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.*

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE, CASE NO. B264946; LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. TC027341, COMBINED WITH BC505918 & TC027438, THE HONORABLE ROSS M. KLEIN, JUDGE.

AMICUS BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS

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INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The Civil Justice Association of California ("CJAC") welcomes the opportunity to address the issue this case presents:[1]

> May a defendant who commits an intentional tort along with other defendants who are negligent, invoke Civil Code § 1431.2 to have his liability reduced along with all other parties to the lawsuit based on "principles of comparative fault"?

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[1] By separate application accompanying the lodging of this brief, CJAC asks the Court that it be accepted for filing.

Section 1431.2[2], which limits a defendant's liability for noneconomic damages "in direct proportion to that defendant's percentage of fault," was enacted by the voters as Proposition 51, a statewide ballot initiative named "The Fair Responsibility Act of 1986."[3] CJAC, then called the Association for California Tort Reform ("ACTR"), was the official proponent of Proposition 51 for its placement on the ballot and a principal sponsor and drafter of the measure. *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1211-1212, fn. 16 ("*Evangelatos*").

In the Proposition 51 ballot arguments submitted to voters, proponents argued its enactment was needed because the then current "deep pocket" law (*i.e.*,"joint and several liability") was "unfair," and "repeated attempts in the Legislature to reform [that law] . . . were thwarted by the intense lobbying of the [organized plaintiff's bar]." *Evangelatos, supra,* Appendix to Opinion. "Fairness" along with "efficiency, economy and certainty" have consistently been the principal goals of CJAC's efforts to improve our civil liability laws for determining who pays, how much, and to whom when the conduct of some occasions harm to others. Proposition 51 is a prime illustration of

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[2] All statutory references are to the Civil Code unless otherwise indicated.

[3] Throughout this brief amicus refers to the same statute interchangeably as Proposition 51, The Fair Responsibility Act and section 1431.2.

greater "fairness" the people achieved by ballot.

When drafting section 1431.2 to further *fairness* in the damage apportionment for multiple-defendant, personal injury lawsuits, CJAC and other sponsors of Proposition 51 were familiar with California judicial opinions, as well as those of other jurisdictions and scholarly legal articles, limning the term "fault" and the phrase "principles of comparative fault." For instance, we were informed and influenced by, amongst others, Justice Mosk's dissenting opinion in *Mathews v. Workmen's Compensation Appeals Board* (1972) 6 Cal.3d 719 and this Court's analyses in *Daly v. General Motors, Inc.* (1978) 20 Cal.3d 725 ("*Daly*").

Justice Mosk's opinion in *Mathews* described the various legal meanings of the term "fault," explaining that "lexicographers deem 'fault' to be a broad generic term which includes the lesser word negligence but also many others, such as *wilful misconduct*, gross negligence, misbehavior, transgression, dereliction, offense, culpability, wrongdoing, deviation from rectitude, and in general '*a failure to do what is right.*' *Webster's New Internat. Dict.* (3d ed. 1961), p. 829.)" 6 Cal.3d at 743; emphasis added.

Daly, which applied pure comparative fault principles adopted by *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 ("*Li*") to replace the all-or-nothing rule of contributory negligence, holds that when allocating loss amongst various defendants in strict product liability actions,

"technically, neither fault nor conduct is really compared functionally. The conduct of one party in combination with the product of another, or perhaps the placing of a defective article in the stream of projected and anticipated use, may produce the ultimate injury. In such a case . . . we think the term 'equitable apportionment or allocation of loss' may be more descriptive than 'comparative fault.'" 20 Cal.3d at 736.

This equation by *Daly* of the phrase "equitable apportionment or allocation of loss" with "principles of comparative fault" is what CJAC and drafters of Proposition 51 had in mind when writing section 1431.2. It is also what CJAC argued and the appellate court agreed with in *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847 when it explained that section 1431.2's furtherance of the comparative fault doctrine "allocates liability not simply on the relative blameworthiness of the parties' conduct, but on the proportion to which their conduct *contributed to the plaintiffs' harm,*" a process it suggested is more accurately described as "comparative responsibility." *Id.* at 854; emphasis added.

The appellate opinion here echoes the aforementioned authorities in holding that section 1431.2's mandate that several liability governs noneconomic damage allocation amongst all parties to a lawsuit even when one defendant's tortious conduct is intentional. *B.B. v. County of Los Angeles* (2018) 25 Cal.App.5th 115, 123-124. "Just as . . . section 1431.2 neither states nor implies an exception for damages

attributable to the fault of persons who are immune from liability [citation], we likewise find [it] neither states nor implies an exception for damages attributable to the fault of a person who acted *intentionally* rather than negligently." *Id.* at 127; emphasis added.

Logic and continued fairness underscore the correctness of the appellate opinion's conclusion. It deserves to be affirmed by the Court as the culmination of an analytical trend that began with the landmark opinions in *Li* and *Daly* and has been buttressed along the way by an ever growing bevy of legal scholarship.

If, as happened here in the trial court, a single defendant in a tort action is forced to pay 100 percent of a plaintiff's noneconomic damages, the "inequity" and "injustice" that Proposition 51 sought to remedy will be thwarted. The appellate opinion got it right by holding that the statute requires several liability for noneconomic damages by allocating them in proportion to each party's respective percentage of responsibility regardless of whether misconduct by any defendant is intentional. No defendant should, under the aegis of the Fair Responsibility Act, be made to suffer joint liability for noneconomic damages.

SUMMARY OF SALIENT FACTS AND PROCEDURE UNDERLYING THE OPINION[4]

The six plaintiffs in this wrongful death action are the estranged wife, Rhandi T. and two of her children with the deceased, Charles Burley, two children Burley had with Shanell S., and another child he had with Akira E.

Plaintiffs sued the County of Los Angeles and several of its Sheriff's Deputies for battery, negligence and violation of Burley's civil rights under the Bane Act (section 52.1) stemming from a violent struggle in 2012 that ensued when deputies sought to arrest him for having just assaulted a woman while he was under the influence of cocaine, marijuana, and PCP.

To subdue Burley and take him into custody, the deputies tased him several times without effect, and then wrestled him to the ground. Two deputies applied their body weight to his back and neck while two others hobbled his legs and handcuffed him. Burley's breathing became labored during the struggle and he lost consciousness. Paramedics were called to the scene and Burly was transported by them to a nearby hospital where he died ten days later. The autopsy report cited cardiac arrest and brain death from lack of oxygen "due to status post-restraint maneuvers or behavior associated with cocaine, phencyclidine and cannabinoids intake," but stated "the manner of

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[4] This summary is taken from the appellate opinion to provide context for the issue it presents.

death could not be determined."

Defendants moved for and were granted summary adjudication of plaintiffs' Bane Act claim. After a several-weeks long trial on the battery and negligence claims, the jury returned a verdict finding one deputy, Aviles, liable for battery and another, Beserra, liable for negligence. The jury attributed 40 percent of the responsibility ("fault") to Burley for his own death, Aviles and Beserra each 20 percent responsible, and the remaining deputies and County 20 percent responsible. After hearing evidence on damages, the jury awarded plaintiffs $8 million in noneconomic damages for Burley's wrongful death.

After a hearing on apportionment of damages, the court entered judgment against Deputy Beserra and the County for $1.6 million (20 percent of the damages award) and against Deputy Aviles and the County for the full $8 million award. The parties appealed and cross-appealed.

The Court of Appeal, in reliance on section 1431.2, reversed that part of the trial court's judgment making Deputy Aviles liable for 100 percent of the total noneconomic damages award and directed the trial court to enter a separate judgment against Aviles and the County imposing liability for the noneconomic damages in an amount proportionate to the jury's 20 percent comparative responsibility determination. The appellate opinion reversed, however, the trial court's summary adjudication for defendants' on the Bane Act claim

(§ 52.1) stating plaintiffs (cross-appellants) presented sufficient evidence to raise a triable issue of fact as to whether defendants acted with a specific intent to violate plaintiff's civil rights, while upholding the trial court's denial of attorney fees for plaintiff under Code of Civil Procedure section 1021.5.

SUMMARY OF ARGUMENT

Proposition 51's plain language and clear purpose provide that in cases where multiple parties have caused an injury, and at least one acted intentionally in doing so, the court should compare the fault of all tortfeasors and allocate noneconomic damages among them in accordance with their respective percentages of responsibility. As a matter of law, Proposition 51 forbids holding each intentional tortfeasor responsible for the entire noneconomic injury to the plaintiff without subtracting for the plaintiff's share of responsibility for his own injury. "All" tortfeasors means those whose conduct is intentional and negligent, including the plaintiff. Only in this way can the intentional tortfeasor avoid the unfairness of having to overcompensate the plaintiff, while assuring that negligent tortfeasors cannot escape responsibility for their acts.

Wrongful conduct by intentional and negligent actors can be compared because their actions are only "different in degree," not "different in kind," so fact-finders can weigh the egregiousness of each parties' conduct when apportioning noneconomic damages amongst them. Only in this way can the sound public policy underlying

Proposition 51 encourage all parties to exercise due care and be held accountable for their negligent, reckless, or intentional actions, thereby preventing windfalls to any by virtue of the happenstance of another.

Viewing intentional conduct by defendants independently of their comparative responsibilities impermissibly focuses only on the "bad acts" of one category of parties – defendants – and places them at risk of over-punishment. The fairness objective of Proposition 51 mandates that courts shift to apportionment of noneconomic damages among negligent and intentional tortfeasors.

ARGUMENT

I. THE FAIR RESPONSIBILITY ACT'S APPORTIONMENT OF LIABILITY FOR NONECONOMIC DAMAGES BASED ON "PRINCIPLES OF COMPARATIVE FAULT" APPLIES TO ALL INTENTIONAL AND NEGLIGENT PARTIES IN LAWSUITS WITH MULTIPLE DEFENDANTS.

The starting point for interpreting the meaning of a statute is its plain language and purpose. Under general settled canons of statutory construction, courts "ascertain the Legislature's intent in order to effectuate the law's purpose." *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386. "If a statute is to make sense, it must be read in the light of some assumed *purpose.* A statute merely declaring a rule, with no purpose or objective, is nonsense." Karl N. Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed* (1950) 3 *VAND. L. REV.* 395, 400 (emphasis added), reprinted in Singer, *STATUTES AND*

STATUTORY CONSTRUCTION §48A:08, p. 639 (2000 ed.). To do this requires looking to the statute's words and giving them their "usual and ordinary meaning." *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 ("*DaFonte*"). "The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent." *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861.

Section 1431.2 provides:

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

Argument over the meaning of this provision turns on the phrase in the first sentence that is set-off by commas and reads "based upon principles of comparative fault." Plaintiffs contend these words exclude from apportionment any defendant who acts "intentionally" because "comparative fault" is necessarily restricted to "negligent" conduct by defendants. ["The phrase] 'based on principles of comparative fault' was intended to exclude intentional tortfeasors from enjoying the benefits of several liability whenever noneconomic damages [are] at

issue." OBM 23-24.

Conversely, defendants argue this defies syntactical analysis of the sentence, that the voters used an introductory clause – "[i]n *any* action" – followed by a participial phrase – "based on principles of comparative fault" – "to define the manner in which liability [is to] be apportioned." ABM 31. "If the voters intended the participial phrase to modify the [noun] 'action,' the modifier 'any' would not exist and the participial phrase would not be offset by commas in a later clause, but instead be included in the introductory clause." *Id.* at 30.

While amicus agrees with defendants' syntactical analysis in parsing the correct meaning of section 1431.2, we doubt the Court will decide an issue of this moment solely at the initial grammatical threshold. See *People v. Strickler* (1914) 25 Cal.App. 60, 66 ("Grammatical construction and punctuation may be ignored, and even clauses of the statute may be transposed and rearranged, in order to ascertain and give effect to the true intent and meaning of statutory enactments."). But this syntactical analysis takes on added persuasive power when combined with section 1431.2's purpose, logic and common sense.

A. The Fair Responsibility Act's Express Purpose, Judicial Opinions in Existence at the Time of its Enactment, Logic and Common Sense all Show that "Principles of Comparative Fault" Meant the same as "Comparative Responsibility" and "Equitable Allocation of Loss" amongst all Tortfeasors.

Amicus agrees with *Hill v. National Collegiate Athletic Assn.* (1994)

7 Cal.4th 1, 23 that "[w]hen an initiative contains terms that have been judicially construed, 'the presumption is almost irresistible' that those terms have been used 'in the precise and technical sense' in which they have been used by the courts." See OBM 23.

1. Opinions of the Court in Existence when the Fair Responsibility Act was Passed Demonstrate that "Principles of Comparative Fault" include "Comparative Responsibility" and "Equitable Allocation of Loss" amongst all those Contributing to the Injury.

Examination of judicial opinions extant when voters approved the Fair Responsibility Act show the phrase "principles of comparative fault" includes and means "comparative responsibility" and "equitable allocation of loss" applicable to all parties to a tort lawsuit whose conduct contributes to the injury animating the litigation.

We begin, as previously mentioned, with the Court's adoption of comparative fault principles in *Li, supra*, 13 Cal.3d 804. There, the Court announced a comprehensive system of proportionate, comparative negligence for all injuries to person or property, in what it described as "a first step in what we deem to be a proper and just direction . . .." *Id.* at 826. "Pending future judicial or legislative developments, the . . . courts of this state are to use broad discretion in seeking to assure that the principle stated is applied in the interest of justice and in furtherance of the purposes and objectives set forth in this opinion." *Id.* at 829.

Three years later, *Daly, supra*, 20 Cal.3d 725 held comparative

fault principles applicable to strict liability actions that did not sound in negligence, and stated in remarkably broad language its intent to extend those principles beyond negligence actions: "We conclude . . . that the expressed purposes which persuaded us in the first instance to adopt strict liability in California would not be thwarted were we to apply comparative fault principles." *Id.* at 737.

> What would be forfeit is a degree of semantic symmetry. However, in this evolving area of tort law in which new remedies are judicially created, and old defenses judicially merged, *impelled by strong considerations of equity and fairness* we seek a larger synthesis. If a more just result follows from the expansion of comparative principles, we have no hesitancy in seeking it, mindful always that the fundamental and underlying purpose of *Li* was to promote the equitable allocation of loss *among all parties legally responsible* in proportion to fault.

Ibid.; emphasis added.

Contemporaneously with *Daly*, *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322 also opined that principles of comparative responsibility should be used as the basis for apportioning liability between two tortfeasors, one whose liability rests upon strict liability doctrine and the other whose liability derives, at least in part, from negligence theory.

Daly was followed by *Sorensen v. Allred* (1980) 112 Cal.App.3d 717, 723 ("*Sorensen*"), holding that principles of comparative fault

should apply in cases where *wilful misconduct* would be compared to mere negligence:

> Although our Supreme Court has not made a specific pronouncement upon the issue before us, *we find a trend in its decisions which points toward an adoption of an apportionment of the fault doctrine, irrespective of the nature of the alleged operative negligence or other basis for liability in a particular case.* In summary, we conclude that no defensible reason exists for categorizing wilful and wanton misconduct as a different kind of negligence not suitable for comparison with any other kind of negligence. The adoption of comparative negligence in *Li* rendered such a separate category unnecessary. . .. [¶] The submission to triers of fact . . . of issues of liability upon the simply stated question, "Whose fault was it, and if both are at fault, what are the degrees of fault of each" places the issues in a context more readily understood.

Id. at 725; emphasis added. Accord: *Zavala v. Regents of University of California* (1981) 125 Cal.App.3d 646, 650 ["The trial court's conclusion that wilful misconduct bars application of the comparative negligence doctrine was erroneous."].

Moreover, *Allen v. Sundean* (1982) 137 Cal.App.3d 216, though declining on the authority of *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 to extend principles of comparative responsibility to the defendant who committed the intentional tort of fraudulent concealment, nonetheless recognized "there may be sound

policy arguments for extending comparative fault principles to intentional tortfeasors" (see Note, *Comparative Fault and Intentional Torts* (1978) 12 *LOYOLA L. REV* 179). It did not extend these principles because, given *American Motorcycle*'s endorsement of "joint and several liability" (the "deep pocket" rule), "there is as yet no authority to support such an extension." 137 Cal.App.3d at 226-227; citation omitted. Proposition 51, by modifying joint and several liability to provide only "several liability" for noneconomic damage, provided that authority.

2. Proposition 51's Express Purpose Supports the Conclusion of the Court of Appeal Opinion in this Case.

"The 'findings and declaration of purpose' included in the proposition clearly indicate that the measure was proposed to remedy the perceived inequities resulting under the preexisting joint and several liability doctrine and to create what the proponents considered a fairer system under which 'defendants in tort actions shall be held financially liable in closer proportion to their degree of fault.'" *Evangelatos, supra,* 44 Cal.3d at 1213.

That this perceived goal of "fairness" to be achieved through the equitable allocation of loss was intended by voters to encompass *all* tortfeasors in multiple defendant lawsuits, including those whose conduct is intentional, is shown by the official ballot argument in support of the measure. There, voters were given an example of why Proposition 51 was needed to secure "fairness":

> A drunk driver speeds through a red light, hits another car, injures a passenger. The drunk driver has no assets or insurance.
>
> The injured passenger's trial lawyer sues the driver *AND THE CITY* because the city has a very "deep pocket"—the city treasury or insurance. He claims the stop light was faulty.
>
> The jury finds the drunk driver 95% at fault, the city only 5%. It awards the injured passenger $500,000 in economic damages (medical costs, lost earnings, property damage) and $1,000,000 in non-economic damages (emotional distress, pain and suffering, etc.).
>
> Because the driver can't pay anything, THE CITY PAYS IT ALL—$1,500,000.
>
> *THAT'S THE "DEEP POCKET" LAW AND IT'S UNFAIR!*

Evangelatos, supra, Appendix: Official Ballot Argument Favoring Proposition 51.

That ballot argument's hypothetical case illustration was based on an actual case – *Sills v. City of Los Angeles*, San Fernando Superior Court, 1985.[5] *Sills* arose when a Los Angeles driver under the influence of drugs ran a stop sign and was hit broadside by another motorist. A 16-year-old passenger in the first driver's car was left crippled and brain damaged. The jury awarded a verdict of $2,160,000 jointly

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[5] JVR No. 6006, 1985 WL 348405. *Sills* is described in Frank J. Macchiarola, *Not-for-Profit Organizations and the Liability Crisis*, reprinted in *NEW DIRECTIONS IN LIABILITY LAW* (Walter Olson ed. 1988), pp. 81, 87, fn. 7.

against the first driver and the city of Los Angeles, which had been sued for failing to trim bushes that had partially obstructed the view of the drugged driver. Although the city was found liable for only 22 percent of the injury, it had to pay virtually all of the damages. The driver was judgment proof, and his three co-defendants settled for their insurance policy limits – a total of $200,000.

The unfairness of the situation described by the ballot argument and occurring in *Sills* was that the least culpable defendant, the city, was forced by the doctrine of joint and several liability to pay the lion's share of the damages. "Nothing is more unfair than forcing someone—be it a city, a county or the state, a school, a business firm or a person—to pay for damages that are someone else's fault." *Evangelatos, supra,* Appendix: Ballot Argument in Favor of Proposition 51. That predicament is analogous to this case, where the party most responsible for the plaintiff's death was the plaintiff himself who the jury found twice as responsible (40 percent) as the deputy whose intentional conduct only contributed 20 percent to plaintiff's harm. Yet plaintiffs herein seek to impose 100 percent of the $8,000,000 noneconomic damage award upon that one intentional acting deputy and his county employer contrary to the clear purpose of section 1431.2. As the Legislative Analyst reported to the voters about the Fair Responsibility Act, it "limits the liability of each responsible party in a lawsuit to that portion of noneconomic damages that is equal to the responsible party's share of fault." *Evangelatos, supra,* 44 Cal.3d at

1243, appendix. A court is, of course, obliged to construe Proposition 51 according to its own statement of purpose. See *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 544; *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 493 (findings and declarations of policy entitled to great weight).

3. *Opinions Post Proposition 51 support the Appellate Opinion Here.*

Opinions decided after Proposition 51's passage support inclusion of all tortfeasors in apportioning damages based on principles of comparative fault or responsibility. *DaFonte, supra*, 2 Cal.4th 593, for example, held that an employer-defendant immune from liability under workers' compensation must still be considered in the allocation of damages pursuant to section 1431.2 because it "expressly provides relief to every tortfeasor who is a liable 'defendant,' and who formerly would have had full joint liability." *Id.* at 601.

In reliance on *DaFonte*, a leading practice guide on personal injury law states:

> As a result, notwithstanding section 3333 (full compensation for all damages legally *caused* by tortious wrongdoing), plaintiff must bear the shortfall in a compensatory damages recovery when responsible tortfeasors are immune or otherwise judgment proof and thus cannot be reached for their appropriate share of noneconomic damages. [See *DaFonte, supra*, 2 Cal.4th at 596].

CALIF. PRACTICE GUIDE: PERSONAL INJURY ¶3:30 (2018 ed.).

Similarly, *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985 explained that section 1431.2's "statutory protection is constant and absolute [and] does not permit a 'defendant's' share of 'noneconomic' damages to vary depending upon which other tortfeasors happen to be before the court, or upon the reason why a full proportionate contribution from each such tortfeasor may not be forthcoming." *Id.* at 997. Accord: *Rashidi v. Moser* (2014) 60 Cal.4th 718, 722 ("[S]ection 1431.2 imposes 'a rule of strict proportionate liability' on noneconomic damages.").

While *DaFonte, Richards* and *Rashidi* did not involve intentional tortfeasors and their expressions about the scope and application of section 1431.2 might then arguably be characterized as non-binding *dicta,* "there is dicta and then . . . there is Supreme Court dicta." *Schwab v. Crosby* (11th Cir. 2006) 451 F.3d 1308, 1325; see also *Amex Life Assurance Co. v. Superior Court* (1997) 14 Cal.4th 1231, 1241 ("[The] discussion . . ., although dicta, is particularly significant here.); and *In re McDonald* (3d Cir. 2000) 205 F.3d 606, 612 ("[W]e should not idly ignore considered statements the Supreme Court makes in dicta. The Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket.").

B. The Public Policy Reasons for Applying Comparative Responsibility to Equitably Allocate Damages Amongst all Tortfeasors, including those whose Conduct is Intentional, are Superior to the Arguments Against Doing so.

Most notably, five years after enactment of section 1431.2, the New Jersey Supreme Court addressed the issue now before this Court and held, consistent with the appellate opinion in this case, that "responsibility for a plaintiff's claimed injury is to be apportioned according to each party's relative degree of fault, including the fault attributable to an intentional tortfeasor." *Blazovic v. Andrich* (1991) 124 N.J. 90, 107 ("*Blazovic*"). The factual posture of that opinion concerned a restaurant patron who was assaulted after leaving the establishment. The plaintiff patron brought suit both against his assailants for intentional assault and battery and against the restaurant for negligence in failing to provide adequate security and lighting outside the building and for negligently serving alcoholic beverages to the assailants. *Blazovic* had to decide whether, under the state's comparative responsibility statute that displaced joint and several liability, the trier of fact must allocate fault among a contributorily negligent plaintiff (who provoked the fight), several defendants guilty of intentional misconduct (the assailants), and a negligent defendant (the restaurant).

In grappling with this issue, *Blazovic* considered and repudiated the same arguments advanced by plaintiffs here against allocating

comparative responsibility amongst all tortfeasors and instead making each intentional tortfeasor jointly responsible for all the noneconomic damages to the injured plaintiff.

1. The Difference Between Intentional and Negligent Conduct is a Matter of Degree, not Kind.

Plaintiffs contend that intentional conduct differs from negligence in the social condemnation attached to it, and that is reason enough to make each intentional tortfeasor totally liable for all of plaintiff's noneconomic. OBM 31. This is the same argument advanced by those opposing comparative responsibility for strict product liability defendants, what *Daly* dubbed the "oil and water do not mix" pitch, one premised on the notion that "strict liability, which is not founded on negligence or fault, is inhospitable to comparative principles." *Daly, supra,* 20 Cal.3d at 734.

Blazovic examined this claim and properly found it wanting. Instead, the opinion viewed intentional wrongdoing as "different in degree" but not "in kind" from either negligence or wanton and wilful or intentional conduct. After quoting from the *Restatement (Second) of Torts* § 8A comment b (1965) that an intentional tort involves knowingly or purposefully engaging in conduct "substantially certain" to result in injury to another; and wanton and wilful conduct poses a highly unreasonable risk of harm likely to result in injury (*id.*, § 500 comment a), *Blazovic* explained:

> Neither that difference nor the divergence between

> intentional conduct and negligence precludes comparison by a jury. The different levels of culpability inherent in each type of conduct will merely be reflected in the jury's apportionment of fault. By viewing the various types of tortious conduct in that way, we adhere most closely to the guiding principle of comparative fault – to distribute the loss in proportion to the respective faults of the parties causing that loss.

124 N.J. at 107.

Exclusion of intentional torts from the ambit of comparative responsibility has also come under criticism in legal literature. A number of commentators have challenged the traditional dogma that negligent and intentional wrongdoing are different from each other "in kind," rather than merely "different points on a continuum of fault." Comment, *Comparative Fault and Intentional Torts* (1978) 12 *LOY.L.A.L.REV.* 179, 186. These commentators argue that intentional torts and other torts based upon fault "reflect a continuum of conduct in violation of a singular social norm" established for protecting the safety of citizens. Jake Dear & Steven Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations* (1984) 24 *SANTA CLARA L. REV.* 1, 2. They posit that the only true difference between intentional and negligent misconduct is the degree of the actor's knowledge of possible harmful consequences, ranging "from a low level of objective knowledge (negligence) to a very high level of subjective knowledge (intent)." *Id.* at 15. As Dean William L. Prosser

expressed it: "As the probability of injury to another, apparent from the facts within his knowledge, becomes greater, his conduct takes on more of the attributes of intent, until it reaches that substantial certainty of harm which juries, and sometimes courts, may find inseparate from intent itself." William L. Prosser, *LAW OF TORTS* § 31, pp. 145-46 (4th ed. 1971). Accordingly, these commentators state, and amicus agrees, there is no logical reason why intentional wrongdoing cannot be compared with negligent conduct as part of the allocation of fault under a comparative fault approach to tort liability.

In sum, under comparative fault or responsibility an airtight categorical distinction between recklessness and intent no longer makes sense. Although generally those who commit intentional torts have a rather weak moral claim to have their fault compared with that of their victims, "in many intentional torts the element of intention is severely attenuated." See William McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?* (1984) 37 Okla.L.Rev. 641, 689 (suggesting extension of comparative fault to cases of "technical battery" or "where defendant intends an invasion of plaintiff's interests but is incapable of appreciating its wrongfulness or foreseeing its harmful consequences"). A tort called "intentional" may involve "simply a conflict between legitimate activities." Richard Posner, *ECONOMIC ANALYSIS OF LAW* § 6.1, p. 120 (2d ed. 1977). Our legal system should not judge the landowner protecting his property (McNichols, *supra*, 37 *OKLA.L.REV.* at 695-96 (proposing application of

comparative fault) or that a surgeon operating reasonably but beyond her patient's express consent by the same standards applicable to a person who deliberately spits in another's face.

Moreover, intentional and reckless conduct differ principally in the probability of injury; it is therefore somewhat incongruous to draw a sharp and inviolable line between the two for the purpose of apportioning damages. Finally, if juries can be trusted to allocate most of the fault to a party guilty of conduct deemed "reckless" (Victor Schwartz, *COMPARATIVE NEGLIGENCE* §§ 5.3, p. 108 (1974)["the core of comparative negligence is full apportionment on the basis of fault"]), they can be trusted to do the same when one of the parties has caused harm intentionally. Consequently, rather than bar comparative fault in cases of intentional tort, a comparative responsibility system should permit the court to instruct the jury to apportion the parties' comparative damage responsibilities.

2. Proposition 51's Goal of "Fairness" is Furthered when, as here, the Plaintiff's Comparative Responsibility for his Own Death is Greater than the Intentional Tortfeasor's Responsibility.

The jury in this case found that plaintiff's responsibility for his own death (40%) was twice as great than that of the defendant sheriff's deputy who intentionally contributed to it and greater than that of the other deputies whose negligent conduct (20%) also contributed to it. Nonetheless, plaintiff wants the Court to saddle the intentional tortfeasor and his employer, the County of Los Angeles, with the full $8

million judgment for the noneconomic loss due his heirs. This would allow the plaintiff to avoid entirely his (40%) responsibility for his own death, netting him more than $3,200,000 than he would obtain if his own conduct was taken into account.

That approach is anomalous and conflicts with Proposition 51's purpose, logic and common sense. *Blazovic* properly rejected plaintiff's attempt to do the same thing in that case, explaining that this gambit

> [D]erives from an earlier era when courts attempted to avoid the harsh effect of the contributory negligence defense and sought to punish and deter intentional tortfeasors. Refusal to compare the negligence of a plaintiff whose percentage of fault is no more than fifty percent with the fault of intentional tortfeasors is difficult to justify under a comparative-fault system in which that plaintiff's recovery can be only diminished, not barred.

124 N.J. at 106; citations omitted. The opinion cited to and quoted from Dear & Zipperstein, *supra*, 24 *SANTA CLARA L.REV.* at 11: "With the advent of comparative fault and the rejection of contributory negligence . . . one major policy reason for ignoring the plaintiff's negligent conduct when an intentional tort is alleged – that of avoiding a bar to recovery – is gone" *Id.* at 107.

3. *Deterrence is not Furthered by Making the Intentional Tortfeasor Shoulder all the Responsibility and Damage for a Plaintiff Irrespective of that Plaintiff's own Responsibility.*

The appellate opinion makes clear that the plaintiff here, after

attacking and beating a pregnant woman, resisted the sheriff deputies' attempts to peaceably take him into custody. Indeed, as the deputies approached plaintiff, he stood up, faced them, and, with a blank stare, began making grunting sounds while moving toward them in slow, stiff, exaggerated robotic movements, leading the deputies to conclude that he might be under the influence of PCP. 25 Cal.App.5th at 121. (An autopsy report for plaintiff confirmed he was under the influence of cocaine, PCP and marijuana.) Plaintiff then moved to pursue a distraught woman who ran into the street, pointed at plaintiff and yelled, "He tried to kill me!" This prompted a deputy to wrestle plaintiff to the ground where plaintiff struggled with deputies who subdued him with force that resulted in his death.

Plaintiff Burley's misconduct smacks of intentionality more than that of the deputy who was found to have intentionally used excessive force in the struggle to subdue and arrest him. If the appellate opinion is reversed allowing plaintiff to escape any reduction in damages solely because one deputy was found to have acted intentionally in his efforts to subdue him, this will send a dangerously wrong message to law enforcement and those they attempt to take into future custody: resist arrest, provoke officers to use force and, if it turns out to ultimately be excessive and harmful to the resister, collect all damages for harm from any officers found by a jury to have acted with "substantial certainty" that their conduct would be harmful to the wrongdoer. This is "bass ackwards" deterrence, the wrong kind to enshrine into law. It

presumes that as against an intentional tortfeasor, the plaintiff who provokes him into acting with "substantial certainty" that his responsive conduct would or could harm the plaintiff, had best "stand down" and do nothing. Do we really want to adopt this type of obverse "all-or-nothing" principle of liability for peace officers? Play it safe and let the law violator go free, perhaps in this case let him chase down and again attack the woman he had already assaulted, or run the risk of stopping him and be found after the fact to be 100 percent liable for all his ensuing injuries regardless of the risk he presents to public safety and security?

Amicus submits this would be wrong. Conceptually, of course, when it comes to allocating responsibility for damages between intentional and negligent tortfeasors in a multiple defendant context (including the comparative fault of the plaintiff), the benefits afforded to one seemingly reduces the deterrent incentive of the other. "Nonetheless, the costs indirectly associated with the intentional tort will provide the negligent tortfeasor with an incentive to exercise due care and prevent its future repetition." Comment, *Comparative Responsibility Sometimes: the Louisiana Approach to Comparative Apportionment and Intentional Torts* (1995) 70 *TUL. L. REV.* 1501, 1518. For example, merchants who fail to take adequate security measures to prevent criminal attacks on their patrons will suffer a loss in business. In addition, criminal penalties provide the majority of the deterrence for intentional tortfeasors; and scholarly studies have shown, the

deterrent objective of tort law "overemphasizes both the amount of overly dangerous activity that would occur without tort liability, and the amount of injury reduction achieved." Stephen D. Sugarman, *Doing Away with Tort Law* (1985) 73 *CALIF. L. REV.* 555, 561.

CONCLUSION

For all the foregoing reasons, CJAC requests the Court affirm the opinion below that Proposition 51 mandates comparative fault apportionment, even when tortious conduct is intentional.

Dated: May 13, 2019

Respectfully submitted,

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Fred J. Hiestand, General Counsel
Civil Justice Association of California

CERTIFICATE OF WORD COUNT

I certify that this document, based on the word processing program used to compose it, contains approximately 6,500 words, exclusive of the caption, tables, certificate and proof of service.

Dated: May 13, 2019

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Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 3rd Avenue, Suite 1, Sacramento, CA 95817.

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Executed this 13th day of May 2019 at Sacramento, California.

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