S250734

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

OPENING BRIEF ON THE MERITS

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INTRODUCTION

The overriding purpose of Proposition 51 (the so-called "Deep Pocket Initiative") was to restore fairness to our system of comparative fault. Its language, history, and statements of "legislative" intent (in the context of a voter initiative) all confirm that it attacked that problem on two closely related fronts.

First, declaring the need to redress the "unfair[ness]" of "deep pocket" defendants suffering "inclu[sion] in lawsuits," despite there being "little or no basis for finding them at fault," Proposition 51 eliminated the former rule of joint and several liability for the plaintiff's non-economic damages (while preserving it for economic damages to protect the plaintiff-victim). (Civ. Code, § 1431.1(a–b).)[1]

Second, however, Proposition 51 pointedly placed a major limitation on the change it was making. It included the key language at the heart of this appeal: "based upon principles of comparative fault." (§ 1431.2(a).) One of those carefully preserved

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[1] Unless otherwise indicated, all references are to the California Civil Code.

principles is that intentional tortfeasors are not entitled to shift any portion of their liability to those who are merely negligent.

In decisions construing sections 1431.1–1431.2, this Court has highlighted how the statute was concerned with affording protection to those less morally culpable. *DaFonte v. Up-Right, Inc.* ("*DaFonte*") (1992) 2 Cal.4th 593, 599, for example, explained that Proposition 51's purpose was to alleviate the "exploitation of *relatively blameless* defendants." (Emphasis added.) This makes perfect sense given that comparative fault, itself, is an equitable remedy.

In our case, the Court of Appeal erred because, rather than following the basic meaning and purpose of the statutory scheme, it felt bound by certain dicta in *DaFonte*. But *DaFonte* had zero to do with intentional tortfeasors; rather it dealt solely with adjustment of liability among negligent parties.

As we explain below, the Court of Appeal's Opinion cannot be sustained for at least four reasons. First, the Opinion failed to address in any meaningful way section 1431.2's key language: "based upon principles of comparative fault."

Second, the Opinion disregarded an eminently reasonable—and historically accurate—interpretation of that key

statutory phrase. As noted, the preexisting principles of comparative fault incorporated by reference do not permit an intentional tortfeasor to reduce his or her liability based on another's negligence.

Third, the Court of Appeal's holding—which protects *intentional tortfeasors* at the expense of merely negligent parties—is absurd given section 1431.2's intended purpose: to relieve "relatively blameless defendants" of disproportionate liability. Although intentional tortfeasors are covered in part by section 1431.2, it is purely a one-way street. Merely negligent actors receive the full benefit of not being responsible for any of the harm caused by an unavailable or a judgment-proof intentional actor, i.e., the statute creates a shield. Conversely, however, intentional tortfeasors cannot use the statute as a sword, i.e., they cannot benefit at the expense of the other parties from the statute's limitation on non-economic damages liability.

Fourth, as we will demonstrate, the Court of Appeal's Opinion conflicts with basic public policy principles. Whether reference is made to analogous statutes, fundamental principles of equity, or just plain common sense, it is clear that it was never

the intention that intentional tortfeasors would be given any dispensation from their bad acts.

ISSUE PRESENTED

May a defendant who commits *an intentional tort* invoke Civil Code section 1431.2, which limits a defendant's liability for non-economic damages "in direct proportion to that defendant's percentage of fault," to have his liability for damages reduced *based on principles of comparative fault*?

SUMMARY OF MATERIAL FACTS AND PROCEDURAL HISTORY

A. Los Angeles County Sherriff's Deputies respond to a domestic disturbance call.

On the evening of August 3, 2012, Los Angeles County Sheriff's Department officers responded to a domestic dispute in Compton, California, involving Darren Burley. (*B.B. v. County of Los Angeles* ("*B.B.*") (2018) 25 Cal.App.5th 115, 121.) Deputies David Aviles and Steve Fernandez who were the first to arrive at the scene ordered Burley to get on his knees facing away from the deputies. (*Ibid.*) Burley did not respond. (*Ibid.*)

B. Deputies engage in excessive force, including use of a carotid chokehold and flashlight strikes to Burley's head, and leave Burley face down with weight on his back and neck, compressing his airway.

Fernandez "hockey checked" Burley off his feet, causing him to hit his head on a parked truck before falling to the asphalt. (*B.B, supra*, 25 Cal.App.5th at 121.) A struggle ensued during which Aviles punched Burley in the face approximately five times, while Fernandez controlled Burley's lower body. (6RT 1668, 1670; 7RT 1857, 2009.) Eventually, the deputies maneuvered Burley to a prone position, face-down on the concrete. (*B.B., supra*, 25 Cal.App.5th at 121.) Aviles then mounted Burley's upper back, while pinning his chest to the ground with the maximum body weight he could apply. (*Ibid.*)

As Fernandez knelt on Burley's upper legs with all of his weight, Aviles pressed his right knee down on the back of Burley's head, near Burley's neck, and placed his left knee in the center of Burley's back. (*B.B., supra*, 25 Cal.App.5th at 121.) Burley struggled with the deputies, attempting to raise his chest from the ground. (*Ibid.*)

Eye-witness Carl Boyer testified that one of the deputies choked Burley in some type of "headlock" throughout

most of the struggle. (*B.B.*, *supra*, 25 Cal.App.5th at 121.) Burley appeared to be *gasping for air*. (*Ibid.*) Boyer also saw a deputy hit Burley in the head several times with a flashlight. (*Ibid.*)

When Deputy Paul Beserra arrived, Burley was face-down and Aviles and Fernandez were trying to restrain him. (*Ibid.*) Deputies Timothy Lee, Ernest Celaya, and William LeFevre arrived soon after. (*Ibid.*)

Beserra attempted to restrain Burley's left arm, while Lee assisted on the right and Celaya held Burley's feet. (*Ibid.*) Celaya and Lee tased Burley multiple times. (*Ibid.*) Burley was prone on his stomach the entire time, with Aviles still mounted on his back. (*Ibid.*)

Even after Burley was fully cuffed, Aviles still *remained* on Burley's back until Burley's legs were hobbled; at that point all deputies disengaged from Burley excepting Beserra. (*Id.* at 121–122.) A "Code 4"—indicating that the situation was under control—was sent via radio 17 minutes after Deputies Aviles and Fernandez arrived. (8RT 2108, 2138.)

While the other deputies disengaged, Beserra stayed with Burley. (*B.B.*, *supra*, 25 Cal.App.5th at 121.) Approximately two minutes later, Beserra heard Burley's breathing become labored

and felt his body go limp. (*Ibid.*) Beserra took no steps to administer C.P.R. (*Ibid.*)

C. Rendered unconscious and not breathing, Burley ultimately dies as a result of the struggle with Sherriff's Deputies.

When the paramedics arrived, Captain Jason Henderson of the Compton Fire Department found Burley still face-down on his stomach, with Beserra pressing his knee into the small of Burley's back. (*B.B.*, *supra*, 25 Cal.App.5th at 122.) Burley had no pulse. (*Ibid.*) Paramedics immediately began treating him with C.P.R. (*Ibid.*)

After five minutes, the paramedics restored Burley's pulse and transported him to the hospital. (*Ibid.*) Unfortunately, Burley never regained consciousness and died 10 days later. (*Ibid.*)

The autopsy report listed Burley's cause of death as brain death and swelling from lack of oxygen following a cardiac arrest "due to status post-restraint maneuvers or behavior associated with cocaine, phencyclidine and cannabinoids intake." (*Ibid.*) The manner of death was marked, "could not be determined." (*Ibid.*)

D. The jury trial, verdict, and post-trial motions.

Three sets of plaintiffs filed lawsuits against the County and deputies: (1) Burley's estranged wife, Rhandi T., and their two children; (2) Burley's two children with Shanell S.; and (3) Burley's child with Akira E. The complaints asserted causes of action for battery, negligence, and civil rights violations under Civil Code section 52.1.

Defendants moved for summary adjudication of the civil rights claim. The trial court granted the motion, and the three consolidated cases proceeded to trial on the battery and negligence claims against Deputies Aviles, Beserra, Fernandez, Celaya, Lee, and LeFevre and the County.

After a multi-week trial, this wrongful death action culminated in a jury verdict finding "Aviles liable for i*ntentional battery* by use of *excessive force* and [] Beserra liable for negligence." (*B.B.*, *supra*, 25 Cal.App.5th at 119, emphasis added.) The jury apportioned fault for Burley's death between Aviles (20%), Beserra (20%), other deputies (20%), and Burley, himself (40%), based on his own negligence. The jury awarded $8 million in combined non-economic damages (no economic

damages had been sought) to Burley's five children and his widow. (*Ibid.*)

After Plaintiffs filed a proposed judgment, Defendants opposed it on the grounds that it failed to apportion damages for Aviles and Beserra according to their percentages of fault. They contended the matter was governed by Civil Code section 1431.2 ("section 1431.2"), which provides for several liability for non-economic damages in certain actions.

After a hearing on the apportionment issue, the court rejected Defendants' argument that section 1431.2 reduced the liability of an intentional tortfeasor (Aviles). Therefore, it entered judgment against Beserra and the County for $1.6 million (20% of the damages award) and against Aviles and the County for the full $8 million non-economic damages award. In holding Aviles liable for the entire damages award, the trial court followed *Thomas v. Duggins Construction Co., Inc.* ("*Thomas*") (2006) 139 Cal.App.4th 1105—the only published authority dealing with the treatment of intentional tortfeasors under section 1431.2. In *Thomas*, the Fourth Appellate District, Division One, held that "section 1431.2 does not apply to an *intentional* tortfeasor's

liability in a personal injury case." (*B.B.*, *supra*, 25 Cal.App.5th at 124, citing *Thomas*, 139 Cal.App.4th at 1112–13.)

E. The Court of Appeal's Opinion.

Defendants appealed the judgment attacking virtually every aspect of the trial.[2] The Court of Appeal held that section 1431.2 must be applied to reduce Aviles' liability to 20 percent, in proportion to the percentage of fault that the jury had attributed to him. (*B.B.*, *supra*, 25 Cal.App.5th at 135.)

ARGUMENT

THE COURT OF APPEAL'S CONCLUSION THAT SECTION 1431.2(a) "*UNAMBIGUOUSLY*" REQUIRES APPORTIONMENT IN ALL CASES—EVEN WHERE IT WOULD BENEFIT INTENTIONAL TORTFEASORS—CANNOT STAND. IT IGNORES KEY STATUTORY LANGUAGE, MISREADS *DAFONTE*'S DICTA, DOES VIOLENCE TO THE STATUTE'S VERY PURPOSE, AND FLOUTS FUNDAMENTAL PUBLIC POLICY.

The Court of Appeal's Opinion reflects a fundamental misinterpretation of section 1431.2(a). It holds that the statute requires apportionment of non-economic damages in all cases—

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[2] In addition, Plaintiffs successfully appealed summary adjudication of their Bane Act claim (Civ. Code, § 52.1). (*B.B.*, *supra*, 25 Cal.App.5th at 133–134.) The Bane Act claim is not at issue here, and trial of that claim will commence following this Court's ruling.

even those where such apportionment would enure to the *benefit of* intentional tortfeasors. (*B.B.*, *supra*, 25 Cal.App.5th at 128.)

However, pertinent statutory language tells a different story. It provides:

> In any action for personal injury, property damage, or wrongful death, *based upon principles of comparative fault*, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(§ 1431.2(a), emphasis added.)

Once meaning is given to the italicized phrase above, it becomes clear that the statute was not meant to benefit an *intentional tortfeasor* at the expense of a negligent plaintiff. Indeed, when the statute was enacted, the "very principles of comparative fault" that it incorporated by the forgoing reference had consistently recognized that intentional tortfeasors were not entitled to any of the benefits of comparative fault.

(See Section B, *infra*.)

Here, the Court of Appeal went astray because it focused solely on the words "each defendant," concluding that section 1431.2's language is "unambiguous" and "mandates

allocation of noneconomic damages in direct proportion to a defendant's percentage of fault, regardless whether the defendant's misconduct is found to be intentional." (*B.B., supra*, 25 Cal.App.5th at 128.) It based this conclusion on pure dicta contained in *DaFonte v. Up-Right, Inc.* ("*DaFonte*") (1992) 2 Cal.4th 593:

> [T]he plain language of section 1431.2 unambiguously applied in "every case" to shield "every 'defendant'" from joint liability for noneconomic damages not attributable to his or her own comparative fault.

(*B.B., supra*, 25 Cal.App.5th at 124, quoting *DaFonte, supra*, 2 Cal.4th at 602.)

However, *DaFonte* had nothing to do with *intentional* tortfeasors and, therefore, its limited holding did not—and could not—profess to apply to the long-standing legal distinction between intentional versus negligent tortfeasors. The only issue in *DaFonte* concerned the comparative liability of *negligent* tortfeasors where one such tortfeasor (the plaintiff's employer) was statutorily immune from liability under the workers' compensation laws. (2 Cal.4th at 603–604.) Given that immunity, the specific issue was whether the negligent defendant's liability

was reduced by the percentage of fault attributable to the negligence of the immune third-party employer. (*Ibid.*)

Thus, *DaFonte* was solely concerned with apportionment *among negligent co-tortfeasors.* It had no reason to consider, much less substantively address, whether "principles of comparative fault" apply to the benefit of an intentional tortfeasor. (§ 1431.2(a).) Indeed, the *DaFonte* opinion repeatedly highlighted how limited its holding was. The Court pointedly noted that the order granting review

> provided that "[t]he issue to be argued before this court *shall be limited* to whether Civil Code section 1431.2 applies to limit a tortfeasor's liability for non-economic damages in proportion to that defendant's fault where other tortfeasors at fault *are not subject to suit.*"

(2 Cal.4th at 605, fn. 7, emphasis added.) The actual holding likewise underscored how limited it was intended to be:

> *Here* we conclude that the plain language of section 1431.2 eliminates a third party defendant's joint and several liability to an injured employee for unpaid noneconomic damages attributable to the fault of the employer, who is statutorily immune from suit.

(*Id.* at 596, emphasis added.)

Because *DaFonte* had no reason to consider the portion of the statute rendering it applicable only to actions "based upon principles of comparative fault," the Court of Appeal's heavy

reliance on *DaFonte* in our case was greatly misplaced. "'Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.'" (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 118, citation omitted.)

All agree that where statutory "language is clear, courts must generally follow its plain meaning." (*Bruns v. E-Commerce Exchange, Inc.* ("*Bruns*") (2011) 51 Cal.4th 717, 724; see *Halbert's Lumber v. Lucky Stores* (1992) 6 Cal.App.4th 1233, 1239 ["If the meaning is without ambiguity, doubt, or uncertainty, then the language controls. ... There is nothing to 'interpret' or 'construe'"].)

But, where statutory language "permits more than one reasonable interpretation," it is ambiguous and different rules apply. (*Bruns, supra,* 51 Cal.4th at 724.) In such cases, extrinsic aids must be considered to interpret the statute's meaning. (*Ibid.*)

Here, contrary to the Court of Appeal's ruling, section 1431.2 is facially susceptible to at least a few arguable interpretations.

A. The Opinion failed to meaningfully address section 1431.2(a)'s key phrase "based upon principles of comparative fault."

Because the Opinion never explained *how it* would actually interpret the key phrase, we are left to guess.

The only justification the Opinion even hints at is set forth in a passing footnote, which purported to rebut *Thomas*, *supra*, and the cases it relied upon. (*B.B.*, *supra*, 25 Cal.App.5th at 126, fn. 10.) In particular, that footnote states:

> (... see also *Martin By and Through Martin v. United States* [("*Martin*")] (9th Cir. 1993) 984 F.2d 1033, 1039 [agreeing with *Weidenfeller[v. Star & Garter* ("*Weidenfeller*") (1991) 1 Cal.App.4th 1], recognizing section 1431.2 "literally applies to any personal injury action," and the "clause 'based upon principles of comparative fault,' *instructs how* 'the liability of each defendant' is to be determined"].)

(*B.B.*, *supra*, 25 Cal.App.5th at 126, fn. 10, emphasis added.)

The issue presented in *Martin* (just like in *Weidenfeller*), was whether, in cases where the intentional wrongdoer was absent (and/or insolvent), a negligent tortfeasor could be forced to pay more than that party would have paid otherwise. (*Martin*, *supra*, 984 F.2d at 1035 [the plaintiff sued the government for "negligent supervision which allowed her to become separated, abducted and raped," but did not sue the intentional assailant.)

Martin did what the Court of Appeal should have done here—it applied the preexisting "principles of comparative fault" in the specific context that had arisen and, therefore, limited a *negligent* tortfeasor's liability to its percentage share of fault (regardless of the status of concurrent intentional actors). The same is true for *DaFonte*, which, as we previously discussed, in its context correctly applied preexisting principles of comparative fault to limit a negligent tortfeasor's liability.

The same cannot be said for our case, which, unlike *Martin* and *DaFonte*, concerns whether an *intentional tortfeasor can benefit* from section 1431.2 apportionment. As we further detail in Section B, *infra*, the very "principles of comparative fault" mentioned in the above quotation recognize that intentional wrongdoers are not entitled to the benefits of protections (such as indemnity) that are afforded to less blameworthy parties.

We need not resolve whatever justifications might actually have moved the result in our case. The key point is that, as we explain below, regardless what interpretation the Court of Appeal had in mind, it necessarily treated the phrase "based upon principles of comparative fault" as surplusage. Such an interpretation violates the "fundamental rule of statutory

construction that requires every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely necessary." (*People v. Arias* (2008) 45 Cal.4th 169, 180.)

As we discuss in Section B, there is a reasonable—indeed compelling—alternative interpretation of the statute that neither requires any such strained reading nor defies basic canons of statutory interpretation.

B. The Court of Appeal ignored a more direct, and far more reasonable, interpretation of section 1431.2—one that gives full meaning to the words "based upon principles of comparative fault" and the historic evolution of that concept.

The far more reasonable interpretation of section 1431.2 is that, by its own terms, the statute requires several liability for non-economic damages *only* in an "action ... based upon principles of comparative fault..."—i.e., in an action in which comparative fault principles apply. (§ 1431.2(a).)

As previously noted, when section 1431.2 was enacted, "comparative fault" was a "legal term of art" that "had an established meaning in the judicial vocabulary." (*Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 855, 858.) Voters who enact an initiative measure "are presumed to have adopted and

incorporated accepted judicial constructions when they used the construed terms in their enactment." (*Id.* at 855; *see Hill v. National Collegiate Athletic Assn.* ("*Hill*") (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" (emphasis added, internal citations and quotations omitted)].)

Nothing in section 1431.2 purports to change the *long-established meaning* of "comparative fault." Because the preexisting construction of that term governs, this Court should analyze section 1431.2's meaning through the historical context of "comparative fault's" accepted usage.

Before Proposition 51's enactment, the comparative fault doctrine was understood as reducing only an *unintentional* tortfeasor's liability based on another's fault. (See, e.g., *Thomas, supra,* 139 Cal.App.4th at 1111; *Weidenfeller,* 1 Cal.App.4th at 6–7.) Accordingly, it must be presumed that section 1431.2(a)'s phrase "based upon principles of comparative fault" was intended to exclude intentional tortfeasors from enjoying the benefits of

several liability whenever non-economic damages were at issue. (See *Hill, supra*, 7 Cal.4th at 23.)

Pre-Proposition 51 caselaw consistently recognized that, despite the plaintiff's negligence, comparative fault principles did not allow an intentional tortfeasor to reduce its liability in any way. In *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 176, for example, the appellate court held that the plaintiff's negligence did not provide any basis for reducing the defendant's damages liability for an intentional tort.

Likewise, pre-Proposition 51 caselaw precluded an intentional tortfeasor from relying on comparative fault principles to decrease any portion of his liability by suing merely *negligent* co-tortfeasors for indemnity. For instance, a defendant liable for fraudulent concealment was barred from partial indemnity from a negligent co-defendant because comparative fault principles did not apply to the benefit of intentional tortfeasors. (*Allen v. Sundean* ("*Allen*") (1982) 137 Cal.App.3d 216, 226–227.)

These holdings reflect this Court's own analysis and treatment of comparative fault (i.e., negligence) vis-à-vis intentional torts. In its landmark decision, *Li v. Yellow Cab Co.*

("*Li*") (1975) 13 Cal.3d 804, 808, this Court replaced "the 'all-or-nothing' doctrine of contributory negligence" with comparative fault principles. In so doing, it declared that "a comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct which falls short of being *intentional*." (*Id.* at 826, emphasis added; see, e.g., *Allen, supra,* 137 Cal.App.3d at 226–227, fn. 3 [noting language in *Li* that "appears to exclude intentional torts from the comparative fault system"]; *Zavala v. Regents of University of California* (1981) 125 Cal.App.3d 646, 650 [same]; *Sorensen v. Allred* (1980) 112 Cal.App.3d 717, 722–723 [same].)

There is more. In *American Motorcycle Assn. v. Superior Court* ("*American Motorcycle*") (1978) 20 Cal.3d 578, 607–608, this Court further implied that only *unintentional* tortfeasors have a right to partial indemnity on a comparative fault basis. (*Allen, supra,* 137 Cal.App.3d at 226–227, fn. 4; accord, *Considine Co. v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 768–769 [barring party that has engaged in intentional misrepresentation from obtaining indemnity]; see also *Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 213 [noting negligent tortfeasor's

entitlement to *full equitable indemnity* against concurrent intentional tortfeasor].)

Moreover, this Court has used the terms "comparative fault" and "comparative negligence" interchangeably—further demonstrating that the doctrine was solely intended to govern the relations amongst negligent parties only—not to offer *intentional* tortfeasors a windfall for their bad acts. (See, e.g., *American Motorcycle, supra,* 20 Cal.3d at 583, 604.) Similarly, Black's Law Dictionary defines the two terms—"comparative fault" and "comparative negligence"—synonymously. (See Negligence, Black's Law Dictionary (10th ed. 2014) [noting that "comparative negligence" is "also termed *comparative fault*"].)

Finally, post-Proposition 51 caselaw confirms that, before the measure's enactment, the comparative fault doctrine had been understood as precluding intentional tortfeasors from reducing their liability based on other's negligence. The holding in *Thomas, supra,* 139 Cal.App.4th at 1111, was actually dictated by this key distinction: "At the time Proposition 51 was adopted, the *law was well established* that a tortfeasor who intentionally injured another was not entitled to contribution from any other

tortfeasors." (Emphasis added; accord *Weidenfeller*, *supra*, 1 Cal.App.4th at 6–7 [recognizing that pre-Proposition 51 caselaw "stand[s] for the proposition that an intentional actor cannot rely on someone else's negligence to shift responsibility for his or her own conduct"]; *Heiner v. Kmart Corp.* ("*Heiner*") (2000) 84 Cal.App.4th 335, 350 [describing "unbroken line of authority," predating Proposition 51, that barred damages "apportionment where ... the defendant has committed an intentional tort and the injured plaintiff was merely negligent"]; *Martin*, *supra*, 984 F.2d 1033, 1039–40 [acknowledging "the principle that intentional tortfeasors should not be able to shift the financial burden to a negligent party" and applying section 1431.2 to limit negligent defendant's liability based on intentional co-tortfeasor's fault].)

In sum, given the established construction of comparative fault when Proposition 51 was enacted, this Court should interpret the phrase "based upon principles of comparative fault" as excluding intentional tortfeasors from profiting from the statute's limitation on damages liability amongst negligent parties. (See *Hill*, *supra*, 7 Cal.4th at 23.)

C. Section 1431.2's very purpose was to relieve "*relatively blameless* defendants" from disproportionate liability. Given that purpose, it would be absurd to construe the statute so as to protect *intentional tortfeasors* at the expense of merely negligent parties.

An interpretation that denies section 1431.2's benefits to intentional tortfeasors best accords with the statute's stated purpose and avoids absurd results. (*People v. Jenkins* (1995) 10 Cal.4th 234, 246 [noting that this Court "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences"].)

DaFonte explained that Proposition 51's purpose was to alleviate the "exploitation of *relatively blameless* defendants." (2 Cal.4th at 599, emphasis added.) In *Evangelatos v. Superior Court* ("*Evangelatos*") (1988) 44 Cal.3d 1188, 1198, this Court analyzed the purpose of Proposition 51 from that key perspective.

After tracing the evolution of comparative fault principles, which were adopted "to reduce much of the harshness of the original all-or-nothing common law rules," *Evangelatos* addressed

an unfairness problem that had not been cured by the foregoing evolution:

> [R]etention of the common law joint and several liability doctrine produced some 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.

(*Id.* at 1198, emphasis added.)

This Court then described why Proposition 51's drafters sought to relieve a "minimally culpable" tortfeasor "from bear[ing] all of the plaintiff's damages." (*Ibid.*) In particular, Civil Code section 1431.1, which explains and codifies Proposition 51's purpose, expresses the "unfair[ness]" of "deep pocket" defendants' strategic "inclu[sion] in lawsuits" despite there being "little or no basis for finding them at fault." (§ 1431.1(a–b).)

Proposition 51's legislative history (contained within the measure's ballot pamphlet) illustrates the decisive chasm between minimally responsible persons versus intentional tortfeasors and why construing the measure as limiting the latter's liability would defy logic and sound policy. (See *People v. Valencia* (2017) 3 Cal.5th 347, 364 [discussing propriety of considering arguments contained in ballot pamphlet when

construing proposition].) Proposition 51's proponents described a hypothetical deep-pocket case in which a drunk driver runs a red light. (*Evangelatos, supra,* 44 Cal.3d at 1245 [reproducing ballot pamphlet in appendix].) In the hypothetical, the jury finds the defendant driver 95% at fault and the defendant city 5% at fault for negligently maintaining the stop light. (*Ibid.*) Because the hypothetical driver is insolvent, the *minimally culpable,* negligent city is forced to pay the entire damages award. (*Ibid.*)

Thus, Proposition 51 was intended to limit the liability of relatively blameless, *negligent* tortfeasors. It certainly was not intended to give intentional tortfeasors a free ride at the expense of the plaintiff.

D. The Court of Appeal's interpretation of section 1431.2 runs afoul of basic public policy principles.

Longstanding public policy dictates that "an intentional actor cannot rely on someone else's negligence to shift responsibility for his or her own conduct." (*Weidenfeller, supra,* 1 Cal.App.4th at 6–7.) It has been described as a matter of "commonsense [] that a more culpable party should bear the financial burden caused by its intentional act." (*Id.* at 6.)

It is axiomatic that "[i]ntentional 'conduct differs from negligence ... in the social condemnation attached to it.'" (*Id.* at 7.) Moral blameworthiness attaches to intentional acts in a manner entirely distinct from merely negligent acts. When responsibility for intentional wrongdoing is diluted by transferring it to one with no bad intent, the result is perceived injustice and a consequent diminishment in respect for the law.

The requirement that intentional tortfeasors bear *full responsibility* for their actions is also reflected in the Legislature's enactment of Code of Civil Procedure section 875, et seq., which "permit[s] contribution between negligent tortfeasors, but preclude[es] contribution for 'any tortfeasor who has intentionally injured the injured person.'" (*Weidenfeller, supra,* 1 Cal.App.4th at 6, quoting Code Civ. Proc. § 875(d).)

The one-way shifting of liability—permitting negligent tortfeasors to decrease their liability by that of intentional tortfeasors (as was the case in *Weidenfeller*), but not the inverse (as *Thomas* held)—makes sense from all perspectives. It also furthers what this "Court has [] emphasized [is] the purpose of section 1431.2 [:] ... to prevent the unfairness of requiring a tortfeasor who is only minimally culpable *as compared to the*

other parties to bear all the damages." (*Weidenfeller, supra,* 1 Cal.App.4th at 6, quoting *Evangelatos, supra,* 44 Cal.3d at 1198, original emphasis.)

In *Heiner, supra,* 84 Cal.App.4th at 347, the court noted that even where the plaintiff's injuries result in part from the plaintiff's own negligence, an *intentional* tortfeasor's liability is not subject to any reduction by apportionment. *Heiner* observed that it would be

> " ... contrary to sound policy to reduce a plaintiff's damages under comparative fault for his 'negligence' in encountering the defendant's *deliberately inflicted harm*." (Prosser & Keaton on Torts (5th ed. 1984) § 67, pp. 477-478, fn. omitted; see also Dear & Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations* (1984) 24 Santa Clara L.Rev. 1, 19-20.)

(*Heiner, supra,* 84 Cal.App.4th at 349, emphasis added.)

These same policy considerations also prevent a party from obtaining indemnity or insurance for its intentional wrongdoing. (Civ. Code, § 1668 [voiding contracts exempting persons from liability for fraud, willful injury, or willful or negligent violation of law]; Ins. Code, § 533 [voiding insurance coverage for intentional acts]; *Allen, supra,* 137 Cal.App.3d at 226–227 [intentional tortfeasor may not seek partial indemnity from negligent joint tortfeasor under comparative fault doctrine].)

PPG Indus., Inc. v. Transamerica Ins. Co. (1999) 20 Cal.4th 310, 319, provides another example of this Court's embrace of this fundamental public policy. There, it barred an intentional tortfeasor from obtaining insurance coverage for its punitive damages liability, even though the insurer's *negligent* failure to settle was *a cause in fact* of the liability. This holding was based, inter alia, upon "the policy of not allowing liability for intentional wrongdoing to be offset or reduced by the negligence of another." (*Id.* at 316.)

The Opinion in our case fully acknowledged the "'policy considerations of deterrence and punishment,'" but it then wrongly concluded that section 1431.1

> expresses no concern for advancing or preserving liability principles related to deterrence or punishment. Rather, section 1431.1 decries the unfairness and cost of "[t]he legal doctrine of joint and several liability" that "has resulted in a system of inequity and injustice" (§ 1431.1, subd. (a)), often holding defendants "financially liable for all the damage" even where they are found to share just "a fraction of the fault." (§ 1431.1, subd. (b).)

(*B.B.*, *supra*, 25 Cal.App.5th at 127.) However, the snippets of section 1431.1 that the Opinion quotes pointedly omit the statute's reference to the stated aim of remedying situations where "defendants [who] are perceived to have substantial

financial resources ... have [] been included in lawsuits even though there was little or no basis for finding them at fault." (§ 1431.1(a–b).)

The major flaw in the Opinion is that it creates a *false dichotomy* between (a) the desire to protect merely negligent "deep pockets" from being dragged into litigation because of their resources and (b) the long-standing and fundamental principle that intentional wrongdoers should not benefit at the expense of merely negligent ones.

As we have shown—and as *Thomas* so forcefully illustrates—there is no reason that section 1431.1, et seq. cannot be interpreted as *protecting both* of those societal interests. That result is not only desirable, it is also fully consistent with the statute's language, purpose, and historical context.

Conversely, the message the Court of Appeal would send is that intentional torts—including excessive force/battery by law enforcement officers—are no worse than purely negligent acts. Under the Opinion's construction, the statute will not only protect deep pockets, it will also protect intentional tortfeasors who are deeply culpable.

Indeed, the facts of this case demonstrate that Aviles was hardly a relatively innocent defendant of the sort that section 1431.2 was intended to benefit. Nothing about section 1431.1(b)'s stated purpose would justify extension of section 1431.2 apportionment to decrease Aviles' liability where the jury determined that he had intentionally used "unreasonable force" that was "a substantial factor in causing [the plaintiffs' injury]"—here, Burley's death. (2AA 439.) Far from being "included in [this] lawsuit[] even though there was little or no basis for finding [him] at fault," Aviles is at the opposite extreme of section 1431.1(b)'s intended beneficiaries, i.e., someone whose fault is off-the-charts.

We cannot presume that section 1431.2 was meant to remedy one unfairness (holding deep pocket defendants liable for all damages where they are minimally at fault) by enacting a statutory scheme that results in an equal or greater unfairness (allowing intentional tortfeasors to decrease their liability because others happened to be negligent).

An interpretation of the statute that allows one-way shifting of liability benefitting negligent, but not intentional, tortfeasors would fully serve both purposes of Proposition 51—

protection against strategically dragging "deep pockets" into litigation *and* ensuring that apportionment does not benefit intentional wrongdoers rather than "relatively blameless" co-defendants.

NOTICE OF JOINDER IN SECTION IV (POLICE BATTERY ISSUE) IN CO-PETITIONERS' OPENING BRIEF ON THE MERITS

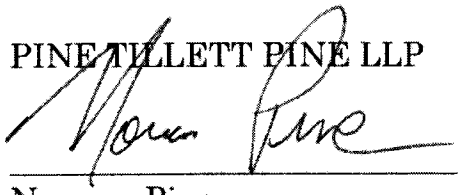
Petitioners B.B. and B.B. respectfully join in Section IV. (police battery issue) in co-Petitioners D.B., D.B., and T.E.'s Opening Brief on the Merits.

CONCLUSION

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

Dated: December 7, 2018

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 Opening Brief on the Merits contains 5,585 words, excluding those items identified in Rule 8.520(c)(3).

Dated: December 7, 2018

Chaya M. Citrin

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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 December 7, 2018, I mailed from Sherman Oaks, California, the Opening Brief on the Merits. 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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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 7, 2018 in Sherman Oaks, California.

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