S192768

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AIDAN MING-HO LEUNG, a minor by and through his Guardian ad Litem NANCY LEUNG,

Plaintiff, Respondent and Cross-Appellant.

vs.

VERDUGO HILLS HOSPITAL, a California Corporation, et al.

Defendants, Appellants and Cross-Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 4, CASE NO. B204908
HON. LAURA A. MATZ, JUDGE, L.A.S.C. NO. BC343985

OPENING BRIEF ON THE MERITS

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1. Whether, *as the Court of Appeal in this case expressly recognized*, review is needed because the time has come for this Court to "fully repudiate" the antiquated and nonsensical common law "release-of-one-release-of-all" rule that was last applied by this Court in 1932, and has since been repeatedly criticized and limited by this Court (as well as Courts of Appeal)? As the Court of Appeal recognized, the release rule was based on a "misconception" equating a release with a full satisfaction and which gave rise to the contrivance of covenants not to sue to bypass the harsh and unintended consequences of the rule. (Repudiation of that nonsensical rule is particularly appropriate here since its application (as the Court of Appeal in this case concluded was necessary solely because of stare decisis) served to largely deprive plaintiff Aidan Leung of the recovery needed for his care and treatment due to the horrendous injuries he suffered as a result of the defendant hospital's medical negligence).

2. Whether, upon the abolition of the release rule, the non settling defendant should only be entitled to a pro tanto (dollar-for-dollar) reduction of the judgment due to the settlement consistent with the application of joint and several liability and just as with every other type of offset under California law?

INTRODUCTION

This Court granted review to consider whether the time has come to dispense with the antiquated and heavily criticized release-of-one-release-of-all rule which the Court of Appeal in this case felt constrained to reluctantly apply. As explained, there is no justification for the perpetuation of a rule which serves to arbitrarily deprive injured parties of the opportunity to be made whole and which provides torfeasors who elect not to settle an unwarranted and unjustified windfall.

Plaintiff Aidan Leung must suffer through life with severe brain damage caused by a condition called kernicterus resulting from elevated bilirubin (which is often signified by jaundice). This is made even more tragic because kernicterus can be easily avoided if the elevated bilirubin is detected in time before it enters a newborn's brain. Although the Verdugo Hills Hospital had information which, if provided to Aidan's parents, would have alerted them their son was at such great risk, it did not pass on that information to them, or to the Hospital's staff caring for Aidan or to Aidan's treating physician. Rather, the Hospital provided Aidan's parents with outdated information misleading them to believe that Aidan's warning signs were actually nothing to worry about.

Aidan brought suit against the Hospital and his treating pediatrician (Dr. Nishibayashi). Before trial, Aidan and Dr. Nishibayashi agreed to a settlement under which Dr. Nishibayashi would pay the limits of his malpractice insurance, $1 million, and

participate at a trial in which the jury would allocate the negligence, if any, of the Hospital and Dr. Nishibayashi and set the amount of damages. In exchange, Aidan would give Dr. Nishibayashi and his corporation a release of liability. This settlement was conditioned upon a finding that it was in "good faith" under Code of Civil Procedure sections 877 and 877.6. The trial court denied the motion.

The parties decided to still proceed with the settlement subject to the trial court's approval of a minor's compromise. Trial then commenced and Dr. Nishibayashi, represented by counsel, fully participated defending against Aidan's negligence claims. The jury then reached a verdict for Aidan apportioning fault as follows: Dr. Nishibayashi, 55 percent; the Hospital, 40 percent; and the Leungs, 5 percent. Following this trial, the court approved the minor's compromise and only then the settlement was consummated.

The Hospital appealed and argued among other things that because Aidan and the Doctor entered into a release without obtaining a "good faith" finding under section 877, under the common law "release-of-one-release-of-all" rule, that release served to exonerate the Hospital for its joint and several liability for Aidan's injuries. Aidan argued that this antiquated rule has been disreputed and no longer represented California law, especially in the aftermath of California's adoption of comparative fault and also because the subject settlement was consummated after a trial during which the jury apportioned fault.

The Court of Appeal "agree[d] with many of Aidan's arguments," explaining that the release rule "can create unintended and inequitable results, resulting in the plaintiff receiving an inadequate settlement from a defendant of modest means and unintentionally releasing another culpable tortfeasor with no opportunity to receive additional compensation from that tortfeasor. The rationale of the release rule -- preventing a plaintiff's double recovery -- has largely been eviscerated by California's modification of the joint and several liability rule to require allocation of non-economic damages based on each tortfeasor's percentage of fault (Civ. Code, § 1431.2, subd. (a); see *Dafonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603), and by the adoption of the right of partial indemnity on a comparative fault basis among multiple tortfeasors (*American Motorcycle*, *supra*, 20 Cal.3d at p. 598)." (Opinion pp. 42.)

However, the Court of Appeal felt constrained to nevertheless continue to apply the release rule because this Court has never directly repudiated that rule.[1] As explained

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[1]See Opinion pp. 42-43 ["[O]ur role as an intermediate appellate court in a case such as this is not to disregard controlling Supreme Court precedent, or to purport to find in sections 877 and 877.6 an implicit abrogation of that precedent with respect to non-good faith settlements in violation of the statutory language. Rather, our role is to 'defer[] to [the California Supreme Court] for any reconsideration of the doctrine.' (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 388.) *We do so here, and urge the California Supreme Court to repudiate the release rule once and for all.*] ; see also Opinion p. 4 ["we urge the California Supreme Court to grant review, conclusively abandon the release rule, and fashion a new common law rule concerning the effect of a non-good faith settlement on a non-settling tortfeasor's liability"]; p. 28 ["we urge the California Supreme Court to grant review, abandon the release rule, and fashion a new common law rule concerning the effect of a non-good faith settlement on a non-settling tortfeasor's liability"].) In reaching this conclusion, the Court recognized that one other

below there is no rationale basis for the perpetuation of the release rule and therefore the rule should now be directly repudiated by this Court.

As further, explained the Court should reinforce that under settled California law, following a settlement, the non-settling defendant is only entitled to a pro tonto offset based on the amount of the settlement attributable to the settling defendant's joint and several liability to the plaintiff. Then, absent a good faith determination under Code of Civil Procedure section 877, the non-settling defendant would be able to seek indemnity from the settling defendant for payments to the plaintiff in excess of the non-settling defendant's share of liability as found by the jury.

Contrary to the Hospital's position, the non-settling defendant is not entitled to a pro rata offset based upon the proportion of the settling defendant's liability as found by the jury. Such a rule would mean that the plaintiff is deprived of full compensation for his or her injuries and would afford an unwarranted windfall to the non-settling defendant who would avoid its full obligations under the verdict for the plaintiff's economic injuries.

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published decision had reached a contrary result (*River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986), but declined to follow it. (Opinion p. 41.)

STATEMENT OF FACTS

A national alert issued by the JCAHO ("Joint Commission on Accreditation of Healthcare Organizations") just two years before Aidan's birth warned defendant Verdugo Hills Hospital ("the Hospital") (and others) to be vigilant about the re-emergence of kernicterus. (This re-emergence of kernicterus which had all but disappeared in this country was the result of the proliferation of so-called "drive-through" deliveries where infants and their mothers are discharged soon after birth.) But the Hospital failed to pass that alert on to its staff, or its doctors or its patients. (Opinion pp. 13-14.)

Rather, the Hospital continued providing patients with an outdated booklet which it characterized as "the bible," telling the parents that jaundice in newborns is common and nothing to worry about. Thus, when Aidan was born with six of the nine risk factors placing him at a high risk of developing kernicterus and in turn permanent brain damage (RT 1843-1844, 2126, 3343), Aidan's parents were totally unaware their son was at such grave risk.

The Hospital's "bible" downplayed the risk factors and potential danger of kernicterus and in essence affirmatively told the Leungs not to worry about the many risk factors that the JCAHO Alert specifically warned hospitals to educate parents their newborns could suffer brain damage from, and upon which the Leungs, indisputably,

specifically relied in not bringing Aidan in to the hospital. (RT 1298, 1849-1851, 2423-2424, 2468-2469, 2472-2473, Ex. 256.) Thus, for example, the Hospital's self-proclaimed "bible" told the Leungs:

> Your baby's head and face may be bruised or red from the birth; this will heal in a few days and is not dangerous to your baby.

(Ex. 256-4.) The "bible" also informed the Leungs:

> Jaundice is a condition to which the skin or eyes have a yellowish tone. Many babies have some jaundice during their first week. It often appears or gets worse on the third or fourth day. Call your baby's care provider if jaundice doesn't clear up in a few days.

(Ex. 256-4.)[2]

The "bible" contains a section specifically dealing with jaundice called "Jaundice in Newborn Babies," and begins by assuring parents "it often disappears within a week," "in most instances, the jaundice is so mild that it can be ignored," and "it usually will disappear without treatment." (Ex. 256-6.) The "bible" concludes its section on jaundice with the following emphasis, headed in bold, italicized type:

> ***Remember:***

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[2] Thus, when, two days after Aidan's birth, on Thursday March 27, the Leungs noticed Aidan turned yellow, the Leungs turned to the "bible," read the section about jaundice, and trusted and relied upon this information in "deciding how [we] were going to deal with Aidan's jaundice" and in deciding to "wait a few days" to see if the jaundice would clear up like the "bible" said. (RT 1292-1294, 1659-1661.)

- Jaundice in newborn babies is very common.
- In most instances, the condition is normal, harmless, and lasts for only a short time.
- When treatment is necessary, the methods are safe and effective in virtually all cases.

(Ex. 256-7.) In addition, the Hospital provided the Leungs with another pamphlet stating: "In mild cases of physiologic jaundice, little or no treatment is usually necessary. Ordinarily physiologic jaundice is temporary and harmless to your baby and will have no lasting effects on the future health and development." (AA 1254-1262 [exhibit 454].) Nancy Leung read and relied upon this material as well. (RT 2467-2468.)

Despite the fact Aidan was a high-risk newborn, the Hospital discharged Aidan less than 24 hours after birth, at 11:50 a.m. the following day Tuesday March 25 (RT 1285, 1350, 1651). Moreover, the Hospital arranged for a follow-up appointment (which should have been one to two days later) not to take place until six days later, the following Monday March 31. (RT 1326-1327, 1652-1653.)

At home, the Leungs followed the advice in the "bible," as instructed by the Hospital. On Thursday March 27, when the Leungs observed Aidan's eyes turn yellowish, they turned to the "bible," which said among other things it is a common condition called jaundice, it is not dangerous, and it normally goes away on its own after a few days. (RT 1294-1296, Ex. 256-4, -6, -7.) The Leungs relied on this written advice

not to be concerned, and spoke briefly with Dr. Nishibayashi's office which echoed the Hospital's advice, suggested Aidan be placed near sunlight, and advised there was no need to bring Aidan in earlier than the scheduled Monday March 31 follow-up appointment. (RT 1298, 1655-1656, 1659-1661.) The Leungs thus put Aidan near a window and some sunlight, did not think Aidan was in any danger, and waited. (RT 1298-1299, 1329, 1659-1660.)

Aidan's condition did not go away. Unbeknownst to the Leungs, for the next few days, the bilirubin levels in Aidan severely increased and by late Saturday night March 29, Aidan became lethargic, indicating (as the Leungs would later learn) the bilirubin was attacking his brain. (RT 1300-1301, 1661-1662, 1905, 2129-2130, 2141-2142.) During the early hours of that Sunday morning, the Leungs called their doctor's answering service, spoke to the physician on call, and were told to immediately bring Aidan in to the emergency room at Huntington Memorial Hospital. (RT 1301, 1662-1663.) The Leungs did so, and were immediately, shockingly, told by the emergency staff Aidan's life was in danger. (RT 1305, 1663, 1667.) Aidan received an emergency blood transfusion, and for the next several weeks, the Leungs continued to heed every bit of advice given them by the medical experts. (RT 1306-1312, 1648-1650, 1667-1672, 1969-1971.) But it was too late – the kernicterus had caused Aidan permanent, severe brain damage. (RT 1905, 2117-2118.)

Before trial, Aidan entered a written "Settlement Agreement and Release" with Dr. Nishibayashi, under which Dr. Nishibayashi would pay the limit of his malpractice insurance policy, $1 million, pursuant to a specified payment schedule during Aidan's life, and would participate as a defendant in the trial. In exchange, Aidan would release Dr. Nishibayashi and his professional corporation from all claims. The settlement document expressly excludes the Hospital: "Notwithstanding the foregoing, this Settlement Agreement release and discharge shall not apply to Verdugo Hills Hospital and shall not settle or release any claims that Plaintiff has or may have against Verdugo Hills Hospital." (AA 899.)

The settlement was conditioned on the court approving a minor's compromise for Aidan, and on the court finding the settlement to be in good faith under sections 877 and 877.6. It also provided that the release and discharge of Dr. Nishibayashi did not apply to the Hospital. Dr. Nishibayashi moved for a declaration of good faith settlement. The trial court denied the motion. (Opinion pp. 28-29.)

Rather than abandoning the settlement, Aidan and Dr. Nishibayashi elected to pursue it, and amended their agreement to delete the condition requiring the court to declare the settlement to be in good faith, though the condition requiring approval of the minor's compromise remained. On May 9, 2007, Aidan filed a petition to approve the compromise of his claim against Dr. Nishibayashi. On May 22, 2007, shortly before trial, with the consent of Aidan's counsel, the court continued the hearing on the petition in

order to have it reviewed by a staff attorney in the probate department. The court stated that a new date for hearing on the petition would be scheduled after the review was complete. (Opinion p. 29.)

Meanwhile, the trial occurred, and the jury returned its verdict on July 2, 2007, awarding damages to Aidan of $96,410,376, consisting of $78,376 for past medicals, $82,782,000 for future medicals (with a present cash value of $14 million), $13.3 million for future lost earnings (with a present cash value of $1,154,000) and general damages of $250,000. At the time judgment was entered, the total present value of the judgment, including allowable costs and interest, was $14,893.27. (AA Tab 88, p. 247.) The jury apportioned liability finding Dr. Nishibayashi 55 percent negligent and the Hospital 40 percent. (AA 1455; Opinion p. 29.)

On July 20, 2007, after the court informed Aidan's attorney of recommendations for changes to the proposed special needs trust, Aidan filed a revised petition which was heard on September 21, 2007. (Opinion p. 29.)

Aidan's counsel argued that the settlement was in Aidan's best interests because although Dr. Nishibayashi was 55 percent liable for the judgment, Aidan's parents had determined that it was economically unfeasible to try to obtain more from him than the $1 million settlement, and it was in Aidan's interests to receive the settlement funds immediately in order to ensure his continuing care. Further, according to Aidan's attorney, the Hospital remained jointly and severally liable for the entire amount of

economic damages in the judgment. Thus, regardless of the settlement, Aidan could collect the full sum of economic damages from the Hospital alone. (AA 1729-1734.) For his part, Dr. Nishibayashi's counsel argued that the Hospital could seek equitable indemnity from Dr. Nishibayashi for amounts it paid in excess of its percentage share of the judgment. (AA 1748, 1898; Opinion pp. 29-30.)

The Hospital did not oppose the petition, and did not initially argue that the common law release rule would extinguish the Hospital's joint and several liability for Aidan's economic damages. Rather, it argued that if the petition were approved and Aidan settled with Dr. Nishibayashi, then under the terms of the settlement, the Hospital would be relieved of its joint liability for Dr. Nishibayashi's 55 percent share of the economic damages. (AA 1739-1744; Opinion p. 30.)

After argument, the court granted the petition to approve the minor's compromise, but referred the revised plan for a special needs trust to the probate department for further review. The order approving the minor's compromise was not signed and entered until October 12, 2007. (AA 2075-2076, 2211; Opinion p. 30.)

In the meantime, the parties filed competing versions of the judgment. As part of that debate, the Hospital filed objections to the judgment which invoked the common law release rule and argued that the settlement with and release of Dr. Nishibayashi released the Hospital's joint liability for Aidan's economic damages, leaving only the Hospital's several liability for its proportionate share of the $250,000 in noneconomic damages.

Alternatively, the Hospital argued that its liability was reduced (as reflected in the Rest.3d Torts, § 16) to its comparative share of economic damages -- 40 percent. (AA 1990-1992.) The court rejected the arguments, finding that the common law release rule was not "the current state of the law," and noting that "it would be nice to have a court of appeal opinion on it and maybe this is the case that is going to do it. And I would urge you to go find out." (2 RT 910-911.) The court entered judgment on November 2, 2007. (AA 2472; Opinion pp. 30-21.)

The Hospital then moved to vacate the judgment, reiterating its argument that Aidan's settlement with and release of Dr. Nishibayashi released the Hospital's joint and several liability for Aidan's economic damages. (AA 2559-2564.) The court denied the motion. (AA 3737; Opinion p. 31.)

The Hospital appealed. In the published portion of its opinion the Court of Appeal concluded that it was bound by this Court's decisions to rule that Aidan's release of Dr. Nishibayashi served to also release the Hospital from its joint and several liability to Aidan. The Court of Appeal urged this Court to grant review and "to repudiate the release rule once and for all." (Opinion pp. 42-43.) If the Court's opinion is allowed to stand, Aidan will be limited to recovering only his $250,000 in non-economic damages from the Hospital. In the unpublished portion of its opinion the Court rejected the Hospital's contentions that there was not substantial evidence of causation and that the trial court incorrectly instructed and polled the jury. (Opinion pp. 45-64.)

ARGUMENT

I. As the Court of Appeal in this Case Urges, the Time Has Come for this Court to "Fully Repudiate" the Antiquated and Nonsensical Common Law "Release-of-one-release-of-all" Rule That Was Last Applied by this Court in 1932, Has since Been Criticized and Limited by this Court (As Well as Courts of Appeal), Especially since That Rule Was Based on a "Misconception" Equating a Release with a Full Satisfaction and Which Gave Rise to the Contrivance of Covenants Not to Sue to Bypass the Harsh and Unintended Consequences of the Rule.

Under the common law release rule, last applied by this Court in 1932, a release for consideration of one joint tortfeasor operates as a release of the joint and several liability of the other joint tortfeasors. (See e.g., *Bee v. Cooper* (1932) 217 Cal. 96, 99-100 (*Bee*); *Tompkins v. Clay Street R.R. Co.* (1884) 66 Cal. 163, 166-168 (*Tompkins*).) The rationale for this rule was that "there can be but one compensation for the joint wrong; that each joint tortfeasor is responsible for the whole damage, and that once the injured party is paid for the injury he has suffered by any one of the wrongdoers, his cause of action is satisfied and his right to proceed against the others is at an end. . . ." (*Dougherty v. California Kettleman Oil Royalties, Inc.* (1937) 9 Cal.2d 174, 180-181.) Accordingly,

"the rule [was] intended to prevent double compensation for the injury." (*Id.* at p. 181.)

This rule is traced back to English common law. "In *Cocke v. Jennor, Hob.* 66, 80 Eng. Rep. 214 (K.B. 1614), plaintiff brought an action of trespass against Jennor for breaking his house and beating him. Defendant pleaded that he and Millborne did jointly break the plaintiff's house and beat him, that the plaintiff had released Millborne, and that therefore the court should hold that the release to Millborne discharged defendant. The court so held by reasoning that there can be only one satisfaction of an action, that the plaintiff can choose the best means to be satisfied, and that as plaintiff chose to release Millborne, plaintiff released Jennor." (*Tino v. Stout* (N.J. 1967) 229 A.2d 793, 797.)

In *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, this Court explained: "The rule was . . . based on the misconception, as Dean Prosser suggested, that a 'satisfaction' is the equivalent of a 'release.' (Prosser, Joint Torts and Several Liability (1937) 25 Cal. L. Rev. 413, 423.) However, while '[a] satisfaction is an acceptance of full compensation for the injury; a release is a surrender of the cause of action, which may be gratuitous, or given for inadequate consideration.' (*Ibid.*) Even if it could be said that any sum the plaintiff received in settlement was a compensation for the joint wrong [Citation], the rule produced unfair results. For example, a plaintiff who settled with a defendant of modest resources for an amount below the value of his damages did not have his claim fully satisfied; nevertheless, under the common law rule he could not seek further compensation from other defendants." (*Mesler v. Bragg Management Co.*, *supra*,

39 Cal.3d at p. 298.)

In order to soften the harsh and arbitrary operation of this rule, the "entirely artificial" contrivance of a covenant not to execute (rather than releases) was employed. Although the effect of such a covenant was exactly the same as a release, the courts concluded that their effect would be to not release all joint tortfeasors. *(Pellett v. Sonotone Corp.* (1945) 26 Cal.2d 705, 711; See Slip Opinion pp.34-35.) One Court characterized this as the "muddled and tortuous common law rule that a release, but not a covenant not to sue, discharges other tortfeasors who may be liable for the same injury. . . ." (*Milicevich v. Sacramento Medical Ctr.* (1984) 155 Cal.App.3d 997, 1002-1003.)

Thus, it is no surprise that since 1932 the rule has been repeatedly questioned and limited by this Court, the Courts of Appeal and the Legislature. (See *Ash v. Mortensen* (1944) 24 Cal.2d 654, 658-659 [court declines to apply the release rule to successive tortfeasors who produced separate, though related, injuries.]; *Pellett, supra*, 26 Cal.2d 705, 711 [court refuses to apply the release rule to a plaintiff's covenant not to execute on any future judgment that might be obtained against one joint tortfeasor – a pledge that was "not strictly a release or a covenant not to sue, although it par[took] somewhat of the nature of both." (*Id.* at p. 711.)]; *Lamoreux v. San Diego & A. E. R. Co.* (1957) 48 Cal. 2d 617, 625-262 [This Court held that the plaintiff's claim against the railroad whose train struck the decedent's car was not barred by the plaintiff's release of the decedent's employer, who had been sued along with the railroad, but who received a release in a

collateral worker's compensation proceeding].)

Then, in 1957 the Legislature enacted section 877. As the Court of Appeal explained: "Section 877 abrogated that rule only as to releases given in 'good faith' and 'before verdict or judgment.' (§ 877.) Later, in 1980, responding to the California Supreme Court's decision in *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, the Legislature enacted section 877.6, which, among other things, 'codifies the American Motorcycle result by providing that a section 877 settlement bars claims for partial or comparative indemnity as well as for contribution.' (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 496.)" (Opinion p. 37.)

In its opinion, the Court of Appeal next identified three Court of Appeal decisions since the enactment of section 877, which have recognized that the common law release rule applies when section 877 does not. (*Thomas v. General Motors Corp.* (1970) 13 Cal.App.3d 81, 86; *Watson v. McEwen* (1964) 225 Cal.App.2d 771, 775; *Apodaca v. Hamilton* (1961) 189 Cal.App.2d 78, 82.) (Opinion pp. 39-40.)

The Court further recognized that in *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986, the Court held that after the passage of section 877, the common law release rule does not apply to non-good faith settlements. However, the Court of Appeal declined to follow *River Gardens*, reasoning that (1) it "ignores the express language of section 877, which by its terms applies to a release only when 'given in good faith before verdict or judgment.' (§ 877.);" (2) "it does not accord proper

respect for stare decisis, and fails to consider that, although the California Supreme Court certainly appeared to be moving toward abandoning the release rule entirely, it did not do so" and (3) "[I]n *Mesler* (decided after *River Garden Farms*), the California Supreme Court necessarily acknowledged that the release rule remained part of California common law." (Opinion p. 41.)

Under the Court of Appeal's reasoning, therefore, section 877's abolition of the release rule has no application either where the terms of that statute do no apply or where a good faith settlement motion is denied. Since, in this case, both of those circumstances are present (the good faith settlement motion was denied and the settlement was consummated after trial therefore rendering section 877 inapplicable), the Court concluded that it must decide the issue under existing California common law.

Of course, as the Court of Appeal recognized, the existence of section 877 does not prevent the development of common law in this area and therefore does not prevent this Court from agreeing with the Court of Appeal that the time has come to fully abandon the release rule. This Court too has recognized that the enactment of section 877 did not stunt the development of the common law in the area. (*American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal.3d 578, 599 ("AMA").)

While the Hospital has argued in this case that the Legislature's enactment of section 877 required the perpetuation of the release rule, that argument does not withstand analysis. If accepted, the Hospital's position would mean that the terms of section 877

would be at war with each other. Under the Hospital's position the denial of a good faith settlement motion means both (1) the release of all joint tortfeasors and (2) the continued ability of the non settling joint tortfeasors to seek indemnity from the settling joint tortfeasor.

Yet if the release-of-one-release-of-all rule remains in effect, then a defendant whose settlement has been found not to be in good faith will never be subject to any claims for indemnity or contribution because all of the non-settling defendants will be deemed released and will therefore have no claims for indemnity or contribution. Thus, under the Hospital's reading of section 877, the only party harmed by a finding that a settlement is not in good faith is the plaintiff. Nothing in the legislative history suggests that the Legislature intended such a result. Rather, section 877 should be harmonized as (1) abolishing the long criticized release-of-one-release-of all rule outright and (2) depriving the settling defendant of protections from indemnity and contribution as the statutory consequence for a finding that a settlement is not in good faith.[3]

As to the invalidity of the release rule, the Court of Appeal explained:

"We agree with many of Aidan's arguments. The rule lacks a creditable heritage.

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[3]If the Hospital's position were accepted it would mean that, as to settlements not found to be in good faith, section 877 makes California law more severe than it was before the enactment of that section because, under section 877, releases and other settlement devices such as covenants not to execute are treated the same. Therefore, with respect to a settlement not found in good faith, then, under the Hospital's position, even the use of the covenant not to execute contrivance would not save the plaintiff from the release-of-one-release-of-all rule.

It can create unintended and inequitable results, resulting in the plaintiff receiving an inadequate settlement from a defendant of modest means and unintentionally releasing another culpable tortfeasor with no opportunity to receive additional compensation from that tortfeasor. The rationale of the release rule -- preventing a plaintiff's double recovery -- has largely been eviscerated by California's modification of the joint and several liability rule to require allocation of non-economic damages based on each tortfeasor's percentage of fault (Civ. Code, § 1431.2, subd. (a); see *Dafonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603), and by the adoption of the right of partial indemnity on a comparative fault basis among multiple tortfeasors (*American Motorcycle*, *supra*, 20 Cal.3d at p. 598).

"But our role as an intermediate appellate court in a case such as this is not to disregard controlling Supreme Court precedent, or to purport to find in sections 877 and 877.6 an implicit abrogation of that precedent with respect to non-good faith settlements in violation of the statutory language. Rather, our role is to "defer[] to [the California Supreme Court] for any reconsideration of the doctrine." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 388.) We do so here, and urge the California Supreme Court to repudiate the release rule once and for all."

(Opinion pp. 42-43.)

The Court of Appeal's criticism of the release rule was well-founded. As described above, the rationale for the release-of-one-release-of-all rule was premised on the then existing all-or-nothing nature of California law under which any recovery from any defendant was considered to be complete satisfaction. In the aftermath of section 877 California has evolved so that equitable rights of indemnity between joint tortfeasors is recognized. (See *Richards v. Owens-Illinois* (1997)14 Cal.4th 985, 993-994 [explaining the evolution of California law].)

This abandonment of an all-or-nothing approach to tort law likewise mandates the abandonment of the release-of-one-release-of-all rule. "All or nothing" is no longer the law in California. Now a plaintiff's comparative fault serves to reduce his recovery (and no longer is a complete bar) (*Li v. Yellow Cab* (1975) 13 Cal.3d 578) and a defendant found jointly liable can seek equitable indemnity under *AMA*. Thus, the stated and fictional underpinnings of the release-of-one-release-of-all rule that there is only one debt which is extinguished by any satisfaction, no longer exists.

And these arguable underpinnings are even further illusional when, as here, the settlement is consummated after the jury has apportioned fault following a trial where the settling defendant fully participates. This Court has long recognized that "it is a well-settled rule that before one tortfeasor can be held to be discharged from liability through the release of another, the consideration for such release must have been accepted by the plaintiff in full satisfaction of the injury. [Citations.]" (*Wallner v. Barry* (1929) 207 Cal.

465, 473; *Alexander v. Hammarberg* (1951) 103 Cal.App.2d 872, 880 [same].)

Thus, to the extent there was any rational basis for the "release-of-one" rule as to pretrial settlements, there was never any rationale for it to apply to a settlement completed after a full trial involving all joint tortfeasors where the jury has actually allocated fault. Following such a trial it can be objectively determined whether the payment of the settling tortfeasor is full satisfaction or not. (See *Milicevich v. Sacramento Medical Ctr.*, *supra*, 155 Cal.App.3d 997, 1003 ["Whether there is in fact a double recovery cannot be determined unless the damages which measure the full recovery for the injury have been"]; *McCall v. Four Star Music Co.* (1996) 51 Cal.App.4th 1394, 1398-1399 ["[W]here fewer than all of the joint tortfeasors satisfy less than the entire judgment, such satisfaction will not relieve the remaining tortfeasors of their obligation under the judgment. Stated otherwise, 'partial satisfaction has the effect of a discharge pro tanto.' [Citations.] 'Pro tanto' means 'for so much.' (Webster's Third New Internat. Dict. (1971) p. 1822.) Hence, Civil Code section 1543, concerning releases, specifically provides, 'A release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution. . . .' "]; see also *Bank of America Nat'l Trust & Sav. Asso. v. Duer* (1941) 47 Cal.App.2d 100, 101 [satisfaction and release of one judgment debtor does not release a second judgment debtor when the terms of the document expressly state no such release was intended]; *Williams v. Riehl* (1899) 127 Cal. 365, 369.)

Simply put, there is no reason why releases should be treated any differently than partial satisfactions of judgment – especially when the release is only effective after the trial has concluded. Thus, consistent with long standing California law in other settings, in determining the extent a release effects a plaintiff's rights against joint tortfeasors, the "intent of the parties as expressed in the release [should be] controlling. (See *Barnum v. Cochrane* (1903) 139 Cal. 494, 495 [73 P. 242]; *Bank of America v. Duer* (1941) 47 Cal.App.2d 100, 102 [117 P.2d 405]; cf. *Security Pac. Nat. Bank v. Lyon* (1980) 105 Cal.App.3d Supp. 8, Supp. 10, fn. 1 [165 Cal. Rptr. 95].)" (*McCall v. Four Star Music Co.*, *supra*, 51 Cal.App.4th at p. 1400.)

As explained in the Restatement Second of Torts: "In the beginning, exact language of the covenant not to sue was the controlling factor, so that the words of release would discharge other tortfeasors while words of covenant would not. This gradually gave way in most jurisdictions to a holding that the language was not conclusive, and the essential question was whether there was an intent to retain rights against others or to surrender them. Hence a release with reservation of a right to sue came to be held in reality to amount to a covenant not to sue. See for example *Carey v. Bilby*, 129 F. 203 (8th Cir. 1904); *Smallwood v. Bickers*, 139 Ga.App. 720, 229 S.E.2d 525 (1976); *Whitt v. Hutchison*, 43 Ohio St.2d 53, 72 O.O.2d 30, 330 N.E.2d 678 (1975); *Natrona Power Co. v. Clark*, 31 Wyo. 284, 225 P. 586 (1924)." (Rest. 2d of Torts, § 885, Reporter's Notes.)

The release rule has now been almost universally abrogated. (See 76 C.J.S. Release (2011) § 54 ["The original common-law rule has been eroded,[fn] and its vitality placed in doubt.[fn] Some states have enacted statutes to abrogate the common-law release rule, and even where such statutes have not been enacted, courts have retreated from the common-law rule.[fn] Under authority supplanting the common-law rule, it is possible to settle with one tortfeasor without releasing the others.[fn] A valid release of one tortfeasor from liability for harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them.[fn] The intent of the parties governs the effect of a release of one joint tortfeasor on others.[Fn]"])

This Court should now finally follow suit and fully abandon the release of one release of all rule, and instead adopt a rule construing releases consistent with the intent of the parties in determining the impact the release has on the plaintiff's claims against other joint tortfeasors. The artificial rule under which the mere fact that the word "release" was used rather than "covenant not to sue" or "partial satisfaction of judgment", means that a seriously injured plaintiff such as Aidan is deprived full recovery for absolutely no valid reason. The time has come to recognize the abolition of this arbitrary rule.

II. Upon the Abolition of the Release Rule, the Hospital Should Only Be Entitled to a Pro Tanto (Dollar-for-dollar) Reduction of the Judgment Due to the Settlement.

In its opinion the Court of Appeal observed that "should the release rule be abandoned, there is an important related issue, namely, the extent of the set off to which the non-settling defendant is entitled after a codefendant enters a settlement that does not qualify under section 877. The Hospital asserts that the rule stated in section 16 of the 3d Restatement of Torts should be adopted as the common law rule applicable to non-good faith settlements. Under that rule, '[t]he plaintiff's recoverable damages from a jointly and severally liable tortfeasor are 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 to defendants who do not settle.' On the other hand, Aidan argues that the non-settling tortfeasor should receive only a pro tanto (i.e., dollar for dollar) set off, regardless of whether the settlement was in good faith. We express no opinion on the subject, and leave it to the Supreme Court, should it repudiate the release rule in this case, to determine the proper approach." (Opinion p. 44.)

There is a split in the United States whether, as a result of a settlement a pro tanto (dollar-for-dollar) or pro rata setoff should be applied. (See comments to Restatement 3d of Torts: Apportionment of Liability, § 16, explaining the different policy considerations

supporting each approach; see also 5 Witkin Summ. Cal. Law (10th ed. 2005) Torts, section 75, pp. 151-152 [explaining that the Restatement departs from common law].)

California has chosen to employ the pro tanto approach. Before the enactment of section 877 California courts applied a pro tanto set off when there was a settlement and a covenant not to execute. (See *Laurenzi v. Vranizan* (1945) 25 Cal.2d 806, 813; *Ellis v. Jewett Rhodes Motor Co.* (1938) 29 Cal.App.2d 395, 399.)

As just explained, the distinction between a release and a covenant not to execute is no longer valid (if it ever were valid). Section 877 reflects a legislative determination that pro tanto is preferable. *Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 111-112, explains: "Section 877 embodies a 'strong public policy in favor of encouraging settlement of litigation' by providing incentives to settle to both tortfeasors and injured plaintiffs, in that a settling tortfeasor is discharged from liability for contribution to any other party, while the plaintiff's award against nonsettling defendants is reduced only by the amount of the settlement rather than by the settling defendant's pro rata share of liability. [fn] (*American Motorcycle*, *supra*, 20 Cal.3d at p. 603.) *American Motorcycle* regarded the choice of a pro tanto setoff embodied in section 877, subdivision (a), rather than a pro rata setoff or a setoff in proportion to the settling defendant's apportioned share of liability, as providing a greater incentive to plaintiffs to settle." (*Ibid.*)

In the out-of-state authorities on which the Hospital relied below, the Courts decided whether to employ pro rata and not pro tanto regardless whether there was a good faith decision. Those authorities have nothing to do with whether pro rata should be used as a consequence for a ruling that a settlement is not in good faith. Therefore, these authorities are in direct conflict with what even the Hospital acknowledges is California law (pro tanto set off used when settlement found in good faith).

The jurisdictions that adopted the pro rata method urged by the Hospital, did so in order to encourage settlement. These courts reasoned that if a a pro tanto reduction is employed, then the non settling defendant may seek contribution from the settling defendant for any payment on the judgment in excess of its proportionate share and therefore, there is less incentive for a defendant to settle if it knows that the settlement will not fully extricate it from the litigation. Thus, in *Tino v. Stout, supra* 229 A.2d 793, the Court explained:

> The first alternative, established by the common law prior to the contribution act, is the one proposed by the Uniform Act and *Brandstein v. Ironbound Transportation Co., supra*, 112 N.J.L. 585. The injured party may have a judgment for his total damage, less consideration received in settlement with one tortfeasor (a pro tanto reduction). The judgment tortfeasor who pays in excess of his pro rata share may have his action for contribution against the other defendant who settled. This alternative, while preserving the contribution rights of the settling defendant under the act, would discourage settlements in that such settlements would lack finality insofar as a settling defendant was concerned. If a settling defendant remains amenable to contribution on the other defendant's application, the peace he would buy from plaintiffs might be a delusion. See *Judson v. Peoples Bank & Trust Co.*, 25 N.J. 17, 35 (1957) (*Judson II*).
>
> The second alternative was the one adopted in *Judson I.* The injured person is required to credit upon a verdict of a judgment against nonsettling tortfeasors not

> the consideration received in settlement, but a pro rata share of the amount of the verdict. It was thought that the adoption of this rule would encourage defendants to settle, because a settling defendant, under the pro rata rule, would no longer be amenable to contribution by the nonsettling defendant. If plaintiff must credit pro rata anything received from the settling defendant, contribution rights against the settling defendant under the statute would never accrue to nonsettling defendants. The strong policy of the law favoring out-of-court settlements prevailed upon the Judson I court and the pro rata rule was adopted. Unfortunately, this pro rata rule worked an unwelcome result for the settling plaintiffs, as in most cases the pro rata rule reduces the total amount of plaintiff's recovery.

(*Id.* at p. 798.)

In California, these policy justifications for adoption of a pro rata reduction (even though it often works a hardship on plaintiffs) are absent. As already explained, if a settlement is found to be in good faith under section 877 then a settling defendant is no longer subject to any claims for indemnity or contribution and therefore settlements are not discouraged. A defendant who enters into such a settlement is insulated from any further liability. Therefore the issue here is what should be the rule when a settlement is not found to be in good faith under section 877.

While the determination that the settlement is not in good faith may mean that it is too small in relation to the settling defendant's proportionate share of liability, using a pro rata setoff is not the appropriate fix. Rather, the Legislature has already described what the fix should be. The settling defendant remains potentially liable for indemnity or contribution. Therefore, the nonsettling defendant who may pay more than its proportionate share of a joint judgment because of the so-called "bad faith" settlement, is able to seek recovery of the amount it paid in excess of that proportionate share from that

settling defendant. There is no reason to penalize the plaintiff by precluding him from recovering less than 100% of the joint amount of the judgment due to the earlier settlement. Such a rule will frustrate settlement by providing an unwarranted reward to the defendant that refused to settle at the expense of the injured plaintiff.

Further such a rule would again place the terms of section 877 at war with each other. If pro rata is used then the nonsettling defendant will only be liable for its proportionate share of a joint and several judgment. Therefore, that nonsettling defendant will never have an indemnity or contribution claim based upon it having paid more than its proportionate share. Accordingly, the Legislature's determination that a consequence of a finding that a settlement is not in good faith is that the settling defendant is not protected from contribution or indemnity will be rendered a nullity.[4]

In short, there is no basis for the court to adopt a pro rata offset for settlements not found to be in good faith. In any event, since under the Hospital's position this was a post-verdict settlement, clearly a pro tanto reduction is all that is warranted. (See *McCall*

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[4]While *River Garden Farms, Inc. v. Superior Court*, *supra*, 26 Cal.App.3d 986, does state that when a settlement is found not to be in good faith a pro rata set off rather than a pro tanto set off should be used, no case appears to have accepted that Court's view and we urge this Court to disapprove of that portion of *River Gardens* for the reasons just explained. "[T]his court, of course, is not bound to follow this decision of a single intermediate appellate court, and in past cases we have declined to consider reliance upon Court of Appeal decisions when we are called upon to determine for the first time whether those decisions were correct. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 689, fn. 28 [254 Cal. Rptr. 211, 765 P.2d 373].)" (*Grafton Partners v. Superior Court* (2005) 36 Cal. 4th 944, 963.)

v. Four Star Music Co. (1996) 51 Cal.App.4th 1394, 1399.)

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that this Court reverse the decision of the Court of Appeal only insofar as it applied the common rule release rule. This Court should conclude that the release rule no longer represents California law, that settlements are offset from the judgment on a pro tanto basis and that the matter should be remanded to the Court of Appeal for it to resolve the issues which were not addressed in its earlier opinion, including plaintiff's cross-appeal.

Dated: July 8, 2011

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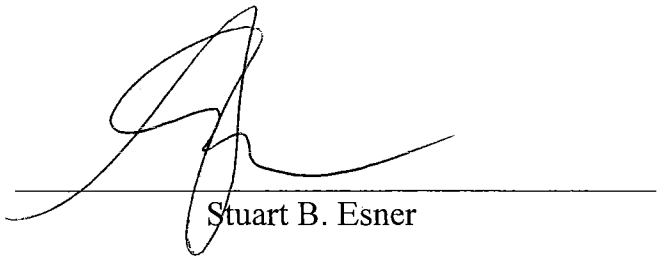

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