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

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INTRODUCTION

In the case before this Court, the jury determined that a Sheriff's deputy intentionally used excessive force causing the death of a young husband and father of five. Upon review, the Court of Appeal incorrectly offset the deputy's responsibility for his intentional conduct in causing the man's death by improperly considering the negligent conduct of the decedent and others. The decision below contravenes well-established law and basic principles of statutory interpretation, working a manifest miscarriage of justice by allowing an *intentional* tortfeasor to reduce his responsibility for the Plaintiffs' damages due to the simple *negligence* of others.

The Court of Appeal's decision is contrary to the plain language of Section 1431.2, which expressly applies *only* to actions "*based upon principles of comparative fault*" [emphasis added]. However, the law has never applied comparative-fault principles to allow intentional-tortfeasor defendants to avoid responsibility for their deliberate conduct in causing a plaintiff's injuries. Indeed, the foundational premise of California's comparative fault regime is plainly incompatible with the

extension of this regime to intentional tortfeasor defendants; the entire motivating principle is to ensure a fair distribution of fault among culpable, *negligent* actors. Comparative fault does not allow a defendant who has committed an intentional tort to avoid full responsibility for his conduct by having his liability reduced because of another's non-intentional conduct.

In fact, before the court's decision below was issued, it had been firmly established for decades in California that comparative-fault principles do not allow intentional-tortfeasor defendants to have their liability reduced based on the non-intentional conduct of others. (See *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 825–26 [noting 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.*"] [emphasis added]; see also Code Civ. Proc., § 875(d) ["There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person."].) The Court of Appeal's contrary conclusion, that Proposition 51 allows a defendant who committed an intentional tort to reduce

his liability based on the negligent conduct of others, is thus a radical and deleterious departure from well-established law.

The Court of Appeal based its holding, in part, on an overbroad interpretation of this Court's opinion in *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, a products liability case which did not involve intentional torts, mistakenly asserting that *DaFonte*'s holding applied to cases involving intentional torts. (Ct. App. Opn. pp. 44–45.) However, because *DaFonte* did not address the application of "principles of comparative fault" to intentional-tortfeasor defendants, the Court below erred in relying on it to vastly expand the scope of Proposition 51.

Moreover, established precedent from the Court of Appeal holds that Proposition 51 does not apply where the defendant committed an intentional tort, and sound policy considerations such as deterrence underlie the principle that an intentional tortfeasor should not be allowed to reduce his liability based on the non-intentional conduct of others. (See *Thomas v. Duggins Construction Co., Inc.* (2006) 139 Cal.App.4th 1105 at p. 1112 (hereafter *Thomas*).) The Court of Appeal's decision also ignores the critical fact that, by finding that the deputy committed an

intentional battery, *the jury had already considered the conduct of the decedent* yet still determined that the deputy's force was excessive.

This Court should reverse the decision below and reaffirm the well-established principle that intentional tortfeasors cannot evade responsibility for their conduct by shifting liability to unintentional actors.

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?

FACTUAL BACKGROUND

On the evening of August 3, 2012, Los Angeles County Sheriff's Deputies David Aviles and Steve Fernandez were the first officers to arrive at the scene of an incident in Compton,

California involving Darren Burley, who had reportedly assaulted a woman. (Ct. App. Opn. p. 4.)

Mr. Burley, who was unarmed, did not respond to the deputies' commands. In an attempt to take him into custody, one of the deputies "hockey checked" Mr. Burley, who fell to the ground, hitting his head. After a struggle, the deputies maneuvered Burley to a prone position, face-down on the concrete. Deputy Aviles then mounted Burley's upper back, while pinning Burley's chest to the ground with the maximum body weight he could apply. As Deputy Fernandez knelt on Burley's upper legs with all of his weight, Deputy Aviles pressed his right knee down on the back of Burley's head, near the neck, and his left knee into the center of Burley's back.[1] Burley struggled against the deputies, trying to raise his chest from the ground. (Ct. App. Opn. pp. 4–5.)

Charles Boyer, who was only seven or eight feet away, witnessed the struggle. (12 RT 3439:8–18.) He testified that

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[1] The Sheriff's Department's use-of-force investigation in this case concluded that a deputy placing a knee on Burley's neck would be excessive, unreasonable, and an improper use of force that could crush his windpipe. (13 RT 3766.)

Aviles choked Burley in some type of headlock, which was held almost the entire time the deputies were on-scene. He said Burley appeared to be gasping for air. (12 RT 3440:2–3443:2; 6 RT 1613.) This chokehold, either a bar-arm or a carotid restraint hold, continued while other deputies arrived. (12 RT 3440:2–3443:2.)

When paramedics arrived, Burley, who had been handcuffed and hobbled, was face-down on his stomach with Deputy Beserra pressing his knee into the small of Burley's back. Burley had no pulse. Paramedics immediately began treating him with C.P.R and other life-saving procedures. After five minutes, they restored Burley's pulse and transported him to the hospital. However, Burley never regained consciousness, and he died ten days later. (Ct. App. Opn. p. 6.)

PROCEDURAL HISTORY

Three sets of plaintiffs filed lawsuits against the County and deputies: (1) Burley's wife, Rhandi T., and their two children, D.B. and D.B.; (2) Burley's two children with Shanell S., B.B. and B.B; and (3) Burley's child with Akira E., T.E. The complaints

asserted causes of action for battery, negligence, and civil rights violations under Civil Code section 52.1 (the Bane Act). Defendants moved for summary adjudication of the Bane Act claim, which was granted. The consolidated cases proceeded to trial on the battery and negligence claims against the County and Deputies Aviles, Fernandez, Beserra, Celaya, Lee, and LeFevre. (Ct. App. Opn. p. 6.)

After a several-week trial, the jury returned a verdict finding in Plaintiffs' favor on two separate claims. As to battery, Deputy Aviles was found liable. Deputy Beserra was found liable for negligence. On the negligence claim, the jury attributed fault in the following percentages: 40 to Burley, 20 to Aviles, 20 to Beserra, and 20 to the remaining deputies. Upon hearing evidence on damages, the jury awarded Plaintiffs $8 million in noneconomic damages for Burley's wrongful death. (Ct. App. Opn. pp. 6–7.)

Plaintiffs filed a proposed judgment, which Defendants opposed because it failed to apportion damages for the two liable deputies according to their percentages of fault. Thereafter, the trial court entered judgment against Deputy Beserra and the

County for $1.6 million (20 percent of the damages award) and against Deputy Aviles and the County for the full $8 million award, concluding that comparative fault did not apply to the battery claim. (Ct. App. Opn. p. 7.)

In a partially published decision, *B.B. v. County of Los Angeles* (2018) 25 Cal.App.5th 115, the Court of Appeal reduced the verdict against Defendant Aviles from 100 percent to 20 percent based on principles of comparative fault. (Ct. App. Opn. p. 50.)[2]

Plaintiffs filed a petition for rehearing which was denied. (Ct. App. Order Den. Plaintiffs' Petn. for Rehg.)

Thereafter, Plaintiffs filed a Petition for Review which was granted by this Court on October 10, 2018.

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[2] The Court of Appeal also reversed the trial court's summary adjudication of Plaintiffs' Bane Act claim. (Ct. App. Opn. p. 61.)

ARGUMENT

I. By its Plain Language, Proposition 51 Applies Only to Actions "Based on Principles of Comparative Fault" and Therefore Does Not Allow an Intentional-Tortfeasor Defendant to Avoid Responsibility for the Plaintiff's Damages Based on Other Parties' Non-Intentional Conduct.

Civil Code Section 1431.2 (Proposition 51) states:

> 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 noneconomic 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.

(Civ. Code, § 1431.2, subd. (a) [emphasis added].)

In this case, the Court of Appeal misinterpreted the scope of Proposition 51 by finding it applicable to every "defendant" in every "tort action," regardless of whether the defendant's misconduct was merely negligent or intentional. (Ct. App. Opn. p. 50.) In reaching this result, the Court in *B.B.* purported to rely on the "plain" language of Proposition 51. (*Ibid.*) However, the *B.B.* Court failed to consider *all* of the language of Section 1431.2,

ignoring the important qualifying clause limiting its scope to actions "based upon principles of comparative fault." Considering all of the "plain language" of the statute, it is clear that cases which are not based upon principles of comparative fault, such as where the defendant is an intentional tortfeasor, are not subject to Proposition 51.

Disregarding this critical limiting phrase in Proposition 51, *B.B.* erroneously concluded that "the unambiguous reference to '[e]ach defendant' in section 1431.2 subdivision (a) mandates allocation of noneconomic damages in direct proportion to a defendant's percentage of fault, regardless of whether the defendant's misconduct is found to be intentional." (Ct. App. Opn. p. 50.) This flawed analysis fails to give any meaning to the phrase "based on principles of comparative fault." In statutory construction, "[c]ourts should give meaning to every word of a statute if possible and should avoid a construction making any word surplusage." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) Under *B.B.*'s analysis, the phrase "based upon principles of comparative fault" is rendered surplusage. Instead, the phrase should be given its common-sense meaning: that the reach of

Proposition 51 is limited to those cases in which "comparative fault" principles already apply.

In reaching its conclusion, the Court of Appeal in *B.B.* heavily relied on a case from this Court which did not involve an intentional-tortfeasor defendant, *DaFonte v. Up-Right, Inc.* *supra*, 2 Cal.4th 593 (hereafter *DaFonte*). Just as the *B.B.* Court misread Proposition 51 by failing to consider the phrase "based on principles of comparative fault," the Court of Appeal also misread the scope of the *DaFonte* decision. Unlike *B.B*, *DaFonte* was a products liability case where the jury determined that the plaintiff's employer, who was immune from suit based on Workers' Compensation laws, was partially responsible for the plaintiff's damages and that therefore an apportionment of damages was required under Proposition 51. This Court held that despite the employer's immunity from suit, Proposition 51 applied to reduce the defendant's fault by the percentage that was attributable to the negligent conduct of the plaintiff's employer. (*Dafonte*, *supra*, 2 Cal.4th at pp. 603–04.)

DaFonte, in analyzing the issue of whether a defendant in a products liability action could invoke Proposition 51 to reduce its

fault based on the negligent conduct of another tortfeasor who was immune from liability, noted that Proposition 51 contained "no ambiguity" (2 Cal.4th at p. 602)—a point which was seized upon in isolation by the *B.B.* Court. However, in *DaFonte*, the question of whether Proposition 51 applied to intentional tortfeasors was simply not at issue. Rather, the issue was whether fault could be apportioned to a negligent co-tortfeasor who was statutorily immune from liability. Accordingly, this Court in *DaFonte* had no reason to address the phrase "based on comparative fault" in its analysis of the scope of Proposition 51, and its conclusion that there was "no ambiguity" in the statute was limited to the discrete issue before the Court.

Thus, the Court of Appeal committed reversible error in applying *DaFonte* to extend Proposition 51 to intentional-tortfeasor defendants; contrary to the decision below, it is readily apparent based on the language of the statute that Proposition 51 does not apply to all torts and is limited to actions "based on principles of comparative fault."

II. Comparative-Fault Principles Have Never Allowed Intentional Tortfeasors to Reduce their Liability Based on the Non-Intentional Conduct of Others.

Proposition 51 was passed by voters in 1986. (See *Thomas*, *supra*, 139 Cal.App.4th at p. 1110.) At the time it was enacted, it was well established both by common law and by statute that an intentional tortfeasor may not reduce his liability by shifting it to other, non-intentional tortfeasors. (See *Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 385 ["[A]ssault and battery are intentional torts. In the perpetration of such crimes negligence is not involved. As between the guilty aggressor and the person attacked the former may not shield himself behind the charge that his victim may have been guilty of contributory negligence . . . ."]; see also 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."].)

From its onset, the concept of comparative fault has always sounded in negligence and other non-intentional torts. In the

seminal case of *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 812–13, this Court replaced the outdated "all or nothing" rule of contributory negligence and adopted "a system under which liability for damage will be borne by those whose *negligence* caused it in direct proportion to their respective fault." (*Ibid.* [emphasis added].)

Subsequently, in expanding the application of comparative fault to negligent third parties, this Court stated: "we concur with Dean Prosser's observation in a related context that '[there] is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were . . . *unintentionally* responsible, to be shouldered onto one alone . . . ." (*American Motorcycle Ass'n v. Superior Ct.* (1978) 20 Cal.3d 578, 607–08 [citing Prosser, Law of Torts (4th ed. 1971) § 50, p. 307] [emphasis added]; see also *Safeway Stores, Inc. v Nest-Kart,* (1978) 21 Cal.3d 322, 332 [holding that comparative-fault principles apply "to allocate liability between a negligent and a strictly liable defendant."].)

Notably, all of the relevant 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 [Comparative Fault of Decedent]; CACI No. VF-402 [Negligence—Fault of Plaintiff and Others at Issue].) This further demonstrates that principles of comparative fault only apply to non-intentional torts such as negligence and strict liability.

Indeed, during the trial in this action while the jury was deliberating, counsel for Defendants (likely aware of the well-settled nature of this issue) specifically conceded to the trial court "for the record" that apportionment of fault did not apply to the battery claim. (18 RT 5306:26-5307:13.) However, after the verdict was reached, Defendants reversed their position on this issue. Nonetheless, Defendants' initial concession that apportionment of fault did not apply to the battery claim demonstrates the widely-accepted view that an intentional tortfeasor cannot reduce his liability based on comparative negligence.

The fact that comparative-fault principles are grounded in negligence jurisprudence reflects "the common law determination that a party who commits intentional misconduct should not be entitled to escape responsibility for damages based upon the negligence of the victim or a joint tortfeasor." (*Weidenfeller v. Star & Garter* (1991) 1 Cal.App.4th 1, 7; see also *id.* at pp. 6–7 ["*Godfrey* [*v. Steinpress* (1982) 128 Cal.App.3d 154] and *Allen* [*v. Sundean* (1982) 137 Cal.App.3d 216], therefore, stand for the proposition an intentional actor cannot rely on someone else's negligence to shift responsibility for his or her own conduct"].)

It is thus beyond dispute that, prior to the passage of Proposition 51, comparative fault did not apply to intentional torts. Thus, by definition, intentional tort cases are not based on principles of comparative fault. (See *Allen v. Sundean* (1982) 137 Cal.App.3d 216, 225–26 [rejecting application of comparative-fault principles to tort of fraudulent concealment]; *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 176 [comparative fault held not applicable to claim for intentional infliction of emotional distress and fraud by concealment].)

As the Court of Appeal in *Allen, supra,* explained:

> Applicability of comparative fault principles to the intentional tort of fraudulent concealment is, however, a different matter. We note that the Supreme Court in *Li*, and again in *American Motorcycle* used language which appears to exclude intentional torts from the comparative fault system. *Nor has there been support for an extension of comparative fault principles to intentional torts, as there was to willful misconduct or to strict liability, in other states, among the commentators generally, or in the Uniform Comparative Fault Act.*

(137 Cal. App. 3d at p. 226 [emphasis added].)

By their very nature, intentional torts differ from non-intentional torts such as negligence or strict liability. Indeed, this Court has recognized that there are conceptual inconsistencies between negligence and intentional tort causes of action based on the same conduct: "There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence." (*Grudt v. City of Los Angeles* (1970), 2 Cal.3d 575, 586 [citations omitted].)

Notably, negligence is simply based on the failure to exercise ordinary care. In contrast, battery is both a crime and a tort. (See 5 Witkin, Summary of Cal. Law (11th ed. 2018) Torts, § 452.)[3] Witkin classifies battery under the heading "Intentional Invasions of Interests in Personality." (*Ibid.*) Moreover, the jury was instructed that on the battery claim, Plaintiffs had to prove that the Defendant acted "intentionally" in touching the decedent. (17 RT 4953:21.) Thus, the jury's verdict on the battery claim in this action was consistent with the longstanding principle that intentional torts are fundamentally different from non-intentional torts sounding in negligence.

The rationale for apportionment of fault principles simply does not apply when a tortfeasor acts intentionally. In cases involving negligence or other non-intentional conduct, it is eminently fair to allow equitable principles of apportionment to apply given that all of the actors involved have engaged in conduct that was not deliberate or intentional and bear the same

[3] Penal Code Section 242 states: "A battery is any willful and unlawful use of force or violence upon the person of another." Moreover, Witkin notes: "In tort actions for assault and battery, the courts usually assume that these Penal Code definitions and related criminal cases are applicable." (5 Witkin, Summary of Cal. Law (11th ed. 2018) Torts, § 452.)

level of moral culpability. However, intentional torts reflect a higher level of misconduct by the tortfeasor and the law has consistently treated intentional tortfeasors differently from non-intentional ones. As the Court in *Thomas* noted, "policy considerations of deterrence and punishment" require that an intentional tortfeasor not be allowed to reduce his liability based on the plaintiff's contributory negligence. (See *Thomas, supra,* 139 Cal. App.4th at p. 1112.) Therefore, it would be contrary to sound jurisprudence to allow a person who acts deliberately to benefit from another's unintentional conduct. (See *ibid.* ["'Contributory negligence never has been considered a good defense to an intentional tort . . . and it would likewise appear contrary to sound policy to reduce a plaintiff's damages under comparative fault for his 'negligence' in encountering the defendant's deliberately inflicted harm.'"] [quoting *Heiner v. Kmart Corporation* (2000) 84 Cal.App.4th 335, 349].)

There is accordingly a long, well-established consensus among cases *after* the passage of Proposition 51 finding that comparative fault does not and *should not* apply where the defendant has committed an intentional tort. (See, e.g., *Heiner,*

supra, 84 Cal.App.4th at p. 350 [emphasizing "an unbroken line of authority barring apportionment where, as here, the defendant has committed an intentional tort and the injured plaintiff was merely negligent"]; *People v. Brunette* (2011) 194 Cal.App.4th 268, 283 [noting that the doctrine of comparative negligence does not apply where the defendant has committed an intentional crime or tort such as battery]; *Ash v. N. Am. Title Co.* (2014) 223 Cal.App.4th 1258, 1276 n.13 ["In California, *comparative fault only applies to negligence causes of action.*"] [citing *People v. Brunette,* 194 Cal.App.4th at p. 282] [emphasis added]; *People v. Millard* (2009) 175 Cal.App.4th 7, 41 [noting that the doctrine of comparative negligence does not apply to "intentional crimes and torts," including battery].)

However, because of its mistaken belief that the plain language of Proposition 51 applied to all tort claims, the *B.B.* Court failed to consider the policy reasons why comparative-fault principles should not apply to intentional-tortfeasor defendants and ignored the clear, longstanding consensus of cases holding comparative negligence should not apply where the defendant committed an intentional tort. (Ct. App. Opn. pp. 49–50.)

In sum, the decision below—drastically reducing an intentional tortfeasor's responsibility for plaintiffs' damages based on the non-intentional conduct of others—is incompatible with California jurisprudence and the interests of justice it furthers.

III. The Court of Appeal's Decision Improperly Applies Proposition 51 by Allowing Intentional Tortfeasors to Shift Their Responsibility to Merely Negligent Actors.

Thomas, *supra*, correctly recognized that Proposition 51 did not change the well-established law that "a tortfeasor who intentionally injured another was not entitled to contribution from any other tortfeasors." (139 Cal.App.4th at p. 1111.) In *Thomas,* the plaintiffs, who were seriously injured by a scissor lift purchased from the defendants, prevailed at trial on causes of action for negligence, breach of warranty and intentional misrepresentation. The Court held that because the defendant committed the intentional tort of intentional misrepresentation, he and his employer were liable for 100 percent of the plaintiffs' damages, even though he was only found to be 10 percent at fault

on the negligence claim. (*Thomas, supra,* 139 Cal.App.4th at pp. 1108–09.)

Unlike the Court of Appeal in *B.B.*, *Thomas* rejected the defendants' contention that Proposition 51 applies to intentional torts, reasoning:

> *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. . . .* Thus, a defendant who committed an intentional tort against the plaintiff was not entitled to a reduction because the plaintiff's injuries also resulted from his or her own negligence or the negligence of a third party. . . . The question presented in this case is whether the passage of Proposition 51 changed the existing law regarding the intentional tortfeasor's potential liability for the entirety of plaintiff's damages. . . . *[W]e conclude that Proposition 51 did not alter the existing principles governing an intentional tortfeasor's liability . . . .*

(139 Cal. App 4th at p. 1111, emphases added, citations omitted.)

Thomas is part of an unbroken line of cases holding, consistent with the statutory language of Civil Code section 1431.2, that Proposition 51 does not apply to claims where the defendant committed an intentional tort. (See *Kesmodel v. Rand* (2004) 119 Cal.App.4th 1128, 1142–45 [Proposition 51 not applicable to co-conspirator in intentional false imprisonment of plaintiff]; *Heiner, supra,* 84 Cal.App.4th at p. 349 [rejecting

belated attempt to apply Proposition 51 to intentional battery and stating "it is reasonably clear that apportionment of fault for injuries inflicted in the course of an intentional tort–such as the battery in this case–would have been improper."]; see also *Srithong v. Total Investment Company* (1994) 23 Cal.App.4th 721, 728 [Proposition 51 not applicable where defendant violated a non-delegable duty]; *Myrick v. Mastagni*, (2010) 185 Cal.App.4th 1082, 1090–91 [all members of joint venture are jointly and severally liable for all non-economic damages notwithstanding jury's apportionment of fault].)

The rationale for not allowing intentional tortfeasors to shift their culpability to less responsible parties is echoed in this Court's decision in *Knight v Jewett* (1992) 3 Cal. 4th 296, which addressed the viability of the assumption of risk affirmative defense in light of the comparative-fault principles adopted in *Li, supra.* In *Knight*, this Court determined that assumption of risk, when applied to a recreational sport, bars the plaintiff's recovery unless the defendant "intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of ordinary activity involved in the sport." (*Id.* at p. 320.)

The Court's ruling recognized that assumption of risk will bar basic negligence claims arising from recreational sports but made a distinction for conduct that is intentional and not part of the normal risk associated with the sport. The same logic and policy considerations demonstrate that an intentional-tortfeasor defendant should not be allowed to escape liability for his own misconduct by pointing to the negligent conduct of the plaintiff or other persons.

Despite a long line of authority confirming the common-sense proposition that comparative-fault principles do not apply to all tort cases, and in particular not to intentional torts, the Court of Appeal in *B.B.* improperly expanded the scope of the Proposition 51, finding no limitation on its application to any tort case. *B.B.* is contrary to the plain meaning of the statute and if left to stand would allow intentional tortfeasors to shift the responsibility for their misconduct to negligent actors, contrary to accepted jurisprudence and sound policy. Therefore, this Court should reaffirm well-established law that Proposition 51 does not apply to cases where the defendant committed an intentional tort.

IV. Comparative-Fault Principles Do Not Apply Where a Peace Officer Uses Excessive Force to Commit an Intentional Battery.

Although Plaintiffs contend that comparative fault should never apply to intentional-tortfeasor defendants, the application of the comparative fault doctrine is particularly improper in the context of battery by a peace officer. This is because the tort of battery by a peace officer mandates a finding that the officer used excessive force *notwithstanding the actions of the victim*.

The Court of Appeal's decision in *B.B.*, reducing the fault of an officer who committed a lethal battery due to the contributory conduct of the victim, cannot be reconciled with the fact that, in finding that Defendant Aviles was liable for battery by a peace officer, the jury had already considered the decedent's own conduct and concluded *Defendant Aviles nonetheless used excessive force*. In particular, the jury was given CACI No. 1305 which stated in relevant part:

> In deciding whether each of individual Defendant used unreasonable force, you must determine the amount of force that would have appeared reasonable to a peace officer in Defendants' position under the same or similar circumstances.

> You may consider, among other factor [*sic*] the following: The seriousness of the crime at issue, whether Darren Burley reasonably appeared to pose an immediate threat to the safety of the deputies or others, and whether Darren Burley was actively resisting arrest or attempting to evade arrest.

(17 RT 4954:10-20.)

Moreover, in order to prevail on a battery claim, the offensive touching must be non-consensual. (CACI No. 1305.) Therefore, if a person consents to the offensive touching (for example, by provoking or initiating it) there is no battery in the first place, meaning that the tort of battery inherently presumes that the other person did not do anything that would justify the use of force.

Furthermore, the jury was instructed that self-defense and defense of others were defenses to the battery claim. (17 RT 4954:25-4955:7.) No such instruction was given regarding the negligence claim.

In other words, by finding that the actions of Defendant Aviles amounted to an intentional battery, the jury already considered and rejected the argument that the decedent's own actions justified or contributed to Aviles' use of force. Applying principles of comparative fault in this situation, as the Court of

Appeal did, gives the defendant a second opportunity to avoid responsibility for his intentional actions by blaming the victim. The fact that the plaintiff seeks recovery under both negligence and battery theories should not mean that comparative fault—which is an affirmative defense to negligence—somehow also applies to the battery claim. Had the Plaintiffs elected only to proceed on their battery claim, the jury would not have been instructed on the affirmative defenses of contributory negligence and comparative fault. However, this Court has long recognized that a plaintiff is entitled to pursue both negligence and intentional tort claims in the same case. (See *Grudt, supra,* 2 Cal.3d at p. 586 [holding that a victim of a wrongful police shooting could pursue claims asserting both intentional battery and negligence].)

In *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 638–39, this Court noted the differences between a claim that police used excessive deadly force under a negligence theory and a claim for battery. More specifically, *Hayes* noted the distinction between a Fourth Amendment claim for excessive force, which must be examined at the time the force was used (and which has

the same elements as a claim for battery by a peace officer),[4] and a claim for negligence, which can be based on decisions occurring before the use of deadly force. "Law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to *negligence* liability." (*Id.* at p. 639, emphasis added.)

Therefore, in the context of the use of excessive force by a peace officer, comparative-fault principles are *inherently inapplicable*, because such a claim is based on the use of force at the time it was deployed and whether such force was reasonable *notwithstanding the conduct of the victim*. In contrast, in a negligence claim, the defendant officer's actions preceding the use of force are relevant factors and the victim's conduct may be considered in apportioning fault. In failing to recognize the critical distinction between Plaintiffs' negligence claim, which is based on principles of comparative fault, and their battery claim, which is not, the Court below failed to follow established law.

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[4] See *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527 ["A state law battery claim is a counterpart to a federal claim of excessive use of force."].

Accordingly, Plaintiffs respectfully request that this Court reverse the decision below.

V. Petitioners Join in the Brief Filed by Plaintiffs B.B. and B.B.

Plaintiffs T.E., D.B and D.B. join in the brief that was filed by co-Plaintiffs B.B and B.B.

CONCLUSION

For all the foregoing reasons, the decision below, which allowed an intentional tortfeasor defendant to invoke Proposition 51 to reduce his liability for Plaintiffs' non-economic damages, should be reversed.

Dated: December 10, 2018

SCHONBRUN SEPLOW HARRIS & HOFFMAN LLP
ORANGE LAW OFFICES, P.C.
DOUGLAS / HICKS LAW

By: _____

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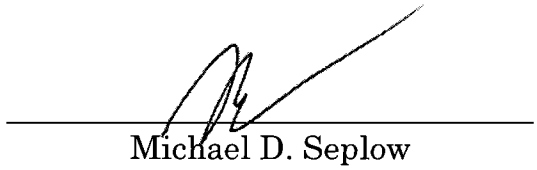
Attorneys for Plaintiffs-Petitioners T. E. by and through her Guardian Ad Litem Akira Earl, D. B. and D. B., by and through their Guardian Ad Litem Terri Thomas and Rhandi Thomas, individually and as successor in interest to the Estate of Darren Burley

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5,211 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.

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

Executed at Los Angeles, California on December 10, 2018.



Michael D. Seplow

PROOF OF SERVICE

I am over the age of eighteen 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 11543 West Olympic Boulevard, Los Angeles, California 90064. On this date I served the attached **OPENING BRIEF OF PLAINTIFFS T.E, D.B. AND D.B.** in said action by depositing a true and correct copy thereof, enclosed in a sealed envelope addressed to the parties listed below. Under that practice it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

(SEE ATTACHED SERVICE LIST)

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

Executed on December 10, 2018, in Los Angeles, California.

Carlos Gallegos

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