IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

B.B., a Minor, etc., et al., *Plaintiffs and Appellants*, v. County of Los Angeles, et al., *Defendants and Appellants*. T.E., a Minor, etc., et al., *Plaintiffs and Appellants*, v. County of Los Angeles, et al., *Defendants and Appellants*. D.B., a Minor, etc., et al., *Plaintiffs and Respondents*, v. County of Los Angeles, et al., *Defendants and Appellants*.	**Case No. S250734** Los Angeles Superior Ct. Nos. TC027341, TC027438, BC505918 Honorable Ross M. Klein

REPLY BRIEF OF PLAINTIFFS T.E, D.B. AND D.B.

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INTRODUCTION:

It has never been the law that an intentional tortfeasor can lessen his liability based on the non-intentional conduct of others, and nothing in Proposition 51 changed that principle. The plain language of Proposition 51, its legislative history, and underlying policy considerations demonstrate that the statute does not and was never intended to permit an intentional-tortfeasor defendant to limit his legal responsibility for a plaintiff's damages based on the non-intentional conduct of another.

Indeed, nearly eighty years ago, this Court recognized the established distinction between negligence and intentional torts, such as battery, in the following terms: "Negligence is an unintentional tort, a failure to exercise the degree of care in a given situation that a reasonable man under similar circumstances would exercise to protect others from harm. Rest. Torts, secs. 282, 283, 284; Prosser, Torts, sec. 30, et seq. *A negligent person has no desire to cause the harm that results from his carelessness.* Rest. Torts, sec. 282(c). *And he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm.* Prosser, Torts, p.

261." (*Donnelly v. S. Pac. Co.* (1941) 18 Cal.2d 863, 869 [emphasis added].) That distinction could not be more relevant to the matter before the Court today, in which a defendant who intentionally inflicted lethal harm is seeking to reduce his liability due to the negligence of others.

In this case, the jury determined that Sheriff's Deputy David Aviles intentionally used unreasonable, excessive force upon Darren Burley, resulting in his death. Although the jury also determined that Mr. Burley was contributorily negligent, the trial court – consistent with well-established law and sound policy – properly rejected Defendant Aviles's attempt to shift the blame for his intentional conduct based on the negligence of Mr. Burley.

Recognizing that the legal and policy arguments strongly favor reversing the decision below, the Defendants, relying on inapplicable canons of interpretation, proffer a counterintuitive reading of Civil Code section 1431.2 that violates common sense while rendering the critical phrase at issue – "based on principles of comparative fault" – absolute surplusage. Defendants' textual argument cannot withstand scrutiny and must be rejected.

Moreover, contrary to Defendants' assertions, under the common law, an intentional tortfeasor could never seek to avoid liability for his own intentional conduct based on the contributory conduct of the victim. In reality, principles of comparative fault have *never* been applied to allow an intentional-tortfeasor defendant to reduce his share of liability based on the negligence of another.

Further, by admitting that the jury was not asked to apportion fault on Deputy Aviles's use of force on the battery claim, Defendants have in essence conceded that comparative fault cannot apply where a peace officer uses excessive force in committing an intentional battery. Indeed, to do so would have been improper because in determining whether the deputy used excessive force, the jury was required to consider all of the actions of the decedent relating to the use of force. Therefore, because the jury had to consider Mr. Burley's own conduct in deciding that Aviles used excessive force, Defendants are not entitled to have any reduction in the verdict on the battery claim pursuant to Proposition 51.

The decision below should be reversed and the judgment of the trial court finding Defendants Aviles and County of Los Angeles 100 percent liable for Plaintiffs' damages should be reinstated.

ARGUMENT

I. PROPOSITION 51 ONLY APPLIES"BASED UPON PRINCIPLES OF COMPARATIVE FAULT,"REGARDLESS OF WHETHER THAT PHRASE MODIFIES "ACTIONS" OR "LIABILITY."

A. By its Plain Terms, Section 1431.2(a) Unambiguously Applies "Based upon Principles of Comparative Fault."

Defendants maintain that the phrase "based upon principles of comparative fault" limits the word "liability" but not "actions." (Answering Brief ["Answer"] at 27–28.) Even if that were true, it is a distinction without a difference for Defendants. Under Defendants' interpretation of section 1431.2(a), liability is made several and not joint only to the extent liability is "based upon principles of comparative fault . . . ." (§ 1431.2(a).) Any other interpretation renders the phrase complete surplusage. (See *Arnett v. Dal Cielo* (1996) 14 Cal.4 4, 22.)

Comparative fault has never modified intentional tort liability. (See § IV, *infra*; Opening Brief of Plaintiffs T.E., et al.

at pp. 18–29; Opening Brief of Plaintiffs B.B. et al. at pp. 23–27.).[1] The inclusion of comparative fault principles in Proposition 51 presumptively reflects that meaning. (E.g. *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 855 [collecting citations].) Thus, it is irrelevant whether the phrase "based upon principles of comparative fault" modifies the word "actions" or "liability." Whatever the referent, Defendants cannot escape the plain text of section 1431.2(a) th at it is limited to applications "based upon principles of comparative fault," which have never applied to intentional torts.

The premise in Defendants' textual argument is that section 1431.2 is not limited based upon comparative fault principles, and that it expanded those principles beyond their common-law reach in 1986. This is indefensible given the explicit

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[1] Even Defendants tacitly concede this. Defendants argue that the shift to comparative fault liability in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 ("*Li*") had not expanded it to intentional tortfeasors yet, because *Li* reserved on that question. (Answer at 32–34.) Even if that were true, then by reserving the question *Li* left intact the common law that preceded it, under which intentional tortfeasors could not have their liability reduced based on the unintentional conduct of others.

text. The fact that section 1431.2(a) refers to the liability of "each defendant" is irrelevant because the statute applies to "each defendant" *insofar as* the provision is "based upon principles of comparative fault."[2] Under Defendants' reading, section 1431.2(a) applies to each defendant where liability *is based upon principles of comparative fault.* Under Plaintiffs' reading, it applies to each defendant in actions *based upon principles of comparative fault.* It is not true, as Defendants contend, that there is no "qualifying provision" in the statute and "each defendant" sits alone. Such an argument simply sidesteps section 1431.2(a)'s clear qualification that it applies "based upon principles of comparative fault."[3]

This Court (and others) have repeatedly construed Proposition 51 as being limited to the extent "based upon principles of comparative fault." (*Diaz v. Carcamo* (*Diaz*) (2011) 51 Cal.4th 1148, 1156 ["In cases 'based upon principles

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[2] The statute's reference to "each defendant" reflects the fact that it was intended to address the situation where the "deep pocket" defendant who is less culpable is held liable for all the plaintiffs' damages in a situation where there are multiple defendants. (See Section I.B, *infra.*)

[3] Defendants' argument that as applied to "action" the term "any" as opposed to "an" is significant suffers the same fate.

of comparative fault,' each defendant is liable . . . only 'for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault.'"]; see also *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 835 [describing Proposition 51 as applying "'in a tort action governed by principles of comparative fault . . . . [citations]"]; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 959, fn. 1 [same].)

Defendants' interpretation also requires that Proposition 51 apply to *every* defendant without exception. However, as this Court has recognized, section 1431.2's reach is not so broad. As stated in *Diaz, supra*, a case decided after *DaFonte v. Up-Right, Inc.* (*DaFonte*) (1992) 2 Cal.4th 593, Proposition 51 only applies to cases "based on principles of comparative fault" and thus does not apply to cases involving vicarious liability based on *respondeat superior*. (*Diaz*, 51 Cal. 4th at pp. 1156–57.)

Contrary to Defendants' assertions, this Court has never adopted their position that Proposition 51 applies to every defendant without exception. In *DaFonte*, the Court concluded only that where an action and liability *was* based upon principles

of comparative fault, section 1431.2(a) clearly did modify liability. In *DaFonte*, the suit was for a negligent and products liability action, which *does* fall under principles of comparative fault. *DaFonte* said nothing of the issue here, whether section 1431.2(a) applies to liability for intentional tort actions *not* based on principles of comparative fault.[4] (See also Opening Brief for Plaintiffs T.E. et al. at pp. 16–17.) Defendants' citations to *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985, and *Rashidi v. Moser* (2014) 60 Cal.4th 718, are similar. *Richards* even rejected the contention that certain parties need share responsibility for contributing to a plaintiff's injuries under 1431.2(a) or *DaFonte*. (14 Cal.4th at p. 998.) *Rashidi* was an action based on comparative fault principles (negligence), and the quote cited by Defendants addressed offsets between co-defendants. (60 Cal.4th at 721.) The Court of Appeal opinions that Defendants cite are similar. *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, and *Arena v. Owens-Corning Fiberglas Corp.*

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[4] *Stare decisis* does not constrain the Court to adopt as binding language addressing a different concern and making no pronouncement as to the issue here. (E.g. *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 1 [en banc].)

(1998) 63 Cal.App.4th 1178, concerned products liability claims based on principles of comparative fault, at no point addressing the issue in this case.

In this Court's only cases in which it *has* addressed the relevance of intentional torts, it has hardly suggested that Proposition 51 unambiguously applies without exception. If anything, it has indicated the opposite. In *Buttram v. Owens* (*Buttram*), the Court held that Proposition 51 "modified the common law rule of joint and several liability *in comparative fault situations*." ((1997) 16 Cal.4th 520, 527 [emphasis added].) In addition, in *Buttram*, the plaintiff urged that Proposition 51 could not apply in a products liability or negligence case, because the jury had awarded punitive damages against the defendant, which the plaintiff argued made the defendant an intentional tortfeasor to whom Proposition 51 could not apply. (*Id.* at p. 539.) The Court accepted that intentional tort liability would preclude the operation of Proposition 51 and dismissed the argument on other grounds: namely that the punitive damage finding was not sufficient to determine whether the defendant was an intentional tortfeasor. (*Ibid.*) The Court reasoned: "There is no authority

supportive of plaintiff's suggestion that the applicability of the tort reform measures embodied in Civil Code section 1431.2 *in a products liability or negligence case* should turn on the outcome of findings made specifically in connection with the punitive damages phase of trial. Nor does the wording of the statute lend itself to such an interpretation, *plaintiff's cause of action herein having been based upon 'principles of comparative fault.'"* (*Ibid.* [emphases added].)

Had the Court held in *DaFonte* that Proposition 51 "unambiguously" applied to intentional torts, the Court would presumably not then be willing to assume otherwise in *Buttram*. Moreover, the Court's analysis underscores the significant distinction between willful negligence (for which punitive damages may be available, although the principle of liability still sounds in breaching a duty of care), and intentional torts (which impose a higher standard of culpability).

B. The Purpose and Legislative History of Proposition 51 Also Establish that the Statute Applies to the Extent the Claims are "Based upon Principles of Comparative Fault."

Defendants' textual argument that section 1431.2 altered comparative fault principles is indefensible because the text

explicitly states otherwise. The Court need not look any further than the text, a point on which the parties agree. (E.g., Answer at 17.) But if it does, nothing suggests (as Defendants maintain) that Proposition 51 was designed to *expand* comparative fault principles.

First, as addressed in greater detail in Appellants B.B., et al.'s Opening Brief, the purpose of Proposition 51 was to apply to "relatively blameless defendants" and not intentional tortfeasors. (Opening Brief of B.B. et al. at pp. 28–30.) Second, Proposition 51 remedied a perceived problem concerning the relationship *between multiple defendants.* At the time of Proposition 51's passage, joint and several liability in California meant that a plaintiff could select one defendant to pay all of the plaintiff's damages. Although *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, and its progeny permitted a defendant to be indemnified from co-defendants, the defendant whom a plaintiff selected – presumably a "deep pocket" – would be liable for the more-shallow pockets' shares when they were insolvent. This was a problem of liability *as between multiple defendants* which

Proposition 51 sought to address, not modifying any relationship concerning a plaintiff's comparative fault.

Indeed, the express focus and declared purpose of the statute is to alter the "deep pocket rule." (§ 1431.1(a)(b).) The official statement included with the Proposition noted that the problem modified by it was as follows: "Under existing law, tort damages awarded a plaintiff in court *against multiple defendants may all be collected from one defendant.* A defendant paying all the damages may seek equitable reimbursement from other defendants." (*Evangelatos v. Superior Court* (*Evangelatos*) (1988) 44 Cal.3d 1188, 1243, appen. [emphasis added].) As this Court put it:

> [T]he retention of the common law joint and several liability doctrine produced some situations in which defendants who bore only a small share of fault for an accident could be left with the obligation to pay all or a large share of the plaintiff's damages if other more culpable tortfeasors were insolvent. *[Proposition 51] was addressed to this remaining issue.*

(*Id.* at p. 1198 [emphasis added]; *see also DaFonte, supra*, 2 Cal.4th at p. 599 [same] [citing *Evangelatos, supra,* 44 Cal.3d at p. 1198]; *Buttram, supra*, 16 Cal. 4th at p. 528 ["It is clear from the plain language of Proposition 51 that the remedial tort

reform measures it enacted were intended to eliminate the 'deep pocket rule' that had 'resulted in a system of inequity and injustice.' More specifically, Proposition 51 was designed to rectify the situation, *under California's comparative fault tort law*, whereby a defendant who bears only a small share of fault for an injury can be left with the obligation to pay all or a large share of the plaintiff's damages if more culpable tortfeasors are insolvent."] [emphasis added].)

Relatedly, the Official Title of Proposition 51 was "*Multiple Defendants* Tort Damage Liability." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1243, appen. [emphasis added].) The arguments in favor and against Proposition 51 provided with the measure indicate the same. Each concerned the "deep pocket rule," and provides as the sole examples of the bill's changes for voters the relative liability between defendants (*Ibid.* at p. 1245), and nothing whatsoever modifying comparative fault, the doctrine that a "plaintiff's own negligence . . . proportionally reduces the damages recoverable . . . ." (COMPARATIVE FAULT, Black's Law Dict. (10th ed. 2014).). No reasonable voter would assume that Proposition 51 would *expand* principles of comparative fault

such that a plaintiff could no longer recover fully in intentional torts, particularly when the text of the Proposition explicitly states that it did not modify such comparative liability, and that it incorporates existing "principles of comparative fault."

II. THE "COMPARATIVE FAULT" PHRASE APPLIES TO "ACTIONS."

Defendants' textual argument is essentially that the qualifying phrase "based upon principles of comparative fault" must qualify part of the phrase following it and cannot qualify the preceding phrase. In support, Defendants claim that the most reasonable referent canon demands their reading, and that it would be "unreasonable" for the phrase to modify what it has followed. As stated above the arguments are irrelevant. They also fail.

Under Plaintiffs' interpretation, the phrase "based upon principles of comparative fault" refers to what precedes it, "any action for personal injury, property damage, or wrongful death." Under Defendants' interpretation, the "based upon" phrase refers to what follows it, "the liability of each defendant for non-economic damages." The referent in Plaintiffs' interpretation is

at least as reasonable as Defendants' according to the canon Defendants evoke.

Defendants suggest that their interpretation is the only reasonable one because liability has no other modifier, unlike "action." (Answer at 28; see also Reply Brief of Plaintiffs B.B. et al. at 23–24 [noting that there is no requirement that language have only one modifier].) That is untrue. "Liability" has the modifier "of each defendant for non-economic damages" and continues "shall be several only and shall not be joint." (§ 1431.1(a).) And the phrase "liability of each defendant for non-economic damages" is as distant from the middle phrase as is the referent in Plaintiff's interpretation.

Defendants' alleged referent is not only unaided by their canon, but it also violates the established canon against surplusage. According to Defendants, "based upon principles of comparative fault" serves to modify "liability" in order to instruct "*how*" fault should be calculated. (Answer at 15–16, 26.) If that interpretation were accurate it would make the phrase pure surplusage, given that the sentence continues: "the liability of each defendant for non-economic damages shall be several only

and shall not be joint." (§ 1431.2(a).) Defendants render the entire "based upon" phrase meaningless, and it could be deleted wholly without any effect. But statutes are presumed not to have such surplusage and are interpreted to avoid it. (See, e.g., *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.)

Defendants have not even attempted to rebut the striking surplusage in their brief. Instead, they argue that their construction prevents more egregious and unreasonable surplus. Defendants argue that if "based upon principles of comparative fault" modified "action" this would render the word "any" superfluous in the phrase "in any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault." (Answer at 30.) The argument is meritless. "In any" action means in any of the types actions referenced where the action is based on principles of comparative fault.

Defendants' argument that "action" cannot reasonably be modified by the phrase "based upon principles of comparative fault" is also unpersuasive. This Court has used the phrase similarly. (E.g., *Diaz, supra*, 51 Cal.4th at p. 1156 [referring to "cases based upon principles of comparative fault"]; see also

Myers v. Philip Morris Companies, Inc. (2002) 28 Cal.4th 828, 835 [describing Proposition 51 as applying "'in a tort action governed by principles of comparative fault . . . . [citations]'"]; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 959, fn. 1 [same]; *Buttram*, *supra*, 16 Cal.4th at p. 539 [referring to the "cause of action herein having been based upon 'principles of comparative fault.'"].) Numerous courts (in addition to this one), have in fact rejected Defendants' interpretation, and accepted the more intuitive understanding that "based upon principles of comparative fault" modifies "actions." As the Court of Appeal noted in *Greathouse v. Amcord, Inc.*: "Civil Code section 1431.2, subdivision (a) . . . establishes the principle that, *in actions against multiple defendants based on comparative fault*, the liability of an individual defendant for non-economic damages cannot exceed the percentage of the non-economic damages attributable to his fault." ((1995) 35 Cal.App.4th 831, 838 [emphasis added].) As the court in *Wilson v. John Crane, Inc.*, *supra*, held, the particular phrase limited the statute to "actions for personal injury involving multiple tortfeasors . . . subject to the allocation of damages according to principles of comparative

fault." (81 Cal.App.4th at p. 855.) Numerous other courts have adopted this reading. (See, e.g., *Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 93 ["Proposition 51 . . . by its terms applies *to actions* 'based upon principles of comparative fault'"] [emphasis added]; *Henry v. Superior Court* (2008) 160 Cal.App.4th 440, 446 [noting that Proposition 51 "provides in personal injury *actions based upon principles of comparative fault* "the liability of each defendant for non-economic damages shall be several only and shall not be joint") [emphasis added].)

Defendants suggest that numerous courts have adopted their textual argument, yet, apart from the decision on appeal, Defendants only cite a single case from the Ninth Circuit which preceded all of the cases in the previous two paragraphs and which – in passing and without analysis – stated that the comparative fault phrase modifies how the liability of each defendant is to be determined, *Martin v. United States* (9th Cir. 1993) 984 F.2d 1033, 1039. The statement was also dicta – *Martin* addressed a plaintiff's attempt to shift liability from the intentional tortfeasor to another negligent defendant, as the plaintiff maintained Proposition 51 would not offset liability for

the negligent defendant.[5] In such circumstances, the sentence that Defendants cite was irrelevant because the decision was consistent with principles of comparative fault – it permitted a negligent tortfeasor to benefit from Proposition 51 and offset his fault.

Defendants argue that the fact that there is a third comma preceding the "based upon" phrase indicates a lack of an intention that the phrase modify the actions preceding it. But it is the opposite. Retaining the third comma indicates that the phrase applies to *each* action, as without that comma the "comparative fault" phrase would be construed to apply only to a wrongful death action, and not the others. (E.g. *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 ["Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."]; SERIES-QUALIFIER CANON, Black's Law Dictionary (10th ed. 2014).).)

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[5] *Martin,* in which the victim of a crime sued a third party for negligent security, simply followed the holding *Weidenfeller v. Star & Garter* (1991) 1 Cal.App.4th 1, (which is discussed in the Opening Briefs) that the more culpable intentional actor cannot shift responsibility to the less culpable negligent actor.

It is also unclear whether Defendants have created a moving target for their interpretation, obscuring the answer to what a should be a simple question: exactly what words do they contend are modified by the phrase "based upon principles of comparative fault" in the following clause? Is it liability, in the phrase "the liability of each defendant for non-economic damages"? (Answer at 27.) A defendant's liability in intentional tort was never based upon principles of comparative fault, so if the section applies to liability "based upon principles of comparative fault," it does Defendants no favors. Defendants elsewhere state that the "based upon" phrase instead instructs "*how*" liability should be assessed, (Answer at 26), perhaps meaning that "based upon principles of comparative fault" modifies the predicate phrase "shall be several only and shall not be joint." But if that is so, then Defendants' arguments premised on the "nearest reasonable referent" canon fail. Moreover, and more fundamentally, liability would then still only apply to the extent "based upon principles of comparative fault." (Answer at 26–28.) Whatever the referent though, Defendants cannot escape

the plain text of the statute, which indicates that its application is limited to claims "based upon principles of comparative fault."

III. EVEN IF THE COURT CONCLUDES THAT PROPOSITION 51 IS AMBIGUOUS, WHICH IT IS NOT, PLAINTIFFS'READING IS COMPELLED BY THE CANON AGAINST ALTERING THE COMMON LAW.

As addressed above, section 1431.2 expressly states that it only applies where "based upon principles of comparative fault." Even if this Court were to find 1431.2(a) ambiguous though, ambiguity would be resolved in favor of the interpretation that does not alter the common law, under which comparative fault principles had not extended to intentional tortfeasors. (*Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 326.) Statutes should be construed to avoid conflict with the common law, unless the language "clearly and unequivocally" departs from it. (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.) Even if it were ambiguous how the phrase "based upon principles of comparative fault" applied in section 1431.2(a), then the section would not "clearly and unequivocally" depart from the common law. (*Ibid.*; see also *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1193 [where a

term is not defined, the "silence triggers a presumption in favor of permitting settled common law . . . rules to apply."].) Thus, the interpretation consistent with the common law – Plaintiffs' – ought to be retained.

IV. COMPARATIVE-FAULT PRINCIPLES HAVE NEVER ALLOWED INTENTIONAL TORTFEASORS TO REDUCE THEIR LIABILITY BASED ON THE NON-INTENTIONAL CONDUCT OF OTHERS, DESPITE DEFENDANTS' CLAIMS TO THE CONTRARY.

Disregarding clear authority to the contrary in Plaintiffs' Opening Brief, Defendants claim that comparative fault principles never excluded intentional tortfeasors. Glaringly absent from Defendants' Answer is any discussion of the Court of Appeal's decision in *Bartosh v. Banning* (1967) 251 Cal.App.2d 378, cited in Plaintiffs' Opening Brief, in which the Court of Appeal made clear that comparative fault principles do not apply to intentional torts. The opinion is unambiguous and reflects an established consensus, consistent with this Court's 1941 decision in *Donelly*, *supra*: "[A]ssault and battery are intentional torts. In the perpetration of such crimes negligence is not involved. As between the guilty aggressor and the person attacked ***the former may not shield himself behind the charge that his victim may have been guilty of contributory negligence*** . . . ." (*Id.* at

385 [emphasis added]; see also Code Civ. Proc., § 875, subd. (d) [providing that there is no right of contribution for intentional tortfeasors]; Rest.2d Torts, § 481, com. b ["This section states that the plaintiff is not barred from recovery against an intentional wrongdoer by his contributory negligence."].)

Indeed, as far back as the nineteenth century, the California Supreme Court itself recognized the principle that intentional torts impose a different standard of culpability. (See *Craven v. Cent. Pac. R. Co.* (1887) 72 Cal. 345, 349–50 [drawing an analytical distinction between negligence and "'acts that are done intentionally, willfully, or maliciously,'" the latter of which "'are done with a specific object in view, and they are performed, not by force of habit, but with a definite purpose.'"] [quoting *State v. Manchester & L.R.R.* (1873) 52 N.H. 528, 550].) Nothing in this Court's decision in *Li*, or in Proposition 51, for that matter, altered this established doctrine.

Moreover, although this Court in *Li* did not expressly reach the question of whether comparative fault principles would apply to intentional tortfeasors, that question was not before the Court in that case, and the Court noted the existing principles

applicable in California: "In jurisdictions following the 'all-or-nothing' rule, *contributory negligence is no defense to an action based upon a claim of willful misconduct* (see Rest. 2d Torts, § 503; Prosser, Torts, supra, § 65, p. 426), *and this is the present rule in California.*" (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 825.) In a footnote, the Court further explained: "'Disallowing the contributory negligence defense in this context is different from last clear chance; the defense is denied not because defendant had the last opportunity to avoid the accident but rather because defendant's conduct was so culpable it was different in 'kind' from the plaintiff's. *The basis is culpability rather than causation.*'" (*Id.* at 825 n.20 [quoting Schwartz, Comparative Negligence (1974) § 5.1, p. 100; fn. omitted] [emphasis added].)

These articulations of black letter law form the basis against which this Court adopted comparative negligence, and against which Proposition 51 was subsequently enacted. This Court did not alter that backdrop in *Li*, and neither did the voters in enacting Proposition 51. Further, the absolute silence of the legislative history as to any expression of intent to change

this backdrop to encompass intentional torts (combined with the clear, common-sense language of the statute itself) only provides further confirmation that section 1431.2 did not change the longstanding common-law rule. Moreover, although this Court declined to reach the issue of whether that rule would continue to apply, it strongly signaled that comparative fault principles could *at most* be extended *only* to conduct that "falls short of being intentional." (See *id.* at 385 ["It has been persuasively argued, however, that the loss of deterrent effect that would occur upon application of comparative fault concepts to willful and wanton misconduct as well as ordinary negligence would be slight, and that a comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct *which falls short of being intentional.*"] [emphasis added].)

Accordingly, the cases Defendants cite in which this Court extended the applicability of comparative fault principles to other forms of liability beyond negligence, such as strict liability, have no bearing on whether comparative fault principles would apply to reduce the liability of intentional tortfeasors; in other words,

the backdrop in this regard remained unchanged. Indeed, as one of Defendants' own authorities put it in stark terms, as of 1984: "No court . . . has explicitly applied comparative fault principles to intentional torts." (Dear & Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations* (1984) 24 Santa Clara L.Rev. 1, 1; see also *Allen v. Sundean* (1982) 137 Cal.App.3d 216, 226 [observing that "the Supreme Court in *Li*, and again in *American Motorcycle*, used language which appears to exclude intentional torts from the comparative fault system. Nor has there been support for an extension of comparative fault principles to intentional torts . . . . in other states, among the commentators generally, or in the Uniform Comparative Fault Act."] [footnotes omitted].)

Defendants' attempts to brush aside the unambiguous indemnity and contribution doctrines are similarly unavailing. Both section 875 of the Code of Civil Procedure and the common law of indemnity reflect the widespread, longstanding consensus that intentional tortfeasors are distinct from negligent actors and should be treated differently. The enactment of Proposition 51

did nothing to change this backdrop, and it strains credulity to argue that it would have done so essentially *sub silentio*.[6]

Thus, it is beyond clear that comparative fault principles did not reach intentional torts at the time Proposition 51 was enacted, and it would work a miscarriage of justice in this case and many others were the Court to extend the reach of Proposition 51 decades after its enactment. It is thus equally clear that the Court of Appeal's decision in *Thomas v. Duggins Construction Co.* (2006) 139 Cal.App.4th 1105 ("*Thomas*"), was correctly decided. Defendants' arguments to the contrary are

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[6] Defendants ask this Court to take judicial notice of a legislative bill from February 1986 that was not passed in which the bill purported to exempt intentional tortfeasor defendants from being able to limit their responsibility in situations where there are two or more persons responsible for the plaintiff's damages. The fact that this legislative bill was pending is of no significance whatsoever as there is no indication that voters were even aware of its existence. Even prior bills within the same body have little value in statutory interpretation. (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 746 [en banc].) In any event, the proposed bill simply reflects the consensus that principles of comparative fault did not apply to intentional tortfeasor defendants. The fact that Proposition 51 has different language than a bill in a different body which did not pass has no legal significance whatsoever, especially in light of the statute's plain language and the well-established rule that intentional tortfeasors cannot shift responsibility for their misconduct to other less culpable actors.

predicated on their flawed and counter-intuitive reading of section 1431.2, and are unavailing.

Specifically, Defendants claim that *Thomas* failed to consider the "each defendant" language in section 1431.2 and accordingly failed to effectuate the voters' intent in passing Proposition 51. However, the Court of Appeal in *Thomas* clearly considered the *entire* text of the statute, and its interpretation properly gives meaning to *each phrase* in section 1431.2, unlike the interpretation championed by Defendants and adopted by the Court of Appeal in this case. (See *Thomas*, *supra*, 139 Cal.App.4th at p. 1111 [quoting section 1431.2, including the "each defendant" language].)

Next, Defendants claim that *Thomas* failed to consider this Court's decision in *DaFonte*, *supra*. However, as Plaintiffs explained in their Opening Brief and above, *DaFonte* was a products liability case which did not involve intentional torts. Because *DaFonte* did not address the application of "principles of comparative fault" to intentional-tortfeasor defendants, *DaFonte*'s holding does not apply to cases involving intentional torts and has no bearing on this case.

Finally, Defendants claim that Code of Civil Procedure section 875 has no relevance to the proper interpretation of section 1431.2. However, section 875 reflects the clear consensus in both common law and the legislature that intentional tortfeasors act with a greater degree of culpability and are to be treated differently than other, merely negligent actors. In short, *Thomas* was correctly decided, and this Court should rectify the contrary and untenable interpretation of section 1431.2 adopted by the Court of Appeal in this case.

V. DEFENDANTS FAIL TO ARTICULATE ANY FREESTANDING PUBLIC POLICY RATIONALE FOR THEIR STRAINED AND COUNTERINTUITIVE READING OF SECTION 1431.2.

Defendants predicate their policy arguments on the mistaken premise that section 1431.2 unambiguously intended to eradicate the longstanding principle that intentional tortfeasors cannot reduce their liability due to the negligence of others. This simplistic tautology does not withstand scrutiny. Purporting to champion the intent of the voters in enacting Proposition 51 does not provide any insight whatsoever into *what that intent was*, and the common-sense interpretation of section 1431.2 suggests that the voters in fact intended the section only to apply to those

actions that are based on principles of comparative fault, not those based on intentional torts.

As noted above, it has long been established that negligence on the part of the victim is no defense to an intentional tort such as battery, because battery imposes a higher standard of culpability. Accordingly, from a public policy perspective as well, there is no justification for adopting Defendants' counterintuitive interpretation of section 1431.2.

VI. PRINCIPLES OF COMPARATIVE FAULT DO NOT APPLY TO BATTERY BY A PEACE OFFICER.

A father of five was killed by a Los Angeles Sheriff's deputy whom the jury found liable for battery based on excessive force. The Plaintiffs, who were Mr. Burley's children and wife, sued for wrongful death under California law. At trial, Plaintiffs asserted two alternative theories of liability: negligence and battery by a peace officer using excessive force (an intentional tort).

The deputy, Defendant Aviles, asserted contributory negligence as an affirmative defense to the negligence claim. However, as Defendants conceded at trial, apportionment of fault did not apply to the battery claim. (18 RT 5306:23-5301:13.). Indeed, the Defendants never requested that fault be apportioned

with respect to the battery claim, only with respect to the negligence claim. (18 RT 5307:7-13.) This is because they knew that there is no apportionment where the defendant commits an intentional tort.

As noted in Plaintiffs' Opening Brief, the jury was instructed to consider the decedent's conduct in determining whether Deputy Aviles committed battery. (See CACI No. 1305; 17 RT 4954:15–20.) The jury was also instructed that self-defense and defense of others were affirmative defenses to battery. (17 RT 4954:25-4955:7.) Critically, the jury was instructed that the defendant is liable for battery if Plaintiffs establish that the deputy's use of excessive force was a substantial factor in causing Mr. Burley's death. (17 RT 4953:15–4954:2; 18 RT 5197:12-16.) Here, by finding that Aviles was liable for using excessive force, the jury necessarily determined that the use of excessive force was a substantial factor in causing Mr. Burley's death. Moreover, because battery is an intentional tort, there can be no apportionment of fault on the battery claim.

As discussed herein, contributory negligence has never been a defense to an intentional tort. (Section IV, *supra.*) Accordingly, any finding that Mr. Burley was contributorily negligent cannot apply to offset the damages on the battery claim. Indeed, if the negligence claim had been dismissed beforehand, the jury would have simply had to decide a straightforward battery claim and there would have been no basis to apportion fault between the defendant and the decedent.[7]

Defendants improperly attempt to gloss over the distinction between the negligence and battery claims by arguing that there was a single cause of action for wrongful death and that Proposition 51 applies to wrongful death claims. However, this simplistic reading ignores the fact that a wrongful death claim can be based *either* on negligent or on intentional conduct, and Plaintiffs here proceeded on *both* types of claims. Indeed, Code of Civil Procedure Section 377.60 reads in part: "A cause of action for the death of a person caused by the *wrongful act or neglect of*

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[7] Notably, the CACI Model Verdict from for Battery by a Peace Officer does not include any questions regarding apportionment of fault. (See CACI VF-1303.) Indeed, only the negligence verdict forms contain questions regarding apportionment. (See CACI-VF 402.)

another may be asserted by any of the following persons . . ." As discussed in the Opening Brief at 22-23, plaintiffs often bring alternative theories of liability to support their claim, particularly in cases involving police misconduct. (See, e.g., *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798 ["'In California the phrase "cause of action" is often used indiscriminately . . . to mean counts which state [according to different legal theories] the same cause of action . . . .'"] [quoting *Eichler Homes of San Mateo, Inc. v. Superior Court* (1961) 55 Cal.2d 845, 847] [modification in original]; see also *Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1191 [observing that the term "wrongful act" "has been defined in other cases as meaning simply any tortious conduct, i.e., any act for which the defendant may be liable in tort. This definition of 'wrongful act' would include not only intentional and willful torts, but strict products liability as well."] [footnote omitted].)

By falsely asserting that Plaintiffs' sole cause action was wrongful death, Defendants have missed the key distinction between the negligence claim (to which principles of comparative fault apply) and the battery claim (to which comparative fault

does not apply). Because they disregard this distinction, Defendants mistakenly assert that "California law has always imputed the decedent's fault in his own death to the wrongful death plaintiffs," (Answer at 46 [citing *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 285]), although – as established above – California law has *never* permitted a reduction in an intentional tortfeasors' liability as a result of the negligence of the victim or other parties.

Notably, however, this Court's decision in *Horwich* pertained to the application of Civil Code section 3333.4 (barring uninsured motorists from recovering non-economic losses in actions arising from the operation of a motor vehicle). This Court concluded that section 3333.4 *did not* apply to bar the heirs of the decedent in that case from recovering non-economic damages. (See 21 Cal.4th at p. 287 ["Thus, contrary to defendant's assertion, no 'absolute' rule allows a wrongful death defendant to assert any defense that would have been available against the decedent. In the case of a statutory defense, the court must consider the language and intent of the enactment as well as the original and distinct nature of a wrongful death action."]; see also

id. at p. 288 ["We decline to ascribe this essentially irrational result to the electorate."]; Civil Code § 4 [requiring that the provisions of the Civil Code "are to be liberally construed, with a view to effect its objects and to promote justice"].). Accordingly, Defendants' misleading argument that there was only a single cause of action for wrongful death does not in any way change the well-established rule that contributory negligence is not a defense to an intentional tort and that therefore there can be no apportionment with respect to the battery claim.

Here, the jury was instructed to consider all of Mr. Burley's conduct in determining whether Deputy Aviles used excessive force. (CACI No. 1305.) The jury was also instructed that self-defense and defense of others were affirmative defenses to the battery claim. (17 RT 4954:25-4955:7.)

The jury necessarily considered all of Mr. Burley's conduct leading up to his death and nevertheless conducted that Aviles was liable for excessive force which was a substantial factor in the death of Mr. Burley.[8] Indeed, the jury viewed all of the

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[8] Defendants make the misplaced claim that because there was evidence that Mr. Burley had consumed drugs on the day of his

evidence made this finding, notwithstanding Defendants' claims that the use of force against Mr. Burley was justified by his own actions.

As such, Aviles is 100 percent liable for the damages resulting from Mr. Burley's death, notwithstanding any claims that Burley's own actions contributed to his death. Accordingly, because the battery finding against Defendant Aviles took into account the decedent's own conduct, Defendant Aviles is not allowed to invoke Proposition 51 to get a second "bite at the apple" to reduce his liability for his use of excessive force – an intentional tort. As noted above, had battery been the only claim, the jury never would have been asked to apportion fault. The only reason for the apportionment being on the verdict form is because Plaintiffs pursued alternative theories of liability for Mr. Burley's wrong death: one based on intentional battery and the other based on negligence. The jury's apportionment findings on

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death, the jury could conclude he was 40% at fault. While the apportionment was relevant to Plaintiffs' negligence claim, it has no bearing on the intentional battery claim because the jury found that the excessive force was a substantial factor in Mr. Burley's death which means that Deputy Aviles is 100 percent responsible for Plaintiffs damages, as there is no apportionment on the battery claim for Mr. Burley's contributory negligence.

the negligence claim have absolutely no bearing on the battery claim. Therefore, the decision below should be reversed, and the judgment of the trial court should be reinstated.

VII. PETITIONERS JOIN IN THE BRIEF FILED BY PLAINTIFFS B.B. AND B.B.

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

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CONCLUSION

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

Dated: April 1, 2019

SCHONBRUN SEPLOW HARRIS & HOFFMAN LLP
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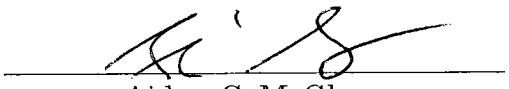
CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 6,973 words, including footnotes. This Brief is proportionately spaced in 13-point Century Schoolbook typeface. In making this certification, I have relied on the word count of Microsoft Word, which was used to prepare the brief.

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

Executed at Los Angeles, California on April 1, 2019.



Aidan C. McGlaze

PROOF OF SERVICE

I am over the age of eighteen and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 11543 West Olympic Boulevard, Los Angeles, California 90064. On this date I served the attached REPLY BRIEF OF PLAINTIFFS T.E, D.B. AND D.B. in said action by depositing a true and correct copy thereof, enclosed in a sealed envelope addressed to the parties listed below. Under that practice it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

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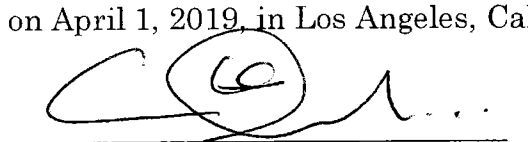

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