No. S192768

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

AIDAN LEUNG by and through his Guardian ad Litem NANCY LEUNG Plaintiff, Appellant and Respondent vs. VERDUGO HILLS HOSPITAL Defendant, Appellant and Respondent	B204908 (Los Angeles County Super. Ct. No. BC343985)

ANSWERING BRIEF ON THE MERITS

California Court of Appeal, Second District, Division Four
Case No. B204908
Los Angeles Superior Court Case No. BC343985
Honorable Laura A. Matz

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

Page

Cases:

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

Page

Cases:

TABLE OF AUTHORITIES
(Continued)

Page

Cases:

TABLE OF AUTHORITIES
(Continued)

Page

Cases:

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

INTRODUCTION

Plaintiff asks this Court to throw out a common law rule that the Legislature relied on in enacting Code of Civil Procedure section 877. The Legislature specifically *rejected* the very rule that plaintiff now proposes when it drafted section 877 to require "good faith." Plaintiff *knew* before trial that the agreed-to settlement had been judicially determined *not* to be in good faith. But he persisted anyway. Now he wants this Court to relieve him of his gambit's consequences – consequences the Legislature intended to flow from disregard of its good faith requirement. The setoff issues here necessarily require the Legislature's input on how it might rewrite section 877 (if at all) in a post-comparative fault world. If this Court chooses to supervene the Legislature's role, the most it should do is to follow the United States Supreme Court and Restatement rule for non-good faith settlements – holding that the settlement eliminates the settling defendant's fault-attributable damages share.

But this Court need not reach the setoff issue. At least two grounds require reversing the judgment without setoff even being determined:

First, the Court of Appeal got the causation determination wrong. It applied the wrong standard, one at odds with California law not only in medical tort actions, but in virtually all tort actions. It allowed the required causation element to be replaced with gut conjecture premised upon "common sense." And it did so in an area – medical diagnosis and treatment – where only an expert can opine.

Second, at a minimum, damages must be retried because the trial court wrongly refused to allow the defense to present evidence of future

insurance benefits as Civil Code section 3333.1 mandates. No setoff can be calculated before the damages amount is known. The setoff issue therefore is not ripe.

The judgment of the Court of Appeal should be affirmed. If not, the trial court's judgment should be reversed.

QUESTIONS PRESENTED

1. Specifically rejecting a pro tanto (dollar-for-dollar) offset for all settlements, the Legislature, in enacting Code of Civil Procedure section 877, limited a pro tanto offset to *good faith* settlements, knowing that the alternative for non-good faith settlements would be the existing common law release-of-one/release-of-all rule. Should this Court intervene to upset section 877's carefully enacted balance or is revisiting the setoff effect of settlements a matter best left to the Legislature?

2. If this Court chooses to circumvent the Legislature, should it adopt the modern, post-comparative fault common law rule preferred by the United States Supreme Court and the Restatement of Torts, Third, that a prejudgment settlement releases the settling defendant's proportionate liability?

3. By what standard must causation be proven in a medical malpractice case? Is it that but for the alleged omission, there is a reasonable medical probability the patient would have obtained a better outcome, as held in cases such as *Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1314-1316? Or does a gestalt substantial factor test apply as held in this case, requiring merely that the plaintiff introduce evidence sufficient to support the expectation that had more exacting care been provided there might have been a better result? And given the ban on hospitals practicing medicine, can a hospital's allegedly

inadequate medical advice have proximately caused a patient to accept a physician's later erroneous medical advice?

4. Is Civil Code section 3333.1's abrogation of the collateral source rule in healthcare provider professional liability cases limited to past expenses or does it apply equally to future expenses?

5. Does the rule announced in *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 532, that Civil Code section 3291 interest runs only on the judgment as entered and does not create "prejudgment" interest, apply to medical malpractice periodic payments judgments or is section 3291 interest on such judgments to be calculated twice – once on the verdict's present value through the time of judgment and then solely on the periodic payments amounts as they become due as suggested post-*Hess* in *Deocampo v. Ahn* (2002) 101 Cal.App.4th 758, 775?

STATEMENT OF THE CASE

A. The Nature Of The Case And The Judgment.

This is a medical tort case against a hospital and a pediatrician. Plaintiff claims that after his hospital discharge as a newborn, the pediatrician failed to adequately diagnose and treat his jaundice, resulting in severe injuries. (Opn. 6-12.) He claims the hospital failed to adequately caution his parents about jaundice, even though its warnings sufficed to cause his mother to call the pediatrician. (Opn. 9-10, 12-15.)

The jury found the pediatrician 55% at fault, the hospital 40% at fault, and the parents 5% at fault. (Opn. 3, 26.) It found present value economic damages of $15.2 million and $250,000 in noneconomic damages. (VI AA 56:1453-1454.)[1] The trial court entered a periodic payments judgment calling for immediate payment of $1.5 million (plus $1.1 million in Civil Code section 3291 "prejudgment interest") and varying monthly payments over 57 years. (X AA 88:2472-2483.)

B. Plaintiff's Prejudgment, Non-Good Faith Settlement With The Doctor.

Pretrial, plaintiff agreed to settle his claims against the pediatrician for $1 million. (IV AA 15:900-901 [¶¶2.1-2.3].) The settlement initially was conditioned on a "good faith" determination. (Opn. 28-29; IV AA 15:900 [¶1.6(b)].) The trial court denied the good faith determination, finding the settlement "grossly disproportionate to the amount a reasonable person would estimate [Dr. Nishibayashi's] liability would be." (III AA

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[1] For simplicity we round the amounts.

14:840.) The doctor (but not the plaintiff) sought writ relief, which the Court of Appeal denied. (No. B199419.) Plaintiff and the doctor then modified the settlement to delete the good faith determination requirement. (IV AA 15:899-900 [¶1.6]; IV AA 15:910 [¶1 striking ¶1.6(b)].) At trial, the court instructed the jury that plaintiff had settled with the doctor, although the settlement had not yet been confirmed as a minor's compromise. (VI AA 55:1442; Opn. 20, fn. 9.)

Post-verdict but before judgment, the trial court held two hearings on the minor's compromise. (2 RT 601-900.) The Hospital argued that approval of the settlement would reduce or eliminate the Hospital's remaining joint and several liability. (2 RT 610-614, 902-903 [release of one is release of all]; VII AA 68:1740, 1743-1744 [approving compromise "will extinguish any claims of joint liability as against Verdugo Hills Hospital"]; VIII AA 79:1990-1992 [effect of settlement is to release all liability; in the alternative releases settling defendant's share of liability].) Both plaintiff and the trial court dismissed the point. (2 RT 613-614, 648, 910-911; VIII AA 81:2085-2087.) The trial court approved the minor's compromise. (IX AA 83:2213.)[2]

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[2] Plaintiff claims the Hospital raised only a proportional offset, not release-of-one/release-of-all, before the trial court approved the minor's compromise. The trial court signed the order approving the minor's compromise on October 12, 2007 (IX AA83:2211, 2213.) It specifically heard (and rejected) argument on the release-of-one/release-of-all point *before* signing that order. (2 RT 901, 910 [rejecting argument], 929-930 [signing order].)

C. The Undisputed Expert Testimony That It Is Unknowable Whether An Earlier Doctor's Visit Would Have Made A Difference.

The causation evidence came from a single witness, plaintiff's expert Dr. Bhutani. The basic facts were undisputed. Plaintiff was discharged from the hospital (with no indication of jaundice and within the standard of care) on Tuesday. (3 Aug.RT 1294, 1356, 1365; 4 Aug.RT 1654; 5 RT 1837, 1887, 1920-1921; IV AA 29:1137.) His mother called the pediatrician's office on Thursday to report his jaundice and was advised there was no need to bring him in. (Opn. 9-10.) By Saturday night/Sunday morning he had suffered injury. (Opn. 11-12.)

Dr. Bhutani testified:

- "What I'm interested as a clinician is what is the bilirubin level. And I can't judge a bilirubin level based on the level or absence or presence of jaundice." (5 Aug.RT 1827-1828.)
- "[I]n all the babies the bilirubin is rising for the first three to five days [i.e., up until between Thursday and Saturday]." (5 Aug.RT 1818.)
- "If at the age of about 48 hours [i.e., Wednesday], that [bilirubin] level is about 14, that is a level of concern. At the age of 72 hours [i.e. Thursday], if the level is about 17, that is above concern." (5 Aug.RT 1820.)
- "Q: From your perspective, had the baby be[en] brought in, [the pediatrician] would have been able to do those things [e.g., assess

weight and skin color] and you believe we wouldn't be here today; is that fair?

A: I -- hopefully not. *Depends on what the bilirubin level was on that day* [i.e., Thursday].

Q: We don't know what it was 'cause it wasn't taken; right?

A: That's right." (5 Aug.RT 1868, emphasis added.)

- "Q: [O]n Thursday, isn't it true that at that point in time it is more probable than not that child could have been cured?

  A: . . . [Normally,] bilirubin values are rising fairly linearly, steadily, progressively, for the first 72 hours [i.e., through Thursday] and then they flatten out . . . . And so more likely than not the bilirubin was elevated on Thursday, Friday, Saturday and reached the level of 41 on Sunday. *The question really is as to what that number is*. And *without a measurement we can only guess*. (5 Aug.RT 1904, emphasis added.)

- "Q: Applying the retrospectus [sic] from Sunday back, isn't it true that you're of the opinion that on Thursday the child *was diagnosable as having high level of bilirubin and need of treatment* and, if it had been rendered, he would have been cured?

  A: Again, I think you're making multiple jumps *because it depends on getting the bilirubin value, then reacting to the bilirubin value, and it depends on what the bilirubin value was*. If the bilirubin value was already very high, then there would have been a different response to hyperbilirubin value of 17.

Q: Don't you think it's more reasonably probable that it was high on Thursday than not?

A: *I cannot speculate either way.* I can only give my best estimate as that it was rising. *I don't think I can give you an estimate what the number was and where the number was.*

(5 Aug.RT 1915-1916, emphasis added.)

Thus, Dr. Bhutani testified that proper treatment depended on the bilirubin level, but he could only speculate what that was.

Dr. Bhutani also opined that plaintiff's mother's milk would not come in for at least two days and that she received insufficient breastfeeding coaching *once her milk came in.* (5 Aug.RT 1824, 1872-1873.) He opined, however, that plaintiff was discharged within the standard of care (5 Aug.RT 1837) *before* his mother's milk came in. (5 Aug.RT 1824, 1837-1839, 1883.) While plaintiff and his mother were in the hospital, she received coaching, instruction and evaluation regarding breastfeeding. (5 Aug.RT 1967; 7 Aug.RT 2444-2445; 9 Aug.RT 3063, 3073; V AA 30:1188.) There is *no* evidence any of it was below the standard of care, although it ultimately may not have been effective.

D. The Trial Court Precludes Evidence Of Likely Insurance Coverage For Future Medical Expenses.

Insurance paid most of plaintiff's past medical expenses. The parties stipulated to recovery of past medical expenses uncovered by insurance (about $78,000 out of $405,000). (Opn. 5, fn. 2; 9 Aug.RT 3042.)

The trial court precluded defendants from introducing evidence that plaintiff's *future* medical expenses would likewise be paid by (or reduced due to) medical insurance. It read Civil Code section 3333.1's abrogation of the collateral source rule in medical tort cases as limited to *past* expenses and not applying to *future* expenses. (8 Aug.RT 2771; 11 Aug.RT 3905.) The trial court instructed the jury *not* to consider *any* party's insurance. (12 Aug.RT 4275; 13 Aug.RT 5102-5103, 5106, 5413-5415.)

E. The Trial Court Awards $1 Million In Civil Code Section 3291 "Prejudgment Interest."

The verdict exceeded plaintiff's Code of Civil Procedure section 998 demand. (X AA 88:2477-2478.) The hospital argued that Civil Code section 3291 interest ran from the date of that demand only on amounts immediately due as of the judgment date. (2 RT 927, 1203-1206.) The trial court, following *Deocampo v. Ahn*, *supra*, 101 Cal.App.4th 758, awarded interest on the jury's total present value determination from the offer date to the judgment date, incorporating that amount into the judgment as "prejudgment interest under Civil Code section 3291." (X AA 88:2477-2478, 2481.) Under the judgment, after entry interest runs only on unpaid amounts.

F. The Periodic Payments Judgment.

The trial court entered a periodic payments judgment. (X AA 88:2472.)

The Hospital is jointly and severally liable for 95% of all present ($1.6 million + $1.1 million, prejudgment interest) and future ($82.8 million spread over 57 years) economic damages, less a dollar-for-dollar offset for amounts payable under Dr. Nishibayashi's settlement. (X AA 88:2477-2478.)

The trial court rejected the Hospital's argument that Dr. Nishibayashi's settlement should offset its joint and several liability either entirely or in proportion to Dr. Nishibayashi's fault. (See VIII AA 79:1990-1995; X AA 88:2477; 2 RT 902-903, 910.)

G. The Court Of Appeal Opinion.

The Court of Appeal held that as the settlement was not in good faith, Code of Civil Procedure section 877 did not apply. (Opn. 32.) It held further that plaintiff executed a release, not a covenant not to execute. (Opn. 43, fn. 23.) Plaintiff challenges neither holding. Following *Bee v. Cooper* (1932) 217 Cal. 96, the Court of Appeal held that the plaintiff's release of the doctor also released his joint and several claims against the hospital. (Opn. 33, 42.)

The Court of Appeal suggested, however, that this Court revisit *Bee* and reject the common law release-of-one/release-of-all rule. (Opn. 4, 28, 42-43.) It declined to express an opinion whether this Court should replace

that rule with a pro tanto (dollar-for-dollar) or release of proportionate fault offset rule. (Opn. 44.)

Regarding causation, the Court of Appeal held that "'causation in fact [is] a matter of probability and common sense: . . . [such that] "'[i]f as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case.' [Citation.]'" (Opinion, p. 46, quoting *Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029-1030.) Adopting such a "common sense"/"ordinary human experience" approach, it viewed as probable that an experienced pediatrician would have treated plaintiff differently had he seen him – "it is certainly probable that a pediatrician of 26 years' experience such as Dr. Nishibayashi would have detected Aidan's hyperbilirubinemia and treated it." (Opn. 48.) It noted several factors other than bilirubin level – weight loss, chapped lips, more searching inquiries – that the pediatrician *might* have evaluated had he seen plaintiff. It described Dr. Bhutani's testimony tying the treatment decision to an admittedly speculative bilirubin number as "confusing" and characterized by "his refusal to state which specific treatment option (continued breast feeding [what the pediatrician, in fact, prescribed], phototherapy or exchange transfusion) should have been used because a specific bilirubin reading was not done." (Opn. 21, fn. 10.) *Quoting a question, rather than the response*, the opinion suggests Dr. Bhutani testified that "had [the pediatrican] seen Aidan on Thursday,

'there would have been a recognition of a need for further testing [and] there would have been a finding that [Aidan] had a high level of bilirubin and he needed treatment.'" In fact, Dr. Bhutani never so testified. (5 Aug.RT 1918.)

The Opinion did not reach the collateral source rule as to future damages or the section 3291 interest issues.

H. The Rehearing Petition.

The hospital sought a limited rehearing, asking the Court of Appeal, as a matter of judicial efficiency, to decide the future collateral source and Civil Code section 3291 interest issues and pointing out crucial factual errors in the Court of Appeal's causation analysis.

Rehearing was denied.

ARGUMENT

I.

THE LEGISLATURE, NOT THIS COURT, IS THE APPROPRIATE FORUM TO ADDRESS SETOFF RULES THAT ARE INEXTRICABLY INTERTWINED WITH CODE OF CIVIL PROCEDURE SECTION 877's GOOD FAITH SETTLEMENT SETOFF SOLUTION; IF NOT, A PROPORTIONAL OFFSET IS THE PREFERRED, MODERN COMMON-LAW RULE.

A. The Legislature In Enacting Section 877 Specifically Rejected The Across-The-Board Pro Tanto Offset Rule That Plaintiff Advocates.

It would be one thing if this Court could write on a blank canvas. But the Legislature has occupied a substantial portion of the field with Code of Civil Procedure section 877. Section 877 establishes a strongly pro-plaintiff rule: a nonsettling defendant only gets credit for a pro tanto (dollar-for-dollar) amount. But that rule comes with a substantial qualification: The settlement must be in good faith.

Section 877 *as originally introduced* would have replaced the common law rule with a dollar-for-dollar offset *in all circumstances*, the very proposal plaintiff now advances. (Request for Judicial Notice ("RJN") tab 1, p. 2.) But the Legislature amended the bill to require that to qualify for such a pro tanto setoff, a release must be in good faith. (See RJN, tab 2, p. 2, tab 4, p. 2, tab 5, p. 3077.) That amendment applied as much to the

statute's "release" provision (subdivision (a)) as to its "contribution" provision (subdivision (b)). (*Ibid.*) Thus, the Legislature specifically *rejected* the proffered pro-tanto-offset-in-all-circumstances rule.

"'[T]he Legislature's rejection of a specific provision which appeared in the original version of an act supports the conclusion that the act should not be construed to include the omitted provision.'" (*Hess v. Ford Motor Co.*, *supra*, 27 Cal.4th at p. 532, citation omitted [deleting reference to "prejudgment" interest under Civil Code section 3291, discussed in section V, below].)[3] The Legislature presumptively has in mind existing law when it enacts a new statute, including the existing common law. (E.g, *People v. Cruz* (1996) 13 Cal.4th 764, 775; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 625 ["It will be presumed, of course, that in enacting a statute the Legislature was familiar with the relevant rules of the common law"]; *Estate of McDill* (1975) 14 Cal.3d 831, 837.) "'The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.'" (*Estate of McDill, supra*, 14 Cal.3d at pp. 837-838.) "Having chosen to change the common law [in one respect], the Legislature's failure to [address a related issue] reflects the legislative intent to continue the

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[3] See also *Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1116 [FEHA exemption not limited to religious entities' religious operations where Legislature rejected language that would have done just that]; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 576-577 [narrowing standard for corporate employers' punitive damages liability where Legislature rejected language that would have broadened the standard]; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 88 [deleting personal knowledge requirement in statute governing *Pitchess* motions barred courts from implying such a requirement].

common law rule [as to the related issue]." (*People v. Brady* (1991) 234 Cal.App.3d 954, 959-960.)

Thus, in enacting section 877 the Legislature not only intended to limit its novel institution of a pro tanto setoff to "good faith" settlements, but presumptively understood and intended that it was leaving in place the release-of-one/release-of-all rule for *non*-good faith settlements.

B. Given Section 877's Careful Balance, The Legislature Is The Proper Forum To Address Any Remaking Of The Law Governing Prejudgment Settlement Offsets.

In limiting any pro tanto offset rule to *good faith* settlements, the Legislature consciously created a two-tier system – one for "good faith" settlements, one for other settlements. It necessarily understood that the existing, contrasting rule for non-good faith settlements was release-of-one/release-of-all. The contrasting treatment of good faith and non-good faith settlement offsets provides a strong incentive for what the Legislature sought to encourage: *good faith* settlements. It equally provides a strong disincentive for what the Legislature sought to *discourage*: non-good faith settlements.

The Legislature created a balance – a pro-plaintiff, pro-settling defendant result (pro tanto offset/contribution claims barred) for a good faith settlement and a countervailing pro-nonsettling defendant result (release of all/contribution claims remain) for a non-good faith settlement. In doing so, it created incentives for *all* settling parties to ensure that the settlement is in good faith. This Court can't address one side of the

equation (a non-good faith settlement offset) without affecting the overall balance the Legislature achieved in section 877.

Furthermore, the release-of-one/release-of-all rule is not inherently unwise when considered in its broader context. It mitigates the unfairness inherent in a joint and several liability scheme whereby a plaintiff can affix on a targeted defendant liability for damages far disproportionate to that defendant's fault. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1196-1198.) If the plaintiff wants to "pick off" a particular defendant, he must do so in good faith. That is a reasonable balance for the Legislature to achieve. More importantly, the Legislature achieved that balance consciously.

C. Plaintiff's Proposed Radical Reworking Of The Common Law Would Eviscerate Section 877.

Plaintiff's approach effectively rewrites section 877. In relevant part, section 877 directs that a pre-judgment release (or other settlement vehicle) "given *in good faith*": (a) does not discharge any other defendant from liability but provides only a pro tanto offset, and (b) discharges any contribution claim against the settling defendant. Subdivision (a) addresses release of settling *plaintiffs'* claims against others; subdivision (b) addresses settling *defendants'* contribution liability. The good faith requirement applies to *both* subdivisions. What plaintiff proposes would remove the good faith requirement from subdivision (a).

Under plaintiff's view, plaintiffs have *no* incentive to enter into good faith settlements; the settlement's "good faith" is solely a concern of

defendants, settling and nonsettling. The Legislature thought otherwise. If not, it would not have made the good faith requirement applicable to subdivision (a). But it constrained *both* subdivisions (a) and (b) with the good faith requirement, giving plaintiffs and defendants alike an incentive to settle *in good faith*.

Plaintiff insists this will mean that defendants have no incentive to settle in good faith. Plaintiff's postulation goes like this: If a settlement isn't in good faith, under the existing common law, the plaintiffs' claims against other defendants are released and the other defendants will have no contribution claims against the settling defendant.

There are several problems with plaintiff's reasoning. The first is the big "if" – *if* plaintiff agrees to a settlement that is not in good faith. The plaintiff has complete control. The plaintiff can insist – as he originally did here – that the settlement be conditioned on a good faith determination. When that determination was denied, plaintiff could equally have sought writ relief along with the settling defendant. He chose not to do so. Plaintiff then consciously chose to amend the settlement agreement to remove the good faith requirement. Plaintiff went in with his eyes open; he was not surprised by the lack of good faith finding, a finding he has *never* challenged on appeal.

Second, the claim that only plaintiffs will have an incentive to ensure a settlement is in good faith is nonsense. This very case belies it. The settling defendant here vigorously pursued the writ petition from the denial of good faith determination.

And oftentimes it will be *defendants*, not plaintiffs, who will suffer if there is no good faith finding. For example, assume Defendant One settles in good faith and thereafter Defendant Two settles, but *not* in good faith. Defendant One will be able to recover contribution from Defendant Two. In that scenario, it is the defendant (Defendant Two), not the plaintiff (whose claims were not released in settling with Defendant One), that suffers from the absence of good faith. And the prior good faith settlement could be in the same action, in different actions, even in different jurisdictions (see *Nutrition Now, Inc. v. Superior Court* (2003) 105 Cal.App.4th 209 [prior out-of-state action].)

Likewise, if judgment is entered against Defendant One before Defendant Two settles not in good faith, there will have been no opportunity for Defendant One to raise release as an affirmative defense. For example, assume Dr. Nishibayashi had obtained summary judgment and plaintiff appealed while proceeding to trial and judgment against the Hospital. If the summary judgment were reversed and Dr. Nishibayashi and plaintiff on remand then entered into a non-good faith settlement, it would be too late for the Hospital to raise the release as an affirmative defense, but the Hospital would still retain comparative indemnity rights against Dr. Nishibayashi. The same result occurs if for some reason plaintiff's claim were stayed against the doctor (e.g., bankruptcy, military service, some legal disability) until after judgment against the hospital. There are numerous scenarios where the effect of the lack of a good faith settlement falls squarely or primarily on a defendant and not on the plaintiff under section 877's express language.

Sometimes the effect of a failure to settle in good faith will fall mainly on the plaintiff and sometimes mainly on the settling defendant. But that was the Legislature's intent – to give *both* plaintiffs and settling defendants incentives to act in good faith. Plaintiff's proposal wholly relieving one side of the negotiating table of any good faith requirement contravenes the Legislature's clear intent.

Finally, plaintiff argues that the common law distinctions between releases (for which a release-of-one/release-of-all rule applies) and covenants not to execute and other settlement mechanisms (for which pro tanto offsets have been applied) make no sense. But if so the solution is not simply to eliminate section 877's incentive to plaintiffs to act in good faith. Section 877 applies to all settlements no matter what form and it sets *good faith* as the requirement for a pro tanto offset. Good faith, not settlement form, is the legislatively decreed dividing line. If it's not in good faith, the release-of-one/release-of-all rule is what the Legislature intended would apply. Otherwise, section 877, subdivision (a), is surplusage.

D. In Any Event, Proportional – Not Pro Tanto – Offset For Non-Good Faith Settlements Would Be The Only Rule Consistent With Section 877 And Comparative Fault Principles.

1. Any reevaluation of settlement offsets must take comparative fault into account.

The Legislature enacted section 877 before the advent of comparative fault. Any reevaluation of settlement offsets requires taking

into account the comparative fault landscape in revisiting section 877. Only the Legislature can rightly undertake that job.

But if this Court chooses to revisit setoffs for non-good faith settlements without consulting the Legislature, the pro tanto approach is not the right result. In the first place, the Legislature specifically rejected that approach. Second, if a new approach is to be adopted it should be the proportional liability offset favored in modern common law and consistent with comparative fault principles.

2. Proportional offset is the modern common law principle consistent with comparative fault.

Under modern, post-comparative fault common law, a joint tortfeasor's settlement completely releases the settling defendants' *proportionate liability share*. A jointly and severally liable tortfeasor's liability is "reduced by *the comparative share* of damages attributable to a settling tortfeasor who otherwise would have been liable for contribution to jointly and severally liable defendants who do not settle." (Rest.3d Torts: Apportionment of Liability § 16, emphasis added; see *id.*, com. c, p. 133.) That is the federal common law rule (e.g., in admiralty). (See *McDermott, Inc. v. AmClyde* (1994) 511 U.S. 202 [114 S.Ct. 1461, 128 L.Ed.2d 148] [adopting comparative share approach to effect of settlement in admiralty case]; see also *Franklin v. Kaypro Corp.* (9th Cir. 1989) 884 F.2d 1222, 1231-1232 [same as a matter of federal common law; federal securities act

claims].)[4] And that is the modern common law rule in many states, including as adopted by the highest courts in leading jurisdictions like New York, New Jersey and Pennsylvania.[5]

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[4] See generally Lea & Bridger, *McDermott v. AmClyde And The Rule Of Proportionate Fault: Maritime Law Leads In Developing A Fair, Consistent, And Efficient Credit For Settlement Rule* (1995) 19 Tul. Mar. L.J. 261, 277 [noting application of *AmClyde* rule to federal securities and environmental claims].

[5] Overwhelmingly, states address the issue statutorily (34 states), strongly suggesting that the issue should be left to the Legislature to determine in rewriting (or not) section 877. (See *Levine v. Wyeth* (Vt. 2006) 944 A. 2d 179, 196 [declining to revisit common law rules and leaving issue to legislature].)

Those states for which no statutory solution is dictated are fairly evenly split between a pro tanto and proportional approach with leading jurisdictions agreeing with *AmClyde*. The following summarizes, with statutory jurisdictions italicized:

Proportionate Offset:
United States: *McDermott, Inc. v. AmClyde* (1994) 511 U.S. 202; *Franklin v. Kaypro Corp.* (9th Cir. 1989) 884 F.2d 1222, 1231-1232; **Alabama**: *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.* (Ala. 1993) 627 So.2d 367; **Alaska:** *Petrolane Inc. v. Robles* (Alaska 2007) 154 P.3d 1014; ***Colorado***: Colo. Rev. Stat. §13-50-102; ***Connecticut***: Conn. Gen. Stat. Ann. §52-572h(n); *Savoie v. Prudential Property and Casualty Ins. Co.* (Conn.Ct.App. 2004) 854 A.2d 786; ***Iowa:*** Iowa Code §668.7; *Thomas v. Solberg* (Iowa 1989) 442 N.W.2d 73; **Louisiana**: *Miller v. Intern. Diving & Consulting Serv., Inc.* (La.Ct.App. 1996) 669 So.2d 1246; ***Minnesota:*** Minn. Stat. Ann. §604.01(5); *Rambaum v. Swisher* (Minn. 1989) 435 N.W.2d 19; ***Nebraska***: Neb. Rev. Stat. §25-21; *Tadros v. City of Omaha* (Neb. 2007) 735 N.W.2d 377; **New Jersey**: *Cartel Capital Corp. v. Fireco of New Jersey* (N.J. 1980) 410 A.2d 674; **New York**: *Whalen v. Kawasaki Motors Corp.* (N.Y. 1998) 703 N.E.2d 246; ***Oregon:*** Or. Code §31.815; **Pennsylvania**: *Charles v. Giant Eagle Markets* (Penn. 1987) 513 Pa. 474.

Pro Tanto, Good Faith Limitation:
Arizona: Ariz. Rev. Stat. §12-2504; ***California***: Code Civ. Proc. §877; ***Hawaii***: Hawaii Rev. Stat. §663-15.5; ***Illinois***: §740 Ill. Comp. Stat. 100/2(c); *BHI Corp. v. Litgen Concrete Cutting & Coring Co.* (Ill. 2005) 827 N.E.2d 435 [settling defendant cannot evade good faith requirement by obtaining assignment of plaintiff's claim]; ***Massachussets***: Mass. Gen. Laws ch. 231B §4; ***Missouri***: Mo. Rev. Stat. §537.060; ***Nevada***: Nev. Rev. Stat. Ann. §17.245; ***New Hampshire***: N.H. Rev. Stat. Ann. §507:7-h; ***North Dakota***: N.D. Cent. Code §32-38-04; ***Ohio***: Ohio Rev. Code Ann. §2307.28; ***Oklahoma***: Okla. Stat. §12-832(H); ***South Carolina***: S.C. Code

(continued...)

And that's essentially the result in *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986, the one Court of Appeal decision to address the issue. Decided pre-advent of comparative fault, *River Garden Farms* concluded that a pro rata (i.e., per defendant) offset rather than a pro tanto offset should apply. (*Id.* at p. 1001.) Post-comparative fault, *River Garden Farms* translates into the modern fault-allocated common law rule. This Court has repeatedly cited with approval

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[5] (...continued)
Ann. §15-38-50; ***Tennessee***: Tenn. Code Ann. §29-11-105; ***Virginia***: Va. Code Ann. §8.01-35.1(A)(1).

Pro Tanto, No Good Faith Limitation:
Arkansas: Ark. Code §16-61-204; ***Delaware***: Del. Code §10-6304; ***Florida***: Fla. Stat. Ann. §768.041; **Georgia**: *Barnes v. Wall* (Ga.Ct.App. 1991) 411 S.E.2d 270; ***Idaho***: Idaho Stat. §6-805(1); **Indiana**: *Marquez v. Mayer* (Ind.Ct.App. 2000) 727 N.E.2d 768; ***Maine***: 14 Me. Rev. Stat. §163; ***Maryland***: Md. Cts. & Jud. Proc. Code §3-1404 *et seq.*; **Michigan:** *Markley v. Oak Health Care Investors of Coldwater, Inc.* (Mich.Ct.App. 2003) 660 N.W.2d 344; **Montana**: *Hulstine v. Lennox Industries, Inc.* (Mont. 2010) 237 P.3d 1277; ***North Carolina***: N.C. Gen. Stat. §1B-4; ***Rhode Island***: R.I. Gen. Law §10-6-7; ***South Dakota***: S.D. Codified Laws §15-8-17; ***Texas***: Tex. Civ. Prac. & Rem. Code Ann. §33.012; **Utah**: *Yost v. State* (Utah 1981) 640 P.2d 1044; ***Washington***: Rev. Code Wash. §4.22.060; **West Virginia**: *Charles v. State Farm Mut. Auto. Ins. Co.* (W.Va. 1994) 452 S.E.2d 384; **Wisconsin**: *Haase v. Employers Mut. Liability Ins. Co.* (Wis. 1947) 27 N.W.2d 468; **Wyoming**: *Haderlie v. Sondgeroth* (Wyo.Ct.App. 1993) 866 P.2d 703.

No Joint and Several Liability:
Kansas: *Glenn v. Fleming* (Kan. 1987) 732 P.2d 750; **Kentucky**: *Central Kentucky Drying Co., Inc. v. Dept. of Housing* (Ky. 1993) 858 S.W.2d 165.

Pro Rata Offset:
District of Columbia: *Berg v. Footer* (D.C. 1996) 673 A.2d 1244; ***New Mexico***: N.M Stat. Ann. §41-3-5.

Others:
Mississippi: Miss. Code Ann. §85-5-1 [hybrid: pro rata up to settling tortfeasor's "ratable share" and pro tanto to the extent that the settling tortfeasor pays more than its "ratable share"]; **Vermont**: *Levine v. Wyeth* (Vt. 2006) 944 A. 2d 179, 196 ["we will allow the legislature to determine which approach is best"].

River Garden Farms's emphasis on good faith as the necessary prerequisite to a pro tanto as opposed to pro rata or proportional offset. (*Tech-Bilt, Inc. v. Woodward- Clyde & Associates* (1985) 38 Cal.3d 488, 496; *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 604.)

The proportional offset rule simply holds the plaintiff to the very bargain he made – releasing the settling defendant's share of liability. The pro tanto rule that plaintiff promotes undermines encouraging settlements in *good faith* as it affords plaintiffs no incentive to treat all defendants fairly, and instead encourages gamesmanship (as here). (See Comment, *Good Faith Settlements: The Inequitable Result of the Evolving Definition of Equity* (1986) 22 Cal. W.L.Rev. 362, 368 ["The good faith requirement is [] designed to limit the opportunity for an unscrupulous plaintiff to hand pick the best defendant to proceed against – the one whose deep pockets will satisfy his judgment or whose evil disposition will ensure a sympathetic judgment at trial – by dismissing the other defendants from the case"].)

Plaintiff's solution permitting the nonsettling defendant to still pursue the settling defendant for comparative equitable indemnity has the incentives all wrong. The *plaintiff* is in control of the settlement process with the settling defendant. The *plaintiff* has a choice in that matter. Having voluntarily (and in this case knowingly) entered into a settlement not in good faith, plaintiff is in no position to argue that the burden to recoup any shortfall should shift to the party who is a complete stranger to the settlement negotiation (the nonsettling defendant).

3. Plaintiff's approach relies anachronistically on a pre-comparative fault landscape.

Plaintiff's references to other pre-section 877, pre-comparative fault rules (e.g., for covenants not to sue) ignore modern legal developments. Section 877 treats equally all mechanisms for resolving cases – so long as, unlike here, the settlement is in good faith. (See Code Civ. Proc., § 877.) So, too, does the modern common law proportional liability release rule. (Rest.3d Torts: Apportionment of Liability, § 24.) If this Court chooses to revisit various settlement offset rules, it should do so comprehensively. If it revisits the release-of-one/release-of-all rule, it should equally revisit precedents – of almost the same vintage – creating countervailingly one-sided pro tanto offset rules for covenants not to sue and the like. Rather than becoming entangled in a briar patch of pre-comparative fault precedents, the modern release of proportionate liability rule should apply across the board (excluding, of course, the "good faith" settlement arena where the Legislature has occupied the field with section 877).

Ultimately underlying plaintiff's anti-proportional offset position is the concept that a plaintiff should be able to capitalize on joint and several liability no matter whether a case resolves by judgment or settlement and regardless whether the settlement is not in good faith. But joint and several liability is also the rule in admiralty, where the United States Supreme Court adopted a proportionate liability offset. As it explained, in the

settlement context proportionate responsibility applies because the plaintiff controls his own fate:

> When the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall. [Citation. Footnote.] . . . [T]he proportionate share rule announced in this opinion applies when there has been a settlement. In such cases, the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle.

(*McDermott, Inc. v. AmClyde*, *supra*, 511 U.S. at p. 221 [114 S.Ct. at p. 1471].)

4. Plaintiff's approach would unfairly reward settling plaintiffs at the expense of nonsettling defendants.

Nonsettling defendants shouldn't be entitled to an overly generous offset just because the plaintiff negotiated a particularly good settlement, nor should they have to compensate the plaintiff for the settlement discount that the plaintiff willingly provides in order to obtain the settlement's benefits:

> There is no reason to allocate any shortfall to the other defendants, who were not parties to the settlement. Just as the other defendants are not entitled to a reduction in liability when the plaintiff negotiates a generous settlement, [citation],

so they are not required to shoulder disproportionate liability when the plaintiff negotiates a meager one.

(511 U.S. at p. 221 [114 S.Ct. at pp. 1471-1472].)

Looked at another way, plaintiffs afford a discount to settle a case against a particular defendant in return for eliminating the risks of recovery (both in terms of liability and amount of damages) and the advantage of earlier payment and the time value of money. Plaintiff determines the discount amount in an arm's length transaction, freely entered into. Under plaintiff's approach, however, a plaintiff recovers *the entire* settlement discount from the nonsettling defendant through joint and several liability. Plaintiffs get to settle for free, obtaining all of the benefits of settlement, with the nonsettling defendants repaying the full settlement discount to the plaintiff. That makes sense where the settlement is within the reasonable ball park of the settling defendant's liability share, as the Legislature decided in section 877, but it is unfair and wrong where, as here, the settling defendant pays far less than its actual share of liability (Dr. Nishibayashi bore 55% of the fault but paid under 7% of the economic damages in settlement),[6] creating a particularly large settlement discount. Under plaintiff's approach, the greater the settlement discount the plaintiff affords, the more a nonsettling defendant must indemnify the plaintiff for that cost. That makes no sense.

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[6] He settled for present value $1 million. The jury found economic loss of present value $15.237 million. $1 million is just under 6.6% of $15.237 million.

The weight of legal scholarship agrees. The Restatement of Torts, Third, section 16 "Apportionment of Liability," Reporter's Notes, comment c, discusses the countervailing arguments at length. Ultimately, it concludes that "[o]n balance, the comparative-share credit [i.e., proportional fault offset] appears preferable and is generally the rule in jurisdictions that retain joint and several liability. [Citations.]" Likewise, "[t]he comparative-share credit is the preferred approach by most commentators." (*Ibid.*; see Kornhauser & Revesz, *Settlements Under Joint and Several Liability* (1993) 68 N.Y.U. L. Rev. 427 [where (as here) litigation costs are high, comparative-share credit is fairer than pro tanto offset]; Klerman, *Settling Multidefendant Lawsuits: The Advantage of Conditional Setoff Rules* (1996) 25 J. Legal Stud. 445, 460-461 [comparative-share credit produces fairer result amongst all parties: plaintiff, settling defendant, non-settling defendant].)

The United States Supreme Court got it right in *AmClyde*. If this Court chooses to create a new common law rule, it should adopt *AmClyde*'s proportional offset. Under that approach, the settling defendant's proportional damages share that the jury ultimately finds is set off against the plaintiff's recovery.

E. Post-Judgment Partial Satisfaction Rules Are Inapposite.

Plaintiff also argues that prejudgment settlements should be treated just like post-judgment settlements, relying on Civil Code section 1543 and cases involving satisfactions of *judgments*. (E.g., *McCall v. Four Star Music Co.* (1996) 51 Cal.App.4th 1394, 1397; *Milicevich v. Sacramento*

Medical Center (1984) 155 Cal.App.3d 997.) But satisfactions of judgments and pre-judgment releases are different animals.

The law has long distinguished between pre-judgment and post-judgment. And for good reason. Post-judgment, plaintiff can no longer affect liability or direct proof efforts to focus more on one defendant than another. Pre-judgment, the opportunities for mischief abound in a plaintiff's ability to pick and choose amongst defendants to focus on in terms of proof. The target defendant one day, once it settles, is depicted as just tangentially responsible.

Likewise, section 1543 affords plaintiff no solace. That section has been around since 1872. It has consistently been interpreted to apply only to contract obligations (and perhaps judgments). (See *Dougherty v. Cal. Kettleman Oil Royalties* (1939) 13 Cal.2d 174, 181-182; *Bee v. Cooper*, *supra*, 217 Cal. at p. 101.) If it were otherwise, section 877, subdivision (a), would have been unnecessary. The law does not presuppose that the Legislature engages in idle acts. In any event, as the more recent statute, section 877 controls as to the Legislature's view.

Plaintiff also argues that the settlement here falls within some nether land between pre-trial and post-judgment releases because, although agreed upon in all respects pre-trial, the minor's compromise approval was not obtained until post-trial but still pre-judgment. The fact is, though, that the dividing line between post-judgment satisfactions and other releases is *judgment*. Again, for good reason. Before judgment, liability remains fluid (as illustrated here by the months of wrangling over periodic payments). After judgment, it does not. And plaintiff's "post-trial" claim here is

particularly suspect. Plaintiff and the doctor agreed on the amount well in advance of trial. They entered an agreement and release binding in every respect except minor's compromise approval. And, most important, *they told the jury that they had settled.* (VI AA 55:1442.) The inevitable result was to focus attention on the remaining defendant, the Hospital.

* * *

This Court should retain the release-of-one/release-of-all rule that the Legislature had in mind in enacting section 877 as the non-good faith alternative. The Legislature, not this Court, is the proper venue for any changes to section 877's balance. But if this Court is to change the rules on the Legislature, it should adopt the proportional fault setoff followed by the United States Supreme Court, the Restatement, and leading jurisdictions.

II.

PLAINTIFF HAS WAIVED ANY ARGUMENTS REGARDING THE ANSWER'S ADDITIONAL ISSUES FOR REVIEW BY FAILING TO ADDRESS THEM IN THE OPENING BRIEF.

This Court's unconditional grant of review put in play all issues "raised or fairly included in the petition *or answer.*" (Cal. Rules of Court, rule 8.516(b)(1), emphasis added.) An opening brief is required to address the "issues in the petition for review *and*, if any, *the answer.*" (Cal. Rules of Court, rule 8.520(b)(2), emphasis added.) By failing to address the important issues raised in the answer, the Opening Brief on the Merits is defective.

What should be the consequence? Surely, a party may not dictate or limit the issues before this Court simply by ignoring inconvenient ones. Likewise, it is unfair for a party to ignore an issue in an opening brief and then spring its arguments only in reply. (E.g., *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn 4; *Kahn v. Wilson* (1898) 120 Cal. 643, 644; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10.) Accordingly, the issues raised in the Answer and not addressed in the Opening Brief should be decided solely upon this Answering Brief.

III.

ESTABLISHING CAUSATION IN A MEDICAL TORT ACTION SHOULD REQUIRE MORE THAN "COMMON SENSE" SECOND-GUESSING OF A MEDICAL EXPERT'S TESTIMONY THAT WHAT TREATMENT WOULD HAVE BEEN PRESCRIBED IS UNKNOWABLE.

Plaintiff is undoubtedly sympathetic. The temptation to seize upon any negligence as supporting causation is only natural. The sentiment is that if only the pediatrician had seen plaintiff earlier, he would have been saved. Everyone would "hope" (plaintiff's expert's word) that had the pediatrician only seen plaintiff when his mother called with her concerns, he would have prescribed a different course of treatment and injury would have been avoided. But does such a "hope" suffice for the causation element

necessary to affix liability? According to the Court of Appeal, apparently so. But should it? No.

According to the Opinion, to prove causation a medical tort plaintiff need only produce evidence of "'causation in fact [as] a matter of probability and common sense: . . . [such that] "'[i]f as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case.' [Citation.]'" (Opinion, p. 46, quoting *Raven H. v. Gamette*, *supra*, 157 Cal.App.4th at pp. 1029-1030.) In other words, a plaintiff need only show negligence of a type that *can* cause the injury in question and that an expected injury type occurred, but need not actually tie cause and effect together.

That should not be the causation standard, especially in a medical tort context where the issue is what treatment would have been prescribed had events unfolded differently. The law, properly, requires more than Monday-morning quarterbacking. A causation test – the test adopted by the Opinion – that allows a jury to leap ("infer") from omission to result without more is a gateway to allowing liability based on hypothesis, conjecture and speculation. That risk is heightened as regards issues of medical diagnosis and conduct, where only *expert* testimony can provide the necessary "more likely than not" link.

A. Causation Requires More Than Just A Negligent Omission And A Foreseeable Outcome; It Requires Evidence Of The Actual Harm-Causing Mechanism.

Just as in any other negligence case, a medical tort plaintiff must prove "a proximate causal connection between the negligent conduct and the resulting injury." (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1077.) "There must be a causal relationship between the physician's [or here, hospital's] failure to inform and the injury to the plaintiff." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) "'A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for defendant.' [Citation.]" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776, emphasis omitted.)

Comparably in negligent property security cases, the fact that some safety measure designed to prevent assaults was omitted and an assault thereafter took place is *not* sufficient to establish causation, even though the omission is one that might be expected to produce such a result: "the plaintiff must establish, by nonspeculative evidence, some *actual causal link* between the plaintiff's injury and the defendant's [negligent] failure . . . ." (*Id.* at p. 774, emphasis added [causation not established even though negligence in securing premises where not shown how assailant entered]; *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472 [same]; cf. *Raven H., supra*, 157 Cal.App.4th at pp. 1029-1030 [triable issue of fact where although not known how assailant came on premises,

known that assailant entered plaintiff's apartment through negligently secured window].)

This same rule requiring some *evidence*, not just a resort to "common experience," connecting the negligence to the injury applies in other tort arenas as well. (E.g., *Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1602 [common experience insufficient to establish that failure to warn of natural gas odor suppression resulted in explosion where no evidence "that plaintiffs would have acted differently if they had *known* of odor fade"]; *Miranda v. Bomel Const. Co., Inc.* (2010) 187 Cal.App.4th 1326 [although "Valley Fever" can be caused by disturbed dirt, no showing that it *was* caused by dirt disturbed next to plaintiff's workplace]; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 312-313 [directing no-causation finding on brake-failure claim: insufficient showing that brake defect caused run-stop-sign traffic collision where no evidence of brake failure as opposed to driver inattention].)

Like other ultimate facts, causation often must be proved by inference. But inferences cannot be drawn "'from thin air.'" (*Leslie G., supra*, 43 Cal.App.4th at p. 483.) Something *more* than the nature of the negligent omission (a security or safety measure, a failure to warn) must be shown.

The same rule applies in the medical tort context: There must be more than just an omission and an outcome that *could* result from that omission. The evidence must "'allow the jury to infer that in the absence of the defendant's negligence, there was *a reasonable medical probability* the plaintiff would have obtained a better result.'" (*Espinosa v. Little Co. of*

Mary Hospital, supra, 31 Cal.App.4th at pp. 1314-1315, emphasis added quoting *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 216.) A "reasonable medical probability" means more likely than not: "'A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, *it becomes more likely than not that the injury was a result of its action*. This is the outer limit of inference upon which an issue may be submitted to the jury.'" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118, quoting *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-403, emphasis added by *Jennings*.)

In the medical tort context there is an added burden. "[A] reasonable medical probability" is not something within lay jurors' "ordinary experience" or "common sense." Lay jurors can only guess, speculate or conjecture as to "reasonable medical probability." For a rational decision, there must be *expert* evidence.

B. Ordinary Experience Has No Role In Establishing *Medical* Causation; Medical Conclusions Can Only Be Established By Expert Testimony.

"'[C]ausation must be proven within a reasonable medical probability *based upon competent expert testimony*.'" (*Miranda v. Bomel Const. Co., Inc., supra*, 187 Cal.App.4th at p. 1336, emphasis added, quoting *Jones v. Ortho Pharmaceutical Corp., supra*, 163 Cal.App.3d at pp. 402-403.) Medical diagnosis and treatment, like the standard of care for doctors, is something *uniquely* within the knowledge of the expert medical

community – and outside the common knowledge of jurors. Obviously, in retrospect everyone would conclude that something different should have been done. That will be true whenever there is a missed opportunity and an injury occurs. But that is not the causation question. The causation question is what would a physician faced with this situation *normally* do? Only expert testimony can answer that question.

The expert testimony itself must not be speculative, it must "provide some articulation of how the jury, if it possessed [the expert's] training and knowledge and employed it to examine the known facts, would reach the same conclusion as the expert." (*Jennings v. Palomar Pomerado Health Systems, Inc.*, *supra*, 114 Cal.App.4th at p. 1120, fn. 12.) Even an expert's conclusion, standing alone, does not suffice – there must be a supporting expert reasoning process: "an expert who expresses a conclusion supported only by a statement telling the jury (in essence), 'Trust me, I'm an expert, and it makes sense to me' has provided no grist for the jury's decisional mill." (*Ibid.*; see *Saelzler*, *supra*, 25 Cal.4th at pp. 775-776 [rejecting conclusory expert testimony that but for negligent security omission assault would not have occurred].)

The Opinion's lay jurors' reasonable-expectation-based-on-ordinary-experience standard is irreconcilable with causation requirements. The only *expert* testimony here was that what a reasonable physician would have done is unknowable because the critical diagnostic information is unknowable.

C. The Sole Expert Testimony Here States That It Is Unknowable Whether An Earlier Office Visit Would Have Changed Anything.

Here the expert evidence on causation falls far short of the "reasonable medical probability" standard. The sole relevant expert, Dr. Bhutani, was consistent and unvarying in his opinion: (1) Whether more aggressive treatment would have been prescribed (over the phone the physician prescribed continued breastfeeding and sunlight) depended on what the bilirubin level was, (2) the critical level on Thursday would have been 17, (3) he could *not* say what the bilirubin level was on Thursday; indeed, it would be "speculation." (5 Aug.RT 1915-1916.) That's what Dr. Bhutani had "already testified to," i.e., that he could *not* say that there "'would have been a finding that [plaintiff] had a high level of bilirubin and he needed treatment.'" (Opn. 49; 5 Aug.RT 1917-1918.) He could only speculate.

To the extent that Dr. Bhutani was nonresponsive, evasive or misfocused on prevention rather than treatment, as the Opinion characterized his testimony (Opn. 21, fn. 10), the evidence failed to satisfy *plaintiff's burden of proof* to show causation. (See Evid. Code, § 500.) Plaintiff's burden was to present *expert* evidence – not judicial or jury hypothesis – of what diagnosis a reasonable pediatrician would have made. Dr. Bhutani said that, as a clinician, the critical factor was the bilirubin level and he could only *guess* at what that was.

Plaintiff's burden was to show that had he been seen, he would have been differently treated. The *absence* of such evidence (e.g., Dr. Bhutani's testimony that he couldn't tell) is a failure of proof.

In another case, perhaps there would be different testimony. But in *this* case, the record — the *sole*, undisputed expert testimony — was that it is unknown and unknowable whether the pediatrician would have prescribed different treatment (and, therefore, a different outcome possibly obtained). That is "'[a] mere possibility of . . . causation'" where "'the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, . . .'"; that is not good enough. (*Saelzler*, *supra*, 25 Cal.4th at pp. 775-776.)

Where uncontradicted expert testimony states that certain information critical to determining medical diagnosis and treatment is unknowable except by speculation, the factfinder cannot bridge the gap by resorting to "ordinary experience," "common sense" or sympathy. A critical piece of the medical tort puzzle — expert testimony establishing the causal link between negligence and outcome — is missing.

This failure of proof of a necessary element requires a reversal with directions. (*Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1066 ["Having thus received a full and fair opportunity to prove her case, (plaintiff) is not entitled to a new trial"]; *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 833 [failure of proof requires reversal with directions].) At the very least, this Court should remand to the Court of Appeal with directions to resolve the causation issue under the correct standard.

D. As A Matter Of Proximate Cause, Public Policy Precludes The Hospital From Usurping The Pediatrician's Role Or Otherwise Practicing Medicine.

There's another fundamental problem with plaintiff's causation theory: proximate cause. In addition to cause in fact, a plaintiff must establish proximate – or legal – cause as tempered by public policy considerations. (E.g., *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 313 [although a cause in fact, the carrier's misconduct in declining a settlement offer is not a *proximate* cause of punitive award against insured].) "As Justice Traynor observed, proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.' [Citation.]" (*Id.* at p. 316.)[7]

The central public policy issue here is that doctors practice medicine; hospitals and nurses do not. (*People v. Cole* (2006) 38 Cal.4th 964, 970 [Califiornia bans corporate practice of medicine]; *Ermoian v. Desert Hosp.* (2007) 152 Cal.App.4th 475, 501 [a hospital "as an entity that is not a natural person, cannot practice medicine"]; Bus. & Prof. Code, § 2032;

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[7] In the Court of Appeal, plaintiff claimed that proximate cause is just superseding cause in other clothing. *One* proximate cause consideration is that a defendant is not responsible for an unforeseeable intervening cause (superseding cause). (See, e.g., *Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1030-1037.) But superseding cause does not cover the waterfront of proximate cause considerations. (E.g., *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1046 [public policies underlying punitive damages]; *PPG Industries, supra*, 20 Cal.4th at p. 313 [same]; cf. *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 399 [public policy considerations for related duty issue not limited to foreseeability].)

4 Aug.RT 1559 [plaintiff's expert: "(H)ospitals don't practice medicine. Physicians practice medicine. Let's make no mistake about that"].) That means hospitals and nurses cannot usurp the doctor's role in practicing medicine, that is, in "diagnos[ing], treat[ing] . . . [or] prescri[bing] for any ailment, . . . disease, . . . disorder, injury, or other physical . . . condition . . . ." (Bus. & Prof. Code, § 2052, subd. (a).) But such usurpation is the heart of plaintiff's claim against the Hospital, a claim that the Hospital should have supervened Dr. Nishibayashi's advice, e.g., as regards an appropriate follow-up appointment or the need to treat or how to treat jaundice.[8]

The public policy implications of requiring hospitals to provide medical advice beyond that of a treating physician, that is, beyond directing the patient to call the doctor with concerns, are decidedly negative. It would undermine the physician-patient relationship. To protect themselves from liability, hospitals would have to become primary caregivers. They would have to educate patients to second-guess physicians' advice. A hospital may owe a duty to inform a patient of when to *seek* medical advice, but any such duty, any such proximate cause, cannot extend to interfering with the patient-doctor relationship and providing advice, counseling, education or instruction, to cause the patient to *disregard* as inadequate the physician's medical advice or prescribed treatment.

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[8] There is no *evidence* that the care afforded to plaintiff in the hospital from nursing to maternal feeding instructions to early discharge fell below the standard of care. (See 5 Aug.RT 1837, 1920-1921 [discharge within standard of care]; 5 Aug.RT 1893, 1910 [expert does not know what instruction given]; 4 Aug.RT 1646, 1651; 5 Aug.RT 1967; 7 Aug.RT 2444-2445; 9 Aug.RT 3073 [nurse gave feeding instruction].)

The fulcrum fact here is that the Hospital's advice *did* cause plaintiff's mother to call the pediatrician specifically seeking medical advice regarding plaintiff's jaundice. That the Hospital instructed the parents on discharge to seek medical advice for jaundice and that the parents promptly called the pediatrician seeking medical advice when they suspected jaundice is undisputed. And the pediatrician provided just such advice. Plaintiff's theory is that the Hospital failed to supplant or to counteract the pediatrician's telephonic medical advice, that it had to educate the parents to question, to disregard or second-guess the physician's advice. But under that theory, the Hospital had to practice medicine (and do so better than the pediatrician). That cannot have been its obligation. Thus, there can be no legal or proximate cause.

IV.

LIMITING CIVIL CODE SECTION 3333.1'S COLLATERAL SOURCE RULE MODIFICATION IN MEDICAL TORT CASES TO PAST, AND NOT FUTURE, DAMAGES WOULD EMASCULATE THAT STATUTE'S EXPRESS PURPOSE.

The trial court categorically barred the Hospital from introducing, under Civil Code section 3333.1, future collateral source evidence (e.g., likely future insurance payments). (8 Aug.RT 2771-2772.) By limiting collateral source evidence to past payments, the trial court eviscerated section 3333.1's plain language and evident purpose, creating a gaping hole

in one of MICRA's fundamental tenets. This evidentiary error requires retrial, mooting any setoff issue.

A. Section 3333.1's Plain Language Encompasses Future Collateral Benefits Evidence.

Section 3333.1 allows a defendant healthcare provider to "introduce evidence of *any amount payable* as a benefit to the plaintiff . . . ." (Civ. Code, § 3333.1, emphasis added.) "'Unless there is reason to believe that a special or technical meaning was intended, courts give the words of the statute their usual, ordinary meaning.'" (*Sacramento County Alliance of Law Enforcement v. County of Sacramento* (2007) 151 Cal.App.4th 1012, 1017, quoting *People v. Anderson* (2002) 28 Cal.4th 767, 785-786 (conc. & dis. opn. of Kennard, J.); accord *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063; Civ. Code, § 13 [words and phrases construed according to "approved usage of the language," and not technically unless used in a technical sense].)

"'[T]he ordinary meaning of the word 'any' is clear, and its use in a statute unambiguously reflects a legislative intent for that statute to have a broad application.'" (*Brandon S. v. State of California ex rel. Foster Family Home etc. Ins. Fund* (2009) 174 Cal.App.4th 815, 825, quoting *Department of California Highway Patrol v. Superior Court* (2008) 158 Cal.App.4th 726, 736; see *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1191 [use of the word "any" serves to "broaden the applicability" of statutory provision].)

The ordinary meaning of "payable" is "to be paid." (Dictionary.com. Unabridged (v. 1.1), Random House, Inc. <http://dictionary.reference.com/browse/payable> (as of Sept. 5, 2011); see Merriam-Webster's Dictionary of Law, Merriam-Webster, Inc. <http://dictionary.reference.com/browse/payable> (as of Sept. 5, 2011) ["that may, can, or must be paid"].) It is future tense. "Payable may therefore signify an obligation to pay at a future time . . . ." (Black's Law Dict. (6th ed. 1990) at p. 1128, col. 2 ["payable"].) That "payable" may have a technical meaning in some contexts (e.g., accounting, financial instruments) is immaterial. Section 3333.1 does not use the term in any technical sense.

Plaintiff has argued that "payable" should be read as past tense because later the statute allows a "plaintiff [to] introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits . . . ." (Civ. Code, § 3333.1, subd. (a).) At the same time, the statute defines the relevant collateral sources as any insurance, contract, or agreement "to provide, pay for, or reimburse" – future tense – medical expenses. (*Ibid.*)

The simple answer is that where "a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Reasonably read, a mitigating provision does not negate the fundamental principle; i.e., the "premiums paid" mitigating provision should not trump "payable's" plain future meaning. Rather, the referenced offsetting premiums "paid" should be read to allow evidence as to both past *and* future insurance premiums. (See *Plumbing etc. Employers Council v.*

Quillin (1976) 64 Cal.App.3d 215, 224-225 [construing "may" to mean "must" where necessary to reasonable construction of statute].)

B. Section 3333.1's History And Underlying Purpose Make Clear That The Statute Applies To Future Collateral Source Benefits.

The trial court's overly restrictive construction runs into an even more fundamental problem. It contravenes the statute's context and purpose. The "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83; accord, *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487; *In re Marriage of Harris* (2004) 34 Cal.4th 210, 221; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 927; see Code Civ. Proc., § 1859 ["In the construction of a statute the intention of the Legislature, . . . is to be pursued, if possible . . ."].)

Even plain statutory language must yield to evident statutory purpose. (*Silver v. Brown* (1966) 63 Cal.2d 841, 845; accord, *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6.) "'The courts resist blind obedience to the putative "plain meaning" of a statutory phrase where literal interpretation would defeat the Legislature's central objective.'" (*Kramer v. Intuit Inc.* (2004) 121 Cal.App.4th 574, 579, quoting *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 614; *People ex rel. Flournoy v. Yellow Cab Co.* (1973) 31 Cal.App.3d 41, 45.) The law "turn[s] to other sources for insight, including the provision's statutory context, its legislative history,

and 'the human problems the Legislature sought to address' . . . examining the [statutory] scheme as a whole, [to] better understand the consequences of a particular interpretation, avoid absurd or unreasonable results, and select the interpretation most consonant with the Legislature's overarching goals." (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 844-845.)

Section 3333.1 is part of MICRA. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 34.) MICRA "reflects a strong public policy to contain the costs of malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 112.) The policy judgment in section 3333.1, specifically, and MICRA generally, is clear. The Legislature intended to reduce medical tort insurance costs by shifting medical care costs from professional liability insurers to healthcare insurers, finding it "preferable to require the victim's health or workers' compensation insurer to absorb some of the loss" and by eliminating plaintiffs' double recovery when collateral sources were not reimbursed. (See *Barme v. Wood* (1984) 37 Cal.3d 174, 179-181 & fn. 5; *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 166-167; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 505-506.) Indeed, the trial court's ruling placed plaintiff in a better position than even in a non-MICRA case where future damages would be limited to the amounts to be actually paid, including by health insurers. (See *Howell v. Hamilton Meats & Provisions Inc.* (2011) 52 Cal.4th 541 [plaintiff entitled

to recover as damages only the amounts actually paid for medical services, including at discounted health insurer rates, if applicable].)

The concerns underlying MICRA clearly include liability for *future* damages. (Code Civ. Proc., § 667.7 [periodic payment judgments for future medical expenses; future payments cease if plaintiff dies prematurely].) It is absurd to think the Legislature, concerned about future damages, would limit section 3333.1's collateral source rule modification to past damages. Future medical expenses are often (as here) the lion's share of a judgment. It is unthinkable that the same Legislature that enacted section 667.7 constraining judgments for future damages intended to radically remake the collateral source rule in medical tort actions only as to past damages. Such a reading would be contrary to the Legislature's express intent to reallocate responsibility from professional liability insurers to health insurers and to prevent double recoveries.[9] (*Cf. Western Steamship, supra*, 8 Cal.4th at p. 112 [failing to apply Civil Code section 3333.2 to indemnity actions would undermine MICRA goal of controlling professional liability insurance costs].)

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[9] Under plaintiff's view, either future insurers have lien rights against the judgment or plaintiffs obtain a double recovery. Disallowing health insurer reimbursement of future medical payments not introduced into evidence would violate section 3333.1, subdivision (b). If not, plaintiff obtains exactly the sort of "double recovery" that section 3333.1 was intended to eliminate (AOB 69, citing *Hernandez v. California Hospital Medical Center, supra*, 78 Cal.App.4th at pp. 505-506 and *Fein v. Permanente Medical Group, supra*, 38 Cal.3d at pp. 166-167) and which plaintiff told the jury would not happen (8 Aug.RT 2805; 12 Aug.RT 4384).

C. Section 3333.1 Has Consistently Been Read As Applying To Future Damages.

Case law and commentary *consistently* view section 3333.1 as applying to *future* amounts payable.

- *Fein v. Permanente Medical Group, supra*, 38 Cal.3d at pp. 146, 165 fn. 21: Affirming section 3333.1's constitutionality in context of judgment directing the "defendant to pay the first $63,000 of any *future* medical expenses *not covered by medical insurance*"; "[I]f anything, the trial court may have given plaintiff more than he was entitled to, since it did not reduce the jury's $63,000 award by the collateral source benefits plaintiff was [merely] *likely* to receive." (Emphasis added.)

- *Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499, 502, 505-506: Annulling Worker's Compensation Appeals Board award crediting employer for "*future* workers' compensation payments" (emphasis added) to an employee who settled a medical tort claim for exacerbating the employee's workplace injury. Section 3333.1 necessarily excluded *future* workers' compensation collateral source payments from the medical tort settlement just as it precludes employer reimbursement for past workers' compensation payments.

- Arnell, *California's MICRA: The Need For Legislative Reform* (1986) 23 San Diego L.Rev. 171, 199-200 ["As it presently reads" section 3333.1 "allows for the introduction of evidence 'of any amount payable'" and includes payments for future medical expenses].)

D. "Payable" As Used In Far Different Statutory Contexts Sheds No Light On That Term's Meaning Here Given Section 3333.1's Distinct Purpose.

In the Court of Appeal, plaintiff relied on out-of-state cases and California statutes addressing issues vastly different from MICRA. Plaintiff acknowledged that those authorities "interpret[] 'payable' in other contexts," divorced from section 3333.1's intent and purpose and the overall MICRA statutory scheme. (RB 83-85.) Interpreting "payable" in different statutory schemes, with different purposes and legislative histories, in no way supports narrowly interpreting "payable" in the MICRA legislation context and contravenes the fundamental California statutory construction precept: to effectuate legislative intent and the purpose underlying the particular statute being construed.

None of the cases plaintiff relied on supports limiting "payable" in section 3333.1 to only collateral source payments for *past* damages:

- *Rollins v. Pizzarelli* (Fla. 2000) 761 So.2d 294. Review of the legislative history for the statute at issue (and a preceding statute) showed that the Florida Legislature had specifically discussed and understood that it was enacting an offset of certain paid and "*currently* payable" insurance benefits. (*Id.* at pp. 298-299, original emphasis.) There is no such legislative history here. Nor was the Florida statute enacted to stem the undue growth in judgments where damages for future medical expenses needed to be controlled. Rather, the Florida statute was designed to encourage prompt payment by insurers of certain benefits that were owed.

- *Carlsen v. Unemployment Ins. Appeals Bd.* (1976) 64 Cal.App.3d 577. *Carlsen* interpreted the Unemployment Insurance Act ("UIA"), a remedial statute to be accorded "liberal construction" in workers' favor. (*Id.* at pp. 585-586.) Given its remedial purpose, *Carlsen* construed the statutory scheme's "unemployment" definition – a period for which "no wages are payable" – as not including contingent or disputable future claims for wages. (*Id.* at pp. 583-585.) The future tense interpretation was unreasonable in the particular statutory context as it would obligate an employee to pursue an unliquidated or even speculative claim against his employer before he could qualify for unemployment benefits. (*Id.* at pp. 585-586.) *Carlsen confirmed* that "payable" can include the future tense and that what matters is the statutory purpose. (*Id.* at p. 586.)

- *Burkett v. Continental Cas. Co.* (1969) 271 Cal.App.2d 360, interpreted a disability insurance policy providing that "the benefit payable shall be 'Less Any Amount Paid or Payable'" under workers' compensation. (*Id.* at p. 361.) *Burkett* recognized that "payable" had alternative meanings, including both past and future tense. (*Id.* at p. 362.) Because the "terms of an insurance policy are to be construed strictly against the insurer," *Burkett* construed "payable" against the insurer to mean the more narrow, past tense, definition that provided greater benefits to the insured. (*Ibid.*)

- *Crowell v. Harvey Inv. Co.* (1932) 128 Cal.App. 241, analyzed a statute directing tax payments in two installments, the first being "due and payable" in October and the second being merely "payable" in January. (*Id.* at p. 245.) *Crowell* rejected the untenable taxpayer argument that the

omission of "due" from the phrase "due and payable" for the second installment meant that there was no time fixed for the second installment to be paid. (*Ibid.*)

These cases demonstrate that what "payable" means depends on context and statutory purpose.

E. Projecting Future Collateral Source Payments Is No More Speculative Than Projecting Future Medical Expenses.

In the Court of Appeal, plaintiff argued that his future medical insurance coverage is uncertain and therefore cannot support reducing his future medical damages. (RB 87-88.) The trial court did not rule on that basis. In any event, this Court has already rejected plaintiff's very argument.

In *Fein v. Permanente Medical Group*, *supra*, 38 Cal.3d at p. 165, fn. 21, the plaintiff argued that "he may not be covered by medical insurance in the future" and on appeal "object[ed] to any reduction of future damages on the basis of potential future collateral source benefits." But a defendant isn't required to prove absolutely certain future benefits, only benefits that the plaintiff is "likely to receive." (*Ibid.*) This is no different than the plaintiff's burden in proving *future* medical expenses or lost earnings (including fringe benefits, such as health insurance) in the first place. (See CACI Nos. 3903A, 3903C; VI AA 55:1436, 1437 [future lost earnings and future medical expenses recoverable where "reasonably certain"]; *Fein*, *supra*, 38 Cal.3d at p. 153 [plaintiff entitled to recover future lost earnings "likely" to be suffered]; 2 Nates et al., Damages in Tort

Actions (2008) Loss of Time or Earnings, § 10.02[4], p. 10-12 & fn. 41 [lost future earnings include fringe benefits such as health and accident insurance].)

Section 3333.1 allows to the jury to decide how much, if any, collateral benefits to offset against future damages. (*Fein, supra*, 38 Cal.3d at p. 165, fn. 21.) Thus, the jury can account for any uncertainty in future collateral source benefits. The jury, not the court or the plaintiff, gets to judge the reasonable likelihood of future collateral source benefits.

F. Barring It From Presenting Future Collateral Source Evidence Prejudiced The Hospital.

The trial court *categorically* denied the Hospital the opportunity to present *any* evidence of likely future collateral source payments. (8 Aug.RT 2701-2706, 2771-2772; 11 Aug.RT 3727, 3905; AOB 14-15.) The prejudice accordingly must be judged by the case the Hospital might have presented given the opportunity (e.g., the parents' admissions that insurance coverage would continue, expert testimony that continuing collateral source benefits would be available, available insurance-continuation [COBRA] and state-sponsored insurance pool benefits). (See 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial § 404, p. 493, and cases cited therein [no proof offer required where whole category of evidence excluded]; Ins. Code, § 12700 et seq. [available insurance pool]; *id.*, § 1366.20, et seq [Cal-COBRA].)

The trial court's ruling forced the Hospital to remove any reference to plaintiff's likely receipt of future collateral insurance benefits from its

expert's testimony (11 Aug.RT 3727; V AA 41:1265-1290), barred the Hospital from examining plaintiff's parents or presenting other evidence on the subject, and prevented the Hospital from rebutting plaintiff's jury argument that "every penny" of damages would be necessary to pay for plaintiff's future medical care (8 Aug.RT 2805; 12 Aug.RT 4384) – a claim that is false to the extent insurance continues to pay. Past collateral source payments covered all but 19 percent of medical expenses. (9 Aug.RT 3042.)[10] Unenlightened about future collateral sources, the jury found a present value of $14 million in future medical expenses occurring over 58 years, roughly a present value of $240,000 per year, versus $19,000 per year for the first four years, when collateral sources paid and reduced medical expenses by over 80 percent. (X AA 88:2475, 2478.)

The trial court compounded the prejudice, instructing the jury "not [to] consider whether *any* of the parties in this case have insurance" and that the presence of insurance was "totally irrelevant." (12 Aug.RT 4275, emphasis added.)[11] Twice during deliberations the trial court readmonished

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[10] Of plaintiff's $405,312 in past medical expenses, insurance paid $171,949 (or 42.4%), healthcare providers discounted $154,986 (or 38.2%) pursuant to insurance-negotiated agreements, and plaintiff's parents paid or were billed $78,375.55 (or 19.3%). (9 Aug.RT 3042.)

[11] In the Court of Appeal, plaintiff claimed the Hospital invited error by requesting the jury instruction. (RB 90.) The reporter's transcript shows that the Hospital agreed to the instruction only defensively after the trial court excluded defense future collateral source benefits evidence and only *after* unsuccessfully reiterating its objection to the prior ruling. (11 Aug.RT 3904 [court responding to the reiteration of the section 3333.1 argument, "that battle is over" and "you lost"]; 11 Aug.RT 3905-3906; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212 [invited error "doctrine does not apply when a party, while making the appropriate objections, acquiesces in a judicial determination"]; *Park City Services, Inc. v. Ford Motor Co.,*

(continued...)

the jury not to consider insurance as "the presence or absence of insurance is totally irrelevant." (*Ibid.*; 13 Aug.RT 5102-5103, 5106, 5413-5415.)

* * *

The trial court prejudicially erred in limiting evidence under section 3333.1 to *past* collateral source benefits. That error in and of itself requires that the judgment be reversed and a retrial ordered. Like the causation issue, the section 3333.1 issue is dispositive of this appeal without requiring the setoff issue to be reached.

V.

IN PERIODIC PAYMENT JUDGMENTS, AS IN OTHER JUDGMENTS, CIVIL CODE SECTION 3291 INTEREST CANNOT BE INCORPORATED INTO THE JUDGMENT AND SHOULDN'T RUN ON AMOUNTS NOT YET DUE OR THAT MAY NEVER BE DUE.

The judgment includes over $1 million in section 3291 interest incorporated as "prejudgment" interest. (See X AA 88:2477.) Over the Hospital's objection, the trial court calculated and incorporated into the judgment section 3291 "prejudgment interest" from the date of the section 998 offer until the date of judgment, calculated as 10 percent per annum of

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[11] (...continued)
Inc. (2006) 144 Cal.App.4th 295, 311 [attorney who properly objects to an erroneous ruling doesn't waive the error by "endeavoring to make the best of a bad situation for which he was not responsible"].)

In any event, the Hospital did not invite the *error*: the exclusion of future collateral source benefits evidence. At most, plaintiff's claim is that the Hospital didn't do more to mitigate prejudice. It owed no duty to do so.

the jury's *entire* present value damages award (i.e., including the $14 million present value for *future* medical expenses) even though, under the periodic payments judgment, future medical expenses will be paid out over 58 years. (X AA 88:2477-2478; 2 RT 1204-1205.)

The trial court recognized (and plaintiff conceded) that section 3291 does *not* allow interest to run *post*-judgment on periodic payment amounts before due. (2 RT 1205-1206; see 2 RT 904 [plaintiff concedes point]; *Deocampo v. Ahn*, *supra*, 101 Cal.App.4th 758.) Nonetheless, it calculated prejudgment interest on periodic payments not yet due, an approach it described as nonsensical. (See 2 RT 1205-1206, 1507.)

A. Section 3291 Does Not Award Prejudgment Interest; It Only Starts Interest On The Judgment Running Early.

In *Hess*, *supra*, 27 Cal.4th 516, this Court *rejected* the argument the "interest accrued from the date of [a prevailing party's] section 998 offer to the date of the judgment should be added to the judgment" as prejudgment interest where it would be compounded by postjudgment interest. (*Id.* at p. 530-531.) "Civil Code section 3291 does not even mention the date of the judgment. . . . [It] provides for a *single* award of interest and expressly eschews any division of this award into separate prejudgment and postjudgment components." (*Id.* at p. 531, original emphasis.) "[T]he language and history of Civil Code section 3291 precludes inclusion of the prejudgment portion of the interest in the judgment for purposes of compounding the interest." (*Id.* at p. 532; see Civ. Code § 3291 ["[*T*]*he judgment* shall bear interest . . . calculated from the date of the plaintiff's

first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment . . . ." (Emphasis added).]

The judgment violates this principle.

B. Section 3291 Interest Only Runs On Periodic Payment Amounts Currently Due And *Not* On The Present Value Of Amounts That Will Be Due, If At All, In The Future.

The trial court's "pre-judgment" section 3291 interest calculation is also wrong. The trial court calculated such interest based on a present value number that is not due, and will never be due, under the judgment. Section 3291 interest runs only on amounts *currently due* under the judgment; it cannot run on periodic payment amounts not yet due: "[I]nterest will only accrue on each individual periodic payment *as that payment becomes due.*" (*Deocampo v. Ahn*, *supra*, 101 Cal.App.4th at p. 776, original emphasis [postjudgment interest]; see 2 RT 904 [plaintiff concedes same].) That is because "[p]ursuant to section 667.7, *periodic payments* (i.e., the future damages portion of the jury's award) are not immediately payable . . . ." (101 Cal.App.4th at p. 775, original emphasis.) *No* interest accrues on amounts not yet due because interest only compensates for lost use of moneys *currently* due. (*Id.* at p. 776, citing *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 874 [periodic payments inherently have interest incorporated in them].) By their nature, future periodic payments already include an interest element, i.e., growth over time. (See *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 639 [periodic payments based on *future gross* value]; *Holt v. Regents of University of California* (1999)

73 Cal.App.4th 871, 877 [same]; see 2 RT 923; IX AA 84:2279; compare IX AA 84:2276, 2296-2297 with X AA 88:2481 [periodic payments in this case grow at 5.7% per annum].)[12] Awarding additional interest on those same amounts is a double recovery.

Section 3291 makes no distinction between "prejudgment" and "postjudgment" interest. (*Hess*, *supra*, 27 Cal.4th at pp. 530-531.) It creates a single calculation of interest on the judgment. The same reasons why no section 3291 interest accrues on the periodic payment portions of the judgment *after* the date of judgment apply equally to dictate that section 3291 interest does not accrue before judgment as regards such future periodicized losses. There is, and can be, only one rule as to how section 3291 interest accrues.

Dicta in *Deocampo* has confused what should be a clear and straightforward rule. There, the trial court – pre-*Hess* – calculated and incorporated into the judgment section 3291 "prejudgment interest." The defendant *paid the judgment, including the prejudgment interest amount.* (101 Cal.App.4th at p. 775.) On appeal the defendant raised no issue as to whether the "prejudgment interest" was properly calculated. Rather, *plaintiff* appealed arguing that section 3291 interest should continue post-judgment on periodic payment sums until actually paid (an argument *Deocampo* rejects). In rejecting *plaintiff's* appeal, *Deocampo* unnecessarily remarked that "[t]he trial court calculated the prejudgment interest based on the entire judgment, except that the future damages were *reduced to present*

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[12] Here, a $14 million present value yields $82 million in future payments.

value. . . . This was the proper way to calculate that prejudgment interest on a judgment involving the periodicized payment of damages for future losses." (*Id.* at p. 775, citation omitted.)[13] As *Deocampo* presented no issue regarding prejudgment interest calculation, this offhand remark is dicta. It creates the precise distinction between "prejudgment" and "postjudgment" section 3291 interest that *Hess* rejects.

Logically, interest *cannot* be awarded on sums (i.e., periodic payment amounts) not yet due. If plaintiff dies prematurely the remainng periodic payments will *never be due.* (Code Civ. Proc., § 667.7; X AA 88:2477-2478.) The judgment, thus, awards interest on amounts that may *never* be due. Interest is to *compensate* for the lost use of or delay in payment of moneys that are *due.* (E.g., *Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444, 1459.) Failing to accept the section 998 offer did not cause any delay in payment or any lost use of moneys. The judgment matches recompense with damages yet to be incurred. There is no payment delay for interest to compensate.

Dicta in *Hrimnak v. Watkins* (1995) 38 Cal.App.4th 964, 980-981 (pre-*Hess*) attempts to justify section 3291 interest on future periodic payments as "designed to encourage settlements *and penalize* those who refuse reasonable settlement offers." (*Ibid.*, emphasis added.) *Hess* disagrees. Section 3291's plain language imposes *simple interest,* even if a different formulation, e.g. compound interest or a penalty, would provide a

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[13] Elsewhere, *Deocampo* noted that section 3291 interest cannot be incorporated into the judgment as prejudgment interest. (101 Cal.App.4th at p. 768, fn. 9.) It did not address, however, that the trial court in that case did just that as no party raised the issue.

greater incentive to settle. (*Hess, supra*, 27 Cal.4th at p. 531.) "[S]imple, rather than compound, interest still creates 'an incentive for recalcitrant defendants to accept reasonable settlement offers in a timely manner.' [Citation.]" (*Id.* at p. 533.)

The Legislature presumably knew the meaning of "interest." (*Korbel v. Chou* (1994) 27 Cal.App.4th 1427, 1431.) "Interest" is compensatory, *not* a penalty. "In enacting section 3291, the Legislature provided a means of *compensating* personal injury plaintiffs *for loss of use of money during the prejudgment period.*" (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664, emphasis added [no section 3291 interest on punitive damages because no *compensatory* purpose].) Section 3291 cannot be read as imposing a penalty untethered to *any* legitimate *interest* purpose, i.e., beyond *compensating* for delay in payment.

The judgment is wrong in incorporating over $1 million as section 3291 prejudgment interest. It must be reversed, with directions to strike the "prejudgment interest."

CONCLUSION

The Court of Appeal's judgment should be affirmed.

Alternatively, the trial court's judgment should be reversed with directions to enter judgment in the Hospital's favor on causation or the causation issue should be remanded to the Court of Appeal for determination under the appropriate standard.

At a minimum, the trial judgment should be reversed and remanded for new trial in which evidence of plaintiff's future insurance may be presented.

In any event, the "prejudgment" section 3291 interest should be stricken from the judgment.

Dated: September 7, 2011 Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this **ANSWERING BRIEF ON THE MERITS** contains **13,994** words, not including the tables of contents and authorities, the caption page, and this Certification page.

Dated: September 7, 2011

Feris M. Greenberger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On September 7, 2011, I served the foregoing document described as: **ANSWERING BRIEF ON THE MERITS** the parties in this action by serving:

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

Anita F. Cole
ANITA F. COLE