

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)  
Judges Mark J. Cavanagh, Karen Fort Hood, and Alton T. Davis

MYRIAM VELEZ,

Docket No. 138952

*Plaintiff-Appellee,*

Court of Appeals No. 281136

v

Wayne County Circuit Court  
No. 04-402161 NH

MARTIN TUMA, M.D.,

*Defendant-Appellant.*

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DEFENDANT-APPELLANT'S BRIEF ON APPEAL

**\*\*ORAL ARGUMENT REQUESTED\*\***

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**STATEMENT REGARDING JURISDICTION**

The trial court entered the judgment in this case on July 13, 2007 (see **Appendix**, pp 16a-20a, Judgment). Defendant timely filed his motion for judgment notwithstanding the verdict or, alternatively, a new trial on August 3, 2007. MCR 2.611(B). The trial court entered its order denying defendant's motion on September 19, 2007 (see **Appendix**, p 21a, Order Denying Defendants' Motion for Judgment Notwithstanding the Verdict or New Trial). The trial court entered an order awarding plaintiff taxable costs, attorney fees as case evaluation sanctions, and prejudgment interest on September 20, 2007 (**Appendix**, pp 22a-26a). Defendants timely appealed to the Court of Appeals, which affirmed the trial court in a published opinion (**Appendix**, pp 27a-40a). Defendant-appellant timely filed an application for leave to appeal to this Court. Plaintiff also filed a cross application for leave to appeal to this Court. Although this Court initially denied both the application and the cross application, *Velez v Tuma*, 488 Mich 903 (2010), this Court granted defendant-appellant's motion for reconsideration, and on reconsideration, granted leave to appeal to Dr. Tuma (but not to plaintiff) limited to the issue of the proper application of the setoff for plaintiff's settlement with co-defendants, *Velez v Tuma*, 489 Mich 956 (2011).

Under Const 1963, art 6, § 4, MCL 600.215, MCR 7.301(A)(2), and MCR 7.302, this Court may grant leave to appeal after a decision of the Court of Appeals, and thus it has properly exercised jurisdiction over this appeal.

STATEMENT OF QUESTION PRESENTED

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I. Michigan retains joint liability for medical malpractice claims. Defendants are entitled to a setoff for settlements paid by joint tortfeasors to prevent plaintiffs from receiving “double recoveries.” The trial court applied a setoff before reducing the noneconomic damages to the capped amount. The resulting judgment was the same amount it would have been without a setoff. Does Michigan law require a setoff for a joint tortfeasor’s settlement to be deducted from what would otherwise be the judgment as opposed to the raw verdict in order to respect both the setoff and the statutory cap?

The trial court answered, “No.”

Plaintiff-appellee answered, “No.”

The Court of Appeals answered, “No.”

Defendant-appellant submits that the correct answer is, “Yes,” and that this Court should reverse and remand with instructions to enter judgment by first reducing damages to the 2007 lower noneconomic damages cap and then subtracting the \$195,000 settlement setoff.

**I. Introduction and Summary of Argument**

This medical malpractice case presents the question of how setoffs for settlements paid by joint tortfeasors interact with the non-economic damages cap set forth in MCL 600.1483. This issue is one of first impression in Michigan. Until now, there hasn't been a case that determines how settlement setoffs are to be applied when the statutory cap on non-economic damages also applies. In joint-liability situations, a defendant is entitled to a setoff for a settlement paid by a joint tortfeasor. Each defendant is answerable for a plaintiff's entire damage, so whatever a settling defendant paid reduces the remaining defendants' obligation. The reasoning is that plaintiffs cannot have a "double recovery" and recover more for their injuries than the amount to which they are entitled.

Here, two former codefendants paid \$195,000 and settled with plaintiff. Collateral-source reductions totally eliminated the jury's economic damages award and the judgment was limited to noneconomic damages. What is disputed is how to apply that settlement setoff. Plaintiff asserted, and the lower courts agreed, that the setoff of \$195,000 should be subtracted from the raw jury verdict of \$1.3+ million before the application of the non-economic damages cap statute. Under that formulation, however, the settlement setoff has no practical effect because the resulting judgment is the same as it would have been without the setoff: \$394,200. Dr. Tuma submits that to ensure that the noneconomic damages cap is honored and plaintiff is not overcompensated beyond the statutory cap, the verdict must first be reduced to the 2007 low cap and then the settlement setoff should be subtracted for a judgment of \$199,200. This Court should correct the lower courts' error and provide guidance to courts and litigants as to the correct way to apply settlement setoffs in noneconomic damages cap medical-malpractice cases.

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**II. Statement of pertinent facts.**

**A. Plaintiff's medical malpractice claim against Dr. Tuma.**

On January 22, 2000, plaintiff Myriam Velez underwent a triple-bypass heart surgery after suffering a heart attack.<sup>1</sup> On January 30, 2000, soon after she was discharged after her heart surgery, she arrived at the Detroit Receiving Hospital's emergency room complaining of pain in her left leg, but she was discharged and sent home.<sup>2</sup> She returned to the emergency room at Detroit Receiving the next day, complaining of pain and numbness in her left leg.<sup>3</sup>

Velez's heart surgeon, Dr. Apostolou, had Velez transferred to Harper Hospital and admitted there.<sup>4</sup> Dr. Apostolou asked for a vascular surgery consultation with Defendant Martin Tuma, M.D.<sup>5</sup> Dr. Tuma is a vascular surgeon at Harper Hospital.<sup>6</sup> Vascular surgeons specialize in such procedures as surgical bypasses in the legs, amputations, and treatment of problems in veins and arteries.<sup>7</sup>

Dr. Tuma received notification of the consultation request at about 7:50 a.m. on February 1, 2000 and saw plaintiff within one hour.<sup>8</sup> After pulse measurements were taken in her legs and feet, Dr. Tuma ordered an arteriogram, a dye test that helped him view the circulation in her blood vessels.<sup>9</sup> As a result of these tests, Dr. Tuma determined that clotting in her arteries had blocked the

<sup>1</sup> See Testimony of plaintiff's expert Wayne Gradman, M.D., Trial Transcript January 10, 2007, pp 17-18; **Appendix**, pp 69a-70a. Although there was a significant amount of medical testimony presented by the parties, the medical testimony is not relevant to the issue on appeal and will merely be very compactly presented to provide this Court with the context of the parties' dispute.

<sup>2</sup> *Id.*, p 17; **Appendix**, pp 69a-70a; Testimony of Dr. Tuma, Trial Transcript January 8, 2007, pp 184-185; **Appendix**, pp 52a-53a.

<sup>3</sup> Gradman, 01/10/2007, pp 17-18; **Appendix**, pp 69a-70a; Tuma, 01/08/2007, pp 184-185; **Appendix**, pp 69a-70a.

<sup>4</sup> *Id.*, pp 18-19; **Appendix**, pp 70a-71a; Trial Transcript, January 9, 2007, pp 31-32; **Appendix**, pp 60a-61a.

<sup>5</sup> *Id.*, pp 19-20; Tuma, 01/09/2007, pp 31-32; **Appendix**, pp 60a-61a.

<sup>6</sup> Tuma, 01/09/2007, pp 22-23; **Appendix**, pp 58a-59a.

<sup>7</sup> *Id.*

<sup>8</sup> Tuma, 01/08/2007, p 158; **Appendix**, p 41a.

<sup>9</sup> *Id.*, 163-167; **Appendix**, pp 42a-46a.

blood flow to Velez's legs, depriving them of blood and oxygen.<sup>10</sup> Dr. Tuma testified that he concluded that Velez's left leg was not salvageable, and on February 1, 2000, he advised Velez that she should have her left leg amputated.<sup>11</sup> Velez refused to consent to that surgery, and continued to refuse until February 12, 2000, when she finally agreed—even then, however, she would not agree to have the surgery until the following day.<sup>12</sup> Plaintiff's theory, on the other hand, was that Dr. Tuma never advised Velez of needing an amputation because his intent was to try and salvage the leg, an attempt plaintiff contends failed because of a delay in taking her to surgery. For her part, though, Velez admitted that she didn't even remember talking to **any** doctor for the first seven days she was in the hospital.<sup>13</sup>

Dr. Tuma took Velez to surgery on February 2, 2000 to remove blot clots and try to restore blood flow to her legs.<sup>14</sup> His goal was to save Velez's life, to save her right leg, and to restore as much blood flow as possible to her left leg to salvage as much of the muscle mass as possible before the amputation, which would make fitting a prosthesis easier.<sup>15</sup> He performed two more surgeries on February 4 and February 8, 2000, to remove more blood clots that formed after surgery.<sup>16</sup> Finally, Dr. Tuma performed a below-the-knee amputation of Velez's leg on February 13, 2000.<sup>17</sup>

Velez filed this medical-malpractice action against Dr. Tuma, claiming that he should have somehow acted sooner to salvage her leg. The jury returned a verdict in her favor against Dr. Tuma.

<sup>10</sup> Tuma, 01/09/2007, pp 46-49; **Appendix**, pp 63a-66a

<sup>11</sup> Tuma, 01/08/2007, pp 171-172; **Appendix**, pp 47a-48a; 01/09/2007, pp 59-60; **Appendix**, pp 67a-68a.

<sup>12</sup> Tuma, 01/08/2007, pp 171-172; **Appendix**, pp 47a-48a.

<sup>13</sup> Velez, Trial Transcript, January 11, 2007, pp 26-29; **Appendix**, pp 73a-76a.

<sup>14</sup> Tuma, 01/08/2007, pp 180-181; **Appendix**, pp 50a-51a.

<sup>15</sup> Tuma, 01/09/2007, pp 45-46; **Appendix**, pp 62a-63a.

<sup>16</sup> Tuma, 01/08/2007, pp 187, 189, 190-191; **Appendix**, pp 54a-57a.

<sup>17</sup> *Id.*, pp 171-172; **Appendix**, pp 47a-48a.

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**B. The trial court applied the setoff for the former co-defendants' settlement before applying the non-economic damages cap, which meant it had no effect on the judgment amount.**

Former codefendants Detroit Receiving Hospital and University Health Center and

Harper Hospital settled with Velez and were dismissed from this case in exchange for paying her \$195,000.<sup>18</sup>

Velez submitted a proposed judgment to which Dr. Tuma timely objected. Tuma raised a number of objections to the proposed judgment, including, in relevant part, the fact that the proposed judgment made no allowance for setoff of the \$195,000 settlement paid by the hospital codefendants.

Judge Stephens held a hearing on Velez's proposed judgment and the objections Dr. Tuma raised. There was no dispute about Dr. Tuma's entitlement to a setoff for plaintiff's settlement with the hospital defendants,<sup>19</sup> but the parties disagreed about how the setoff should be applied. Tuma urged that the settlement should be set off from what would otherwise be the *judgment* amount after reducing non-economic damages to the appropriate lower cap.<sup>20</sup> Velez, on the other hand, urged applying the setoff to the entire verdict amount *before* reduction to judgment.<sup>21</sup> The trial court agreed with Velez.<sup>22</sup> Judge Stephens acknowledged that her ruling meant that Velez would recover a greater amount of non-economic damages than she was entitled to recover by law because plaintiff would receive the full statutory amount of non-economic damages *plus* the settlement from the hospital:

The Court believes that *Markley* says verdict. I don't know what they meant, but I'll take it literally, and we will apply it to the verdict. I will absolutely concur that that will *result in a plaintiff receiving more money than the cap amount*.<sup>[23]</sup>

<sup>18</sup> Settlement Agreement, **Appendix**, pp 130a-136a.

<sup>19</sup> See plaintiff's response to Dr. Tuma's objections to plaintiff's proposed judgment, dated February 27, 2007; **Appendix**, pp 113a-124a.

<sup>20</sup> The parties agree that the 2007 lower cap, not the higher one, applies here.

<sup>21</sup> See plaintiff's response to Dr. Tuma's objections to plaintiff's proposed judgment, dated February 27, 2007, pp 4-7; **Appendix**, pp 113a-124a.

<sup>22</sup> See March 2, 2007 Hearing Transcript, **Appendix** pp 99a-100a (Transcript pages 23-24).

<sup>23</sup> *Id.*

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Judge Stephens was impressed by the Court of Appeals writing about the “verdict” being reduced in *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 249 (2003) (the panel also wrote about reduction of the “judgment”).<sup>24</sup> Judge Stephens decided that she would apply the setoff to the raw “verdict,” before it was reduced to judgment.<sup>25</sup>

**C. The Court of Appeals affirms the trial court decision regarding the application of the setoff.**

Dr. Tuma appealed to the Court of Appeals. A panel consisting of Judges Mark Cavanagh, Karen Fort Hood, and Alton Davis affirmed the trial court’s rulings. *Velez v Tuma*, 283 Mich App 396 (2009). With respect to the setoff for the settlement paid by the settling former co-defendant in this case, the Court of Appeals acknowledged that it was necessary to set off that amount to ensure that Velez “is not overcompensated for her injury”:

To ensure that plaintiff is not overcompensated for her injury, as determined by the jury, the setoff rule applies and the partial payment of \$195,000 is subtracted from the jury verdict. [*Velez, supra* at 414; **Appendix** p 35a.]

Despite this, the Court of Appeals nevertheless affirmed the trial court’s application of the setoff before application of the non-economic damages cap, which ultimately led to no change whatsoever in the judgment amount entered in Velez’s favor.

**III. Argument: Michigan retains joint liability for medical malpractice claims. Non-settling defendants are entitled to a setoff for settlements paid by codefendants to prevent plaintiffs from receiving a “double recovery.” The trial court applied a setoff before reducing the noneconomic damages to the capped amount. The resulting judgment was the same amount it would have been without a setoff. Michigan law requires a setoff for a joint tortfeasor’s settlement to be deducted from what would otherwise be the judgment as opposed to the raw verdict in order to respect both the setoff and the statutory cap.**

Velez settled with codefendants Detroit Receiving Hospital and University Health Center and Harper Hospital for \$195,000. She went to trial only against Dr. Tuma. When it was time to enter judgment, neither Velez nor the trial court disputed Dr. Tuma’s entitlement to a setoff for

<sup>24</sup> 3/2/2007 Hearing, **Appendix** pp 99a-100a (Transcript pages 23-24).

<sup>25</sup> *Id.*

Velez's settlement with the hospital codefendants.<sup>26</sup> Dr. Tuma argued that the policy behind setoffs, as well as the case law on point, prohibits plaintiffs from receiving "double recoveries" for their injuries. Dr. Tuma asserted that to respect this precedent and the cap statute, the setoff should have been applied to what would otherwise be the final judgment amount—in other words, the amount that remains after reducing the damages to the appropriate capped amount. Velez argued that the setoff should be subtracted from the "raw" jury verdict rather than from the final judgment. The trial court agreed with Velez, relying on *Markley v Oak Health Care*, 255 Mich App 245 (2003) and its interchangeable use of the terms "verdict" and "judgment." Using the amount of the "raw" verdict as the judgment awards Velez the same amount she would have received in the absence of any settlement setoff. This defeats the purpose of having settlement setoffs in the first place and allows Velez to recover a larger award for her injuries than Michigan law says she is entitled to.

**A. Standard of Review**

The proper application of a settlement setoff is a question of law that is reviewed de novo. *Kaiser v Allen*, 480 Mich 31, 35 (2008); *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 249 (2003), citing *Cardinal Mooney High Sch v Michigan High Sch Athletic Ass'n*, 437 Mich 75, 80 (1991).

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<sup>26</sup> Plaintiff only belatedly raised the issue of whether Dr. Tuma was entitled to a setoff for the first time in a footnote in her Court of Appeals brief. Plaintiff's Court of Appeals brief, p 33 n 5; **Appendix**, p 125a. Even then, there was almost no authority cited for the assertion. An issue that is not raised, addressed by, and decided by the trial court is not preserved for appellate review. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533 (2003); *Walters v Nadell*, 481 Mich 377, 387-388 (2008). Plaintiff filed a cross application for leave to appeal to this Court, which this Court denied. *Velez v Tuma*, 488 Mich 903 (2010). Plaintiff didn't move for reconsideration, and this Court only granted Dr. Tuma's application, limited to the issue of how the setoff interacts with the noneconomic damages cap. Importantly, this Court already decided the issue of the availability of common-law setoffs in joint-liability cases three years ago in *Kaiser v Allen*, 480 Mich 31 (2008). The issue of whether Dr. Tuma is entitled to a settlement setoff is not properly before this Court.

**B. Michigan’s commitment to the principle that in joint-liability cases, a plaintiff is entitled to only one recovery for the plaintiff’s injury has long and repeatedly been affirmed by this Court and the Court of Appeals. To honor that commitment, courts must subtract the amounts paid by settling joint tortfeasors from the amount recovered from nonsettling defendants.**

As this Court explained in *Kaiser v Allen*, 480 Mich 31, 39 (2008), “[t]he common-law setoff rule is based on the principle that a plaintiff is only entitled to **one full recovery for the same injury.**” (Emphasis added.) *Kaiser* was an auto-negligence claim that arose from an accident that killed the plaintiff’s decedent. The plaintiff sued two people: Allen, the driver of the car that killed his decedent, and Keidel on a vicarious-liability basis as the owner of the car Allen was driving. Keidel settled with plaintiff for \$300,000 and was dismissed from the suit before trial. *Id.* at 34. The case went to trial against Allen, and the jury awarded the plaintiff \$100,000 in damages against Allen. *Id.* Allen requested that the trial court set the \$300,000 settlement off against the \$100,000 jury award. *Id.* The trial court agreed, which resulted in a reduction of the jury’s award to zero upon entry of judgment. *Id.* The Court of Appeals reversed, concluding that the tort-reform statutes abolished joint liability and that the jury’s verdict was allocated only to Allen’s fault and not to Keidel’s. *Id.* This Court, however, disagreed, reversed the Court of Appeals, and held that the jury’s award must be reduced by the amount of the settlement. *Id.* at 40. This Court explained that “[t]o the extent that joint and several liability principles have not been abrogated by statute, they remain the law in Michigan.” *Id.* at 34. Because joint liability remains, it is also the case that “the common-law setoff rule remains the law in Michigan for vehicle-owner vicarious-liability cases.” *Id.* In other words, where there is joint liability, there must be a setoff to ensure that the plaintiff only receives a single recovery for his or her injury. As Justice Kelly explained in her concurring opinion in *Kaiser*, “[a] corollary of joint and several liability was that, if one of the tortfeasors settled, the judgment against the nonsettling defendant was reduced by the settlement amount.” *Id.* at 41 (Kelly, J., concurring). Justice Kelly wrote that “the injured party was limited to one full recovery” and that “[t]his limitation became known as the common-law setoff rule.” *Id.* And as this Court explained in *Stitt v Mahaney*, 403 Mich 711, 725-726 (1978), “[t]o limit an injured party to one satisfaction for his or her total injuries is basic to the concept of civil justice ....”

In reaffirming this principle in *Kaiser*, this Court looked back to its 1928 decision in *Verhoeks v Gillivan*, 244 Mich 367, 371 (1928), in which the Court held that “whatever has been paid” by one joint tortfeasor “must apply pro tanto upon [the plaintiff’s] further recovery”:

The liability of tort-feasors for a joint tort is joint and several. The injured party has the right to pursue them jointly or severally at his election, and recover separate judgments; but, the injury being single, he may recover but one compensation. Therefore he may elect de melioribus damnis and issue his execution accordingly, but if he obtains only partial satisfaction he has not precluded himself from proceeding against another cotortfeasor; his election of the first judgment concluding him only as to the amount he may receive, and whatever has been paid must apply pro tanto upon his further recovery. [*Verhoeks v Gillivan*, 244 Mich 367, 371 (1928).]

In *Larabell v Schuknecht*, 309 Mich 419 (1944), the trial court refused to give one dram shop defendant a setoff for a settlement paid by a jointly liable bar. This Court reversed, however, holding that the defendant was entitled to a setoff because the “plaintiff could have but ‘one satisfaction for his injuries; the amount paid to the person in whose favor the covenant not to sue is given will be regarded as a satisfaction, pro tanto, as to the joint tort-feasors.’” *Id.* at 423.

The common-law rule regarding settlement setoffs is “that where 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.” *Markley v Oak Health Care*, 255 Mich App 245, 250 (2003), quoting *Thick v Lapeer Metal Products*, 419 Mich 342, 348 n 1 (1984) and citing *Larabell*, *supra* at 423 and *Cooper v Christensen*, 29 Mich App 181, 183-184 (1970). “The common-law rule of setoff is predicated on the principle that a plaintiff is entitled to only one recovery for his injury.” *Markley*, *supra* at 250, citing *Great Northern Packaging, Inc v General Tire & Rubber Co*, 154 Mich App 777, 781 (1986).

The Restatement (Second) of Torts has also codified the common-law setoff rule:

A payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made, whether or not the person making the payment is liable to the injured person and whether or not it is so agreed at the time of payment or the payment is made before or after judgment. [Restatement (Second) of Torts § 885(3) (1979).]

The Legislature codified this common-law rule at MCL 600.2925d(b). *Markley, supra* at 255. But tort-reform legislation led to the abolition of joint-and-several liability in most cases, **except** in medical-malpractice cases. MCL 600.2956; MCL 600.6304(6). Because of the abolition of joint liability, the Legislature also repealed the setoff language that had been codified at MCL 600.2925d(b). After the amendment of MCL 600.2925d, the statute no longer addresses setoffs. *Markley, supra* at 256. This is because “[w]hen liability is several, each tortfeasor ordinarily will be liable for the percentage of damages attributable to his or her own negligence.” *Kaiser, supra* at 42 (Kelly, J., concurring), citing MCL 600.2957(1) and 600.6304(4) and (8). In such a case, “[a] setoff will be unnecessary because, even without it, the plaintiff will recover full compensation only once.” *Id.* at 42 (Kelly, J., concurring). “Importantly, tort reform did nothing to overrule the common-law setoff rule.” *Id.* at 43 (Kelly, J., concurring). Instead, “[i]t simply makes it unnecessary to apply the rule in most situations.” *Id.* “But in cases like this one [involving joint liability], in which it is necessary to apply the rule to prevent overcompensation, its application is appropriate.” *Id.*

**C. MCL 600.6306’s entry-of-judgment terms give no guidance for when the cap is to be applied in relation to the setoff. But to honor the purpose of the setoff, guarding against double recoveries, it must be applied *after* application of the cap.**

The question here is one of first impression: how does the common-law settlement set-off interact with the noneconomic damages cap—does the setoff get applied to the pre- or post-cap amount? Michigan has a statute that prescribes the procedure for reducing jury awards to judgments. MCL 600.6306 provides that “after a verdict is rendered by a trier of fact in favor of a plaintiff,” the court is to enter an “order of judgment” that contains an amount calculated in a precisely defined sequence, with collateral-source payments deducted as appropriate. There is,

however, no step in this precisely defined sequence that provides that a settlement setoff must first be deducted from the verdict, as the trial judge did here:

(1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:

(a) All past economic damages, less collateral source payments as provided for in section 6303.

(b) All past noneconomic damages.

(c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.

(d) All future medical and other health care costs reduced to gross present cash value.

(e) All future noneconomic damages reduced to gross present cash value.

(f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 on the judgment amounts. [MCL 600.6306(1).]

Here, the trial court ruled, correctly, that collateral sources reduced all economic damages to zero. After that reduction was applied, only noneconomic damages remained.

The statutory cap on noneconomic damages in medical-malpractice cases imposed under MCL 600.1483 required the reduction of the jury's award of \$1.4 million in total noneconomic damages. MCL 600.1483. MCL 600.1483 provides that total amount of noneconomic damages in medical-malpractice cases is to be capped at an amount that "shall not exceed \$280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the ... exceptions" in MCL 600.1483(1)(a), (1)(b) or (1)(c) "apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed \$500,000.00 ...." MCL 600.1483(1). There is no dispute that none of the exceptions apply here, and that the lower of the two amounts is applicable. The trial court ruled that the appropriate amount is \$394,200, the adjusted amount for 2007.<sup>27</sup>

<sup>27</sup> The cap amount is subject to adjustment each year: "The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index." MCL 600.1483(4). The Michigan Department of Treasury provides a report, updated annually, with the appropriate cap amounts as adjusted online at [http://www.michigan.gov/documents/nonecolimit101\\_3658\\_7.pdf](http://www.michigan.gov/documents/nonecolimit101_3658_7.pdf).

Since joint liability still applies to defendants in medical-malpractice cases,<sup>28</sup> even though the Legislature’s “tort reform” legislation abolished joint liability in almost all other types of personal-injury actions, the common-law setoff must be applied to judgments in medical-malpractice cases.

In *Markley*, the Court of Appeals confirmed that a medical-malpractice defendant who proceeds to trial is entitled to a setoff for the amount of any settlements paid by codefendants.<sup>29</sup> The plaintiff estate in *Markley* sued Community Health Center for its decedent’s wrongful death. It settled the wrongful death case for \$220,000. The estate then sued the nursing-home defendants in a separate lawsuit that was tried to a total “wrongful death damages” award of \$300,000. The court held that the full \$220,000 paid in settlement for wrongful-death damages should be deducted from the \$300,000 that the jury awarded. The result was that the nursing-home defendants were only required to pay \$80,000 in damages, with pre- and post-judgment interest owed only on that reduced amount.

The Court of Appeals relied upon “the common-law rule ‘that where 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.’” *Markley, supra* at 250, quoting *Thick, supra* at 348 n 1 (1984) (emphasis added). The panel explained that before the Legislature’s enactment of “tort reform” legislation in 1995, this common-law setoff rule was codified as a subsection of MCL 600.2925d. *Markley, supra* at 254-255. The same legislation that abolished joint liability in most cases also repealed this subsection of the contribution statute. *Id.* The court reasoned that because joint liability had been abolished for most tort causes of action, there “would be no need for a setoff because the tortfeasor-defendant not involved in the settlement would necessarily be responsible for an

<sup>28</sup> MCL 600.6304(6)(a), which applies to medical malpractice cases, provides that “...the liability of each defendant is joint and several...,” unless a plaintiff is comparatively at fault. See MCL 600.6304(4) & (6)(a). Velez was not found to be at fault.

<sup>29</sup> Indeed, the Court of Appeals held in *Markley* that a setoff is even available to a defendant who is sued in a *separate lawsuit* for the same wrongful death.

amount of damages distinct from the settling defendant on the basis of allocation of fault.” *Id.* at 255. The panel recognized, however, that because joint liability was expressly retained for medical-malpractice cases, the same reasoning did not apply to medical-malpractice defendants.

*Id.*

Noting that “[t]he comprehensive tort reform legislation, however, simply no longer addressed the issue of setoff in any manner,” the Court of Appeals held that where the Legislature retained joint-and-several liability, “it is logical to conclude that common-law setoff in joint and several liability cases remained the law ....” *Markley, supra* at 256, 257.

The Court of Appeals stressed that it is essential to retain setoffs for settlements of joint tortfeasors in cases with joint liability, because to do anything else would “defeat the principle underlying common-law setoff, that being that a plaintiff can have but one recovery for an injury.” *Markley, supra* at 257. The panel decided that “the principle of one recovery and the common-law rule of set-off, in the context of joint and several liability cases, continue to be the law in Michigan.” *Id.*

Likewise, in *Kaiser, supra*, this Court affirmed that common-law settlement setoffs must be applied to reduce jury awards in cases in which joint liability has been retained. In *Kaiser*, this Court held that because the vehicle owner, Keidel, was liable for all of the damages for which the driver Allen was liable by virtue of the owner-liability statute, a setoff must apply “to ensure that a plaintiff only recovers those damages to which he or she is entitled as compensation for the whole injury”:

[D]amages in this case are *all* due to the fault of Allen because Keidel is only vicariously liable for Allen’s actions—Keidel is liable for *everything* that Allen is liable for through vicarious liability conferred by the vehicle-owner liability statute. Allowing plaintiff to recover the entire verdict against Allen and to retain all the proceeds from the settlement with Keidel would allow the plaintiff to recover four times more than the jury determined plaintiff should be awarded for his injuries. The Legislature did not intend that a plaintiff be awarded damages greater than the actual loss in vicarious-liability cases, resulting in a double recovery. The 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 for the whole injury**. Plaintiff’s jury

verdict against Allen must be offset pro tanto by the settlement paid by Keidel. [*Kaiser, supra* at 40 (italicized text in the original, boldfaced text added).]

In *Kaiser*, the jury’s \$100,000 award against Allen was reduced to **zero** based on Keidel’s \$300,000 settlement payment.

The Court of Appeals’ opinion in *Markley* relied in part upon this Court’s opinion in *Thick, supra*, which held that a worker’s-compensation carrier should have been given a credit against the judgment entered on the plaintiff’s claims for benefits where the plaintiff received a settlement from another carrier. *Thick, supra* at 350-351. The plaintiff was an employee injured on the job who claimed worker’s-compensation benefits. Her employer had policies from two successive insurers during the relevant period: the defendant, Transamerica, covered the employer in April 1969 when the injury occurred, and Great American covered the employer beginning in July 1969. Great American settled for \$20,000, and specifically provided in the settlement agreement that it was settling only the employer’s liability after June 30, 1969—in other words, only the liability arising after Great American began insuring the employer. *Id.* at 345-346. The Worker’s Compensation department’s hearing officer and the Workers’ Compensation Appeal Board<sup>30</sup> both found, however, that all of the post-June-30 injuries related back to the April injury, and that Transamerica was the only insurer liable for all of the plaintiff’s claims. *Id.* at 348. The plaintiff argued that Transamerica wasn’t entitled to a credit for the \$20,000 Great American paid because it was for different injuries than those Transamerica was responsible for, and the hearing officer, the appellate board, and the Court of Appeals all agreed. *Id.* at 345. This Court, however, reversed. It held that since all of plaintiff’s injuries were reducible to one claim, and thus that Transamerica was entitled to a setoff for the settlement Great American paid, *Id.* at 347, even though Great American “in fact bore no liability and, in hindsight, had improvidently settled,” *Id.* at 348. “To hold otherwise,” this Court concluded, “would ignore the reality of the situation and create two claims where only one was found to exist. *Id.* at 348.

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<sup>30</sup> Apparently a predecessor of the current WCAC.

Likewise, the trial court and the Court of Appeals both “ignore[d] the reality of the situation,” *Id.*, here by permitting the setoff “deduction” to take place before application of the noneconomic damages cap so that there would be no practical effect of the setoff. Remarkably, the Court of Appeals went as far as to dismiss Dr. Tuma’s argument that he received no benefit from the setoff. *Velez, supra*, 283 Mich App at 414; **Appendix**, p 35a. But applying the setoff in a way that makes no difference neither confers a benefit nor is faithful to the principle that common-law setoffs must be applied in joint-liability cases in a way that a plaintiff does not recover more than he or she is entitled to.

While this issue is one of first impression in Michigan, the Virginia Supreme Court has held that settlement setoffs are to be applied after the imposition of that state’s statutory medical-malpractice damages cap. *Fairfax Hosp Sys, Inc v Nevitt*, 249 Va 591 (1995). In *Fairfax Hosp*, the plaintiff sued a physician, his medical practice, and a hospital for malpractice based on complications from surgery. The plaintiff settled with the doctor and his practice for \$600,000 and proceeded to trial against the hospital. *Id.* at 593. The jury returned a \$2 million verdict against the hospital. *Id.* at 596. The trial court reduced the \$2 million verdict by the \$600,000 settlement and then applied the \$1 million statutory cap. *Id.* The hospital argued that the trial court should have applied the cap first and then the setoff for the settlement. *Id.* The Virginia Supreme Court agreed. *Id.* at 599. The Court emphasized that “[t]he effect of the formula the trial court employed ... was to deny the hospital any credit for the PCA settlement.” *Id.* at 598. In order to honor the statutory damage cap, the court held 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 [the cap amount], the total amount the plaintiff can recover for that injury is [the cap amount].” *Id.* at 599.

The Maryland Court of Appeals (which is that state’s court of last resort) has also considered the issue of which order to apply a settlement setoff and the statutory noneconomic damages cap. In *Lockshin v Semsker*, 412 Md 257, 281-282 (2010), the trial court concluded that

the setoff should be applied first, and then the cap. The Maryland Court of Appeals, however, “reach[ed] the opposite conclusion, holding 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 agreement.” *Id.* at 282.

Likewise, here, the total amount plaintiff is authorized by MCL 600.1483 to recover is \$394,200. Because she has already received \$195,000, that amount must be deducted from the \$394,200 cap amount to honor the noneconomic damages cap and ensure that plaintiff only receives one recovery.

**D. The lower courts ruled that the setoff was to be applied to the raw verdict amount rather than the judgment amount. Plaintiff and the trial court relied on the *Markley* opinion’s use of the word “verdict.” But *Markley* used the terms judgment and verdict interchangeably. The panel held that the setoffs are necessary in joint liability cases to advance the policy of preventing plaintiffs from receiving windfalls. This is the correct rationale and mandates setting off settlement payments from settling tortfeasors from what would otherwise be the final judgment and not from the raw verdict.**

The Court of Appeals also considered the application of settlement setoffs in the post-tort-reform medical malpractice arena in *Salter v Patton*, 261 Mich App 559 (2004). In *Salter*, the panel rejected the medical-malpractice defendants’ argument that it was necessary for the trial court to allocate fault between the nonsettling defendants and the settling joint tortfeasors in order to prevent plaintiffs from double recovery for the plaintiff’s injuries. The Court of Appeals held that even if fault was allocated, that would not reduce the judgment against defendants because they would remain jointly liable for the entire judgment. Instead, the court explained that “plaintiffs are not entitled to double recovery from settling and nonsettling defendants because the *judgment* will be reduced by the amount of the settlement.” *Salter, supra* at 566 (emphasis added), citing *Markley, supra*.

Despite its thorough analysis of the law regarding joint liability in medical-malpractice cases, the availability of common-law setoff in the wake of tort reform, and the policy of preventing windfalls to plaintiffs, the *Markley* panel was not precise in its choice of words between “judgment” and “verdict.” The panel used the words interchangeably. But in *Markley*,

unlike here, there were no damages awarded in excess of the statutory noneconomic damages cap. Functionally speaking, therefore, the “judgment” and the “verdict” in *Markley* were identical—there was no real need to distinguish between the two, and no consequence to the parties from not doing so. The Court began by characterizing the trial court’s ruling as denying “a reduction in the **judgment**.” *Markley, supra* at 249 (emphasis added).<sup>31</sup> The panel also quoted the common-law rule set forth in *Thick, supra*, which provides that a “**judgment** is reduced *pro tanto* by the settlement amount.” *Markley, supra* at 250, quoting *Thick, supra* at 348 n1 (emphasis added). Later, however, the panel wrote that if the common-law setoff applied, then the “\$300,000 *verdict* would be reduced by the \$220,000 settlement ....” *Id.* at 251 (emphasis added). Still later in the opinion, the panel found it necessary “in light of some apparent confusion in the trial court, to distinguish setoff” from the concept of allocation of fault. *Id.* at 252. The panel first explained that even if the jury had allocated fault to the settling codefendant (which it apparently had not), because of joint liability, “it would not have resulted in a reduction of the \$300,000 *verdict* ....” *Id.* at 253 (emphasis added). A few sentences later, however, the panel reiterated that because of joint liability, “there would be no basis to reduce the **judgment**” even if fault had been allocated.” *Id.* at 254 (emphasis added). The panel then reverted to using the term “verdict” at other points in its opinion. See, e.g., *Id.* at 257, 258. But in the closing paragraph (as in the opening), the court confirmed that it “reduced the amount of the **judgment**” by the amount of the joint tortfeasor’s settlement when it concluded that the award of prejudgment interest should also be reduced:

Likewise, we find no error in the trial court’s award of prejudgment interest on the entire amount; however, because *we reduced the amount of the judgment* to \$80,000 against defendants pursuant to common-law setoff, the award of interest shall be reduced accordingly. [*Id.* at 259 (emphasis added).]

Though the *Markley* panel used “judgment” and “verdict” interchangeably, Velez (and Judge Stephens) seized upon the use of the word “verdict” in support of the proposition that the trial court must apply the \$195,000 setoff to the entire verdict amount before reducing the non-

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<sup>31</sup> The Court of Appeals, of course, reversed the trial court’s denial of a setoff.

economic damages amount to the capped amount. But a fair reading of the *Markley* opinion shows that the panel ascribed no special significance to the word “verdict” versus “judgment.” In that case, unlike here, there were no MCL 600.6306(1) collateral source deductions to subtract from the verdict and no non-economic damages cap reductions at issue. In fact, the panel specifically stated that it was “not considering the effect of the medical malpractice damage cap” in its analysis. *Id.* at 257 n 6. At the time, the applicable non-economic damages cap was \$328,700. *Markley*’s entire verdict was only \$300,000. Because the entire verdict was less than the non-economic damages caps, there was no need to reduce the award to comply with MCL 600.1483 like there is here. In fact, the court expressly stated that “there is no reason to address the damage cap” for this exact reason. *Id.* at 258. The *Markley* panel had no need for precision in word choice between “verdict” and “judgment” because, in that case, they were functionally the same thing. That is not so here. Here, the Court of Appeals, while acknowledging the difference between “judgment” and “verdict,” nevertheless held that the setoff should be applied to the verdict. *Velez, supra* at 413-414; **Appendix** pp 35a-36a.

In *Markley*, the overarching theme of the court’s opinion was that setoffs are necessary to prevent plaintiffs from “double recovery” for damages in cases, like medical malpractice cases, where Michigan law retains joint liability. The great irony here is that in endorsing *Velez*’s reliance solely on the panel’s use of the word “verdict,” the lower courts thwarted the central holding of the *Markley* opinion. And, in fact, the trial judge **acknowledged** that her ruling results in plaintiff recovering a higher amount of non-economic damages than MCL 600.1483 entitles her to. Indeed, applying the setoff to the raw verdict amount *before* reducing the verdict to the applicable capped amount under MCL 600.1483 results in the judgment being the same as if there were no setoff at all. This completely frustrates the purpose of the setoff.

Here, the Court of Appeals also held that the setoff should be applied to the “verdict” as opposed to the judgment. But while paying lip service to the concept that a settlement setoff is intended to ensure that “plaintiff is not overcompensated for her injury,” the panel applied the setoff in a way that gave the setoff no practical effect whatsoever:

To ensure that plaintiff is not overcompensated for her injury, as determined by the jury, the setoff rule applies and the partial payment of \$195,000 is subtracted from the jury verdict. In accordance with the imposition of joint and several liability, defendant remained potentially liable to plaintiff in the amount of \$1,329,831.86, an amount that is not in excess of her actual loss. [*Velez, supra* at 414; **Appendix** p 35a.]

The panel concluded that “[i]n accordance with the imposition of joint and several liability, defendant remained potentially liable to plaintiff in the amount of \$1,329,831.86, an amount that is not in excess of her actual loss.” *Id.* In other words, according to the panel, the purpose of settlement setoffs—avoiding overcompensation—is served by merely subtracting the number from the jury’s verdict, without any regard to whether there is any effect on the actual recovery the plaintiff receives when judgment is entered.

In fact, the panel stated that Dr. Tuma’s “argument that he did not receive a ‘benefit’ from the application of the setoff amount is unavailing.” *Velez, supra* at 414; **Appendix** p 35a. Far from being unavailing, however, the fact that the setoff made absolutely no impact at all on the judgment amount shows that the trial court and the Court of Appeals improperly applied the setoff. The Court of Appeals entirely disregarded the fact that the purpose of the setoff is to prevent “double recovery,” *Markley, supra*, and instead focused solely on the verdict before adjustments were made. But it is the recovery amount that is the focus of the settlement setoff. Under a joint liability scheme, a plaintiff is not to be permitted to recover more in damages and settlements than he or she is entitled to by law.

The *Markley* panel illustrated this point by explaining that the jury had determined that plaintiff was entitled to \$300,000 “in total damages for wrongful death,” but the plaintiff had already received \$220,000 from a wrongful settlement with a joint tortfeasor. *Id.* at 257. The panel explained that without a setoff, plaintiff would be paid a total of \$520,000 “in compensation for a \$300,000 harm.” *Id.* That would be unacceptable. But if the defendant was entitled to the \$220,000 setoff, it would pay \$80,000. The defendant’s \$80,000 judgment, plus the \$220,000 settlement would equal a total recovery of the \$300,000 to which plaintiff was entitled.

The same principle applies here. Here, Michigan law provides that “the *total amount* of damages for noneconomic loss *recoverable* by all plaintiffs, resulting from the negligence of all defendants, *shall not exceed* \$280,000.00” as adjusted on an annual basis. MCL 600.1483(1) & (4). The cap amount for 2007 is \$394,200. Because collateral sources reduced Velez’s economic damages to zero, as required under MCL 600.6303, the capped amount of noneconomic damages under MCL 600.1483 represents the maximum recovery to which Velez is entitled (\$394,200 in capped noneconomic damages and zero in past and future economic damages) for her medical-malpractice claim. Because the setoff was applied to the raw verdict before these reductions took place, there was no effect on the final judgment amount. Velez argued and the trial court ruled that the \$195,000 should be subtracted from the \$1.4 million jury award for noneconomic damages, and that the result should *then* be reduced to the capped amount of \$394,200. But simply reducing the \$1.4 million verdict to \$1.205 million and then reducing that to the \$394,200 cap had the same effect as not applying any setoff in the first place.<sup>32</sup> The settlement setoff thus “disappeared,” and Velez would receive the same \$394,200 MCL 600.1483 entitles her to *plus* her \$195,000 settlement.<sup>33</sup> Thus, Velez would recover \$589,200 where she is limited by law to a recovery of \$394,200.<sup>34</sup> Not only would the setoff have no effect, but plaintiff would be compensated twice for the same damages.

To respect Michigan’s law regarding setoffs and the cap statute, the judgment should have been reduced by \$195,000 to \$199,200. If this had been done, plaintiff would not have received more—or less—for her injuries than the law says she is entitled to. She would have received a judgment in the amount of \$199,200, plus her \$195,000 settlement, for a total of \$394,200.<sup>35</sup> This Court should remand this case with an order to modify the judgment applying the \$195,000 setoff *after* applying the 2007 noneconomic damages cap.

<sup>32</sup> Defendant’s **Appendix**, p 131a, sets forth several mathematical illustrations of the effect of applying the setoff to the verdict, as the lower courts ruled it should be, and applying it to the final judgment, as *Salter* and *Markley* mandate.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, Illustration B.

<sup>35</sup> **Appendix**, p 131a, Illustration B.

The Court of Appeals panel’s further rationale for affirming the trial court, namely that this case is somehow distinguishable from *Markley* is similarly unpersuasive. The panel wrote that “[u]nlike in *Markley*, the jury in this case found that plaintiff suffered actual harm that far exceeded the previously negotiated settlement amount paid by the joint tortfeasors.” *Velez, supra* at 414; **Appendix** p 36a. The panel offered no explanation or authority for the proposition that a jury verdict that “far exceeds” the settlement somehow negates the proper application of the setoff. This conclusion is especially confounding given the fact that the judgment in *Markley* also exceeded the settlement paid to the tune of \$80,000. The *Markley* panel still applied the setoff, and reduced the \$300,000 judgment to \$80,000.

Likewise, Velez’s reliance in the Court of Appeals upon *Kaiser, supra* and *Rittenhouse v Erhart*, 424 Mich 166 (1986) for the proposition that the setoff must be applied to the raw verdict before application of the cap is misplaced. *Kaiser, supra* held that setoffs apply. In so holding, this Court stated that setoffs would apply to the “verdict” or to the “jury’s award.” But *Kaiser* did not involve a medical-malpractice case, and, more significantly, did not involve any statutory cap on noneconomic damages. For those reasons, there was no functional difference between the “jury’s award” or the “verdict” and the “judgment” amount awarded—the result would be that the plaintiff’s recovery against the defendant would be reduced by the amount of the settlement. There was, in other words, no need for this Court to determine whether the setoff applied to the “verdict” or the “judgment” since the result would be the same either way. Here, the law also requires that plaintiff’s recovery against Dr. Tuma be reduced by the amount of the codefendant’s settlement; the trial court, however, applied the setoff in such a way that it did not reduce plaintiff’s recovery against Dr. Tuma by a single penny. Such a result flies in the face of *Markley* and *Salter*, both of which hold that a judgment must be reduced by the settlement paid by a settling codefendant.

*Rittenhouse, supra* does not apply because it was construing the now-repealed statutory setoff provision, which used neither the word “judgment” nor the word “verdict,” but rather the word “claim” to describe what a settling codefendant’s settlement would be set off from. More importantly, *Rittenhouse* dealt with the interaction between a statutory settlement setoff and a

statutory reduction for comparative fault. It did not, as *Markley* and *Salter* did, apply a common-law setoff to a medical malpractice judgment, nor did it address the issue here: the interaction between a common-law setoff and the noneconomic damages cap. In *Rittenhouse*, this Court refused to apply a setoff to the final judgment reduced by the plaintiff's comparative fault because the jury's determination of comparative fault only compared plaintiff's percentage of fault to the actual defendants at trial, and not to the settling joint tortfeasors:

[T]here is no indication that the juries in these cases determined the plaintiffs' percentages of negligence by comparing their actions to all the possible tortfeasors. Rather, the juries only weighed the responsibility of the plaintiffs as to the defendants at trial. It would thus be inaccurate to reduce plaintiffs' total damages by a percentage which only applies to the trial parties and not all tortfeasors. [*Rittenhouse, supra* at 177-178.]

In other words, while the settlement represented a portion of plaintiffs' total recovery from all joint tortfeasors, including the defendants **and** the nondefendant settling tortfeasors, the comparative fault percentage only represented plaintiffs' fault compared to the defendants. In the *Rittenhouse* Court's view, applying the setoff after the comparative-fault reduction would effectively result in a plaintiff being treated as though he or she were more comparatively at fault than the jury found. *Id.* at 178 n 3. The *Rittenhouse* Court essentially determined that typically, settling parties aren't likely to overpay, and assuming they don't, applying the setoff **after** the comparative-fault reduction would prejudice the plaintiff:

We believe that in the vast majority of cases the settlement process will insure that the settlement is not likely to exceed the tortfeasor's liability. ... A calculation that allows plaintiff to recover only to the extent of the fault of others is mandated by comparative negligence principles. In the ideal situation where a tortfeasor has settled for the exact amount of its actual liability, [plaintiffs'] version correctly distributes the liability among the remaining parties while [defendants'] method assigns plaintiff an artificially high percentage of comparative negligence. When the settlement amount is below an accurate amount, and in many cases where it is above the ideal figure, the [plaintiffs'] computation will result in a net recovery closer to the optimal amount. [*Id.* at 178.]

Essentially, assuming that settlements accurately represent the settling party's portion of the total liability, that would necessarily account for the comparative fault of plaintiff compared to the

settling party, and thus applying the setoff against the reduced judgment would be tantamount to applying a double comparative fault reduction. It makes sense, then, that the *Rittenhouse* Court would apply the settlement, which applies to plaintiffs' **total** damages, first to the jury award, which is the jury's finding of **total** damages, and then take the remaining figure, representing the defendants' liability and reduce **that** figure by the comparative fault percentage, which represents only the jury's finding of the plaintiff's fault compared to the defendants'.

These sensibilities do not apply here, however, because the noneconomic damages cap is a bright-line, statutory amount that applies to a plaintiff's **total** amount of noneconomic damages. It is not an amorphous concept that depends upon the jury's findings the way a comparative-fault determination is. The noneconomic damages cap is always the same amount, regardless of how many defendants and tortfeasors there are.

What happened here completely contradicts the longstanding concept of limiting the plaintiff to one single recovery in joint-liability cases. That isn't what happened here at all. Instead, the lower courts applied the setoff in a way that plaintiff will receive **more** than she is entitled to. The noneconomic damages cap limits plaintiff's **total** recovery. So does the common-law setoff rule. The only way to have both limitations perform their functions properly is to apply the cap first, then subtract the settlement setoff. That is the only way to prevent plaintiff from getting a recovery in excess of the \$394,200, which amount is the limit the law says she's entitled to.

The Court of Appeals took issue with Dr. Tuma's characterization of this additional recovery as a "windfall"—and indeed termed it "outlandish"—because of the apparent conclusion that the application of the statutory noneconomic damages cap already reduced plaintiff's recovery enough. The Court of Appeals and plaintiff injected an essentially public-policy-based argument into the issue of the proper application of setoffs in a noneconomic-damages-cap scenario. Plaintiff essentially argued that it would be unfair to reduce plaintiff's recovery by applying the settlement setoff when the noneconomic damages cap was already

applied to significantly reduce the verdict.<sup>36</sup> The Court of Appeals apparently agreed. The gist of both plaintiff's argument and the Court of Appeals' characterization of Dr. Tuma's "windfall" argument as "outlandish" is apparently that the statutory noneconomic damages cap the Legislature created is unfair, and the lower courts' toothless application of the common-law settlement setoff here somehow compensates for that supposed unfairness. But whatever a plaintiff, a plaintiff's attorney, or even a court may think about the wisdom of the fact that the Legislature has capped noneconomic damages in medical malpractice cases, *they are capped*. To argue, as plaintiff does, that the lower courts' result should be respected "because [Dr. Tuma] injured Ms. Velez so seriously"<sup>37</sup> is to argue from a public-policy position that has been completely rejected by our legislature. It has decided that the maximum amount Velez can recover for her damages is \$394,200.<sup>38</sup> Arithmetic, something neither side can argue with, shows that unless this Court acts as Dr. Tuma requests, Velez will receive a core amount of noneconomic damages, before calculation of interest, of \$589,000. That is \$195,000 more than the statute allows, as Judge Stephens explicitly recognized: "*I will absolutely concur that that will result in a plaintiff receiving more money than the cap amount.*"<sup>39</sup>

The Court of Appeals panel accepted plaintiff's unique view of "joint and several" liability that overlooked the limits of what the defendants could statutorily be jointly and severally liable for. It was impressed merely by how much the jury had awarded in unrecoverable (beyond cap) damages. The panel recounted the full amount of the jury's verdict. It subtracted the \$195,000 settlement from the jury's full verdict and then announced that "[b]ecause [Dr. Tuma] is jointly and severally liable for [the amount of the jury verdict in excess of the settlement amount], he is potentially liable for that remaining amount of the loss." *Velez, supra* at 414; **Appendix**, p 36a. But Dr. Tuma is not liable, potentially or otherwise, for any portion of the jury verdict beyond the non-economic damages cap. The noneconomic-damages-

<sup>36</sup> See Plaintiff's brief on appeal in the Court of Appeals, pp 37-38; **Appendix**, pp 126a-127a.

<sup>37</sup> Plaintiff's answer to Dr. Tuma's application for leave to appeal to this Court, p 26; **Appendix** p 128a.

<sup>38</sup> The lower courts decided the capped amount should be the cap in place in 2007 when the judgment was entered, not the lower cap from two years earlier when the complaint was filed.

<sup>39</sup> Hearing transcript, **Appendix**, pp 99a-100a.

cap legislation prevents such liability from being imposed. The panel, akin to plaintiff's argument that the setoff result was justified by how "seriously" plaintiff was injured, did the arithmetic a second time in its opinion and announced again that Dr. Tuma was "potentially liable to plaintiff" for the \$1.3 million damage amount. The panel rationalized that this was "an amount that is not in excess of [plaintiff's] actual loss," *Id.* It found inspiration in the notion that the "purpose" of joint and several liability was to "place the burden of injustice...on the wrongdoer instead of on the innocent plaintiff." *Id.* at 412; **Appendix**, p 35a. The panel wrote that "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." *Id.* at 413; **Appendix**, p 35a. The concept that Dr. Tuma "would be liable" except that the law provides he isn't is a non sequitur. The panel reasoned that "[b]ecause defendant is jointly and severally liable for those damages," by which the panel meant the \$1.3 million figure, "he is potentially liable for that remaining amount of the loss." Defendant's argument that such treatment gave plaintiff more than she was entitled to under the cap statute was characterized as "outlandish." *Id.* at 414; **Appendix**, p 36a.

The panel improperly concluded that the cap statute imposes a "burden of an injustice" on an "innocent plaintiff" and that this somehow justified the ineffectual application of the setoff. The Legislature's will was made to take a back seat. Dr. Tuma is not even "*potentially* liable" for beyond-cap damages. No medical-malpractice defendant, whether joint-and-several liability is at issue or not, can be compensated at a level that exceeds the statutory cap. "That [a] legislative solution appears undesirable, unfair, unjust or inhumane does not of itself empower a court to override the legislature and substitute its own solution." *Doe v Dep't of Social Services*, 439 Mich 650, 681 (1992). "Arguments that a statute is unwise or results in bad policy should be addressed to the Legislature." *People v Kirby*, 440 Mich 485, 493-494 (1992).

Velez also contends that setting off the settlement against what would otherwise have been the judgment against Dr. Tuma will have the effect of discouraging pretrial settlements. She claims that "there would be a dramatic disincentive to settle cases if the plaintiff faces the

prospect of having any verdict first reduced by the limitation on noneconomic damages imposed in §1483 and then having that reduced amount subject to further reduction based on a common law setoff.”<sup>40</sup> But she offered no explanation or even any hint about why this would supposedly be true. Cases are settled for all kinds of reasons that have nothing to do with caps or setoffs. They are settled because plaintiffs believe they may have difficulty proving liability. They are settled because defendants believe they may have difficulty avoiding liability. They are settled because settlements help finance ongoing litigation. They are settled because a defendant offers a fair sum given the liability and damage picture. And they are settled for an assortment of other reasons. In fact, as this Court noted in *Thick, supra*, they are sometimes settled for reasons that appear, in hindsight, to be “improvident[.]” when it turns out later that the settling party wouldn’t have been liable to the plaintiff. *Thick, supra* at 348. A plaintiff’s decision to settle a case, or not, is a function of making an informed and realistic evaluation of the liability issues relative to each defendant and of the damage issues related both to economic and noneconomic loss. The only amount of noneconomic damages a plaintiff can secure, and therefore the only amount of such damages that a plaintiff can rightfully expect as she and her attorney decide whether or not to settle, is a capped measure of noneconomic damages. That is a fact of litigation in medical malpractice—not something that incentivizes (or not) a plaintiff’s decision to settle with one party but proceed to trial against another.

#### **E. Conclusion**

Plaintiff asserted that Dr. Tuma received the benefit of the settlement setoff even though the judgment entered is no different than it would have been without any setoff. Clearly, Dr. Tuma cannot be said to have been credited with a settlement setoff if there is absolutely no impact on the judgment. The Court of Appeals incorrectly affirmed the trial court. This Court should correct that error, reverse the Court of Appeals and the trial court, and remand with

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<sup>40</sup> Plaintiff’s answer to Dr. Tuma’s application for leave to appeal to this Court, p 28; **Appendix**, pp 129a-130a.

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instructions to amend the judgment by subtracting \$195,000 from the \$394,200 in noneconomic capped damages.

**IV. Relief Requested**

Defendant-appellant Martin Tuma, M.D., asks this Court to reverse the Court of Appeals and the trial court, and to remand to the trial court with instructions to amend the judgment to properly credit him for the settlement paid by the settling former co-defendant by applying the setoff after reduction of noneconomic damages to the 2007 cap amount.

**COLLINS, EINHORN, FARRELL  
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Dated: August 24, 2011  
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STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)  
Judges Mark J. Cavanagh, Karen Fort Hood, and Alton T. Davis

MYRIAM VELEZ,

*Plaintiff-Appellee,*

v

MARTIN TUMA, M.D.,

*Defendant-Appellant.*

Docket No. 138952

Court of Appeals No. 281136

Wayne County Circuit Court  
No. 04-402161 NH

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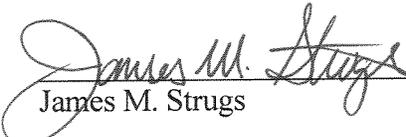
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