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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HAMID RASHIDI,
Plaintiff, Respondent and Cross-Appellant,

vs.

FRANKLIN MOSER, M.D.,
Defendant, Appellant and Cross-Respondent.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION 4, CASE NO. B237476
SUPERIOR CASE NO. BC392082

PETITION FOR REVIEW

BALABAN & SPIELBERGER, LLP
DANIEL BALABAN, BAR NO. 243652
ANDREW J. SPIELBERGER, BAR NO. 120231
11999 SAN VICENTE BOULEVARD,
SUITE 345
LOS ANGELES, CALIFORNIA 90049
TELEPHONE: (424) 832-7677

ESNER, CHANG & BOYER
STUART B. ESNER, BAR NO. 105666
234 EAST COLORADO BOULEVARD,
SUITE 750
PASADENA, CALIFORNIA 91101
TELEPHONE: (626) 535-9860

ATTORNEYS FOR PLAINTIFF, RESPONDENT AND CROSS-APPELLANT

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1. Whether Civil Code section 3333.2's cap on non economic "*damages*" allows a non settling defendant to reduce his liability below that section's $250,000 cap by offsetting the portion of a pretrial settlement which is attributable to non economic damages even though (1) monies voluntarily paid pursuant to a settlement are not "damages" and therefore are not included within the express terms of section 3333.2's cap and (2) non economic damages are not joint and several in nature and therefore a non settling defendant is not entitled to an offset for the portion of a settlement attributable to non economic damages?

2. Whether Civil Code section 3333.2 cap on non economic damages is unconstitutional (1) because it deprives a plaintiff of his right to have the jury determine the amount of damages to which he is entitled and (2) because there is no rational basis for limiting a plaintiff to the same $250,000 amount that existed when section 3333.2 was first enacted in 1975 even though, due to inflation, a victim of malpractice in 2013 is limited to recovering approximately 1/4 of what the same plaintiff suffering the same injuries would have been able to recover in 1975?

INTRODUCTION: WHY REVIEW IS WARRANTED

This petition raises two issues of critical import in this state and which readily meet the standard contained in California Rules of Court, rule 8.500(a) for review by this Court. Plaintiff Hamid Rashidi must suffer through the rest of his life blind in one eye as a result of the malpractice of Dr. Moser. The jury found that plaintiff suffered $331,250 in past noneconomic damages and $993,750 in future noneconomic damages. Nevertheless, based upon Civil Code section 3333.2, these amounts awarded were reduced to a total of $250,000. That was bad enough. However, in its published opinion, the Court of Appeal concluded that plaintiff's non economic damages should be reduced even further to $16,655 (a small fraction of what the jury found he was injured) because plaintiff had entered into a pre trial settlement with another health care provider.

According to the Court of Appeal, because section 3333.2 caps a plaintiff's non economic "damages" at $250,000, that is the most the victim of malpractice can recover by settlement or verdict, even though non economic damages are not joint and several in nature and therefore there is ordinarily no offset based upon an earlier settlement. The Court erred.

As this Court (and other courts) have recognized, the word "damages" means an amount that was awarded by a court or jury. It therefore does not include an amount voluntarily paid as part of a settlement. Thus, by its express terms, when section 3333.2 limits non economic "damages" to $250,000 it does not apply to amounts paid as a result

of a settlement. Indeed, under the Court of Appeal's analysis, a settlement under which a health care provider voluntarily pays more than $250,000 would be invalid because it exceeds the cap contained in section 3333.2. Yet, there is nothing in the history, language or purpose of section 3333.2 that indicates the Legislature intended to restrict the ability of health care providers to pay whatever amount they deem appropriate in settlement of an action.

Further, under the Court's analysis, a defendant such as Dr. Moser is actually rewarded for not settling in direct contravention of the strong policy of this state to encourage settlements. Once one defendant settles and pays most or all of the $250,000 cap on non economic damages, the remaining defendants will know that even if they lose at trial, their liability for non economic damages will be significantly limited – even below the $250,000 cap. This will reduce any incentive they have to settle.

Finally, the Court's analysis contravenes Civil Code section 1431.2 which expressly provides that non economic damages are not joint and several in nature. If that is the case then there is no basis why defendants such as Dr. Moser should nevertheless be entitled to offset non economic damages paid by other tortfeasors in settlement.

The second issue raised in this petition concerns the constitutionality of Section 3333.2. That section was enacted by the Legislature in 1975 in response to a supposed medical malpractice insurance crisis. That section's $250,000 limit on all noneconomic damages applies, regardless of how grievous the injuries the defendant inflicted upon the plaintiff.

More than thirty-five years later, time and inflation have eroded the real dollar value of that limit on compensation. Section 3333.2 violates the fundamental constitutional right to jury trial under the California Constitution by supplanting the jury's verdict based on the evidence in the case with a legislative judgment made in 1975.

Additionally, the statute violates the equal protection clauses of the California and United States Constitutions, as applied to plaintiff. As explained, the clear trend of cases from other states find similar restrictions on recovery to be unconstitutional. This Court should now follow this trend and conclude that section 3333.2 is unconstitutional and that the jury's verdict for noneconomic damages should be reinstated.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Plaintiff Hamid Rashidi underwent an embolization procedure to stop a nose bleed. Under this procedure an artery is selected and a catheter is inserted into that artery in the thigh and up into the nose, Embospheres, which are in the nature of glue pellets, are then shot through the catheter to block the artery and stop the bleed. Once the artery is blocked, the procedure is irreversible. (RT 367-369, 694, 1323-1324, 1522, 1534-1544.)

Sometimes there is an artery that connects between that major artery in the nose and the eye. If that connection is present and visible on the angiogram it is a contraindication and the procedure either needs to be halted or larger sized particles need to be used so that they won't travel to the eye. Here the Dr. Moser failed to observe that

this artery existed, allowing particles to travel to the eye. As a result of this plaintiff, is now blind in his right eye. (RT 370-372, 275, 388-389, 395-396.)

At the time of the procedure the Plaintiff was 26 years old. He was a 49% shareholder in a lighting company earning approximately $1.5 Million per year before the surgery. (See RT 903, 970.) The malpractice caused plaintiff 30% net loss of vision, his eye is now disfigured in that it drifts noticeably to the right, he has a loss of self esteem, confidence, is depressed, and fears losing his other eye so he no longer travels, plays sports etc. (RT 1012-1013, see RT 665, 711-712.)

The jury found for plaintiff on his medical negligence claim and awarded $331,250 for past noneconomic, $993,750 for future noneconomic damages, and $125,000 present cash value for future eye surgeries. (AA 99-100.) As a result of application of MICRA's cap on noneconomic damages (Civil Code section 3333.2), plaintiff's noneconomic damages were from $ 1,325,000 to $250,000 (a $1,075,000 reduction). (AA 100.)

Dr. Moser argued that there should be an offset based upon two pre trial settlements that were found by the trial court to be in good faith. The first settlement was with Cedars Sinai Hospital for $350,000 and the second settlement was with Biosphere Medical (which Dr. Moser acknowledged was a non medical malpractice defendant) for $2 million. (AA 68.) In support of its request, Dr. Moser argued that he was entitled to an offset as to noneconomic damages based upon the settlement with Cedars because under Civil Code section 3333.2 plaintiff could only recover $250,000 in noneconomic

damages. (AA 90.) He urged that the settlement with Biosphere completely offset the economic damages awarded by the jury. (AA 91.) Accordingly, Dr. Moser claimed that there should be a judgment for $16,690 in noneconomic damages. (AA 94.)

Plaintiff opposed Dr. Moser's offset request arguing that Dr. Moser was not entitled to any offset as to the noneconomic damages award. (AA 63.)

The trial court denied an offset. Dr. Moser appealed and plaintiff cross appealed arguing that Civil Code section 3333.2's cap on non economic damages was unconstitutional. In its published opinion, the Court of Appeal ruled, among other things, that (1) even though, because of section 3333.2, plaintiff's award of non economic damages was already reduced from $1,325,000 to $250,000, that award should be further reduced to $16,655 because plaintiff had entered into a pretrial settlement with another medical provider and (2) section 3333.2 was not unconstitutional and did not deprive plaintiff of his right to have the jury calculate the amount of his damages or violate his equal protection rights.

Plaintiff now petitions this Court for review.

ARGUMENT

I. MICRA's $250,000 Cap on Noneconomic *"Damages"* Does Not Entitle a non Settling Defendant to Reduce its Proportionate Share of Noneconomic Damages by Way of Offset Even Though Those Damages Are Not Joint and Several.

The Court of Appeal held that under Civil Code section 3333.2's $250,000 cap on non economic damages, defendant Dr. Moser is entitled to an offset for that portion of plaintiff's pretrial settlement with Cedars Hospital which was attributable to non economic damages. The Court recognized that in a non medical malpractice case there would be no such offset because defendants (such as Dr. Moser and Cedars) are not jointly liable for non economic damages due to the operation of Civil Code section 1431.2.[1] However, the Court in this case concluded that section 3333.2 operated to serve

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[1]Under Code of Civil Procedure § 877, a non-settling defendant is entitled where there is a settlement "given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort. . . ." This section has been interpreted to allow an offset for only that portion of a settlement attributable to those damages for which the settling defendant and the non settling defendant are jointly and severally liable. (See *McComber v. Wells* (1999) 72 Cal.App.4th 512, 516; *Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1837.)

Under California's Proposition 51, passed in 1986, a tort defendant has no joint liability for noneconomic damages. (Civ. Code, § 1431.2.) A nonsettling codefendant who sustains a money judgment is solely responsible for his share of noneconomic damages as assessed by the jury; to subject noneconomic damages to a setoff would effectively treat settlement money as if it were paid under a joint liability system.

as an absolute cap to the recovery of non economic damages in the action by way of settlement of judgment. The Court reasoned:

> "Since $233,345 from Cedars-Sinai is attributable to noneconomic damages, he could recover only an additional $16,655 from Dr. Moser for noneconomic damages. This is consistent with the way MICRA has phrased its damages cap: "In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)."

(Slip opinion 8.)

With respect, neither the text or purpose of section 3333.2 warrants the result that was reached. First, the text of section 3333.2 specifically references a cap on "damages." It is the use of the particular word, as it is generally understood that "'provide[] the most reliable indicator of legislative intent.' [Citation.]" (*Bernard v. Foley* (2006) 39 Cal.4th 794, 804.)

As this Court has recognized in other contexts "the term 'damages" in its "full context" and in its "ordinary and popular sense" is limited to "money ordered by a court." (See *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 961-963; see also *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 263 [Since "'[g]eneral compensatory damages for emotional distress . . . are not pecuniarily measurable, defy a fixed rule of quantification, and are awarded without proof of pecuniary loss'" the award of these types of damages is purely a judicial

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(*Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 276.)

function.]; *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 67-68 ["'[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.'"]; *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 37 [same].)

The fact that the Legislature used the word "damages" in section 3333.2 gains even greater significance in view of the fact that, when the Legislature specifically described settlement offsets in Code of Civil Procedure section 877, it did not use "damages." Rather, in that section the Legislature clearly stated that a settlement which is found to be in good faith "shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater." This language reflects that it knows full well how to phrase a statute to specifically articulate that a settlement will operate to reduce the plaintiff's ultimate recovery at trial. The fact that the Legislature did not include such language in section 3333.2 signifies that the legislature did not intend that result. (See *Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 497 ["Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning."]; *Romano v. Mercury Ins. Co.* (2005) 128 Cal.App.4th 1333, 1343 [same].)

This result is further supported by the fact that there is absolutely nothing in the text or the history of section 3333.2 suggesting that the Legislature intended to impose a limit on what a medical malpractice defendant could voluntarily pay in settlement of an action. In other words, if a medical defendant voluntarily pays $260,000 in settlement of a claim for non economic damages, section 3333.2 will not prevent a court from approving or enforcing that settlement. Not one case since the enactment of section 3333.2 in 1975 has concluded that a settling defendant cannot pay more than $250,000 attributable to non economic damages in settlement of a claim.

In this case, the jury found that Dr. Moser was entirely responsible for the $1,325,000 plaintiff suffered. However, and entirely as a result of Civil Code section 3333.2, there was a $1,075,000 reduction in that award so that before the issue of offset is even reached, plaintiff can recover only $250,000 of the noneconomic damages the jury found that he suffered. This statutory reduction does not mean that plaintiff did not suffer these damages in their entirety. As explained in *McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, a medical malpractice plaintiff can suffer more than $250,000 in noneconomic damages. "Section 3333.2 does not cause those noneconomic damages Ms. McAdory suffered in excess of $250,000 to vanish." (*Id.* at p. 1278; see also *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1392-1393 [agreeing with *McAdory*].)

Rather, section 3333.2 simply was intended to limit the amount a medical defendant was involuntarily required to pay as a result of the non economic damages inflicted on a plaintiff as a result of medical negligence. If, as the Court of Appeal held,

the non settling defendant is nevertheless entitled to further reduce the $250,000 the jury found he was liable for, as a result of a pretrial settlement, then that rule will have the perverse effect of actually discouraging pre trial settlements.

If a defendant knows it could ride on the coat tails of another defendant's settlement and thereby effectively escape most if not all of its potential liability for non economic damages under section 3333.2's cap, then this may blunt any incentive a defendant has to also settle. This would subvert the "strong public policy of this state to encourage the voluntary settlement of litigation." (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1359; accord, *Casa de Valley View Owner's Assn. v. Stevenson* (1985) 167 Cal.App.3d 1182, 1190 ["public policy of this state supports pretrial settlement of lawsuits and enforcement of judicially supervised settlements"].)

In nevertheless concluding that Dr. Moser could reduce his liability for the $1,325,000 in non economic damages the jury found that plaintiff suffered from $250,000 (the cap under section 3333.2) to $16,665 (as a result of an offset because of the Cedar's settlement), the Court of Appeal reasoned:

> "To the extent a specific statute is inconsistent with a general statute potentially covering the same subject matter, the specific statute must be read as an exception to the more general statute." (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 857.) While section 1431.2 protects any joint tortfeasor from paying more than its proportionate share of noneconomic damages, MICRA prohibits a plaintiff from recovering more than $250,000 for noneconomic damages from all healthcare providers in the

same action. MICRA does not distinguish between settlement dollars and judgments; it addresses a plaintiff's total recovery for noneconomic losses. Since MICRA, with its absolute limit on the total recovery of noneconomic damages from health care providers, is the more specific statute, we read it as an exception to the more general limitation on liability in section 1431.2.

(Slip Opinion 9.)

There are several flaws with the Court's analysis. First, the principle that a specific statute controls over a general statute only applies after it is determined that the specific statute actually clashes with the general statute. Here, as already described no such clash exists. Section 3333.2 by its terms only limits the recovery of "damages" and does not serve to cap the amount paid in settlement.

Second, even if there were a clash between section 3333.2 and Civil Code section 1431.2, it is not as clear as the Court of Appeal depicts which statute is general and which statute is specific. The issue here is precisely the amount of offset to which Dr. Moser is entitled as a result of plaintiff's earlier settlement with Cedars Hospital. Viewed from this perspective, section 1431.2, which specifically deals with non economic damages not being joint and several in nature, is more specific than section 3333.2 which deals with the recovery of non economic damages in medical malpractice actions generally. Thus, even if this Court were to conclude that the two sections clash, then it should conclude that section 1431.2 is the more specific section and therefore controls as a result of the legal principle relied upon the Court of Appeal.

Simply put, plaintiff respectfully requests that this Court grant review to rule that section 3333.2 at most allows a non settling defendant to escape liability for those non economic damages he had tortiously inflicted which are above $250,000. It does not also allow him to obtain an even greater reduction due to the fact that there was a pre trial settlement with another tortfeasor, a portion of which is attributable to non economic damages. Rather, and just as with every other tort action, since non economic damages are not joint and several in nature there is no right to obtain an offset based upon the portion of a pre trial settlement attributable to them.

II. The Time Has Now Come for this Court to Expressly Consider and Rule That Section 333.2 (1) Violates a Plaintiff's Jury Trial Rights by Redetermining the Amount of non Economic Damages Awarded by the Jury and (2) Violates Equal Protection by Arbitrarily Allowing a 1975 Medical Malpractice Plaintiff to Recover $250,000 While Limiting a Present Day Plaintiff to Recovery of the Equivalent of $58,581.67 in 1975 Dollars.

In the Court below, plaintiff argued that section 3333.2's $250,000 cap on non economic damages violated plaintiff's right to a jury trial, violated the equal protection clauses of the California and the United States Constitutions and was a violation of separation of powers. The Court of Appeal, in summary fashion, rejected these arguments largely echoing the analysis by the Courts of Appeal in *Yates v. Pollock* (1987)

194 Cal.App.3d 195 and *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, which concluded that this Court's opinions in *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 368-369 and *Fein v. Perminente Medical Group* (1985) 38 Cal.3d 137, 158, disposed of these constitutional challenges. This is a misnomer that should now be corrected by this Court.

Neither *American Bank* nor *Fein* addressed the constitutional challenges plaintiff has raised (or for that matter the challenges that were raised by the plaintiff in *Yates* or *Stinnett*). As explained, just the opposite is true. If anything, this Court's previous opinions serve to support rather than undermine these challenges. Plaintiff will start with his jury trial challenge.

A. Section 3333.3's $250,000 cap violates a plaintiff's constitutional right to a jury trial.[2]

The California Constitution guarantees the right to jury trial to civil litigants. (Const. Art. I, § 16 ["Trial by jury is an inviolate right and shall be secured to all"]; Code Civ. Proc., § 592.) This right encompasses all rights to a jury trial which existed at the time the Constitution was adopted (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 287; *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1,

[2]This constitutional issue is presently being considered by the Fourth District, Division two in *Hughes v. Pham* (E052469). The argument raised in this brief is largely derived from the plaintiffs' briefs in that appeal.

8) and extends to a plaintiffs' claim for pain, suffering, shock, fear, anxiety and emotional distress. (See *Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288, 292, 299 [in equitable and legal action, jury causes of action included intentional infliction of emotional distress]; *Cook v. Maier* (1939) 33 Cal.App.2d 581, 584 [emotional distress is a question for jury]; Code Civ. Proc., § 592 ["In actions for . . . injuries, an issue of fact must be tried by a jury"]; *Van de Kamp v. Bank of America, supra,* 204 Cal.App.3d at p. 863 ["Where the action is one at law, there is a right to a jury trial."]; see, e.g., *State Rubbish etc. Assn. v. Siliznoff* (1952) 38 Cal.2d 330, 341 [Court affirms jury's award of general and exemplary damages under plaintiff's intentional infliction of emotional distress claim].)

Because the right to jury trial is a basic constitutional right, it is zealously guarded and any doubts should be resolved in favor of the litigant's right to trial by jury. (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 862-863.)

Pursuant to this right, a plaintiff is entitled to have the jury make all the necessary factual determinations, including those with respect to damages. (*Dorsey v. Barba* (1952) 38 Cal.2d 350, 356 [constitutional guarantee of jury trial includes right to have jury determine issue of damages].)

Further, "the amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506, 15 Cal.Rptr. 161, 167; see also *Feltner v. Columbia Pictures Television, Inc.* (1998) 523 U.S. 340, 353, 118

S. Ct. 1279, 1287 ["the jury are judges of the damages"].) This includes "nonpecuniary items of damage" such as "pain and suffering, past and future, humiliation as a result of being disfigured and being permanently crippled, and constant anxiety and fear." (*Seffert*, 56 Cal.2d at 508-09.) The amount of damages in a common law cause of action for personal injuries is not, and never has been, a question of law committed to the discretion of the Legislature. As a factual determination based on the facts of the case, general damages are not subject to legislative override.

Any statute which abridges the constitutional right to jury trial is void. (*People v. Collins* (1976) 17 Cal.3d 687, 692; *People v. One 1941 Chevrolet Coupe, supra,* 37 Cal.2d 283, 287 ["Any act of the Legislature attempting to abridge the constitutional right [to a jury trial] is void."].) This constitutional proscription includes any attempts by the Legislature "in the guise of procedural changes or changes in remedy, [to] deprive a litigant of a jury in a case formerly triable at law." (*Ripling v. Superior Court* (1952) 112 Cal.App.2d 399, 402.)

When a party otherwise has a right to have a jury decide a question of fact, the constitutional guarantee to a jury trial precludes the court from (1) weighing the evidence to determine whether that fact question should be submitted to the jury or (2) reweighing the evidence and rendering a finding of fact contrary to that of the jury. (*Howell v. Ducommon Metals & Supply Co.* (1950) 101 Cal.App.2d 163, 166 [In reversing a judgment notwithstanding the verdict the court explained: "The right to a jury trial will become meaningless if a verdict, supported by substantial evidence, is to be set aside

because the judge entertains an opinion contrary to that arrived at by the jury."]; *Tracey v. L.A. Paving Co.* (1935) 4 Cal.App.2d 700, 706 [In ruling on motion for J.N.O.V. court cannot reweigh the evidence "[f]or that, if permitted, would have the effect of depriving the aggrieved litigant of his constitutional right to a jury trial."]; *Spillman v. City etc. of San Francisco* (1967) 252 Cal.App.2d 782, 786-787 [same]; *Hozz v. Felder* (1959) 167 Cal.App.2d 197, 200 [same]; see also *Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 921 [court's power to dismiss action "is narrowly circumscribed because every litigant must be afforded the opportunity to present his claims before a jury of his peers."], emphasis omitted.)

Consistent with the constitutional right to a jury trial, a court could remove an issue from the jury's consideration only when no substantial evidence exists to support the jury's finding on that issue. (*In re Bairds* (1926) 198 Cal.490 ["the granting of a nonsuit when the evidence of plaintiff is insufficient to support a judgment in his favor is not a violation of the constitutional right to a jury trial."]; *see Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 235 ["We may affirm the judgment of nonsuit only if no substantial evidence would support a verdict for plaintiff."]; *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 [same]; *Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc.* (1981) 116 Cal.App.3d 111, 119 ["directed verdict on issue of punitive damages can be affirmed only when "the evidence would not support a jury verdict. . . ."].)

In *Jehl v. S. Pac. Co.* (1967) 66 Cal. 2d 821, 828-33, this Court concluded that a trial court's conditional award of an additur increasing the plaintiff's damages did not violate the defendant's jury trial rights and therefore concluded that a trial court could conditionally order an additur just as it could order a remittitur of damages. This Court's analysis in *Jehl* serves to reinforce why section 3333.2 violates a plaintiff's jury trial rights.

(1) Under the additur or remittitur procedure a court first determines whether the jury's damage award is against the great weight of the evidence. Under section 3333.2 there is absolutely no examination of the evidence. It does not matter whether there is overwhelming evidence (such as in this case) supporting an award of non economic damages in excess of $250,000.

(2) Under the additur or remittitur procedure a court determines the amount of damages that would be appropriate under the evidence. Under section 3333.2, the Legislature has employed a one-size-fits all approach concluding that $250,000 is the appropriate amount regardless of the evidence.

(3) And most importantly under the additur or remittitur procedure a court cannot impose its dollar amount on the parties. Rather, and in keeping with the absolute right to have a jury fix the dollar amount of damages, the court can only conditionally grant a new trial under which a new jury trial as to damages is avoided if the party opposing the new trial motion accepts the amount calculated by the court. Thus, the consent of the party whose jury trial rights are implicated by the addditur or the remittitur is the key reason

why those procedures do not violate jury trial rights. The same is of course not true as to section 3333.2. Under that statute the medical malpractice victim has no choice whatsoever. A $250,000 cap is imposed.

Section 3333.2 cannot be harmonized with California's "inviolate" jury-trial right because it replaces a jury's fairly determined damage assessment with an arbitrary legislatively determined amount utterly divorced from the evidence adduced in the case. "For a reviewing court to upset a jury's factual determination ... would constitute a serious invasion into the realm of fact-finding." (*Bertero v. Nat'l Gen. Corp.* (1974) 13 Cal.3d 43, 65 n.12; *Bigboy v. County of San Diego* (1984) 154 Cal.App.3d 397, 406. Thus, in common-law cases tried to juries, the right guarantees the judgment will reflect what the jury determines as damages absent the parties' consent. (See *Feltner, supra*, 523 U.S. at 355, 118 S.Ct. at 1288.)

For common-law actions, the Court in *Feltner* held that "if a party so demands, a jury must determine the actual amount of... damages." (*Feltner*, 523 U.S. at 355, 118 S.Ct. at 1288.) Venerable case law that establishes that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury." (*Feltner*, 523 U.S. at 353,118 S.Ct. at 1287 [citation omitted].) Any other approach to finalizing the award of damages would fail "to preserve the substance of the common-law right of trial by jury," as required by the Constitution. (*Feltner*, 523 U.S. at 355, 118 S.Ct. at 1287 (citation omitted).) Thus, statutorily capping damages in a common-law cause of action, so that the jury's determination of necessary compensation,

supported by competent evidence, is set aside in favor of an arbitrary and inflexible number, similarly fails to preserve the substance of the common-law right of trial by jury under the California Constitution.

Even if viewed as a legislative attempt to define the "legal" import of the jury's factual determination of necessary compensatory damages, the legislative revision of the jury's assessment of damages would still fail to "preserve the substance of the common law-right" by supplanting the jury's preeminent and fundamental role in assessing damages with an arbitrary number divorced from the evidentiary record, as Section 3333.2 requires. Nor does it make sense to treat the jury's findings of fact, including its determination of the amount of money necessary to provide compensation for the wrong committed, as susceptible to a different, legislatively assigned "legal" meaning. Beyond the obvious circularity of such an argument, if such a rationale were valid, the Legislature could enact laws that turn a jury's factual determination that a party was negligent to mean the absence of negligence, a determination of not guilty to mean guilty, and a determination that $100 in damages in a common-law action meant $1,000,000. Not only would such a legislative corruption of jury findings of fact be intolerable, illogical, irrational, and utterly arbitrary, but it would rob the constitutionally guaranteed right of its central meaning.

A cap on damages, such as the one in Section 3333.2, which forces the trial court to enter judgment not in accordance with the facts, as found by the jury, but according to a legislative determination in 1975, hardly comports with this "inviolate" right. The

growing trend of courts from other states with similar constitutional provisions protecting the jury trial right as "inviolate" have held that a cap on damages eviscerates the right to have the jury determine damages, and is thus unconstitutional. (See *Watts v. Lester E. Cox Med. Centers* (Mo. 2012) 376 S.W.3d 633, 641, reh'g denied [$350,000 cap on noneconomic damages. "This Court holds that section 538.210 violates the article I, section 22(a) right to trial by jury."]; *Atlanta Oculoplastic Surgery, P.C. v. Nesilehutt* (Ga. 2010) 691 S.E.2d 218 [unanimously striking down a cap on noneconomic damages in medical malpractice actions because the cap violated that state's "inviolate" jury trial right]; *Lakin v. Sen.co Prods., Inc.* (Or. 1999) 987 P2d 463, 468-470 [applying Oregon's "inviolate" jury right]; *Sofie v. Fibreboard Corp.* (Wash. 1989) 771 P.2d 711, 716-17; see *also Klotz v. St. Anthony's Med Cir.* (Mo. 2010) 311 S.W.3d 752, 773-780 (Wolff, J., concurring) [describing the cap' inconsistency with an "inviolate" jury-trial right]; *Rhyne v. K-Mart Corp.* (NC 2004) 594 S.E.2d 1,12 [distinguishing between a punitive damages cap as not inconsistent with the "inviolate" right to a jury trial and a cap affecting compensatory damages, which is].)

This Court has not addressed whether section 3333.2 violates the right to a jury trial in either *Fein v. Perminente Medical Group* (1985) 38 Cal.3d 137 or in any other case. Thus, there is no authority binding on this Court upholding the MICRA cap against a claim that it violates the fundamental constitutional right to trial by jury.

In *Yates v. Pollock* (1987) 194 Cal.App.3d 195, the Court of Appeal concluded that section 3333.2 did not violate a plaintiff's jury trial rights. The Court was mistaken.

The *Yates* Court simply adopted the conclusion in *Fein v. Perminente Medical Group, supra,* 38 Cal.3d 137, on equal protection and due process even though there was no jury trial argument presented in *Fein.* (*Yates*, 194 Cal.App.3d at 200.) For its jury-trial rationale, the *Yates* court erroneously relied on dicta in *Fein* that "the Legislature retains broad control over the measure, as well as the timing, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and that the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest." (*Yates*, 194 Cal.App.3d at 200, quoting *Fein*, 38 Cal.3d at 158.) But these statements in *Fein* invoke rational-relationship analysis, a form of scrutiny apropos to certain equal-protection and due-process challenges but not to challenges based on the fundamental right to a jury trial.

Critically, *Yates* engaged in no independent analysis of the jury-trial right. The Fifth District Court of Appeal recently adopted the Second District's decision in *Yates* without any independent analysis of the jury-trial right in *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412. Neither case is persuasive on the merits of the jury-trial challenge. Significantly, both *Yates* and *Stinnett* were wrongful death actions, not common law actions for medical negligence to which the jury-trial right applies.

Further, in *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 376-377, this Court concluded the periodic payment provision of MICRA (Code of Civil Procedure section 667.7) did not violate the right to a jury trial because that statute requires "the jury to designate the amount of future damages which is subject to periodic

payment. . . ." (*Id.* at p. 667.)

The same is not true with respect to the reduction of damages pursuant to section 3333.2. The jury's determination of the amount of plaintiff's injuries is disregarded in every case in which those damages are determined to be in excess of $250,000. This case presents a prime example. The jury found that the plaintiff was injured in the sum of $1,325,000. However, under MICRA the lion's share of this amount ($1,075,000) is ignored. Plaintiff's constitutional jury trial rights were thus violated.

Finally, the Court of Appeal in this case concluded that "[o]nce a verdict has been returned, the effect of the constitutional provision is to prohibit improper interference with the jury's decision. There is no such improper interference under MICRA. The issue of damages is still submitted to the jury. The subsequent reduction of the damages awarded – either under the periodic payment provision challenged in American Bank (Code Civ. Proc., § 667.7) or under the damages cap challenged in this case – does not improperly interfere with the jury's decision." (Slip Opinion 10.)

This reasoning does not withstand analysis. The imposition of a fixed cap renders the jury's determination of the amount of non economic damages a nullity every bit as much as if that issue had not been submitted to the jury in the first place. As the Missouri Supreme Court explained in striking down a similar cap:

> "The argument that [the Missouri cap] does not interfere with the right to trial by jury because the jury had a practically meaningless opportunity to assess damages simply "pays lip service to the form of the jury but robs it of its function."

(*Watts v. Lester E. Cox Med. Centers* (Mo. 2012) 376 S.W.3d 633, 642.)

Precisely the same thing is true here. In short, this Court should conclude that section 3333.2 violates a plaintiff's constitutional right to have the jury fix the amount of his damages.

B. Section 3333.3's $250,000 cap violates equal protection.

The MICRA cap on noneconomic damages also violates plaintiff's constitutional right to equal protection of the law under both the United States and California Constitutions. (Cal. Const., art. I, § 7(a); U.S. Const., 14th Amend.) Under the California Constitution, "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." (Cal. Const., art. I, § 7(a).) The United States Constitution provides a parallel constitutional protection. (U.S. Const., 14th Amend.)

The equal protection clauses of the United States and California Constitutions require, at a minimum, some rational relationship between the legislative goal and the class singled out for unfavorable treatment. (*Brown v. Merlo* (1973) 8 Cal.3d 855, 861, 882; *City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 442.)

The real dollar value of the amount successful plaintiffs can receive in medical negligence cases has been severely reduced by inflation over the more than 35 years that have passed since its enactment. Even if the $250,000 limit on noneconomic damages

was considered a constitutionally adequate figure in 1975 or 1985, inflation has eroded its value today to $58,581.67 in 1975 dollars. It now requires more than $1 million to obtain the same buying power that $250,000 had in 1975 per the Bureau of Labor Statistics, U.S. Dept. of Labor, CPI Inflation Calculator.

While the MICRA cap might have once provided reasonable compensation to severely injured plaintiffs, the amount of damages plaintiffs are able to recover in real dollars has significantly decreased over time. Even if the cap on damages was a rational way to curb insurance costs in 1975, the diminished value of the MICRA cap on damages is no longer "a rational means to a legitimate end." (*City of Cleburne*, 473 U.S. at 442.) The Legislature in 1975 did not think that $60,000 was adequate to compensate medical malpractice plaintiffs for their pain, suffering and disfigurement. Yet that is precisely the result in this case. It is not reasonable or rational to impose such a heavy burden on those most seriously injured by medical malpractice.

The failure to adjust the cap for inflation over the last thirty-five years means that a medical malpractice victim today receives, at most, one-fourth of the compensation for noneconomic losses that a 1975 victim could recover. These factors together establish that the legislative classification of catastrophically injured medical malpractice victims as deserving of far less than full compensation for their injuries has lost its rationality and can no longer be viewed as a benign classification bearing a rational relation to a legitimate state interest. Therefore, this Court should hold that the MICRA cap on noneconomic damages unconstitutionally conflicts with the state and federal guarantees

of equal protection of the laws and decline to reduce the jury's noneconomic damage award under Civil Code section 3333.2. (See *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 169 [In reviewing the validity of rent control provisions, the Supreme Court has recognized that when there is a rent ceiling "of indefinite duration an adjustment mechanism is constitutionally necessary to provide for change in circumstances and also to provide for . . . situations in which the base rent cannot reasonably be deemed to reflect general market conditions."])

In *Fein v. Perminente Medical Group, supra,* 38 Cal.3d 137, 158, this Court held that section 3333.2 did not deprive a plaintiff of "due process because it limits the potential recovery of medical malpractice claimants without providing an adequate quid pro quo." The court explained that "the Legislature retains broad control over the measure, as well as the timing, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and that the Legislature may expand or limit recoverable damages so long as its action is reasonably related to a legitimate state interest." (*Id.* at p. 158; emphasis deleted.)

The *Fein* court went on to explain that the legitimate interest involved was the reduction of medical malpractice insurance premiums. (*Id.* at pp.159-160.) While the *Fein* court concluded that the Legislature could properly limit the recovery of noneconomic damages, it did not address whether the arbitrary fluctuation of that limitation depending upon inflationary trends was valid. Of course, since *Fein* did not address this issue it should not be viewed as foreclosing this challenge. (*People v.*

Ceballos (1989) 215 Cal.App.3d 1273, 1277 [An appellate opinion is "not authority for propositions not there considered."].)

There is no "plausible explanation" for limiting 2013 victims of medical malpractice to approximately one-quarter of the recovery of noneconomic damages than was recovered by a 1975 victim for precisely the same injuries. Because he lost the use of an eye Mr. Rashidi suffered real harm the same as when a parent loses a child or when an elderly parent is killed. Even though in each of these settings it may be the case that the plaintiff was not financially harmed, they suffered actual, life-altering injuries. The Legislature's 1975 determination capping a medical malpractice victim's recovery at $250,000 was presumably based upon a balance being struck between allowing a victim to recover at least an aspect of his or her true noneconomic damages and the goal of supposedly reduce medical malpractice insurance premiums. But, as explained, time (and inflation) have robbed these victims of approximately 3/4 of the amount the Legislature has determined was the permissible maximum recovery.

While money may not replace Mr. Rashidi's eye any more than it will replace either a dead child or parent, that is the only means our system has to compensate victims for their losses. Since this is the case, at the very least a plaintiff should not be deprived of the bulk of his or her recovery for a purely arbitrary and irrational reason. As the Illinois Supreme Court explained in *Best v. Taylor Mach. Works* (Ill. 1997) 689 N.E.2d 1057, 1076, simply because "damages for noneconomic injuries are difficult to assess" does not mean that "the difficulty in quantifying compensatory damages for noneconomic

injuries is alleviated by imposing an arbitrary limitation or cap on all cases, without regard to the facts or circumstances." (*Ibid.*) But that is precisely what section 3333.2 does.

Just because the Legislature considered but then rejected indexing the $250,000 cap to inflation (as was argued below) is not dispositive. Rather, this is the beginning but not the end of the analysis. In order to pass constitutional muster a statute must at least have a rational basis. If the Legislature made a conscious decision to act in a purely arbitrary manner than that statute is just as unconstitutional as if the Legislature never considered a particular aspect of a statute at all.

There is simply no rational basis (i.e. a plausible explanation) for a legislative determination that a victim of malpractice in 2013 can recover only one-fourth of the amount of non economic damages as a 1975 malpractice could recover for the same injuries. Even if it were true that increasing the amount of the cap (whether due to inflation or for other reasons) will increase health care costs as was argued below, that is besides the point. The point remains that the Legislature fixed $250,000 as the appropriate cap for non economic damages in 1975 dollars. There is no justification for decreasing that cap and tipping that balance just because of the passage of time. If anything, there is less need for any damages cap today then there was in 1975. Yet, under the Court of Appeal's analysis, section 3333.2 would remain constitutional 50 or even 100 years from now even if the inflation reduced the cap to an infinitesimal fraction of the amount the Legislature determined struck the appropriate balance.

There is no justification for such arbitrary disparate treatment between the victims of malpractice just because one happened to be injured as a result of tortious conduct in 1975 and one was injured in 2013 (or any other year for that matter). Section 3333.2 therefore violates plaintiff's equal protection rights by reducing his recovery simply by operation of the passage of time and the effects of inflation.

CONCLUSION

For the foregoing reasons, Supreme Court review is warranted.

Dated: November 4, 2013

Respectfully submitted,

BALABAN & SPIELBERGER, LLP

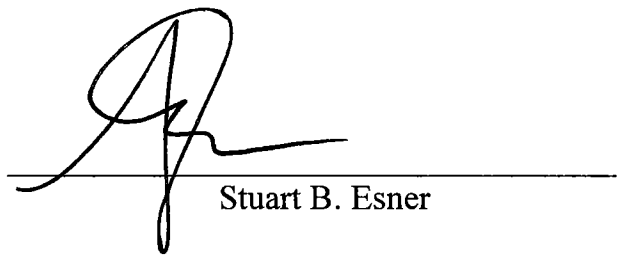
ESNER, CHANG & BOYER

By: _____
Stuart B. Esner

Attorneys for Plaintiff, Respondent and Cross-Appellant Hamid Rashidi

CERTIFICATE OF WORD COUNT

This Petition for Review contains 7,484 words per a computer generated word count.



Stuart B. Esner

Filed 10/9/13 (unmodified opn. attached)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HAMID RASHIDI, Plaintiff, Respondent and Cross-Appellant, v. FRANKLIN MOSER, M.D., Defendant, Appellant and Cross-Respondent.	B237476 (Los Angeles County Super. Ct. No. BC392082) MODIFICATION ORDER [NO CHANGE IN JUDGMENT]

THE COURT*

It is ordered that the published opinion filed September 23, 2013 be modified as follows:

The second paragraph of the caption page which lists counsel for Defendant, Appellant and Cross-Respondent shall be corrected to read:

"Reback, McAndrews, Kjar, Warford & Stockalper and Robert C. Reback; Cole Pedroza, Curtis A. Cole and Kenneth R. Pedroza for Defendant, Appellant and Cross-Respondent."

There is no change in judgment.

*EPSTEIN, P.J. MANELLA, J. SUZUKAWA, J.

Filed 9/23/13 (unmodified version)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HAMID RASHIDI, Plaintiff, Respondent and Cross-Appellant, v. FRANKLIN MOSER, M.D., Defendant, Appellant and Cross-Respondent.	B237476 (Los Angeles County Super. Ct. No. BC392082)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Judge. Affirmed as modified.

Reback, McAndrews, Kjar, Warford & Stockalper and Robert C. Reback; Cole Pedroza and Curtis A. Cole for Defendant, Appellant and Cross-Respondent.

Tucker Ellis, E. Todd Chayet, Rebecca A. Lefler, Corena G. Larimer; and Fred J. Hiestand as Amici Curiae on behalf of Defendant, Appellant and Cross-Respondent.

Balaban & Speilberger, Daniel Balaban, Andrew J. Spielberger; Esner, Chang & Boyer, Stuart B. Esner and Holly N. Boyer for Plaintiff, Respondent and Cross-Appellant.

In this case, we deal with the intersection of three statutes addressing the recovery of damages: Civil Code section 3333.2,[1] part of the Medical Injury Compensation Reform Act of 1975 (MICRA), limiting recovery of noneconomic damages for medical malpractice to a total of $250,000; section 1431.2, part of the Fair Responsibility Act of 1986 adopted by the passage of Proposition 51, which provides that liability for noneconomic damages is several only, in accordance with the percentage of fault; and Code of Civil Procedure section 877, which addresses the impact of a good faith settlement on settling and nonsettling tortfeasors.

Appellant Franklin Moser, a physician, challenges the damages awarded against him in this medical malpractice action, claiming the trial court should have offset the entire award, including both economic and noneconomic damages, based on pretrial good faith settlements by two codefendants. In his cross-appeal, respondent Hamid Rashidi raises constitutional challenges to the limitation on noneconomic damages in MICRA. We find appellant was entitled to an offset as to the economic damages awarded by the jury and to a portion of the noneconomic damages, and reject respondent's constitutional challenges to MICRA.

FACTUAL AND PROCEDURAL SUMMARY

According to the allegations of the charging pleading, in April 2007, 26-year-old Rashidi went to the emergency room at Cedars-Sinai Medical Center with a severe nose bleed. He was treated and discharged. In May 2007, he again went to the emergency room at Cedars-Sinai for a severe nose bleed. This time, he was examined by Dr. Moser, who advised him "to have an operation to treat his nose bleeds and/or arteriovenous malformation."

The operation, an embolization procedure, was performed by Dr. Moser at Cedars-Sinai the same day. It involved insertion of a catheter into an artery in Mr. Rashidi's leg and up into the nose, and injection of embospheres into the catheter to permanently and

[1] All further statutory references are to the Civil Code, unless otherwise specified.

irreversibly occlude blood vessels. The embosphere microspheres used by Dr. Moser were manufactured by Biosphere Medical, Inc. When Rashidi regained consciousness, he was blind in one eye. The blindness is permanent.

Mr. Rashidi brought this action against Dr. Moser, Cedars-Sinai, and Biosphere Medical. He alleged causes of action against Dr. Moser and Cedars-Sinai for medical malpractice and medical battery. He also alleged causes of action against Biosphere Medical for product liability based on design or manufacturing defect, failure to warn, negligence per se, breach of express and implied warranty, and misrepresentation. The theory against Biosphere Medical was that the particles it manufactured had specific chemical and elastic physical qualities which enhanced their ability to travel through very small blood vessels and collateral veins, causing a significant risk that they would travel through the blood system to sites other than the intended surgical sites, and that they did so in this case, causing the blindness. Mr. Rashidi alleged that Biosphere failed to disclose this risk, and failed to disclose that the embosphere microspheres were of nonuniform size, instead marketing the product as being of uniform size which allowed for accurate targeting of particular arteries.

Mr. Rashidi settled with Biosphere Medical for $2 million. He settled with Cedars-Sinai Medical Center for $350,000. The settling defendants each moved for a determination that its settlement was in good faith. Notice of this motion was served on all parties, including Dr. Moser. The motions were unopposed and were granted by the court.

Trial proceeded against Dr. Moser, the remaining defendant. The jury found he was negligent in the diagnosis or treatment of Mr. Rashidi and that this negligence was a cause of injury to Mr. Rashidi. It awarded Mr. Rashidi $125,000 present cash value for future medical care resulting from this negligence, $331,250 for past noneconomic damages, and $993,750 for future noneconomic damages. In accordance with MICRA's cap on noneconomic damages, the court reduced the noneconomic damages to $250,000.

Dr. Moser argued there should be an offset against this judgment, based upon the pretrial settlements with Cedars-Sinai and Biosphere Medical that were found to be in

good faith. The trial court rejected this argument, finding no basis for allocating the settlement sums between economic and noneconomic damages. As the court explained, the agreements with the settling defendants did not make any such allocation, those defendants did not participate in the trial, and the jury was not requested to make any finding of proportionate fault attributed to the settling defendants. Dr. Moser filed a timely notice of appeal. Mr. Rashidi filed a cross-appeal, challenging the constitutionality of MICRA.

DISCUSSION

I

The issues raised by Dr. Moser concern the amount of economic and noneconomic offset he should have been given against the award of damages, based on the pretrial settlements by Cedars-Sinai and Biosphere Medical. The easier question—the right to an offset of economic damages—involves the interplay between Code of Civil Procedure section 877 and section 1431.2.

Code of Civil Procedure section 877 describes the impact of a good faith settlement on settling and nonsettling tortfeasors: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, . . . it shall have the following effect: [¶] (a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater. [¶] (b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties."

Section 1431.2 provides in pertinent part: "(a) 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. Each defendant shall be liable only for the amount of non-economic damages

allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount."

Section 1431.2 "retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damage were limited by [section 1431.2] to a rule of strict proportionate liability." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600.) With respect to economic damages, codefendants are jointly and severally liable, but with respect to noneconomic damages, liability is several but not joint: "each defendant is liable for only that portion of the plaintiff's noneconomic damages which is commensurate with that defendant's degree of fault for the injury." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1198.)

As we have noted, in this case there was no allocation between economic and noneconomic damages in either of the good faith settlements.[2] "The absence of a court approved pretrial allocation of a settlement between economic and noneconomic damages does not preclude a court from making a postverdict allocation. . . . Some allocation of an undifferentiated settlement between economic and noneconomic damages is required because only the amount attributable to the joint responsibility for economic damages may be used as an offset." (*Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1320.)

In the absence of a pretrial allocation, courts have developed a method for applying the allocations of the jury verdict to the settlements. (*Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 276–277; see also *Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1838-1839; *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 840–841.) The idea is to allocate the settlements so that they mirror the jury's apportionment of economic and noneconomic damages. (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1006.) This is done by calculating the

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[2] Dr. Moser did not object to the good faith determination as to either settlement, nor did he ask the court at the time of either good faith hearing to make a determination as to the allocation of the settlement between economic and noneconomic damages.

percentage of the award attributable to economic damages in relationship to the entire award, and then applying that same percentage to the settlement. (*Espinoza v. Machonga, supra*, at p. 277.) This will yield the portion of the settlement attributable to economic damages, for which the nonsettling defendant is entitled to an offset.

The jury awarded Mr. Rashidi a total of $1,450,000 against Dr. Moser. Of this, $125,000 was for economic damages. The percentage of the award attributable to economic damages is 8.62 percent. Applying that percentage to the $2 million settlement with Biosphere Medical, we calculate that $172,400 of that settlement should be allocated to economic damages. Under section 877, Dr. Moser is entitled to a reduction of the claim against him in that amount. Since the jury's verdict for economic damages against Dr. Moser was only $125,000, the Biosphere Medical settlement completely offsets that portion of Dr. Moser's obligation to Mr. Rashidi. The judgment should reflect this offset.

II

The other settling defendant, Cedars-Sinai, and nonsettling defendant, Dr. Moser, are both healthcare providers, so the calculation of the percentage of the award attributable to economic damages is different. These health care providers are entitled to the benefit of MICRA, which limits the amount of noneconomic damages a plaintiff may recover for injury by health care providers.

The relevant portion of MICRA is found in section 3333.2: "(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage. [¶] (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)."

Because the MICRA cap applies, the noneconomic portion of the total award to be used in the percentage calculation must be reduced to $250,000. (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1101–1102; *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121, 128–129.) The total award for this purpose is $375,000: $125,000 in economic damages and $250,000 in noneconomic damages. The percentage of economic

damages to the total is 33.33 percent. Applying that percentage to the $350,000 settlement with Cedars-Sinai, $116,655 of the settlement is attributable to economic damages; the remaining $233,345 is consequently attributable to noneconomic damages.

III

That brings us to the intersection of section 1431.2 and MICRA. Ordinarily, each health care provider would pay its share of the noneconomic loss, based on its portion of liability, in accordance with the several but not joint obligation for noneconomic losses under section 1431.2. (*Gilman v. Beverly California Corp., supra*, 231 Cal.App.3d at pp. 128–130.) "A defendant bears the burden of proving affirmative defenses and indemnity cross-claims. Apportionment of noneconomic damages is a form of equitable indemnity in which a defendant may reduce his or her damages by establishing others are also at fault for the plaintiff's injuries. Placing the burden on defendant to prove fault as to nonparty tortfeasors is not unjustified or unduly onerous." (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 369.) It is similarly reasonable to place the burden on a nonsettling defendant to prove fault as to settling tortfeasors for purposes of apportioning noneconomic damages.

At trial, Dr. Moser presented no evidence that Cedars-Sinai was at fault, and the court ruled he had presented insufficient evidence to support instructions on that theory as to Biosphere Medical.[3] The special verdict form asked the jury to determine if Dr. Moser was negligent in the diagnosis and treatment of Mr. Rashidi, and, if so, whether that negligence was a cause of injury to him. The jury answered both questions in the affirmative. Mr. Rashidi argues that since Dr. Moser is the only defendant found at fault, Dr. Moser is liable for all of the MICRA-reduced noneconomic damages of $250,000. This result is consistent with the express purpose of section 1431.2, "to eliminate the perceived unfairness of imposing 'all the damage' on defendants who were 'found to share [only] a fraction of the fault.' [Citation.]" (*DaFonte v. Up-Right, Inc., supra*, 2 Cal.4th at p. 603.) Under section 1431.2, since there was no apportionment of

[3] Dr. Moser does not challenge that ruling on appeal, nor does he claim there was error in the special verdict form.

fault to another, Dr. Moser would be liable for the entire amount of noneconomic damages, *if MICRA did not apply to this case.*

But MICRA does apply, and it sets an absolute limit on the total amount of damages a plaintiff can recover from health care providers for noneconomic losses. Dr. Moser urges us to apply the portion of Cedars-Sinai's settlement with Mr. Rashidi which was attributable to noneconomic damages up to the MICRA maximum of $250,000 recovery for noneconomic damages. Under that approach, Mr. Rashidi would be entitled to recover only a total of $250,000. Since $233,345 from Cedars-Sinai is attributable to noneconomic damages, he could recover only an additional $16,655 from Dr. Moser for noneconomic damages. This is consistent with the way MICRA has phrased its damages cap: "In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)." Nothing in the statute addresses the proportionate share each healthcare provider must pay for noneconomic damages. Instead, the focus is on the total amount of damages for noneconomic loss an injured plaintiff may recover from *all* defendant healthcare providers in a single action. This serves the purpose of MICRA: "to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums." (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 159 (*Fein*).)

Mr. Rashidi seeks to avoid this result, relying on language in *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 67–68 (*Hoch*). In *Hoch*, as in our case, the noneconomic damages paid in settlement exceeded the settling parties' proportionate share of fault. After trial, the court applied section 1431.2 and held the nonsettling defendant liable for the portion of noneconomic damages consistent with its percentage of fault; it did not offset that amount by the noneconomic damages received in settlement. As a result, plaintiffs' net recovery of noneconomic damages exceeded the amount awarded at trial. In allowing this, the court relied on language in *Duncan v. Cessna Aircraft Co.* (Tex. 1984) 665 S.W.2d 414, 431–432 (*Duncan*): "[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. There is no conceptual inconsistency in allowing a plaintiff to recover more from a settlement or partial settlement than he could receive as damages." Neither the *Hoch* case, nor the *Duncan* case on which it relies, had to consider a damages cap such as that in MICRA.

"To the extent a specific statute is inconsistent with a general statute potentially covering the same subject matter, the specific statute must be read as an exception to the more general statute." (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 857.) While section 1431.2 protects any joint tortfeasor from paying more than its proportionate share of noneconomic damages, MICRA prohibits a plaintiff from recovering more than $250,000 for noneconomic damages from all healthcare providers in the same action. MICRA does not distinguish between settlement dollars and judgments; it addresses a plaintiff's total recovery for noneconomic losses. Since MICRA, with its absolute limit on the total recovery of noneconomic damages from health care providers, is the more specific statute, we read it as an exception to the more general limitation on liability in section 1431.2.

IV

We turn to Mr. Rashidi's cross appeal, in which he challenges the constitutionality of MICRA. As the court observed in *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1419, "After MICRA's enactment, judicial challenges to various provisions of MICRA were abundant, but unsuccessful." We find settled, well-reasoned authority rejecting each of the constitutional claims.

Mr. Rashidi's first claim is that the $250,000 damages cap violates a plaintiff's constitutional right to a jury trial. In *Yates v. Pollock* (1987) 194 Cal.App.3d 195, 200, the court characterized this same claim as "an indirect attack upon the Legislature's power to place a cap on damages." (*Ibid.*) In *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 368–369 (*American Bank*) and *Fein, supra,* 38 Cal.3d at p. 158, the Supreme Court confirmed that a plaintiff has no vested property right in a

particular measure of damages, and the Legislature has broad authority to modify the scope and nature of such damages. "'So long as the measure is rationally related to a legitimate state interest, policy determinations as to the need for, and the desirability of, the enactment are for the Legislature.'" (*Fein, supra*, at p. 158, quoting *American Bank, supra*, at pp. 368–369.) The Supreme Court found that the $250,000 ceiling on the recovery of noneconomic damages is rationally related to the objective of reducing the costs of medical malpractice litigation and in that way restraining the costs of medical malpractice insurance premiums. (*Id.* at p. 159.) The court found no California case suggesting "that the right to recover for noneconomic injuries is constitutionally immune from legislative limitation or revision." (*Id.* at pp. 159–160.)

In *American Bank, supra*, 36 Cal.3d at page 376, the court explained that the constitutional guarantee of jury trial operates at the time of trial to require submission of certain issues to the jury. Once a verdict has been returned, the effect of the constitutional provision is to prohibit improper interference with the jury's decision. There is no such improper interference under MICRA. The issue of damages is still submitted to the jury. The subsequent reduction of the damages awarded—either under the periodic payment provision challenged in *American Bank* (Code Civ. Proc., § 667.7), or under the damages cap challenged in this case—does not improperly interfere with the jury's decision. (*American Bank, supra*, 36 Cal.3d at pp. 376–377; *Yates v. Pollock, supra,* 194 Cal.App.3d at p. 200.)

Next, Mr. Rashidi claims the damages cap violates equal protection because it "arbitrarily imposes a one-size-fits-all" $250,000 limit on the noneconomic damages a plaintiff may receive in a medical malpractice action, regardless of the jury's findings as to the extent and severity of a plaintiff's injuries. In *Fein, supra*, 38 Cal.3d at pages 161–162, the Supreme Court considered and rejected a similar claim. The Legislature had a rational basis for enacting the damages limitation, and sought to obtain the desired cost savings only by limiting noneconomic damages. This limitation applies equally to all plaintiffs, without precluding the more seriously injured plaintiff from obtaining complete compensation for out-of-pocket medical expenses or lost earnings. (*Id.* at

p. 162; *Stinnett v. Tam, supra*, 198 Cal.App.4th at p. 1425.) Mr. Rashidi's argument regarding the need to adjust the MICRA cap so that it is indexed for inflation should be directed to the Legislature. (See *Stinnett v. Tam, supra*, at p. 1432.)

Mr. Rashidi also argues that section 3333.2 violates the separation of powers by requiring the courts to enter judgment in an amount unrelated to the facts found by the jury. The Supreme Court has recognized the authority of the Legislature to limit the recovery of noneconomic damages. (*Fein, supra*, 38 Cal.3d at pp. 157–160.) The Legislature possesses broad authority to establish or to abolish tort causes of action. (*Cory v. Shierloh* (1981) 29 Cal.3d 430, 439.) Although that authority necessarily affects the work of the judiciary, it does not impermissibly impinge on that separate branch of government. We find no violation of the separation of powers by the requirement that the court reduce awards of noneconomic damages to comply with the MICRA ceiling.

DISPOSITION

The judgment is modified to reflect an offset against economic damages in the amount of $125,000 and a reduction of the noneconomic damages to $16,655. In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. My business address is 234 East Colorado Boulevard, Suite 750, Pasadena, California 91101.

I am readily familiar with the practice of Esner, Chang & Boyer for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. I served the document(s) listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, addressed as follows:

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Parties Served: See attached Service List

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(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Carol Miyake

SERVICE LIST

Kenneth R. Pedroza, Esq.
Cole Pedroza LLP
200 South Los Robles Ave., Suite 300
Pasadena, CA 91101-4006
(Attorneys for Defendant Franklin Moser, M.D.)

Robert Reback, Esq.
Reback, McAndrews, Kjar,
Warford & Stockalper, LLP
1230 Rosecrans Ave., Suite 450
Manhattan Beach, CA 90266
(Attorneys for Defendant Franklin Moser, M.D.)

Hon. Richard Fruin, Jr.
Los Angeles Superior Court
111 North Hill Street, Dept. 15
Los Angeles, CA 90012
(Trial Judge)

Clerk's Office, Court of Appeal
Second Appellate District
300 South Spring Street
Second Floor, North Tower
Los Angeles, California 90013

Daniel K. Balaban, Esq.
Andrew J. Spielberger, Esq.
Balaban & Spielberger, LLP
11999 San Vicente Blvd., Suite 345
Los Angeles, CA 90049
(Attorneys for Plaintiff Hamid Rashidi)

Fred J. Hiestand, Esq.
2001 P Street, Suite 110
Sacramento, CA 95811
(Attorney for Amicus Curiae Civil Justice Association of California)

E. Todd Chayet, Esq.
Rebecca A. Lefler, Esq.
Corena G. Larimer, Esq.
Tucker Ellis, LLP
515 South Flower Street, 42nd Floor
Los Angeles, CA 90071-2223
(Attorneys for Amici Curiae California Medical Association, California Dental Association, California Hospital Association, and American Medical Association)