

STATE OF MICHIGAN  
IN THE SUPREME COURT  
ON APPEAL FROM THE COURT OF APPEALS

MYRIAM VELEZ,

Plaintiff-Appellee,

vs.

MARTIN TUMA, M.D.,

Defendant-Appellant.

Supreme Court Docket No. 138952

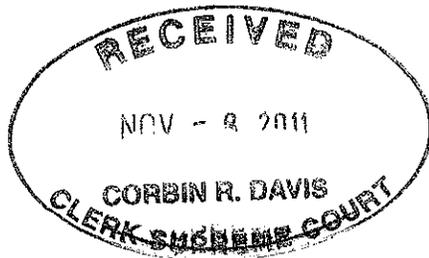
Court of Appeals No. 281136

Wayne County Circuit Court  
No. 04-402161-NH

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**BRIEF OF AMICI CURIAE MICHIGAN STATE MEDICAL SOCIETY  
AND AMERICAN MEDICAL ASSOCIATION**

**PROOF OF SERVICE**



**KERR RUSSELL AND WEBER PLC**

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### **BASIS FOR JURISDICTION**

Amici Curiae Michigan State Medical Society and American Medical Association refer this Court to Defendant-Appellant Martin Tuma, M.D.'s Brief on Appeal, which addresses the basis for jurisdiction.

### **STATEMENT OF QUESTIONS PRESENTED FOR REVIEW**

Whether the Court of Appeals erred in concluding that the amount a plaintiff receives from a settling joint tortfeasor was properly setoff against the jury verdict before application of the noneconomic damages cap and calculation of the final judgment.

The Court of Appeals would say "no."

Plaintiff-Appellee says "no."

Defendant-Appellant says "yes."

Amici Curiae MSMS and AMA say "yes."

### **STATEMENT OF FACTS**

Amici Curiae Michigan State Medical Society and American Medical Association rely upon the Statement of Facts recounted in Defendant-Appellant Martin Tuma, M.D.'s Brief on Appeal.

**STATEMENT OF INTEREST OF AMICI CURIAE MICHIGAN STATE MEDICAL  
SOCIETY AND AMERICAN MEDICAL ASSOCIATION**

Amicus Curiae Michigan State Medical Society (“MSMS”) is a professional association that represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS has a continuing interest in issues which affect the medical profession and the patients it serves. MSMS greatly appreciates the opportunities this Court has provided to MSMS and other interested groups to express their views on significant pending matters.

Amicus Curiae American Medical Association (“AMA”) is the largest professional association of physicians, residents and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents and medical students in the United States are represented in the AMA's policy-making process. AMA members practice and reside in all states, including Michigan. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

The question presented in the pending case – whether the amount paid by settling joint tortfeasors should be “set off” before or after the jury verdict is reduced to the statutory noneconomic damages cap – is an issue of first impression in this state. The Court of Appeals acknowledged that common law setoff survived the legislative elimination of statutory setoff. However, the manner in which the Court applied setoff allowed Plaintiff to recover noneconomic

damages in excess of the capped amount. The Court never acknowledged this result, focusing instead on the fact that Plaintiff's recovery, even after setoff, was less than the amount awarded by the jury. The Court reasoned that the purpose of joint and several liability is "to place the burden of injustice ... on the wrongdoer instead of on the innocent plaintiff" and *but for* the noneconomic damages cap and the collateral source rule, Dr. Velez would be liable for the remaining amount. Therefore, the Court reasoned, it is proper to deduct the setoff from the jury's award before application of the cap. *Velez v. Tuma*, 283 Mich App 396; 770 NW2d 89 (2009).

The Court's "but for" rationale is specious. Under no circumstance – with or without setoff – could Dr. Velez "be liable" for the amount the jury awarded. Given the legislative mandate which governs medical malpractice, economic damages *must be* adjusted in accordance with the collateral source rule, and noneconomic damages *must be* reduced to the capped amount. By disregarding this pivotal reality, the Court of Appeals has turned the recognized purpose of the setoff doctrine – to assure that a plaintiff only recovers once – on its head. Amici Curiae Michigan State Medical Society and the American Medical Association therefore respectfully join Dr. Velez's request for reversal.

**ARGUMENT**

**I. The Court of Appeals Erred in Applying Setoff to the Verdict Before Reducing the Verdict To the Noneconomic Damages Cap.**

**A. The Question Before This Court is Subject to De Novo Review.**

The setoff issue raised in this appeal is a question of law subject to de novo review. *See Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 249; 660 NW2d 344 (2003). Issues of statutory construction are also subject to de novo review. *Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008). The goal is "to give effect to the plain meaning of the

text” and “[i]f the text is unambiguous, we apply the language as written without construction or interpretation.” *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). *See also*, *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003) (“If the language of a statute is clear, no further analysis is necessary or allowed”); *People v Herron*, 464 Mich 593, 611; 628 NW2d 528 (2001) (words of a statute must be given “their plain and ordinary meaning”).

**B. The Court of Appeals Disregards the Noneconomic Damages Cap as the Determinant of a Plaintiff’s One Full Recovery in a Medical Malpractice Action.**

Setoff exists to further the fundamental principle that while joint tortfeasors are individually liable for the full amount of a judgment, “a plaintiff is only entitled to one full *recovery* for the same injury.” *Kaiser*, 480 Mich at 39 (emphasis added). In *Kaiser*, this Court explained:

An injured party has the right to pursue multiple tortfeasors jointly and severally and recover separate judgments; however, a single injury can lead to only a single compensation. *See Verhoeks v Gillivan*, 244 Mich 367, 371; 221 NW 287 (1928).

*Id.* at 39. This principle of common law setoff was codified in the former MCL 600.2925d(b), which (as of the last year in which the former statute was effective) stated in pertinent part:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons liable in tort for the same injury or the same wrongful death: . . .

(b) It reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.

With the advent of tort reform and the repeal of joint liability in most cases, the setoff provisions of MCL 600.2925d(b) were eliminated. The liability of each tortfeasor was to be determined according to the tortfeasor’s percentage of fault, such that each tortfeasor could only

be responsible for that portion of the total damages allocable to the tortfeasor, rendering setoff unnecessary. See MCL 600.2957(1), MCL 600.2956, MCL 600.6304; *Kaiser*, 480 Mich at 37.

There are circumstances, however, for which common law setoff continues to exist. In *Kaiser*, common law setoff was applied to determine a plaintiff's recovery of damages in a vehicle-owner vicarious liability case. Common law setoff likewise continues to exist in medical malpractice cases where, by express statute, joint and several liability has been preserved if the plaintiff is not at fault. See MCL 600.6304(6)(a); *Markley*, 255 Mich App at 251-252. *Velez* accepted *Markley*'s holding on this point and the continued viability of common law setoff was apparently not an issue in that court.<sup>1</sup>

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<sup>1</sup> Plaintiff improperly challenges the continuing viability of common law setoff as a predicate premise, despite this Court's express denial of leave to consider that issue. Plaintiff argues that through the amendment of MCL 600.2925d and MCL 600.6304(5), the Legislature intended "to wipe out setoffs in this state," and goes so far as to say that "by express direction of the Legislature, no setoffs are to be applied." Plaintiff's Br. at 7. Plaintiff offers no evidence of the Legislature's purported intent and although the Legislature could have included a provision in the amendment that "express[ly] direct[s]" that "no setoffs are to be applied," it has not done so (and Plaintiff provides no citation to any such "express direction"). In addressing this issue, *Markley* recognized that two principles arise in this context. The Court first noted the generally recognized rule that the repeal of a statute revives the common law as it existed before enactment of the statute, citing *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995) (superceded on other grounds, *People v Nowack*, 462 Mich 392; 614 NW2d 78 (2000)). The Court also noted a somewhat competing principle which provides that where comprehensive legislation details "a course of conduct," the "parties and things affected," and "specific limitations and exceptions," the Legislature "will be found to have intended that the statute supersede and replace the common law dealing with the subject matter," citing *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987). *Markley* properly determined that the second principle did not apply here, stating:

With tort reform and the switch to several liability, it is logical to conclude that common-law setoff in joint and several liability cases remained the law, where the new legislation was silent, where application of the common-law rule does not conflict with any current statutes concerning tort law, and where a plaintiff is conceivably overcompensated for its injury should the rule not be applied. Considering the general nature and tone of tort reform legislation, we conclude that the Legislature did not intend to allow recovery greater than the actual loss in joint and several liability cases when it deleted the relevant portion of §2925d, but

Facially, the issue before this Court relates to the manner in which setoff is to be applied, but the fundamental issue more deeply reflects resistance to the reach of the noneconomic damages cap. The implicit premise underlying the *Velez* analysis is that setoff should place the Plaintiff's ultimate recovery as close as possible to the jury's damages determination. This is evident from the Court's repeated emphasis on "value," "loss" and "claim," concepts which divert the analysis from the determinative principle of recoverability.

The *Velez* analysis begins with the proposition that under MCL 600.2925d(b) before tort reform, "prior settlements reached by joint tortfeasors before a verdict was reached were credited -- or setoff -- against the jury verdict, reducing the verdict by the settlement amounts." 283 Mich App at 410 (citing *Rittenhouse v Erhart*, 424 Mich 166, 181-183; 380 NW2d 440 (1985)). The Court then explained that the "**claim**" against a nonsettling tortfeasor equaled the total damages minus the settlement and "to arrive at the *value* of the unsettled, adjudicated part of the plaintiff's claim, the amount of a previous settlement had to be subtracted from the plaintiff's **total amount of loss as determined by the finder of fact.**" 283 Mich App at 410 (emphasis added). The Court's analysis continues with the recognition that the effect of setoff "was to eliminate a recovery by a plaintiff that was in excess of the *actual loss* sustained as determined by the finder of fact," and that "although the plaintiff was entitled to the **full amount of the damages the jury determined proper**, the source of payment could be split between the defendant and another." *Id.* at 411 (emphasis added). The Court reasoned that it was proper to deduct the settlement from the jury's award before application of the cap because plaintiff's recovery, even after setoff, was less than the amount awarded by the jury; the purpose of joint

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instead intended that common-law principles limiting a recovery to the actual loss would remain intact.

255 Mich App at 256-257.

and several liability is “to place the burden of injustice ... on the wrongdoer instead of on the innocent plaintiff;” and *but for* the noneconomic damages cap and the collateral source rule, Dr. Tuma would be liable for the remaining amount. *Id.* at 412. Indeed, the Court of Appeals went so far as to say that the jury’s determination *sets the limit* of a plaintiff’s recovery, and that setoff exists to “protect and enforce the trier of fact’s decision”:

When a matter is adjudicated, the plaintiff is exercising his or her constitutional right to have a trier of fact decide the case, including the matter of damages. See *Zdrojewski v Murphy*, 254 Mich App 50, 75-76; 657 NW2d 721 (2002). In cases where joint and several liability is imposed, the trier of fact’s determination of damages sets the limit regarding the amount of a plaintiff recovery for his or her loss. The common-law rule of setoff is applied to protect and enforce the trier of fact’s decision -- that is its ultimate purpose. By its application, a plaintiff is entitled to recover only that amount, in total, and not more; but not less either, at least not by operation of this rule of setoff. Again, the purpose of the setoff rule is to ensure that a plaintiff is not overcompensated for his or her actual loss as determined by the trier of fact. A single indivisible injury can lead to only a single recovery, even when joint tortfeasors combine to cause that injury and even though each tortfeasor is potentially liable for the entire amount of a plaintiff’s damages. Thus the setoff rule applies to the trier of fact’s determination of damages, and does not apply to, and directly reduce, the amount of the final judgment.

*Id.* at 413.

The articulated premise for the Court’s conclusion is faulty. The “value” of a medical malpractice claim and the extent of a plaintiff’s “loss” do not determine the plaintiff’s recovery. When the cap is triggered, a defendant is not liable for the “remaining amount” of the jury-determined loss beyond the setoff amount. The defendant is only liable for economic damages that are not offset under the collateral source rule and for noneconomic damages up to the capped amount. The Court of Appeals recognized this fact, *Id.* at 412-413, but did not permit it to influence the result, stating:

Here, the jury determined that plaintiff’s *actual loss* for her injury totaled \$1,524,831.86. See *MCL 600.6304(1)(a)*. Defendants and the settling tortfeasors were jointly and severally liable for that single indivisible injury. Because a portion of *that actual loss* was previously paid by the joint tortfeasors through a

settlement agreement, plaintiff remains entitled to a potential recovery from this defendant for the remainder of that loss -- \$1,329,831.86. Under principles of joint and several liability -- whose purpose, as stated in *Bell, supra at 471* [sic] is "to place the burden of injustice . . . on the wrongdoer instead of on the innocent plaintiff" -- defendant would be liable for the remainder of the damages but for the application of the collateral source rules and the statutory cap on noneconomic damages. This result is consistent with the purpose underlying common-law setoff—plaintiff is not overcompensated for her injury in that *her potential recovery is not greater than her actual loss* and she would only be entitled to one recovery for her single injury.

*Id.* at 412-413 (emphasis added).

The Court's deference to the jury's determination in disregard of the cap imperative is completely misplaced in this context. The appellate courts of this state, including this Court, have upheld the constitutionality of the non-economic damages cap not only in the medical malpractice context, but in other contexts as well. Constitutional challenges to the malpractice cap were rejected in *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002),<sup>2</sup> consistent with rulings upholding the constitutionality of the products liability cap in *Kenkel v The Stanley Works*, 256 Mich App 548; 665 NW2d 490 (2003),<sup>3</sup> and the auto lessors' liability cap in *Phillips v MIRAC*, 470 Mich 415; 685 NW2d 174 (2004).<sup>4</sup> In *Phillips*, this Court concluded that the cap

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<sup>2</sup> MCL 600.1483 was enacted by the Legislature in 1986 and amended in 1993 as part of Michigan's tort reform initiative. In *Zdrojewski*, the Court observed that the cap was designed to "control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs." 254 Mich App at 80. The cap amount is adjusted each year to reflect the cumulative annual percentage change in the consumer price index. MCL 600.1483(4).

<sup>3</sup> MCL 600.2946a limits damages for noneconomic loss to \$280,000 unless the defect in the product caused death or permanent loss of a vital bodily function, in which case damages are capped at \$500,000. These limits are adjusted each year by the State Treasurer to equal the limits under MCL 600.1483. MCL 600.2946a(1). In *Kenkel*, the Court of Appeals concluded that the statute was "rationally related to the legitimate governmental interests of encouraging the manufacture and distribution of products in Michigan and protecting those who place products in the stream of commerce from large damage awards in jury trials." 256 Mich App at 563.

<sup>4</sup> MCL 257.401(3) caps the damages recoverable for the vicarious liability of persons engaged in the business of leasing motor vehicles. MCL 257.401(3). The cap was enacted in 1995 to

did not offend the right to jury trial because “*the amount the plaintiff actually receives was never within those things a jury can decide.*” *Id.* at 429 (emphasis added). This Court observed that numerous statutes alter the amount of damages assessed by the jury or bar recovery altogether. *Id.* at 428-429. Among them are:

- Statutes which double or treble the jury’s damage award (MCL 125.996, MCL 230.7, MCL 257.1336, MCL 429.103, MCL 445.778);
- Statutes that set a minimum recovery (MCL 14.309, MCL 339.916, MCL 445.257, MCL 445.911, MCL 550.1406);
- Statutes which add costs, fees, interest or penalties to the jury’s award (MCL 35.462, MCL 125.1449m);
- Remittitur and addittur rules (MCR 2.611(A)(c)-(e));
- Statutes which permit the reduction of awards to present value (MCL 600.6306(1)(c)); and
- Statutes that limit full recovery when a plaintiff is more than 50% at fault or when plaintiff is operating his own vehicle while uninsured (MCL 600.2955a and MCL 500.3135).

In other words, once the verdict is rendered the jury’s function is complete and it is the court’s duty “to determine the legal effect of those findings, whether it be that her damages are capped, reduced, increased, tripled, reduced to present value, or completely unavailable.” *Phillips*, 470 Mich at 431. *See also, Jenkins v Patel*, 471 Mich 158, 172; 684 NW2d 346 (2004), where this Court observed that “§1483 does not diminish the ability of the trier of fact to render a fair and equitable award of damages; it merely limits the plaintiff’s ability to recover the full amount awarded in cases where the cause of action is based upon medical malpractice and the amount exceeds the cap.”

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address a concern that companies engaged in the leasing of motor vehicles were unfairly burdened with unlimited vicarious liability.

In *Charles Reinhart Co v Winiemki*, 444 Mich 579, 601; 513 NW2d 773 (1994), this Court recognized that juries “traditionally do not decide the law or the outcome of legal conflicts ... a jury may determine what happened, how, and when, but it may not resolve the law itself.” The Court of Appeals distinguished between a jury verdict and the judgment ultimately entered on the verdict in *Heinz v Chicago Road Investment Co*, 216 Mich App 289, 298; 549 NW2d 47 (1996), explaining:

A jury verdict ... does not become enforceable until the court enters a judgment on that verdict. Plaintiffs’ argument fails to comprehend the distinction between a judgment, which finally disposes of the claim between the parties, and the jury’s verdict, which is merely the basis for the judgment.

*See also Tull v United States*, 481 US 412, 426, n9; 107 S Ct 1831; 95 L Ed 2d 365 (1987) (nothing in the language of the Seventh Amendment “suggests that the right to a jury trial extends to the remedy phase of a civil trial.”)

In *Zdrojewski*, the Court of Appeals rejected the assertion that the Constitution guaranteed plaintiff the unfettered right to recover precisely what the jury awarded. 254 Mich App at 77-78. It is disconcerting to find that a variation of that very same argument is at play in *Velez*. After *Phillips*, *Zdrojewski*, *Jenkins* and *Kenkel*, the outer limits of a plaintiff’s one recovery is the noneconomic damages cap, not the jury’s verdict. The Court of Appeals’ failure to recognize this fact undermines its analysis and requires reversal.

**C. A Logical Reading of the Applicable Statutes Contemplates That the Cap Be Applied Before Setoff.**

While the precise issue before this Court is not addressed by statute or common law, the statutory framework for applying the noneconomic damages cap logically contemplates that the cap be applied before setoff. MCL 600.6304(3) directs that:

[t]he court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1) [relating to the total amount of each plaintiff’s damages and the percentage allocation of fault among persons

contributing to the injury], subject to any reduction under subsection (5) [the noneconomic damages cap] or section 2955a [impaired ability reduction] or 6303 [collateral source reduction], and shall enter judgment against each party ...”

“Total damages” are the unambiguous starting point for the court’s determination of the “award of damages.” The first specified reduction is to the noneconomic damages cap. *See* MCL 600.6304(3). This procedure is reinforced in subsection (5), which also directs a reduction from the “award of damages” to the capped amount. MCL 600.6304(5) states in pertinent part:

In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 [the noneconomic damages cap] to the amount of the appropriate limitation set forth in section 1483.

The same procedure is specified in MCL 600.6098, another caps provision, although the word choice here is “verdict.” The statute states at subsection (1):

A judge presiding over an action alleging medical malpractice shall review each *verdict* to determine if the limitation on noneconomic damages provided for in section 1483 applies. If the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount specified in section 1483.

*See also, Jenkins*, 471 Mich at 172 (“Only after the court or jury has, in its discretion, awarded damages as it considers fair and equitable does the court, pursuant to §6304(5), apply the noneconomic damages cap of §1483.”)

Under this legislative scheme, setoff cannot occur until after the specified statutory reductions are made and judgment is to enter. *See* MCL 600.6304(3). That is the only way to honor the plain language of the damages cap which, in no uncertain terms, limits “*the total amount* of damages for noneconomic loss *recoverable* by all plaintiffs” (emphasis added). MCL 600.1483(1) states in pertinent part (with emphasis added):

In an action for damages alleging medical malpractice by or against a person or party, *the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed \$280,000 unless, as the result of the negligence of 1 or more of the defendants, 1*

or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed \$500,000...”

*Velez* completely disregards this legislative mandate but, when faced with similar directives in their own statutes, courts in other states have not. In *Fairfax Hosp System Inc v Nevitt*, 457 SE2d 10 (Va 1995), the Virginia Supreme Court confirmed that settlements were to be included in the total amount a plaintiff could recover for medical malpractice injury. In that case, the trial court reduced the \$2 million jury verdict by the settlement amount and then reduced the remainder to the medical malpractice cap. Defendant argued that the court “should have reduced the verdict to the amount of the statutory cap and then applied the statutory credit for the amount of the settlement...” *Id.* at 13. The Supreme Court agreed with defendant, focusing on the language in the cap statute which prescribed “the total amount recoverable ...”

The Court explained:

The right of recovery to which the medical malpractice recovery cap is addressed is “the **total amount recoverable** for any injury to ... a patient”. The adjective “**recoverable**” modifies the words “**total amount**”. What is “**recoverable**” is that which is capable of recovery. Hence, the mandate of Code § 8.01-581.15 is that in any judgment entered against a health care provider, the quantum of the recovery for a medical malpractice injury cannot exceed the aggregate amount capable of recovery.

*Id.* at 14 (emphasis added). The Court deemed this result reinforced by Code § 8.01-35.1, which “expressly provides that ‘in determining the amount for which judgment shall be entered’ against a defendant at trial, ‘any amount recovered ... shall be reduced by ... the amount of the consideration paid’ in settlement with a joint tortfeasor.” The Court explained:

[T]he plain meaning of the two statutes in issue, read together, is that where there is a verdict by a jury or a judgment by a court against a health care provider for “injury to ... a patient” and the total amount recovered in that action and in all settlements related to the medical malpractice injury exceeds one million dollars, the total amount the plaintiff can recover for that injury is one million dollars.

*Id.* at 14-15. The Court emphasized that its conclusion “promotes the public policy purpose of the Medical Malpractice Act, which was designed to confront substantial problems of ‘escalating costs of medical malpractice insurance and the availability of such insurance ... adversely affecting the health, safety, and welfare of Virginia’s citizens.’” *Id.* at 15, n2 (quoting *Etheride v Medical Center Hospitals*, 376 SE2d 525, 528 (1989)).

In *Lockshin v Semsler*, 412 Md 257, 282; 987 A2d 18 (Md 2010), the Maryland Court of Appeals addressed the order in which a noneconomic damages cap and settlement credit were to be applied. The Court held that “the cap on non-economic damages must be applied to reduce the award or verdict prior to any reduction based on a joint tortfeasor settlement,” explaining:

Section 3-2A-09(b) provides that “an award or verdict under this subtitle for noneconomic damages ... *may not exceed \$650,000*” (citation omitted). The section mandates that a jury’s verdict may not exceed the statutory cap. ***Thus, any verdict rendered by a jury exceeding the amount of the non-economic damages cap inherently is a verdict in the amount of the cap from the moment it is rendered . . .*** Thus, the appropriate order of operations is to apply first the cap to the jury’s verdict for non-economic damages, followed by a credit for the joint tortfeasor settlement.

*Id.* at 283 (italic emphasis in original; bold emphasis added). *See also State of Idaho v Hudelson*, 146 Idaho 439, 447-448; 196 P3d 905 (Ida 2008) (statutory cap is the maximum value of a claim for noneconomic damages and limits recovery in a judgment or a settlement).

Michigan’s analogous statutes contain similar language, warranting a similar result. As described above, MCL 600.1483 provides that “[i]n an action for damages alleging medical malpractice by or against a person or party, the ***total amount of damages*** for noneconomic loss ***recoverable*** by all plaintiffs, resulting from the negligence of all defendants, shall not exceed \$280,000” unless one of the statutory exceptions applies (emphasis added). Concomitantly, MCL 600.6304 provides in pertinent part:

(3) The ***court shall determine the award of damages to each plaintiff*** in accordance with the findings under subsection (1), ***subject to any reduction under***

*subsection (5)* or section 2955a or 6303, **and shall enter judgment against each party**, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.

(5) In an action alleging medical malpractice, **the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation** set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

*Id.* (emphasis added). As in the above cases, the Michigan mandate is a limitation on the amount a plaintiff can **recover** for noneconomic damages.

Plaintiff unduly relies upon semantics to describe the “one full recovery” to be preserved by setoff. Quoting *Kaminski v Newton*, 176 Mich App 326; 438 NW2d 915 (1989), Plaintiff asserts that “[t]he adjudication of the amount of the loss” establishes the limit of an injured party’s entitlement to redress. Plaintiff’s Br. at 10. In truth, the nomenclature goes both ways. This Court has repeatedly described setoff as a deduction against the “judgment.” *See e.g., Michigan Dep’t of Transportation v Thrasher*, 446 Mich 61, 86-87; 521 NW2d 214 (1994) (“[t]he total **judgment** [sic] is reduced only by the settlement amount ...”) (emphasis added); *Thick v Lapeer Metal Products*, 419 Mich 342, 348, n1; 353 NW2d 464 (1984) (“[W]here a negligence action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his potential liability by paying a lump sum in exchange for a release, and a judgment is subsequently entered against the non-settling tortfeasor, **the judgment is reduced pro tanto by the settlement amount**”) (emphasis added). *See also, Salter v Patton*, 261 Mich App 559, 566; 682 NW2d 537 (2004) (“plaintiffs are not entitled to double recovery from settling and nonsettling defendants because the **judgment** will be reduced by the amount of the settlement”) (emphasis added).

But this Court has also used terms like verdict, damages, and liability to describe the object of setoff. Sometimes variations in terminology occur within a single opinion, as in *Mayhew v Berrien County Road Commission*, 414 Mich 399; 326 NW2d 366 (1982), where this Court described setoff as “the entire amount of damages minus the value of the settlement,” *id.* at 407, “the total liability of the joint tortfeasors minus the amount of the settlement ...” *id.* at 410, and “the verdict rendered by the jury ... reduced by the ... settlement ...” *id.* at 411.<sup>5</sup> *See also*, *Longworth v MDOT*, 110 Mich App 771, 784; 315 NW2d 135 (1981) (remanding with instructions to reduce the damage award by the amount of a settlement because it would be inequitable to permit plaintiffs a double recovery). Catch-phrases from the case law do not resolve the issue.<sup>6</sup> It is the cap, not the jury, which determines a plaintiff’s “one full recovery” in a medical malpractice case.<sup>7</sup>

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<sup>5</sup> Likewise, the Legislature sometimes uses verdict and judgment interchangeably. *See e.g.*, MCL 600.6305(1) (“Any verdict or judgment rendered by a trier of fact in a personal injury action subject to this chapter shall include specific findings of the following...”)

<sup>6</sup> Nor is the issue resolved by *Kaiser* or *Markley*. The noneconomic damages cap was not the issue in either case. In *Markley*, the Court expressly recognized that the noneconomic damages at issue did not exceed the cap and “therefore, there is no reason to address the damage cap.” 255 Mich App at 257-258.

<sup>7</sup> Plaintiff’s assertion that the cap does not apply to a settlement because it is impossible to know what portion of the settlement was allocable to noneconomic damages and thus part of the capped recovery is a red herring in this case, where collateral source reductions completely eliminated the jury’s economic damages award. Further, given that Plaintiff’s economic damage award was reduced to zero by the offset of the collateral source rule, *see* Plaintiff’s Br. at 1, Plaintiff’s assertion that the settlement setoff “must be taken against the *total* amount of the verdict, both economic and noneconomic damages,” is an enigma. Plaintiff’s Br. at 17. Plaintiff also argues that the Legislative failure to require that settlements be allocated between economic and noneconomic damages is “the product of the fact that all setoffs were supposed to be ended with the 1996 amendment of §2925d(b).” But the issue Plaintiff raises is not unique to common law setoff. To the extent it is an issue at all, it would have likewise existed with statutory setoff. Finally, Plaintiff argues that if the cap is applied before the setoff, a plaintiff who is guilty of some negligence will recover more than a plaintiff who has not been negligent because joint and several liability (and consequently setoff) does not apply if a plaintiff is guilty of some negligence. But as Plaintiff acknowledges, when only several liability exists, a defendant can identify non-parties at fault (including settling parties) and the jury must allocate their fault

Plaintiff urges this Court to resort to the terminology of the repealed statute, which directs that the “claim” against other tortfeasors be reduced by the settlement amount. See MCL 600.2925d(b). But this reads too much into the statute, which did not purport to address the mechanics of setoff or the time at which it was to occur. If “claim” were to be given that significance, the reduction would have to be taken while the claim is still a claim, before it is adjudged valid and assigned a value, i.e., before it is transformed into a verdict. See *Central Wholesale Warehouse v Chesapeake & O R Co*, 366 Mich 138, 149; 114 NW2d 221 (1962) (“‘Claim’ is defined to be ‘a demand of a right or alleged right; a calling on another for something due or asserted to be due; as, a claim of wages for services.’ Century Dictionary.”) (quoting *Allen v Board of State Auditors*, 122 Mich 324; 81 NW 113 (1899); *American Heritage Dictionary* (1981) (defining claim as a “demand for something as one’s rightful due; affirmation of a right” “basis for demanding something” “something claimed” “a statement of something as a fact”). See also, *Heinz*, 216 Mich App at 298, noting that a judgment “finally disposes of the claim between the parties.”<sup>8</sup>

In *Kaiser*, this Court explained that “[t]he common-law setoff rule should be applied to ensure that a plaintiff only recovers those damages to which he or she is entitled as compensation

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percentage. The non-settling defendant would only be liable for his or her own percentage of fault. Consequently, the circumstance Plaintiff postures is not comparable.

<sup>8</sup> Plaintiff’s reliance upon *Rittenhouse v Erhart*, 424 Mich 116; 380 NW2d 440 (1986), is also misplaced. *Rittenhouse* does not establish that the setoff reduction must be taken from the total amount of damages awarded. Rather, this Court ruled that setoff should be taken before the comparative fault reduction because the plaintiff’s percentage of fault was only determined in relation to the defendants participating at trial. “Therefore,” this Court explained, “a plaintiff’s comparative negligence should only be deducted from that part of the judgment to be paid by the defendant who was the only other party to a determination of fault.” 424 Mich at 182-183. The Court further stated that “[h]ad the jury . . . been asked to apportion fault among all those whose negligence proximately caused the damages, our method of calculation should perforce be the same as in *Lemos* [where the comparative negligence factor was deducted before the settlements]. *Id.* at 184.

for the whole injury.” 480 Mich at 40. Tort reform did not change this. As Justice Kelly explained:

The common-law setoff rule is based on the premise that a plaintiff is entitled to no more than full recovery for his or her injuries. Importantly, tort reform did nothing to overrule the common-law setoff rule. It simply makes it unnecessary to apply the rule in most situations. But in cases like this one, in which it is necessary to apply the rule to prevent overcompensation, its application is appropriate.

*Id.* at 43 (Kelly, J., concurring).

In this case, the noneconomic damages cap determines the compensation to which Plaintiff is entitled. The lower court’s disregard of this mandate allows Plaintiff to recover more than the law allows. Contrary to its purpose of preventing overcompensation, the setoff rule devised by the lower court would enable overcompensation and would thus defeat the Legislative purpose in enacting the cap.

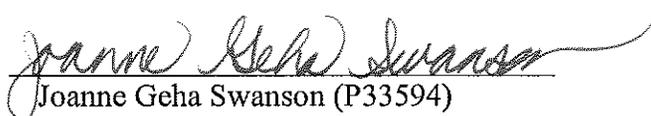
#### **RELIEF REQUESTED**

For these reasons, Michigan State Medical Society and the American Medical Association respectfully support Dr. Tuma’s request for reversal of the Court of Appeals decision and urge this Court to hold that the noneconomic damages cap must be applied to the jury’s verdict before setoff is applied.

Respectfully submitted,

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