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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DANIEL CODNER et al., Plaintiffs and Respondents, v. JOHN STEVENSON WILLS, Defendant, Cross-complainant and Appellant, IN-N-OUT BURGERS, Defendant, Cross-complainant and Appellant.	2d Civil No. B198675 (Super. Ct. No. CIV 239017) (Ventura County)
DANIEL CODNER et al., Plaintiffs, JOHN STEVENSON WILLS, Cross-complainant and Appellant, v. IN-N-OUT BURGERS, Cross-complainant and Appellant.	2d Civil No. B202091

A motorcycle driven by respondent Daniel Codner collided with a car driven by appellant John Stevenson Wills near the exit of appellant In-N-Out Burger, a restaurant on Harbor Boulevard in Ventura. The cause of the accident was sharply disputed. The Codners claim that Wills failed to yield the right of way in making a left turn across the lane in which Codner was traveling. Wills claims that Daniel Codner was traveling in excess of the posted speed limit of 35 miles per hour. Appellant In-N-Out Burger allegedly contributed to the accident by violating its conditional use permit and a City of Ventura ordinance, causing cars to back up on Harbor Boulevard, impairing Wills' line of sight, and preventing him from seeing the motorcycle in time to avoid the collision.

Daniel; his son, Cody, who was a passenger on the motorcycle; and wife, Rebecca, sued Wills and In-N-Out alleging negligence, premises liability and loss of consortium. Wills and In-N-Out filed cross-complaints against each other for indemnity. In-N-Out settled with Codner for $500,000 prior to trial allocating $145,000 to economic damages and $355,000 to noneconomic damages. The trial court approved the settlement, finding it was made in good faith. Despite the settlement, In-N-Out participated in the trial. The jury found by special verdict that Wills was 100 percent at fault and awarded damages totaling $3,084,305.29. The verdict apportioned the award between economic and noneconomic damages in a percentage different than that allocated in the settlement agreement.

On appeal, Wills contends the court made three errors during trial: (1) admitting photographs showing crash test results of a collision between an automobile and motorcycle, (2) refusing to give a negligence per se jury instruction as to In-N-Out, and (3) precluding Wills from informing the jury of the settlement between Codner and In-N-Out. Wills also contends the trial court erred in denying his post-verdict motion to reduce the award for past medical expenses to the amount actually paid by Codner's insurer.

In-N-Out cross-appeals asserting the trial court made several post-verdict procedural errors, including amending the judgment after Wills filed an appeal. In-N-Out also asserts the trial court erred in awarding it indemnity only for economic damages and, alternatively, the trial court erred in using the apportionment between economic and noneconomic damages contained in the settlement agreement rather than the apportionment made by the jury. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Daniel and Cody Codner were riding a motorcycle northbound on Harbor Boulevard in Ventura. As they were passing the In-N-Out Burger restaurant, they struck a car driven by John Wills who was attempting to make a left-hand turn onto Harbor Boulevard from the restaurant. Daniel sustained serious injuries, including brain damage, a fractured pelvis and shattered kidney. Cody sustained a fractured clavicle requiring multiple surgeries.

Daniel, his son, and wife filed a complaint for damages against Wills and In-N-Out alleging negligence, premises liability and loss of consortium. Wills and In-N-Out cross-complained against each other for equitable indemnity.

The Codners and In-N-Out settled before trial for $500,000. The agreement allocated $145,000 to economic damages and the remainder to noneconomic damages. The trial court approved the settlement agreement, including the allocations made to economic and noneconomic damages, and determined that the settlement was made in good faith. Wills' cross-complaint for equitable indemnity against In-N-Out was dismissed as a result of the court's good faith determination. In-N-Out participated in the trial, seeking indemnity from Wills.

Prior to trial, Wills made a motion in limine to exclude photographs contained in an article published by the Society of Automotive Engineers (SAE) showing damage resulting from a motorcycle colliding with an automobile at varying rates of speed. The trial court denied the motion. In-N-Out moved in limine to exclude evidence of Codner's claims against In-N-Out and of the

settlement and to preclude reference to negligence per se based on alleged violations of In-N-Out's conditional use permit (CUP) and City of Ventura ordinances. The trial court granted these motions.

At trial, Wills testified that his vision was obscured when he was attempting to make the left-hand turn because In-N-Out permitted cars using its drive-thru lane to back up onto Harbor Boulevard. Wills also testified that Codner was responsible for the accident because he was exceeding the speed limit.

Accident reconstruction experts called by Codner and In-N-Out testified that the motorcycle was traveling between 35 and 42 miles per hour. The jury was shown the SAE photographs during the experts' testimony. The experts stated that the photographs were consistent with their opinions but that they relied on other factors in reaching their conclusions as to the speed of the motorcycle. Wills did not present expert testimony. Several percipient witnesses called by Wills estimated the motorcycle was going much faster than the speed limit and was accelerating just before the accident.

The jury returned a special verdict totaling $3,084,305.29. Daniel was awarded $1,200,648.23 in economic damages and $1,750,000 in noneconomic damages; Cody was awarded $58,657.06 in economic damages and $25,000 in noneconomic damages; Rebecca was awarded $50,000 in noneconomic damages.[1] The trial court entered a judgment in favor of Codner for that amount and a separate judgment in favor of In-N-Out for "Complete Indemnity." Wills filed a motion to reduce the verdict based on the amount of paid medical expenses.

On April 30, 2007, Wills filed a notice of appeal. On the same day, he filed a motion to set aside and vacate the judgment under Code of Civil Procedure section 663 on the ground that In-N-Out's judgment for indemnity must

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1 "Economic damages" means objectively verifiable monetary losses including, but not limited to, medical expenses and loss of earnings. (Civ. Code, § 1431.2, subd. (b)(1).) "Noneconomic damages" means subjective nonmonetary losses including, but not limited to, pain and suffering, emotional distress, loss of society and companionship and loss of consortium. (*Id.* at subd. (b)(2).)

be reduced to $145,000 under Proposition 51--the allocation made for economic damages in the settlement agreement. On May 3, Wills filed a motion for new trial. Codner and In-N-Out opposed the motions. The trial court denied the motions for new trial and to reduce the verdict and granted the motion to vacate the judgment. The court filed an amended judgment that limited In-N-Out's indemnity judgment against Wills to $145,000. Both Wills and In-N-Out appeal from the amended judgment. The Consumer Attorneys of California filed an amicus curiae brief in support of Codner.

DISCUSSION

A. Wills' Appeal

1. No Reversible Error in Permitting Photographs to be Shown to the Jury

Wills asserts the trial court erred in denying his motion to preclude the jury from viewing the SAE photographs. Wills asserts that showing the photographs to the jury was prejudicial error because they were inadmissible hearsay, not properly authenticated and did not represent circumstances similar to the accident.

The photographs depicted crash test results and were part of a study done by the SAE. They were shown to the jury in conjunction with testimony by two accident reconstruction experts testifying for the plaintiffs as well as in plaintiffs' counsel's opening statement and closing argument. The photographs depicted the results of a crash between a Kawasaki 1000 motorcycle and a 1989 Ford Thunderbird automobile colliding at a 90-degree angle. The motorcycle in the photographs was substantially similar to that driven by Codner; Wills' Thunderbird, however, was a 2003 and its body style differed from the Thunderbird in the photographs. In addition, Codner's motorcycle hit the Thunderbird at less than a 90-degree angle.

The photographs should not have been shown to the jury. It is well established that, while experts may rely on hearsay evidence, such evidence may not be shown to the jury. (See, e.g., *People v. Campos* (1995) 32 Cal.App.4th 304,

308 ["An expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts"].) "'[T]he rule which allows an expert to state the reasons upon which his opinion is based may not be used as a vehicle to bring before the jury incompetent evidence.'" (*Ibid*.)

Respondents contend that the photographs were admissible as experimental evidence. We disagree. The cases relied on by respondents where photographs were deemed admissible evidence all have one characteristic absent in this case. In *People v. Cummings* (1993) 4 Cal.4th 1233, *DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, and *Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, the experiments were performed by the testifying witness. Thus, the opposing parties had the opportunity for effective cross-examination. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 950 [court did not abuse discretion in admitting photograph where counsel could cross-examine witness as to differences between photograph and actual crime scene and where jury readily understood differences between photographs and crime scene].)

Although showing the photographs to the jury was error, the error was harmless, as the photographs provided visual confirmation of the experts' admissible testimony and was merely corroborative of evidence from independent sources. (*DiRosario v. Havens, supra*, 196 Cal.App.3d at p. 1233.)

2. No Error in Refusing to Instruct the Jury on Negligence Per Se

The trial court granted respondents' motions in limine to preclude Wills from offering evidence that In-N-Out violated a condition of its CUP and City of Ventura ordinances and arguing that In-N-Out was negligent per se. Accordingly, the court denied Wills' request for a negligence per se instruction. The trial court found that neither the CUP nor the ordinances were intended to prevent traffic collisions or protect passing motorists.

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

'". . . "A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented. . . ." . . .'" (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1157.) A judgment may not be reversed on the basis of instructional error unless the error caused a miscarriage of justice and there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. (*Soule, supra,* at pp. 573-574.)

The doctrine of negligence per se is codified in Evidence Code section 669, which states in part: "(a) The failure of a person to exercise due care is presumed if: [¶] (1) He violated a statute, ordinance, or regulation of a public entity; [¶] (2) The violation proximately caused death or injury to person or property; [¶] (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and [¶] (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted."

To be entitled to an instruction on negligence per se, there must be evidence supporting each of these elements. The first two are matters for the trier of fact to decide, whereas the second two are to be determined by the court as a matter of law. (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 347.) The courts may look to the provision's legislative history in considering the second two elements. (*Lua v. Southern Pacific Transportation Co.* (1992) 6 Cal.App.4th 1897, 1902.)

Wills argues that In-N-Out was negligent per se by violating a provision of its CUP requiring a sign to be placed at the entrance to the restaurant's drive-through lane instructing customers not to queue beyond the end of the lane

when it reaches full capacity.[2] Wills submitted environmental impact and traffic studies stating that a drive-through lane could cause traffic to line up in the curb lane on Harbor Boulevard and that the sign requirement in the CUP was intended to mitigate that impact. It is undisputed that the sign was not posted and that cars were lined up in the curb lane on Harbor Boulevard waiting to enter the restaurant's parking lot at the time of the accident. Wills argues that the line of cars stacked up on Harbor Boulevard prevented him from seeing Codner in time to prevent the accident.

Wills also contends that In-N-Out violated section 24.475.020(4) of the City of San Buenaventura Ordinance Code which requires drive-up lanes to "be of sufficient length to accommodate, on the site, at least three waiting vehicles at a pickup station . . . and five waiting vehicles at an order station . . . without blocking access to parking or ingress or egress to adjacent streets." Wills presented no legislative history relating to the ordinance, relying instead on language in the ordinance which expresses an intent to prevent "blocking access to parking or ingress or egress to adjacent streets." Wills argues that In-N-Out's practice of having an employee take orders outside the fixed order station violated the ordinance. The evidence was undisputed that a restaurant employee was taking orders from customers waiting in line at the time of the accident.[3]

"The California decisions agree that the per se effect of a statute is limited to the conduct the statute or regulation was designed to prevent. [Citations.] . . . '[C]ourts . . . have been careful not to exceed the purpose which

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[2] Wills has provided no case law or other authority that a condition in a CUP is a "statute, ordinance, or regulation of a public entity." For purposes of this opinion, we assume that it meets this criteria and that the first element of Evidence Code section 669, subdivision (a) has been satisfied. (See *Stafford v. United Farm Workers* (1983) 33 Cal.3d 319, 324 [courts have construed section 669 broadly, applying it to police department manuals and Administrative Code safety orders].)

[3] Wills also argued in the trial court that a second Ventura ordinance prohibiting solicitation on City sidewalks was violated by an In-N-Out employee by taking orders while allegedly standing on the sidewalk. He does not pursue this theory on appeal.

they attribute to the legislature.'" (*Lua v. Southern Pacific Transportation Co.*, *supra*, 6 Cal.App.4th at pp. 1903-1904.) In *Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 422, for example, the court held that regulations requiring the deep end of a pool to be marked were designed to prevent drowning, not diving, accidents.

The courts have given traffic regulations a similarly narrow construction. In *Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, the court held that a statute limiting yellow curb zones to vehicles which were loading and unloading was not designed to prevent injury to a bicyclist struck by a passing car. (See also *Gilmer v. Ellington* (2008) 159 Cal.App.4th 190 [statute aimed at preventing gridlock not related to safe operation of vehicles and not intended to prevent traffic accidents]; and see *Victor v. Hedges* (1999) 77 Cal.App.4th 229 [statute prohibiting parking of vehicle on sidewalk not designed to prevent injury to pedestrian struck by vehicle other than the illegally parked vehicle].)

Wills did not meet his burden of showing that the regulations were designed to prevent traffic accidents or that Codner was in the class of persons the regulations were intended to protect. The legislative history of the CUP shows that the sign was intended to prevent traffic congestion on Harbor Boulevard and the language of the ordinance shows it was intended to prevent traffic congestion on the restaurant premises. While a secondary effect may have been to provide an unobstructed view of traffic, Wills provided no evidence this was the purpose of the regulations or that Codner was in the class of persons meant to be protected by them. (See, e.g., *Capolungo v. Bondi, supra,* 179 Cal.App.3d at p. 352 ["it could always be said, in the most general sense, that any statewide scheme for the uniform regulation of traffic has an overall purpose of promoting traffic safety"].) The trial court did not err in refusing to give a negligence per se instruction.

3. No Error in Excluding Evidence of Good Faith Settlement Agreement And Claims Against In-N-Out

Wills contends the trial court erred in prohibiting him from informing the jury of the settlement between Codner and In-N-Out. He asserts that he had a right to have the jury given this information to show bias. He argues that "[a]fter the settlement, the Codners and In-N-Out had no reason to continue to blame each other for the accident. Instead, In-N-Out wanted the jury to find Wills 100 percent at fault so that In-N-Out could seek indemnity from Wills for the full economic damages portion of the settlement, and the Codners wanted the jury to find Wills 100 percent at fault so they could maximize their total recovery."

A trial court's ruling on the admissibility of evidence, including the admissibility of settlement offers, is reviewed for abuse of discretion. (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 31-32.)

Under Evidence Code section 1152, a settlement between a plaintiff and one or more joint tortfeasors may not be disclosed to a jury to prove liability. However, under Code of Civil Procedure section 877.5, subdivision (a)(2), a sliding scale settlement agreement[4] between a plaintiff and one or more joint tortfeasors must be disclosed to the jury if a defendant party to the agreement is called as a witness at trial unless the court finds that the disclosure will create a substantial danger of undue prejudice. The reason for requiring disclosure is because of the collusive nature of such agreements and the unfair prejudice to the nonsettling defendant. (*Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 125.) As explained in *Alcala Co. v. Superior Court* (1996) 49 Cal.App.4th 1308, 1316, "[t]he typical 'Mary Carter' agreement is secret, calls for the settling defendant to participate in the trial on the plaintiff's behalf, and provides for a settling defendant

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4 A "Mary Carter" or sliding scale agreement is an agreement between a plaintiff and one or more but not all alleged tortfeasor defendants, which limits the liability of the agreeing tortfeasor defendants to an amount which is dependent upon the amount of recovery which the plaintiff is able to recover from the nonagreeing defendant or defendants. (Code Civ. Proc., § 877.5, subd. (b); *Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 863, fn. 1.)

to be credited for amounts the plaintiff recovers from nonsettling defendants. [Citation.] Its collusive nature and potential for fraud have been well documented and recognized. [Citation.] The interests of the parties are clearly realigned in a manner not apparent to the trier of fact."

The settlement agreement between In-N-Out and Codner was not a sliding scale agreement--the settlement amount was fixed at $500,000, and Codner would receive that amount regardless of the outcome of the trial. Such an agreement is not subject to the disclosure requirements of Code of Civil Procedure section 877.5. (*Everman v. Superior Court* (1992) 8 Cal.App.4th 466, 471-472.) In *Barajas v. USA Petroleum Corp.* (1986) 184 Cal.App.3d 974, we held that whether to disclose a sliding scale settlement to the jury was subject to the trial court's discretion, and the court did not abuse its discretion in failing to do so. "The settling plaintiffs retained their theoretical self-interest and bias and could be impeached therewith. Based on this and the trial court's retained continuing discretion to advise the jury, we cannot say that the trial court's decision to not advise the jury of the settlements was arbitrary, whimsical or capricious." (*Id.* at p. 989.)

The trial court indicated that no purpose would be served by disclosing the settlement to the jury other than to show In-N-Out's liability. The court was well within its discretion in refusing to admit such evidence. (Evid. Code, § 1152, subd. (a).) Furthermore, the trial court could have concluded that disclosing the settlement had the potential of confusing the jury. (Evid. Code, § 352.) The record supports the conclusion by the trial court that there was nothing in the nature of the settlement that would lead a reasonable person to infer In-N-Out had any interest in favoring Codner. Wills has not shown the court abused its discretion by excluding evidence of In-N-Out's settlement with Codner. (See *Albrecht v. Broughton* (1970) 6 Cal.App.3d 173, 178 ["There can be no question that it was a great advantage to the defense to be able to let the jury know that appellant's injuries were not wholly uncompensated. But that advantage is not one

which a party is *entitled* to enjoy in the absence of any issue in the determination of which the evidence will be relevant and proper for the jury to hear. The situation is closely analogous to an admission of liability by a [settling] defendant"].)

4. No Error in Failing to Reduce Jury's Award of Past Medical Damages

Wills asserts the trial court erred in denying his post verdict motion to reduce the jury's award of past medical damages to Daniel and Cody from $521,750.23 to $291,577.19. He argues they are not entitled to recover more than the insurance company paid to their medical providers for treatment. He presented evidence that Codner's health care providers assigned their claims to Accent, a financial recovery company, and that Accent had accepted the smaller sum in full payment for Codner's past medical expenses.

Wills relies on a line of cases beginning with *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635. In *Hanif*, the trial court awarded as special damages the reasonable value of medical care and services, even though the award exceeded the amount paid by Medi-Cal for that care. The Court of Appeal modified the award, holding that plaintiff was entitled to recover only the actual amount paid by Medi-Cal. The court reasoned that an award of damages for past medical expenses in excess of that actually paid for the care and services would constitute overcompensation to the plaintiff. The court stated: "[W]hen the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact it may have been less than the prevailing market rate." (*Id.* at p. 641.)

In *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, the court followed *Hanif* and reduced a jury award of $17,168 in medical costs to $3,600, the amount plaintiff's health care provider accepted from plaintiff's insurance carrier as full payment for its services. (*Id.* at p. 306.)

In *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595, the plaintiff participated in a health plan, which contracted with a preferred provider organization (PPO) to give discounts on medical care to its insureds. Parnell received treatment at a hospital that was a preferred provider, which accepted a discounted rate as payment in full, pursuant to the hospital's agreement with the PPO. The hospital then filed a notice of lien against Parnell's tort claim, attempting to recover the difference between the cost of medical services and the amount it received from the insurance provider. (*Id.* at pp. 598-599.) Our Supreme Court held that under California's Hospital Lien Act (HLA) (Civ. Code, §§ 3045.1-3045.6), the hospital could not recover more than the amount it accepted as payment in full. The court stated: "Because Parnell no longer owes a debt to the hospital for its services, we conclude that the hospital may not assert a lien under the HLA against Parnell's recovery from the third party tortfeasor." (*Id.* at p. 609.)

In *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, personal injury plaintiffs received services from medical providers who secured a lien against any recovery in plaintiffs' personal injury actions. Some of the providers later sold plaintiffs' accounts, at a discount, to a financial services company. The providers wrote off the balance but plaintiffs remained liable to the financial services company for the full costs of their medical bills. The Court of Appeal held that "[t]he intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, as long as the plaintiff legitimately incurs those expenses and remains liable for their payment." (*Id.* at p. 1291.)

Most recently, in *Olsen v. Reid* (2008) 164 Cal.App.4th 200, the jury awarded medical expenses in the full amount for which plaintiff was billed. The trial court reduced the award, finding that the health care providers had written off a large amount of the bill, relying on *Hanif* and *Nishihama*. The Court of Appeal reversed the judgment and directed the trial court to reinstate the full amount of

the jury's award. The court held the trial court erred in reducing the amount of the jury verdict because there was no evidence that plaintiffs were not liable for the full cost of the medical expenses incurred.

As in *Katiuzhinsky* and *Olsen,* Wills has not met his burden of showing that Codner does not remain liable for the full cost of medical services rendered. Wills' only evidence is statements from Accent showing that some of Codner's medical providers assigned their claims for medical services to Accent for a reduced sum. The amount for which a medical provider is willing to sell and a third party is willing to buy an account receivable has little if any bearing on the value of the services rendered to the plaintiff and provides no basis for concluding that Codner does not remain liable for payment of the full amount of the services provided. As in *Olsen,* Wills has not provided any documents showing the contractual agreement between Codner and his insurer, or acknowledgment from Codner, Accent, or the medical providers that Codner has no potential liability for the full cost of medical services provided. (See *Katiuzhinsky v. Perry, supra,* 152 Cal.App.4th at p. 1291 [where medical lien was sold to third party, plaintiff was entitled to the full amount billed by the medical provider as long as the amount was legitimately incurred and plaintiff remained liable for its payment].) The trial court did not err in denying Wills' motion to reduce the jury's award for past medical expenses.

B. In-N-Out's Appeal

1. Jurisdiction to Amend Judgment After Appeal Has Been Filed

In-N-Out contends the trial court did not have jurisdiction to grant Wills' Code of Civil Procedure section 663 motion to vacate the judgment and to reduce In-N-Out's right to indemnity from Wills to $145,000, the amount of economic damages allocated in the settlement agreement, because Wills had previously filed a notice of appeal from the judgment in which the court had entered judgment for "complete indemnity" on In-N-Out's cross-complaint against Wills.

An appeal from a judgment generally strips the trial court of any authority to rule on the judgment. (*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 666.) However, a judgment which is void on its face, because its infirmity is determinable from the judgment roll or record, may be set aside by the trial court on motion at any time after its entry. The setting aside of a void order by the trial court while an appeal is pending renders the appeal moot. (*Andrisani v. Saugus Colony Limited* (1992) 8 Cal.App.4th 517, 523.)

The trial court retains the inherent power at any time to modify the judgment for correction of clerical error in order to reflect the court's intended adjudication. (*Aspen Internat. Capital Corp. v. Marsch* (1991) 235 Cal.App.3d 1199, 1204.) The trial court may not, however, amend a judgment to substantially modify it or materially alter the rights of the parties under its authority to correct clerical error. (*Ibid.; Craven v. Crout* (1985) 163 Cal.App.3d 779, 782.)

When the trial court enters a judgment for damages in excess of statutorily prescribed limitations, the error is presumed inadvertent in the absence of evidence to the contrary, and the trial court has inherent authority to amend this clerical error in the judgment at any time to comport with the limits set forth in the statute. (*Pettigrew v. Grand Rent-A*-Car (1984) 154 Cal.App.3d 204, 211.) Thus, in *Pettigrew,* where the Vehicle Code limited liability to $15,000 and the trial court entered judgment in excess of that amount, the trial court had jurisdiction to correct the clerical error in the judgment at any time to reduce damages to the amount prescribed by statute. (*Ibid.;* see also *Westcott v. Hamilton* (1962) 202 Cal.App.2d 261 [judgment entered in excess of damage limitation in Vehicle Code was subject to correction by the trial court for clerical error].)

Code of Civil Procedure section 877, subdivision (a) provides in part that when a defendant settles with plaintiff before trial, the plaintiff's claims against the other defendants are to be reduced by the amount "stipulated by the release . . . or in the amount of the consideration paid for it whichever is the

greater." Civil Code section 1431.2, subdivision (a) provides: "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint."

The good faith settlement agreement approved by the court contained an apportionment of economic and noneconomic damages. From the time of the good faith hearing, the court and the parties were aware of the apportionment. Under these circumstances, where the trial court manifested its intent to reduce damages to comport with the statutorily-prescribed reduction and subsequently entered judgment in excess of that amount, we can presume the entry of judgment was inadvertent and the trial court had the inherent authority to correct this clerical error in judgment at any time, even after an appeal had been filed. (*Pettigrew v. Grand Rent-A-Car, supra,* 154 Cal.App.3d at p. 211; see also *Conservatorship of Tobias* (1989) 208 Cal.App.3d 1031, 1035 ["[t]he signing of a judgment, which does not express the actual judicial intention of the court, is clerical rather than judicial error"].) Here, as discussed further below, In-N-Out's indemnity was limited to $145,000 under Proposition 51.

The trial court's initial judgment was void on its face as it was clearly contrary to law. As such, it was subject to correction for clerical error to deduct the statutorily-mandated settlement amount pursuant to Code of Civil Procedure section 877 and Civil Code section 1431.2.[5]

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[5] Because we conclude that the initial judgment was void and subject to correction at any time, it is unnecessary to discuss In-N-Out's remaining assignments of post-judgment procedural error--that the judgment should not have been amended because Wills failed to object timely to the original judgment and Wills' post-trial motion seeking to reduce In-N-Out's indemnity was in the wrong form--except to note that the trial court has broad discretion to determine the relief being requested in a post-trial motion and neither the styling of a party's request nor the label placed upon it is determinative. (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 727.)

2. No Error in Limiting In-N-Out's Indemnity to Amount of Economic Damages

In-N-Out contends the trial court erred in limiting its indemnity from Wills to $145,000, the amount apportioned to economic damages in the settlement agreement. It argues that the jury found it had no fault; therefore, it is entitled to indemnity of $500,000, the full amount of its settlement with Codner.

Equitable indemnity in tort was developed to apportion damages among multiple tortfeasors on a comparative negligence basis. (See, e.g., *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 109.) Code of Civil Procedure section 877 provides that a good faith settlement bars other defendants from seeking contribution from the settling defendant (subd. (b)), and that the plaintiff's claims against the other defendants are to be reduced by the amount "stipulated by the release . . . or in the amount of the consideration paid for it whichever is the greater." (*Id.* at subd. (a)). "[W]hile a good faith settlement cuts off the right of other defendants to seek contribution or comparative indemnity from the settling defendant, the nonsettling defendants obtain in return a reduction in their ultimate liability to the plaintiff." (*Abbott Ford, Inc. v. Superior Court*, *supra*, 43 Cal.3d at p. 873.)

Prior to the adoption of Proposition 51 in 1986, a joint tortfeasor was jointly and severally liable for both economic and noneconomic damages. Thus, each tortfeasor was liable for the total amount of all damages awarded to a plaintiff. The result was that plaintiffs often named only "deep pocket" defendants in a lawsuit. Frequently, such a defendant would be required to pay 100 percent of the damages even though its fault was found to be minimal in comparison with the other defendants. Proposition 51 sought to remedy this perceived inequity by partially eliminating the "deep pocket rule" of joint liability.[6] California law now

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6 Civil Code section 1431.1, subdivision (a) states: "The People of the State of California find and declare as follows: [¶] (a) The legal doctrine of joint and several liability, also known as 'the deep pocket rule', has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has

provides: "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint." (Civ. Code, § 1431.2, subd. (a).) Proposition 51 retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to economic damages. On the other hand, noneconomic damages are limited to a rule of strict proportionate liability. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600.) "In sum, section 1431.2 plainly limits a defendant's share of noneconomic damages to his or her own proportionate share of comparative fault." (*Id.* at p. 604.)

In determining that In-N-Out was entitled to indemnity only for economic damages, the trial court relied on *Union Pacific Corp. v. Wengert* (2000) 79 Cal.App.4th 1444. In that case, three of four defendants settled with plaintiffs for $3 million, and then cross-complained against the nonsettling defendant for comparative equitable indemnity. The nonsettling defendant argued that, under Proposition 51, equitable indemnification could only be based on a joint obligation and, therefore, the jury should have been required to assess only the reasonable amount of plaintiff's economic damages. The trial court rejected the argument and awarded judgment against cross-defendant based on the total settlement.

The Court of Appeal reversed, holding that a party acting in good faith in making a payment under the reasonable belief that it is necessary to his or her protection is entitled to equitable indemnity, even though it develops that the settler has no interest to protect. As a result of Proposition 51, the settling defendants could never be held liable for plaintiffs' noneconomic damages to the extent they were caused by the nonsettling defendant's negligence. Thus, they could not have reasonably believed that they were protecting their own interests when they settled all of plaintiffs' claims. (*Union Pacific Corp. v. Wengert, supra,*

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resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers."

79 Cal.App.4th at pp. 1448-1449.) The court reasoned: "It is well established that the right to indemnity flows from payment of a joint legal obligation on another's behalf. . . . Before the enactment of Proposition 51, a defendant who settled the plaintiff's entire claim was entitled to seek indemnification from concurrent tortfeasors for its payment of their joint obligation to the plaintiff. . . . Now, however, joint liability is restricted to economic damages, and the right to seek indemnity after settlement is correspondingly limited." (*Id.* at p. 1448.) Therefore, the trial court should have instructed the jury to determine the amount of the settlement attributable to economic losses, and the nonsettling defendant should have been charged only with his proportionate share of the amount. (*Ibid.)* The settling defendant argued that Proposition 51 applies only to liability that has been apportioned by the trier of fact and thus has no applicability to a settlement that dismisses the plaintiff's principal action but preserves comparative indemnity rights. The court found the argument had no merit. "If liability is firm enough to induce a defendant to settle, it is subject to the unequivocal terms of Proposition 51." (*Id.* at p. 1449.)

Since the passage of Proposition 51, no case has held that a settling defendant is entitled to indemnity for noneconomic damages. In *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 63, the court explained: "[T]he relevant language of section 877(a) . . . presupposes the existence of multiple defendants jointly liable for the same damages. The settlement by one or more of several tortfeasors 'claimed to be liable for the same tort' reduces 'the claims against the others.' Under the scheme of purely several liability created by section 1431.2(a), however, '. . . a personal injury plaintiff's valid "claim" against one such tortfeasor for noneconomic damages can never be the liability of "the others." . . . Thus, there is no longer any such claim "against the others" to "reduce."'" (See also *Fieldstone Co. v. Briggs Plumbing Products, Inc.* (1997) 54 Cal.App.4th 357, 367 [manufacturers were not liable for equitable indemnity because they were not

jointly and severally liable for economic damages under either strict liability or negligence theory].)

In *Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1841, the court resolved the question of whether a nonsettling defendant is entitled to a setoff from plaintiff's award of economic damages in the amount of settlements paid prior to trial by other defendants, despite the jury's finding that the settling defendants had no fault for plaintiff's injuries. The court answered the question in the affirmative, despite the fact that the jury found the settling defendants had no fault for plaintiff's injuries. The court reasoned that Code of Civil Procedure section 877 requires only that a nonsettling defendant prove that settling codefendants were claimed to be liable for the same tort, not that they were in fact liable. Civil Code section 1431.2 retains the traditional joint and several liability doctrine with respect to plaintiff's economic damages. Therefore, the nonsettling defendant was entitled to a setoff in the amount of economic damages paid by the settling defendant.

The trial court's ruling so limiting In-N-Out's indemnity to the amount of economic damages is consistent with *Union Pacific* and several subsequent cases,[7] including cases decided by this court. (See *Leko v. Cornerstone Building Inspection Service* (2001) 86 Cal.App.4th 1109, 1115 ["Joint and several liability is a prerequisite for equitable indemnity"] and *Heritage Oaks Partners v. First American Title Ins. Co.* (2007) 155 Cal.App.4th 339, 348 ["'At the heart of the doctrine [of equitable indemnity] is apportionment based on fault. At a minimum equitable indemnity "requires a determination of *fault* on the part of the alleged indemnitor . . ." . . .'"]; cf. *Bostick v. Flex Equip.*

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[7] Other opinions stating this rule include *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1040*; BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc.* (2004) 119 Cal.App.4th 848, 852; *Fieldstone Co. v. Briggs Plumbing Products, Inc., supra,* 54 Cal.App.4th 357; *Yamaha Motor Corp. v. Paseman* (1990) 219 Cal.App.3d 958; *Gem Developers v. Hallcraft Homes of San Diego, Inc.* (1989) 213 Cal.App.3d 419.

Co., Inc. (2007) 147 Cal.App.4th 80, 129-136 (conc. opn. of Croskey, J.) [doctrine of equitable indemnity applies to settlement payments for both economic and noneconomic damages].) Thus, a defendant has no claim against a codefendant for indemnity with respect to noneconomic damages because such a claim arises only when two or more persons are liable for the same harm and one of them discharges the liability of another in whole or in part.

While it may seem unfair not to permit In-N-Out indemnity for the total amount of its settlement because the jury found it not to be at fault, "'[S]ettlement dollars are not the same as damages. Settlement dollars represent a contractual estimate of the value of the settling tortfeasor's liability and may be more or less than the proportionate share of the plaintiff[']s damages. The settlement includes not only damages, but also the value of avoiding the risk, expense, and adverse public exposure that accompany going to trial. . . .'" (*Hoch v. Allied-Signal, Inc., supra,* 24 Cal.App.4th at pp. 67-68.)

3. No Error in Using Apportionment in Settlement Agreement To Calculate Indemnity

In-N-Out argues in the alternative that if its indemnity is limited to economic damages, that amount should be calculated using the apportionment between economic and noneconomic damages in the jury award.[8] In-N-Out relies on *Peter Culley & Associates v. Superior Court* (1992) 10 Cal.App.4th 1484 (*Peter Culley*), *Regan Roofing Co. v. Superior Court* (1994) 21 Cal.App.4th 1685 (*Regan Roofing*), *Gouvis Engineering v. Superior Court* (1995) 37 Cal.App.4th 642 (*Gouvis*), and *Greathouse v. Amcord, Inc* (1995) 35 Cal.App.4th 831 (*Greathouse*). These cases do not support In-N-Out's contention.

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8 The settlement agreement allocated economic damages and noneconomic damages in a ratio of 29/71. The jury award resulted in a ratio of approximately 49/51. Applying the jury ratio to the settlement amount would result in $245,000 being apportioned to economic damages. Thus, using the jury apportionment, In-N-Out's indemnity would be an additional $100,000.

In-N-Out cites *Peter Culley* for the proposition that allocations made at a good faith hearing are not conclusive in an indemnity action, but are only presumptive evidence of liability and the amount thereof. This case does not help In-N-Out because it involved contractual, not equitable, indemnity. "Paramount is the rule that '[w]here . . . the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity.'" (10 Cal.App.4th at p. 1492; see also *Prince v. Pacific Gas & Elec. Co.* (2009) 45 Cal.4th 1151, 1158 ["Express indemnity generally is not subject to equitable considerations or a joint legal obligation to the injured party; rather, it is enforced in accordance with the terms of the contracting parties' agreement"].)

Regan Roofing is similarly unavailing. In that case, the nonsettling defendant challenged the trial court's determination that a settlement between the plaintiff and other defendants was in good faith by a petition for writ of mandate before trial. The Court of Appeal rejected the contention that the amounts allocated to emotional distress claims, filing fees and deposition costs, and construction defects in the settlement agreement were not reasonable. *Regan Roofing* does not involve the issue of whether a jury's allocation of economic and noneconomic damages supersedes allocations made in a good faith settlement agreement when the party challenging the settlement agreement allocations was a party to the agreement

In-N-Out relies on *Gouvis* for the proposition that "the determination of the value of the settlement as well as whatever underlying allocations may have been approved at the good faith hearing has **no precedential value** in terms of the subsequent cross-action by the settling defendant." This is a misreading of the case. In fact, what the court said was that "the allocation and indeed the valuation put on the settlement by the settling parties and approved by the trial judge as 'good faith' have no binding or res judicata effect as to Gouvis in terms of the subsequent indemnity action." (37 Cal.App.4th at p. 650.) The court reasoned:

"A contractual settlement of a disputed claim is an agreement the interpretation and effect of which are governed by ordinary principles of contract law. [Citation.] Gouvis, not being a party to the settlement agreement . . . cannot, absent some unusual exception to ordinary principles of contract law, be bound or affected by any of its terms." (*Id.* at p. 649.) Unlike In-N-Out, Gouvis was not a party to the settlement agreement. Under ordinary principles of contract law, a party to a settlement agreement is bound by its terms. (See, e.g., *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677 ["'[A] valid compromise agreement has many attributes of a judgment, and in the absence of a showing of fraud or undue influence is decisive of the rights of the parties . . .'"].) We have been cited to no case or other authority making an exception to this rule. There is no authority that would permit In-N-Out to evade the terms of its settlement. In addition, as in *Regan Roofing, Gouvis* involved a challenge to a good faith determination made by the trial court brought prior to trial and not the issue of whether a jury allocation supersedes an allocation made in a good faith settlement agreement.

In *Greathouse,* the court held that a nonsettling defendant was not bound by the trial court's post verdict allocation of economic and noneconomic damages contained in a pretrial settlement agreement between plaintiffs and codefendants. The court in *Greathouse* expressly declined to address the claim made by In-N-Out: "[T]he *Espinoza* [*v. Machonga* (1992) 9 Cal.App.4th 268] decision holds that 'the undifferentiated settlement figure' should be allocated to economic damages according to the percentage of the final award attributable to economic damages. (*Espinoza v. Machonga, supra,* 9 Cal.App.4th at p. 277.) In a footnote, the court reserved the question 'of whether a trial court presiding over a good faith settlement hearing should make any such allocation if it is requested to do so. (See Code Civ. Proc., § 877.6 . . . .)' [Citation.] [¶] Like the *Espinoza* court, we need not consider the power of the trial court to allocate a settlement between economic and noneconomic damages at a good faith settlement hearing

before trial conducted pursuant to Code of Civil Procedure section 877.6. Here, the issue of settlement allocation was raised after trial . . . ." (*Greathouse, supra*, 35 Cal.App.4th at p. 840.) "We do not question the power of the trial court to determine the amount of a settlement credit in a hearing under Code of Civil Procedure section 877.6 that satisfies due process standards." (*Id.* at p. 841.)

Where, as here, there has been a determination by the trial court that the allocation between economic and noneconomic damages was made in good faith in a proceeding in which the nonsettling parties are allowed to be heard, the allocation in the settlement agreement prevails in a subsequent indemnity action between the settling and nonsettling defendants. (*Dillingham Construction, N.A., Inc. v. Nadel Partnership, Inc.* (1998) 64 Cal.App.4th 264, 285; see also *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1006 ["When prior recoveries have not previously been allocated in a manner found by the court to be in good faith, the posttrial allocation of prior settlements should mirror the jury's apportionment of economic and non-economic damages"]; *Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1320 ["In the absence of any other allocation, *Espinoza* provides that the percentage of economic damages reflected in the jury verdict be applied to determine the percentage of the settlements to be offset"].) The trial court did not err in using the allocation in the settlement agreement to determine In-N-Out's right to indemnity.

The kernel of wisdom to be gleaned from this rather lengthy discussion is that a defendant who enters into a good faith settlement agreement approved by the court is bound by that agreement even though a jury subsequently finds no fault on the part of the settling defendant.

The judgment is affirmed. The Codners shall recover costs on

appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Vincent J. O'Neill, Jr., Judge

Superior Court County of Ventura

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