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

REPLY BRIEF ON THE MERITS

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I. As this Court Has Already Held, the Legislature's Enactment of Code of Civil Procedure Section 877 Did Not Stump the Evolution of the Common Law Rules Regarding Releases. Nothing the Hospital Argues Is to the Contrary.

In his opening brief on the merits, plaintiff explained that the time has come for this Court to finally abandon the long disreputed release-of-one-release-of-all-rule ("the release rule") which was last applied by this Court in 1932. (See e.g., *Bee v. Cooper* (1932) 217 Cal. 96, 99-100.) As this Court explained in *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290: "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.*) The release rule has thus now been universally repudiated.

As further explained (at pp 21-22), if the release rule ever had any valid basis, then such a basis certainly no longer continues to exist in view of California's adoption of comparative fault. Accordingly, that rule should instead be directly disapproved by this Court, and the scope of a release should be based upon the intentions of the settling

parties.

Nothing the Hospital argues in its answer brief supplies any reason why this Court should perpetuate the harsh and unfounded release rule contrary to the other courts and commentators which have considered the issue.

Instead, the Hospital initially argues that, regardless of whether the release rule has any continued validity, the Legislature's enactment of Code of Civil Procedure, section 877 precludes this Court from modifying that rule. In making this argument the Hospital chooses to ignore *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal.3d 578, 599 ("*AMA*"), cited by plaintiff and by the Court of Appeal below.

In *AMA* the defendant argued that the enactment of section 877 prevented the Court from evolving the common law with respect to comparative indemnity. This Court rejected that argument, concluding:

> The legislative history of the 1957 contribution statute quite clearly demonstrates that the purpose of the legislation was simply "to lessen the harshness" of the then prevailing common law no contribution rule.[Fn.] **Nothing in the legislative history suggests that the Legislature intended by the enactment to preempt the field or to foreclose future judicial developments which further the act's principal purpose of ameliorating the harshness and inequity of the old no contribution rule. Under these circumstances, we see no reason to interpret the legislation as establishing a bar to judicial innovation.**

(*Id.* at p. 601, emphasis added.)

In reaching this conclusion the Court drew an analogy to *Green v. Superior Court* (1974) 10 Cal.3d 616, 629-631. The *AMA* Court explained: "At early common law a landlord owed a tenant no duty to maintain leased residential premises in habitable condition throughout the duration of the lease, and in *Green* the landlord argued that because the Legislature had enacted a series of statutes affording tenants a limited "repair and deduct" remedy (Civ. Code, §§ 1941 et seq.), California courts were not free to evolve a broader, more comprehensive common law warranty of habitability. In *Green* we emphatically rejected the landlord's contention, declaring that 'the statutory framework . . has never been viewed as a curtailment of the growth of the common law in this field.' (10 Cal.3d at p. 630.)") (*AMA, supra,* 20 Cal.3d at pp. 601-602.)[1]

In its answer brief, the Hospital cites *AMA* for another point (AB 24) but utterly ignores that decision when making its preemption argument. Instead the Hospital references a series of cases concerning much different circumstances where the

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[1]Indeed, as the Court of Appeal observed in its opinion below: "Since enactment of section 877, at least three decisions by Courts of Appeal have recognized that the common law applies when section 877 does not." (Citing to *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.) The Hospital itself argued this very point in the Court of Appeal in contending that section 877 did not eliminate the release rule. (See ARB 10-11.) If it is the case that section 877 left the common law alone to the extent that section does not apply, then it must also be the case that section 877 does not preempt this Court from modifying the common law release rule. The Hospital never tries to reconcile these inconsistent positions it has taken.

Legislature has considered and rejected particular language which is precisely what a party is arguing should be grafted onto the statute being interpreted in those cases. (See *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 531-532 [Court concludes that because the Legislature specifically deleted a proposed portion of Civil Code section 3291 making prejudgment interest part of the judgment it was "confident the Legislature did not intend to include prejudgment interest accrued pursuant to Civil Code section 3291 in the judgment.]; *City of Santa Cruz v. Mun. Court* (1989) 49 Cal.3d 74, 88-89 [Court concludes that a declaration demonstrating personal knowledge was not required to seek discovery under Evidence Code section 1043 because the Legislature considered and expressly rejected the requirement of personal knowledge].)

These cases do not aid the Hospital. The issue presented here is whether the Court could eliminate the universally criticized common law release rule. The Court is not being asked to even interpret Code of Civil Procedure section 877. Nor is there any basis to conclude that the Legislature through the insertion of the words "good faith" into section 877 intended to preempt this Court from continue to evolve a common law rule of law.

Next the Hospital argues that it should be up to the Legislature to alter the careful balance drawn by section 877. (AB 16.) This argument is a strawman. The abandonment of the common law release rule will not alter section 877's balance in the least.

Rather, it is only the Hospital's position that upsets the balance crafted by the Legislature in section 877. Under the Hospital's position, (1) unless a good faith finding is made, the release of one tortfeasor constitutes the release of all tortfeasors and (2) the non settling tortfeasor is entitled to seek indemnity from the settling tortfeasor. But, as explained in the opening brief, if the common law release 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 the non-settling defendants will be deemed released from all liability and will therefore have no claims for indemnity or contribution to pursue. Accordingly, it is the Hospital's position that eliminates any "balance" in section 877 by requiring the plaintiff to shoulder all of the adverse consequences of a settlement to which section 877 does not apply (such as a post verdict settlement as here) or a settlement not found to be in good faith.

Next, contrary to the Hospital's argument, it is not the case that plaintiff is proposing a "radical reworking of the common law" or that the elimination of the release rule will "eviscerate section 877." (AB 17.) Rhetoric is no substitute for analysis.

This argument is premised entirely upon the misnomer that absent the perpetuation of the disreputed common law release rule, parties will no longer have an incentive to seek a good faith determination under section 877. What the Hospital ignores is that a plaintiff cannot settle alone. Absent a willing tortfeasor there can be no settlement. And absent a good faith determination the settling tortfeasor will still be subject to an

indemnity claim by the non settling tortfeasor.

Thus, upon the elimination of the release rule, it will only be in those rare cases where a settling tortfeasor agrees to remain subject to an indemnity action that a settlement will be possible absent a good faith determination.

The Hospital's true complaint is with joint and several liability under which a non settling tortfeasor may be liable for more than its proportionate share of economic damages. But the Hospital knows better than to try and directly challenge that bedrock principle of California law.

The issue therefore becomes whether a non settling tortfeasor whose conduct has caused the plaintiff economic harm should avoid any joint and several responsibility because the plaintiff has settled with another claimed tortfeasor and that settlement was not found to be in good faith under section 877, or should that non settling tortfeasor remain jointly and severally liable, be entitled to a settlement offset so there is no chance the plaintiff will receive a double recovery and also have the right to seek indemnity from the settling tortfeasor? The Hospital offers no justification why, just because the plaintiff chose to settle with one tortfeasor (here Dr. Nishibayashi) and that tortfeasor elected to consummate the settlement even though it was not found to satisfy section 877, the Hospital should get a windfall of being exonerated for all liability for its tortious conduct because it refused to settle and forced the case to trial.

Simply put, the Hospital offers no justification for the continuation of the common law release rule other than the fact that its operation serves to afford it with unjustified protection from its tortious conduct.

II. Upon the Elimination of the Release Rule, the Hospital Should Remain Jointly Liable for its Tortious Conduct and Should Therefore Be Entitled to a Pro Tanto (Dollar-for-Dollar) Offset for the Amount of the Settlement Attributable to Plaintiff's Joint and Several Injuries.

In the opening brief on the merits, plaintiff acknowledged there is a split of authority in the United States whether, as a result of a settlement, a pro tanto (dollar-for-dollar) or pro rata (proportionate) setoff should be applied. (See OB 25.) Plaintiff also explained that California has chosen to employ the dollar-for-dollar approach both through the enactment of section 877 and, before the enactment of that section 877, through the common law. (See *Laurenzi v. Vranizan* (1945) 25 Cal.2d 806, 813; *Ellis v. Jewett Rhodes Motor Co.* (1938) 29 Cal.App.2d 395, 399.)

In its answer brief, the Hospital asks this Court to adopt a cafeteria approach under which different offset rules would be chosen depending on whether the settlement is found to be in good faith under section 877 (in which case the Hospital must concede a dollar-for dollar approach is used) or whether the settlement was not approved under that

section (in which case the Hospital argues proportionate offset applies). The Hospital has not referenced any jurisdiction that has adopted such a hybrid approach.[2]

The reason the Hospital asks this Court to rule in this manner is in recognition of the fact that the Hospital is foreclosed from asking this Court to adopt the proportionate rule in all cases (as did the jurisdictions it relies upon in its answer brief) because the Legislature has expressly rejected that approach in section 877 and instead has expressly enacted a dollar-for-dollar offset.

As now explained, if this Court accepts the Hospital's position to adopt a proportionate offset rule applying only to settlements not found in good faith under section 877 then that approach would render good faith settlements determinations largely illusory. This Court recently characterized the balance struck by section 877 as follows: "'while a good faith settlement cuts off the right of other defendants to seek contribution or comparative indemnity from the settling defendant, the nonsettling defendants obtain in return a reduction in their ultimate liability to the plaintiff.' [Citations.] [I]f a plaintiff's settlement completely offsets a damage award against a nonsettling joint tortfeasor or co-obligor, 'it reduces the judgment to zero by operation of law.' [Citation.]" (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1333.)

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[2]The Hospital notes that Mississippi has enacted a statute that contains a hybrid offset approach different than the one proposed by the Hospital. (AB 23, fn. 5.)

If a proportionate offset rule is adopted as to settlements not found in good faith under section 877 (as the Hospital urges) then both aspects of this balance will be skewed. First, under the Hospital's approach, if a settlement is not found to be in good faith, the verdict would be reduced by the settling defendant's proportionate liability. Since, under that approach, a non settling tortfeasor would not be liable for more than its proportionate share of liability, that non settling tortfeasor can never have a claim for contribution of equitable indemnity against the settling tortfeasor. (*McDermott, Inc. v. Amclyde* (1994) 511 U.S. 202, 209 ["The third alternative, supported by petitioner, involves a credit for the settling defendants' 'proportionate share" of responsibility for the total obligation. Under this approach, no suits for contribution from the settling defendants are permitted, nor are they necessary, because the nonsettling defendants pay no more than their share of the judgment.'"]).[3]

Thus, under the Hospital's approach, it will not matter to the settling tortfeasor whether or not the settlement is found to be in good faith under section 877. Either way

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[3]Thus, as a result of the *McDermott* Court's conclusion that in admiralty cases the proportionate offset rule would apply, the Court dismissed certiorari in a companion case which presented the issue "whether, in an action against several alleged joint tortfeasors under general maritime law, the plaintiff's settlement with one defendant bars a claim for contribution brought by nonsettling defendants against the settling defendant." (*Boca Grande Club v. Fla. Power & Light Co.* (1994) 511 U.S. 222, 222-223.) The Court explained: "Because the opinion that we announce today in *McDermott, Inc. v. AmClyde*, ante, p. 202, adopts the proportionate share rule, under which actions for contribution against settling defendants are neither necessary nor permitted, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with that opinion." (*Ibid.*)

the settling tortfeasor will not be subject to an indemnity claim. As one leading law review article in the area explains: "There is no reason to have good faith hearings in the absence of a right of contribution. If the plaintiff can collect its damages in any way that it wants when it litigates and prevails against both defendants, it is not logical to be concerned about fairness when the plaintiff settles with one defendant and litigates against the other.[Fn.] Also, there is no reason for such hearings under contribution regimes that do not provide contribution protection to a settling defendant. Then, the remedy for a non-settling defendant that pays more than its apportioned share of the liability is to seek contribution from the settling defendant. Finally, good faith hearings are not necessary under the apportioned share set-off rule because there the plaintiff, rather than the non-settling defendant, suffers the loss from a low settlement." (Kornhauser and Revesz, Settlements under Joint and Several Liability, 68 N.Y.U.L. Rev. 427, 443-444.)

Accordingly, under the Hospital's approach, the nonsettling tortfeasor will have absolutely no incentive to seek a good faith settlement determination as it will not be subject to any claim for contribution of equitable indemnity either with or without a good faith finding. Further, the Hospital's rule would also create a disincentive for the plaintiff to seek a good faith determination in a number of cases.

While in this case, it is true that the application of the proportionate offset rule would mean that Aidan would recover less from the jointly liable Hospital then he would

under the pro tanto, dollar-for-dollar offset rule, that is not always going to be the case. Rather, in the context of pretrial settlements, it will be just as likely that the application of the proportionate offset rule will yield a greater recovery to the plaintiff than will a pro tanto offset.

Indeed that was precisely what happened in *McDermott, Inc. v. Amclyde* (1994) 511 U.S. 202, 214 on which the Hospital relies. There, it was the non settling defendant that urged the Court to adopt a dollar-for dollar offset rule in admiralty cases and it was the plaintiff who urged the Court to adopt the proportionate offset rule. The Court explained: "It is . . . possible for the pro tanto rule to result in the nonsettlor paying less than its apportioned share, if, as in this case, the settlement is greater than the amount later determined by the court to be the settlors' equitable share." (*Ibid.*)

The determination whether a pro tanto offset or a proportionate liability offset will yield a greater recovery to the plaintiff can therefore only be determined through the hindsight of what ultimately occurred at trial. If the settling tortfeasor pays less than its proportionate share of liability found by the jury then the proportionate offset will reduce the plaintiff's recovery lower than under the dollar-for-dollar offset. However, if the settling tortfeasor pays more than its proportionate share of liability then the proportionate offset the plaintiff will have a greater recovery than under a pro tanto offset. This is the case because the settling tortfeasor may either be found by the jury not to be at fault at all or at fault for a percentage that means it paid more in settlement than it would have had it

not settled and proceeded to trial. In these instances, under the Hospital's proportionate offset approach there will be an offset of less than the settlement amount. In these cases, the Hospital's rule would thus result in both a smaller offset and will also result in the plaintiff partially obtaining a double recovery, contrary to the core basis for California's offset rule. (See *McComber v. Wells* (1999) 72 Cal.App.4th 512, 516-517.) Significantly, under the Hospital's approach, that could not be the case when a good faith determination has been made where the Legislative has required that there is to be a dollar-for-dollar offset.

Thus, in those cases where the plaintiff believes that the jury will ultimately find a low percentage of fault to the settling tortfeasor, the Hospital's proposed rule will actually create an incentive for the plaintiff not to seek a good faith determination as it will be in that plaintiff's financial interest to have the proportionate offset rule apply rather than the pro tanto offset required under section 877.

Accordingly, under the Hospital's approach (1) the settling tortfeasor has no incentive to seek a good faith determination while (2) the settling plaintiff may either be neutral or actually be motivated not to seek a good faith determination. It is thus the Hospital's approach that creates a disincentive to the use of section 877 and skews the balance the Legislature sought when it enacted that section.

This balance on the other hand is not disturbed in the least by application of a dollar-for-dollar offset as to a settlement regardless of whether a settlement is found to be

in good faith under section 877. If the dollar-for-dollar offset is applied then the settling defendant continues to have a strong motivation to obtain a good faith determination as that is the only way it could avoid a contribution or equitable indemnity claim. Further, since the dollar-for-dollar approach is the same as the offset employed when there is a good faith determination under section 877, there will never be an actual incentive for the plaintiff to avoid a good faith determination.

Next, the Hospital raises a series of supposed policy justifications for the use of a proportionate share offset. However, each policy justification applies every bit as much to settlements that are found to be in good faith as they do to settlements where a good faith finding is not made. But the Legislature (and this Court) has already determined that the policy justifications for the pro tanto rule nevertheless prevails. The one policy justification which the Hospital asserts for why a special rule should apply when there is no good faith determination is that, according to the Hospital, the pro tanto rule promotes "gamesmanship (such as here)." (AB 24.)

Once again the Hospital is not able to make an argument without casting unfounded aspersions. There were no games here. Plaintiff and Dr. Nishibayashi elected to consummate their settlement for Dr. Nishibayashi's policy limits after trial without the good faith determination and the trial court ruled that settlement was in the minor plaintiff's best interest, due to the fact that the Doctor was paying his full policy limits and because Aidan would still be entitled to recover his joint and several economic

damages from the Hospital. However, if the trial court were faced with a rule precluding Aidan's recovery of his joint and several damages from the Hospital then it is almost certain the Court would not have concluded that the settlement was in Aidan's best interest.

In short, the manner in which a settlements should be offset has been resolved by the Legislature and the Courts. The non settling defendant is only entitled to an offset for the dollar amount of the settlement attributable to the plaintiff's economic damages. Adopting the Hospital's hybrid approach would significantly dilute any motivation to employ the good faith settlement procedures under section 877.

III. None of the Issues Briefed by the Hospital Warrants this Court's Attention. In Any Event, the Hospital's Arguments Are Without Merit.

In its answer to the petition for review the Hospital raised a series of issues it urged this Court to also review. First, the Hospital challenged the Court of Appeal's conclusion that there is substantial evidence supporting the jury's finding that the Hospital's negligence was a cause of Aidan's injuries. In the unpublished portion of its opinion, the Court of Appeal thoroughly discussed the ample evidence supporting the verdict. (See Opinion pp.45-56.) Next, the Hospital raised issues that were not even addressed by the Court of Appeal in the first place. (Those issues are: (1) Whether the

jury should have been able to reduce Aidan's recovery by the mere possibility that he could receive future insurance payments even though there was no way of determining whether he would even be covered by any future insurance and (2) whether the Hospital's rejection of a settlement offer under Code of Civil Procedure section 998, entitled Aidan to interest based on the entire judgment.) The reason why the Court of Appeal declined to reach these issues is that, due to its conclusion that the release rule precluded Aidan from recovering the joint and several damages against the Hospital, the aspects of the judgment to which these issues related no longer existed. (Based on this reasoning the Court also declined to reach Aidan's cross appeal.)

In its answer brief on the merits, the Hospital briefs the issues raised in its answer to the petition for review and asserts that Aidan has waived his right to even brief these issues by not including them in his opening brief on the merits. The Hospital is mistaken.

This Court granted Aidan's Petition for Review without specifying that the Hospital's proposed additional issues should be briefed. As those issues were raised by the Hospital both in the Court of Appeal and in this Court, Aidan elected to not preemptively brief them. As a leading practice guide in the area explains:

> Addressing opposing party's issues: The Rules of Court do not state whether petitioner's opening brief on the merits should address issues specified in the answer to the petition for review (see ¶ 13:93) in cases where the supreme court has granted review on those additional issues. As a practical matter, however, it

will probably be difficult for the petitioner to do so, since the opposing party has not yet asserted the complete argument on those issues! In this situation, petitioner evidently has two options: (i) address the opposing party's issues in the opening brief, or (ii) await the opposing party's answer brief on the merits and then address those issues in the reply brief on the merits.

(TRG Civil Appeals and Writs, Review by California Supreme Court, paragraph 13:138.1, p. 13-36.)

None of the waiver cases the Hospital cites (AB 31) concern the issue whether one party has the obligation to preemptively brief an issue that was raised by the opposing party in its answer to the petition for review.

Further, as reflected by the Hospital's answer brief, it knows precisely what plaintiff's position is as to the issues it raised based on what the plaintiff argued in the Court of Appeal. Thus, the Hospital does not and cannot claim that it was hindered in briefing its own issues by reason of the fact plaintiff did not preemptively discuss those issues in the opening brief on the merits.

As now explained, the Hospital's issues do not warrant this court's attention and, in any event, lack merit

A. The Hospital's "No-causation" Argument Is Nothing More than a Thinly Disguised Challenge to the Court's of Appeal's Correct Conclusion That There Is Substantial Evidence Supporting the Judgment.

The Hospital condescendingly argues that while Aidan "is undoubtedly sympathetic" that is not a basis for liability (AB 31), as if that was the reason the Court of Appeal, based on its thorough analysis, concluded that there was substantial evidence of causation. Nothing the Hospital argues undermines that analysis contained in the unpublished portion of the Court of Appeal's opinion (at pages 45-56). While the Hospital attempts to convert this substantial evidence argument into an issue worthy of this Court's attention, it fails to do so. The Hospital simply does not like the jury's finding and the Court of Appeal's resolution of this issue. Rather, than reiterate what the Court of Appeal has already said on the subject, plaintiff will simply rely upon that analysis (as well as what plaintiff argued in his Respondent's Brief in the Court of Appeal at pages 43-73).

For the reasons explained in Aidan's Respondent's Brief in the Court of Appeal and for the reasons found by the Court of Appeal, the Hospital's substantial evidence challenge to the jury's causation finding is wholly lacking merit and does not warrant this Court's attention.

B. Civil Code Section 3333.1's Exception to the Collateral Source Rule Applies Only to Amounts Then "Payable" to the Plaintiff and Does Not Apply to Future Amounts Which Might Never Be "Payable."

The Hospital argues that the judgment should be reversed because the trial court precluded it from introducing evidence that Aidan would potentially be receiving future medical insurance payments for decades in the future. (AB 42.) The Hospital was allowed an offset for the insurance payments that were already paid. According to the Hospital, Civil Code, section 3333.1 applies to insurance payments which may or may never be made in the future as well as those payments which have already been made. As already referenced, the Court of Appeal declined to reach this issue and therefore there is no decision for this Court to even review. In any event the Hospital is mistaken.

1. The Language Of The Statute Supports The Trial Court's Ruling.

The Hospital recognizes that the starting point for the analysis of this issue is the language of the statute, but argues that the" plain language" of section 3333.1 supposedly supports its position. (AB 42.) Just the opposite is true.

In two respects the language of section 3333.1 demonstrates the Legislature did not intend an offset for potential future insurance payments. The first is the fact that the Legislature used the phrase "introduce evidence of any amount payable as a benefit to the plaintiff. . . ." In *Rollins v. Pizzarelli* (Fla. 2000) 761 So. 2d 294, 299, the Court interpreted a virtually identical Florida statute to conclude that no offset for potential future insurance payments was appropriate, explaining:

> "The term 'payable' has been defined in this Court's case law as 'meaning "capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable."' [Citation.] Black's Law Dictionary provides this same definition, but with an important amplification that "when used without qualification, [the] term normally means that the debt is payable at once, as opposed to 'owing.'" Black's Law Dictionary 1128 (6th ed. 1990).
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> "In accounting parlance, the term "payable," as in "accounts payable," has a similar usage. An "account payable" is defined in Black's Law Dictionary, in part, as a "liability representing an amount owed to a creditor, usually arising from purchase of merchandise or materials and supplies; not necessarily due or past due." Id. at 18 (emphasis supplied).
>
> "Thus, the most common usage of 'payable' strongly suggests a limitation to incurred expenses that have not yet been paid at the time of

trial, rather than potential future expenses that have not yet been incurred. Because a plaintiff's future medical expenses have not yet been incurred, these expenses cannot be presented to the PIP carrier for payment and therefore do not represent a liability or a "payable" benefit of the PIP carrier."

(Italics added.)

Rollins is consistent with how California courts have interpreted "payable" in other contexts. (See *Carlsen v. Unemployment Ins. Appeals Bd.* (1976) 64 Cal.App.3d 577, 585 ["We are also of the opinion that no wages were 'payable' to plaintiff, within the meaning of section 1252, after he was laid off as a carpenter. Black's Law Dictionary (rev. 4th ed. 1968) defines 'payable' as follows: 'Capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable. [Citation.] A sum of money is said to be payable when a person is under an obligation to pay it. 'Payable' may therefore signify an obligation to pay at a future time, but, when used without qualification, 'payable' means that the debt is payable at once, as opposed to 'owing.'" [Citations.]"]; *Burkett v. Continental Casualty Co.* (1969) 271 Cal.App.2d 360, 362 ["The word 'payable' does not necessarily mean that which might (or might not) have been obtained by the commencement of proceedings under the Workmen's Compensation Act. It is subject to the meaning that what has been awarded by the Workmen's Compensation Appeals Board but has not yet been collected is 'payable.'"]; *Crowell v. Harvey Inv. Co.*

(1932)128 Cal.App.241, 245 ["the words 'payable' and 'due' mean the same thing. The use of both words in one place and of but one in the other is simply a legislative idiosyncracy. Either word, alone, would have served in both places, or one in one place and its synonym in the other"].)

Thus, the use of the word "payable" by itself reflects that the Legislature intended to allow an offset as to only those amounts that the plaintiff was then legally entitled to receive. It did not intend to allow an offset as to those amounts that a plaintiff might receive in the future from an insurer that presently has no legal obligation to pay that amount.

The Hospital's effort to distinguish these authorities fails. Nothing the Hospital argues refutes the fact that the use of the word "payable" reflects a current obligation to pay a particular amount. It does not reflect the possibility that in the future there may or may not be an amount that is paid and as to which there is no present contractual obligation to pay. If that were what the Legislative intended to be, then it would have used language such as "paid or may be paid in the future." It did not.

This conclusion is bolstered by a second provision in section 3333.1 providing: "Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence." Thus, as a quid pro quo to the offset under section 3333.1, the Legislature afforded the plaintiff

the right to compensation for the insurance premiums actually "paid or contributed" to receive benefit used as that offset.

In order to harmonize the "amount payable" provision of section 3333.1 with that section's quid pro quo provision, it is necessary to construe "amount payable" as meaning those amounts to which the insured is entitled to be paid at the time of trial. If, as the Hospital argues, "amount payable" extends to benefits that might be paid years in the future, then the medical malpractice plaintiff's recovery will be diminished by those speculative insurance payments but that plaintiff will be deprived of the benefit of the quid pro quo provision of section 3333.1 as to those payments because there will have been no payment or contribution made to secure the plaintiff's right to those payments.

Thus, under the Hospital's position, a medical defendant would obtain the benefits of section 3333.1 without the plaintiff receiving the quid pro quo for those benefits. This is patently not what the Legislature intended.

2. The Hospital's Interpretation Should Be Rejected Because It Will Lead To Absurd Results.

At the time of verdict, Aidan's life expectancy was over 57 years. (RT 2251.) Under the Hospital's position, the jury should have been able to forecast whether Aidan would receive medical insurance for all or a part of this period even though there is no

existing contractual obligation requiring an insurer to pay for that future care. The insurance that Aidan was receiving up to trial was under his father's employer's insurance plan. It is nothing but speculation as to how long Aidan's father would remain at that same firm, whether that firm would continue offering the same health insurance plan, whether if Aidan's father changed jobs the new employer would offer health insurance, whether any new insurer would provide coverage to Aidan and if so what that coverage would be and how much it would cost. Simply put, the Hospital would have the jury engage in rank speculation in its effort to reduce Aidan's recovery.

It is not true that this is no less speculative than what the costs and need of future medical care will be as the Hospital argues. (AB 50.) Experts could opine whether Aidan will continue to need medical care and what that medical care will cost based upon Aidan's condition and the historical costs of similar care. That is far different from speculating what insurance a particular plaintiff will have available to him in the future. No expert will be able to opine whether Aidan's father will continue to be employed at the same law firm or whether any job he has in the future will offer the same or similar benefits.[4] Nor will an expert be able to offer such opinions regarding Aidan's future career.

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[4]These future events will be dependent upon subjective career and lifestyle choices and not based upon the future medical care a presently existing condition dictates.

In the Court of Appeal, the Hospital referenced a federal statutory scheme and a California statutory scheme to assert that Aidan has continuation rights under that policy. (AOB 70.) The Hospital downplays that position in its answer brief. (See AB 51.) In view of the quickly shifting landscape of the laws regulating health insurance, having a jury determine what laws would apply through Aidan's remaining lifetime would be rank speculation in the extreme.

3. The Hospital's Remaining Arguments on this Issue Lack Merit.

Contrary to the Hospital's position, *Fein v. Permanente Medical Group* (1985) 38 Cal. 3d 137, 165, fn 21, did not directly address the issue. Rather, this Court simply noted that "Plaintiff does raise a minor contention, however, which is somewhat related to this matter" and then proceeded to characterize that "Plaintiff, pointing out that he may not be covered by medical insurance in the future, apparently objects to any reduction of future damages on the basis of potential future collateral source benefits." (*Ibid.*) In declining to reverse on this basis, the Court reasoned: "Under the terms of the trial court's judgment, however, defendant's liability for such damages will be postponed only if plaintiff does in fact receive such collateral benefits; thus, it is difficult to see how plaintiff has any cause to complain about this aspect of the award." (*Ibid.*) Nowhere in this footnote did the Court analyze the language of section 3333.1 to determine whether a

defendant can introduce evidence of possible collateral source benefits the plaintiff may or may not receive regardless of whether there is even a contractual commitment requiring an insurer to even pay for that future care. *Fein* therefore could not be stretched to mean that this Court has actually considered and decided this issue.[5]

Further, the Hospital's argument that under plaintiff's view future insurers will have lien rights against the judgment, (AB 46, fn. 9) is beside the point. The issue whether any of Aidan's future insurer's will have any rights as to Aidan's future recovery is a contractual matter between Aidan and any future insurers. That has absolutely nothing to do with whether Aidan's recovery against the Hospital should be reduced because he may or may not have future insurance coverage.

Next, the Hospital's argument that unless section 3333.1 allows it to introduce evidence of future insurance benefits which the plaintiff may or may not receive, then a medical malpractice plaintiff is somehow in a better position than plaintiffs in other categories of cases under this Court's recent *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 567 decision. (AB 45.) The Hospital's position is absurd. First, in *Howell* this Court limited its opinion to past medical expenses and expressly declined

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[5]"It is well settled that language contained in a judicial opinion is '"to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not there considered. [Citation.]"' [Citations.]" (*People v. Banks* (1993) 6 Cal.4th 926, 945.) "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.' [Citation.]" (*Canales v. City of Alviso* (1970) 3 Cal.3d 118, 128, fn 2.)

to address whether its decision had any relevance to other issues. (*Ibid.* ["We express no opinion as to its relevance or admissibility on other issues, such as noneconomic damages or future medical expenses."]) Moreover, *Howell* concerned the limited issue of the measure of health care expense damages when there is a contracted-for reduced rate. It did not concern whether a jury could decline to award such expenses either when there is insurance or when there *may* be future insurance.

In short, the trial court correctly limited the Hospital to introducing evidence of medical insurance benefits that were actually then receivable and not those that might be received in the future.

C. The Trial Court Correctly Calculated Prejudgment Interest on the Judgment in its Entirety.

Because the verdict in this case far exceeded the statutory settlement offer plaintiff made under Code of Civil Procedure section 998, the trial court awarded prejudgment interest under Civil Code section 3291. (AA Tab 63, p. 1550.)

The Hospital acknowledges that an award of prejudgment interest was warranted but argues that the award in this case was too high because it was based on calculating the award on the entire present value damages award. According to the Hospital, the award should instead have been based on the periodic payments not presently due. (AB 55.)

Again, this issue was not reached by the Court of Appeal and therefore there is again nothing for this court to review.

The Hospital argues that (1) because pre judgment interest should not be included in the judgment for purposes of calculating post judgment interest and (2) because post judgment interest does not accrue on the periodic payment portion of the judgment until each payment becomes due, then (3) it necessarily follows that pre judgment interest under section 3291 does not accrue on the periodic payment portion of the judgment until each payment becomes due. For several reasons the Hospital's contention lacks merit.

First, the Hospital's position is again at odds with the text of the statute at issue.

Section 3291 provides: "If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment."

Section 3291 thus uses the word "judgment" as both (1) the benchmark for determining whether the plaintiff has received a more favorable result than the section 998 settlement offer and (2) to signify the amount on which prejudgment interest accrues. The Hospital does not contest that in determining whether there is entitlement to

prejudgment interest under section 3291 it is the entire judgment, including the present value of future damages, that is compared to the section 998 settlement offer. (*Deocampo v. Ahn* (2002) 101 Cal.App.4th 758, 780 ["When determining whether to award prejudgment interest, the trier of fact's award of future economic damages is reduced to its present value for the purpose of the computation that determines if the verdict award is more favorable to the plaintiff than the plaintiff's section 998 offer to compromise"].)

The only issue is therefore what constitutes the "judgment" for purposes of determining the amount on which that prejudgment interest accrues. It is fundamental that "'[a] word or phrase will be given the same meaning each time it appears in a statute . . . .' [Citations.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 255.) Thus, since in determining whether the entitlement to prejudgment interest is triggered "judgment" refers to the entire judgment including the present value of future payments, then it must also be the case that when the Legislature stated that "the judgment shall bear interest" it likewise intended the entire judgment.

In addition to being contrary to the express terms of the statute, the Hospital's position would subvert the purposes of sections 998 and 3291. Those purposes are to "'encourage settlements and penalize those who refuse reasonable settlement offers.' [Citation.] In addition, '[i]n enacting section 3291, the Legislature provided a means of compensating personal injury plaintiffs for loss of use of money during the prejudgment period.' [Citation.]" (*Steinfeld v. Foote-Goldman Proctologic Medical Group* (1997) 60

Cal.App.4th 13, 20.)

As this case exemplifies, in many medical malpractice actions, the bulk of damages being sought are in the nature of future damages. If the Hospital's position were accepted then a defendant in such an action will know that if it rejects a section 998 settlement offer then it will not have to pay prejudgment interest on the present value portion of the judgment. Instead, that defendant will only have to pay post judgment interest on each periodic payment from the date that payment becomes due – *precisely the same amount it would have had to pay even if there had been no section 998 settlement offer.* In these cases section 3291's incentive to settle and its penalty for not accepting a reasonable settlement offer would be severely diluted.

Moreover, under the Hospital's position, it would be the defendant who unreasonably denies a Section 998 settlement offer that is placed in control of determining its own fate. If that defendant elects a periodic payment judgment it can largely avoid the consequences of its failure to accept a section 998 settlement offer (while if it elects not to have the future payments periodically then, even under the Hospital's position, it would be required to suffer the full consequences of its unreasonable refusal).

Thus, in *Hrimnak v. Watkins* (1995) 38 Cal.App.4th 964, the Court rejected an identical contention reasoning:

> Amici curiae also contend that prejudgment interest under section 998 and Civil Code section 3291 cannot be awarded on the periodic portion of the judgment.

> Amici curiae argue that Civil Code section 3291 simply changes the starting date for legal interest on the judgment from the date of entry of judgment to the date of the section 998 settlement offer; it necessarily follows, argue amici curiae, that any portion of the judgment that by law is not subject to interest from the date of entry of judgment--such as a future periodic payment, which bears interest only if left unpaid after its future payment date [citation]--also should not be subject to interest from the date of the section 998 offer. Amici curiae mistakenly confuse interest on unpaid judgment amounts with the prejudgment interest penalty under section 998 and Civil Code section 3291.
>
> Under section 998, either side to a lawsuit can serve a written settlement offer on the other. Under Civil Code section 3291, if a plaintiff makes a section 998 offer to a defendant which is not accepted "and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 . . . which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment." Section 998 and Civil Code section 3291 are designed to encourage settlements and penalize those who refuse reasonable settlement offers. [Citations.] Amici curiae's argument, besides mixing legal apples and oranges, would also undermine this purpose.[6]

Thus, the language and purpose of section 3291 support the trial court's ruling that prejudgment interest is calculated based upon the present value amount of the judgment.

Contrary to the Hospital's argument, *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 530-533, is not to the contrary. In *Hess* the Court held only that prejudgment interest is not added to the judgment for calculating post judgment interest. It did not rule that the "judgment" for purposes of calculating prejudgment interest should not include the present value of future damages.

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[6]The Hospital's contends that this analysis is dicta because it was in response to an argument made by Amici. But just because the Court is responding to the argument made by Amici does not mean it was not necessary to its conclusion. In any event, characterizing this detailed analysis as dicta does not undermine its correctness.

CONCLUSION

For the foregoing reasons and for the reasons explained in the opening brief on the merits, 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. The Court should further decline to review the additional issues raised by the Hospital, or in the alternative conclude that those issues do not merit reversal of the judgment.

Dated: October 27, 2011

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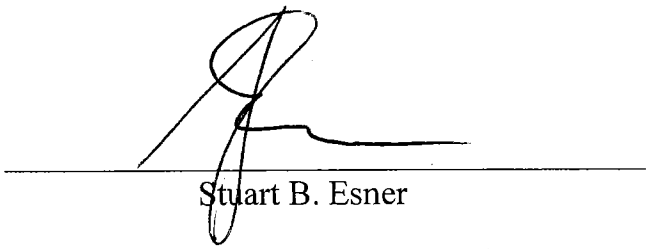

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