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IN THE SUPREME COURT OF CALIFORNIA

**B.B, a Minor, etc., et al.,**
*Plaintiffs, Respondents, and Petitioners,*
v.
**COUNTY OF LOS ANGELES et al.,**
*Defendants and Appellants.*

**T.E., a Minor, etc., et al.,**
*Plaintiffs and Respondents,*
v.
**COUNTY OF LOS ANGELES et al.,**
*Defendants and Appellants.*

**D.B., a Minor, etc., et al.,**
*Plaintiffs and Respondents,*
v.
**COUNTY OF LOS ANGELES et al.,**
*Defendants and Appellants.*

After a Decision by the Court of Appeal
Second Appellate District, Division Three
Case No. B264946

# ANSWER TO AMICI CURIAE BRIEFS OF THE CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND CALIFORNIA HOSPITAL ASSOCIATION; THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA; AND MICHAEL AND CINDY BURCH

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## INTRODUCTION

Amici California Medical Association, California Dental Association, California Hospital Association, and Civil Justice Association of California rehash Defendants' failed argument that Civil Code section 1431.2 extends the benefits of Proposition 51 even to intentional tortfeasors, providing a windfall whenever merely negligent actors have helped cause the injury.[1] Amici misinterpret section 1431.2's statutory language, legislative history, and very purpose.

First, Amici attempt to rewrite the jury's express findings regarding Plaintiffs' decedent Darren Burley's *negligence* and defendant David Aviles's intentional misconduct. They insist that the jury's apportionment findings mean that Burley was somehow more culpable than Aviles. As explained below, however, those findings reflect the jury's conclusions regarding *factual causation*, not relative culpability.

Next, contrary to Amici's contentions, neither the statutory language, ballot materials, other purported legislative history, caselaw, nor the Restatement supports Defendants' view that

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1 Unless otherwise noted, all statutory references are to the Civil Code.

section 1431.2 altered California's established comparative fault law by reducing the exposure of even intentional bad actors based on others' unintentional conduct. To the contrary, each one of the above factors supports Plaintiffs' view that the statute imposes a "one-way shifting of liability," limiting the liability of negligent tortfeasors based on others' conduct while refusing to limit the 100% liability of intentional tortfeasors based on others' negligence.

Amici Michael and Cindy Burch offer a purported "compromise" interpretation. However, that fallback is an illogical and self-serving suggestion simply made for the purpose of preserving their seven-figure judgment that was recently affirmed in *Burch v. CertainTeed Corporation* (2019) 34 Cal.App.5th 341, review granted July 10, 2019, S255969. The Burches assert that section 1431.2 reduces an intentional tortfeasor's liability for non-economic damages based on the plaintiff's comparative fault, but prohibits any reduction based on a co-tortfeasor's fault. This argument conflicts both with the statutory language and with California's established comparative fault law.

Finally, we underscore that none of Amici's purported policy or fairness concerns begins to justify rejecting California's historical understanding of comparative fault by limiting intentional tortfeasors' liability based on others' unintentional conduct. For instance, affording intentional tortfeasors the benefit of equitable apportionment would be inconsistent with the fundamental doctrine that an intentionally bad actor has forfeited the right of any form of equity vis-à-vis unintentional actors. It would also signal an inappropriate tolerance for such abhorrent conduct. Indeed, California law limiting intentional tortfeasors' rights in the areas of indemnity, contribution, contracts, and insurance reflects this policy judgment. And, contrary to Amici's bizarre speculation, holding an intentional tortfeasor jointly and severally liable would hardly incentivize individuals to provoke battery by a police officer or resist arrest.

## I.

## THIS COURT SHOULD FIRMLY REJECT AMICI'S FRONTAL ASSAULT ON THE VERDICT. THERE IS NO PLACE FOR AMICI TO RE-LITIGATE THE JURY'S FINDINGS OR CONJECTURE ABOUT THE JURY'S INTENT.

Like Defendants, Amici attempt to subvert the jury's finding that Burley acted *negligently*. (2AA 346, 440.) Amici

contend that "it is more reasonable to characterize his behavior as motivated by a very real intention to harm someone, either the woman [with whom he was involved in a dispute] or the deputies or all of them." (CMA ACB 28–29; see CJAC ACB 33 [alleging that "Burley's misconduct smacks of intentionality more than that of the deputy who was found to have intentionally used excessive force"]; see also Burch ACB 19–20 [suggesting that "if Burley was an intentional (not negligent) actor, then defendants could obtain a 40% damages reduction reflecting that intentional misconduct"]; ABM 44.)[2]

As we have previously explained, labeling Burley an "intentional wrongdoer" (allegedly more culpable even than Aviles) constitutes an improper frontal assault on the verdict. (B.B. RBM 47.) Moreover, it also ignores the fact that Defendants undeniably *waived* the issue. (*Id.* at 47–48.)

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[2] We refer to the "Amici Curiae Brief of California Medical Association, California Dental Association, and California Hospital Association in Support of Defendants and Appellants" as the "CMA ACB," the "Amicus Brief of the Civil Justice Association of California in Support of Defendants" as the "CJAC ACB," and the "Brief of Amici Curiae Michael and Cindy Burch in Support of Plaintiffs" as the "Burch ACB."

The jury unequivocally found that Burley was merely negligent. (2AA 346, 440 ["Was Darren Burley *negligent*?"; "Was Darren Burley's *negligence* a substantial factor in causing his death?"], italics added.) Despite their duty to establish their affirmative defense[s] based on Burley's conduct, Defendants never even asked the jury to determine whether Burley had acted intentionally. (18RT 5102–5103; see also 17RT 4952–53.)

Thus, Defendants long ago waived any conceivable argument that Burley's conduct was "intentional" by (1) failing to prove as much at trial, (2) fully acquiescing in the special verdict form, and (3) never raising this argument at the Court of Appeal. Amici cannot "unwaive" the parties' strategic decisions about their own case.

Besides attempting to blacken Burley's name in the eyes of this Court, Amici, like Defendants, try to white-wash the jury's express finding that Aviles committed intentional wrongdoing. Their tool is a hypothetical in which the woman with whom Burley had a dispute is "the plaintiff" and Burley a co-defendant. (CMA ACB 29; see ABM 48.) In this inapposite hypothetical, the woman is injured when police try to restrain Burley and Aviles "accidentally [strikes] her." (CMA ACB 29.) According to Amici,

in such circumstances, it would be reasonable for a jury to find Burley twice as responsible as Aviles. (*Id.* at 29–30.)

The desperation underlying this "hypothetical" is palpable. Amici are literally forced to reverse *both* halves of the jury's factual determinations in order to make their point. Here, the jury expressly found that Aviles had committed battery, not that he had "accidentally" injured Burley. (2AA 345.) Likewise, contrary to Amici's suggestion that Burley was an intentional tortfeasor, the jury expressly found that he had only acted negligently. (CMA ACB 29; 2AA 440.)

Moreover, Amici ignore the fact that after fully considering Burley's conduct the jury still found that Aviles had committed intentional wrongdoing. The instructions that the jury received concerning battery and the affirmative defenses of self-defense and defense of others required the jury to determine whether Aviles's use of force was reasonably necessary to counter Burley's resistance and/or to protect himself or others. (2AA 331–333.) Even considering Burley's resistance and whatever potential threat he may have posed, the jury concluded that Aviles's use of force had not been reasonably necessary and therefore constituted battery. (2AA 345.)

Finally, in an effort to negate the jury's unambiguous verdict finding, Amici improperly speculate regarding the jury's intent. They assert that "[a]lthough there is no way to know for sure, it is *possible* that ... *the jury itself intended*" that its apportionment findings would limit Aviles's liability. (CMA ACB 32.) In Amici's view, "It is hard to believe the jury made those calculations of fault completely in the abstract, with no consideration of the likely significance of those findings." (*Ibid.*)

Where to begin? First, speculating about what it is "possible" the jury might have been thinking and then using that unbridled power to undo the jury's factual findings would open a Pandora's Box. Although "guess-what-the-jury-was really thinking" might be a fun parlor game, it is no way to decide the results in a given case—much less how to properly interpret an important statute. The entire exercise is a studied attempt at distraction from the true merits.

Second, the only way that (a) the stated purposes of Proposition 51, (b) the language of section 1431.2, and (c) California's long-standing distinction between negligence versus intentional acts like battery can be reconciled is by

accepting the "one-way" rule we have explicated. (B.B. OBM 8, 31, 35–36; B.B. RBM 11, 39, 49, 52.)

## II.

## SECTION 1431.2 DOES NOT EXTEND THE BENEFITS OF APPORTIONMENT TO INTENTIONAL TORTFEASORS. PERIOD.

### A. Nothing in the statute's language explicitly extends the *benefits* of apportionment to all defendants.

Amici repeatedly intone that the statute's plain language "broadly applies to all tort actions 'for personal injury, property damage, or wrongful death" and that "nothing in the statutory language nor in the ballot materials ... demonstrates an intention to limit its application to negligence." (CMA ACB 33; see *id.* at 40–41, 55.) Amici then assert that Plaintiffs' position is that the statute "only applies to *negligence actions* because the only actions that are 'based upon principles of comparative fault' are negligence actions." (CMA ACB 60; see CJAC ACB 17 ["Plaintiffs contend these words ['based upon principles of comparative fault'] exclude from apportionment any defendant who acts 'intentionally' because 'comparative fault' is necessarily restricted to 'negligent' conduct by defendants"].)

The foregoing characterizations are all false. Our position has never been that the statutory limits only apply in negligence actions or exclude from apportionment any defendant who acted intentionally. Rather, we maintain that the statute's "comparative fault" clause only *benefits* unintentional tortfeasors. (See, e.g., B.B. RBM 15.) For example, comparative fault principles can limit strictly liable tortfeasors' liability, (see, e.g., *Daly v. General Motors Corp.* ("*Daly*") (1978) 20 Cal.3d 725, 742), and limit negligent tortfeasors' liability based on others' intentional conduct, (see, e.g., *Weidenfeller v. Star & Garter* ("*Weidenfeller*") (1991) 1 Cal.App.4th 1, 6–7).

Amici insist, however, that section 1431.2 *limits* even intentional tortfeasors' liability because the statute refers to "comparative fault," not "comparative negligence" (as the doctrine was originally called.) (CMA ACB 55–57.) As noted above, Plaintiffs do not contend that comparative fault principles protect only negligent tortfeasors. Amici refuse to acknowledge that, "comparative fault" is a term of art and that the statute incorporated the term's then-existing meaning. (See Part III(A), *post*; B.B. OBM 22–23; B.B. RBM 30–31.) The CMA Amici fail to acknowledge, let alone attempt to distinguish, the consistent line

of pre-Proposition 51 caselaw that we cited demonstrating that preexisting comparative fault principles did not permit an intentional tortfeasor to reduce his or her liability based on another's negligence. (B.B. RBM 33–34.)

### B. Neither Proposition 51's ballot materials, nor other purported legislative history, suggest that section 1431.2 was intended to limit the liability of intentional tortfeasors.

Amici assert that a hypothetical described in Proposition 51's ballot pamphlet—concerning a lawsuit against a drunk driver and a city after the driver speeds through a faulty red light—"[e]ssentially [w]as a [h]ybrid [o]f [i]ntentional and [n]egligent [t]orts" and therefore supports Defendants' view that the statute limits intentional tortfeasors' liability. (CMA ACB 30–31; see CJAC ACB 22–25.) Nonsense.

This hypothetical is fully consistent with Plaintiffs' view that section 1431.2 permits a *one-way shifting* of liability in a case involving both intentional and negligent tortfeasors. In such a case, the statute denies intentional tortfeasors any benefits, but their portion of fault would remain relevant because it would limit the exposure of any merely negligent (or strictly liable) party. (B.B. OBM 8, 31, 35–36; B.B. RBM 11, 39, 49, 52.)

Assuming arguendo that a drunk driver would be considered an intentional tortfeasor, (*cf. Sorensen v. Allred* ("*Sorensen*") (1980) 112 Cal.App.3d 717, 725 [describing drunk driver as reckless or grossly negligent]), the driver would be 100% liable, while the negligent city would be liable for non-economic damages only in direct proportion to its percentage of fault, (*Evangelatos v. Superior Court* ("*Evangelatos*") (1988) 44 Cal.3d 1188, 1245).

Nor does other purported legislative history cited by Amici demonstrate that section 1431.2 was intended to limit intentional tortfeasors' liability. Amici assert that "Prop. 51 was inspired by MICRA" and intended to remedy a "problem" inherent in MICRA that allows a plaintiff who pleads an intentional tort to bypass MICRA's limitations. (CMA ACB 44–46.) Nonsense. First, MICRA involves setting an artificial ceiling for non-economic damages—it has nothing to do with allocating fault as between various actors. Second, Amici cite no legislative history demonstrating that Proposition 51 was a response to any supposed "problem" with MICRA. Had Proposition 51's proponents intended it to limit even intentional tortfeasors' liability, they easily could have (and should have) explicitly stated that intent in the statutory language.

Moreover, Amici provide no support for their accusation that MICRA's inapplicability to intentional torts has been a "problem." Despite unrestricted liability for medical battery for many years, Amici cite no case or other source suggesting that such liability has incentivized frivolous medical battery claims. This is not surprising given courts' careful distinction between medical battery—which "occurs when a doctor performs a procedure without obtaining any consent"—and professional negligence—"perform[ing] a procedure without first adequately disclosing the risks and alternatives." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324–327 [reversing order denying JNOV motion on medical battery claim where jury "instruction conflated the theories of negligence and battery"].)

## III.

## HISTORICALLY, THE COMPARATIVE FAULT DOCTRINE HAS PROTECTED ONLY *UNINTENTIONAL* TORTFEASORS BASED ON OTHERS' FAULT.

### A. California's comparative fault doctrine historically has not benefitted intentional tortfeasors.

Amici contend that pre-Proposition 51 caselaw shows that the statutory phrase "principles of comparative fault" means that "all parties to a tort lawsuit whose conduct contributes to the

injury animating the litigation" are subject to "'comparative responsibility' and 'equitable allocation of loss.'" (CJAC ACB 19; see CMA ACB 37 ["Even before the election of 1986, the trend was toward comparison of fault for intentional torts"].) We fully agree with Amici that an intentional tortfeasor's portion of fault would limit any unintentional party's exposure, (B.B. OBM 8, 31, 35–36; B.B. RBM 11, 39, 49, 52). However, none of Amici's cited cases suggests the inverse: that under comparative fault principles, an intentional tortfeasor's liability can be reduced based on the mere negligence of others. (CJAC ACB 19–22; CMA ACB 37). Thus, although Amici cite *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 825–826, it did not concern intentional torts at all. (CJAC ACB 19.) Likewise, *Daly, supra*, 20 Cal.3d at 737, and *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 325, both involved strict liability, not intentional misconduct. (CJAC ACB 19–20; CMA ACB 37.) Nor did Amici's non-Supreme Court authorities: *Sorensen, supra*, 112 Cal.App.3d at 725–726, and *Zavala v. Regents of University of California* ("*Zavala*") (1981) 125 Cal.App.3d 646, 650, involved recklessness or willful misconduct, not any intentional conduct. (CJAC ACB 20–21; CMA ACB 37.)

Finally, Amici wrongly assert that the reason *Allen v. Sundean* ("*Allen*") (1982) 137 Cal.App.3d 216, declined to "extend principles of comparative responsibility" to the benefit of an intentional tortfeasor was because of "*American Motorcycle* [*Assn. v. Superior Court* ("*American Motorcycle*") (1978) 20 Cal.3d 578]'s endorsement of 'joint and several liability,'" a doctrine that section 1431.2 later curtailed in part. (CJAC ACB 21–22.) Contrary to that contention, *American Motorcycle*'s endorsement of joint and several liability was not the reason *Allen* denied intentional tortfeasor indemnity from a negligent co-defendant. (*Allen*, *supra*, 137 Cal.App.3d at 224–227.) Rather, *Allen* expressly cited the language in *American Motorcycle* that "appears to exclude intentional tort[feasor]s from [benefitting from] the comparative fault system." (*Allen*, *supra*, 137 Cal.App.3d at 226 & fn. 4, citing *American Motorcycle*, *supra*, 20 Cal.3d at 607–608.)

### B. Nothing in Proposition 51 altered California's long-established understanding of comparative fault.

Amici contend that Proposition 51's adoption of several (as opposed to joint and several) liability provides authority for limiting intentional tortfeasors' liability based on others' fault.

(CJAC ACB 22.) Not so. The adoption of several liability in actions based on principles of comparative fault hardly supports—much less requires—changing the doctrine of comparative fault *to benefit* intentional tortfeasors. As this Court explained in *American Motorcycle, supra,* California's adoption of comparative fault does not "logically compel[] the abolition of joint and several liability of concurrent tortfeasors." (20 Cal.3d at 590.)

Underscoring this point, the Restatement (Third) of Torts: Apportionment of Liability provides that an intentional tortfeasor "is jointly and severally liable for any indivisible injury legally caused by the tortious conduct" *notwithstanding* the jurisdiction's "rule regarding joint and several or several liability for independent nonintentional tortfeasors." (§ 12, com. a.) Indeed, the Restatement notes that "[e]ven among states with statutes that abolish joint and several liability and that do not have an explicit exception for intentional tortfeasors, the courts have *usually held* that intentional tortfeasors are jointly and severally liable." (*Ibid.*, reporter's notes, com. B, italics added.) As an example, the Restatement cites the "extensive discussion in dicta" in *Weidenfeller, supra,* 1 Cal.App.4th at 6–7, "explaining

why an intentional tortfeasor would be jointly and severally liable notwithstanding" section 1431.2's several-liability rule. (Rest.3d Torts: Apportionment of Liability, § 12, reporter's notes, com. b.) Indeed, the Restatement underscores the error in Amici's contention by pointing out that "[n]ot a single appellate decision has been found that stands for the proposition that joint and several liability of intentional tortfeasors has been abrogated or modified" and that "[c]ommentators generally support the retention of joint and several liability for intentional tortfeasors." (*Ibid.*) Moreover, the Restatement also explains,

> one reason for including all tortfeasors in a comparative-responsibility apportionment system is the administrative difficulty of doing otherwise when intentional, negligent, and strictly liable defendants are all liable for a plaintiff's indivisible injury. There are no comparable administrative complexities to holding one tortfeasor jointly and severally liable for the same harm for which another tortfeasor is held only severally liable.

(*Ibid.*) Thus, nothing in section 1431.2's adoption of several liability supports the necessity or desirability of applying that rule to benefit intentional tortfeasors.

Amici strain to dismiss the obvious historical understanding of "comparative fault" in interpreting section 1431.2. They insist that the voters *supposedly* made clear

their intent that the statute applies several liability to all personal injury, property damage, and wrongful death actions, including ones based on intentional torts. (CMA ACB 44.)

But this interpretation renders the statute's "comparative fault" clause surplusage. (See B.B. RBM 27, 29.) Additionally, it is inconsistent with our grammatical argument construing the statute in accordance with the "series-qualifier canon." (See *id.* at 28–29.)

Amici respond that "'[g]rammatical construction and punctuation may be ignored and even clauses of the statute may be transposed and rearranged in order to ascertain and give effect to the true intent and meaning of statutory enactments.'" (CJAC ACB 18, citing *People v. Strickler* (1914) 25 Cal.App. 60, 66.) Although rules of ordinary grammar may be ignored in some cases—or words "rearranged"—this cannot begin to justify the nullification of an entire statutory clause. (B.B. OBM 21–22; B.B. RBM 27–29.)

The Burch Amici's suggested "compromise rule"—reducing an intentional tortfeasor's liability for non-economic damages based on the plaintiff's comparative fault, but prohibiting any reduction based on a co-tortfeasor's fault—is just as bad. (Burch

ACB 20.) It directly conflicts with established comparative fault law and thus with the key clause in section 1431.2 limiting the statute's reach by "principles of comparative fault." Those preexisting principles prohibited an intentional tortfeasor from reducing his liability based on the plaintiff's negligence. (B.B. RBM 33–34, citing *Blake v. Moore* (1984) 162 Cal.App.3d 700, 707; *Phelps v. Superior Court* (1982) 136 Cal.App.3d 802, 805–806, 815; *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 176; *Southern Pac. Transportation Co. v. State of California* (1981) 115 Cal.App.3d 116, 121; see also *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 349–350; *Weidenfeller, supra,* 1 Cal.App.4th at 7.)[3]

Moreover, *none* of the cases that the Burch Amici cite in support of their "compromise rule" even concerned an intentional tortfeasor. (Burch ACB 20–21.)

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[3] According to the Burch Amici, holding Aviles jointly and severally liable for Plaintiffs' full damages could result in "perceived unfairness." (Burch ACB 17, 21.) But how is it unfair that an intentional tortfeasor pay 100% of Plaintiffs' damages where the decedent was merely negligent? To the contrary, it would be unfair if the opposite result would occur. (See Part IV, *post.*)

- *American Motorcycle*, *supra*, 20 Cal.3d at 584–585, 591, concerned equitable indemnity between *negligent* concurrent tortfeasors. Indeed, *American Motorcycle* suggested that only *unintentional* tortfeasors have a right to partial indemnity on a comparative fault basis. (*Id.* at 607–608.)
- *Zavala*, *supra*, 125 Cal.App.3d at 647, involved a negligent defendant and a plaintiff who had committed willful and wanton—but *not intentional*—misconduct. Moreover, *Zavala* favorably cited cases prohibiting intentional tortfeasors from benefitting from apportionment. (*Id.* at 650.)
- In *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 836, 839–840, the parties were negligent and strictly liable.
- Likewise, in *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 270, the parties were apparently negligent.

Given the absence of any textual or historical support for the Burch Amici's position, adopting their results-oriented "compromise" would require that this Court do something it has repeatedly stated it has "'no power'" to do: rewrite a statute "'so

as to make it conform to a presumed intention which is not expressed.'" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, quoting *Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365;
see, e.g., *County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 446.)

### C. Neither post-Proposition 51 caselaw, nor Amici's other cited authority, undermines the historical understanding of comparative fault.

While conceding that there may, at least, be "controversy" regarding whether comparative fault principles limit intentional tortfeasors' liability, Amici argue that the "trend" is to construe such principles (and therefore section 1431.2's "comparative fault" clause) as limiting even intentional tortfeasors' liability. (CMA ACB 37–38, 61–62; see CJAC ACB 25–27.) But none of Amici's cited authorities supports their contention.

First, this Court's post-Proposition 51 decisions—*Evangelatos, supra,* 44 Cal.3d at 1198; *DaFonte v. Up-Right, Inc.* ("*DaFonte*") (1992) 2 Cal.4th 593; *Richards v. Owens-Illinois, Inc.* ("*Richards*") (1997) 14 Cal.4th 985; and *Rashidi v. Moser* ("*Rashidi*") (2014) 60 Cal.4th 718—do *not support* the view that section 1431.2 limits intentional tortfeasors' liability based on

others' negligence. (Cf. CMA ACB 37–39; CJAC ACB 25–26.) As we previously explained, *Evangelatos* never addressed whether, nor suggested that, Proposition 51's several-liability rule would "appl[y] to causes of action based on intentional tortious conduct." (44 Cal.3d at 1202; see B.B. RBM 41.) Moreover, as Amici are forced to concede, "*DaFonte*, *Richards*, and *Rashidi* did not involve intentional tortfeasors and their expressions about the scope and application of section 1431.2 might then arguably be characterized as non-binding *dicta.*" (CJAC ACB 26.) Likewise, the excerpt that Amici quote from the California Practice Guide citing *DaFonte, supra,* does *not address* intentional tortfeasors. (CJAC ACB 25, citing Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2018) ¶ 3:30.)

Thus, Amici are forced to retreat and limply argue that "'there is dicta and then … there is Supreme Court dicta." (CJAC ACB 26, citing *Schwab v. Crosby* ("*Schwab*") (11th Cir. 2006) 451 F.3d 1308, 1325.) *Schwab*, a non-California, federal case, can shed little (if any) light on the purely California question of the role of California dicta. In any event, however, by its own terms *Schwab* is strikingly distinguishable. It dealt not with "devoid-of-analysis, throw-away kind of dicta," but, rather, with dicta that

was "well thought out, thoroughly reasoned, and carefully articulated" and that "constitute[d] an entire, separately enumerated section of the Supreme Court's ... opinion—three long, citation-laden paragraphs, consisting of more than five hundred words." (451 F.3d at 1325.) Here, by contrast, Amici rely on terse dicta that is comparatively lacking in analysis. (CJAC ACB 25–26; CMA ACB 38–39; see *DaFonte, supra,* 2 Cal.4th at 601–602; *Richards, supra,* 14 Cal.4th at 997; *Rashidi, supra,* 60 Cal.4th at 722.)

Amici also cite this Court's comments in *Amex Life Assurance Co. v. Superior Court* ("*Amex*") (1997) 14 Cal.4th 1231, 1241, regarding specific dicta that this Court considered "'particularly significant.'" (CJAC ACB 26.) But *Amex* is inapposite because there the case that it cited in dicta had specifically "contrast[ed] its facts with facts like those" in *Amex.* (14 Cal.4th at 1241.) Conversely, in *DaFonte, Richards,* and *Rashidi,* this Court never even considered facts involving an intentional tortfeasor. Thus, their dicta is hardly "significant." (*Amex, supra,* 14 Cal.4th at 1241.)

But, even if we assume, arguendo, that the foregoing dicta were somehow significant, other decisions from this Court have

repeatedly described section 1431.2 as limiting a defendant's liability only in a case "based upon principles of comparative fault." (B.B. RBM 13, citing *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1156; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 835; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 959, fn. 1.) And, as we have explained, those principles do not limit an intentional tortfeasor's liability based on others' negligence. (See B.B. OBM 22–27; B.B. RBM 30–40.)

Resorting to non-California authority, Amici contend that in *Blazovic v. Andrich* ("*Blazovic*") (1991) 124 N.J. 90, the New Jersey Supreme Court addressed "the issue now before this Court" and decided it in Defendants' favor. (CJAC ACB 27.) To the contrary, *Blazovic*'s actual holding is consistent with California's historical understanding of the comparative fault doctrine; *Blazovic*, like *Weidenfeller*, concerned whether a negligent defendant could reduce its liability based on an intentional tortfeasor's relative fault. Both courts held that negligent defendants were entitled to a reduction in their liability based on the intentional tortfeasors' proportion of fault. (*Weidenfeller*, *supra*, 1 Cal.App.4th at 4–7; *Blazovic*, *supra*, 124 N.J. at 92-93 and 108–109.) We fully agree–that is exactly what

our “one way” shifting interpretation has consistently posited. (See, e.g., B.B. OBM 31; see B.B. RBM 49.)

But neither case involved the only question at issue here: whether an intentional tortfeasor defendant (such as Aviles) may affirmatively benefit by having his non-economic damages liability reduced based on the negligence of others.

Indeed, *Weidenfeller*, *supra*, on equivalent facts, endorsed the “common law determination that a party who commits intentional misconduct should not be entitled to escape responsibility for damages based upon the negligence of the victim or a joint tortfeasor.” (1 Cal.App.4th at 7; see *Martin By and Through Martin v. U.S.* (9th Cir. 1993) 984 F.2d 1033, 1039–1040 [acknowledging “the principle that intentional tortfeasors should not be able to shift the financial burden to a negligent party”].)

Besides being inapposite, there is another hole in Amici’s reliance on *Blazovic*. To the extent that its dicta might theoretically support limiting intentional tortfeasors’ liability based on others’ negligence, Amici have not provided enough information about the history and evolution of New Jersey’s comparative fault doctrine for this Court to determine whether

that dicta may be relevant at all in interpreting section 1431.2. (See, e.g., *Sorensen, supra,* 112 Cal.App.3d at 725 [declining to decide comparative fault doctrine's application to reckless defendant in light of "out-of-state interpretations" given that the doctrine is "[ba]sed ... in California solely upon judicial decisions" and other states' various statutes and interpretations "are sharply in conflict"].)[4]

Amici also acknowledge the significance of the Restatement (Third) of Torts: Apportionment of Liability and attempt to invoke it to their benefit. (CMA ACB 61.) This effort spectacularly backfires. The Restatement states that "most" courts have not held that "a plaintiff's negligence may serve as a comparative defense to an intentional tort." (Rest.3d Torts: Apportionment of Liability, § 1, com. c.) Moreover, it provides that an intentional tortfeasor is jointly and severally liable for all damages attributable to his co-tortfeasors, even in a jurisdiction,

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4 We note that after the decision in *Sorensen* California later adopted Proposition 51. However, because the key statutory language is in such hot dispute (as this case reflects), section 1431.2's adoption does not change *Sorensen's* key point that other states' comparative fault statutes "shed little light" and are of "little profit" given California's long-developed common law on the issue.

such as California, that has "adopted some modification of joint and several liability." (*Id.* at § 12 and com. a, § E18.)

The Restatement also explicitly acknowledges an apportionment regime consistent with our interpretation of section 1431.2. It states that courts may hold that a plaintiff's comparative negligence reduces her recovery against a negligent defendant, but that it does not reduce her recovery against an intentional tortfeasor co-defendant. (Rest.3d Torts: Apportionment of Liability, § 1, reporter's notes, com. c; accord, *id.* at § 3, com. d [noting that "in some jurisdictions a plaintiff's negligence does not reduce recovery from an intentional tortfeasor, even though it does reduce recovery from other tortfeasors"]; *id.* at § E18, com. h ["a plaintiff who sues both a negligent and intentional tortfeasor may be found comparatively responsible with respect to the negligent tortfeasor but not the intentional tortfeasor"].) This analysis destroys the myth (advanced by Defendants and Amici) that all tortfeasors are the same and that *intentional* tortfeasors enjoy the identical benefits as do their negligent counterparts. (See, e.g., CJAC ACB 28–29.)

Furthermore, the Restatement provides that "[w]hen an injury is indivisible and legally caused by the tortious conduct of

an intentional tortfeasor and one or more *other persons*, the intentional tortfeasor is jointly and severally liable for *all* damages" even if the other, unintentional, tortfeasors are not jointly and severally liable. (Rest.3d Torts: Apportionment of Liability, § 12. com. c, italics added.) This rule is consistent with section 1431.2's "one-way shifting of liability" that "permit[s] negligent tortfeasors to decrease their liability by that of intentional tortfeasors ... but not the inverse." (B.B. OBM 31; see B.B. RBM 49.) Indeed, as noted *ante*, Part III(B), the Restatement cites as an example of such a one-way shifting of liability the "extensive discussion in dicta" in *Weidenfeller*, *supra*, 1 Cal.App.4th at 6–7, "explaining why an intentional tortfeasor would be jointly and severally liable notwithstanding" section 1431.2's several-liability rule. (Rest.3d Torts: Apportionment of Liability, § 12, reporter's notes, com. b.)

In sum, the Restatement is fully consistent with California's historical understanding of comparative fault and with Plaintiffs' attendant interpretation of section 1431.2. Amici's is not.

## IV.

## AMICI'S VARIOUS PURPORTED POLICY AND FAIRNESS CONCERNS DO NOT WARRANT APPLYING SECTION 1431.2 TO LIMIT INTENTIONAL TORTFEASORS' LIABILITY.

Asserting that comparative fault is an equitable doctrine, Amici assume that it would therefore be inequitable to deprive intentional tortfeasors of section 1431.2's limitation on liability. (CMA ACB 46–47, 52–54.) The absurdity of *intentional* tortfeasors invoking the protections of equity is breathtaking. An "intentional tortfeasor has no legitimate claim to the benefits of an equitable apportionment, since he has 'unclean hands.'" (Grehan, *Comparative Negligence* (1981) 81 Colum. L. Rev. 1668, 1681.)[5]

Based on *Blazovic, supra*, 124 N.J. at 107, Amici also contend that "[t]he [d]ifference [b]etween [i]ntentional and

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[5] Amici cite *Baird v. Jones* (1993) 21 Cal.App.4th 684, 692–693, as purported support for applying equitable apportionment to intentional tortfeasors' benefit. (CMA ACB 53.) But, as we explained in our RBM, *Baird* is inapposite because it had nothing to do with an intentional tortfeasor seeking any benefit at the expense of a merely negligent party. (B.B. RBM 36–37.) Rather, it solely concerned one intentional tortfeasor's ability to obtain comparative equitable indemnity from *another intentional tortfeasor* who was even more culpable. (21 Cal.App.4th at 690–693.)

[n]egligent [c]onduct is a [m]atter of [d]egree, not [k]ind" and that intentional tortfeasors are therefore entitled to reduce their liability based on others' negligence. (CJAC ACB 28–29.) Other courts, however, have reasoned differently, explaining that an "intentional actor cannot rely on someone else's negligence to shift responsibility for his or her own conduct" because "[i]ntentional 'conduct differs from negligence ... in the social condemnation attached to it.'" (*Weidenfeller*, *supra*, 1 Cal.App.4th at 6–7, quoting Prosser and Keeton, Torts (5th ed. 1984) § 65, p. 462; see DeMott, *Causation in the Fiduciary Realm* (2011) 91 B.U. L. Rev. 851, 865 ["fraudfeasors, like other actors who commit intentional torts, *are morally blameworthy to a greater degree* than are careless or hapless tortfeasors"] [italics added].)

In any event, "Court disagreements about whether intentional and negligent torts are different in kind or different in degree" may be "unhelpful to resolving comparison issues." (Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts* (2003) 78 Notre Dame L. Rev. 355, 402.) Instead, Professor Bublick argues, "courts must consider the actual effects of their decisions--reducing negligent tortfeasor liability to plaintiffs, reducing intentional tortfeasors'

liability to plaintiffs, decreasing plaintiff recoveries, and reducing intentional tortfeasors' responsibility to pay contribution or indemnity to other negligent tortfeasors." (*Id.* at 403–404.)

Interpreting section 1431.2 in accordance with existing comparative fault principles would preserve intentional tortfeasors' liability to plaintiffs, preserve plaintiff recoveries, and preserve intentional tortfeasors' responsibility to pay contribution or indemnity to negligent co-tortfeasors. And, as we have noted previously, these effects are not merely consistent with—they affirmatively advance—California's public policy decision to preclude intentional tortfeasors from benefitting from others' concurrent negligence as reflected in California's law of indemnity, contribution, contracts, and insurance. (B.B. OBM 32; B.B. RBM 49–51.)

Amici argue further that "[f]airness" entitles Aviles to several liability given the jury's finding that Burley's percentage of fault exceeded Aviles's. (CJAC ACB 31; see CMA ACB 27.) This assertion is inconsistent both with caselaw and with the CACI instruction at issue. Both demonstrate that comparative fault is concerned with factual causation, not culpability. For example, in *Daly*, *supra*, this Court explained in the strict liability (no fault)

context that "plaintiff's recovery will be reduced only to the extent that his own lack of reasonable care *contributed* to his injury." (20 Cal.3d at 737, italics added.) Likewise, *Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1198, held that "Proposition 51 is applicable in a strict liability asbestos exposure case where multiple products *cause* the plaintiff's injuries and the evidence provides a basis to allocate liability for noneconomic damages between the defective products." (Italics added.) Indeed, the CACI instruction further confirms this point. Here the jury was instructed to "determin[e] the percentage of Darren Burley's responsibility"—but the test to be applied was one focused purely on factual causation: whether his "negligence was a substantial factor in *causing* his death." (2AA 329 [CACI 407], italics added.)

Thus, when the legal instructions the jury received defined the concept of "comparative fault," the sole focus was causation, not culpability. (*Ibid.*) This makes sense because, as CACI 407 reflects, it is for the judge to "calculate the actual reduction" based upon the controlling *legal* principles, e.g., whether the actors' conduct was intentional versus merely negligent. Moreover, were there any doubt about the jury's findings, the

presumption of correctness of final judgments would dictate the same conclusion, i.e., that the jury was not comparing culpability but rather the actors' causal contribution to Plaintiffs' injury.

Moreover, even if we assume, arguendo, that the jury's findings imply that Burley was more at fault than Aviles, this Court has reasoned that "even when a plaintiff is partially at fault for his own injury, a plaintiff's culpability is not equivalent to that of a defendant" because "a plaintiff's negligence relates only to a failure to use due care for his own protection, while a defendant's negligence relates to a lack of due care for the safety of others." (*American Motorcycle, supra,* 20 Cal.3d at 589–590; see Rest.3d Torts: Apportionment of Liability, § E18, reporter's notes, com. d.) Here, Aviles's conduct was not merely negligent, but, rather, intentional (battery) and is therefore especially culpable. (See B.B. OBM 31–32; B.B. RBM 49.)

Amici further suggest that holding intentional tortfeasors only severally liable would be fair because "there are different types of intentional conduct," some of which are "more abhorrent than others." (CMA ACB 54; see CJAC ACB 30–31.) This argument is wholly inconsistent with Amici's main argument that Proposition 51 created no distinctions whatsoever between

tortfeasors. This argument defies logic given that, despite the distinction Amici carefully draw, their interpretation of section 1431.2 would nonetheless require several liability *even* in the case of an intentional tortfeasor who commits the "more abhorrent" tort—even if it were murder.

Plaintiffs' interpretation of section 1431.2 is much fairer because, generally speaking, intentional tortfeasors are more culpable than merely negligent actors. (B.B. RBM 45–46; accord, CJAC ACB 30 [conceding that "generally those who commit intentional torts have a rather weak moral claim to have their fault compared with that of their victims"].) Moreover, despite their attempted reliance on Dear & Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations* (1984) 24 Santa Clara L. Rev. 1, (see CJAC ACB 29, 32; CMA ACB 15, 37), Amici pointedly ignore the article's "direct conclusion that 'comparative fault should not be extended to self-help intentional torts, such as battery,'" (Bublick, *supra*, 78 Notre Dame L. Rev. 355, 403, quoting Dear & Zipperstein, *supra*, 24 Santa Clara L. Rev. at 2.)

Relatedly, Amici suggest that joint and several liability would be especially unfair in a case of medical battery because,

they contend, medical battery is akin to negligence and is only "technically" an intentional tort. (CMA ACB 36; see CJAC ACB 30–31.) In support Amici pose a hypothetical "loosely based on *Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.* [("*Conte*")] (2003) 107 Cal.App.4th 1260" to illustrate a case of medical battery in which a negligent plaintiff is more at fault than the defendant doctors. (CMA ACB 34–36.) In the hypothetical, the doctors failed to note that the plaintiff had not signed a consent form in full, and the plaintiff negligently failed to explain why he had not fully signed the form. (*Id.* at 35.) According to Amici, several liability would be appropriate in such a case. (*Id.* at 36.)[6]

In any event, even if a patient were negligent in a case of medical battery in which a doctor fails to obtain consent, the defendant doctor would be more culpable than the patient because the doctor is a repeat participant and experienced at obtaining consent whereas the patient is comparatively

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6 The hypothetical is disingenuous because in *Conte, supra*, the Court of Appeal upheld the grant of defendants' motion for nonsuit on the action for medical battery. (107 Cal.App.4th at 1269–1270.) Moreover, unlike in Amici's hypothetical, *Conte, supra*, does not reflect that the jury found the plaintiff negligent.

vulnerable, i.e., in need of medical treatment and likely not as familiar with medical consent.

Perhaps most important, assuming arguendo, that medical battery is only "technically an intentional tort," who cares? Nothing in our case concerns medical battery. Thus, the sui generis implications of a hypothetical medical case have no possible relevance to the conduct at issue here or in most cases arising under section 1431.2. Given Amici's concession that medical battery is akin to negligence rather than a typical intentional tort, this Court should ignore this obvious distraction. The proper time to address section 1431.2's application to medical battery is when a case with real facts and full briefing actually raises the issue.

Amici also contend that the goals of punishment and deterrence do not warrant holding intentional tortfeasors jointly and severally liable for non-economic damages. (CMA ACB 57–58.) Amici fundamentally attack the view, adopted in *Thomas v. Duggins Construction Co., Inc.* (2006) 139 Cal.App.4th 1105, that non-economic damages have a punitive element as not only wrong, but allegedly "'primitive.'" (CMA ACB 58–59, citing *Seffert v. Los Angeles Transit Lines* ("*Seffert*") (1961) 56 Cal.2d 498, 511

(dis. opn. of Traynor, J.).) They argue that the goals of punishment and deterrence are not legitimate factors to consider in determining whether the passage of Proposition 51 was intended to benefit intentional tortfeasors. (CMA ACB 57–59.)

Amici's sole purported support for this critique is Justice Traynor's dissenting opinion in *Seffert, supra*, 56 Cal.2d at 511, which states:

> There has been forceful criticism of the rationale for awarding damages for pain and suffering **in negligence cases**. [Citations.] Such damages originated under primitive law as a means of punishing wrongdoers ....

(CMA ACB 59, emphasis added and CMA's italics omitted.)

The glaring hole[7] in this argument is that the key issue in our case is not whether one of section 1431.2's purposes was to deter/punish negligent tortfeasors. Rather, the critical issue is whether—in including the statutory phrase "based upon principles of comparative fault"— the Legislature intended to ensure that those who commit intentionally bad conduct would not receive the benefits being created for all unintentional

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[7] We note that, contrary to Amici's suggestion, Justice Traynor was not attacking the award of pain and suffering damages. Rather he was attacking the use of "per diem" arguments as inherently arbitrary and misleading.

tortfeasors. Had the Legislature intended to protect intentional wrongdoers (as well as all others), it would have never included the phrase at issue.

One commentator has noted that "allowing defendants to mitigate damages in proportion to the negligence of the plaintiff would seriously undercut the punitive and deterrent purposes of damages for intentional torts." (Grehan, *supra*, 81 Colum. L. Rev. 1668, 1681.) Moreover, "allowing intentional tortfeasors to reduce their liability because of apportionment of fault might unintentionally signal a societal tolerance for clearly unacceptable conduct." (White, *Comparative Responsibility Sometimes: The Louisiana Approach to Comparative Apportionment and Intentional Torts* (1996) 70 Tul. L. Rev. 1501, 1518.) Thus, the public policy of deterrence supports joint and several liability for intentional tortfeasors.

Amici also contend that holding an intentional tortfeasor jointly and severally liable, "[i]rrespective of th[e] [p]laintiff's own [r]esponsibility, would create negative incentives. (CJAC ACB 33–34.) Amici claim that subjecting Aviles to joint and several liability would encourage individuals to "resist arrest, provoke officers to use force and ... collect all damages for harm from any

officers" who commit battery. (*Id.* at 33.) The notion that a suspect being apprehended by law enforcement officers would engage in a legal apportionment calculus defies belief.

Likewise, Amici speculate that law enforcement officers would be deterred from doing their jobs lest they be held jointly and severally liable for non-economic damages. (CJAC ACB 33.) This is disingenuous. By definition, battery in police cases requires the use of unreasonable force, i.e., force going well beyond what an officer's job and the circumstances would justify. (CACI 1305; see 2AA 331, 345.) Therefore, any force that is justified by an individual's resistance or provocation could not constitute battery and could not give rise to joint and several liability. (2AA 331–333.) Moreover, Amici's argument proves too much; taken to its logical conclusion, it would result in the following *reduction ad absurdum*: All tort liability against law enforcement officers should be outlawed lest such liability encourage resistance to arrest.

V.

## NOTICE OF JOINDER IN CO-PETITIONERS' ANSWER TO AMICI CURIAE BRIEFS

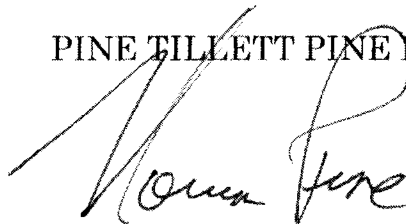
Petitioners B.B. and B.B. join in co-Petitioners D.B., D.B., and T.E.'s Answer to Amici Curiae Briefs.

## CONCLUSION

Petitioners respectfully urge this Court to reverse the portion of the appellate Opinion requiring apportionment of non-economic damages for Aviles's intentional acts. In addition, Petitioners respectfully request their costs and any other relief that they are entitled to by law, or that this Court finds appropriate.

Dated: July 12, 2019

PINE TILLETT PINE LLP



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## CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520

Pursuant to California Rules of Court, Rule 8.520(c)(1), and in reliance on the word count feature of the Word software used to prepare this document, I certify that this Answer to Amici Curiae Briefs contains 7,103 words, excluding those items identified in Rule 8.520(c)(3).

Dated: July 12, 2019

Chaya M. Citrin

## PROOF OF SERVICE

I am over 18 years of age and not a party to this action. My business address is 14156 Magnolia Boulevard, Suite 200, Sherman Oaks, California 91423. On July 12, 2019, I mailed from Sherman Oaks, California, the Answer to Amici Curiae Briefs. I served the document by enclosing it in an envelope and depositing the sealed envelope with the United States Postal Service with the postage fully prepaid. The envelope was addressed and mailed as follows:

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<tr><td>Los Angeles Superior Court<br>Hon. Ross M. Klein<br>Dept. S27<br>c/o Court Clerk<br>Governor George Deukmejian Courthouse<br>275 Magnolia Avenue<br>Long Beach, CA 90802</td><td>Second District Court of Appeal, Division Three<br>Ronald Reagan State Building<br>300 S. Spring Street<br>2nd Floor, North Tower<br>Los Angeles, CA 90013</td></tr>
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I served the Answer to Amici Curiae Briefs on the following parties via email:

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

Executed on July 12, 2019, in Sherman Oaks, California.

Chaya M. Citrin