A098487 & A098897

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION FIVE

TERRY LATHROP,
Plaintiff and Respondent,

vs.

HEALTHCARE PARTNERS MEDICAL GROUP,
Defendant and Appellant.

DOUGLAS LATHROP,
Plaintiff and Respondent,

vs.

HEALTHCARE PARTNERS MEDICAL GROUP,
Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SAN FRANCISCO COUNTY (313369)
HON. DIANE E. WICK, JUDGE

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This is an appeal from two judgments, one in favor of Terry Lathrop (Terry) and the other in favor of Douglas Lathrop (Douglas), the plaintiffs in a combined medical malpractice and loss-of-consortium action against HealthCare Partners Medical Group (HealthCare Partners). The issue is whether the trial court erroneously denied Healthcare Partners the protection of the Medical Injury Compensation Reform Act of 1975 (MICRA).

Under MICRA, in an action for injury against a health care provider based on professional negligence, a patient suing for physical injury and the patient's spouse suing for loss of consortium cannot recover more than $250,000 apiece for noneconomic losses. Yet Terry's judgment against HealthCare Partners includes $1,218,000 in noneconomic damages, and Douglas's judgment against HealthCare Partners is for $300,005 in noneconomic damages.

The trial court held that HealthCare Partners, the legal entity that employs the physicians whom Terry consulted, is not entitled to benefit from the MICRA cap. This was error for two independent reasons:

(1) HealthCare Partners was held vicariously liable for the professional negligence of its physician employees, who are health care providers within the meaning of MICRA. The amount recoverable from a vicariously liable party is limited to the amount recoverable from the primary tortfeasor. Therefore, HealthCare Partners, like its physician employees, is entitled to the protection of the MICRA cap.

(2) HealthCare Partners itself is a health care provider within the meaning of MICRA, entitled in its own right to the protection of the MICRA cap.

After reducing the noneconomic damages in Terry's judgment and Douglas's judgment pursuant to the MICRA cap, this court should set off (against the economic damages in Terry's judgment) two postjudgment settlements that occurred just days before the trial court lost jurisdiction. This appeal is HealthCare Partners' first real opportunity to obtain a setoff.

LEGAL ARGUMENTS

I.

THE NONECONOMIC DAMAGES EXCEED THE LEGAL MAXIMUM.

A. Introduction.

Civil Code section 3333.2, subdivision (b), provides: "In no action [for injury against a health care provider based on professional negligence] shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)." A patient suing for physical injury and the patient's spouse suing for loss of consortium can each recover up to $250,000 for their noneconomic losses. (*Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1394.)

As previously discussed, if a verdict for noneconomic losses exceeds $250,000 and more than one health care provider is at fault, the verdict is reduced to $250,000 first, then each health care provider's percentage of fault

is applied. (*Gilman v. Beverly California Corp.*, *supra*, 231 Cal.App.3d at p. 129; see *ante*, p. 6, fn. 3.)

HealthCare Partners invoked the MICRA cap and argued that its liability to each plaintiff for noneconomic losses is capped at $145,000, i.e., 58% of $250,000, because HealthCare Partners was found to be 58% at fault. (5 CT 1349-1354; 6 CT 1463.) HealthCare Partners based its argument on two independent rationales: (1) HealthCare Partners was held vicariously liable for the professional negligence of its physician employees, who would be protected by the MICRA cap; therefore, HealthCare Partners should be protected by the MICRA cap; and (2) HealthCare Partners itself is a "health care provider" within the meaning of MICRA, entitled in its own right to the protection of the MICRA cap. (5 CT 1352-1358; 6 CT 1453-1455; 10 RT 2502-2505, 2508-2510, 2514-2515, 2517-2518.)

The trial court disagreed with both rationales. (6 CT 1531-1535.) This was error. Both rationales are correct.

B. HealthCare Partners was held vicariously liable for the professional negligence of its physician employees. Because its physician employees would be protected by the MICRA cap, HealthCare Partners should be protected by the MICRA cap.

HealthCare Partners was held *vicariously* liable for the professional negligence of its physician employees. (See 2 CT 98; 5 CT 1245, 1257-1258, 1272-1278; 9 RT 2271-2284, 2301-2302, 2408-2410; 10 RT 2500, 2502-2503, 2508-2509.)

HealthCare Partners' physician employees are "health care providers" within the meaning of MICRA. The definition of "health care provider"

includes "any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code . . . ." (Civ. Code, § 3333.2, subd. (c)(1).) Physicians are licensed pursuant to division 2, section 2050, of the Business and Professions Code. HealthCare Partners' physician employees are licensed. (5 CT 1361, 1365, 1369.) Therefore, they would be protected by the MICRA cap.

Because its physician employees would be protected by the MICRA cap, the vicariously liable HealthCare Partners should be protected by the MICRA cap. "The amount that may be recovered against a party who is vicariously liable is *limited to the amount recoverable from the primary tortfeasor*." (1 Levy et al., California Torts (2002) § 8.01[1], p. 8-4, emphasis added, citing *Campbell v. Security Pac. Nat. Bank* (1976) 62 Cal.App.3d 379, 388 (*Campbell*).)

In *Campbell*, *supra*, the Court of Appeal quoted *Ponce v. Tractor Supply Co.* (1972) 29 Cal.App.3d 500 (*Ponce*), which in turn quoted *Daniel v. Jones* (1934) 140 Cal.App. 145 (*Daniel*), to explain that derivative liability is limited by the primary tortfeasor's liability. *Campbell* said:

"'In *Daniel v. Jones*, 140 Cal.App. 145 . . . , the court stated at page 147, "Since there can be but one verdict for a single sum against the driver and his employer [citation], and since the liability of the latter arises solely by reason of the detriment caused by the former, the judgments against defendant corporation will be reduced to conform to the judgments against defendant Jones, . . ." [Citations.] No other California decision has been found which holds that a recovery against a party secondarily liable is limited to the amount recoverable from the primary tortfeasor, but "The rule is established, in most jurisdictions in which the question has arisen, that an amount recovered as actual or compensatory damages in a tort action against a servant or other person who was the active tortfeasor is the limit of the amount recoverable as

such damages against the master or other person whose responsibility is solely derivative." (141 A.L.R. 1164-1173.) Thus, the damages determined against the primary tortfeasor . . . judgment would be applicable as an upper limit to the one secondarily liable.' (*Ponce v. Tractor Supply Co.*, *supra*, at p. 505.)" (*Campbell*, *supra*, 62 Cal.App.3d at pp. 387-388.)

In *Ponce, supra,* a default judgment for $150,000 was entered against the employee. At trial, the judgment against the employer was $180,000. On appeal, the judgment against the employer was ordered reduced to $150,000. (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 361, pp. 928-929, discussing *Ponce*.)

In *Daniel*, *supra,* the judgments against the employee were for $3,000 and $12,000, while the judgments against the employer were for $3,341.50 and $15,000. (140 Cal.App. at p. 146.) The Court of Appeal reduced the judgments against the employer to $3,000 and $12,000. (*Id*. at p. 147; see also *Luscher v. Jones* (1934) 140 Cal.App. 743, 744.) Witkin cites *Daniel* for the proposition that, "The verdict is also defective when it holds the *employer* liable in a *greater sum* than the *employee*; but in that case, the award against the employer may be reduced to conform, and the whole verdict sustained." (7 Witkin, Cal. Procedure, *supra*, Trial, § 368, p. 419.)

In keeping with this principle, in *Miller v. Stouffer* (1992) 9 Cal.App.4th 70, 84, the Court of Appeal said, "under Proposition 51 [the employer] would have been shielded from liability for noneconomic damages beyond those attributable to . . . her own employee." And, in *Palmer v. Superior Court* (Nov. 19, 2002, D040486) ___ Cal.App.4th ___ [02 D.A.R. 13092, 13098], the Court of Appeal said, "if there were pleadings restrictions upon the agent Dr. Rivkin concerning a particular request for relief [punitive damages], it would be inconsistent to find no such pleading restrictions applied to his principal, SRS [Sharp Rees-Stealy Medical Group, Inc]."

Here, there is no judgment against the primary tortfeasors, HealthCare Partners' physician employees. But the law of vicarious liability applies whether or not the primary tortfeasor is sued along with the secondarily liable defendant. (See *Perez v. City of Huntington Park* (1992) 7 Cal.App.4th 817, 819-820; cf. *Jutzi v. County of Los Angeles* (1987) 196 Cal.App.3d 637, 649-651, & *Baxter v. Alexian Brothers Hospital* (1989) 214 Cal.App.3d 722, 725-726 [Health & Saf. Code, § 1799.110, restricting expert testimony in lawsuits involving emergency room physicians, can be invoked by a hospital sued on a theory of vicarious liability, whether or not the emergency room physician is sued].)

The language of the MICRA cap discloses no intention to depart from the common law rule that limits the amount recoverable from a party who is vicariously liable to the amount recoverable from the primary tortfeasor. (See Civ. Code, § 3333.2) To the contrary, the common law rule is in complete harmony with the MICRA cap, the purpose of which is explained in *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 111-112:

"[T]he Legislature enacted MICRA in response to a medical malpractice insurance 'crisis,' which it perceived threatened the quality of the state's health care. [Citation.] In the view of the Legislature, 'the rising cost of medical malpractice insurance was imposing serious problems for the health care system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments.' [Citations.] The continuing availability of adequate medical care depends directly on the availability of adequate insurance coverage, which in turn operates as a function of costs associated with medical malpractice litigation.

[Citation.] Accordingly, MICRA includes a variety of provisions all of which are calculated to reduce the cost of insurance by limiting the amount and timing of recovery in cases of professional negligence. [Citations.]

"MICRA thus reflects a *strong public policy to contain the costs of malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs*." (Emphasis added.)

Without the common law rule limiting the amount recoverable from a party who is vicariously liable, MICRA's "strong public policy to contain the costs of malpractice insurance by controlling . . . liability for damages" could be undermined. This is because most physicians in this state practice medicine under circumstances in which a legal entity of one sort or another could be held vicariously liable. (See, e.g., Bus. & Prof. Code, § 2416 [physicians may conduct their professional practices in a partnership or group of physicians]; Bus. & Prof. Code, § 2402 et seq. & Corp. Code, § 13401 et seq. [physicians may conduct their professional practices in a medical corporation]; *California Medical Assn. v. Regents of University of California* (2000) 79 Cal.App.4th 542, 548-550 [the University of California may employ physicians]; *Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 206 [the state and counties may employ physicians].) With increasing regularity, medical malpractice plaintiffs, like the plaintiffs in our case, sue the legal entity in addition to or instead of the physician, and argue that MICRA does not apply to the entity. The common law rule limiting the amount recoverable from a party who is vicariously liable helps to prevent this scheme from undermining MICRA.

Despite the compelling case law and logic behind HealthCare Partners' vicarious liability argument, the trial court gave it short shrift: "This court finds that the cases cited by defendant are unpersuasive and finds that *Flores*

v. Natividad Medical Center (1987) 192 Cal.App.3d 1106, 1116-17 [*Flores*], is more on point." (6 CT 1535.) But *Flores* is not on point at all. The reason the MICRA cap did not apply to the state's vicarious liability for noneconomic damages in *Flores* was because the action against the state was *not based on professional negligence*. The MICRA cap applies only in an "action for injury against a health care provider *based on professional negligence*." (Civ. Code, § 3333.2, subd. (a), emphasis added.) The state was *immune* from liability for professional negligence. (*Flores*, *supra*, 192 Cal.App.3d at pp. 1115-1116.)

Instead of professional negligence, the state's vicarious liability for noneconomic damages in *Flores* was based on failure to summon medical aid for a prisoner. [1/] (*Flores*, *supra*, 192 Cal.App.3d at p. 1116.) The Court of Appeal held that "MICRA does not apply to the cause of action against the State for failure to summon medical aid . . . ." (*Flores*, *supra*, 192 Cal.App.3d at p. 1114; see *Delaney v. Baker* (1999) 20 Cal.4th 23, 42, fn. 8.) The Court of Appeal also declined to "insulate the State from liability simply because, fortuitously, the employees who failed to summon assistance were doctors rather than other prison personnel." (*Flores*, *supra*, 192 Cal.App.3d at p. 1117; see *Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 115, fn. 8.)

Flores is inapposite. The pertinent case law is discussed *ante*, pages 9-11. Under that case law, HealthCare Partners, which was held vicariously liable for professional negligence (not for failure to summon medical aid for a prisoner), should benefit from MICRA to the same extent that its physician employees would benefit.

1/ Government Code section 845.6 provides in pertinent part: "[A] public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care."

C. HealthCare Partners is a "health care provider" within the meaning of MICRA, entitled in its own right to be protected by the MICRA cap.

Besides arguing below that the amount recoverable from a party who is vicariously liable is limited to the amount recoverable from the primary tortfeasor, HealthCare Partners argued that it, too, is a "health care provider" within the meaning of MICRA. (5 CT 1352, 1356-1358; 6 CT 1453-1454; 10 RT 2509, 2514-2515, 2517-2518.)

HealthCare Partners presented the undisputed declaration of Daniel Temianka, M.D., who is a "partner in the partnership known as HealthCare Partners Medical Group ('HCPMG')." (5 CT 1356.) Dr. Temianka explained: "The HCPMG partnership consists of duly licensed health care providers and is for the purpose of the practice of medicine. The HCPMG partnership is controlled and owned by the licensed health care provider partners." (5 CT 1357.)

Medical partnerships are expressly authorized by law. (Bus. & Prof. Code, § 2416 ["Physicians and surgeons . . . may conduct their professional practices in a partnership or group of physicians and surgeons"].) [2/] They are an exception to the ban on the corporate practice of medicine (see Bus. & Prof. Code, § 2400).

Medical partnerships also are expressly authorized to practice medicine under a fictitious name, provided that a fictitious name permit is obtained from the Division of Licensing of the Medical Board of California. (Bus. &

2/ Section 2416 is in division 2 of the Business and Professions Code, the division referenced by MICRA's definition of "health care provider."

Prof. Code, § 2415.) [3/] HealthCare Partners has a fictitious name permit (5 CT 1356-1358), which means the Division of Licensing is satisfied that HealthCare Partners' professional practice is wholly owned and entirely controlled by licensed physicians and surgeons. (Bus. & Prof. Code, § 2415, subds. (a) & (b); see *Steinsmith v. Medical Board* (2000) 85 Cal.App.4th 458, 460.)

It would make little sense to apply MICRA in an action for professional negligence against a natural person who is a licensed health care provider, but not in an action for professional negligence against a legal entity wholly owned and entirely controlled by natural persons who are licensed health care providers. Either way, the action is against licensed health care providers. (See *Preferred Risk Mutual Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208, 215 ["The cases agree that MICRA provisions should be construed liberally in order . . . to reduce malpractice insurance premiums"]; *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital*, *supra*, 8 Cal.4th 100, 112-113 [referring to "the role of the courts 'to aid in the familiar common law task of filling in the gaps in the [MICRA] statutory scheme'"]; see also *Taylor v. United States* (9th Cir. 1987) 821 F.2d 1428, 1431-1432 [MICRA applies to U.S. Army hospital and physicians even though they are not licensed under California law]; *Steinsmith v. Medical Board*, *supra*, 85 Cal.App.4th 458, 465 [referring to the requirement of a fictitious name permit as a "'licensing'" requirement].)

Recently, in *Palmer v. Superior Court*, *supra*, ___ Cal.App.4th at page ___ [02 D.A.R. at p. 13096], the Court of Appeal held that an incorporated medical group "must be considered to fall under the statutory definition in [Code of Civil Procedure] section 425.13, subdivision (b) of a health care

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3/ Section 2415 is in division 2 of the Business and Professions Code, the division referenced by MICRA's definition of "health care provider."

provider, because it is a medical group comprised of licensed medical practitioners, who provide direct medical services to patients, albeit under a fictitious name. (Bus. & Prof. Code, § 2415.) The statutory scheme does not contemplate that an additional license need be obtained for the medical group itself. (Bus. & Prof. Code, §§ 2406 & 2408; Corp. Code, § 13400 et seq.) Rather, the definition in section 425.13, subdivision (b) of 'health care provider' should be read broadly to implement its statutory purpose, protecting this type of health care provider, which delivers services to patients, from potentially unfounded punitive damages claims."

The *Palmer* analysis applies as well to the definition of "health care provider" in MICRA, which is virtually identical to the definition in section 425.13. (*Johnson v. Superior Court* (2002) 101 Cal.App.4th 869, 877-879.)

The trial court below took an unjustifiably narrow view: "While doctors are allowed to practice medicine under a fictitious name if the artificial legal entity is owned and operated by doctors [citations], only natural persons may be licensed to practice medicine [citation]. Thus, while the legislature expressly contemplated that doctors could work in medical groups, a license to practice medicine was limited to natural persons. The legislature provided a further safeguard to the public by giving no professional rights, privileges, or powers to fictitious legal entities [citation]." (6 CT 1532-1533.)

Apparently, the trial court overlooked Business and Professions Code section 2416, which gives professional rights, privileges, and powers to a fictitious legal entity, i.e., a medical partnership. True, a medical partnership is not separately licensed to practice medicine. But there is no *need* for the partnership to be separately licensed — not when all the partners are individually licensed. Because all the partners are individually licensed, a medical partnership is a "health care provider" within the meaning of MICRA. (See *Palmer v. Superior Court*, *supra*, ___ Cal.App.4th at pp. ___ [02 D.A.R.

at pp. 13094-13096].)

The trial court also concluded that there is no evidence to "support a finding that [HealthCare Partners] . . . is not a managed care entity, which entity is expressly excluded from the protection of Civil Code section 3333.2 by Civil Code section 3428. While section 3428 was not effective until January 1, 2001, its plain language makes clear that the legislature never intended managed care entities to be covered by MICRA." (6 CT 1534.)

This statement appears to be a backhanded finding that HealthCare Partners *is* a managed care entity within the meaning of section 3428. Based on what? HealthCare Partners proved that it is a partnership of licensed physicians and surgeons engaged in the practice of medicine under a fictitious name permit. (5 CT 1357.) A managed care entity, in contrast, is a health care service plan, i.e., an HMO. [4/] A managed care entity/HMO cannot obtain a fictitious name permit. (Health & Saf. Code, § 1366, subd. (b).) As the holder of a fictitious name permit, HealthCare Partners cannot be a managed care entity/HMO.

Moreover, if the trial court's finding that HealthCare Partners is a managed care entity were correct, the judgment against HealthCare Partners would have to be reversed with directions to enter judgment in favor of

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4/ Civil Code section 3428, subdivision (a), states: "a health care service plan or managed care entity . . . [is] described in subdivision (f) of Section 1345 of the Health and Safety Code . . . ." The cross-referenced statute, Health and Safety Code section 1345, subdivision (f), defines a "health care service plan." Since Civil Code section 3428, subdivision (a), states that *both* a "health care service plan" *and* a "managed care entity" are described in Health and Safety Code section 1345, subdivision (f), and the description in section 1345, subdivision (f) is of a "health care service plan," it follows that "health care service plan" and "managed care entity" are synonymous.

The paradigm "health care service plan"/"managed care entity" is an HMO. (See *Smith v. PacifiCare Behavioral Health of Cal., Inc.* (2001) 93 Cal.App.4th 139, 150, 157-158.)

HealthCare Partners. This is because, by statute, a managed care entity cannot be held liable for the professional negligence of a physician. (Health & Saf. Code, § 1371.25.) [5/]

The trial court's finding that HealthCare Partners is a managed care entity is so obviously wrong, however, that HealthCare Partners is not comfortable relying on it for any purpose, no matter how favorable that purpose might be. If the MICRA cap is applied and the noneconomic damages in each judgment are reduced to $145,000, this court need not consider whether the trial court's finding compels reversal of the entire

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5/ Section 1371.25 provides: "A plan, any entity contracting with a plan, and providers *are each responsible for their own acts or omissions, and are not liable for the acts or omissions of*, or the costs of defending, *others*. Any provision to the contrary in a contract with providers is void and unenforceable. Nothing in this section shall preclude a finding of liability on the part of a plan, any entity contracting with a plan, or a provider, based on the doctrines of equitable indemnity, comparative negligence, contribution, or other statutory or common law bases for liability." (Emphasis added.)

A "plan" is a "health care service plan" (Health & Saf. Code, § 1345, subd. (q)), i.e., an entity that "undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost for those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees" (Health & Saf. Code, § 1345, subds. (f)(1), (j)). "Health care service plan" and "managed care entity" are synonymous. (*Ante*, p. 17, fn. 8.)

A "provider" is "any professional person, organization, health facility, or other person or institution licensed by the state to deliver or furnish health care services." (Health & Saf. Code, § 1345, subd. (i).)

The language "or other statutory or common law bases for liability" should not be read to include the doctrine of vicarious liability. An HMO is allowed to employ the physicians who provide care to the HMO's patients. (Health & Saf. Code, § 1395, subd. (b); *Conrad v. Medical Bd. of California* (1996) 48 Cal.App.4th 1038, 1048.) Unless section 1371.25 precludes vicarious liability, every HMO that employs a physician who commits malpractice will be vicariously liable for that physician's malpractice, despite the fact that section 1371.25 expressly provides that HMOs and providers "are each responsible for their own acts or omissions, and are not liable for the acts or omissions of" each other.

judgment with directions.

II.

TERRY'S JUDGMENT SHOULD BE MODIFIED BY SETTING OFF THE POSTJUDGMENT SETTLEMENTS.

A. This is HealthCare Partners' first real opportunity to obtain a setoff.

After entry of Terry's judgment, codefendants Diagnostic Imaging and Dr. Lanflisi settled, paying $459,375 and $65,625, respectively. (6 CT 1518; Augment 40, 73, 83-84, 118.) The settlements were revealed when Diagnostic Imaging and Dr. Lanflisi filed motions for good faith settlement determinations. (Augment 36-125.) The good faith motions were filed just 10 days before expiration of the trial court's jurisdiction to rule on HealthCare Partners' pending motions for judgment notwithstanding the verdict and a new trial. [6/] (6 CT 1518; Augment 36-125; Code Civ. Proc., §§ 629 & 660 [trial court has 60 days after service of notice of entry of judgment in which to rule].) Also, by the time the good faith motions were filed, the time had long since passed for HealthCare Partners to file a motion to vacate the judgment and enter a different judgment. (See Code Civ. Proc., §§ 663-663a [motion to vacate must be filed within 15 days of service of notice of entry of

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6/ The good faith motions were filed on March 8, 2002. (Augment 36-125.) The hearing on HealthCare Partners' JNOV and new trial motions took place on March 11, only three days later. (10 RT 2529.) The trial court denied HealthCare Partners' JNOV and new trial motions on March 13. (6 CT 1698-1703.)

The hearing on Diagnostic Imaging's and Dr. Lanflisi's good faith motions took place on March 13, only five days after these motions were filed. (10 RT 2542-2560.) The ruling was on March 14. (Augment 147-148.)

judgment].)

The first real opportunity to obtain a setoff is now, on appeal. Because no disputed issues of fact exist regarding the settlements, this court should order Terry's judgment modified as set forth below. (See generally *Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1317-1318 & fn. 3 (*Ehret*); see also *Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 110-112.)

B. Both settlements should be allocated entirely to Terry's claim.

To calculate the setoff, the first task is to determine how much of the money paid in settlement should be allocated to Terry's claim. The settlements encompassed Terry's claim, Douglas's loss-of-consortium claim, and Terry's heirs' potential future wrongful death claim. (Augment 48-49, 73-74, 94, 118-121.) Settlement money allocated to Douglas's loss-of-consortium claim cannot be set off because his claim was entirely noneconomic damages. (*Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 863-864; see also *post*, p. 25). Settlement money allocated to the heirs' potential future wrongful death claim cannot be set off because the heirs' claim was not part of the trial below and is not part of the judgment. (*Hackett v. John Crane, Inc.* (2002) 98 Cal.App.4th 1233, 1240 (*Hackett*); *Wilson v. John Crane, Inc., supra*, 81 Cal.App.4th 847, 860-861.)

As we now explain, however, the settling codefendants never agreed to allocate a specific sum of money to Douglas's claim and to the heirs' potential future claim, and the trial court never found that a specific sum of money was allocated to those claims in good faith; therefore, HealthCare Partners is entitled to have the settlements allocated entirely to Terry's claim.

"In the typical one-plaintiff, multiple-defendants, personal injury action

each tortfeasor is potentially liable for the same injury to the plaintiff. Therefore the full settlement by one defendant will offset a judgment against other tortfeasors; no allocation of the settlement is required. But many lawsuits and many settlements do not fit this pattern. In some, the amount of the offset is uncertain because one settlement covers multiple plaintiffs or causes of action with different damages . . . ." (*Alcal Roofing & Insulation v. Superior Court* (1992) 8 Cal.App.4th 1121, 1124 (*Alcal*).)

"In a situation where the cash amount of the settlement does not dictate the amount of the offset, the settling parties *must* include an allocation or a valuation in their agreement." (*Alcal*, *supra*, 8 Cal.App.4th at pp. 1124-1125, emphasis added; accord, *Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1489 (*Erreca's*).) "Since the settling parties have the most knowledge of the value of the various claims they are attempting to settle, they are *required* to make an allocation of settlement proceeds among those various claims, subject to court approval of the showing made." (*Regan Roofing Co. v. Superior Court* (1994) 21 Cal.App.4th 1685, 1702 (*Regan*), emphasis added; accord, *Erreca's*, *supra*, 19 Cal.App.4th at p. 1491.) "[T]he settling parties *must* include an allocation or a valuation of the various claims in their settlement agreement in order to obtain a finding of good faith." (*Dillingham Construction, N.A., Inc. v. Nadel Partnership, Inc.* (1998) 64 Cal.App.4th 264, 282 (*Dillingham*), original emphasis; see *id*. at pp. 279-281; *Gouvis Engineering v. Superior Court* (1995) 37 Cal.App.4th 642, 648 ["The cases dealing with the obligation of the settling parties to allocate the settlement to various claims all impose that *requirement* for the specific purpose of arriving at the proper offset" (emphasis added)].)

"[W]here the settling parties have failed to allocate, the trial court *must* allocate in the manner which is most advantageous to the nonsettling party." (*Dillingham*, *supra*, 64 Cal.App.4th at p. 287, emphasis added; see *id*. at pp.

287-288; *Alcal, supra*, 8 Cal.App.4th at p. 1127 ["If any of [the settling defendants] did not allocate part of its settlement to nonroofing issues, roofer may obtain an offset for the *entire amount* of that defendant's settlement" (emphasis added)]; *Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 836 ["Absent some good faith agreement between plaintiffs and [the settling defendants] allocating the settlement consideration . . . , defendants were entitled to a setoff of the *entire* settlement figure" (emphasis added)]; Flahavan et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2002) ¶ 4:185.8f, p. 4-86.) [7/]

7/ In *Hackett, supra*, 98 Cal.App.4th 1233, the settling parties failed to allocate the settlement between the plaintiff's personal injury claim and the heirs' potential future wrongful death claim. (*Id*. at p. 1239.) Nevertheless, the trial court determined that 34 percent of the settlement should be allocated to the heirs' claim. (*Id*. at p. 1240.) The Court of Appeal concluded: "The trial court has wide discretion in allocating portions of a prior settlement to claims not adjudicated at trial. (See *North County Contractor's Assn. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1095 [33 Cal.Rptr.2d 166].)" (*Hackett, supra*, 98 Cal.App.4th at p. 1242.)

The case that *Hackett* cited, *North County Contractor's Assn. v. Touchstone Ins. Services, supra*, 27 Cal.App.4th at page 1095 (*North County*), did not involve allocation. The issue was whether the settlement appeared to be within the reasonable range of the settling party's proportionate share of comparative liability for the plaintiffs' injuries. (*Id*. at pp. 1089, 1094-1095.) In that context, *North County* said (*id*. at p. 1095): "The trial court has wide discretion in deciding whether a settlement is in good faith and in arriving at an allocation of valuation of the various interests involved. (*Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1495-1496 [24 Cal.Rptr.2d 156].)"

In the case that *North County* cited, *Erreca's*, the settling parties *did* allocate. (*Erreca's, supra*, 19 Cal.App.4th at pp. 1483-1484, 1488.) In that context, *Erreca's* said: "[T]he trial court is accorded wide discretion to control '[t]he nature, extent and the procedure' regarding any *challenges to the valuation placed on the settlement by the settling parties*." (*Id*. at p. 1496, emphasis added.)

North County and *Erreca's* lend no support to *Hackett's* assertion that the trial court has discretion to allocate in the first instance. *Erreca's* only

(continued...)

Even where the settling parties have allocated, "[t]he effectiveness of such an allocation depends upon its good faith." (*Erreca's*, *supra*, 19 Cal.App.4th at p. 1491.) "The statutory requirement of good faith extends not only to the amount of the overall settlement but as well to any allocation which operates to exclude any portion of the settlement from the setoff." (*Knox v. County of Los Angeles*, *supra*, 109 Cal.App.3d at p. 837; accord, *Ehret*, *supra*, 73 Cal.App.4th at p. 1321; *Regan*, *supra*, 21 Cal.App.4th at p. 1701; see *Dillingham*, *supra*, 64 Cal.App.4th at pp. 279-282.)

The good faith of the allocation should be determined at the same time as the good faith of the overall settlement amount. (*Regan*, *supra*, 21 Cal.App.4th at p. 1703 ["the credit or offset to be accorded a nonsettling defendant should normally be fixed at the time that the settlement is reached, since the issue of the credit is part of the overall good faith determination"]; *Erreca's*, *supra*, 19 Cal.App.4th at p. 1500, fn. 7.)

The nonsettling tortfeasor bears the burden of proving the allocation is not in good faith. (Code Civ. Proc., § 877.6, subd. (d); *Dillingham*, *supra*, 64 Cal.App.4th at pp. 280-281 & fn. 10; *Alcal*, *supra*, 8 Cal.App.4th at p. 1125.) *This burden does not arise*, however, until a party seeking confirmation of the settlement (1) explains to the trial court and to all other parties, by declaration or other written form, how the settlement is allocated and what the evidentiary basis for the allocation is, and (2) demonstrates that the allocation was reached in a sufficiently adversarial manner to justify a presumption of good faith. (*Dillingham*, *supra*, 64 Cal.App.4th at p. 279-281; *Ehret*, *supra*, 73

7/ (...continued)
stands for the proposition that the trial court has wide discretion to *approve* an allocation *by the settling parties* that is "reached in a sufficiently adversarial manner." (*Erreca's*, *supra*, 19 Cal.App.4th at p. 1496.)

Because *Hackett* strayed from the path set by *Erreca's* and the cases cited in the text above, it should not be followed.

Cal.App.4th at pp. 1320-1322; *L. C. Rudd & Son, Inc. v. Superior Court* (1997) 52 Cal.App.4th 742, 750; *Regan*, *supra*, 21 Cal.App.4th at pp. 1700-1701, 1702-1703, 1704; *Erreca's*, *supra*, 19 Cal.App.4th at pp. 1491, 1492-1493, 1494-1496; *Alcal*, *supra*, 8 Cal.App.4th at pp. 1124-1125, 1129.)

An allocation is reached in a sufficiently adversarial manner to justify a presumption of good faith only if the settling parties have "'truly adverse interests in the allocation.'" (*Erreca's*, *supra*, 19 Cal.App.4th at p. 1493.) "Collusion exists where only one of the parties cares how proceeds are allocated . . . ." (*Dillingham, supra*, 64 Cal.App.4th at p. 286.) "[I]f the allocation appears to be the result of collusion between parties, the trial court *must* find that the settlement, or at least the allocation, was not in good faith as a matter of law . . . ." (*Ibid*., emphasis added.)

In the instant case, the settling parties did *not* allocate any specific sum of money to Douglas's loss-of-consortium claim or to the heirs' potential future wrongful death claim. [8/] (Augment 73-78, 118-122.) Since there was no specific allocation by the settling parties, there also was no finding by the trial court that a specific allocation was in good faith. (See Augment 147-148.)

"[W]here the settling parties have failed to allocate, the trial court *must* allocate in the manner which is most advantageous to the nonsettling party." (*Dillingham*, *supra*, 64 Cal.App.4th at p. 287, emphasis added.) The allocation most favorable to HealthCare Partners is: Diagnostic Imaging's entire settlement ($459,375) and Dr. Lanflisi's entire settlement ($65,625) to Terry's claim.

8/ At the good faith hearing, Diagnostic Imaging's attorney went out of his way to make it clear that "we did not provide any allocation of any sort. We simply settled for a dollar amount . . . ." (10 RT 2544.)

C. The money allocated to Terry's claim should be allocated between her noneconomic and economic damages. The sum allocated to her economic damages is the setoff.

Having determined the amount of money allocated to Terry's claim, the next task is to allocate this money between Terry's noneconomic and economic damages. "'[E]ach defendant is solely responsible for its share of noneconomic damages under Civil Code section 1431.2 [Proposition 51]. Therefore, a nonsettling defendant *may not receive any setoff* under [Code of Civil Procedure] section 877 for the portion of a settlement by another defendant that is attributable to noneconomic damages.'" (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 518.)

The settlements of Terry's claim were postverdict. "[T]he amount of a postverdict settlement is to be allocated first to noneconomic damages, but only up to the amount of the settling defendant's liability for such damages under the verdict. The balance of the settlement, if any, is then to be credited against the judgment for economic damages." (*Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 7-8; see *id.* at pp. 37-42.)

Diagnostic Imaging's liability for Terry's noneconomic damages was 87.5% of $250,000, which is $218,750. (6 CT 1564.) This leaves $240,625 ($459,375 minus $218,750) to set off against the economic damages in Terry's judgment.

Dr. Lanflisi's liability for Terry's noneconomic damages was 12.5% of $250,000, which is $31,250. (6 CT 1564.) This leaves $34,375 ($65,625 minus $31,250) to set off against the economic damages in Terry's judgment.

The total setoff against the economic damages in Terry's judgment is $240,625 plus $34,375, which equals $275,000. Accordingly, the economic damages in Terry's judgment should be reduced from $403,055 to $128,055.

The *noneconomic* damages in Terry's judgment against HealthCare Partners should be reduced as well — from $145,000 to zero. This is because Terry already has recovered $250,000 from the settling codefendants, and "a plaintiff cannot recover more than $250,000 in noneconomic damages from all health care providers for one injury." (*Gilman v. Beverly California Corp.*, *supra*, 231 Cal.App.3d at p. 129; see *id*. at p. 128 ["Under MICRA, where more than one health care provider jointly contributes to a single injury, the maximum a plaintiff may recover for noneconomic damages is $250,000"]; accord, *Colburn v. United States* (S.D.Cal. 1998) 45 F.Supp.2d 787, 793 ["MICRA provides a $250,000 maximum aggregate recovery for a single plaintiff"].) [9/]

The above calculations are predicated on the assumption that, under the circumstances of this case, the *Torres v. Xomox Corp.* approach to allocating the settlements between noneconomic and economic damages should be based on the settling codefendants' *erroneously inflated liability* for noneconomic damages in the judgment, rather than on the settling codefendants' *actual liability* for noneconomic damages after the MICRA cap is applied to HealthCare Partners. [10/] Otherwise:

Diagnostic Imaging's liability for Terry's noneconomic damages would

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9/ Unless the noneconomic damages in Terry's judgment are reduced to zero, she will recover $218,750 from Diagnostic Imaging's settlement, plus $31,250 from Dr. Lanflisi's settlement, plus $145,000 (58% of $250,000) from HealthCare Partners. These sums total $395,000, which exceeds the $250,000 cap by $145,000.

10/ The trial court's erroneous failure to apply the MICRA cap to HealthCare Partners impacted all three defendants' liability for noneconomic damages, since the total liability of all three cannot exceed $250,000. (See *ante*, p. 26.) The trial court divided the $250,000 between Diagnostic Imaging and Dr. Lanflisi. The trial court should have divided the $250,000 among Diagnostic Imaging, Dr. Lanflisi, and HealthCare Partners.

be 35% of $250,000, which is $87,500. This would leave $371,875 ($459,375 minus $87,500) to set off against the economic damages in Terry's judgment.

Dr. Lanflisi's liability for Terry's noneconomic damages would be 5% of $250,000, which is $12,500. This would leave $53,125 ($65,625 minus $12,500) to set off against the economic damages in Terry's judgment.

The total setoff against the economic damages in the judgment would be $371,875 plus $53,125, which equals $425,000. Accordingly, the economic damages in the judgment would be reduced from $403,055 to zero. HealthCare Partners' only remaining liability would be its share of the noneconomic damages, which is 58% of $250,000, which equals $145,000.

D. Postjudgment interest on the portion of Terry's judgment that was paid by the settling codefendants should stop accruing as of the dates the settlements were paid.

The amount of postjudgment interest that should be included in Terry's judgment against HealthCare Partners depends on whether this court allocates the settlements between Terry's noneconomic and economic damages using (1) the settling codefendants' *erroneously inflated liability* for noneconomic damages in the judgment, or (2) the settling codefendants' *actual liability* for noneconomic damages after the MICRA cap is applied to HealthCare Partners. (See *ante*, p. 27.)

a. Under the "erroneously inflated liability" approach:

(a) Postjudgment interest accrued on $403,055 (the economic damages in Terry's judgment) from the date of entry of judgment until the date the first settlement was paid. [11/] Then interest accrued on the

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11/ If plaintiffs disclose the dates the settlements were paid, this court can (continued...)

remaining balance until the date the second settlement was paid. From that date, interest has accrued on $128,055 and will continue to accrue on that amount until the date of satisfaction of judgment.

(b) Postjudgment interest accrued on $145,000 (the noneconomic damages in Terry's judgment against HealthCare Partners) from the date of entry of judgment until the date the first settlement was paid. If Diagnostic Imaging's settlement was paid first, interest continued to accrue on $31,250 from the date Diagnostic Imaging's settlement was paid until the date Dr. Lanflisi's settlement was paid. [12/] If Dr. Lanflisi's settlement was paid first, interest continued to accrue on $145,000 until the date Diagnostic Imaging's settlement was paid. [13/] Once both settlements were paid, and Terry had recovered the maximum amount of noneconomic damages allowed by law, interest stopped.

(2) Under the "actual liability" approach:

(a) Postjudgment interest accrued on $403,055 (the economic damages) from the date of entry of judgment until the date the first settlement was paid. Then interest accrued on the remaining balance until the date the second settlement was paid. At that point, all the economic damages were paid, so interest stopped.

11/ (...continued)
specify those dates in its directions to the trial court. Otherwise, on remand, plaintiffs will have to disclose the payment dates to the trial court.

12/ If Diagnostic Imaging's settlement was paid first, the difference between the $250,000 cap and the $218,750 that Diagnostic Imaging paid was $31,250. At that point, only $31,250 of HealthCare Partners' $145,000 liability for noneconomic damages remained within the cap.

13/ If Dr. Lanflisi's settlement was paid first, the difference between the $250,000 cap and the $31,250 that Dr. Lanflisi paid was $218,750. At that point, all of HealthCare Partners' $145,000 liability for noneconomic damages remained within the cap.

(b) Postjudgment interest accrues on $145,000 (the noneconomic damages against HealthCare Partners) from the date of entry of judgment until the date of satisfaction of judgment.

CONCLUSION

The trial court erred by not allowing HealthCare Partners to benefit from the MICRA cap. The noneconomic damages in Terry's judgment against HealthCare Partners should be reduced from $1,218,000 to $145,000. The noneconomic damages in Douglas's judgment against HealthCare Partners should be reduced from $300,005 to $145,000.

The settlements by Diagnostic Imaging and Dr. Lanflisi should be set off against Terry's judgment. The result should be to reduce the economic damages from $403,055 to either $128,059 or zero, depending on which approach this court uses to allocate the settlements between Terry's noneconomic and economic damages.

After the settlement setoff, the noneconomic damages in Terry's judgment against HealthCare Partners should be either zero or $145,000, again depending on which approach this court uses to allocate the settlements between Terry's noneconomic and economic damages.

Terry's judgment should be modified to specify the manner in which postjudgment interest accrues. The amount of interest again depends on which approach this court uses to allocate the settlements between Terry's noneconomic and economic damages.