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

DEFENDANT-APPELLANT'S REPLY BRIEF

*****Oral Argument Requested *****

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Collins, Einhorn, Farrell & Ulanoff, P.C.

By: NOREEN L. SLANK (P31964)
GEOFFREY M. BROWN (P61656)
Attorneys for Defendant-Appellant
4000 Town Center, Suite 909
Southfield, MI 48075
(248) 355-4141

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Attorneys for Defendant-Appellant
4000 Town Center, Suite 909
Southfield, MI 48075
(248) 355-4141

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I. The Legislature's repeal of MCL 600.2925d(b) revived the common-law rule regarding settlement set-offs. The repeal of a statute revives the common law in place before the statute's enactment. The Legislature will not be held to have abolished the common law by implication. This Court has held that the common-law setoff continues to exist. Plaintiff offers no authority that supports the proposition that Legislature has somehow silently abrogated common-law setoffs.

A. This issue is not properly before this Court because it denied plaintiff's cross-application that raised it, and because plaintiff didn't raise it below.

Plaintiff's argument regarding whether the common-law setoff still exists, which plaintiff raised in her cross-application for leave to appeal to this Court, is not properly before this Court because it (1) **denied** plaintiff's cross-application and (2) expressly ruled that this appeal is "limited to the issue whether the Court of Appeals correctly held that the setoff amount in this case was properly set off against the jury verdict ...." *Velez v Tuma*, 489 Mich 956; 798 NW2d 512 (2011). And, for that matter, plaintiff didn't even properly raise the issue in the first place, because she raised it for the first time in a cursory statement made in a **footnote** in her Court of Appeals brief.[1] 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; 672 NW2d 181 (2003); see also *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

B. The common-law discovery rule has not been abrogated.

In addition to not being before this Court, plaintiff's assertion is simply incorrect. As discussed in Dr. Tuma's opening brief, this Court held in *Kaiser v Allen*, 480 Mich 31, 34; 746 NW2d 92 (2008) that "[t]o the extent that joint and several liability principles have not been abrogated by statute, they remain the law in Michigan" and because joint liability remains, it is also the case that "the common-law setoff rule remains the law in Michigan ...." Plaintiff argues that since the Legislature codified the common-law setoff rule at MCL 600.2925d(b) and

[1] Plaintiff's Court of Appeals brief, p 33 n 5.

subsequently repealed the legislation, it somehow repealed the common-law setoff rule by implication.[2] But "[a]lthough statutory enactments can abrogate the common-law rules, ***such rules may not be eliminated by implication***, and statutes in derogation of the common law **must be strictly construed**." *Smith v YMCA*, 216 Mich App 552, 554; 500 NW2d 262 (1996), citing *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652-653; 513 NW2d 799 (1994) (emphasis added). Simply put, there is no statutory language that abrogates the common-law setoff rule in joint-liability situations. Only by a rather strenuous attempt to draw conclusions from legislation that is **silent** about the fate of the common-law rule does plaintiff claim to find support for this proposition.

The Court of Appeals in *Markley* relied on the rule set forth in this Court's decision in *People v Reeves*, 448 Mich 1, 8 (1995) that "the repeal of a statute revives the common-law rule as it was before the statute was enacted" and held that because joint liability remained in medical-malpractice cases, and the statute was silent as to settlement setoffs, the amendment of MCL 600.2925d revived the common-law rule that setoffs are available in joint-liability cases. *Markley v Oak Health Care*, 255 Mich App 245, 256; 600 NW2d 344 (2003). Though plaintiff addressed the rule set forth by this Court in *Reeves* in her cross-application—albeit incorrectly—here she does not discuss it at all, or even acknowledge it. And plaintiff cites no case that supports the assertion that repealing a statute that codifies a common-law rule repeals the common-law rule. In fact, not only is there no such case, but that assertion is contrary to the result and holding of *Reeves*, *supra*, among other cases.[3]

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[2] While plaintiff does not assert that the abrogation was by implication, *per se*, she has also not cited any statutory language that affirmatively abrogates the rule in joint-liability cases because there is no such language.

[3] Dr. Tuma discussed this issue in greater detail in his answer to plaintiff's cross-application for leave to appeal to this Court.

II. Plaintiff's assertion that her "recovery" is considered to be the full, uncapped damages awarded by the jury lacks any basis in law or common sense. Plaintiff will only be able to "recover" damages based on the capped amount. To apply the setoff to the "recovery," as plaintiff acknowledges this Court's decision in *Kaiser* requires, it must be applied to the amount she is entitled to "recover," which requires application of the cap first.

Plaintiff asserts, essentially, that the "one full recovery" that this Court speaks of in *Kaiser v Allen*, 480 Mich 31, 39; 746 NW2d 92(2008) is not the amount the plaintiff is **actually** entitled to recover after reduction of noneconomic damages under MCL 600.1483. Instead, plaintiff asserts that the "full recovery" is the amount the jury awards before the cap is imposed, which may represent amounts plaintiff would **never** be entitled to recover because of the cap. Plaintiff does nothing to explain why her "recovery" should be held to include an amount she would never be able to "recover" because of the imposition of the cap. The cases she cites, certainly, do not support such an assertion. She claims that *Kaiser*, *supra* and *Kaminski v Newton*, 176 Mich App 326; 438 NW2d 915 (1989), stand for the proposition that a "full recovery" is **only** determined by reference to what the jury concludes the plaintiff's damages are **without regard** to limitations placed on recovery by the cap statute. Neither case, however, involves a damages cap. *Kaiser* is not a cap case—in fact, it isn't even a medical-malpractice case.[4] Even if it were a malpractice case, the jury's award of $100,000 is well below the cap amount, and so it can hardly be said that the result stands for the proposition that the jury's award alone is the sole factor in determining a "full recovery."

Kaminski **is** a medical-malpractice case, but it is not about the application of setoffs, or even about the malpractice damages cap. The total amount the jury awarded the plaintiffs was $76,000—

[4] Like a medical-malpractice case, however, it **is** a joint-liability case, which is why its analysis of the application of common-law setoffs applies here. Plaintiff is simply wrong, though, to assert that *Kaiser* stands for the proposition that the "full recovery" to which a settlement setoff applies must ignore the cap altogether.

well below the cap. In any event, the issue in *Kaminski*, a medical-malpractice suit against a doctor and the hospital, was whether the plaintiff's appeal of the trial court's denial of a new trial could go forward against the hospital after the doctor fully satisfied the judgment for which both the doctor and the hospital were jointly liable (the Court of Appeals held the plaintiff could not). *Kaminski, supra* at 332-333.

Plaintiff is impressed with this Court's statement in *Kaiser* that "[t]he Legislature did not intend that a plaintiff be awarded damages greater than the actual loss...." *Kaiser*, *supra* at 40. Plaintiff apparently believes that this means that the jury's valuation of the "actual loss" is the **only** number that matters in determining the "full recovery" that must be set off by a settlement. But plaintiff does not take into account that the Legislature **did intend** that medical-malpractice plaintiffs be awarded damages **lesser** than their actual losses to the extent juries award noneconomic damages in excess of the cap. In the absence of a settlement, the noneconomic damages cap will always make a plaintiff's "full recovery" less than what the jury awarded whenever the jury awards noneconomic damages in excess of the cap. If a jury awarded a plaintiff $100,000 in economic damages and $50 million in noneconomic damages, the "full recovery" would not be $50.1 million, because MCL 600.1483 does not permit plaintiff to recover that amount. Instead, the $50 million noneconomic damages award is reduced to whatever the appropriate cap value is, added to $100,000, and then **that** figure represents the plaintiff's "full recovery" for his or her injury.

Here, if there was no settlement, plaintiff would not be able to recover anything more than $394,200.[5] The result of the lower courts' rulings is that she will now be entitled to recover much more than that. This entirely thwarts the common-law setoff. Plaintiff's characterization of Dr. Tuma's argument on this point as a "hollow criticism" betrays a policy-based criticism of the cap

[5] As plaintiff acknowledges, her entire economic-damages award was reduced to zero by collateral-source deductions, which plaintiff is not challenging.

statute that simply isn't relevant here. What is relevant is that the cap statute **does** apply, and it **does** impact what plaintiffs are able to recover. It makes no sense to view plaintiff's "full recovery" as simply being the amount of damages awarded by the jury because it is extremely clear that she will never be entitled to recover that amount. Plaintiff's argument to the contrary simply has no basis in the law or in fact.

III. Plaintiff's assertion that a setoff cannot be applied because the settlement isn't broken down into economic and noneconomic loss is irrelevant and based upon a misapprehension of Dr. Tuma's argument.

Plaintiff claims that there should be no setoff because it is not known how much of the settlement was for economic loss versus noneconomic loss. Plaintiff goes as far as to say that "without question ... it is absolutely essential" that a settlement would have to apportion such losses in order for a setoff to be applied. But plaintiff has offered absolutely no authority for why this might be. In addition, plaintiff has not raised this argument previously. In fact, when it suited plaintiff's purposes, she made the exact argument regarding the application of the setoff that Dr. Tuma has made, albeit in a different context (and she won). The issue being argued was whether the settlement should apply to past damages (to reduce the amount of prejudgment interest) or to both past and future damages. In **that** context, plaintiff asserted that her settlement was for "all damages" and should be applied to reduce the "total amount" of the recovery "by the full amount of the settlement":

> [T]he Covenant [Not to Sue] expressly provided that the damages being compensated represented all damages. Thus, the set-off can only be applied to reduce Defendant's pre-judgment interest burden on ***the total amount*** of the verdict by ***the full amount of the settlement***.[6]

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[6] Plaintiff's "Brief in Response to Defendant's Objections to Plaintiff's Proposed Judgment," Dated 2/27/2007, pp 5-6 (emphasis in bold and italics added, emphasis in underline in the original). Exhibit D to that brief is the settlement agreement entitled "Covenant Not to Sue." That agreement defines "damages" broadly to include "[p]ain and suffering sustained by MYRIAM VELEZ, and any costs, expenses and fees, in any manner related to personal injuries of any kind whatsoever, including death, whether asserted or unasserted, whether alleged or

If plaintiff felt that it was "without question … absolutely essential" that the setoff should not apply because it was "not known" how it broke down damages, then plaintiff should have raised that argument at that time. Plaintiff tellingly has no problem with the trial court setting off a "mix" of damages from **uncapped** noneconomic damages, admitting that it was "entirely correct" that the "trial judge took the *total* amount of the verdict … and applied the … setoff."[7]

As plaintiff herself said in the trial court, "the damages being compensated [by the settlement] represented all damages."[8] It makes every bit of sense, then, to apply the setoff for the settlement of "all damages" to her "full recovery," *Kaiser, supra*, for "all damages," which can only be known by reducing the jury's award to the capped amount.[9] Plaintiff's settlement and the judgment **both** compensated her for **all** of her damages, economic and noneconomic. Subtracting the settlement from the final judgment is not subtracting a "mix" of damages from noneconomic damages. It is subtracting a settlement for **total** damages from a judgment for **total** damages. This is how the Court of Appeals treated the matter in its opinions in *Markley, supra*, and in *Salter v Patton*, 261 Mich App 559; 682 NW2d 537 (2004). In both cases, the reduction was of the total, final judgment amount by the total amount of the settlement. *Markley, supra* at 250, quoting *Thick v Lapeer Metal Products*, 419 Mich 342, 348 n 1; 353 NW2d 464 (1984) ("'judgment is reduced *pro tanto* by the settlement amount.'"); *Salter, supra* at 566 (rejecting the argument that the trial court erred by not allocating damages between the settling and nonsettling joint

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actual, whether to tangible property or to a person, whether mental or emotional or physical, whether permanent or temporary, whether known or unknown."

[7] Plaintiff's appellee brief, p 17 (emphasis in the original).

[8] Plaintiff's 2/27/2007 brief in response to Dr. Tuma's objections to proposed judgment, p 6 (emphasis in the original).

[9] And by the applicable collateral-source reduction, which, again, plaintiff has not and does not challenge on appeal.

tortfeasors since "plaintiffs are not entitled to double recovery from settling and nonsettling defendants because the ***judgment*** will be reduced by the amount of the settlement.").

Plaintiff's newfound argument to the contrary is founded upon a strawman plaintiff has constructed under which Dr. Tuma allegedly argues that the entire amount of the settlement must be deducted from noneconomic damages.[10] That is how it works out in **this case** because the jury's verdict and the application of the collateral-source statute mean that the only damages remaining in the judgment are noneconomic damages. In **any** medical-malpractice case where a jury awards noneconomic damages in excess of the cap, MCL 600.1483 informs the issue of the amount of a plaintiff's "full recovery." For example, here, if plaintiff had been awarded $1 million in economic damages in addition to her noneconomic damages, Dr. Tuma would still argue that the $195,000 settlement setoff must be applied **after** the cap. Under such a scenario, the "full recovery" that MCL 600.1483 would permit would be $1,394,200.[11] Dr. Tuma would still argue that the failure to apply the setoff after the cap reduction would violate MCL 600.1483 because it would entitle plaintiff to recover $1,589,200 when, without the settlement, she would only be entitled to $1,394,200. The fact that circumstances resulted in economic damages being reduced to zero is a function of the facts of this case. The judgment here is for **all** of the damages plaintiff is entitled to collect, as is the settlement. But this does not mean, as plaintiff apparently believes, that Dr. Tuma's argument is that plaintiff's settlement should be engineered into something it isn't. Dr. Tuma is entitled to a setoff from the judgment for the settlement. *Kaiser, supra.*

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[10] See Plaintiff's brief, p 14.

[11] The hypothetical $1 million in economic damages plus the $394,200 capped noneconomic damages.

Plaintiff's hypothetical regarding a theoretical finding of comparative fault against her is a complete non sequitur and entirely irrelevant to this case. Plaintiff asserts that in such a situation, there would not be joint liability, and thus no setoff, and she could keep both the judgment against Dr. Tuma and the settlement. What plaintiff's hypothetical overlooks, however, is that Dr. Tuma would be entitled to demand that the jury allocate fault not only to plaintiff, but to the settling codefendants. Dr. Tuma would be liable **only** for **his own** percentage of fault, and not for the settling hospital codefendants. If, theoretically, Dr. Tuma were found only to be ten percent at fault himself,[12] then he would be liable for a significantly smaller percentage of the damages.

IV. Plaintiff's reliance on *Rittenhouse v Erhart*, 424 Mich 166 (1986) is misplaced.

Plaintiff's reliance on *Rittenhouse v Erhart*, 424 Mich 166; 380 NW2d 440 (1986) for the proposition that the setoff must be applied to the raw verdict before application of the cap is misplaced. *Rittenhouse* 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 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

[12] Plaintiff's claim against the hospital, for example, was that it (or its agents) committed malpractice by not timely consulting a vascular surgeon—i.e., Dr. Tuma. Perhaps a jury comparing the relative blame of Dr. Tuma and the hospital might have decided that the delay in contacting Dr. Tuma, which would hardly be his fault, was far more to blame than anything Dr. Tuma may have done.

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.

V. Conclusion

This Court confirmed in *Kaiser* that joint-liability cases retain common-law settlement setoffs, and that they apply to reduce a plaintiff's "full recovery" from a trial. In damages-cap cases, the "full recovery" can only be known **after** the application of the cap reduction to the verdict—it is not simply the raw verdict. Here, plaintiff's settlement was for **all** of her damages, and so too was her judgment against Dr. Tuma. The judgment must therefore be reduced by the settlement. This Court should reverse the contrary rulings of the Court of Appeals and the trial court.

Collins, Einhorn, Farrell & Ulanoff, P.C.

By: Noreen L Slank

NOREEN L. SLANK (P31964)
GEOFFREY M. BROWN (P61656)
Attorneys for Defendant-Appellant
4000 Town Center, Suite 909
Southfield, MI 48075
(248) 355-4141

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