STATE OF MICHIGAN

IN THE SUPREME COURT

MAKENZIE GREER, Minor, KENNETH GREER, Individually and as Conservator, and ELIZABETH GREER

Plaintiffs-Appellees,

vs.

ADVANTAGE HEALTH and ANITA R. AVERY,

Defendants-Appellants,

and

TRINITY HEALTH MICHIGAN d/b/a ST. MARY'S HOSPITAL and KRISTINA MIXER, M.D.

Defendants.

Supreme Court No. 149494

Court of Appeals No. 312655

Kent County Circuit Court No. 10-009033-NH

BRIEF OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

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Whether the Court of Appeals misapplied the collateral source setoff rule of MCL 600.6303 and erroneously held that Makenzie Greer was entitled to recover the full amount of her invoiced medical expenses even though her health care insurers paid a lesser amount to Makenzie's health care providers pursuant to a negotiated discount, and could not assert a lien for the discounted amount?

The Court of Appeals would say "no."

The Trial Court said "no."

Plaintiff-Appellee says "no."

Defendants-Appellants say "yes."

Amicus Curiae MSMS says "yes."

Whether the Court of Appeals properly held that the entire proceeds received in the settlement of claims asserted against Defendants St. Mary's Hospital and Dr. Kristina Mixer were properly set off against the recovery of Makenzie Greer?

The Court of Appeals would say "yes."

The Trial Court said "no."

Plaintiff-Appellee says "no."

Defendants-Appellants say "yes."

Amicus Curiae MSMS says "yes."

STATEMENT OF INTEREST OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS is frequently called upon to express its views with respect to legal issues of significance to the medical profession.

The focus of this appeal is MCL 600.6303, a collateral source setoff statute that was enacted as part of Michigan's 1986 tort reform legislation. The statute abrogates the common law collateral source rule and prevents personal injury plaintiffs from obtaining double recovery. This Court is being asked to decide whether the Court of Appeals incorrectly held that Makenzie Greer was entitled to recover the *full amount* of her invoiced medical expenses even though Makenzie's health care insurers paid Makenzie's health care providers (and asserted a lien for) a *lesser discounted amount*. *Greer v Advantage Health*, 305 Mich App 192; 852 NW2d 198 (2014).

In *Greer*, the invoiced medical expenses totaled $425,533.75 but the health care providers accepted $212,714.75 as full payment pursuant to a previously agreed upon discount they negotiated with the health insurers. The health insurers asserted a lien for the lesser amount. While the Court of Appeals properly concluded that both the medical expense payment of $212,714 and the unpaid discount of $212,819 were "benefits received or receivable from an insurance policy" and therefore collateral sources within the meaning of MCL 600.6303(4), the Court of Appeals erroneously held that both amounts were also "benefits paid or payable" and subject to a lien, and thus excepted from the setoff reduction requirement. 305 Mich App at 206-

207. Thus Makenzie was permitted to recover the full amount of the invoiced medical expenses, even the amount that – because of the discount – was not required to be paid.

A second issue, raised on cross-appeal, is whether the Court of Appeals correctly held that the entire proceeds received in the settlement of claims asserted against Defendants St. Mary's Hospital and Dr. Kristina Mixer were properly set off against the recovery of Makenzie Greer. The proper application of the common law setoff rule in medical malpractice cases is an issue of immense importance to MSMS. The setoff doctrine has been embedded in the law of joint and several liability for many years. Although tort reform eliminated joint and several liability in other contexts, it remains the rule in medical malpractice cases. Thus the common law setoff rule applies to ensure that a plaintiff does not recover twice for a single injury.

The statutory collateral source setoff rule and the common law setoff rule are important aspects of medical malpractice litigation and are matters of significance to MSMS and its members. In accordance with MCR 7.306(D), and pursuant to this Court's December 16, 2014 order granting MSMS leave to file an amicus brief, MSMS now presents its views.

STATEMENT OF FACTS

MSMS relies upon the Statement of Facts contained within Defendants-Appellants' Brief on Appeal.

ARGUMENT

I. The Court of Appeals Erroneously Held That the Insurance Discount Qualifies As an Exception to the Collateral Source Setoff Rule.[1]

The status of collateral source payments in personal injury litigation is governed by statute in Michigan, specifically MCL 600.6303. Before MCL 600.6303 was enacted in 1986, the common law collateral source rule "provided that compensation from a source other than another tortfeasor … did not operate to reduce the damages recoverable from the wrongdoer." *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 294; 549 NW2d 47 (1996). MCL 600.6303 reverses the common law rule by (1) allowing the admission of evidence in post-verdict proceedings to establish that medical expenses, rehabilitation services, loss of earnings/earnings capacity, and other forms of economic loss have been paid or are payable by a collateral source, and (2) requiring the trial court to reduce the verdict by the amount of collateral source payments it finds to have been "paid or payable." MCL 600.6303(1) provides in pertinent part:

> In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, *evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought* after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), *if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection* (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.

[1] Questions of statutory construction are reviewed de novo. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). The Court's role "is to give effect to the intent of the Legislature, as expressed by the language of the statute" and to "apply clear and unambiguous statutes as written, under the assumption that the Legislature intended the meaning of the words it has used …" *Id.* (footnotes omitted).

Id. (emphasis added). See also MCL 600.6306a(1)(a) (requiring the trial court to make the post-verdict deduction for collateral source payments in medical malpractice cases); MCL 600.6306(1)(a) (same as to personal injury actions not involving medical malpractice); and MCL 600.6304(3) (directing the court to "determine the award of damages … subject to any reduction under … 6303"). [2]

MCL 600.6303(4) defines "collateral source" and includes within that definition "benefits received or receivable from an insurance policy" and "benefits payable pursuant to a contract with a health care corporation … or health maintenance organization," as well as "medicare benefits." However, benefits "paid or payable" and subject to a contractual lien that "has been exercised" are excluded from the definition of collateral source. MCL 600.6303(4) provides in part:

> Collateral source does not include life insurance benefits or benefits *paid* by a person, partnership, association, corporation, or other legal entity *entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages*. Collateral source does not include benefits *paid or payable* by a person, partnership, association, corporation, or other legal entity *entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3*).

Id. (emphasis added).[3]

The obvious effect of the collateral source setoff statute is to allow a plaintiff to recover for paid medical expenses only in those instances where the benefits must be repaid to the provider pursuant to a properly exercised lien. If the plaintiff enjoys full value of the benefit

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[2] The amount of the expense or loss which has been paid or which is payable by a collateral source (except for insurance premiums required by law) shall be reduced by the premiums paid for the collateral source benefit. MCL 600.6303(2).

[3] Also excluded are life insurance benefits or benefits paid by a person or entity entitled by law to a lien against the proceeds of recovery. Subsection (3) imposes notice and time limitations upon the assertion of the lien.

because no lien has been exercised, the benefit remains a collateral source which reduces the medical expense component of the verdict. This avoids double recovery. In *Heinz*, the Court explained:

> [I]t is just as reasonable to presume from the enactment of MCL 600.6303; MSA 27A.6303 that the Legislature's intent was to promote fairness, i.e., to prevent personal injury plaintiffs from being compensated twice for the same injury.

216 Mich App at 301. See also *id*. at 306 (referring to "the statutory purpose of preventing 'double recovery'").

Justice Young confirmed this purpose in *State Auto Mut Ins Co v Fieger*, 477 Mich 1068, 1072; 730 NW2d 212 (2007) (Young, J, concurring), and likewise explained that payments subject to a lien are not eligible for deduction because the amount due to the lien holder "must still be paid." Justice Young explained:

> The collateral source rule is designed to prevent double recovery by plaintiffs. After a trier of fact reaches a verdict for a plaintiff, the court must enter an order of judgment. MCL 600.6306(1). The judgment must contain a number of elements of damages, including "[a]ll past economic damages, less collateral source payments as provided for in section 6303." MCL 600.6306(1)(a). Section 6303 allows for "evidence to establish that [an] expense or loss was paid or is payable, in whole or in part, by a collateral source . . . ." MCL 600.6303(1). If the court determines that a portion of the past economic damages was paid by a collateral source, then the court must reduce the judgment by that amount. *Id. However, payments subject to a statutory or contractual lien are not eligible for deduction as "collateral sources" under the statute. MCL 600.6303(4). This is because the amount due to the lien holder must still be paid.*

Id. (emphasis added).

In *Greer*, the jury awarded plaintiff the full amount of the invoiced medical expenses in the amount of $425,533. 305 Mich App at 196-197. But plaintiff's health care providers accepted a discounted payment of $212,714.75 in full satisfaction of the invoices rendered to plaintiff's health care insurers. Hence, the health care insurers asserted a lien only in the amount of the discounted payment. The remainder of the amount invoiced for health care services – the

actual discount of $212,819 – was not "paid or payable" and could not be recovered by lien. *Id*. at 212-213. Thus, the discount should not have been excluded from the collateral source benefits deducted from the verdict. *Id.* at 213.

To get around the plain meaning of the statute, *Greer* concluded that when a lien is exercised the benefits payable pursuant to the lien *are not limited to the amount of the lien but include the full amount of the invoiced benefits, including the discount*. *Greer* explained:

> Because insurance discounts are "benefits received or receivable from an insurance policy" within the plain meaning of the first sentence of § 6303(4), we must conclude that the insurance discounts are also "benefits paid or payable" within the plain and ordinary meaning of the last sentence of § 6303(4). The words "paid" and "payable" are both derived from the word "pay," which is defined as "to discharge or settle (a debt, obligation, etc.), as by transferring money or goods, or by doing something." Random House Webster's College Dictionary (1996). There appears to be no dispute that the insurance discounts here, along with cash payments, discharged or settled plaintiffs' debt or obligation to their healthcare providers. So, assuming that an insurance discount is a "benefit[] paid or payable" within the meaning of § 6303(4), then the last sentence of subsection (4) would read: "Collateral source does not include [an insurance discount used to settle or discharge a debt of the plaintiff for medical expenses provided] by [an insurance company] entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3)."

Id. at 211-212. See also *id*. at 212-213 ("the plain terms of the exclusion from the statutory collateral source rule of § 6303(4) when a contractual lien is exercised is not limited to the amount of the lien; it applies to all benefits that were paid or payable by a 'legal entity entitled by contract to a lien'").

The conclusion that the use of the term "lien" in the statute refers to something other than a properly asserted lien for benefits actually paid, violates the intent of the statute. *Greer* overlooks the absence of any lien – and the inability of the insurers to ever assert a lien - on the unpaid discounted amount. *Greer* also overlooks significant statutory language differentiating between liens allowed by law and those allowed by contract. Under MCL 600.6303(4),

collateral source does not include life insurance benefits or benefits paid by a person "entitled by law to a lien against the proceeds." However, the statute qualifies the collateral source exception for benefits paid by contract. To be removed from the definition of collateral source, benefits paid or payable by a person entitled by contract to a lien against the proceeds must be subject to a lien that has "been exercised." *Greer* gives no effect to this distinction.

Indeed, the *Greer* court contradicted itself in finding its holding to be consistent with the holding in *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002), particularly given the *Greer* court's recognition that *Zdrojewski* supports the position that a lien can only be asserted (and the collateral source exclusion can only apply) *to amounts actually paid*. *Id*. at 212. Addressing *Zdrojewski*, the *Greer* court explained:

> The Court concluded that "[b]ecause the statute clearly states that benefits subject to an exercised lien do not qualify as a collateral source, and [Blue Cross Blue Shield of Michigan (BCBSM)] and Medicare exercised their liens, health insurance benefits provided by BCBSM and Medicare to plaintiff do not constitute a collateral source under MCL 600.6303(4)." *Id*. While this ruling supports plaintiffs' position that the insurance payments were not collateral sources because the insurers asserted a lien with respect to the payments, *it also supports defendants' position that only payments an entity actually makes and asserts a lien for—and no lien may be asserted for insurance discounts—are excluded under § 6303(4).*

305 Mich App at 209 (emphasis added).

In *Zdrojewski*, the insurers paid *more* in medical expenses than the liens asserted, and the Court of Appeals noted that the record was unclear as to whether the insurers would exercise their additional lien rights in the future. 254 Mich App at 70. "Regardless of those considerations," however, the Court noted that "the statute does not make any provision for a situation where a lien has been exercised, but for an amount less than the lienholder would be legally entitled to recover." *Id.* Hence, unlike here (where the amount of the lien equals the amount actually paid), the touchtone in *Zdrojewski* was the existence of payments which

exceeded the amount of the asserted liens. This discrepancy was noted in *Wilson v Keim*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2008 (Docket Nos. 275997, 276022, and 276446), 2008 Mich App LEXIS 1535, at *37, where the Court explained, "Here, defendant admits that HAP exercised a lien. This *lien was arguably for a lesser amount than it was entitled to recover*. *Zdrojewski* instructs that in *this situation*, the health insurance benefits do not constitute a collateral source under the law") (emphasis added). See also *Rocha v Better Built Mfg, Inc*, unpublished opinion per curiam decision of the Court of Appeals, issued June 21, 2011 (Docket No. 297090), 2011 Mich App LEXIS 1111, at *4 ("As a collateral source, worker's compensation benefits should be offset from a damages award *unless the recovery is subject to a valid lien* held by the worker's compensation insurance carrier").[4]

Unlike *Zdrojewski*, the health insurers in *Greer* exercised the full amount of the liens to which they were entitled. They could not exercise additional lien rights for the discount they were never required to pay. See *Howell v Hamilton Meats & Provisions, Inc*, 52 Cal 4th 541, 558; 257 P3d 1130 (2011) ("Having agreed to accept the negotiated amount as full payment, a provider may not recover any difference between that and the billed amount through a lien on the tort recovery").[5]

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[4] The Court of Appeals erroneously failed to appreciate this distinction in *Hall v Bartlett*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2011 (Docket No. 290147), 2011 Mich App LEXIS 596 at 52, when it concluded that "[n]othing meaningfully distinguishes this case from *Zdrojewski*." In *Hall*, as in the present case, the health insurer paid less than the amount awarded for past medical expenses. The case does not disclose whether a lien was exercised for the entire amount.

[5] *Detary v Advantage Health Physicians, PC***,** unpublished opinion per curiam of the Court of Appeals, issued November 29, 2012 (Docket No. 308179), 2012 Mich App LEXIS 2409, is to the contrary. In *Detary*, the Court of Appeals refused to deduct the medical expenses "written off" by the health care providers (and as to which no lien could be asserted), finding that the write off was not a collateral source benefit. See i*d*. at *23-24 (finding that "[a]n amount that has

(footnote continued . . .)

Thus in *Greer*, the collateral source benefits deducted from the verdict should have only been reduced by the amount paid or payable by lien – $212,714. In other words, because Makenzie was awarded the full amount of the invoiced medical expenses and no lien could be claimed for the discounted amount of $212,819, the verdict should have been reduced by that amount.[6]

Elementary damages principles support this interpretation of the collateral source setoff statute. In Michigan, the purpose of tort damages is to compensate the injured party and make him whole. *Murray v Ferris*, 74 Mich App 91, 95; 253 NW2d 365 (1977). Thus, a tort plaintiff can only recover for the reasonable damages actually sustained due to the defendant's acts or omissions. *Id*. Where medical expenses are discounted pursuant to a negotiated fee for service agreement between the health insurer and the medical care providers, the discounted portion of the medical expenses will never be paid by the plaintiff, the insurer, or anyone else. Therefore, the discounted medical expenses are not damages which can be recovered in a tort action. To hold otherwise improperly permits a plaintiff to profit from litigation by obtaining a greater

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been written off has not been paid, nor is it payable, such that it is not a collateral source" and "[a]ny benefit plaintiff received from the write offs" was "not a benefit received or receivable from an insurance policy, nor is it a benefit payable pursuant to a contract with a health care corporation" and "does not fall within the statutory definition of 'collateral source.'"). The Court rejected the assertion that this would result in a windfall to plaintiff stating, "Because plaintiff's medical care providers elected to absorb some of the cost of her care does not make defendant any less negligent, nor does the fact that she was insured. Should a windfall arise due to the action of an outside party (here, the "write off" by a medical provider), that would be a function of the statute, and we do not venture into that area of public policy." *Id*. at *25. MSMS believes that this is faulty thinking and contrary to the intent of the statute, which was to prevent windfalls and double recovery.

[6] In addition to disregarding the absence of a valid lien for the amount of the discount, *Greer* erroneously interpreted benefits "received or receivable" (within the definition of collateral source) to mean the same thing as benefits "paid or payable" (for the purpose of the exception). It is incongruent to equate a discount with a payment. Indeed, the very purpose of a discount is to negate the need for a payment in the discounted amount.

reimbursement for medical expenses than were actually paid. As the Court of Appeals explained in *Bombalski v Auto Club Ins Assoc*, 247 Mich App 536, 543; 637 NW2d 251 (2001):

> Plaintiff submits that he likewise became liable for the amounts charged by his health care providers when he accepted their services and that consequently he incurred the full amounts charged. Plaintiff's claim does not persuade us, however, because plaintiff overlooks the significance of "liable," which means "responsible or answerable in law; legally obligated." Black's Law Dictionary, *supra* at 927. The satisfaction of plaintiff's medical bills by BCBSM through payment of less than the amounts charged by the providers relieved plaintiff of any responsibility or legal obligation to pay the providers further amounts exceeding those proffered by BCBSM and accepted by plaintiff's health care providers. Because plaintiff bears no liability for the full medical service amounts initially charged by his health care providers, he has not incurred these full charges…

See also Howell, 52 Cal 4th at 555; ("if the plaintiff negotiates a discount and thereby receives services for less than might reasonably be charged, the plaintiff has not suffered a pecuniary loss or other detriment in the greater amount and therefore cannot recover damages for that amount…The same rule applies when a collateral source, such as the plaintiff's health insurer, has obtained a discount for its payments on the plaintiff's behalf"); *Coop Leasing Inc. v Johnson*, 872 So 2d 956, 958 (Fla App 2004) ("Johnson was not entitled to recover for medical expenses beyond those paid by Medicare because she never had any liability for those expenses and would have been made whole by an award limited to the amount that Medicare paid to her medical providers"); *Moorhead v Crozer Chester Med Ctr*, 564 Pa 156, 162; 765 A2d 786 (2001) ("We find that the amount paid and accepted by Appellee as payment in full for the medical services is the amount Appellant is entitled to recover as compensatory damages").

In *Dyet v McKinley*, 139 Idaho 526; 81 P3d 1236 (2003), the issue was whether Medicare write-offs are a collateral source under the Idaho statute. Idaho Code §6-1606, entitled *Prohibiting Double Recoveries from Collateral Sources*, states in part:

> In any action for personal injury or property damage, a judgment may be entered for the claimant only for damages which exceed amounts received by the claimant

> from collateral sources as compensation for the personal injury or property damage, whether from private, group or governmental sources, and whether contributory or noncontributory. For purposes of this section, collateral sources shall not include benefits paid under federal programs which by law must seek subrogation … Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent the award includes compensation for damages, which have been compensated independently from collateral sources.

The Court concluded that plaintiff could not recover the written-off amounts under this statute, stating:

> Although the write-off is not technically a collateral source, it is the type of windfall that I.C. §6-1606 was designed to prevent. As reasoned by the New York court in *Kastick* [*v. U-Haul*, 740 NYS 2d 167, 292 AD2d 797 (2002)], "Although the write-off technically is not a payment from a collateral source within the meaning of [the collateral source statute], it is not an item of damages for which plaintiff may recover because plaintiff has incurred no liability therefore." *Id.* 740 N.Y.S. 2d at 169, 292 A.D.2d at 798.

139 Idaho at 529. *Kastik* involved medical expenses arising from an automobile accident. In refusing recovery for the unpaid amounts, the Court explained:

> Plaintiff contends that the court's determinations concerning the reductions for collateral sources are erroneous. After receiving payments from no-fault and Medicare, University Hospital "wrote off" the remaining balance of $ 138,613.88. Plaintiff contends that defendants were not entitled to a credit for that amount because the "write-off" did not constitute payment from a collateral source. Defendants contend that plaintiff may not recover from them an amount for which she never became obligated. We agree with defendants. Although the write-off technically is not a payment from a collateral source within the meaning of CPLR 4545, it is not an item of damages for which plaintiff may recover because plaintiff has incurred no liability therefor (*see*, *Coyne v Campbell*, 11 N.Y.2d 372, 374-375, 230 N.Y.S.2d 1, 183 N.E.2d 891 *Hartman v Dermont*, 89 A.D.2d 807, 808, 453 N.Y.S.2d 464; see also, *McAmis v Wallace*, 980 F. Supp. 181, 183-184; *Moorhead v Crozer Chester Med. Ctr.*, 564 Pa 156, 162-163, 765 A.2d 786, 789-790; *Bates v Hogg*, 22 Kan App 2d 702, 705-706, 921 P.2d 249, 252-253).

740 NYS 2d at 169.

By allowing recovery for amounts not paid, *Greer* has seriously undermined the intended purpose and effect of MCL 600.6303, and has expanded the meaning of "damages." Respectfully, as to that issue, the Court of Appeals decision should be reversed.

II. The Court of Appeals Correctly Applied The Common Law Setoff Rule to Reduce Recovery By the Amount of the Settlement.

For nearly a century, setoff has been properly embedded in the principles of joint and several liability, which renders "each tortfeasor … liable for the full amount of damages." *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 253; 660 NW2d 344 (2003). Because a plaintiff can elect to fully recover from multiple potentially liable defendants, plaintiff could conceivably recover many times over by settling her claim with one or more defendants and/or proceeding to judgment in different actions against others. Setoff exists to ensure that despite such machinations, the plaintiff can only recover once for a single injury.

In 1995, the Michigan Legislature abolished joint and several liability in most instances and replaced it with an allocation of fault system by which each defendant pays that portion of the judgment which correlates to the defendant's percentage of fault (as determined by the jury). See MCL 600.2956 and MCL 600.6304. However, allocation of fault only applies where "liability … is several only and not joint," MCL 600.6304(4), and the Legislature ***expressly preserved joint and several liability*** in medical malpractice cases where the plaintiff is without fault. MCL 600.6304(6). Further, medical malpractice actions are expressly carved out of the allocation of fault provisions. *See* MCL 600.6304(4), which states in pertinent part that "[e]xcept as otherwise provided in subsection (6) [the provision which preserves joint and several liability in medical malpractice cases], a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1)."

Prior to its amendment in 1995, MCL 600.2925d provided, in part, that a settlement and release "reduces the claim against the other tortfeasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it,

whichever amount is the greater." *Markley* held that where joint and several liability continued to exist, the common law setoff rule survived the elimination of the statutory setoff provision.[7] 255 Mich App at 257. *Markley* recognized that the common law setoff rule effectuates the principle that "a plaintiff is entitled to only one recovery for his injury." *Id*. at 250, citing *Great Northern Packaging, Inc v Gen Tire & Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986). *Markley* noted that the rule is rooted in this Court's opinion in *Verhoeks v Gillivan*, 244 Mich 367, 371; 221 NW 287 (1928), which explained that an injured party may elect to pursue joint tortfeasors jointly or severally "but, the injury being single, he may recover but one compensation." *Id.* at 251, quoting *Verhoeks*, 244 Mich at 371. See also *Thick v Lapeer Metal Products Co*, 419 Mich 342, 348 n 1; 353 NW2d 464 (1984) (reciting the common law rule "that where a negligence action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his potential liability by paying a lump sum in exchange for a release, and a judgment is subsequently entered against the non-settling tortfeasor, the judgment is reduced *pro tanto* by the settlement amount"). See also *Salter v Patton*, 261 Mich App 559, 566; 682 NW2d 537 (2004) (relying on *Markley* and stating that "plaintiffs are not entitled to double recovery from settling and nonsettling defendants …")

In *Velez v Tuma*, 492 Mich 1, 6; 821 NW2d 432 (2012), this Court confirmed that "where the Legislature has retained principles of joint and several liability, the common-law setoff rule

[7] *Markley* noted that the setoff language in MCL 600.2925d represented a codification of the common-law rule of setoff and "was apparently deleted because the tort reform legislation, for the most part, abolished joint and several liability in favor of allocation of fault or several liability." 255 Mich App at 253.

applies." *Id*. at 6.[8] This was in keeping with this Court's decision in *Kaiser v Allen*, 480 Mich 31; 746 NW2d 92 (2008), and with long-standing jurisprudential principles that are bedrock law. These principles counsel that, in cases of joint and several liability, set off must be applied to ensure that a plaintiff will only recover once.[9] In *Velez*, this Court explained:

> Inherent in the meaning of joint and several liability is the concept that a plaintiff's recovery is limited to one compensation for the single injury. Because in some instances a jointly and severally liable tortfeasor settles before trial, the common-law setoff rule is necessary to ensure that the plaintiff does not recover more than a single recovery for the single injury. The common-law setoff rule entitles the remaining tortfeasors, who are still liable for the *entire* injury, to set off the amount of the cotortfeasor's settlement from any verdict rendered against them.

492 Mich at 13-14.

In advance of trial in this case, defendant St. Mary's Hospital paid $600,000 to settle the personal injury claims asserted by Makenzie Greer and her mother, along with the medical expenses and loss of consortium claims asserted by Makenzie's father. The settlement did not assign a particular portion of the settlement amount to a particular claim or legal theory. Rather, "the settlement payment was for 'any and all claims' that all plaintiffs may have arising from the incident that 'occurred on or about September 28, 2008' and included 'the subsequent medical treatment' of Makenzie." *Greer*, 305 Mich App at 202. As the Court explained, "the settlement was a lump sum payment by an alleged jointly and severally liable tortfeasor to settle all claims of all plaintiffs arising out of the malpractice incident described in plaintiffs' complaint." *Id*.

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[8] The Court further held that a joint tortfeasor's settlement must be setoff from the final judgment after application of the noneconomic damages cap of MCL 600.1483 and the collateral source rule.

[9] See also *Mayhew v Berrien Co Rd Comm*, 414 Mich 399; 326 NW2d 366 (1982), where this Court concluded that the verdict should be reduced by the amount of a jointly liable defendant's settlement, not the percentage of fault, because it was consistent "with the ever-important policies of (1) encouraging settlements and (2) assuring that a plaintiff is fully compensated for injuries sustained." *Id.* at 411-412.

Before the entry of judgment, the defendants moved to set off the entire $600,000 against the jury verdict. Declining to deduct the settlement *in toto*, the trial court reasoned that the settlement was payment for all claims but the verdict applied only to Makenzie (a no cause verdict having been returned for Mr. Greer and Mrs. Greer). Thus, the trial court thought it fair to allocate 1/3 of the settlement to Makenzie's claim and to set off that amount. The Court of Appeals properly concluded that this was error.

Finding "no basis in the release and settlement agreement … or the jury's verdict to allocate any portion of the St. Mary's payment to injuries other than those of Makenzie Greer," and recognizing that it could nor "alter the settlement, which is, of course, a contract," the Court of Appeals held that the entire amount of the settlement should have been set off against Makenzie Greer's recovery. 305 Mich App at 200. The Court of Appeals concluded that by assigning one-third of the settlement to each plaintiff's claims, the trial court "***failed to fully apply the principle of setoff that for one injury there may be a single recovery***." *Id*. at 203 (emphasis added). The Court explained:

> Plaintiffs collectively settled all their claims against a jointly liable tortfeasor arising out of a single instance of malpractice involving Makenzie's birth for a single undifferentiated lump sum of $600,000 … To ensure that plaintiffs are fully but not overly compensated for all their claims, the entire St. Mary's settlement must be offset against the amount the jury determined represented plaintiffs' collective damages. *Markley*, 255 Mich App at 250-251. When there is a recovery "for an injury identical in nature, time and place, that recovery must be deducted from [the plaintiffs'] other award." *Great Northern Packaging, Inc. v. General Tire & Rubber Co*., 154 Mich App 777, 781; 399 NW2d 408 (1986).

Id.

The Court of Appeals' conclusion that the entire amount of the settlement be set off against the verdict is fully supported by *Velez*. See *Velez*, 492 Mich at 24, n 45 ("our holding requires a court to subtract the entire amount of the settlement form *whatever* damages remain after applying the relevant statutory adjustments.") That a plaintiff's recovery is limited to one

compensation for a single injury is inherent in the meaning of joint and several liability. *Id.* at 13. Thus, to insure that Makenzie did not receive more than a single recovery for her single injury, the Court of Appeals properly directed that the full amount of the settlement – which provided partial compensation already received for her single injury - be deducted. See *Id.* at 23 ("application of the common-law setoff rule requires that codefendants' settlement be subtracted from the final judgment so that [she] does not receive more than a single recovery for her single injury.").

Further, *Velez* discouraged the apportionment of an indivisible lump sum settlement into divisible portions. The Court explained that "in instances like the present, in which the composition of the settlement is unknown, circuit courts would be left to guess at how a settlement should be allocated." The Court explained:

> Requiring circuit courts to engage in this guesswork, from which a range of potential outcomes could result, unreasonably burdens them with a determination that they are, in the absence of any statutory guidance, ill-prepared to make.

492 Mich at 26. Given *Velez*, the Court of Appeals properly concluded "that to avoid speculative apportionment of an undifferentiated lump sum settlement paid by a jointly liable codefendant to settle all of the plaintiffs' claims arising from a single incident of malpractice, the entire settlement must be offset." *Greer*, 305 Mich App at 205.

The correct result and analysis inheres in *Greer*. This Court must continue to reject assaults on the longstanding one injury-one recovery rule. Absent application of setoff, nothing would prevent a plaintiff from obtaining duplicative recovery against jointly liable defendants through judgment and settlement. For these reasons, MSMS respectfully requests that this Court affirm *Greer* with respect to the common law setoff issue.

RELIEF REQUESTED

For these reasons, Amicus Curiae Michigan State Medical Society respectfully requests that this Court reverse that portion of the Court of Appeals decision which addresses the collateral source setoff issue and affirm that portion of the Court of Appeals decision which addresses common law setoff based on the settlement with St. Mary's Hospital.

Respectfully submitted,

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