption page, and this Certification page.

Dated: May 23, 2011

Feris M. Greenberger

## PROOF OF SERVICE

## STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On May 23, 2011, I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW CONDITIONAL INCLUDING ADDITIONAL ISSUES FOR REVIEW** the parties in this action by serving:

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Executed on May 23, 2011, at Los Angeles, California.

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

Anita F. Cole

ANITA F. COLE