S250734

No. S250734

SUPREME COURT
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IN THE
SUPREME COURT
OF THE
STATE 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, Respondents, and Petitioners,*
v.
COUNTY OF LOS ANGELES et al., *Defendants and Appellants.*

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

AFTER DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE
CASE NO. B264946

APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES
THE HONORABLE ROSS M. KLEIN
CIVIL CASE NO. TC027341, COMBINED WITH BC505918 & TC027438

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INTRODUCTION

The briefing from the various amici curiae confirms what the Second Appellate District recognized below: that the plain language of Civil Code section 1431.2 imposes a rule of strict proportionate liability on *every* defendant in *every* case, including intentional tortfeasors. The amici opposing affirmance (the "Burch Amici") ask this Court to ignore the text, purpose, and statutory framework of section 1431.2, and to depart from the Court's own prior decisions on section 1431.2's application. The amici supporting affirmance (many of which originally championed Proposition 51 in 1986) rightly caution against the harmful consequences that would befall local governments, medical professionals, and businesses if intentional tortfeasors were excluded from section 1431.2. Defendants and Appellants County of Los Angeles and Deputy David Aviles (collectively, "Defendants") respectfully submit this Consolidated Answer to both groups of amici curiae.

ARGUMENT

I. THE BURCH AMICI DISREGARD THE TEXT AND FRAMEWORK OF SECTION 1431.2.

The Burch Amici offer no justification for departing from the Second Appellate District's opinion on section 1431.2's applicability to intentional tortfeasors. Instead, they (a) rely on an erroneous First Appellate District decision, (b) misrepresent the ability of California juries to allocate fault in complex scenarios, and (c) propose that this Court create new common-law rules that voters in 1986 never intended.

a. *Burch v. CertainTeed* Was Incorrectly Decided.

The Burch Amici argue that this Court should adopt the First Appellate District's conclusions in their case, *Burch v. CertainTeed Corp.* (2019) 34 Cal.App.5th 341 ("*Burch*"), which strayed from the Second Appellate District's holding below, *B.B. v. County of Los Angeles* (2018)

25 Cal.App.5th 115. (Burch Amici Brief at pp. 8–15.) But *Burch* was incorrectly decided for at least four reasons.

Burch *misreads section 1431.2's text.* First, *Burch* failed to consider the overwhelming evidence that California voters intended section 1431.2 to apply to all defendants in tort actions without any exceptions for intentional tortfeasors. *Burch* did not address, much less dispute, that:

- section 1431.2 twice mentions that it applies to "each defendant" in "any action," (Civ. Code, § 1431.2, subd. (a));
- section 1431.1 twice explains that the statute's purpose is to enact reforms "in tort actions," (Civ. Code, § 1431.1); and
- the phrase "intentional tortfeasor" appears *nowhere* in the statutory text.

Despite these clear indications that section 1431.2 does not contain any exception for intentional tortfeasors, *Burch* (like Plaintiffs here) isolated a single participial phrase in section 1431.2, subdivision (a): "based upon principles of comparative fault." The court then concluded that those six words carried an unstated exception for intentional tortfeasors, one that voters would have purportedly understood from reading two court of appeal opinions published in 1982. (*Burch*, *supra*, 34 Cal.App.5th at p. 358.)

Voters could have drawn no such conclusion. As Defendants explained in their Answer Brief on the Merits, and as the Ninth Circuit Court of Appeals explained in *Martin v. United States* (9th Cir. 1993) 984 F.2d 1033, 1039, that participial phrase, in context, instructs that the "liability" in any wrongful death action would reflect the proportional fault of all plaintiffs, defendants, and third parties that contributed to the harm. (ABM at pp. 27–28.) This was the purpose of the comparative fault doctrine—*i.e.*, "distribute tort damages proportionately among all who caused the harm," (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 595)—and the purpose of Proposition 51—*i.e.*, "defendants in tort actions shall be

held financially liable in closer proportion to their degree of fault," (Civ. Code, § 1431.1). *Burch* did not even consider this reasonable interpretation, which, given section 1431.2's plain text and syntax, is the interpretation voters would have reached in 1986, when they passed Proposition 51. (See ABM at pp. 26–29.) That intent must control. (See *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152.)

Burch ***credits inapposite cases.*** Second, *Burch* based its holding on an incorrect assessment of California law before Proposition 51's passage. *Burch* concluded that "[w]hen Proposition 51 was enacted, the comparative fault principles announced in *Li* [*v. Yellow Cab Co.* (1975) 13 Cal.3d 804] and *American Motorcycle* [*Association v. Superior Court* (1978) 20 Cal.3d 578] did not allow intentional tortfeasors to reduce their liability on the account of a negligent joint tortfeasor's fault." (*Burch*, *supra*, 34 Cal.App.5th at p. 358.) But the only two court of appeal opinions that *Burch* cited—*Allen v. Sundean* (1982) 137 Cal.App.3d 216 (*Allen*), and *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154 (*Godfrey*)—do not support this conclusion.

In *Allen*, one of the issues before the court of appeal was whether an intentional tortfeasor (Sundean) who was allocated 90% of the fault could seek contribution from a negligent co-tortfeasor (Kram) who was allocated 10% of the fault but excluded from the final judgment. (*Allen*, *supra*, 137 Cal.App.3d at p. 220 ["Sundean has appealed, contending . . . that Sundean is entitled to a contribution from Kram to the extent Kram was at fault."].) The trial court below had concluded that Sundean was not entitled to contribution from Kram because "a party guilty of fraud and/or willful misconduct is not entitled to contribution from a merely negligent co-tortfeasor." (*Id.*, at pp. 224–225.) The court of appeal agreed, in part, citing Code of Civil Procedure section 875, which bars contribution for

intentional tortfeasors. (*Id.* at p. 226 [citing Code Civ. Proc., § 875].)[1] In reaching this conclusion, the court of appeal made several observations about the development of comparative fault, including that "no authority" had yet addressed the role of intentional tortfeasors in the doctrine. (*Id.* at pp. 226–227.) But *Allen* did not address, much less decide, whether the comparative fault doctrine excluded intentional tortfeasors.

And in *Godfrey*, the court of appeal found no error in the trial court's denial of a comparative fault jury instruction, concluding that the elements of the plaintiffs' contractual fraud claims already encompassed any potential "fault" on their part. (*Godfrey*, *supra*, 128 Cal.App.3d at p. 176.) The court explained that for the plaintiffs to prevail, they had to demonstrate that they had "been unaware of the concealed fact," and therefore the jury was already "asked to evaluate the plaintiffs' conduct" to determine if it contributed to their harm. (*Ibid.*) As in *Allen*, whether the comparative fault doctrine excluded intentional tortfeasors was not decided or even at issue.

Because neither *Allen* nor *Godfrey* excluded intentional tortfeasors from the comparative fault doctrine, neither created any sort of "judicially construed principle[]" that voters would have understood to exclude intentional tortfeasors from the scope of Proposition 51. (*Burch*, *supra*, 34 Cal.App.5th at p. 358.) *Burch* placed controlling weight on two opinions not on point, yet disregarded *this Court's* interpretation of section 1431.2 in *DaFonte*—"section 1431.2 itself contains no ambiguity" (*DaFonte*, *supra*, 2 Cal.4th at p. 602)—on grounds that *DaFonte* was not on point, (*Burch*, *supra*, 34 Cal.App.5th at p. 359 ["The Supreme Court had no occasion to

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[1] The court of appeal disagreed that contribution was unavailable for willful misconduct, and therefore concluded that Sundean was entitled to contribution from Kram for the portion of the damages award attributable only to Sundean's willful misconduct. (*Ibid.*)

consider the question of whether section 1431.2 eliminates an intentional tortfeasor's joint and several liability for noneconomic damages in tort actions."]).[2] This approach reflects the flaws in the *Burch* holding. The Court should look no place other than the text of section 1431.2 to decide the voters' intent.

Burch *conflates intentionality with culpability.* Third, *Burch* concluded that intentional tortfeasors are "the most culpable of all." (*Burch*, *supra*, 34 Cal.App.5th at p. 359.) But that is not always the case. Here, the jury heard evidence that Mr. Burley ingested PCP and cocaine, assaulted a pregnant woman, and repeatedly struck a sheriff's deputy making a lawful arrest. (See, e.g., *B.B.*, *supra*, 25 Cal.App.5th at p. 121.) The jury also heard evidence that the intentional tortfeasor, Deputy Aviles, was not touching or even near Mr. Burley when his heart stopped pumping blood to his brain. (*Ibid.*) And Plaintiffs' counsel during closing argument repeatedly downplayed the culpability of the deputies: "I agree, they ***did not intend*** to kill Darren Burley that day. These aren't bad people." (18.RT.5173:25–5174:2, italics added.) Indeed, the only person who arguably intended to kill anyone that fateful day was Mr. Burley himself. (*B.B.*, *supra*, 25 Cal.App.5th at p. 121 ["He tried to kill me!"].)

Given this evidence and argument, it is hardly surprising that the jury found Mr. Burley the "most culpable of all" and allocated to him the highest percentage of comparative fault. What this case therefore

[2] The Burch Amici attempt to justify *Burch*'s dismissal of *DaFonte* by claiming that this Court in *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520 ("*Buttram*"), "implicitly recognize[d]" that intentional tortfeasors were not entitled to benefits under section 1431.2. (Burch Amici Brief at pp. 12–13.) *Buttram* made no such "implicit" findings. Rather, this Court merely rejected an untimely argument that a jury's punitive damages finding did not remove a strict products-liability defendant from section 1431.2. (*Buttram*, *supra*, 16 Cal.4th at p. 539.)

demonstrates is that international tortfeasors may appear on either side of the "*v.*" in a particular case, and a jury's finding of intentionality may not correlate to its judgment on the "most culpable" actor. Intentional tortfeasors can also be the least culpable, or at least less culpable than a tortious plaintiff or decedent. *Burch*'s simplistic approach is thus unworkable and will produce the very inequities that Proposition 51 sought to eliminate. The only way to fulfill Proposition 51's purpose of ensuring that "defendants in tort actions shall be held financially liable in closer proportion to their degree of fault" (Civ. Code, § 1431.1) is to treat intentional and negligent tortfeasors equally. (See *DaFonte*, *supra*, 2 Cal.4th at p. 602 ["In every case, it limits the joint liability of every 'defendant' to economic damages, and it shields every 'defendant' from any share of noneconomic damages beyond that attributable to his or her own comparative fault."].)

Burch ***ignores the full spectrum of ballot materials.*** Finally, *Burch* relied on a cherry-picked, qualified sentence in the ballot materials to incorrectly justify its conclusion. According to *Burch*, because the Attorney General's summary of Proposition 51 noted that a defendant "*may* seek equitable reimbursement from other defendants" under existing law, then voters must have known that Proposition 51 would never apply to intentional tortfeasors because intentional tortfeasors were barred from equitable reimbursement from co-defendants under Code of Civil Procedure section 875. (*Burch*, *supra*, 34 Cal.App.5th at pp. 358–359.) This speculative conclusion assumes that voters failed to read the rest of the voter materials, which clearly and unambiguously explained that Proposition 51 contained no exceptions for certain types of defendants. *Burch* ignores that voters were also informed of the following statements about proportionality:

- "[F]or 'non-economic damages,' defined as subjective, non-

monetary losses, including pain, suffering, and others specified, *each defendant's* responsibility to pay plaintiff's damages would be limited in direct proportion to that defendant's percentage of fault." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1243, appen.[3])

- "This measure . . . limits the liability of *each responsible party* in a lawsuit to that portion of non-economic damages that is equal to the responsible party's share of fault." (*Ibid.*)

No voter would have understood these unequivocal statements in the ballot materials to exclude intentional tortfeasors. (See ABM at pp. 24–25.) It is the duty of the court to consider all of these materials when determining the voters' intent (*Hutnick v. U.S. Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7). If *Burch*'s myopic approach were correct, then section 1431.2 would apply only in drunk driving cases—the one hypothetical provided to voters. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1243, appen.) That is not—and cannot be—the law.

b. Juries Are Equipped to Assess the Impact of Intentional Torts When Allocating Fault.

The Burch Amici also make the erroneous argument that intentional tortfeasors would not suffer enough "consequences," and would therefore obtain a "free ride," if they could obtain the benefits of section 1431.2. (Burch Amici Brief at pp. 15–16.) But this sells juries short. Through their comparative fault allocation, juries are capable of holding intentional tortfeasors fully responsible for their conduct.

As this Court has observed, "[c]omparative fault 'is a flexible, commonsense concept' adopted to enable juries to reach an 'equitable apportionment or allocation of loss.'" (*Diaz v. Carcamo* (2011) 51 Cal.4th

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[3] The voter pamphlet for the June 3, 1986 primary election was reproduced, in relevant part, in an "Appendix" to the Court's opinion in *Evangelatos*.

1148, 1160.) And for decades, California juries have demonstrated their ability to allocate fault in complex scenarios involving multiple tortfeasors and types of harm using this flexible doctrine. (See, e.g., *Rosh v. Cave Imaging Sys., Inc.* (1994) 26 Cal.App.4th 1225, 1233 [allocating 75% fault to negligent tortfeasor and 25% fault to intentional tortfeasor]; *Weidenfeller v. Star & Garter* (1991) 1 Cal.App.4th 1, 5 [allocating 5% fault to the plaintiff, 20% fault to negligent tortfeasor, and 75% fault to intentional tortfeasor].) This case is yet another example of a jury correctly allocating responsibility for loss using this flexible doctrine. Even though Deputy Aviles was not in contact with Mr. Burley when his heart stopped and did not, as Plaintiffs' counsel conceded, intend to kill Mr. Burley (see 18.RT.5173:25–5174:2), the jury still assigned Deputy Aviles 20% of the fault, which amounts to $1.6 million in damages liability. This is hardly a "free ride."

Juries can and do issue awards that reflect all the facts in the case, the parties' relative degrees of fault, and the nature of the conduct—regardless of whether that conduct is intentional or negligent. Additional "consequences" would negate juries' careful allocations. Moreover, the need for "consequences" is especially improper since noneconomic damages are compensatory and not punitive, and, as the Second Appellate District recognized below, section 1431.2 "expresses no concern for advancing or preserving liability principles related to deterrence or punishment." (*B.B.*, *supra*, 25 Cal.App.5th at p. 127.) There is simply no place to impose "consequences" on intentional tortfeasors under section 1431.2.

c. This Case Is an Improper Vehicle to Create New Common Law.

In their final attempt to avoid the statutory text, the Burch Amici argue that this Court should create new common-law rules so that they can

collect 100% of their noneconomic damages from the lone intentional tortfeasor in their case. (Burch Amici Brief at pp. 19–20.) But new common law has no place in a case about statutory interpretation, and the voters in 1986 would have never intended to incorporate a common-law rule created three decades later. The Court should reject the Burch Amici's improper attempt to rewrite history through the common law.

But if the Court were inclined to do so, the new common law should finish the groundwork that this Court set in *Li*, *American Motorcycle*, *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, and *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, and finally extend the comparative fault doctrine, in full, to intentional tortfeasors. Numerous amici in this case agree. (See, e.g., Brief of Amici Curiae California Medical Association, California Dental Association, and California Hospital Association in Support of Defendants and Appellants ("Medical Amici Brief") at pp. 62–65.) If the Court is inclined to create new common law, its rule should conform to this national trend.

II. PROPOSITION 51'S ORIGINAL PROPONENTS CONFIRM THE VOTERS' INTENT AND WARN OF DIRE CONSEQUENCES IF THAT INTENT IS BETRAYED.

The amici curiae supporting Defendants offer this Court an invaluable firsthand perspective on voter intent that trumps the speculation of the Burch Amici. As local governments, medical professionals, and legal reformers, they also have a keen understanding of the harms that would be visited on many pillars of society if *B.B.* were overturned.

With these amici curiae, the Court has the benefit of hearing directly from the organizations that originally drafted or supported Proposition 51 in 1986. Given their historical role on this issue, including their command of the statute's text and accompanying voter materials, they can help the Court interpret the text of section 1431.2 in a manner that upholds the intent of

California voters. (See *People v. Buycks* (2018) 5 Cal.5th 857, 879 ["Where a law is adopted by the voters, 'their intent governs.'"].)

Six of Proposition 51's original proponents[4] have filed amici curiae briefs confirming that section 1431.2 was intended to benefit "every defendant," including intentional tortfeasors. These amici curiae include the California Medical Association, California Dental Association, California Hospital Association, League of California Cities, California State Association of Counties (a/k/a California Supervisors Association of California), and the Civil Justice Association of California (formerly the Association for California Tort Reform). All recognize that voters never understood Proposition 51 to exclude intentional tortfeasors:

- "[A] reading of the ballot materials indicates the voters reasonably understood that Proposition 51 would enact a bright-line standard, precluding joint liability for non-economic injuries in *all* cases against local agencies, whether involving intentional or negligent conduct." (Brief of Amici Curiae League of California Cities and California State Association of Counties in Support of Defendants and Appellants ("Local Government Amici Brief") at p. 12.)
- "There is nothing in the statutory language nor in the ballot materials that demonstrates an intention to limit [section 1431.2's] application to negligence." (Medical Amici Brief at p. 33.)
- "Proposition 51's plain language and clear purpose provide that in cases where multiple parties caused an injury, and at least one acted intentionally in doing so, the court should compare the fault

[4] The full list of proponents—*i.e.*, "one of the largest coalitions ever"—is available in the voter pamphlet for the June 3, 1986 primary election. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1246, appen.)

> of all tortfeasors and allocate noneconomic damages among them in accordance with their respective percentages of responsibility." (Brief of Amicus Curiae Civil Justice Association of California in Support of Defendants ("CJAC Amici Brief") at p. 15.)

Tellingly, not one of Proposition 51's original opponents has sought amici participation in this case. Nor has a single original proponent filed an amicus brief in favor of Plaintiffs' position.

The amici curiae supporting Defendants also detail the harmful consequences to local government, medical professionals, and businesses that would result if intentional tortfeasors were denied section 1431.2's benefits. Cities and counties will incur significant new costs defending their law enforcement agencies. (Local Government Amici Brief at p. 2.) Doctors and health care providers will incur significant new costs defending lawsuits by plaintiffs seeking to skirt the damages limitations in the Medical Injury Compensation Reform Act. (Medical Amici Brief at pp. 18–20, 33–36.) And thousands of businesses with any connection to products containing asbestos will be dragged into ever-growing asbestos litigation and, like the companies that came before them, will be forced into bankruptcy. (See Brief of Amicus Curiae Associations of Southern California Defense Counsel and Defense Counsel of Northern California and Nevada in Support of Defendants at pp. 33–42; Brief of Amicus Curiae Coalition for Litigation Justice, Inc. at pp. 4–11.)

The impact of this case is not confined to the inequities of forcing the County of Los Angeles to pay $3.2 million in damages for harm that its deputies did not cause. Rather, entire industries could be upended if intentional tortfeasors are deprived of the fairness that section 1431.2 mandates. There is simply no evidence that voters ever intended this kind

of disruption three decades ago when they approved the plain and unambiguous language in Proposition 51.

CONCLUSION

For all the reasons set forth here and in their Answer Brief on the Merits, Defendants respectfully request that the Court affirm the opinion below by the Second Appellate District.

Dated: July 15, 2019

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed brief was produced using 13-point Times New Roman type and contains approximately 3,276 words (including footnotes) as counted by the Microsoft Word 2016 word processing program.

Dated: July 15, 2019

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PROOF OF SERVICE

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is Two Embarcadero Center, 28th Floor, San Francisco, California 94111-3823. On July 15, 2019, I served the following document on the persons listed in the attached service list and in the manner indicated below:

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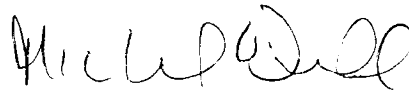

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