**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**



B.B., a Minor, etc., et al.,
*Plaintiffs and Appellants*,
v.
County of Los Angeles, et al.,
*Defendants and Appellants.*
T.E., a Minor, etc., et al.,
*Plaintiffs and Appellants*,
v.
County of Los Angeles, et al.,
*Defendants and Appellants.*
D.B., a Minor, etc., et al.,
*Plaintiffs and Respondents*,
v.
County of Los Angeles, et al.,
*Defendants and Appellants.*

**Case No. S250734**

Los Angeles Superior Ct. Nos.
TC027341, TC027438, BC505918
Honorable Ross M. Klein

Court of Appeal Case No. B264946

# CONSOLIDATED ANSWER TO AMICI CURIAE BRIEFS OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE COALITION FOR LITIGATION JUSTICE, INC., AND THE ASSOCIATIONS OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

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**TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNA SUPREME COURT:**

Pursuant to Rule 8.520(f)(7) of the California Rules of Court, Plaintiffs/Petitioners T.E. by and through her Guardian Ad Litem Akira Earl, and D.B. and D.B., by and through their Guardian Ad Litem Terri Thomas and Rhandi Thomas, individually and as successors in interest to the Estate of Darren Burley, hereby submit the following consolidated Answer to the amicus briefs of: (i) the League of California Cities and California State Association of Counties, (ii) the Coalition For Litigation Justice, Inc., and (iii) the Associations of Southern California Defense Counsel and Defense Counsel of Northern California and Nevada.

Plaintiffs T.E, D.B. and D.B. also join in the consolidated Answer to the amicus briefs of the California Medical Association et al., Civil Justice Association of California, and Michael and Cindy Burch filed by Plaintiffs B.B. and B.B.

## RESPONSE TO AMICUS BRIEF OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

### INTRODUCTION

Amici League of California Cities ["League"] and California State Association of Counties ["CSAC"], argue that the Court must avoid canons of statutory construction and rule in favor of Defendants, based on what Amici purport to know voters were thinking *independent* of the text of Civil Code section 1431.2 and the Court's traditional canons of statutory interpretation. (See League and CSAC Brief Amicus Brief [hereafter "League and CSAC brief"] at pp. 6–13.) The argument fails for several reasons.

First, the plain text of the statute is clearly limited by the phrase "based on principles of comparative fault," a common law doctrine which never extended to intentional tortfeasors. The League and CSAC's halfhearted contention that the text unambiguously favors their interpretation fails for the same reason.

Second, even if the text of Civil Code section 1431.2 ["Section 1431.2"] were ambiguous, the ballot materials do not, as

the League and CSAC contend, establish that Section 1431.2 was intended to allow intentional tortfeasors to offload their liability onto merely negligent actors. Section 1431.2 was designed to apply to "relatively blameless" and "minimally responsible" defendants, and to allow such defendants to avoid liability for all of a plaintiff's non-economic damages. Nothing in the text or ballot measures indicates any intention to allow more culpable intentional actors to shift liability onto negligent ones. Moreover, even if the ballot materials *did* support the League and CSAC's interpretation over Plaintiffs' (which they do not), such materials patently do not do so with the degree of clarity required to overcome either the statute's text or the strong presumption against abrogating the common law.

Lastly, the League and CSAC suggest that voters intended Proposition 51 to reach intentional torts and the Court must so find because "[t]he line between intentional and negligent conduct is not always clear" and would purportedly depend on facts of a case. (League and CSAC brief at pp. 11, 12.) But the voters did not so intend and there is no reason to believe they did.

Moreover, the very premise that the line between intentional and non-intentional torts is difficult to draw is simply wrong.

## ARGUMENT

### I. Plain Text and Well-Established Canons of Construction Support Plaintiffs' Interpretation of Section 1431.2.

As set forth in Plaintiffs' prior briefing, the plain text of the statute supports Plaintiffs' reading: Proposition 51 expressly applies only to actions "based on principles of comparative fault," which have never included defendants who commit intentional torts. (See generally Opening Brief of T.E. et al. ["T.E. OB"] at pp. 14–29; Reply Brief of T.E. et al. ["T.E. RB"] at pp. 10–15, 28–35; Opening Brief of BB et al. ["B.B. OB"] at pp. 22–27; Reply Brief of BB et al. ["B.B. RB"] at pp. 12–15, 30–40.) The majority of Courts of Appeals to consider the issue have agreed. (See *Burch v. CertainTeed Corp.* (2019) 34 Cal.App.5th 341, *reh'g denied* (May 10, 2019), *review filed* (May 24, 2019); *Thomas v. Duggins Construction Co.* (2006) 139 Cal.App.4th 1105.)

This Court need go no further than Section 1431.2's text, given its express limitation that it applies to tort actions "based on principles of comparative fault." (E.g. *Bruns v. E-Commerce*

*Exchange, Inc.* (2011) 51 Cal.4th 717, 724 [where text is unambiguous, no further interpretation is appropriate]; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 23 ["When an initiative contains terms that have been judicially construed, 'the presumption is almost irresistible' that those terms have been used 'in the precise and technical sense' in which they have been used by the courts"]; *People v. Gonzales* (2017) 2 Cal.5th 858, 869 [same; the electorate "is presumed to be aware of existing laws and judicial construction thereof."]; *Burch v. CertainTeed Corp.* (2019) 34 Cal.App.5th 341, 358 [same, specifically as to the phrase "based on principles of comparative fault" in Section 1431.2].)

## II. The Court Should Not Ignore the Plain Text and Established Canons of Construction in Favor of Amici's Dubious Interpretation of Voters' Purported Intent.

The League and CSAC make two initial arguments: first, that the text unambiguously requires Defendants' interpretation, and second, if the text is ambiguous, the Court should look away from all canons of interpretation and adopt the intent of the voters as the League and CSAC divine it. First, the League and CSAC unpersuasively argue that Section 1431.2 clearly and

"unambiguously" applies to intentional torts. They dismiss the majority of courts' rejection of their view with the conclusory assertion that the Courts of Appeals somehow "looked beyond . . . the plain language" of Section 1431.2. (League and CSAC brief at p. 6.) In fact, *only* those courts actually analyzed the relevant text of Section 1431.2, which they concluded requires rejecting Defendants' arguments. (See *Burch*, *supra*, 34 Cal.App.5th at p. 357; *Thomas*, 139 Cal.App.4th at pp. 1110–11, 1113.) The decision appealed from – the only one to adopt the League and CSAC preferred interpretation – *ignored* the plain text of Section 1431.2, excising the relevant parts. (See T.E. OB at p. 14–16; *see also Burch*, *supra*, 34 Cal. App. 5th at p. 37 ["*B.B. v. Cty. of Los Angeles* (2018) 25 Cal. App.5th 115) failed to credit the entire statutory text. Again, section 1432.1 expressly states, "[i]n any action for personal injury, property damage, or wrongful death, *based upon principles of comparative fault*, the liability of each defendant for noneconomic damages shall be several only and shall not be joint."].)[1]

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[1] The League and CSAC's suggestion that in *Dafonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 602, the Court held that Section 1431.2

Next, Amici argue that, if there were any ambiguity, the Court must ignore the text of Section 1431.2 and the relevant canons, and instead adopt the alleged intent of the voters that the League and CSAC purport to have divined. (League and CSAC brief at p. 6.) Amici's haste to jettison the text and established canons for interpreting it in favor of extra-statutory documents from which they claim to surmise the electorate's intent speaks volumes about the weakness of their interpretation of the statute.

Initially, the League and CSAC state that Section 1431.2 was meant to address a perceived problem with the "deep pocket" rule (League and CSAC brief at pp. 8–10), under which a defendant may be unable to recover an insolvent co-defendant's share of liability for harming the plaintiff. That much is true. (See T.E. RB at pp. 16–20.) But this begs the question of *how* Section 1431.2 was intended to address the "deep pocket" rule.

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applies to all actions, including intentional torts, is erroneous and already addressed in the Plaintiffs' briefing. (See T.E. OB at pp. 16–17; T.E. RB at pp. 13–16; B.B. OB at pp. 16–19, B.B. RB at pp. 13–15; see also *Burch*, 34 Cal.App.5th at p. 359.)

As Section 1431.2's plain text and the ballot materials establish, it was not intended to allow intentional tortfeasors to shift liability to less culpable parties, but rather to *otherwise* permit defendants to reduce their liability, only and explicitly according to "principles of comparative fault." (See generally *Burch*, *supra*, 34 Cal. App. 5th at pp. 358–59 [explaining that "[t]o the extent ambiguity exists, Proposition 51's ballot materials also" indicate that the measure was not intended to apply to intentional tortfeasors].)

As the *Burch* court explained, the ballot materials demonstrate that intentional tortfeasors were not intended to benefit from the proposed law:

> The official ballot description of Proposition 51 provided that, "[u]nder existing law, tort damages awarded a plaintiff in court against multiple defendants may all be collected from one defendant," and, "[a] defendant paying all the damages may seek equitable reimbursement from other defendants." (Ballot Pamp., Primary Elec. (June 3, 1986), Prop. 51, Official Title and Summary Prepared by the Atty. Gen., p. 32.) The ballot materials explain that "this rule" is maintained under the initiative for economic damages, but would be modified for noneconomic damages. (*Ibid.*) The rule discussed—that allowing a defendant to seek equitable reimbursement after paying a plaintiffs' damages—never applied to intentional tortfeasors. Thus, the ballot measures

> indicate that intentional tortfeasors were not intended to fall within Proposition 51's modified scope.

(*Burch, supra,* 34 Cal. App. 5th at pp. 358–59; *see also* T.E. OB at pp. 14–29; T.E. RB at pp. 10–20; B.B. OB at pp. 22–27.)

Ballot materials and the caselaw interpreting them also underscore that Section 1431.2 was designed to address the exploitation of "relatively blameless" and "minimally responsible" defendants – not to allow more culpable tortfeasors such as intentional actors to offload liability onto negligent ones. (See B.B. OB at pp. 28–30.) Again, as explained in *Burch, supra*:

> The inequities that Proposition 51 targeted were "situations in which defendants who bore only a small share of fault for an accident could be left with the obligation to pay all or a large share of the plaintiff's damages if other more culpable tortfeasors were insolvent." (*Evangelatos, supra,* 44 Cal.3d at p. 1198, 246 Cal.Rptr. 629, 753 P.2d 585.) [T]his was never the case with an intentional tortfeasor who, deemed to be the most culpable of all, could not seek contribution or equitable indemnity from less culpable tortfeasors regardless of their solvency. (Code Civ. Proc., § 875, subd. (d); *Allen* [*v. Sundean* (1982) 137 Cal. App. 3d 216, 226] . . . . ) Section 1431.2's purpose is simply not fulfilled by applying it in the manner defendant or amici curiae seek.

(34 Cal. App. 5th at p. 359.)

Additionally, the ballot materials are clear that Section 1431.2 was designed to address liability between *co-defendants*

not for Section 1431.2 to create new rules of liability that would limit the recovery that negligent actors could obtain from tortfeasors who intentionally harmed them. (T.E. RB at pp. 16–20.) If anyone had thought the measure *would* do so, presumably this would have been reflected in the ballot materials, in particular by opponents, as it "might well have detracted from the popularity of the measure." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1219.)

Amici make much of an absence of explicit discussion in the ballot materials concerning intentional tortfeasors (League and CSAC brief at pp. 9–10), but this is irrelevant because they were definitionally excluded by the text. (*Burch, supra,* 34 Cal. App. 5th at pp. 358–59.) Tellingly, there was no reference in the ballot materials suggesting that persons who intentionally harmed others would be entitled to reduce their liability. (See generally *Evangelatos,* 44 Cal.3d at p. 1227 [appen.])

The League and CSAC argue that every "deep pocket" defendant is entitled to invoke Proposition 51 in every case. First, the example Amici cite from the ballot materials suggests otherwise, as it expressly concerned a City's ability to offset

liability for an unintentional tort – negligently failing to properly maintain a stop light. (*Evangelatos,* 44 Cal.3d at p. 1227 [appen.].) Second, Proposition 51 was clearly *not* intended to apply to every case in order to eliminate all of a "deep pocket" defendant's exposure "to liability beyond their shares of fault," as Amici repeatedly contend. (League and CSAC brief at p.10; *id.* at pp. 8–10.) As this Court held, Proposition 51 was not intended to relieve "deep pocket" Cities and Counties of all or even the *most* significant source of their liability for another's fault – vicarious liability or *respondeat superior*. (*Diaz v. Carcamo* (2011) 51 Cal. 4th 1148, 1156.)

Amici point to the fact that ballot materials for Proposition 51 stated that the measure would have saved cities and counties money. But this too is irrelevant. Ending joint and several liability as to *non*-intentional tortfeasors would accomplish this. Furthermore, Amici's argument is again belied by the text of the initiative and the ballot materials. Both strongly suggest the focus of Proposition 51 was *not* intentional tortfeasors' liability: a predominant concern in Section 1431.1 and the ballot materials was the effect on insurance coverage, (see generally T.E. RB at

pp. 16–17, but none is possible for intentional torts. (*Id.;* Ins. Code § 533.)

The League and CSAC's argument boils down to Amici's own naked preference cloaked as their dubious and unsupported assertions that voters would have wanted to exclude intentional torts. (E.g. League and CSAC brief at p. 11 ("[G]iven the vigor of the reform movement behind Proposition 51 . . . it is doubtful voters would have agreed to retain joint liability . . . in cases involving intentional conduct."].) The weight of analysis is heavily against Amici. It is better policy to preclude an intentional tortfeasor from offloading his liability to a merely negligent actor, as countless courts have found from before Proposition 51's passage and to the present, which reflects policy preferences that voters presumably fully understood and shared. (See T.E. OB at pp. 23–26; B.B. OB at pp. 30–36; Annot., Applicability of Comparative Negligence Principles to Intentional Torts (1994) 18 A.L.R.5th 525 (2019 supp.), §2[a] ["The clearly prevailing view is that comparative negligence principles are not applicable to intentional torts (§ 3[a])."]; *id.* at fn. 1 [noting that in annotation "no distinction is made between 'comparative

negligence' and 'comparative fault'"]; *id.* § 3[a] [collecting cases across states]. "At the time Proposition 51 was passed . . . policy considerations of deterrence and punishment for intentional torts supported the conclusion that an intentional tortfeasor's liability was not subject to apportionment where the negligence of one or more third party tortfeasors contributed to a plaintiff's injuries." (*Burch, supra*, 34 Cal. App. 5th at p. 356 [citing *Thomas*, 139 Cal.App.4th at p. 1112]; *Thomas*, 139 Cal.App.4th at p. 1112 [same]; see also *Allen v. Sundean* (1982) 137 Cal.App.3d 216, 226 [observing that there was no "support for an extension of comparative fault principles to intentional torts . . . in other states, among the commentators generally, or in the Uniform Comparative Fault Act."] [citations omitted].)

As Proposition 51's own language and subsequent case law suggest, it was designed to extend the comparative fault principles announced in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, and *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 579, in order to permit co-defendants to avoid shouldering a more culpable and insolvent defendant's liability. *Evangelatos*, 44 Cal.3d at p. 1198 [Proposition 51 "was addressed to this

remaining issue."]; see also T.E. RB at pp. 16–20; *Burch*, *supra*, 34 Cal.App.5th at pp. 357–58.) *Li* and *American Motorcycle Assn.* also recognized that the principles so incorporated would not apply to intentional torts. (*Allen*, 137 Cal.App.3d at 226; B.B. OB at pp. 24–26; Annot., Applicability of Comparative Negligence Principles to Intentional Torts (1994) 18 A.L.R.5th 525 (2019 supp.) ["Before comparative negligence was widely adopted, it was black-letter law that contributory negligence principles were not a defense to an intentional tort action. And under comparative negligence, the same defense of nonapplicability to intentional torts carried over and became the general rule, so that there would be no apportionment of damages where an intentional tort would apply."]; *Burch*, *supra*, 34 Cal.App.5th at pp. 357–58.)

In sum, the League and CSAC show the weakness of the interpretation they seek by tacitly acknowledging canons of construction do not support it, and asking for the Court to eschew text and established methods of interpretation in favor of ballot materials that support a position *contrary* to the League and CSAC.

## III. Even if the Ballot Materials Supported Defendants' Interpretation, They Do Not Do So Clearly, as Would Be Required to Overcome the Text and Traditional Canons of Interpretation.

Even if Amici's interpretation were supported by the ballot materials – though for the reasons shown above the materials weigh against the conclusion that Proposition 51's protections were aimed at intentional tortfeasors – such general language and opaque support for Amici's interpretation could not overcome the text and context of the statute. (E.g. *In re Cervera* (2001) 24 Cal.4th 1073, 1079 [noting it was the "law that was enacted, not any of the documents within its legislative or initiative history. A statute, of course, must prevail over any summary."]; *Carman v. Alvord* (1982) 31 Cal.3d 318, 330 [noting "(e)lection materials may be helpful but are not conclusive in determining the probable meaning of in initiative language", and refusing to adopt interpretation in ballot materials where a phrase in the initiative contradicted it]; *People v. Mentch* (2008) 45 Cal.4th 274, 282 [in construing voter initiatives, text of the statute is "the first and best indicator of intent."].)

Furthermore, a statute is construed as consistent with the common law – which here has always prevented intentional

tortfeasors from transferring their liability to negligent ones – unless the statutory language "clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule . . . ." (*California Assn. of Health Facilities v. Dep't of Health Servs.* (1997) 16 Cal.4th 284, 297.) Whatever Amici make of Section 1431.2 the section does not clearly do this, including in the ballot materials, which do not even mention intentional tortfeasors.

## IV. The Line Between Intentional and Non-Intentional Conduct Is Not Remotely Hard to Draw.

Amici suggest that voters intended Proposition 51 to reach intentional torts and voted on this basis because "[t]he line between intentional and negligent conduct is not always clear" and the determination would purportedly depend on the facts of each case. (League and CSAC brief at pp. 11–12.) Initially, nothing whatsoever in the statute's language, text, or ballot materials indicates this to be true. The League and CSAC do not seriously suggest otherwise, and merely repeat conclusory statements such as "[i]t is difficult to believe that voters" would have wanted to support Plaintiffs' position. (*Id.* at p. 12.) Simply

stating this does not make it so. There are good reasons why a person who acts intentionally should be treated differently and not be permitted to transfer liability to non-intentional actors – among others, considerations of deterrence and punishment. (E.g. B.B. OB at pp. 24–26; Annot., Applicability of Comparative Negligence Principles to Intentional Torts (1994) 18 A.L.R.5th 525 (2019 supp.), § 3[a] [collecting cases]; *ante,* pp. 18–19.) Purported difficulties in line drawing would be irrelevant if they existed. Tellingly, the purported difficulties have not precluded decisions to exclude intentional tortfeasors from principles of comparative fault. (*Id.*) Amici's suggestion otherwise is meritless.

Moreover, the claim that it is difficult to distinguish intentional acts from non-intentional ones is absurd. The distinction is simply whether a defendant intended for a harm to happen or acted with substantial certainty that it would. (See CACI No. 1320 [Intent].) A solely negligent act is readily distinguishable, and is a failure to use "ordinary care." (Civ. Code § 1714.) Amici cannot reasonably contend that intentionality is a

complicated and nuanced determination. Nor does this case establish otherwise.

The case concerns a battery by Defendant Aviles, the "willful and unlawful use of force or violence upon the person of another," (Penal Code § 242), specifically, intentionally using force that is unreasonable. (See CACI No. 1305; see also T.E. OB at pp. 30–33 and T.E. RB at pp. 36–43 [to prevail on a claim of battery by a police officer, a jury must find the officer intentionally used force that was unreasonable and unwarranted, taking into account the plaintiff's conduct].) This was distinguished from a failure to use ordinary care by Deputy Beserra. Here, Defendant Aviles punched Mr. Burley in the face five times, (6 RT 1668, 1670; 7 RT 1857), mounted his back, pinned his chest to the ground, pressing his knee into the back of Burley's head, near his neck, and into his back with maximum weight, remaining there even after Burley was handcuffed. (*B.B. v. Cty. of Los Angeles*, *supra*, 25 Cal.App.5th at p. 120.) Deputy Beserra was present and did not intervene or perform C.P.R. (See generally *id.*) The jurors were instructed that Defendants should be held liable in negligence for failing to act when it would

have been reasonable to (17 RT 4952:8–10), but that battery was limited to a Defendant's act of intentionally using unreasonable force against Mr. Burley. (17 RT 4953:20–22

This case concerns facts from which the jury could and likely did find Deputy Beserra negligent for reasons that had nothing to do with the purported difficulty in determining whether someone acted intentionally, and relate instead to *other* elements of negligence and battery on which jurors were instructed. (Compare 17 RT 4951–53 with *id.* at pp. 4953–55.) For example, the jury may have found Deputy Beserra liable for negligence for failing to perform C.P.R. once Mr. Burley's breathing became labored and his body went limp, (E.g. 8 RT 2169:27–2170:15; 2187:17-23, 2179:4–2180:26, 2181:27–2182:5), and/or for failing to stop Defendant Aviles. (E.g. 8 RT 2163:21–2165:12, 2227:8–2228:25). At any rate, nothing in the case suggests that the difference in holding Defendant Aviles liable for battery and holding Deputy Beserra liable for negligence was based on some difficulty in parsing an intentional act from a non-intentional one.

Accordingly, this Court should reject the arguments proffered by the League and CSAC.

## RESPONSE TO AMICUS BRIEFS OF THE COALITION FOR LITIGATION JUSTICE, INC. AND THE ASSOCIATIONS OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

### INTRODUCTION

The Amicus Brief from the Coalition For Litigation Justice, Inc. ("Coalition"), a group representing commercial insurance carriers which focuses entirely on asbestos litigation, as well as the Amicus Brief of the Associations of Southern California Defense Counsel and Defense Counsel of Northern California and Nevada ("Associations"), erroneously argue that unless intentional tortfeasors are allowed to invoke Proposition 51 to shift the blame for their misconduct to other less culpable parties, solvent asbestos companies will end up facing liability for the actions of bankrupt ones. The Coalition's brief is based on the utterly false notion that courts will succumb to "pressure" from plaintiffs and will readily "convert" ordinary negligence and strict liability claims into intentional torts for fraudulent concealment and misrepresentation. (Coalition brief at p. 1.) Likewise, the

Associations' brief argues that plaintiffs in asbestos and other products liability cases will use non-intentional tort claims as a "springboard" to also assert intentional tort claims for fraud and concealment. (Associations brief at p. 10.) Amici's argument does not hold up to scrutiny. The elements of intentional torts and non-intentional torts are clearly distinct, and courts are well equipped to understand the differences among them and are not going to be "pressured" into outcomes that are not supported by the law or the evidence. Indeed, the false doomsday scenario proffered by these amici has not occurred notwithstanding the fact that for at least 12 years prior to the Court of Appeal's decision below, prevailing authority held that Proposition 51 did not apply to defendants found liable for intentional torts as such actions are not based on principles of comparative fault. (See generally *Thomas*, 139 Cal.App.4th 1105.)

## ARGUMENT

### I. The Nuances of Asbestos Litigation Do Not Require the Court to Allow Intentional-Tortfeasor Defendants to Invoke Proposition 51.

In a theme echoed by the Coalition's brief, the Associations' brief contends that plaintiffs in products liability and asbestos

cases, which sound in negligence and products liability, will also attempt to assert intentional tort claims in the same action in order to avoid the effects of Proposition 51. This assertion means nothing. If the evidence does not support a claim for an intentional tort – as opposed a non-intentional one such as negligence or strict liability – such claims will be subject to higher burdens of proof and if appropriate will be rejected by the court and/or jury.[2]

Indeed, the underlying premise of the Coalition's brief, and of Section V of the Associations' brief, is that because many asbestos manufacturers have filed for bankruptcy, victims of asbestos exposure will be able to hold solvent companies, who purportedly were less responsible for the asbestos exposure,

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[2] The Associations' brief cites to a few cases in which fraud claims were simply alleged in the complaint along with claims for products liability. However, none of these cases contain any discussion of whether the evidence supported such claims. (See, e.g., *Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582, 585; *Ramos v. Brenntag Company* (2016) Cal. 4th 500, 505; *Soto v. BorgWarner Music TEC, Inc.* (2015) 239 Cal. App.4th 165, 173.) The absence of any identified (let alone significant) trend in the case law indicating plaintiffs are actually prevailing on such theories of recovery demonstrates that such concerns are unfounded.

accountable for intentional torts such as fraud and concealment and leave them holding the proverbial bag for all of the victim's injuries.[3] This premise is entirely false and finds no support either empirically or in the case law. Indeed, prior to the decision below, the leading case concerning the applicability of Proposition

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[3] Both the Coalition and the Associations' briefs discuss the numerous bankruptcies surrounding companies involved in asbestos litigation. (See, e.g., Associations' brief at p. 13 [noting the "elephantine mass" of asbestos litigation] [*citing Ortiz v. Fibreboard Corp.* (1999) 527 U.S. 815, 821].) Amici suggest that as a result of these bankruptcies, the Court should take steps to protect solvent companies from being saddled with the liability of insolvent ones. However, it would be wrong for this Court to re-write a statute to address an issue that is domain of the legislature. Moreover, the notion of an asbestos litigation crisis is overblown. As the Tennessee Supreme Court has explained, the vast majority of asbestos litigation actions is composed of "unimpaired claimants": "persons who have been exposed to asbestos" but "are not impaired" by "disease" and "likely never will be." (*Satterfield v. Breeding Insul. Co.* (Tenn. 2008) 266 S.W.3d 347, 369–370 [discussing *Ortiz*, 527 U.S. at p. 821].) According to "surveys funded by asbestos defendants," from 66% to 90% of asbestos plaintiffs are "unimpaired." (*Id.* at p. 369.) It is this massive pool of unimpaired claimants – not "persons with more serious illnesses" – who are at the center of the asbestos litigation crisis. (*Id.* at p. 370.) This Court has recently approved *Satterfield* as "particularly instructive," rejecting asbestos defendants' request to curtail asbestos litigation by eliminating liability for "take home" asbestos-exposure cases. (*Kesner v. Superior Ct. et al.* (2016) 1 Cal.5th 1132, 1152, 1164–65 [rejecting proposed policy solution that would "shiel[d] tortfeasors from the full magnitude of their liability for past wrongs . . . ."].)

51 to intentional tortfeasor defendants was the Court of Appeal's decision in *Thomas v. Duggins Construction Co., supra,* a case decided over 12 years ago holding that Proposition 51 could not be invoked by intentional tortfeasor defendants. (See 139 Cal.App.4th at p. 1113.) Despite the fact that *Thomas* has been on the books for over a decade, Amici have only cited a single published case in which a plaintiff in an asbestos case was able to prevail on an intentional tort claim and thereby preclude the defendant from invoking Proposition 51 to limit its exposure. That case is *Burch, supra,* in which the Court of Appeal for the First District expressly disagreed with the Court of Appeal's decision in *B.B.* and correctly determined that because cases involving intentional tortfeasor defendants were not based on principles of comparative fault, a defendant found liable for an intentional tort could not invoke Proposition 51 to shift its responsibility to others who were not deemed to be intentional tortfeasors.

Contrary to the Coalition's assertion, the decision in *Burch* affirming the defendant's liability for the intentional tort of fraudulent concealment, was not based on "questionable"

evidence. Rather, the court carefully examined the evidence at trial and found that substantial evidence "supports the jury's findings on active concealment, intent to deceive and reliance." (34 Cal.App.5th at p. 352.) In particular, the defendant knew of the cancer risks of asbestos exposure since the 1960s yet took active steps to conceal that risk from customers. (*Id.* at 352–53.) Notably, the court determined that the trial court was correct in determining that substantial evidence did not support verdict for intentional misrepresentation. (*Id.* at 353–54.)

*Burch* thus demonstrates that non-intentional torts such as negligence and products liability cannot be simply "converted" into intentional torts in order to avoid the application of Proposition 51. To the contrary, intentional and non-intentional torts are by their very nature different claims with different elements of proof. (See *Conte v. Wyeth Inc.* (2008) 168 Cal.App.4th 89, 101–02 [cited in the Associations' brief at p. 11] [noting differences between fraud and strict liability claims].) A negligence claim is based on the breach of a duty of care by the defendant. Products liability claims are based on the defendant placing a defective product into the stream of commerce. None of

these claims involve intentional conduct on behalf of the defendant, which is the hallmark of an intentional tort.

In particular, liability for intentional fraud either through misrepresentation or concealment does not attach to the mere sale or use of asbestos products. In order to prevail on such claims, the plaintiff must point to specific acts of fraud by the defendant which were targeted towards and relied upon by the victim. (*Burch, supra*, 34 Cal.App.5th at pp. 352–54.) Accordingly, the notion that there are a multitude of non-intentional tort cases that will easily be successfully litigated as intentional torts to avoid Proposition 51 is utterly lacking in merit.[4]

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[4] The Coalition brief cites to this Court's opinion in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 954, noting that the complaint in that asbestos exposure case included a cause of action for intentional infliction of emotional distress. However, it appears that this claim was never presented to the jury as the opinion does not discuss it at all. Indeed, the elements of an IIED claim, which require extreme and outrageous conduct intentionally directed at the victim, would appear to have no viable applicability to the vast majority of cases involving asbestos exposure. (See CACI No. 1600.)

Both the Coalition and Associations' briefs discuss the particulars of asbestos litigation in which many companies are sued for having allegedly exposed the victim to asbestos over several decades. The Associations' brief spends several pages discussing how different factors (such as length of exposure, relationship to the victim, or the type of warning) can lead to a jury's allocation of particular percentages of fault to certain companies. (Associations brief at pp. 36–41.) However, none of the cases cited in the brief involved a defendant found liable for an intentional tort.[5]

Lacking in any real-world examples, Amici posit various hypothetical scenarios in which a solvent company will be held 100 percent responsible for the worker's exposure if it misrepresented a product as safe even if the worker had only

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[5] The Associations' brief erroneously asserts that in *Rutherford v. Owens-Illinois, Inc. supra*, 16 Cal. 4th at p. 976, this Court "lowered" the asbestos plaintiff's "burden of proving causation." (Associations' brief at p. 36.) *Rutherford* did no such thing. To the contrary, *Rutherford* specifically rejected a "relaxed" burden-shifting instruction, requiring asbestos plaintiffs, like all plaintiffs, to prove "substantial factor" causation. (See *Rutherford*, 16 Cal.4th at pp. 957–58, 979–80.)

briefly come into contact with its asbestos product or it produced asbestos that is far less toxic than the brand of another defendant. (Coalition brief at p. 9; Associations brief at pp. 15, 27.) Such incomplete hypotheticals cannot be used to carve out an exception to the rule that intentional tortfeasors should not be allowed to shift their liability to non-intentional ones. If such a case occurs, the courts should address it based on the actual facts and evidence, instead of creating a strained exception which – while potentially preventing a purported injustice in a hypothetical scenario for a single case – would simultaneously create injustice in the vast majority of cases. In the meantime, courts can use a variety of procedural tools, including special interrogatories for the jury and pre and post-trial motions, to address particular situations in which it would be inequitable or contrary to the evidence to hold one company liable for conduct that was not its fault. (See, e.g., *Burch*, *supra*, 34 Cal. App. 5th at pp. 352–55 [affirming judgment for Defendants on intentional tort of misrepresentation notwithstanding a contrary jury verdict].)

Accordingly, worst case scenarios involving insolvent asbestos companies provide no justification for the premise that Proposition 51 should allow a defendant found liable for an intentional tort to lessen its liability based on the non-intentional conduct of another.

## II. Principles of Comparative Fault Have Never Applied to Shift Responsibility from an Intentional Actor to a Non-Intentional One.

In addition to arguing for special treatment in asbestos cases, both the Coalition and Associations' briefs repeat the same refrain argued by Defendants and other amici that there is no difference between defendants liable for intentional torts and actors who are found to have acted unintentionally. (Coalition brief at pp. 11–13; Associations' brief at pp. 27–33.)[6] As

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[6] The principal cases cited by Amici do not in any way suggest that a defendant found liable for an intentional tort should be allowed to invoke Proposition 51 to reduce its liability based on the non-intentional conduct of others. For example, in *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, as well as *Weidenfeller v. Star & Garter*, (1991) 1 Cal.App.4th 1 and *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, the intentional tortfeasor was a third party and not a defendant seeking to shift responsibility to an actor who did not commit an intentional tort. In *Pfeifer v John Crane, Inc.* (2003) 220 Cal.App.4th 1270, 1289–90, the court, in an asbestos case which did not involve intentional torts, merely held that a jury's

demonstrated in Plaintiffs' Opening and Reply briefs, this contention lacks merit. (See T.E. OB, at pp. 18–29; T.E. RB, at pp.28–36; B.B. OB at pp. 28–36; B.B. RB at pp. 30–40, 45–52.) Indeed, as explained previously, at the time Proposition 51 was adopted, the law did not allow an intentional tortfeasor to assert comparative fault as a defense. (See *Allen, supra,* 137 Cal.App.3d at pp. 226–27; see also *Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 385; Code Civ. Proc., § 875, subd. (d) [providing that there is no right of contribution for intentional tortfeasors]; Rest.2d Torts, § 481, com. b ["This section states that the plaintiff is not barred from recovery against an intentional wrongdoer by his contributory negligence."]; *Burch, supra,* 34 Cal. App. 5th at p. 356 [citing *Thomas, supra,* 139 Cal.App.4th at p. 1112].)[7]

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apportionment of a greater percentage of fault to a party whose misconduct was deemed "more egregious" than another's was proper in light of the evidence. *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, and *Arena v. Owens Corning Fiberglass Corp.* (1998) 63 Cal.App.4th 1178, are both asbestos cases which did not involve intentional tortfeasors.

[7] Notably, the Judicial Council Jury Instructions regarding contributory negligence and comparative fault are found within the CACI No. 400 series, which address claims for negligence and strict liability but do not include intentional torts. (See CACI No. 406 [Apportionment of Responsibility]; CACI No. 407

Simply stated, the law has never allowed an intentional tortfeasor to reduce his responsibility for a plaintiff's damages due to the negligence of others. (See *Weidenfeller v. Star & Garter, supra,* 1 Cal.App.4th at p. 7.)[8] Amici ignore this principle and instead argue that juries are capable of using common sense to allocate fault, including deciding that a party who acted intentionally may be found to have a greater percentage of fault.[9] The problem with this argument is that it conflates the jury's role in allocating fault with the Court's role in deciding how to enter the judgment based on the particular causes of action at issue.

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[Comparative Fault of Decedent]; CACI VF-402 [Negligence—Fault of Plaintiff and Others at Issue].)

[8] Amici repeatedly cite to this Court's decisions in *Safeway Stores, Inc. v Nest-Kart,* (1978) 21 Cal.3d 322, 332 and *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, which were issued prior to the passage of Proposition 51. However, these cases, in which principles of comparative fault were applied to strict liability actions, have no bearing on the issue of whether an intentional tortfeasor defendant can invoke principles of comparative fault to reduce its liability.

[9] Amici's argument also sidesteps the fact that jurors are not instructed to weigh intentional versus non-intentional conduct in allocating fault. Rather, the instructions merely inform the jury to find causation only where an act or omission is a "substantial factor" in causing the harm. (See CACI Nos. 430 and 431).

Amici confuse apportionment of fault in the verdict form (a factual finding by the jury) with the application of Proposition 51 to the resulting judgment (a legal determination by the Court). (See CACI No. 407 [Comparative Fault of Decedent] [instructing the jury that the Court will make "the actual reduction."].) While jurors are certainly capable of apportioning fault among joint tortfeasors, the issue here is how to apply that allocation to the final judgment. If judgment is entered against a negligent or other non-intentional tortfeasor, Proposition 51 provides for a reduction of non-economic damages. However, if judgment is entered against an intentional tortfeasor, that judgment should not be reduced.

Where only intentional torts are at issue, the jury should not be instructed on comparative fault. For example, the sample verdict form for battery by a peace officer (an intentional tort) does not contain any questions regarding apportionment of fault. (See CACI VF-1303.) Indeed, none of the sample verdict forms for intentional torts contain apportionment of fault questions for the jury. (See, e.g., CACI VF-1400 et seq. [False Imprisonment], CACI VF-1500 et seq. [Malicious Prosecution]; CACI VF-1600

[Intentional Infliction of Emotional Distress]; CACI VF-1700 et seq. [Defamation]; CACI VF-1900 [Intentional Misrepresentation].) Nonetheless, where, as in this case, the Plaintiffs asserted both intentional and non-intentional tort claims, it was appropriate to provide an apportionment question on the verdict form and it was also correct of the trial court not to apply the jury's apportionment when entering judgment against Defendant Aviles on Plaintiffs' battery claim.

Amici argue that not applying Proposition 51's reduction of fault to intentional tortfeasor defendants will result in the "all or nothing rules" that existed prior to *Li v. Yellow Cab Co.*, *supra*, and would be contrary to Proposition 51's goal of protecting against "deep pocket" liability. (Associations' brief at pp. 15, 26.) However, Amici ignore the fact that "all or nothing" liability has always been the rule for intentional tortfeasor defendants, including after the adoption of comparative fault by this Court in *Li*. The common law has *always* recognized that an intentional tortfeasor cannot offset his liability based on the non-intentional conduct of another. Nothing in *Li* or its progeny altered this common law rule. (See *ante*, p. 19–20 [quoting *Burch*, 34 Cal.

App. 5th at p. 356]; see also 18 A.L.R.5th 525 ["Before comparative negligence was widely adopted, it was black-letter law that contributory negligence principles were not a defense to an intentional tort action. And under comparative negligence, the same defense of nonapplicability to intentional torts carried over and became the general rule, so that there would be no apportionment of damages where an intentional tort would apply."]; *id.* fn. 1 [noting that in annotation "no distinction is made between 'comparative negligence' and 'comparative fault'"].)[10] Neither the statute itself nor any of the ballot materials provide any indication whatsoever that the voters intended to change the well-established common law.

As the Court stated in *Burch, supra*, 34 Cal. App. 5th at p. 358: "When Proposition 51 was enacted, the comparative fault principles announced in *Li* and *American Motorcycle* did not allow intentional tortfeasors to reduce their liability on the account of a negligent joint tortfeasor's fault. . . . Thus, unlike a

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[10] Because this common law rule continued under comparative negligence, the Associations' argument that Plaintiffs have relied on "old contributory negligence cases", (Associations' brief at p. 26), is erroneous.

negligent tortfeasor, an intentional tortfeasor was jointly and severally liable for all the plaintiff's damages and had no mechanism to reduce this liability. In using the language 'based on principles of comparative fault,' section 1431.2 must be read to have incorporated these judicially construed principles." (See also *Allen v. Sundean, supra.,* 137 Cal.App.3d at p. 226; T.E. OB at pp. 18–25; T.E. R.B at pp. 28–35; B.B. RB at pp. 30–40.)

## III. The Plain Language of Civil Code Section 1431.2 Demonstrates that it Only Applies in Actions based on Principles of Comparative Fault.

Amici repeat the same flawed arguments that Defendants make concerning the plain language of the statute and which were addressed by Plaintiffs in their Opening and Reply Briefs. (See T.E. OB, at pp. 14–17; T.E. RB at pp. 10–16; B.B. OB at pp. 15–27; B.B. RB at pp. 12–15, 22–30.) Amici's arguments were also rejected by the court in *Burch*, which held that the statute's use of the words "based on principles of comparative fault" means that Proposition 51 cannot be invoked by a defendant found liable for an intentional tort to reduce its liability. (34 Cal.App.5th at pp. 357–59.) *Burch* also rejected the notion that this Court's

decision in *DaFonte v. Up-Right, Inc.*, *supra*, "compels a different conclusion." (*Burch*, *supra*, 34 Cal.App.5th at p. 359.)

Likewise, the *Burch* court found that the ballot materials for Proposition 51 supported its interpretation of the statute. (*Id.* at pp. 358–59; see also B.B. OB at pp. 28–30.) In particular, the court in *Burch* explained how the ballot materials demonstrate that intentional tortfeasor defendants were not within the scope of the statute, in the extensive citation Plaintiffs have provided at *ante*, pp. 14–15 (citing *Burch*, *supra*, 34 Cal. App.5th at pp. 358–59).

Accordingly, contrary to Amici's assertions, neither the plain language of the statute nor the ballot materials support their position.

## NOTICE OF JOINDER

Plaintiffs T.E., D.B. and D.B. join and incorporate herein Plaintiffs B.B. et al.'s consolidated Answer to the Amici Curiae briefs of the California Medical Association et al.; Civil Justice Association of California; and Michael and Cindy Burch.

Dated: July 12, 2019

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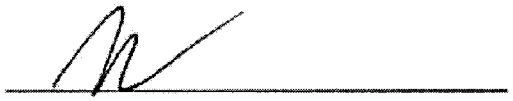
## CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 7,179 words, including footnotes. This brief is proportionately spaced in 13-point Century Schoolbook typeface. In making this certification, I have relied on the word count of Microsoft Word, which was used to prepare the brief.

Dated: July 12, 2019



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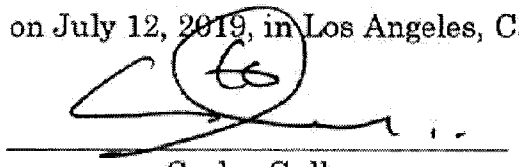

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