No. S192768

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AIDAN LEUNG
by and through his Guardian ad Litem NANCY LEUNG,

Petitioner,

v.

VERDUGO HILLS HOSPITAL,

Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Division Four, Case No. B204908
Los Angeles Superior Court, Case No. BC343985
Honorable Laura A. Matz

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, AND ARTEMIS S.A. IN SUPPORT OF RESPONDENT

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APPLICATION

Pursuant to California Rule of Court 8.520(f), the Chamber of Commerce of the United States of America ("U.S. Chamber"), the California Chamber of Commerce ("CalChamber"), the Civil Justice Association of California ("CJAC"), and Artemis, S.A. ("Artemis") respectfully request leave to file an amicus curiae brief in support of Defendant and Respondent Verdugo Hills Hospital.

STATEMENT OF INTEREST

The U.S. Chamber is the world's largest business federation. The U.S. Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

CJAC is a 30-year-old non-profit organization whose members are businesses, professional associations and local governments committed to restoring "balance" to our civil justice system by making our liability laws more fair, economical, and certain. Toward this end, CJAC regularly participates in the legislative, judicial, and

ballot initiative processes to resolve issues of who should pay, how much, and to whom when certain conduct by defendants is alleged to occasion harm to plaintiffs.

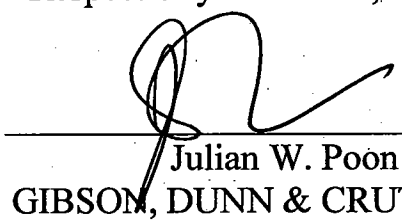
The CalChamber is a non-profit business association with over 14,000 members, both individual and corporate, representing virtually every economic interest in the State of California. It acts on behalf of the business community to improve the economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

Artemis is a French holding company that invests in a wide range of businesses in industries including luxury and consumer goods, insurance, investment funds, and media and communications. Companies like Artemis are often involved in multi-defendant lawsuits, and the question at issue in this case is currently also at issue in a matter in which Artemis is a defendant. (*John Garamendi et al. v. Altus Finance S.A., et al.* (C.D. Cal.) Case No. CV-99-02829.)

All amici curiae believe this case presents issues of paramount concern to the business community. In particular, the outcome of this case will have a significant effect on the dual goals of encouraging

early settlement and the equitable sharing of costs in multi-defendant cases involving joint tortfeasor defendants.

Dated: November 22, 2011 Respectfully submitted,



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INTRODUCTION

This case involves a carefully crafted joint-and-several-liability scheme, Code of Civil Procedure Sections 875 through 880, under which the Legislature specifically chose to retain the preexisting common law rule governing the release of joint tortfeasors in a select category of cases in order to advance the goals of encouraging early settlements and equitably apportioning costs among all parties. Petitioner, Aidan Leung, a medical-malpractice plaintiff, chose, after a jury verdict, to proceed with a settlement that the trial court had previously found not to be in good faith. He now seeks to upset the overall joint-and-several-liability framework considerably by asking this Court to throw out over 200 years of common law and to create a new rule that would gut the statutory scheme's core goal of encouraging early, "good faith" settlements. Since 1957, this system has promoted and helped attain these dual goals, and the Legislature has not seen fit to overturn the common law release rule against the background of which it legislated. This Court should affirm.

Under the common law release-of-liability rule, the release for consideration of one joint tortfeasor operates as a release of the joint-and-several liability of all other joint tortfeasors. The Legislature

partially abrogated the common law rule in 1957 by passing Section 877, under which the liability of non-settling joint tortfeasors is only reduced by the dollar amount specified in the settlement (a "*pro tanto*" reduction) and the settling tortfeasor is protected from any liability for contribution to any other tortfeasor. However, the Legislature required in Section 877 that plaintiffs and settling defendants enter into settlements "in good faith" and "before verdict or judgment" in order to secure these statutory protections. Accordingly, in order for settling plaintiffs to obtain the advantages of a *pro tanto* set-off (rather than a complete release) against the liability of the non-settling defendants, they must settle in "good faith" and do so "before verdict or judgment." Likewise, in order for settling defendants to obtain Section 877's protection from contribution claims by other joint tortfeasors, they must settle in "good faith" and do so "before verdict or judgment."

In Section 877, the Legislature provided a significant incentive for plaintiffs—a *pro tanto* set-off—and a significant incentive for settling defendants—contribution protection—in order to encourage *all parties* at the negotiating table to seek an early, good faith

settlement. Yet Plaintiff and the Court of Appeal would turn this entire structure of incentives on its head.

Plaintiff advocates a radical overhaul of Section 877 and the entire joint-and-several-liability scheme, which the Legislature fashioned against the backdrop of more than 200 years of well-established precedent. Plaintiff's proposed new common law rule would eliminate any incentive for settling plaintiffs to avail themselves of Section 877 and enter into a "good faith" settlement "before verdict or judgment," because plaintiffs would receive the advantages of a *pro tanto* set-off regardless of whether they settled in good or bad faith, or before or after verdict or judgment. Eliminating the "before verdict or judgment" requirement would incentivize Defendants to play the odds and then race to settlement *after* assessments of comparative fault in order to get away with paying less than their fair share. Eliminating the "good faith" requirement would fundamentally undermine the comparative liability scheme in California, encouraging collusion between plaintiffs and settling defendants and rewarding plaintiffs for discriminating among defendants and tampering with the apportionment of liability. Under the novel system that Plaintiff proposes, non-settling defendants may

be required to pay penalties that do not come close to their proportionate share of liability simply because they choose to exercise their due process right to litigate their case, even when plaintiffs and settling defendants collude in bad faith to impose such a penalty.

The Legislature assiduously designed a system to ensure that plaintiffs may choose how to make themselves whole while at the same time encouraging *all parties*—plaintiffs and defendants alike—to negotiate in good faith to work toward an equitable sharing of costs and conserve the limited resources of our judicial system. Upsetting that carefully crafted legislative scheme by overturning the common law backdrop against which the Legislature was operating would undermine the entire statutory scheme and fundamentally alter the incentives for litigants contemplating settlement. This Court should therefore affirm the Court of Appeal's judgment.

ARGUMENT

I. THE LEGISLATURE ADOPTED SECTION 877 AGAINST THE BACKDROP OF THE 200-YEAR-OLD COMMON LAW RELEASE RULE.

The common law rule governing the release of joint tortfeasors originally developed in order to provide plaintiffs the flexibility of suing joint tortfeasors jointly or separately while at the same time

ensuring that plaintiffs could not recover damages more than once for the same injury. In England, as soon as a judgment was entered in any suit against a joint tortfeasor, the plaintiff was barred from pursuing a suit against any other joint tortfeasor. (See, e.g., *Livingston v. Bishop* (N.Y. 1806) 1 Johns. 290.) Early on, courts in the United States rejected that approach, opting for a more plaintiff-friendly rule that allows a plaintiff to recover separate judgments against each joint tortfeasor, but limits the plaintiff to obtaining only one "satisfaction." (See *ibid.*; see also *Dawson v. Schloss* (1892) 93 Cal. 194, 199.)

Under the common law release rule, a plaintiff could pursue each separate case against each joint tortfeasor to separate judgments and then choose which judgment to collect. (See, e.g., *Bee v. Cooper* (1932) 217 Cal. 96, 100; *Grundel v. Union Iron Works* (1900) 127 Cal. 438, 441.) Once a plaintiff chose to collect on a judgment, his claims were satisfied, and he was barred from pursuing claims for the same injury against any other joint tortfeasors. (See, e.g., *Flynn v. Manson* (1912) 19 Cal.App. 400, 404–405 (*Flynn*); *Butler v. Ashworth* (1895) 110 Cal. 614, 618–619.) "By his withdrawal, plaintiff announces that he has received satisfaction for the injury

complained of .... It matters not ... whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law a satisfaction of the claim against them all." (*Chetwood v. Cal. Nat. Bank* (1896) 113 Cal. 414, 426; see also *Turner v. Hitchcock* (1866) 20 Iowa 310, 1866 WL 170, at *5 (*Turner*) ["When ... a legal cause of action *once subsisting* has been suspended by the voluntary act of the party who was entitled to it, it is, in most cases, considered as released by law"]; *Ayer v. Ashmead* (1863) 31 Conn. 447, 1863 WL 785, at *5 (*Ayer*) ["If it be said that it is inequitable to allow a satisfaction to cover the costs in [separate] suits [against joint tortfeasors] when such was not the intention, the answer is, the plaintiff was not obliged to accept of satisfaction unless he secured his costs"].)

Regardless of whether the plaintiff chose to sue joint tortfeasors jointly or separately, each was liable to the full extent of the damages awarded to the plaintiff no matter how small his degree of fault (with no right to contribution from the other tortfeasors). (See, e.g., *Tompkins v. Clay St. R.R. Co.* (1884) 66 Cal. 163, 166.) Thus, it necessarily followed that each would be released if another joint tortfeasor compensated the plaintiff for his injuries:

> Each joint trespasser being liable to the extent of the injury done by all, it follows as a necessary consequence that satisfaction made by one for his liability operates as a satisfaction for the whole trespass, and a discharge of all concerned. [The plaintiff and the settling defendant] could make no agreement impairing the legal rights of the [non-settling] defendant ....

(*Abb v. Northern Pac. Ry. Co.* (1902) 28 Wash. 428, 434; see also *Turner, supra*, 1866 WL 170, at *5.)

Against this backdrop, the Legislature adopted Code of Civil Procedure Section 877 as one component of a carefully crafted, comprehensive, and cohesive joint-and-several-liability scheme. Section 877 provides that, where a release of one joint tortfeasor is given "in good faith before verdict or judgment," it will not release the remaining joint tortfeasors but rather will reduce the amount of the plaintiff's claims against them by the dollar amount specified in the release. (Code Civ. Proc., § 877.)[1] In addition, settling tortfeasors are

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[1] Section 877 states:

> Where a release, dismissal with or without prejudice, or a co[v]enant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:
>
> (a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the

protected from liability for contribution to all other parties. (*Ibid.*; see, e.g., *Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 235 (*Stambaugh*) ["Where an alleged joint tortfeasor, prior to a judicial determination of his liability, in good faith settles the claim against him, he is forever discharged of further obligation to the claimant, and to his joint tortfeasors, by way of contribution or otherwise"]; *Halpin v. Superior Court* (1971) 14 Cal.App.3d 530, 543–544 (*Halpin*).)

After the Legislature passed Section 877, where a plaintiff does not obtain a "good faith" determination or settles after verdict or judgment, as here, the common law release rule continues to govern the release of joint tortfeasors, as it has for more than 200 years. (See, e.g., *Thomas v. Gen. Motors Corp.* (1970) 13 Cal.App.3d 81, 86 (*Thomas*) ["Except as modified by section 877, the [common] law still applies, and a release of one joint tort-feasor is a release of all"];

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covenant, or in the amount of the consideration paid for it whichever is the greater.

(b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties.

(c) This section shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.

(d) This section shall not apply to a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given to a co-obligor on an alleged contract debt where the contract was made prior to January 1, 1988.

Watson v. McEwen (1964) 225 Cal.App.2d 771, 775 (*Watson*); *Apodaca v. Hamilton* (1961) 189 Cal.App.2d 78, 82 (*Apodaca*).) This can occur where the settling parties pursue a settlement but fail to seek a good faith determination from the court or where, as in this case, the court rules that the settlement does not meet the standard of good faith under Section 877. (See, e.g., *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986, 991–992 (*River Garden*).) This can also occur where, as in this case, the settling parties pursue a settlement after a determination of liability has been made. (See, e.g., *Jhaveri v. Teitelbaum* (2009) 176 Cal.App.4th 740, 750 (*Jhaveri*); *Be v. Western Truck Exchange* (1997) 55 Cal.App.4th 1139, 1144 (*Be*); *Southern Cal. White Trucks v. Teresinski* (1987) 190 Cal.App.3d 1393, 1403–1405 (*Teresinski*); *Halpin, supra*, 14 Cal.App.3d at p. 543.)

However, since the enactment of Section 877, virtually all litigants who settle do so "in good faith before verdict or judgment," and Section 877's *pro tanto* set-off rule thus applies in almost every settling case in California. (See *Leung v. Verdugo Hills Hosp.* (2011) 121 Cal.Rptr.3d 913, 923 [citing only four cases since the enactment of Section 877 in 1957 where courts have analyzed the application of

the common law rule because the settlements did not comply with the requirements of Section 877]; see also Senate Passes Bill Curbing Secrecy Agreements in Insurance Bad Suits (May 2001) 13 No. 5 Cal. Ins. L. & Reg. Rep. 75 ["ninety-eight percent of civil cases [in California] settle before trial"].) Thus, over the past 54 years, the requirements that settling parties must meet before obtaining the advantages of Section 877 have effectively achieved the goal of encouraging parties to engage in early, good faith settlements.

II. THE LEGISLATURE'S CAREFULLY CRAFTED JOINT-AND-SEVERAL-LIABILITY SCHEME WAS DESIGNED TO WORK IN TANDEM WITH THE COMMON LAW RELEASE RULE TO ADVANCE THE OVERALL GOALS OF EARLY, "GOOD FAITH" SETTLEMENT.

The Legislature enacted Civil Code Section 877 in 1957—the culmination of three years' careful consideration by a Conference Committee appointed by the State Bar to make recommendations regarding the common law joint-liability scheme. In doing so, the Legislature chose to replace the common law "release of one release of all" rule with a *pro tanto* set-off rule (and protection from contribution claims for settling defendants) only where the release of a settling tortfeasor is "given in good faith before verdict or judgment." (Code Civ. Proc., § 877.) The Legislature expressly mandated these

requirements—providing plaintiffs with the incentive of a *pro tanto* set-off and settling defendants with the incentive of contribution protection only if they meet them—in order to effectuate the Legislature's goal of encouraging early, good faith settlements.

Significantly, Section 877, as initially introduced on January 22, 1957, did not contain the language "in good faith before verdict or judgment." (S.B. 1510, 1957 Reg. Sess. (Jan. 22, 1957).) At the time the bill was introduced, the Senate Judiciary Committee expressed its concern that the bill be crafted so as not to allow a plaintiff to collude with one joint tortfeasor at the expense of another. (Fourth Progress Rep. to the Legis. by the Sen. Interim Judiciary Com. (1957 Reg. Sess.) pp. 129-130.) On April 30, 1957, the Senate Bill was amended to add "before verdict or judgment" (S.B. 1510, 1957 Reg. Sess. (Apr. 30, 1957)), and on May 1, 1957, it was further amended to add "in good faith" (S.B. 1510, 1957 Reg. Sess. (May 1, 1957)).

The Legislature consciously crafted the bill to work in tandem with the common law release rule against which it legislated, and the statute's requirements that parties settle in "good faith" "before verdict or judgment" are therefore explicit conditions on the change in

the common law that the Legislature otherwise left in place. (See, 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"].) "Having chosen to change the common law [in one respect], the Legislature's failure to [completely modify the common law on that issue] reflects the legislative intent to continue the common law rule [as to the unmodified portion]." (*People v. Brady* (1991) 234 Cal.App.3d 954, 959–960.) Just a few months ago, this Court made clear that after the Legislature codifies the common law, the Court is "not at liberty to modify [the] contours [of the common law] in ways at odds with the statutory language." (*In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 759, fn. 5.)

Contemporaneous evidence shows that the Legislature knew full well how the longstanding common law release rule operated at the time it enacted Section 877 and understood that it was legislating against that well-established rule. The Conference Committee tasked with studying the common law release rule originally requested that the State Bar sponsor legislation abrogating the common law rule in its entirety. (1954 Rep. of Conf. Com. on Contribution Between Joint

Tortfeasors and On Third Party Practice p. 3.) The State Bar followed this recommendation when it sponsored the bill, but the Legislature then consciously chose to amend that bill to expressly include the "good faith" and "before verdict or judgment" requirements. (Journal of the State Bar of Cal., 1957 Legis. Program (Jan.-Feb. 1957) p. 17.)

In short, the Legislature understood that it enacted Section 877 against a firmly established common law backdrop and intended that the common law rule continue to control where the Legislature did not specifically abrogate it. (See, e.g., *Thomas*, *supra*, 13 Cal.App.3d at p. 86 ["Except as modified by section 877, the [common] law still applies, and a release of one joint tort-feasor is a release of all"]; *Watson*, *supra*, 225 Cal.App.2d at p. 775; *Apodaca*, *supra*, 189 Cal.App.2d at p. 82.) Far from suggesting otherwise (Pl.'s Reply Br. at p. 2), *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 (*American Motorcycle*) supports this reading of the relationship between the background common law release rule and Section 877.[2]

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[2] In arguing that *American Motorcycle* supports Plaintiff's request for the Court to fashion a new rule, Plaintiff attempts to conflate the Legislature's deliberate choice to retain the common law

The Legislature further amended the very same statutory scheme in 1980, adding Code of Civil Procedure Section 877.6 for the express purpose of providing a mechanism for parties to obtain an early judicial determination on good faith, and yet again did not see fit to overturn the common law release rule against which it was legislating. In Section 877.6, the Legislature underscored its view of the critical importance of the good faith requirement by providing that "[a]ny party to an action in which it is alleged that two or more parties are joint tortfeasors ... shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors." (Code Civ. Proc.,

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release rule in a limited set of circumstances with a question of "preemption." (Pl.'s Reply Br. at pp. 2-3.) This is a red herring. *American Motorcycle* does not stand for the proposition that the Court should modify the common law in ways that conflict with the Legislature's conscious decision regarding which aspects of a specific common law rule should be modified and which should remain. Rather, the excerpt Plaintiff quotes from *American Motorcycle* stands only for the unremarkable proposition that, unless the Legislature intends to preempt an entire field, the Court has the power to continue to develop the common law on related issues in that field in ways that are consistent with and advance the underlying intent of the legislative scheme. (*American Motorcycle*, 20 Cal.3d at p. 601.) Further, that passage of *American Motorcycle* highlights the Legislature's central goal in 1957 of promoting the equitable sharing of costs among joint tortfeasors, which would be gutted by Plaintiff's proposal.

§ 877.6(a)(1).) At that point, the Legislature had the benefit of 23 more years of perspective regarding how Section 877 operated in tandem with the common law release rule and how the courts had interpreted the release of joint tortfeasors, and it chose to bolster the good faith requirement and maintain the common law release rule as an important component of the overall statutory scheme in order to encourage early, good faith settlements.

The Legislature introduced a bill in 1957 that would have dispensed with the common law release rule in its entirety, but deliberately chose to amend it and carve out a more limited exception—Section 877—to the common law rule. It did so against the backdrop of more than 200 years of well-established precedent and as one piece of a comprehensive reshaping of the joint-and-several-liability scheme. When it revisited the statutory scheme in 1980, the Legislature again decided to retain the common law release rule and only further underscored its view of the importance of maintaining a robust mechanism for enforcing the good faith requirement. The overall system that has emerged as a result of the Legislature's handiwork has successfully encouraged parties to settle in good faith well before trial. Consequently, this Court should not

now reject the Legislature's clear, carefully calculated, and efficacious policy choice because this Plaintiff has deliberately and knowingly chosen not to comply with the requirements of Section 877 (despite being warned that the settlement he was entering into was not in good faith) based on the assumption that the common law rule would not be applied. As set forth below, upending the common law rule would thwart the Legislature's overarching intent and severely undermine the operation of Section 877. Plaintiff's and the Court of Appeal's suggestion that this Court do so should therefore be rejected.

III. SECTION 877'S "BEFORE VERDICT OR JUDGMENT" REQUIREMENT IS VITAL TO THE ACHIEVEMENT OF THE STATUTE'S TWIN GOALS OF ENCOURAGING EARLY SETTLEMENT AND APPORTIONING LIABILITY EQUITABLY.

The requirement that parties settle "before verdict or judgment" in order to obtain the protections of Section 877 is the chief mechanism that the Legislature adopted to incentivize parties to settle *early* and conserve the limited resources of California's judicial system. The "before verdict or judgment" requirement also advances the equitable sharing of costs, because it prevents defendants from racing to settlement *after* assessments of comparative fault in order to get away with paying less than their fair share. If the Court were to

overrule the application of the common law release rule to settlements made after verdict or judgment, it would fundamentally undermine the incentives specifically designed by the Legislature to promote early, good faith settlements.

A. The "Before Verdict or Judgment" Requirement Provides the Principal Incentive in Section 877 for Early Out-of-Court Settlements.

The primary goal of Section 877 is to encourage out-of-court settlements. (See, e.g., *American Motorcycle*, *supra*, 20 Cal.3d at p. 603 ["section 877 reflects a strong public policy in favor of settlement"]; *Teresinski*, *supra*, 190 Cal.App.3d at p. 1402 ["the goal of section 877 [is] to efficiently dispose of litigation"]; *Stambaugh*, *supra*, 62 Cal.App.3d at pp. 235–236 ["section 877 gives expression to ... the policy that settlement of litigation should be encouraged"].) Section 877 achieves this goal by providing substantial advantages to both plaintiffs and defendants who settle:

> [S]ection 877 creates significant incentives for both tortfeasors and injured plaintiffs to settle lawsuits: the tortfeasor who enters into a good faith settlement is discharged from any liability for contribution to any other tortfeasor, and the plaintiff's ultimate award against any other tortfeasor is diminished only by the actual amount of the settlement rather than by the settling tortfeasor's pro rata share of the judgment.

(*American Motorcycle*, *supra*, 20 Cal.3d at p. 603.)

To achieve the goal of encouraging *early* out-of-court settlements, the Legislature amended Section 877 to add the requirement that parties settle "before verdict or judgment" in order to obtain the statute's protections. (Compare S.B. 1510, 1957 Reg. Sess. (Apr. 30, 1957) with S.B. 1510, 1957 Reg. Sess. (Jan. 22, 1957).) California courts have consistently held that a settlement "before verdict or judgment" must take place "before establishment of liability." (*Halpin*, *supra*, 14 Cal.App.3d at p. 543; *Teresinski*, *supra*, 190 Cal.App.3d at pp. 1403–1405 ["Section 877 applies only to settlements reached before liability is established by jury verdict or by judgment"]; accord *Jhaveri*, *supra*, 176 Cal.App.4th at p. 750 ["Section 877 ... applies only to a settlement entered into with a cotortfeasor before a verdict or judgment"]; *Be*, *supra*, 55 Cal.App.4th at p. 1144 ["*Teresinski's* reading of Sections 877 and 877.6 to apply only to settlements reached before verdict or judgment is supported ... by the plain meaning of the words of the statute"].)[3]

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[3] Plaintiff concedes, and the Court of Appeal concluded, that the settlement at issue here occurred post-verdict. (Pl.'s Reply Br. at 5; *Leung*, 121 Cal.Rptr.3d at 919, fn. 19.) Consequently, Section 877 by its terms does not govern the release of Dr. Nishibayashi's joint tortfeasor, Verdugo Hills Hospital.

The "before verdict or judgment" requirement is critical to providing all plaintiffs and defendants contemplating settlement with the incentive not just to settle, but to settle *early*. Early settlement, in turn, is crucial to effectuating the overall policy in favor of settlement, because settlements only lighten the load on the overtaxed judiciary and on parties in a significant way if they are reached before the considerable mobilization of resources leading up to trials, especially in the multi-defendant context. (See, e.g., *Be*, *supra*, 55 Cal.App.4th at p. 1146 ["A settlement should be permitted to protect the settling tortfeasors ... only if the settlement actually promotes the legislative purpose of avoiding trials"]; *McClure v. McClure* (1893) 100 Cal. 339, 343 [noting that settlement agreements are highly favored as a means to "reduc[e] the expense and persistency of litigation"].)

If this Court were to overturn the common law release rule for settlements made after verdict or judgment, plaintiffs and defendants alike would be more likely to continue pursuing their case in the hopes of getting a better deal down the road. The assurance to settling parties that they would receive the advantages of Section 877 regardless of whether they settled before or after verdict or judgment would undermine the incentive to settle early and well in advance of

trial. In order to avoid the significant strain that avoidable trials impose on our judicial system, the Legislature chose to condition a *pro tanto* set-off and contribution bar on early settlement, and this Court should reject Plaintiff's attempt to undermine that considered public policy decision by the Legislature. (Cf. *Be*, *supra*, 55 Cal.App.4th at p. 1146; *Jhaveri*, *supra*, 176 Cal.App.4th at p. 750.)

B. The "Before Verdict or Judgment" Requirement Is Necessary to Accomplish the Equitable Sharing of Costs Among All Parties at Fault.

The "before verdict or judgment" prerequisite to receiving Section 877 protection prevents plaintiffs and any particular defendant from negotiating settlements after trial that would alter the factfinder's assessment of comparative fault. Post-trial settlements not reflective of each party's comparative fault would undermine Section 877's fundamental objective of encouraging early, good faith settlements. In *Halpin*, the court explained how essential the "before verdict or judgment" requirement is to promoting the equitable goals of the modern joint-and-several-liability system:

> [W]ere the [Section 877 "before verdict or judgment" rule not construed to mean "before establishment of liability"], there would unquestionably occur concurrently with the determination of joint liability a mad rush by one or more of the joint tortfeasors in an effort to settle and to obtain a release, thus thwarting the

> provisions of the contribution statute and the right of the other joint tortfeasors to obtain contribution from the settlers. A complete breakdown of (1) bifurcation of trials and (2) the operation of the contribution statute's provisions would follow. Both of these modern processes are notably progressive advances towards the more efficient disposition of litigation.

(*Halpin, supra*, 14 Cal.App.3d at p. 543.)

If Plaintiffs received *pro tanto* set-off protection for settlements entered into after verdict or judgment, they could discriminate among defendants or negotiate sweetheart deals to obtain immediate payment from certain defendants who might be willing to forego an appeal (in exchange for a discount), thereby altering the apportionment of liability by the jury. Plaintiffs, knowing that all defendants are jointly and severally liable and that they could thus collect the difference from any other defendant, might be motivated to accept such post-verdict settlements in order to collect some portion of their recovery more quickly. In addition, plaintiffs may be encouraged to modify the comparative fault assessment if they favor certain defendants or disagree with the jury's allocation of liability.

Meanwhile, if defendants were to receive protection from contribution liability even for settlements entered into after verdict or judgment, they would be encouraged to play the odds and then race to

negotiate a settlement after assessments of comparative fault to try to escape paying their fair share. Defendants whose percentage of comparative fault was assessed at trial might rush to negotiate settlements after trial for less than the amount of damages attributed to them at trial. Defendants whose percentage of comparative fault was not assessed at trial, either because the plaintiff did not sue them or because the trial was set to occur in stages, would likewise be motivated to negotiate settlements with plaintiffs after liability has been established. Such post-verdict settlements, if they were to receive Section 877 protection, would shield settling defendants from contribution claims of other defendants with the inappropriate advantage of knowing their potential total exposure, thereby allowing such defendants to attempt to collude with plaintiffs to avoid paying their fair share.

This very concern was realized in *Be*, when a joint tortfeasor whom the plaintiff (Be) had chosen not to sue attempted to settle with the plaintiff after judgment. (*Be*, *supra*, 55 Cal.App.4th at p. 1144.) The plaintiff, Be, had incentive to settle because he was foreclosed from suing the settling tortfeasor anyway, given that he had failed to name the settling tortfeasor in his lawsuit; thus, any additional money

from the settlement would have been a windfall for Be. The settling tortfeasor had an incentive to attempt to obtain the shelter of Section 877, because it would protect the settling tortfeasor from any liability for contribution to any other joint tortfeasor. If the settlement for $125,000 were approved, the settling tortfeasor would avoid potential exposure of up to the $1.2 million verdict from a cross-complaint brought by a joint tortfeasor. (*Ibid.*)

Without the "before verdict or judgment" requirement, the settling tortfeasor could have shielded itself from participating in the equitable sharing of costs with the other tortfeasors, obtaining a release for a small fraction of the total damages even though it very well may have been the most culpable party. (*Id.* at p. 1142.) As the court reasoned, "the case present[ed] a clear illustration of the wisdom of requiring that settlements be completed before judgment or verdict in order to be settlements in good faith." (*Id.* at p. 1144.)

In short, the "before verdict or judgment" requirement is a necessary component to give effect to the "good faith" requirement, and overturning the common law release rule for settlements made after verdict or judgment would fundamentally undermine the

Legislature's central aim of promoting the equitable sharing of costs among joint tortfeasors.

IV. THE "GOOD FAITH" REQUIREMENT IS CRITICAL TO ACHIEVING THE EQUITABLE APPORTIONMENT OF COSTS.

The Legislature's addition of a "good faith" requirement to Section 877 is yet another critical piece of the careful balance of competing interests wrought by the Legislature to ensure that *all parties*—plaintiffs and defendants alike—work toward an equitable sharing of costs among all parties at fault. All a plaintiff has to do to avoid an "unfair" result is himself act in good faith before verdict or judgment. (Pl.'s Br. at p. 15.) Plaintiff's proposed new common law rule would result in an increase in collusion between plaintiffs and settling defendants and violations of the legal rights of non-settling defendants.

A. The Good Faith Requirement Creates a Balanced System of Incentives for All Parties, Which Prevents Collusion Between Plaintiffs and Settling Defendants and Protects the Legal Rights of Non-Settling Defendants.

In overhauling the joint-and-several-liability scheme, which included adding a right of contribution among joint tortfeasors and cabining the application of the common law release rule to a very

limited set of circumstances (such as those present here), one of the Legislature's main objectives was to control the distribution of loss by law, rather than by the plaintiff. (Thaxter, *Joint Tortfeasors; Legislative Changes in the Rules Regarding Releases and Contribution* (1958) 9 Hastings L.J. 180, 185.) The addition of the "good faith" requirement contributes to this objective by providing plaintiffs and settling defendants with strong incentives to settle for an amount that roughly approximates the proportionate liability of the settling defendant.[4] To achieve the goal of equitably sharing costs, this Court has developed a robust interpretation of what constitutes good faith in California, not only requiring settling parties to refrain from engaging in collusion, fraud, or tortious conduct, but also mandating that they settle for an amount that falls "within the reasonable range of the settling tortfeasor's proportional share of

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[4] See *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499 ["[F]actors [to] be taken into account includ[e] a rough approximation of plaintiff's total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants."].

comparative liability for the plaintiff's injuries." (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 499.)

Reading out Section 877's requirement of "good faith" before settling parties can obtain the benefit of a *pro tanto* offset and protection from contribution claims would fundamentally undermine the Legislature's and this Court's goal of achieving the equitable apportionment of costs among joint tortfeasors, which remains a central aim of the modern comparative liability system. (See *American Motorcycle*, *supra*, 20 Cal.3d at p. 591 [noting that "the common goal of both [the contribution and the indemnity] doctrines [is] the equitable distribution of loss among multiple tortfeasors"]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1198 [noting that it would be unfair "to require a tortfeasor who might only be minimally culpable to bear all of the plaintiff's damages"].)

The good faith requirement is an integral component of the Legislature's carefully balanced joint-and-several-liability scheme, because it prevents plaintiffs from abusing their control over the litigation process and discriminating among defendants. Section 877 abrogated the common law rule in order to protect plaintiffs from inadvertently releasing some joint tortfeasors by negotiating and

settling in good faith with others, thereby forgoing their opportunity to be made whole. (See *Flynn*, *supra*, 19 Cal.App. at pp. 402–406 [release of one joint tortfeasor released claims against all other joint tortfeasors, despite settlement for consideration and attempt to reserve right to proceed against remaining defendants].) After 1957, plaintiffs who pursued their case in good faith no longer had to choose between obtaining partial relief and retaining their rights to be made completely whole. (See *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 304–305 (*Mesler*) ["The Legislature [addressed the issue whereby] a settlement with one defendant which partially compensates the plaintiff for injuries sustained would effectively block the road to complete recovery"].) Section 877 provided plaintiffs with leverage to negotiate with joint tortfeasors and determine how they wanted to make themselves whole.

However, in addressing the potential injustice that previously existed for plaintiffs who were subject under all circumstances to the common law release rule, the Legislature was careful not to overcompensate and create perverse incentives that would encourage plaintiffs to undermine the competing goal of promoting equitable sharing of costs among all defendants. Thus, the Legislature added

the "good faith" requirement to deter collusion between plaintiffs (who otherwise may be incentivized to enter into bad faith settlements early, knowing that they can obtain their total damages regardless from other defendants) and settling defendants (who have strong incentives to pay as little as possible irrespective of their fault). (See *Tech-Bilt*, *supra*, 38 Cal.3d at p. 499 [noting that "the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants" should be considered in determining whether a settlement has been made in good faith].)

Even *River Garden*, which misinterpreted the relationship crafted by the Legislature between Section 877 and the common law release rule, recognized that the most pervasive side effect of an incentive scheme that does not properly prevent collusion between plaintiffs and settling defendants is undermining the goal of advancing the equitable sharing of costs:

> Although many kinds of collusive injury are possible, the most obvious and frequent is that created by an unreasonably cheap settlement. Applied *pro tanto* to the ultimate judgment, such a settlement contributes little toward equitable—even though unequal—sharing. [U]nreasonably low settlements with the other tortfeasors and the fear of a large unshared judgment may propel the last remaining defendant into a settlement exceeding the plaintiff's remaining damages and transcending that defendant's equitable share. Prevention of collusion is

> but a means to the end of preventing unreasonably low settlements which prejudice a nonparticipating tortfeasor. The price of a settlement is the prime badge of its good or bad faith.

(*River Garden*, *supra*, 26 Cal.App.3d at p. 996.) The good faith requirement protects the legal rights of non-settling defendants by preventing plaintiffs and settling defendants from engaging in conduct that penalizes non-settling defendants for exercising their legal right to defend themselves:

> Construed in the light of the legislation's objectives, the good faith release clause extends the obligation of good faith beyond the parties to the negotiations, embracing an absent tortfeasor. The latter has a financial stake in the amount of the settlement and thus a justiciable interest in the question of good faith.

(*Ibid.*; see also *Mesler*, *supra*, 39 Cal.3d at p. 305 [noting that settlements that receive the protections of Section 877 are often "inequitable to the nonsettlors" even when they are not in bad faith].) Courts implementing the common law rule have long recognized the limits on settling parties. (See, e.g., *Abb*, *supra*, 28 Wash. at p. 434 ["[The plaintiff and settling defendant] could make no agreement impairing the legal rights of the defendant"].)

Under the novel system proposed by Plaintiff, non-settling defendants would be required to pay penalties that do not approximate their comparative fault simply because they choose to exercise their

due process right to litigate their case, even in cases where plaintiffs and settling defendants collude in bad faith. However, "[t]o punish a person because he has done what the law plainly allows him to do"—exercise his legal right to defend himself—"is a due process violation of the most basic sort ...." (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 362–363.) Indeed, courts have long recognized that defendants have a due process "right to litigate the issues raised," which includes the right "to present every available defense." (*United States v. Armour & Co.* (1971) 402 U.S. 673, 682; see also *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458 [disapproving of rules that "preclude a defendant from defending each individual claim to its fullest"].)

Further, even *River Garden* recognized that if the good faith requirement were eliminated, plaintiffs would have strong incentives to target deep-pocket defendants who would be forced to pay more than their fair share of the liability:

> The California legislation empowers a plaintiff, armed with a strong and lucrative claim, to settle with his antagonists one by one, preserving for the jury the opponent with the most money and least sympathy. The power is great and vulnerable to abuse. In a multi-party case the threat of an unshared[] judgment against the last remaining defendant—diminished only by meager settlements with his eager fellows—permits a plaintiff to

> create acute financial pressures bordering on extortion. Viewed as a demand for settlements which have a reasonable relation to the value of the plaintiff's case, to the strengths and weaknesses of the parties and the financial ability of the settlor, the good faith clause aids the statutory goal of equitable sharing. It also aids the goal of settlement, by preventing a plaintiff from selecting one defendant as the target for enlarged demands after unreasonably low settlements with others.

(*River Garden, supra*, 26 Cal.App.3d at p. 994.)

However, the U.S. Supreme Court has repeatedly warned against punishing a defendant based on its wealth. (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 427; *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 591.) In *Gore*, the Court explained that "[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement" to the protections of the Due Process Clause. (*Gore,* 517 U.S. at p. 585.) Under this clear command, a plaintiff and settling tortfeasors may not collude to bring about the penalization of wealthier joint tortfeasors through the imposition of damages on them that do not approximate their comparative fault simply because those wealthier defendants choose to exercise their due process right to contest liability and/or damages. Overturning the application of the

common law release rule to settlements made in bad faith would allow for and encourage such a punitive and impermissible practice.[5]

The good faith requirement prevents plaintiffs from abusing their power and control over the course of the litigation by holding them to the consequences of their own deliberate actions. Contrary to the Court of Appeal's misreading of the current operation of the common law release rule within the modern joint-and-several-liability system, the rule's application in the small category of cases in which a plaintiff *intentionally* enters into a bad faith settlement and chooses to press forward anyway does not lead to unduly harsh and unjust results. As this Court has recognized since the early days of the common law release rule, there is nothing prejudicial or unfair about holding parties (especially those represented by counsel) to the

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[5] Further, California adopted Proposition 51 in 2002 for the very purpose of eliminating, at least in the context of non-economic damages, the "deep pocket" injustice that can result from joint-and-several liability in tort actions and holding defendants liable "in closer proportion to their degree of fault." (Code Civ. Proc., §1431.1(c).) If this Court were to overturn the application of the common law release rule to settlements made in bad faith, it would undermine the goals of Proposition 51, encouraging discrimination against wealthier defendants and "overemphasiz[ing] the supposed penal character of liability in tort." (Third Progress Rep. to the Legis. by the Sen. Interim Judiciary Com., 2 appen. to Sen. J. (1955 Reg. Sess.) p. 52.)

consequences of their own deliberate actions. (See, e.g., *Turner*, *supra*, 1866 WL 170, at *5 ["When ... a legal cause of action *once subsisting* has been suspended by the voluntary act of the party who was entitled to it, it is, in most cases, considered as released by law"]; *Ayer*, *supra*, 1863 WL 785, at *5 ["If it be said that it is inequitable to allow a satisfaction to cover the costs in [separate] suits [against joint tortfeasors] when such was not the intention, the answer is, the plaintiff was not obliged to accept of satisfaction unless he secured his costs"].)

After the passage of Section 877, the *only* circumstance in which the common law release rule will apply is when the plaintiff has chosen to proceed against the defendants in bad faith, or after verdict or judgment. All a plaintiff has to do to avoid this "unfair" result is himself settle in good faith before verdict or judgment. (Pl.'s Br. at p. 15.) If the Court were to overrule the operation of the common law release rule for settlements made in bad faith, the injustice would be far greater, resulting in collusion between plaintiffs and settling defendants and violations of the legal rights of non-settling defendants.

B. Plaintiff's Proposed Changes to the Legislative Scheme Would Undermine the Statute's Goals and the Carefully Balanced Set of Incentives Adopted by the Legislature to Achieve Those Goals.

If this Court were to adopt a release rule whereby plaintiffs and settling defendants received the protections of Section 877—a *pro tanto* set-off and a bar against contribution from non-settling defendants—even if they settle in bad faith, California would revert to a pre-comparative-fault, pre-contribution-right world, in which plaintiffs could choose which defendants would pay for most or all of the damages associated with plaintiffs' injuries irrespective of fault. (Cf. *American Motorcycle*, *supra*, 20 Cal.3d at p. 593 ["when two individuals are responsible for a loss, but one of the two is more culpable than the other, it is only fair that the more culpable party should bear a greater share of the loss"].) Defendants could settle for amounts that do not approximate their proportionate share of liability, and, at the same time, they would be able to shield themselves from contribution actions brought by other joint tortfeasors. This systemic problem was one of the primary ills the Legislature was trying to cure when it modified the liability scheme for joint tortfeasors in 1957. (Third Progress Rep. to the Legis. by the Sen. Interim Judiciary Com., 2 appen. to Sen. J. (1955 Reg. Sess.) p. 52 [noting that the purpose of

the bill was to lessen the harshness of the doctrine whereby joint tortfeasors may be forced to pay a disproportionate share of the damages and that "the general aim of the law [is] for the equal distribution of common burdens"].)

Likewise, if this Court were to adopt a release rule such as what Plaintiff proposes, whereby only plaintiffs but not defendants received the protections of Section 877 even if they settle in bad faith—a *pro tanto* set-off but no bar against contribution from non-settling defendants—it would completely eliminate any incentive for plaintiffs to seek good faith settlements. In Section 877, the Legislature targeted one significant incentive at plaintiffs—a *pro tanto* set-off—and one significant incentive at settling defendants—contribution protection—so that *all parties* at the negotiating table have incentive to seek a good faith settlement. Plaintiff's proposal of eliminating all incentives designed to induce plaintiffs to act in good faith would fundamentally undermine the carefully balanced incentive scheme that the Legislature targeted at *all parties*, instead putting 100 percent of the risk of a non-good-faith settlement on the settling defendant and zero percent on the plaintiff who drives the process. In doing so, it

would thwart the Legislature's goal of promoting the equitable sharing of costs among all parties at fault.

CONCLUSION

The Legislature deliberately fashioned the joint-and-several-liability scheme to attain the competing goals of maximizing a fair recovery to the injured party, equitably apportioning liability among joint tortfeasors, and encouraging early settlement. It did so by striking a careful balance of incentives directed at all parties, including retaining the common law release-of-liability rule in a narrow set of circumstances, such as those applicable here, as one key component of this comprehensive system. This Court should accord due deference to that determination by the Legislature and affirm the Court of Appeal's application of the well-established common law.

Dated: November 22, 2011 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.504(d)(1), of the California Rules of Court, the undersigned hereby certifies that the foregoing amicus brief is in 14 point Times New Roman font and contains 7,788 words, according to the word count generated by the computer program used to produce the brief.

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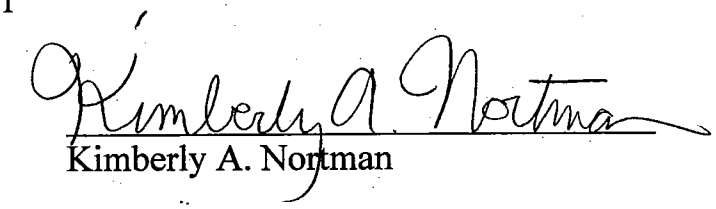

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PROOF OF SERVICE

I, Laura Rocha Maez, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071-3197, in said County and State. On November 23, 2011, I served the following document(s):

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, AND THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, AND ARTEMIS S.A. IN SUPPORT OF RESPONDENT

on the parties stated below, by the following means of service:

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Laura Rocha Maez