S192768

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AIDAN MING-HO LEUNG,

Plaintiff, Respondent and Cross-Appellant,

vs.

VERDUGO HILLS HOSPITAL,

Defendants, Appellants and Cross-Respondents.

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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. After having convinced the Court of Appeal that this Court was the proper forum to determine whether the release of one rule has continued validity, the Hospital should not now be heard to argue that review by this Court is not warranted.

In his petition for review, plaintiff Aidan Leung explained why the time has come for this Court to fully abandon the release-of- one-release-of-all rule which the Court of Appeal in this case concluded it was obligated to apply to deprive Aidan of virtually all his recovery to compensate him for the severe brain injuries caused by defendant Verdugo Hills Hospital's misconduct. In reaching this conclusion the Court of Appeal accepted the Hospital's argument that, under principles of *stare decisis*, it was bound by this Court's earlier decisions recognizing the release rule, because even though this Court has subsequently criticized that rule it had never actually disapproved of it. In so ruling, the Court of Appeal repeatedly urged this Court to grant review in order to disapprove of the release rule. (Opinion pp. 4, 28, 42-43.)

In its answer to the petition, the Hospital does not even try to justify the release rule. Nor could it. The courts (including this one) and commentators have

long explained that the artificial release rule never truly had a rational basis but even if it did, such a basis was long ago erased by the adoption of comparative fault. All of this is fully explained in the Petition for Review (at pp. 13-21) and is ignored by the Hospital.

Rather, after having convinced the Court of Appeal in briefing and at oral argument that only this Court could address the continued efficacy of the release rule (see ARB 25-26), the Hospital now inconsistently argues that this Court should deny review because while of "academic" interest, this is "not an issue deserving of this Court's time attention." (Answer p. 1.)

Putting aside for the moment (1) the hard reality that under the Court of Appeal's resolution of this matter – which it reached only because it was obligated to do so because of this Court's earlier decisions – Aidan will be deprived of the recovery awarded for the care and treatment of his severe brain injuries and (2) there are now directly conflicting published Court of Appeal decisions on the subject, there are other reasons why review by this Court is warranted.

Unless and until this Court intervenes, the decisions which the Court of Appeal in this case concluded it was obligated to follow, will remain binding on the Courts of Appeal and the trial courts of this state. According to the Hospital, however, because there is a scarcity of recent published decisions in this area, this Court should simply leave the admittedly unsound case law endorsing the release

rule undisturbed. The Hospital ignores that there is no way of knowing just how impactful those unsound cases continue to be, since there is no way of knowing whether there are trial court rulings relying on those cases which are not appealed, whether there are appellate decisions relying on those cases which are not published or whether there are settlements that are not consummated because of the specter of those cases.

Further, as the Court of Appeal recognized, the Hospital's argument that review is not necessary because section 877 has "largely occupied the field" is unfounded. The import of the Hospital's position is that only settlements which are held to meet the standard of "good faith" under section 877, could avoid the release rule. What this would mean is that, regardless of the intentions of the parties, all settlements that do not fall within section 877 either because, as here, they occurred after verdict or were found by the trial court not to meet that section's standard, will bar the plaintiff from pursuing his or her claims against the non-settling defendants. This would be the case even though the non-settling defendant would be entitled to seek indemnity from the settling defendant and even though the plaintiff would be precluded from obtaining a double recovery. The only effect of such a rule would be to penalize the plaintiff for entering into a settlement. Such a rule has no rational basis and would have the perverse effect of deterring settlement.

On the other hand, if this Court now recognizes that the release rule is no longer the law of this state, there will be no adverse consequences. It will be up to the settling parties whether or not to consummate a settlement even though it is not within the good faith settlement statute. The settling defendant could still go ahead with the settlement knowing that it may be subject to an indemnity claim by the non settling defendant and the plaintiff could decide whether to proceed with the settlement knowing that there will be an offset against any recovery from the settling defendant.

Next as the Court of Appeal recognized and contrary to the Hospital's argument, the Legislature did not seek to require the perpetuation of the release rule though its adoption of section 977 in 1957. Indeed, under the Hospital's position the terms of that section would be at war with each other. Under the Hospital's position the denial of a good faith settlement motion means both (1) the release of all joint tortfeasors and (2) the continued ability of the non settling joint tortfeasors to seek indemnity from the settling joint tortfeasor.

But if the release-of-one-release-of-all rule remains in effect, then a defendant whose settlement has been found not to be in good faith will never be subject to any claims for indemnity or contribution because all of the non-settling defendants will be deemed released and will therefore have no claims for indemnity or contribution. Thus, under the Hospital's reading of section 877, the

only party harmed by a finding that a settlement is not in good faith is the plaintiff. Nothing in the legislative history suggests that the Legislature intended such a result. Rather, section 877 should be harmonized as (1) abolishing the long criticized release-of-one-release-of all rule outright and (2) depriving the settling defendant of protections from indemnity and contribution as the statutory consequence for a finding that a settlement is not in good faith.[1]

As explained in the Petition for Review (at pp.18-19), in addition to the fact that the common law rule has been roundly criticized because it never truly made sense, California's adoption of equitable rights of indemnity between joint tortfeasors has made that rule even more nonsensical. The underpinnings of the release-of-one-release-of-all rule that there is only one debt which is extinguished by any satisfaction, no longer exist. And the enactment of section 877 did not stunt the development of the common law in the area. *(American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal.3d 578, 599.)

Next, it is not the case that Aidan knowingly encountered the release rule by agreeing to consummate the settlement after the trial court denied the good faith

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

settlement motion. The trial court agreed with Aidan that the settlement would not release the Hospital. And it is beyond reason to suggest that the trial court would have ever granted the petition to approve the minor's compromise as in Aidan's best interest if it were the case that as a result of the $1 million policy limit settlement with the doctor, Aidan would forfeit the $14,893.27 verdict against the Hospital. (AA Tab 88, p. 247.) In fact, the Hospital itself did not even argue that the release of the Doctor was a bar to its joint liability until after the compromise was approved in connection with objections to the verdict. (See Opinion pp. 30-31) The fact is that after having prevailed at trial against the Hospital, Aidan did not knowingly risk losing $15 million in order to consummate a $1 million settlement with the doctor. He was simply proceeding with a settlement that he obviously believed would preserve his rights to proceed against the Hospital. The only party who understood there would be adverse consequences as a result of the trial court's denial of the good faith settlement motion was Dr. Nishibayashi who would be subject to a claim for indemnity or contribution. The Hospital knows as much and its argument to the contrary is less than genuine.

In sum, nothing the Hospital argues in its Answer should dissuade this Court from agreeing with the Court of Appeal that the time has come to affirmatively disapprove of the archaic release rule.

II. None of the Hospital's remaining issues merits review.

In its answer, the Hospital attempts to cloud the water by also raising issues that clearly do not merit review. First, it seeks to have this Court "review" issues that were not even addressed by the Court of Appeal in the first place. (Those issues are: (1) Whether the jury should have been able to reduce Aidan's recovery by the mere possibility that he could receive future insurance payments even though there was no way of determining whether he would even be covered by any future insurance and (2) whether the Hospital's rejection of a settlement offer under Code of Civil Procedure section 998, entitled Aidan to interest based on the entire judgment.)[2] The reason why the Court of Appeal declined to reach these issues is that, due to its conclusion that the release rule precluded Aidan from recovering the joint and several damages against the Hospital, the aspects of the judgment to which these issues related no longer existed. (Based on this reasoning the Court also declined to reach Aidan's cross appeal.) If and when this Court grants review as to the release issue and concludes that the release rule is no longer viable, then the matter should be remanded to the Court of Appeal to resolve these

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A third issue raised by the Hospital relating to the nature of the offset due to the settlement if this Court abolishes the release rule (Answer pp. 21-24), is already encompassed in the second issue raised in the Petition for Review. (See Petition p. 1, 22-25.)

other issues. The Hospital's request that this Court review these undecided issues now is premature.

Next, the Hospital seeks to have this Court review the Court of Appeal's conclusion that there is substantial evidence supporting the jury's finding that the Hospital's negligence was a cause of Aidan's injuries. In the unpublished portion of its opinion, the Court of Appeal thoroughly discussed the ample evidence supporting the verdict. (See Opinion pp.45-56.) No matter how much the Hospital now attempts to "dress up" this issue, it is simply a routine substantial evidence contention. The Hospital just disagrees with the Court of Appeal's resolution of it. Aidan will not now repeat what the Court of Appeal has so carefully explained. This is certainly not an issue warranting this Court's attention.

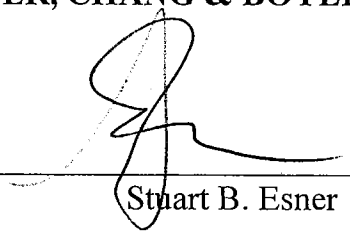
CONCLUSION

For the foregoing reasons and for the reasons explained in the Petition for Review, review by this Court is warranted to fully repudiate the common law release rule.

Dated: June 3, 2011

LKP GLOBAL LAW, LLP

ESNER, CHANG & BOYER



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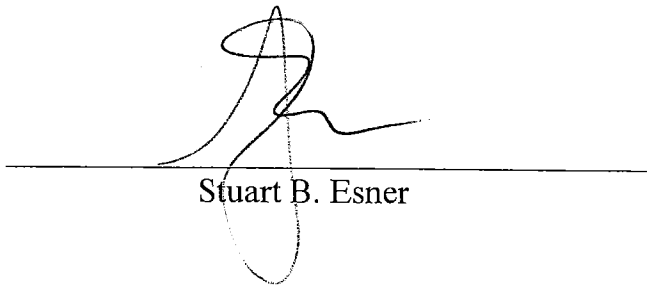

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