

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/Cross-Appellant,

Court of Appeals No. 281136

v

Wayne County Circuit Court
No. 04-402161 NH

MARTIN TUMA, M.D.,

Defendant-Appellant/Cross-Appellee.

DEFENDANT-APPELLANT'S SUPPLEMENTAL
BRIEF ON CROSS APPEAL

****ORAL ARGUMENT REQUESTED****

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

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

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STATEMENT OF QUESTION PRESENTED

- I. In *Markley v Oak Health Care*, 255 Mich App 245, 250 (2003), the Court of Appeals held that the common-law setoff rule applies in medical-malpractice actions where joint-and-several liability is imposed. Did the Court of Appeals correctly decide that issue in *Markley*?

The trial court did not answer this question, because plaintiff did not raise the issue in the trial court.

The Court of Appeals applied *Markley*, but did not answer this question, because plaintiff merely addressed it in a footnote in her Court of Appeals brief.

Plaintiff-appellee answers, "No."

Defendant-appellant submits that the correct answer is "yes."

Statement of Pertinent Facts.

This Court initially denied defendant-appellant/cross-appellee Martin Tuma, M.D.'s application for leave to appeal and plaintiff-appellee/cross-appellant Myriam Velez's cross application for leave to appeal, *Velez v Tuma*, 488 Mich 903; 789 NW2d 440 (2010), but later granted Dr. Tuma's application on reconsideration, *Velez v Tuma*, 489 Mich 956; 798 NW2d 512 (2011), limited to the issue of whether the trial court and the Court of Appeals properly ruled that the setoff for the settlement Velez received from a former codefendant was properly applied before application of the noneconomic damages cap under MCL 600.1483. The parties briefed and argued that issue. After argument, this Court sua sponte reconsidered Velez's application for leave to cross appeal, and granted it, "limited to the issue raised in that cross-application, and whether *Markley v Oak Health Care*, 255 Mich App 245, 250; 660 NW2d 344 (2003), correctly decided that the common law setoff rule applies in medical malpractice actions where joint and several liability is imposed." *Velez v Tuma*, 491 Mich 873; 809 NW2d 572 (2012).¹ This Court invited both Velez and Dr. Tuma to file supplemental briefs on that issue.

Dr. Tuma is aware that this Court is well acquainted with the remaining facts of this case, and will therefore rely on the recitation of those facts he set forth in his brief on appeal in this Court.

¹ 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).

Argument: The Legislature has clearly provided that joint liability remains in place for medical-malpractice cases. It has long been the law of this state that settlement setoffs are an integral part of joint liability. To properly honor the Legislature’s mandate for joint liability in medical-malpractice cases, the common-law setoff rule must apply.

Velez argues that the Legislature’s repeal of MCL 600.2925d(b) (which provided for settlement setoffs) is a “clear statement” of the Legislature’s intent to do away with setoffs as though MCL 600.2925d(b) was the only word on setoffs in this state. Velez does not (and cannot) argue, however, that the Legislature has expressly abolished settlement setoffs because it hasn’t. Velez instead looks with stridently focused tunnel vision at the enactment and later repeal of MCL 600.2925d(b) as though it is the only statement of legal authority in this state that speaks to the issue of the existence of settlement setoffs. Velez then supports this narrow view of the law with a strident appeal to honor what she characterizes as the “will of the Legislature.”² Ironically, this apparent appeal to legislative supremacy entirely fails to address the fact that (1) the Legislature has expressly provided that joint liability – which has been abolished in most cases – remains in place for medical-malpractice actions; and (2) it has long been the law of this state that setoffs are an integral part of the joint-liability scheme to ensure that a plaintiff only receive one recovery for his or her injury.

What Velez proposes is that the Legislature somehow has replaced the longstanding joint-liability scheme with a modified version that removes settlement setoffs – and thus the imperative that a plaintiff be limited to one recovery – without any affirmative statement that it was drastically modifying the common law. And Velez does so by asking this Court to assume that the Legislature meant to effect this drastic change in the joint-liability scheme by implication – by enacting and later repealing

² See, e.g., Velez’s supplemental brief, p 5.

MCL 600.2925d(b). As discussed within, the Legislature is presumed to know what the law regarding joint liability was, and that an integral component of the joint-liability scheme is the existence of settlement setoffs to limit the plaintiff to one single recovery. A "joint-liability" system that does not allow for setoffs is something other than "joint liability," and to impose such a system would thwart the Legislature's mandate that joint-liability be retained for medical-malpractice cases.

A. The Legislature has retained joint liability in medical-malpractice cases. Michigan has long been committed to the principle that in joint-liability cases, a plaintiff is entitled to only one recovery for the alleged injury. To honor that commitment, courts must subtract the amounts paid by settling joint tortfeasors from the amount recovered from nonsettling defendants. To do otherwise would not properly honor the legislative mandate to apply principles of joint liability to medical-malpractice cases.

As long ago as 1928, this Court has mandated settlement setoffs be applied to judgments to ensure that a plaintiff "recover but one compensation." *Verhoeks v Gillivan*, 244 Mich 367, 371 (1928). This Court stressed in that decision 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* [3] and issue his execution accordingly, but if he obtains only partial satisfaction he has not precluded himself from

³ "This term describes a plaintiff's election of the defendant against which to take judgment when the jury has mistakenly awarded separate damages against two or more defendants for a joint tort. Under these circumstances, the plaintiff could take a judgment against the defendant that had been assessed the greatest damages, and then enter a *nolle prosequi* against the others." Black's Law Dictionary (9th ed. 2009)

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.

This Court, in other words, has made it clear that 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." *Thick v Lapeer Metal Products*, 419 Mich 342, 348 n 1 (1984), citing Restatement (Second) of Torts § 885(3) (1979); see also *Larabell* 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* 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).]

These cases are significant because they establish that Michigan common law has recognized setoffs as a fundamental part of joint liability going back nearly a century. And this Court has also firmly stated that “[t]he Legislature is presumed to know of the existence of the common law when it acts.” *Wold Architects & Engineers v Strat*, 474 Mich 223, 234 (2006), citing *Bennett v Weitz*, 220 Mich App 295, 299 (1996). The presumption here is that when the Legislature imposed joint liability on medical-malpractice cases, it knew that setoffs were a fundamental component of the joint-liability scheme. If this Court were to rule that there is no setoff in medical-malpractice cases, then it would be imposing a different joint-liability scheme than the Legislature knew of when it mandated joint liability (and indeed, joint liability without setoffs would be a divergence from case law dating back at least to 1928).

In *Wold Architects*, the issue was whether the Michigan Arbitration Act (MAA) preempted common-law arbitrations. The significance of that issue is that a party can unilaterally revoke a common-law arbitration agreement, but not one to which the MAA applies. This Court held that the MAA “does not show an intention to abrogate common-law arbitration” and given the presumption that the Legislature knows the common law, “the Legislature could have easily stated an intent to abrogate common-law arbitration.” *Wold Architects* at 234. Since it did not, then this court refused to hold that the MAA abolished the common-law rule that a party could unilaterally revoke a common-law arbitration agreement. *Id.*

In *Nummer v Treasury Dept*, 448 Mich 534 (1995), this Court reversed the Court of Appeals’ published opinion holding that principles of collateral estoppel did not apply

to preclude multiple litigation in litigation under the Civil Rights Act. The Court of Appeals relied on the fact that the Civil Rights Act permitted an aggrieved person to either file a complaint with the Department of Civil Rights to be heard by the Civil Rights Commission or to file an action for injunctive relief or damages in the circuit court. It concluded that this meant “the Legislature chose to set aside the principles of collateral estoppel in civil rights cases and to countenance a multiplicity of litigation.” *Nummer v Dept of Treasury*, 200 Mich App 695, 700 (1993), rev’d *Nummer v Treasury Dept*, 448 Mich 534 (1995). This Court, however, disagreed. “Preclusion doctrines are judicial creations,” and “it must be remembered that the Legislature is deemed to legislate with an understanding of common-law adjudicatory principles.” *Nummer*, 448 Mich at 544. *Nummer* accordingly held that the statute did not allow one who received an adverse determination from the Commission to file a brand new action in the circuit court and that “[i]f the Legislature intended anything else, it would have said so more directly,” *Nummer*, 448 Mich at 551. Consequently, collateral estoppel would apply to bar relitigation in the circuit court of the same issue that had been finally determined in the Commission. *Id.*

The Court of Appeals applied the rule in *In re Nale Estate*, 290 Mich App 704, 709 (2010), a case where a wife convicted of the voluntary manslaughter of her husband argued that the “slayer statute” (MCL 700.2803) should not apply to keep her from inheriting from her husband’s estate because the phrase “feloniously and intentionally kills” meant murder only, and not manslaughter. The Court of Appeals rejected that argument. It ruled that “the common-law application of the slayer rule extends beyond the crime of murder to manslaughter.” *Id.* at 709. Citing *Wold Architects*, the Court of Appeals accepted that the Legislature “is presumed to know the existence of the

common law,” and held that “[h]ad the Legislature, knowing the state of the common law, intended to limit the operation of MCL 700.2803 to instances where the beneficiary murders the decedent, it could have used that specific term.” *Id.* at 710.

In *Heindlmeyer v Ottawa County Concealed Weapons Licensing Bd*, 268 Mich App 202 (2005), the defendant concealed-weapons licensing board argued that the circuit court erred in not applying a deferential “clearly erroneous” standard of review to the board’s decision to deny a concealed-weapons permit under MCL 28.425b(7)(n), despite the fact that MCL 28.425d(1) provides a petitioner with a “hearing de novo” for denials based on MCL 28.425b(7)(n). The issue was whether the circuit court had authority to not only conduct a new hearing on appeal but also come to an independent determination of permit entitlement without any deference to the board. Quoting *Nummer*, 448 Mich at 544, the Court of Appeals stressed that “the Legislature is deemed to legislate with an understanding of common-law adjudicatory principles.” *Id.* at 220. This meant that the Legislature is presumed to know the meaning of terms (such as “de novo”) that have been defined at common law:

“[W]here [a legislature] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.” [*Id.*, quoting *People v Couch*, 436 Mich 414, 419 (1990), quoting *Morissette v United States*, 342 US 246, 263 (1952).]

Accordingly, the Court of Appeals “h[e]ld that our Legislature used the term ‘hearing de novo’ with the clear intent that the language be accorded its plain and ordinary

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meaning as reflected in the common law and legal tradition of Michigan"

Heindlmeyer at 221 (emphasis added).

Here, by the same token, the "common law and legal tradition of Michigan" is that joint liability and settlement setoffs go hand-in-hand, to ensure that a plaintiff only receives one recovery for his or her injuries. That has long been a part of the common law of this state, and Velez's argument that setoffs somehow no longer exist is solely premised on the fact that MCL 600.2925d(b) was enacted and later repealed. But the Legislature repealed MCL 600.2925d(b) at the same time it abolished joint liability, and it is equally well settled that in several-only liability, each defendant only pays his or her proportionate share of the plaintiff's damages. See *Kaiser v Allen*, 480 Mich 31, 42 (2008) (M.J. Kelly, J., concurring). Repealing MCL 600.2925d(b) in a shift to several-only liability is necessary to avoid having a defendant pay less than his or her fair share (since the statute said nothing about the setoff applying only to joint liability). But when the Legislature revived joint liability for certain cases (like medical-malpractice cases), it was unnecessary to also reenact MCL 600.2925d(b), because the Legislature is presumed to know the common law, *Wold Architects*, and thus is presumed to know of the "common law and legal tradition in Michigan," *Heindlmeyer* at 221, that provides that joint-liability necessarily requires a setoff of settlements paid by joint tortfeasors. To decide otherwise would be to impose a greatly modified version of "joint liability" in a form unknown to the common law of this state, and thus unknown to the Legislature when it mandated joint liability for medical-malpractice cases. Employing this radically different form of "joint liability" would thwart the Legislature's intent.

Contrary to Velez's argument, Dr. Tuma is not suggesting that this Court must find that common-law setoffs remain in place for joint-liability cases because it's

“logical” or “common sense” to conclude that they do.⁴ Instead, Dr. Tuma’s position is that this Court must conclude that common-law setoffs exist for joint-liability because that is what the Legislature’s words imposing joint liability require, based on Michigan’s longstanding common-law tradition.

Deciding that common-law setoffs remain in place for joint-liability cases is a determination that this Court has already unanimously made in *Kaiser v Allen*, 480 Mich 31, 39 (2008). In *Kaiser*, this Court explained that “[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.**” *Id.* (emphasis added). *Kaiser* involved an auto-negligence claim that arose from an accident that killed the plaintiff’s decedent. The plaintiff sued two jointly liable 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, 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

⁴ In conjunction with this assertion, Velez also makes a puzzling argument that discusses, at length, this Court’s decision in *Driver v Naini*, 490 Mich 239 (2011). *Driver* deals with the notice-of-intent provisions of MCL 600.2912b and the notice-of-nonparty-fault provisions of MCL 600.2957(2), neither of which have any conceivable application here. Velez apparently means to rely on *Driver* for the proposition that the Legislature’s will must be adhered to regardless of whether it “makes sense.” But since that is not Dr. Tuma’s argument here, that use of *Driver* has dubious application. And, more to the point, Velez is simply wrong to state that *Driver* prevents a medical-malpractice plaintiff from ever being able to add a nonparty at fault to a medical-malpractice case; this Court gives a very detailed, step-by-step description of what a plaintiff should do (but what the plaintiff in *Driver* didn’t do) to accomplish that goal. *Id.* at 248 n 28.

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 Marilyn 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 (M.J. 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"

Velez relies on an unpublished Court of Appeals case, *Herteg v Somerset Collection GP, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2002 (Docket No. 227936),⁵ for the proposition that the common-law setoff rule no longer exists. That case, however, involves a premises-liability action, which is a cause of action to which **several** and not **joint** liability applies. Indeed, the fact that it was a

⁵ Exhibit A to Velez's supplemental brief.

several-liability case is the driving force behind why the Court of Appeals held that a setoff doesn't apply:

The elimination of the language at issue from the statute was a part of a legislative tort reform package that "replaced the common-law doctrine of joint and several liability among multiple tortfeasors with the doctrine of several liability." *Smiley v Corrigan*, 248 Mich App 51, 53; 638 NW2d 151 (2002). Under the new system, "defendants now are only accountable for damages in proportion to their percentage of fault." Trial courts are now required to instruct juries to answer special interrogatories and apportion the percentage of fault of all persons that contributed to the injury, including any individual released from liability. MCL 600.6304(1). We believe that this statutory scheme reflects a clear Legislative intent to abolish the rule requiring offset and replace it with a several liability system to apportion damages. [*Herteg*, slip op, pp 7-8 (footnotes omitted).]

Importantly, these considerations are entirely inapplicable here. The "new system" doesn't apply to medical-malpractice cases. And while a jury can still apportion fault between defendants, each defendant can be held liable for the entire judgment, even if he is only apportioned a minuscule portion of the fault. *Salter v Patton*, 261 Mich App 559, 565-566 (2004).

So the result of *Herteg*, in which the Court of Appeals refuses to apply setoffs to a several-liability judgment, is not inconsistent at all with applying setoffs in a joint-liability case, and is also consistent with this Court's ruling in *Kaiser*. As Justice Kelly wrote in her concurrence, "[w]hen liability is several, each tortfeasor ordinarily will be liable for the percentage of damages attributable to his or her own negligence." *Kaiser* at 42 (M.J. 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 (M. J. Kelly, J., concurring). "Importantly, tort

reform did nothing to overrule the common-law setoff rule.” *Id.* at 43 (M. J. 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.*

Markley concluded, consistent with this Court’s holding in *Kaiser*, that setoffs remain the law in Michigan for joint liability cases because to do otherwise, i.e., allow a plaintiff to recover a judgment without reducing it for a codefendant’s settlement, “would defeat the principle underlying common-law setoff, that being that a plaintiff can have but one recovery for an injury.” *Markley* at 257. *Markley*, in other words, correctly held that because joint liability still applies in medical-malpractice cases, so do common-law setoffs.

B. Alternatively, 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. Plaintiff offers no authority for the proposition that common-law set-offs have somehow been silently abolished by the Legislature.

Plaintiff essentially argues that the Legislature has silently abolished the common-law setoff rule. Velez stridently asserts that that isn’t her argument at all, but is unable to point to any statutory language from which one might determine that the Legislature intended to abolish the common-law setoff. Instead, she simply relies upon the fact that the Legislature incorporated the common-law setoff rule into MCL 600.2925d(b) and later repealed that provision. Velez makes this argument despite acknowledging 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” Velez asserts that this rule only applies if the Legislature enacts

a statute that **abrogates** the common law and later repeals it, but not when the Legislature enacts a statute that merely codifies the common law and later repeals it. The trouble with this assertion is that Velez provides no citation to a case that adopts this alleged rule, because there isn't one. The best Velez can do is cite a federal bankruptcy case that says nothing even close to what Velez claims the law is.⁶

Another point *Velez* overlooks is that the law of this state is that courts cannot assume or imply that a statute abrogates a common-law rule: "Although 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 (1996), citing *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652-653 (1994) (emphasis added).

The Legislature included the common-law rule setoff at MCL 600.2925d(b). *Markley* 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 included in MCL 600.2925d(b). After the amendment of MCL 600.2925d, the statute did not address setoffs at all. *Markley* at 256. 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

⁶ See Velez's supplemental brief, p 4, citing *In re Spradlin*, 284 BR 830, 834-835 (ED Mich 2002). That case merely recites the rule set forth in *Reeves*, and even cites *Reeves*, but it does not at all stand for the proposition that the rule in *Reeves* **only** applies when a statute modifies or abolishes the common law, as Velez urges it does.

MCL 600.2925d revived the common-law rule that setoffs are available in joint liability cases. *Markley* at 256.

Velez acknowledges this Court's rule in *Reeves*, but wants to graft onto it an additional component that has never been articulated in any case: a requirement that the statute must be in derogation of, or abrogate, the common-law before its repeal will be deemed to revive the common law. Velez hasn't cited a case articulating such a rule because there isn't one. And in fact, a recent decision of this Court **held the contrary**.

In *People v Moreno*, ___ Mich ___ (2012), the defendant was charged with resisting arrest for preventing police officers from making what the trial court later determined was an illegal entry into his home. At common law, resisting arrest is a crime, but one has the common-law right to resist an unlawful arrest. *Id.* at ___; slip op, pp 7-8. MCL 750.479 codified the common-law crime of resisting arrest, and consistent with the common-law, one of the elements of the crime is that the arrest in question was a lawful one. *Id.* at ___; slip op, p 8. It was replaced by MCL 750.81d, which does not include as an element the requirement that the arrest be lawful. *Id.* The issue was whether the Legislature's removal of the lawful-arrest requirement was intended to abrogate the common-law right to resist unlawful defense, or whether, after removal of the statutory provision, the common-law rule remained in place. This Court concluded the latter. *Id.* at ___; slip op, p 10. In reaching this conclusion, it emphasized that it "must also adhere to the traditional rules concerning abrogation of the common law. The common law remains in force unless it is modified." *Id.* at ___; slip op, p 6, citing *Wold Architects* at 233. This Court stressed that it "must presume that the Legislature 'know[s] of the existence of the common law when it acts.'" *Id.* at ___; slip op, pp 6-7, quoting *Wold Architects* at 234. "Accordingly, the Court has explained that '[t]he abrogative effect of a

statutory scheme is a question of legislative intent' and that 'legislative amendment of the common law is not lightly presumed.'" *Id.* at ___; slip op, p 7, quoting *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28 (2010) and *Wold Architects* at 233. "While the Legislature has the authority to modify the common law, it must do so by speaking in 'no uncertain terms.'" *Id.* at ___; slip op, p 7, quoting *Dawe* at 28. "Moreover, this Court has held that 'statutes in derogation of the common law must be strictly construed' and shall 'not be extended by implication to abrogate established rules of common law.'" *Id.* at ___; slip op, p 7, quoting *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 508 (1981). Applying these rules, the Court concluded that the Legislature's mere act of deleting language codifying a common-law rule doesn't evidence an intent to abrogate the common-law rule. If Velez's allegations about the import and application of *Reeve* were correct, however, this Court would have reached the opposite conclusion in *Moreno*. It didn't.⁷

And in fact, there is ample case law that supports the conclusion that the *Moreno* decision represents the correct application of law, while Velez's unsupported "condition" allegedly attached to *Reeves* that the common-law only revives if the statute being repealed abrogated the common law is not a correct statement of Michigan law.

In *Reeves*, the issue was whether the defendant's conviction of first-degree felony-murder could be predicated on arson when the buildings he burned were not dwellings. The statutory definition of felony-murder in effect at the time enumerated "arson" as one of the predicate felonies. At common law, the definition of arson

⁷ For that matter, if Velez's unsupported interpretation of the rule in *Reeves* were correct, then if the Legislature chose to repeal MCL 750.316, 750.317, 750.317a, and 750.318, which codify the common-law crime of murder, this Court would be required to hold that the crime of murder was abolished in Michigan. That simply cannot be the case.

included only the burning of a dwelling house, but a statute enacted under 1927 PA 38, redefined arson to include burnings of other kinds of dwellings. *Reeves, supra* at 11-12.

That statute, however, was amended in 1931 by 1931 PA 328, and while it continued to be a felony to burn other kinds of buildings, the burning of non-dwelling buildings was no longer called "arson." *Id.* at 12. The issue was whether the definition of "arson" for purposes of the felony-murder statute continued to include the burning of non-dwelling buildings, or whether the amendment removing the term arson revived the common-law definition of arson, limited to dwellings. This Court concluded the latter, and held that the relevant definition of "arson" was the common-law definition, because the amendment of the statute revived the common-law definition. *Id.* at 14-15. Because the statutory language in the then-effective felony murder statute first came about in 1931 after the Legislature repealed its expansion of the definition of arson, the Legislature must have intended the term "arson" in the felony murder statute to refer to the common-law definition. *Id.* If plaintiff's assertion about the effect of repealing statutes that codify common-law rules is correct, however, then this Court should have held (but did not hold) that the 1931 repeal of the arson statute also abolished the common-law crime of arson.

As this Court discussed in *Moreno*, "in the absence of a contrary expression by the Legislature, well-settled common-law principles are not to be abolished by implication in the guise of statutory construction." *Marquis v Hartford Accident & Indem*, 444 Mich 638, 652 (1994), citing *Rusinek* at 508. In other words, if the Legislature wanted

to abolish the common-law setoff rule, it could have said so, and in fact was required to say so.⁸

In *Marquis*, a first-party no-fault auto insurance benefits case, the issue was whether the plaintiff's failure to mitigate her damages by looking for alternate employment after she could not return to her former position barred her from recovering further work-loss benefits. The plaintiff had argued that the fact that the Legislature enacted MCL 500.3107 based on a provision from the Uniform Motor Vehicle Accident Reparations Act (UMVARA)⁹ without including mitigation of damages language from the UMVARA meant that the Legislature intended to excuse the failure to mitigate damages with respect to work-loss benefit claims. But this Court held that the common law rule requiring contract and tort plaintiffs to mitigate damages also applied to the No-Fault Act. *Marquis* at 652. This Court held that the mere fact that the Legislature declined to include the mitigation language from the UMVARA in the No Fault Act did not mean that the Legislature meant to abrogate the common-law mitigation rule. *Id.* at 652-653.

⁸ For example, in MCL 551.2, the Legislature affirmatively abolished common-law marriage by providing that mere consent is no longer enough to create a marriage in this state, as it would be at common-law; a license and solemnization are also required in addition to consent. *Id.* There is no need to imply that the Legislature abolished common-law marriage, despite the fact that the Legislature did not say "we abolish common-law marriage," because the Legislature explicitly stated that mere consent is not sufficient to create a marriage.

⁹ One of the model statutes that served as source material for the No-Fault Act. *Marquis, supra* at 652 n 17.

In *Smith*, the Court of Appeals applied *Marquis* to hold that MCL 700.403, a statute that provided¹⁰ that a person who owed money or property to a minor could discharge the duty by delivering the money or property to the minor's parents, did not implicitly abrogate the common-law rule that a parent does not have the right to settle a minor's cause of action merely by virtue of being a parent. *Smith* at 554.

In *Rusinek*, this Court rejected the defendant's argument that section MCL 500.3135 of the No-Fault Act abolished common-law causes of action for loss of consortium because it did not enumerate loss of consortium damages as recoverable non-economic damages.¹¹ The *Rusinek* Court explained that "[a]lthough a statute which expressly extinguishes a common-law right is a proper exercise of legislative authority, statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law." *Rusinek* at 507-508 (internal citations omitted). The Court held that because MCL 500.3135 did not expressly abolish common-law causes of action for loss of consortium, those damages would be recoverable in lawsuits brought under that section. *Id.*

Plaintiff relies upon *Robinson v Detroit*, 462 Mich 439, 459 (2000), *People v Crucible Steel Co of America*, 150 Mich 563, 566 (1907), and *Chaney v Department of Transp*, 447 Mich 145, 165 (1994), which stand for the proposition that courts may not assume that the Legislature's actions were inadvertent. But ironically, that's precisely what Velez asks this Court to do. Plaintiff essentially asks this Court to accept that the Legislature intended to do away with the common-law setoff rule, but forgot to affirmatively say

¹⁰ The Legislature has since repealed MCL 700.403 and replaced it with a substantially similar statute, MCL 700.5102.

¹¹ MCL 500.3135 provides for third-party causes of action for death or bodily injury that exceeds the "serious impairment" threshold.

so. As discussed in section A above, Dr. Tuma asserts that this is wrong because the Legislature affirmatively enacted joint liability for medical-malpractice cases, and joint liability necessarily includes setoffs. But it is also wrong because *Markley* is correct. The repeal of the statutory version of the common-law setoff rule simply revived the common-law version because the Legislature did not enact anything showing its intent to abolish setoffs in joint-liability cases.

This Court should hold, then, that the common-law setoff rule continues to apply to joint-liability medical-malpractice cases. It should also hold that the Court of Appeals and the trial court improperly applied the setoff before imposing the noneconomic damages cap.

**COLLINS, EINHORN, FARRELL
& ULANOFF, P.C.**

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

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