

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

MYRIAM VELEZ,

Plaintiff-Appellee,

-vs-

MARTIN TUMA, M.D.,

Defendant-Appellant.

Supreme Court No. 138952

Court of Appeals No. 281136

Wayne County Circuit Court
No. 04-402161 NH

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

- II. DID THE COURT OF APPEALS PROPERLY AFFIRM THE TRIAL COURT'S JULY 13, 2007 JUDGMENT IN WHICH THE JURY'S VERDICT WAS FIRST REDUCED ON THE BASIS OF A COMMON LAW SETOFF BEFORE IMPOSING THE LIMITATION ON NONECONOMIC DAMAGES CALLED FOR BY MCL 600.1483?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

COUNTERSTATEMENT OF FACTS

This is a medical malpractice action in which Dr. Martin Tuma's negligent delay in performing surgery ultimately resulted in the amputation of Myriam Velez's left leg.

In September 2001, Ms. Velez filed suit in the Wayne County Circuit Court against Dr. Tuma, Detroit Receiving Hospital and Harper Hospital. *Velez v Detroit Receiving Hospital, et al.*, Wayne County Circuit Court No. 01-132265. Ms. Velez settled her claim against Detroit Receiving Hospital and Harper Hospital for \$195,000.00.

Ms. Velez's 2001 cause of action ended with a stipulated dismissal without prejudice as to Dr. Tuma and she filed a new complaint against him on January 26, 2004. Ms. Velez's claims against Dr. Tuma proceeded to a jury trial. At the conclusion of that trial, the jury returned a verdict in favor of Ms. Velez. (App. 1b-6b) The jury awarded Ms. Velez both economic and noneconomic damages. The jury determined that Ms. Velez's past and future economic damages totaled \$124,831.86. The jury also awarded \$480,000.00 in past noneconomic damages and total future noneconomic damages of \$920,000.00 over a twenty-three year period. (*Id.*)

A judgment based on the jury's verdict was entered on July 13, 2007. (App. 16a-20a) That judgment provided that the \$195,000.00 settlement that Ms. Velez reached with Detroit Receiving Hospital and Harper Hospital would first be deducted from the jury's total damage award, \$1,524,831.86. (App. 17a) In addition to this reduction, the judgment reduced the jury's economic damage awards, both past and future, to zero on the basis of collateral source payments made or to be made to Ms. Velez. (App. 17a-18a) Finally, the July 13, 2007 judgment specified that, after these reductions were made, the remaining noneconomic damage award would be subject to the limitation on such damages available in a medical malpractice action under MCL 600.1483. As a result, the

July 13, 2007 judgment specified that the jury's noneconomic damage award, which totaled \$1.4 million, would be reduced to \$394,200.00, the statutory limitation on noneconomic damages in effect on that date.

Dr. Tuma appealed to the Michigan Court of Appeals. Among the issues he raised on appeal was that the trial court had improperly applied the setoff based on the \$195,000.00 settlement reached with two previously named defendants. Dr. Tuma contended that the trial court should have first reduced the jury's verdict by the limitation on noneconomic damages called for by MCL 600.1483. Dr. Tuma further asserted that, it was only after this reduction of the jury's verdict that the \$195,000.00 setoff should have been applied.

The Court of Appeals issued its decision in this matter on April 16, 2009. *Velez v Tuma*, 283 Mich App 396; 770 NW2d 89 (2009). The Court of Appeals rejected all of Dr. Tuma's arguments for either a new trial or for a judgment in his favor. The Court of Appeals also affirmed the trial court's implementation of the common-law setoff resulting from Ms. Velez's settlement. *Id.*, pp. 409-413.

Dr. Tuma applied for leave to appeal in this Court, again raising a number of issues. Ms. Velez filed a cross-application for leave to appeal in which she argued that, in light of the Legislature's 1996 amendment of MCL 600.2925d(b), it was error for the trial court to impose any setoff in this case.

This Court initially denied the parties' applications for leave to appeal in an Order dated October 22, 2010. *Velez v Tuma*, 488 Mich 903; 789 NW2d 400 (2010). Dr. Tuma moved for reconsideration of this order. On June 22, 2011, the Court issued an Order granting leave to appeal, limited to the question of whether the trial court erred in reducing the jury's verdict under the setoff

and the statutory limitation on noneconomic damages. *Velez v Tuma*, 489 Mich 956; 798 NW2d 512 (2011).

ARGUMENT

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S CALCULATION OF THE JUDGMENT IN ITS APPLICATION OF A COMMON LAW SETOFF AND THE LIMITATION ON NONECONOMIC DAMAGES PROVIDED IN MCL 600.1483.

Prior to trial, Ms. Velez reached a settlement of \$195,000.00 with two other tortfeasors. At trial, the jury awarded Ms. Velez a total of \$1.4 million in noneconomic damages and over \$124,000.00 in economic damages. On the basis of the Court of Appeals' decision in *Markley v Oak Health Care*, 255 Mich App 245; 600 NW2d 344 (2003), the defendant was entitled to a setoff of the \$195,000.00 settlement. In calculating the judgment, the trial court first reduced the jury's total damage award by the amount of the setoff called for by *Markley*. (App. 17a). After adjusting the verdict by the setoff amount, the trial court then applied the limitation on noneconomic damages applicable to medical malpractice actions under MCL 600.1483, thereby reducing the jury's award of noneconomic damages to the statutory limitation, \$394,200.00. (App. 18a).

Dr. Tuma argues on appeal that the courts below erred in the manner in which they applied the common law setoff and §1483's damage limitation. He contends that the jury's noneconomic damage award should have first been reduced to the maximum amount of damages recoverable under §1483, \$394,200.00. According to Dr. Tuma, after the verdict is first reduced under §1483, the common law setoff should then be deducted. Thus, in Dr. Tuma's view, the jury's award of \$1.4 million noneconomic damages award should have been reduced to \$199,200.00.

The issue presented in this case is obviously one of sequencing: In a malpractice case in which both a common law setoff and §1483's noneconomic damage limitation apply, which of those reductions occurs first? For reasons that will be discussed in this brief, this Court must reject Dr.

Tuma's proposed sequencing of a common law setoff and §1483's limitation on noneconomic damages. However, before proceeding to such a discussion, it is imperative that this Court understand precisely why confusion exists on the single issue on which it has granted leave to appeal in this case.

A. The Michigan Legislature Took Steps To Guarantee That The Issue Defendant Presents In This Case Would Never Arise.

In his dissent from the October 22, 2010 order originally denying leave to appeal in this case, Justice Stephen J. Markman observed that “there is no clear provision concerning which of the reductions is to be made first . . .” *Velez*, 488 Mich at 904. (J. Markman, dissenting). Justice Markman was entirely correct; there is no clear provision in Michigan statutes addressing the sequencing of the two reductions at issue in this case.¹ But, what is absolutely essential for this Court to understand is why there is no clear provision in the applicable statutes. There is no such provision for the simple reason that *the issue that this Court has voted to decide was never supposed to arise*. Even more importantly, *this issue was never supposed to arise because of direct action taken by the Michigan Legislature*.

Prior to 1996, Michigan law recognized that a defendant in a personal injury action had the right to a reduction of any damage award rendered at trial based on the amounts paid by another joint tortfeasor in settlement. The statutory basis for such a setoff was MCL 600.2925d(b), which at that time provided:

¹This legislative failure to address the sequencing of reductions based on both a setoff and §1483 must be contrasted with other reductions to a verdict called for by Michigan law. MCL 600.6306(1) specifies that after any verdict rendered in favor of the plaintiff, a judgment is to be entered against each defendant “in the following order and the following judgment amounts.” MCL 600.6306 proceeds to describe the sequence of any reductions to a verdict.

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

* * *

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

Former MCL 600.2925d(b) (emphasis added).

In 1996 the Legislature enacted sweeping changes in Michigan personal injury law. Among these changes was the amendment of MCL 600.2925d. The Michigan Legislature amended that statute by completely eliminating MCL 600.2925d(b) and its setoff provision. Thus, as of 1996, the statutory basis for a setoff premised on settlement amounts paid by other tortfeasors no longer exists.

The abrogation of prior law with respect to setoffs is also reflected in the 1996 changes to another statute, MCL 600.6304(5). Prior to 1996, that statute stated that, after a damage award was rendered in a personal injury action, the court was to award the plaintiff the amount of the verdict, “subject to any reductions under sections 2925d and 6303 . . .” Thus, the pre-1996 version of the statute governing the adjustments to be made to a jury verdict specifically incorporated the setoff provision of §2925d. In 1996, MCL 600.6304(5) was amended to eliminate any reference to a reduction of a jury’s verdict on the basis of a setoff. Thus, the Michigan Legislature took action in 1996 to insure that no personal injury verdict would be subject to reduction on the basis of a settlement reached with another tortfeasor.

Despite the fact that the Michigan Legislature took these steps to see that no setoff would ever be imposed in a tort action, the Court of Appeals in *Markley* reestablished such a setoff in certain medical malpractice actions. The *Markley* Court recognized that the Michigan Legislature

in 1996 eliminated the statutory setoff previously contained in §2925d(b). The *Markley* Court found, however, that prior to the adoption of §2925d(b), Michigan courts had recognized a common law setoff based on settlements reached by the plaintiff with co-tortfeasors. 255 Mich App at 250-251. The *Markley* Court concluded that, in spite of the Michigan Legislature's complete abrogation of setoffs through the amendment of both §2925d(b) and §6304(5), Michigan courts could enforce a common-law setoff which would accomplish precisely the same result as would have been dictated by the former §2925d(b) and §6304(5), in those medical malpractice cases still controlled by joint and several liability.

The *Markley* Court's decision to resuscitate a common-law setoff represents judicial action that cannot be reconciled with what the Michigan Legislature did in 1996 when it amended both MCL §2925d(b) and §6304(5), completely eliminating setoffs from Michigan law. This brief bit of the history of setoffs demonstrates that in 1996 the Michigan Legislature took affirmative steps to prevent the question on which this Court has granted leave to appeal from ever becoming an issue. By undertaking review of the issue raised in this case, this Court is ignoring the fact that the intent of the Michigan Legislature in 1996 was that this sequencing issue would be eliminated from Michigan law.²

In recent years, this Court has on multiple occasions resolved conflicts between legislative action and the common law by giving primacy to legislative will. *See, e.g., Trentadue v Buckler Law*

²The defendant misconstrues the impact of the 1996 legislative changes to §2925d(b) and §6304(5). Defendant asserts: "After the amendment of MCL 600.2925d, the statute no longer addressed setoffs." Defendant's Brief, p. 9. This assessment of what happened in 1996 is oblivious to what the Michigan Legislature intended in its elimination of §2925d(b) and amendment of §6304(5). It intended to wipe out setoffs in this state. Thus, the point is not that §2925d "no longer addresses setoffs." The point is that, by express direction of the Legislature, no setoffs are to be applied.

Sprinkler Co, 479 Mich 378; 738 NW2d 664 (2007); *Garg v Macomb County Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005); *Devillers v Auto Club Ins Assn*, 473 Mich 562; 702 NW2d 539 (2005). This significant deference to legislative action should be brought to bear in this case. The Michigan Legislature has spoken on the subject of setoffs - they have been eliminated from Michigan law. Rather than examining a legal question that the Legislature expressly eliminated from Michigan law, this Court should be giving its usual obeisance to the acts of the Legislature and recognize that the issue presently before this Court is not appropriate for this Court's review. It is beyond the authority of a court to circumvent the Legislature's actions in 1996 by reestablishing through the common law a concept that the Legislature has acted to eliminate.

B. Defendant's Proposed Sequencing Of The Setoff and §1483 Is Wrong.

Assuming that this Court reaches the merits of the sequencing issue presented in this case, it still must reject Dr .Tuma's position. There are numerous errors in Dr. Tuma's analysis of this issue and numerous reasons why the trial court's judgment calculation must be affirmed.

The defendant's position in this case can be summarized in the following three charts:

<u>The Jury's Verdict</u>	
Past Economic Damages	\$ 28,880.00
Past Noneconomic Damages	480,000.00
Future Economic Damages	95,951.86
Future Noneconomic Damages	<u>920,000.00</u>
Total	\$1,524,831.86

The Trial Court's Calculation of the Judgment

Total Verdict	\$ 1,524,831.86
Less Settlement Amount	<u>195,000.00</u>
Adjusted Verdict	\$ 1,329,831.86
Less Collateral Source Payments	<u>124,831.86</u>
Adjusted Verdict	\$ 1,205,000.00
Reduced to-Limitations on Damages Provided in §1483	\$ 394,200.00

Defendant's Calculation of the Judgment

Past Economic Damages Reduced by Collateral Source Payments	\$ -0-
Future Economic Damages Reduced by Collateral Source Payments	-0-
Total Noneconomic Damages Adjusted As Provided in §1483	394,200.00
Less Settlement Amount	<u>195,000.00</u>
Total	\$ 199,200.00

There are two principal theories offered by defendant in support of the sequencing that he proposes. He asserts that a reduction of the statutory cap by the amount of a common law setoff is necessary to prevent a "double recovery" or the "overcompensation" of the plaintiff. Second,

defendant intimates that by enacting §1483, the Michigan Legislature has decreed that the maximum amount that a malpractice plaintiff may collect (in both settlements and verdict) is the limitation on noneconomic damages imposed by the Michigan Legislature. Both of these arguments are demonstrably wrong.

Dr. Tuma begins his analysis of this issue with a reference to the “purpose” of setoffs. According to him, a setoff is to be imposed because “plaintiff is entitled to one full recovery for the same injury.” *Kaiser v Allen*, 480 Mich 31, 39; 746 NW2d 92 (2008). From this premise, defendant proceeds to conclude that Ms. Velez’s “full” recovery must be measured in terms of the maximum amount she would be able to collect under §1483, in this case \$394,200.00.

Defendant’s argument based on the purported purpose of a setoff is initially flawed in that it fails to take into account what constitutes “one full recovery” under Michigan case law. What is significant for purposes of this case is that the Michigan cases that have addressed the concept of “full recovery” have calculated that “full recovery” *based on the amount of the jury’s determination of the plaintiff’s damages*.

As expressed by the Court of Appeals in *Kaminski v Newton*, 176 Mich App 326; 438 NW2d 915 (1989), “[t]he adjudication of the amount of the loss also has the effect of establishing the limit of the injured party’s entitlement to redress . . .” *Id.* at 331, *quoting* Restatement Judgments, 2d, §50, comment d; *see also Velez*, 283 Mich App at 410. Thus, where a case proceeds to trial, the “one full recovery” that the plaintiff is entitled to is the trier of fact’s adjudication of the damages sustained. It is for the trier of fact to determine the plaintiff’s “full recovery” thereby establishing the maximum amount to which the plaintiff is entitled.

This Court’s decision in *Kaiser* also demonstrates this fact. In that case, plaintiff settled with

one tortfeasor before trial for \$300,000.00. The case then proceeded to trial where the jury was asked to award plaintiff “the total amount of damages” that he sustained. At trial, the jury found these total damages to be \$100,000.00.

The issue presented to this Court in *Kaiser* was whether a setoff would be imposed in these circumstances. This Court concluded that a setoff was appropriate. In reaching this result, the Court held that the plaintiff was entitled to only “one full recovery.” That “one full recovery” was identified by the *Kaiser* Court as the jury’s determination of plaintiff’s total damages, \$100,000.00. Thus, the Court reasoned that a \$300,000.00 setoff had to be imposed because a failure to do so “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 causes.” 480 Mich at 40 (emphasis added).

Kaiser and numerous other cases demonstrate that the “one full recovery” that a plaintiff is limited to by a setoff is *the total recovery as determined by the trier of fact*.³ The purpose of the

³Another case that demonstrates this basis fact is *Markley*, the Court of Appeals decision that reinvigorated the common law setoff. In that case, plaintiff entered into a \$220,000.00 settlement before trial with one tortfeasor. The case went to trial against the remaining defendant and the jury returned a verdict of \$300,000.00. In *Markley*, as in *Kaiser*, it was the jury’s verdict that represented the benchmark for the “one recovery” that plaintiff was entitled to. The *Markley* Court ruled:

Here, a jury determined that plaintiff was entitled to \$300,000 in total damages for wrongful death; however, plaintiff already received \$220,000 for wrongful death. Without reduction of the jury verdict, *plaintiff receives \$520,000 in compensation for a \$300,000 harm*. If we were to allow such a recovery, we would defeat the principle underlying common-law setoff, that being that a plaintiff can have but one recovery for an injury.

255 Mich App at 257 (emphasis added).

Thus, the panel held in *Markley* that the application of a common law setoff was necessary to prevent the plaintiff from recovering (in both settlement and verdict) an amount *above the*

setoff is, therefore, to limit the plaintiff's entire recovery to the total amount of damages assessed by the trier of fact. Based on the underlying purpose of a setoff, plaintiff's recovery of any amount above that which the jury assesses would constitute overcompensation for the plaintiff's injuries.

What is significant about this particular case is that here the jury determined that the amount of Ms. Velez's damages exceeded \$1.5 million. Both *Kaiser* and *Markley* teach that it is this amount awarded by the jury - Ms. Velez's actual injuries - that provides the reference point for determining if the plaintiff, absent application of a setoff, would be "overcompensated" for her injuries. With *Kaiser* and *Markley* as guides, it is obvious that Ms. Velez's recovery under the circuit court's calculation in no way constitutes a "double recovery" or "overcompensation." The combined amount that Ms. Velez would recover under the trial court's rendering of the judgment, based on both the settlement amounts she received and the ultimate judgment amount, would be \$589,200.00. This total recovery is nearly \$1 million less than the amount of Ms. Velez's actual damages as determined by the jury.⁴

Dr. Tuma asserts in his brief 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.*" Defendant's Brief, p. 14. This is a particularly hollow criticism of what the trial court did in this case. What Ms. Velez was *entitled to* according to the jury, based on the extensive injuries caused by Dr. Tuma's negligence, was over \$1.5 million in total damages, \$1.4 million of which was associated with her

damages assessed by the jury.

⁴Or, stated somewhat differently, the total amount that Ms. Velez would recover in this case in both settlement and adjusted verdict cannot possibly exceed the "one full recovery" discussed in *Kaiser* and related cases, when her final total recovery under the trial court's judgment would be only 38% of her total damages.

noneconomic damages alone. No matter how one approaches it, the total amount that she would receive by settlement and judgement if the circuit court's judgment is affirmed (\$589,200.00) does not exceed what the jury found that Ms. Velez was *entitled to*. Collecting \$589,200.00 for a \$1.4 million injury does not offend the "purposes" behind a setoff.

Yet, even if the Court were to reject the forgoing argument, there is another gaping hole in the logic behind defendant's assessment of Ms. Velez's "one full recovery" or her purported "double recovery." Dr. Tuma's entire argument that the total amount of Ms. Velez's recovery under the settlement proceeds and the trial court's judgment (\$589,200.00) represents overcompensation for her injuries is predicated on the fact that this amount exceeds the limitation on noneconomic damages imposed in §1483. According to Dr. Tuma, to avoid such "overcompensation", the entirety of Ms. Velez's \$195,000.00 settlement must be deducted from the \$394,200.00 cap. This entire "overcompensation" argument is constructed on an enormous - and erroneous - assumption. This argument assumes that the entirety of the \$195,000.00 settlement that Ms. Velez entered into had to be meant to compensate her for her noneconomic damages. It is only where the *entire* settlement is assumed to represent compensation for Ms. Velez's noneconomic damages that one could accept defendant's position that she received \$195,000.00 more than she was entitled to under §1483.

It is important to note that Ms. Velez's damage claim in this case was not limited to the recovery of noneconomic damages. She sued for both economic and noneconomic damages and the jury awarded her in excess of \$124,000.00 in economic damages. This economic damage award was reduced to zero on the basis of MCL 600.6303's collateral source rule. But, the point is that Ms. Velez *sustained* economic damages as a result of Dr. Tuma's professional negligence.

The defendant's entire argument is based on a purported clash between the limitation on

noneconomic damages imposed in §1483 and the total amount that Ms. Velez could recover in this case under her settlement and the July 13, 2007 judgment. In defendant's view, Ms. Velez's recovery of the \$195,000.00 settlement as well as the \$394,200.00 judgment amount constitutes a \$195,000.00 windfall for the plaintiff because it exceeds §1483's limitation on noneconomic damages by \$195,000.00. This argument is based on the assumption that the entirety of the settlement that Ms. Velez reached with two other defendants was *exclusively* to compensate her for her noneconomic damages. It is only if one assumes that every cent of settlement received by Ms. Velez was meant to compensate her for her noneconomic loss that one can accept defendant's contention that the entirety of that settlement must be setoff from the limitation on noneconomic damages called for by §1483.

If, for example, \$100,000.00 of the \$195,000.00 settlement reached in this case was to compensate Ms. Velez for her *economic* damages, defendant's entire argument would have to be substantially adjusted. Since §1483 is exclusively a limitation on noneconomic damages, the defendant's "overcompensation" argument based on that statute could only be invoked with respect to the remaining \$95,000.00 of the settlement, the amount of the settlement covering her noneconomic damages. In this hypothetical, it is only this \$95,000.00 recovery associated with Ms. Velez's noneconomic damage award that could possibly violate §1483 under Dr. Tuma's rendering of Michigan law.

It is obvious that Ms. Velez and the two settling defendants in this case did *not* segregate economic and noneconomic damages when they reached a resolution of her claims. But, the foregoing discussion demonstrates without question that *for any court to make the "overcompensation" determination advocated by Dr. Tuma, it is absolutely essential that any*

settlement reached in a medical malpractice case would have to specify what portion of that settlement is designed to compensate plaintiff for her economic damages and what percentage is meant to cover noneconomic damages. Only where such an itemization of plaintiff's damages is made in conjunction with a settlement could a court make the determination demanded by Dr. Tuma's argument - whether the plaintiff, through settlement and verdict, has recovered noneconomic damages in excess of §1483's limitation on such damages.

But, what is of critical import to the outcome of this case is that there is no requirement in Michigan law that parties reaching a settlement in a medical malpractice action must designate which portion of that settlement is attributable to economic damages and which portion constitutes reimbursement for noneconomic damages. This omission with respect to settlements must be compared to the explicit directions given by the Legislature for a medical malpractice action that proceeds to trial. MCL 600.1483(2) specifically provides that “[i]n awarding damages in an action alleging medical malpractice, the trier of fact *shall* itemize damages into damages for economic loss and damages for noneconomic loss.” (emphasis added).

The itemization of damages mandated by MCL 600.1483(2) is simply a reflection of the fact that §1483's limitation on damages can operate *only* if the trier of fact distinguishes between economic and noneconomic damages. Precisely the same thing is true with respect to the setoff principle that Dr Tuma proposes in this case based on a settlement reached with another tortfeasor. His contention that Ms. Velez would be “overcompensated” for her injuries based on §1483 would make sense only if some or all of her settlement was meant to compensate her for her noneconomic damages.

There are two ramifications that follow from the foregoing analysis. First, at the time that Ms.

Velez reached a settlement with the other tortfeasors in this case, she had a valid claim for economic damages. Thus, it is impossible for defendant or anyone else to state with any degree of certainty what part of the \$195,000.00 settlement was meant to cover Ms. Velez's noneconomic damages. Since it is impossible to determine what portion of the settlement covered Ms. Velez's noneconomic damages, it is equally impossible to ascertain the extent of the setoff that defendant would be entitled to even if Dr Tuma were correct in his contention that a combined recovery based on a settlement and a judgment could not exceed the damage limitation imposed in §1483.

There is a second, much broader implication that follows from these observations. The simple fact is that the logic of defendant's "overcompensation" position can be sustained only if parties entering into a settlement in a medical malpractice case were compelled to distinguish between economic and noneconomic damages covered by that settlement. The fact that the Michigan Legislature never imposed such a requirement on parties who reach a settlement in a medical malpractice case constitutes overwhelming proof that the sequencing that defendant proposes is both entirely unworkable under present law and was never intended to take place.

If the Michigan Legislature intended §1483 to be an absolute bar to a total recovery that exceeded the limitation on noneconomic damages imposed in that statute, it would have had to require all parties settling a medical malpractice case to either designate which portion of that settlement represented noneconomic damages or, alternatively, set up some judicial procedure for apportioning a settlement between economic and noneconomic damages. The fact that the Legislature made no such allowance for malpractice settlements renders defendant's reading of

§1483 erroneous.⁵

The foregoing analysis also demonstrates that the trial judge was entirely correct in its approach to this case. As indicated in the July 13, 2007 judgment, the trial judge took the *total* amount of the verdict (\$1,524,831.86), representing both the economic and noneconomic damages awarded by the jury, and applied the \$195,000.00 common law setoff. (App. 17a). This is the only completely accurate reduction that can be performed in light of the fact that there is no legal requirement that parties resolving a malpractice case through settlement must separate out economic and noneconomic damages. Since a settlement in a case such as this could represent compensation for both economic and noneconomic damages, it necessarily follows that this setoff must be taken against the *total* amount of the verdict, both economic and noneconomic damages.⁶

⁵The system that exists in Michigan where the statutory limitation on damages applies only to noneconomic damages must be compared to that in one of the out-of-state cases cited by Dr. Tuma as supportive of his position, *Fairfax Hospital System, Inc. v Nevitt*, 249 Va 591; 457 SE2d 10 (1995). *Fairfax Hospital* arose out of a Virginia statute which, at the time that case was decided, provided that “*the total amount recoverable* for any injury to . . . a patient shall not exceed one million dollars.” Thus, the Virginia statute at issue in *Fairfax Hospital* represented a limitation on the *total* damages that the plaintiff might recover in a malpractice case, both economic and noneconomic. The same cannot be said of Michigan law. Since the Virginia law makes no distinction between economic and noneconomic damages, a court in that state would be able to determine with certainty how much a plaintiff’s total recovery in settlement and verdict could exceed the state’s statutory maximum.

⁶This discussion is not meant to suggest that the trial court’s approach herein would lead to a seamless application of a common law setoff. Such a seamless application is completely impossible where the Michigan Legislature thought that it was eliminating all such setoffs and, as a result, made no provision for them. For example, after deducting the total setoff from the total verdict as the trial court did, a court might in certain cases still be compelled to separate out economic and noneconomic damages either for application of a damage cap (which applies only to noneconomic damages) or for a determination of collateral source reductions (which apply only to economic damages). There is no provision in Michigan law as to how this apportionment would have to be made. Once again, this gap in the law is the product of the fact that all setoffs were supposed to be ended with the 1996 amendment of §2925d(b). Another separate item of a jury verdict subject to differing treatment is medical costs. *See* MCL 600.6306(1)(c), (d)

Dr. Tuma also suggests that the wording of §1483 itself provides support for his argument. That statute provides that in a medical malpractice action the total amount of damages for noneconomic loss recoverable by all plaintiffs shall not exceed the cap established by the Legislature. Defendant takes the position that §1483 sets a firm limitation on the amounts that a plaintiff may recover through both settlement and verdict. But, as discussed previously, defendant's argument with respect to the text of §1483 fails because there simply is no way of knowing precisely how much Ms. Velez would receive in noneconomic damages through the combined total of her settlement and the judgment.

There is a second major error in any argument based on the text of §1483. That statute does not limit the total amount of noneconomic damages that a plaintiff may recover in both settlements and verdict. Rather, the proper interpretation of §1483's language is that it limits the amount of noneconomic damages *that a plaintiff may recover in a trial*. The text of both §1483 and MCL 600.6304 supports the conclusion that the limitation imposed by that statute *is a limitation in the amount of damages that a trier of fact may award*. MCL 600.1483(2) compels a *trier of fact* to segregate the economic and noneconomic elements of its award. As noted previously, this segregation of these two types of damages is absolutely essential to any application of a cap that applies only to noneconomic damages. Once again, the fact that there is no requirement that the parties segregate economic and noneconomic damages represents overwhelming proof that when §1483 speaks of the total amount of noneconomic damages "recoverable," it is directly addressing

(providing that past and future medical costs will not be subject to collateral source reductions.) In cases in which such damages are awarded and the trial court applies a setoff to the total amount of the verdict, there would have to be some way of determining how much of the verdict that remains, after the setoff is applied, pertains to medical care.

the noneconomic damages recoverable *at trial*. Moreover, MCL 600.6304(5) specifies that, *following a verdict* in favor of the plaintiff, the court is compelled to reduce the trier of fact's award of noneconomic damages to the appropriate limitation provided in §1483.

The text of these two statutes demonstrates that the limitation being imposed on noneconomic damages in §1483 is a limitation on the amount of such damages *awarded at trial*. The cap on noneconomic damages in no way addresses what the plaintiff may have previously collected by way of a settlement with other tortfeasors.

A central premise of Dr. Tuma's argument before this Court is that a plaintiff in a medical malpractice action can never recover an amount in settlement and verdict that is in excess of the statutory limit provided in §1483. This argument is completely wrong for another reason. The error in defendant's argument can be demonstrated in a simple hypothetical taken from the facts of this case with one minor adjustment. Assume that Ms. Velez institutes a medical malpractice action against three defendants. She settles with two of the defendants prior to trial for \$195,000.00 and the case proceeds to trial solely against the remaining defendant. At that trial, the jury awards Ms. Velez a total of \$1,400,000.00 in noneconomic damages. However, this hypothetical situation differs from the instant case in one significant respect - Ms. Velez is found at trial to be 10% negligent.

Two things would necessarily follow from this finding of comparative fault against Ms. Velez. First, under MCL 600.6304(6)(a), liability in the case would no longer be joint and several; the case would instead be governed by the modified several liability system described in MCL

600.6304(6)(b).⁷ The second thing that would inevitably result from the jury's finding of comparative fault on the part of Ms. Velez is that the setoff that is at the heart of this case would no longer come into play. The \$195,000.00 settlement that Ms. Velez reached with the two settling defendants would be completely irrelevant in calculating the resulting several liability judgment.⁸

Under this hypothetical which includes an assessment of a degree of negligence against Ms. Velez, the jury's noneconomic damage award of \$1,400,000.00 would first have to be reduced by 10% (\$140,000.00) to account for Ms. Velez's fault, leaving an adjusted noneconomic damage

⁷Plaintiff would acknowledge that in a malpractice case in which the plaintiff is found partially at fault and the case is then controlled by the modified several liability of MCL 600.6304(6)(b), the defendant (assuming compliance with the requirements of MCR 2.112(K)(3)) could name the settling defendants as non-parties at fault and seek at trial to apportion a percentage of damages against them as well. Under the facts of this case, in which the jury awarded an enormous amount of noneconomic damages, the jury could have assigned a combined total of 71% of the fault in this case to Ms. Velez and the two settling parties and the resulting verdict against Dr. Tuma would still have exceeded the \$394,200.00 cap established by §1483. Thus, the hypothetical that plaintiff is offering could just as well include the potential liability of both Ms. Velez and the two settling defendants and, as long as 29% of the fault were assigned to Dr. Tuma at trial, the verdict against him would still have been above the statutory cap.

⁸The reason for this is quite simple. When a finding of comparative fault removes a malpractice case from joint and several liability, the general Michigan law applicable to tortfeasor liability must be applied. Under that law, the "responsibility" of all tortfeasors - including those tortfeasors who were previously named as defendants, but have settled - will be decided by the trier of fact at trial when it assesses percentages of relative fault. *See* MCL 600.2957. Since the trier of fact's allocation of fault against a settling defendant serves to reduce the liability of the remaining defendants at trial, *see* MCL 600.2957(3), the amount of the non-settling defendant's liability could not be further reduced by a setoff based on prior amounts paid in settlement. This would constitute an inappropriate double reduction of the jury's award. The *Markley* Court recognized the fact that its holding with respect to setoffs applied only to those medical malpractice cases in which joint and several liability applied. In *Markley*, the Court held, "[w]ith tort reform and the switch to several liability, it is logical to conclude that *common-law setoff in joint and several liability cases remains the law.*" 255 Mich App at 256 (emphasis added). This Court adopted the same reasoning in *Kaiser*, holding that "[t]o the extent that joint and several liability principles have not been abrogated by statute . . . the common law setoff rule remains the law of Michigan . . ." 480 Mich at 33.

verdict of \$1,260,000.00. *See* MCL 600.6306; MCL 600.6304(3); *Shinholster v Annapolis Hospital*, 255 Mich App 339, 359-360; 660 NW2d 361 (2003), *aff'd in part, rev'd in part on other grounds*, 471 Mich 540; 685 NW2d 275 (2004). Since this adjusted amount substantially exceeds the \$394,200.00 limitation on noneconomic damages imposed by §1483, the adjusted \$1,260,000.00 noneconomic damage award would then have to be reduced to that cap.

There are two critical points to be gleaned from this hypothetical. First, the plaintiff's total recovery in this hypothetical case would be the sum of the noneconomic damage cap and the amount of the pretrial settlement. Since there is no setoff in this hypothetical to reduce the jury's verdict, the plaintiff would be able to collect *both* the \$195,000.00 paid in settlement *and* the maximum noneconomic damage award available after the trial, \$394,200.00. This hypothetical clearly demonstrates that to the extent that defendant's argument in this Court is predicated on the notion that the Michigan Legislature has purportedly set up a system in which a plaintiff in a medical malpractice case may *never* recover through settlement and trial an amount in excess of §1483's statutory cap, defendant's position is completely untenable. As the above hypothetical demonstrates, all that a plaintiff needs to do to recover *both* the settlement *and* a judgment in the amount of the cap under the system set up by the Michigan Legislature is to be guilty of some degree of comparative fault.

There is, however, a second important lesson to be taken from this hypothetical. If the defendant's argument regarding the sequencing of the setoff and the cap were to be adopted by this Court, there will undoubtedly be cases in which a negligent plaintiff could achieve a substantially greater recovery than a similarly situated plaintiff who is found to have been responsible for no negligence. If this Court were to reverse the decision of the Court of Appeals on this point and adopt

Dr. Tuma's argument, there will be future cases in which a plaintiff who is found to be negligent would be "rewarded" for that negligence with a larger recovery than she would have realized if the jury had found her to be without fault. This makes absolutely no sense. But this senseless result will occur if the Court were to adopt Dr. Tuma's position in this case.

Based on the foregoing analysis, Dr. Tuma's argument as to how §1483 and a common law setoff are supposed to interact is completely impossible to apply and would in certain cases lead to truly absurd results. There are, however, additional reasons why defendant's argument fails.

In adopting a common law setoff after the repeal of §2925d(b), the Court of Appeals in *Markley* recognized that this statute "represented a codification of the common-law rule of setoff." 255 Mich App at 255. Since the *Markley* Court adopted a common law setoff for actions such as this and since the former §2925d(b) represented a codification of that common law rule, it is logical to look to the operation of that former statute in determining how the common law setoff adopted by the panel in *Markley* should be applied herein.

Before its elimination in 1996, §2925d(b) specified that a settlement with another tortfeasor, "reduces the *claim* against the other tortfeasors to the extent that any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it . . ." (emphasis added). Thus, the former statute called for a reduction of the plaintiff's *claim* against the defendant. Here, Ms. Velez's damage *claim* against the defendant was for the full amount of her damages, both economic and noneconomic. Her *claim* was not based on the amount of those damages first reduced by the limitation imposed in §1483.

The language of the former §2925d(b), therefore, provides further support for the view that the common law setoff called for by *Markley* is to be taken from the *entirety* of the jury's award -

the amount of the plaintiff's *claim* - not the amount of the plaintiff's recovery after it is first reduced by the statutory cap imposed in §1483. This aspect of the former setoff statute is aptly demonstrated in this Court's decision in *Rittenhouse v Erhart*, 424 Mich 166; 380 NW2d 440 (1986). The *Rittenhouse* decision is analogous to this case in that it involved a jury verdict in a joint and several liability case that was subject to two reductions, the then-existing statutory setoff and plaintiff's comparative fault. As in this case, the *Rittenhouse* Court had to decide the order of these two reductions.

The defendants in *Rittenhouse* made an argument comparable to that which Dr. Tuma makes herein. They contended that the first reduction of the jury's verdict should be for the percentage of comparative fault assessed against the plaintiff. They argued that after that reduction was made, what remained of the verdict would be subject to a setoff based on the then existing statute, §2925d(b). Thus, the defendants in *Rittenhouse*, like the defendant herein, contended that the setoff should be the second of the two reductions imposed by the court. The plaintiffs in *Rittenhouse* advocated a different sequence. They contended that the verdict should first be reduced by the amount of the setoffs associated with the prior settlements. After those setoffs were applied, plaintiff argued that the percentage of comparative fault should be assessed on the remainder of the verdict.

This Court in *Rittenhouse* adopted the plaintiff's argument. 424 Mich at 177-183. The *Rittenhouse* Court ruled, based on the text of §2925d(b), that the first reduction from the jury's verdict had to be the amount of the setoff, not the comparative fault reduction called for by the jury's verdict. Citing the language of §2925d(b), which indicated that a setoff reduces the plaintiff's "claim", the Court held in *Rittenhouse*: "Accordingly, by the time of trial, the 'claim' of each plaintiff against the nonsettling tortfeasors was an amount equal to the total damages minus the

settlements.” 424 Mich at 182 (emphasis added); *see also Velez*, 283 Mich App at 410.

This Court’s decision in *Rittenhouse* is important in two respects. First, the reduction sequence which it adopted is consistent with that applied by the trial court and the Court of Appeals in this case. Even more important, *Rittenhouse* establishes that the language of §2925b(d) called for a setoff to serve as a reduction of the *total amount of damages awarded, i.e.*, the entirety of the plaintiff’s “claim”. That is precisely what the trial court did in this case. It ruled that the setoff had to first be taken from the *total amount of damages* awarded to the plaintiff and only then could §1483 be applied. Since the common law setoff that is being applied in this case has been determined to be consistent with prior practice under the former §2925d(b), *Markley*, 255 Mich App at 255, this Court’s ruling in *Rittenhouse* construing that former statute provides further support for the rulings below.

Dr. Tuma also asserts in his brief that if this Court affirms the decision reached in the lower courts in this case, the \$195,000.00 setoff that he claims will have “no practical effect”. Defendant’s Brief, pp. 1, 14. This argument completely ignores the reality of the jury’s verdict in this case. Dr. Tuma did, in fact, get the full “benefit” of the setoff; the jury’s total award of damages, \$1.52 million, was reduced by the amount of Ms. Velez’s settlement with Dr. Tuma’s co-tortfeasors, \$195,000.00. Unfortunately for Dr. Tuma, the jury assessed damages against him in an amount that was so substantial that the adjusted verdict amount based on the setoff still did not reduce the jury’s damage award to an amount below §1483’s statutory cap on such damages.

Thus, the reason that Dr. Tuma did not get the “benefit” of the common law setoff as he contends is because *he injured Ms. Velez so seriously*. Obviously, if the jury had assessed noneconomic damages in the amount of \$500,000.00 or \$400,000.00, a \$195,000.00 setoff would,

under the trial court's ruling on the sequencing issue, have had "practical effect" on the final judgment amount. Such a setoff would have taken the final judgment below the \$394,200.00 statutory cap. But, the jury did not award noneconomic damages of \$500,000.00 or \$400,000.00; it awarded substantially more.⁹ Dr. Tuma's argument that he did not "get the benefit" of the setoff overlooks the rather obvious fact that, even if one accepts the premise of his argument, the reason he does not get that benefit of a setoff is because Ms. Velez was so severely injured by his negligence.

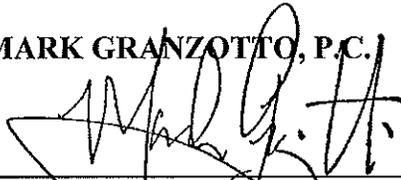
Dr. Tuma's position in this case is wrong for any number of reasons. The trial court and the Court of Appeals got this issue completely right. Their decisions should not be disturbed.

⁹Criticizing the Court of Appeals' ruling in this case because it gives "no practical effect" to the common law setoff that Dr. Tuma claims is about as valid as suggesting that a noneconomic damage verdict of \$200,000.00 - an amount below the statutory cap - is somehow suspect because it gives "no practical effect" to §1483's cap. MCL 600.1483 has "no practical effect" on a \$200,000.00 noneconomic damage verdict because of the size of that verdict. Similarly, to use defendant's phraseology, the setoff applied in this case has "no practical effect" on the ultimate judgment precisely because of the size of the jury's verdict against Dr. Tuma.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellee, Myriam Velez, respectfully requests that this Court affirm the Court of Appeals April 16, 2009 ruling upholding the trial court's calculation of the judgment.

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