S214430

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 Four
Case No. B237476

ANSWER TO PETITION FOR REVIEW

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION P	Court of Appeal Case Number: B237476
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APPELLANT/PETITIONER: FRANKLIN MOSER, M.D. RESPONDENT/REAL PARTY IN INTEREST: HAMID RASHIDI	COURT OF APPEAL - SECOND DIST. FILED DEC 06 2011 JOSEPH A. LANE Clerk O. CARBONE Deputy Clerk
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Franklin Moser, M.D.

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) The Doctor's Company	Insurer
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 5, 2011

Joshua C. Traver
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

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ANSWER TO PETITION FOR REVIEW

REVIEW IS UNNECESSARY

It is not necessary for this Court to review the Court of Appeal decision in *Rashidi v. Moser* (2013) 219 Cal.App.4th 1170. As to the settlement offset issue, the court correctly analyzed the applicable statutes, followed prior appellate authority, and then explained "the intersection" of Code of Civil Procedure section 1431.2 and the Medical Injury Compensation Reform Act ("MICRA"). (Slip Opn., pp. 7-9.) That is why the decision should be published. As to the constitutional issue, the court followed this Court's lead in addressing "the constitutionality of MICRA." (*Id.* at pp. 9-11.) As such, it is neither "necessary to secure uniformity of decision" nor "to settle an important question of law" (Cal. Rules of Court, rule 8.500(b)(1)) in this case.

THE PETITION FOR REVIEW IS UNPERSUASIVE

The Petition is incomplete in two major respects, misleading in another respect, and unapologetically derivative of an earlier appellate brief in yet another respect. It also is fundamentally inconsistent.

First, as it relates to the settlement offset question, plaintiff ignores the relevant factual and procedural features of the appeal. He

filed an action against three defendants, settled with two of those defendants for a total of $2,350,000, and yet the Superior Court refused to apply *any* settlement offset, either as to plaintiff's economic losses or as to his noneconomic losses. Plaintiff proposes in his Petition for Review that this Court create a rule which will allow him and all other plaintiffs to pretend as if they have recovered nothing in order to recover unlimited amounts in settlement. In other words, he proposes an exception to California's settlement offset scheme.

Second, plaintiff ignores the relevant statutory and appellate decision which the Superior Court concluded was "inapposite" (Appellant's Appendix ("AA) 105) and the Court of Appeal followed, *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121. (Slip Opn., pp. 6-7.) Plaintiff also ignores *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, the more recent case upon which the Court of Appeal relied for the proposition that "[b]ecause the MICRA cap applies, the noneconomic portion of the total award to be used in the percentage calculation must be reduced to $250,000." (Slip Opn., p. 6, citing *Mayes, supra,* 139 Cal.App.4th at 1101-1102 and *Gilman, supra,* 231 Cal.App.3d at 128-129.)

Third, the Petition misleadingly suggests that the jury allocated 100% of the total comparative fault to Dr. Moser. Or, as plaintiff puts it, "*the jury found* that Dr. Moser was *entirely responsible* for the $1,325,000 plaintiff suffered." (Pet. for Rev., p. 10, emphasis added.) That is not true. There was no jury finding on comparative fault percentages for the simple reason that the verdict form did not ask the jurors to determine comparative fault.

appeal, *Hughes v. Pham* (E052469, app. pending) (cited at Pet. for Rev., p. 14, fn. 2), apparently hoping that Division Two of the Fourth Appellate District will do what no other California court has ever done – declare Civil Code section 3333.2 to be unconstitutional. The equal protection / inflation argument in that case and, therefore, the argument in this case, is flawed, if only for the reasons given by the Court of Appeal. (Slip Opn., pp. 10-11.) The $250,000 limitation on noneconomic damages "does not improperly interfere with the jury's decision." (*Id.* at p. 10, citing *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 376-377 and *Yates v. Pollock* (1987) 194 Cal.App.3d 195, 200.) "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." (Slip Opn., p. 10, citing *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 162 and *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1425.)

Finally, the Petition is fundamentally inconsistent in arguing MICRA deprived plaintiff of "his right to have the jury determine the amount of damages to which he is entitled" (Pet. for Rev. p. 1) – $1,450,000 – when plaintiff settled for far more – $2,350,000.

THE COURT OF APPEAL CORRECTLY ANALYZED THE ISSUES ON APPEAL AND CROSS-APPEAL

I. THE COURT OF APPEAL CORRECTLY DECIDED THE SETTLEMENT OFFSET ISSUES THAT WERE RAISED ON APPEAL BY DR. MOSER

There is no reason for this Court to review the settlement offset issue raised by plaintiff (at Pet. for Rev., pp. 1, 7-13). Civil Code section 3333.2 applies "in any *action* for injury against a health care provider" (Civ. Code, § 3333.2, subd. (a), emphasis added), and plaintiff's settlements with the co-defendants were in the same "action" that plaintiff pursued to judgment against Dr. Moser. The Courts of Appeal have consistently held for more than twenty years that "the plaintiff could not recover more than $250,000 in non-economic damages from all health care providers for one injury[.]" (*Mayes v. Bryan, supra,* 139 Cal.App.4th at 1101, citing *Gilman v. Beverly California Corp supra,* 231 Cal.App.3d at 129.) Or, as the Court of Appeal put it in this case, citing *Mayes* and *Gilman*, "[b]ecause the MICRA cap applies, the noneconomic portion of the total award to be used in the percentage calculation must be reduced to $250,000." (Slip Opn., p. 6.)

Plaintiff does not argue that the courts in *Mayes* and *Gilman* incorrectly stated the law. To the contrary, plaintiff does not even mention those decisions in his Petition. Instead, plaintiff misleadingly asserts that the jury found Dr. Moser to be 100% at fault, implying that the jury found the settling defendants to be 0% at fault, and then

argues that Code of Civil Procedure section 877 should not apply. (Pet. for Rev., pp. 7-9.) Plaintiff is wrong, both factually and legally.

A. Plaintiff's Petition For Review Is Incomplete In Some Respects And Misleading In Other Respects

1. Plaintiff ignores the statutory reference to "action"

Plaintiff emphasizes the word "damages" and ignores the word "action" in the statute to argue that "Section 3333.2 by its terms only limits the recovery of 'damages' and does not serve to cap the amount paid in settlement" by the co-defendant health care provider in plaintiff's action for professional negligence. (Pet. for Rev., p. 12.) As the Court of Appeal correctly observed, however,

> 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."

(Slip Opn., p. 8, quoting *Fein, supra,* 38 Cal.3d at 159, original italics, emphasis in boldface added.) Plaintiff argues that the total amount of damages for noneconomic loss that an injured plaintiff may recover from all defendant health care providers can exceed $250,000 by the

simple device of ignoring the opening phrase of Civil Code section 3333.2 – "[i]n any **action** for injury against a health care provider based on professional negligence." (Civ. Code, § 3333.2, subd. (a), emphasis added.)

That is one of the ways in which plaintiff's "Statement of Facts and Proceedings Below" (at Pet. for Rev., pp. 4-6, emphasis in heading omitted) is incomplete – it inadequately describes the single action that he pursued against the three defendants.

2. Plaintiff pursued a single action and recovered a total of $2,366,655 as compensation for his injury, in the form of two settlements and a judgment, but he does not explain how he did so

Plaintiff named Dr. Moser, Cedars-Sinai Medical Center, Cedars-Sinai Imaging Group, and Biosphere Medical, Inc. as defendants. (AA 1-25.) Plaintiff alleged that "[o]n or about May 3, 2007, [plaintiff] Rashidi, after being examined by defendant Moser was advised by Moser to have an operation to treat his nose bleeds and/or arteriovenous malformation. The operation was performed by Moser at Cedars-Sinai Medical Center that same day." (AA 6:16-19.) "When [plaintiff] Rashidi regained consciousness after the operation he was blind in one eye. That blindness is permanent." (AA 7:3-4.)

As against defendants Dr. Moser and Cedars-Sinai Medical Center, plaintiff alleged three causes of action: (1) "Medical Malpractice – Professional Negligence," (2) "Medical Battery," and (3) "Medical Malpractice – Lack of Informed Consent." (AA 7:10 – 10:24.) Specifically, plaintiff alleged that "Moser told Rashidi that

the operation would take care of his problem with nose bleeds. Moser did not inform Rashidi that the operation carried any risk of having any negative effect upon Rashidi's vision or making him blind." (AA 6:20-23.)

As against defendant Biosphere Medical, Inc., plaintiff alleged six causes of action: (4) "Strict Products Liability – Design and/or Manufacturing Defect," (5) "Negligent Products Liability – Failure to Warn," (6) "Negligence Per Se," (7) "Breach of Express Warranty," (8) "Breach of Implied Warranty," and (9) "Misrepresentation." (AA 10:27 – 22:21.) Specifically, plaintiff alleged that "[d]uring the operation performed by Moser he injected Biosphere Medical's Embosphere Microspheres in Rashidi. Embosphere Microspheres are an Intravascular Embolization Device designed to permanently and irreversibly occlude and embolize blood vessels. The FDA has classified them as a Class II device under 21 CFR 882.5950." (AA 6:24 – 7:2.)

Plaintiff further alleged,

> Biosphere Medical failed to disclose to the FDA, physicians and the general public that its embosphere microspheres contained microspheres were of nonuniform size. Even after the it [*sic*] became aware of the risks, dangers and adverse effects associated with it[s] embosphere[s], Biosphere Medical aggressively marketed them to hospitals and physicians as being easy to deliver and being of uniform size, thus allowing for accurate targeting of particular end arteries. Biosphere Medical made the same misleading statements to the FDA.

(AA 15:2-11.) This was what plaintiff was referring to in his allegation that "Moser did not inform Rashidi that the operation carried any risk[.]" (AA 6:21-23.)

Plaintiff settled with defendant Biosphere Medical, Inc. (AA 42-43.) Although the settlement was confidential, counsel for Biosphere revealed at the hearing on that motion that the settlement amount was $2 million. (2 Reporters' Transcript on Appeal ("RT") A-3:5-7.) Of significance to the first issue raised by plaintiff in his Petition for Review is the following exchange during the hearing on the motion for good faith settlement determination. The trial court asked plaintiff's counsel, "[s]o this settlement amount will be an offset . . . with respect to any verdict that you might obtain?" (2 RT A-5:10-14.) Plaintiff's counsel responded, "It will be some sort of offset I imagine, depending on how the verdict comes in, yeah." (2 RT A-5:15-16.) Plaintiff subsequently argued that defendant Dr. Moser should not receive the benefit of the settlement offset (AA 62:25 – 63:10), and the court did not apply the "settlement amount" as an "offset." (See AA 105.)

Plaintiff also settled with defendant Cedars-Sinai Medical Center. (AA 55, ¶¶ 4-8.) The hospital settlement was in the amount of $350,000. (AA 55, ¶ 6; see AA 51:10-20.) The trial court granted the motion and ordered that that the settlement was in good faith, as well. (AA 60-61.)

The case against Dr. Moser was tried to a jury. The jury was not informed of the settlements. (See AA 105.)

3. The jury did not find Dr. Moser to be 100% comparatively at fault for plaintiff's injury, nor did the jury find the settling defendants to be 0% at fault

Contrary to plaintiff's basic argument that the jury found Dr. Moser to be 100% at fault for purposes of Proposition 51 (see, *e.g.*, Pet. for Rev., p. 10 ["the jury found that Dr. Moser was entirely responsible for the $1,325,000 plaintiff suffered"]), the jury made no such finding. The reason why the jury did not determine the comparative fault of Dr. Moser (AA 98-100 ["Judgment On Jury Verdict"]) was because the trial court directed the parties to prepare a special verdict form that made *no* reference to comparative fault. (7 RT 1739:24-25 ["straight med/mal, only have Moser in it, no comparative"].)

Plaintiff says nothing in his Petition for Review about the arguments during trial that led to the court's ruling on the issue of comparative fault. (7 RT 1729-1739.) Plaintiff says nothing about Dr. Moser's argument to the trial court for the jury to determine comparative fault. (7 RT 1732:22-25 ["it strikes me as anomalous in the face of [Dr. Halbach's] testimony to say that there is – there can be no attribution at fault to the manufacturer"].) Plaintiff says nothing about his own argument in opposition. (7 RT 1739:6-7 ["Biosphere won't be on the – if there's no comparative fault, they won't be on the form"].) Plaintiff says nothing about the trial court's statement, after the parties argued for and against comparative fault, that "the jury verdict will not have a comparative fault question." (7 RT 1739:3-4.)

Plaintiff knows that Dr. Moser was far less than "100% at fault" for his injury, if only because plaintiff recovered $2,350,000 from Cedars-Sinai Medical Center and Biosphere Medical, Inc. (See AA 1-25.) Plaintiff never explains why he named Cedars-Sinai and Biosphere as defendants in this lawsuit. More to the point of comparative fault, plaintiff does not explain *how* those defendants caused his injury. The most that he says about those defendants is that "[t]he first settlement was with Cedars Sinai Hospital for $350,000 and the second settlement was with Biosphere Medical [] for $2 million." (Pet. for Rev., p. 5.) Plaintiff offers no insight as to why those two defendants paid him so much money.

B. The Court Of Appeal Correctly Modified The Judgment To Correct The Superior Court's Refusal To Apply Any Settlement Offsets

The Superior Court refused to apply any settlement offsets and ordered judgment against Dr. Moser for $350,000 (AA 100:16-21), although in its Notice of Entry of Judgment, the court stated, "[t]he Court enters Judgment in favor of plaintiff in the sum of $375,000." (AA 103.) The Court of Appeal held that the trial court erred in failing to apply the settlement offsets, both as to plaintiff's economic losses (Slip Opn., pp. 4-6) and noneconomic losses (*id.* at pp. 6-9), explaining that "appellant was entitled to an offset as to the economic damages awarded by the jury and to a portion of the noneconomic damages[]" (*id.* at p. 2). The Court of Appeal followed the holdings of the Courts of Appeal in *Gilman v. Beverly California Corp., supra,* 231 Cal.App.3d at 128-129 and *Mayes v. Bryan, supra,* 139

Cal.App.4th at 1101-1102, and then extended their reasoning to the question of settlement offset.

That was the correct analysis.

In *Gilman,* the court held that a general damages award in a medical malpractice action which exceeds the MICRA cap should first be reduced to $250,000 and then reduced under Proposition 51 to reflect the defendants' several liability. (*Gilman, supra,* 231 Cal.App.3d at 129-130.) The *Gilman* court did not say that a defendant waives the right to a settlement offset for the portion attributable to noneconomic damages if that defendant does not affirmatively prove the basis of the plaintiff's claim against the settling defendant, as plaintiff has suggested in this case. To the contrary, the *Gilman* court said, "[u]nder MICRA, where more than one health care provider jointly contributes to a single injury, the maximum a plaintiff may recover for noneconomic damages is $250,000." (*Gilman, supra,* 231 Cal.App.3d at 128, citing *Yates v. Pollock, supra,* 194 Cal.App.3d at 200-201.) "[A] plaintiff cannot recover more than $250,000 in noneconomic damages from all health care providers for one injury." (*Gilman, supra,* 231 Cal.App.3d at 129, citing *Yates v. Pollock, supra,* 194 Cal.App.3d at 200-201.) In other words, a plaintiff can recover a total of $250,000 for a single injury due to professional negligence, regardless of the source or sources of recovery: settlement or jury verdict.

The point is that the trial court in this case erred when it declared the *Gilman* decision "inapposite" (AA 105), and the Court of Appeal correctly applied and then extended *Gilman* as it did.

The relevant holding in the other case cited by the Court of Appeal, *Mayes v. Bryan,* relating to the application of Code of Civil Procedure section 998, was based on "the interplay between MICRA (Civ. Code, § 3333.2), Proposition 51 (Civ. Code, § 1431.2), and settlements with other tortfeasors who are subject to MICRA. (Code Civ. Proc., § 877.)" (*Mayes, supra,* 139 Cal.App.4th at 1099.) The court followed *Gilman* (*Mayes, supra,* 139 Cal.App.4th at 1101-1102), holding that "the trial court here properly reduced the non-economic verdict to the $250,000 MICRA cap before it applied the Proposition 51 percentage to the settlement." (*Id.* at p. 1103.)

To repeat, plaintiff does not even mention the *Gilman* and *Mayes* decisions in his Petition for Review, let alone explain why the Court of Appeal was wrong to rely upon those authorities. [1]

The *Gilman* rule is supported by the reasoning of this Court in *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1999) 8 Cal.4th 100, where the Court explained that Section 3333.2 operates as a limitation on liability. "To the extent it precludes recovery for noneconomic damages against health care providers in

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[1] *Amicus Curiae* attorney Benjamin Siminou improperly cites an unpublished decision, *Rutledge v. Stewart* (Jan. 16, 1996, D022567, as "authority" (Letter in Support of Petition for Review, dated Nov. 7, 2013, p. 8, fn. 1), and he attaches a copy of the slip opinion to his letter, presumably to suggest that there is a conflict of authority. Dr. Moser objects to that citation. First, it is improper and, indeed, unethical to cite an unpublished decision as authority. Second, the *Rutledge* opinion is irrelevant because the court in that case failed to address the key point of this case – that under Civil Code section 3333.2 the maximum allowable recovery by the plaintiff against all involved health care providers for a single injury is $250,000.

excess of $250,000, it concomitantly *limits their joint liability* irrespective of proportionate fault." (*Id.* at p. 116, emphasis added.)

Here, pursuant to Civil Code section 3333.2, the verdict was properly reduced to $250,000. Then, pursuant to Code of Civil Procedure section 877, the Court of Appeal ordered that the settlement offset be applied. The court relied upon prior appellate authority, in *Gilman* and *Mayes*. The court's holding was correct.

C. Plaintiff Essentially Argues For An Exception To The Rule That "A Plaintiff Cannot Recover More Than $250,000 In Noneconomic Damages From All Health Care Providers For One Injury" Where Some Of The Damages Are Paid "*Voluntarily*," By Way Of Settlement

Plaintiff argues that the court was wrong to offset the amounts paid by co-defendants in settlements, as required by Code of Civil Procedure section 877, because settlement payments are "voluntary" compensation from the co-defendants. To support that argument, plaintiff rewrites the relevant statutes in terms of "involuntary" and "voluntary" compensation of plaintiffs. For example, with regard to the compensation that is paid by way of settlement, plaintiff refers to "monies voluntarily paid pursuant to a settlement." (Pet. for Rev., p. 1.) For other examples, he refers to "an amount voluntarily paid as part of a settlement" (*id.* at p. 2), to "a settlement under which a health care provider voluntarily pays more than $250,000" (*id.* at p. 3), and to "what a medical malpractice defendant could voluntarily pay in settlement of an action" (*id.* at p. 10). In effect, plaintiff proposes to rewrite Section 877.

Plaintiff contrasts this "voluntary" compensation by way of settlement with the "involuntary" compensation that a jury awards in damages, which he characterizes as "the amount a medical defendant was involuntarily required to pay[.]" (Pet. for Rev., p. 10.) In that way, plaintiff proposes to rewrite Civil Code section 3333.2. He reasons, "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" and "[n]ot 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." (Pet. for Rev., p. 10.) Notably, plaintiff does not argue that there is anything "in the text or the history of section 3333.2" or even "one case since the enactment of section 3333.2" to support his analysis of "involuntary" and "voluntary" compensation.

Plaintiff says nothing about the public policy of Civil Code section 3333.2, even though it was mentioned by the Court of Appeal. (Slip Opn., p. 8 ["to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums"], citing *Fein, supra,* 38 Cal.3d at 159.) Plaintiff only refers to the public policy favoring settlements. (Pet. for Rev., p. 11.)

Perhaps most importantly, plaintiff also says nothing – and therefore does not deny – the obvious likelihood that he and defendant Cedars-Sinai took into consideration the $250,000 limitation on noneconomic damages when they "voluntarily" agreed to settle for a total of $350,000. Plaintiff suggests that settling defendant health care providers sometimes do pay more than $250,000 in noneconomic

damages (Pet. for Rev., p. 10), but cites nothing to support that surprising suggestion.

The Court of Appeal rejected plaintiff's argument that MICRA does not apply. (Slip Opn., pp. 7-8.) The court correctly analyzed what it characterized as "the intersection of Section 1431.2 and MICRA" (Slip Opn., p. 7), observing that "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" (*id.* at p. 8). "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." (Slip Opn., p. 2.)

The court was correct. It is not necessary to review the settlement offset issue.

II. THE COURT OF APPEAL CORRECTLY DECIDED THE CONSTITUTIONAL ISSUE THAT WAS RAISED ON CROSS-APPEAL BY PLAINTIFF

The Court of Appeal was correct to "reject respondent's constitutional challenges to MICRA" and hold that Civil Code section 3333.2 is still constitutional. (Slip Opn., pp. 9-11.) This Court and the other Courts of Appeal have repeatedly affirmed the constitutionality of MICRA. With respect to MICRA's cap on noneconomic damages contained in Civil Code section 3333.2, this Court rejected the first such constitutional challenge in *Fein, supra,* 38 Cal.3d at 161-164. This Court also found the other interrelated provisions of MICRA constitutional, including the periodic payments

of future damages pursuant to Code of Civil Procedure section 667.7 (*American Bank, supra,* 36 Cal.3d at 371-374), reversal of the collateral source rule contained in Civil Code section 3333.1 (*Barme v. Wood* (1984) 37 Cal.3d 174, 181-182), and the limitation on attorneys' fees contained in Business and Professions Code section 6146 (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 930-932).

Given the previous challenges and the repeated statements by this Court and other courts that MICRA is constitutional, there is no reason to grant review of this matter.

A. The Court of Appeal Correctly Held That Civil Code Section 3333.2 Does Not Violate The Right To Jury Trial

Plaintiff's right to jury trial / unlimited damages argument (at Pet. for Rev., pp. 14-24) fails, if only for the reasons given by the Court of Appeal (at Slip Opn., pp. 9-10). As even plaintiff acknowledges (at Pet. for Rev., pp. 13-14, 21-22), the Second District of the Court of Appeal upheld Section 3333.2 twenty-five years ago, in *Yates v. Pollock, supra,* 194 Cal.App.3d 195, and specifically stated that Section 3333.2 does not violate the right to jury trial. Plaintiff also acknowledges that the Fifth Appellate District upheld Section 3333.2, in *Stinnett v. Tam, supra,* 198 Cal.App.4th at 1433, and specifically stated that Section 3333.2 does not violate the right to jury trial. (Pet. for Rev., pp. 14, 22.) "This argument was rejected more than 20 years ago in *Yates* . . ., and we reject it again here for the same reason – *Fein* and *American Bank* instruct us otherwise and we are

bound to follow the precedents of the California Supreme Court." (*Stinnett, supra,* 198 Cal.App.4th at 1433, citing *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

Even though both courts rejected the argument "for the same reason," plaintiff nevertheless raises the same argument. (Pet. for Rev., pp. 13-24.) Plaintiff contends that those decisions of the Second District and the Fifth District are not binding, are not persuasive, and, in any event, are distinguishable because they were wrongful death actions. (*Id.* at p. 22.) Plaintiff ignores guidance from *Fein* and *American Bank.*

Plaintiff is wrong, for the following seven reasons.

1. This Court rejected the argument that MICRA infringes the right to jury trial

In *American Bank, supra*, 36 Cal.3d 359, the Court considered the issue of whether Code of Civil Procedure section 667.7 infringed on article I, section 16 of the California Constitution. Section 667.7 provides that when a plaintiff in a medical malpractice case has sustained "future damages" of $50,000 or more, compensation for those future damages is to be paid periodically over the course of time that the plaintiff incurs the losses, rather than in a lump sum payment at the time of judgment. (Code Civ. Proc., § 667.7.) And, in the event that the plaintiff dies, those future payments stop. That is, the statute reduces the amount of damages that the plaintiff recovers notwithstanding the jury's factual determination.

The Court rejected the constitutional attack. (*American Bank, supra*, 36 Cal.3d at 375-376.) As the Court further explained,

> Once the jury has designated the amount of future damages – and has thus identified the amount of damages subject to periodic payment – we believe that the court's authority under section 667.7, subdivision (b)(1), to fashion the details of a periodic payment schedule does not infringe the constitutional right to jury trial.

(*American Bank, supra*, 36 Cal.3d at 376.)

Admittedly, Code of Civil Procedure section 667.7 is not identical to Civil Code section 3333.2, but *American Bank* is a compelling endorsement of all of the MICRA statutes. The effect of Section 667.7 is to reduce the value to the plaintiff of the jury's determination of damages. This is because, in the event that the plaintiff dies, the future payments for medical expenses are terminated. It is this reduction of damages that is the source of savings to defendants and their insurance carriers.

The point is that a statute that effectively reduces personal injury damages following their determination by a jury does not infringe on the constitutional right to jury trial. In fact, in so holding, this Court noted that, "the court's function in this regard is similar to the authority long exercised by courts in the disbursement of the proceeds of a judgment under a number of well-established statutory schemes." (*American Bank, supra,* 36 Cal.3d at 376.) This point was reinforced the following year, in *Fein, supra,* 38 Cal.3d 137. The Court reiterated what it previously had stated in *American Bank*:

"One feature of the periodic payment provision upheld in *American Bank* – terminating payments for future damages, other than damages for loss of earnings, on the plaintiff's death – clearly does operate to *reduce the amount of damages ultimately recovered.*" (*Fein, supra,* 38 Cal.3d at 158, fn 14, emphasis added.)

2. The method of trial in this case *was* by jury, which is the method of trial to which the California Constitution refers

The most obvious reason why there was no violation of the constitutional right to jury trial in this case is that there *was* a jury trial! The jury decided the many factual disputes in the case, relating to negligence, causation, and damages. After the jury rendered its verdict, the trial judge entered judgment, which is all the California Constitution requires.[2] The right to jury trial relates to the *method* of trial, not the *outcome* of a particular case. What matters is that the jury, not a judge, decides the questions of fact. Once that is done, the right to jury trial is satisfied. (See *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 746.)

Plaintiff invokes California's "inviolate right" to jury trial (at Pet. for Rev., p. 14), but ignores Anglo-American legal history as it relates to the method of trial. Many, if not most, state constitutions include the word "inviolate" in their provisions relating to the right to

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[2] In support of his argument, plaintiff cites *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283 (Pet. for Rev., pp. 14, 16), but that decision is inapplicable to this case for precisely the reason that there was no jury trial in that case and there *was* a jury trial in this case.

jury trial because the original American colonies and then the other states responded to the law of England, where the Anglo-American method of trial by jury began. In England, there was no guarantee of that method of trial. It was not "inviolate." For that matter, there still is no constitutional requirement of the jury method of trial in England. Parliament has been free to abolish jury trial. As a result, the only civil jury trials in England are held for a specific limited group of cases: fraud, libel, slander, malicious prosecution, and false imprisonment. All other civil cases are tried to judges. (Lloyd-Bostock & Thomas, *Decline of the "Little Parliament:" Juries and Jury Reform in England and Wales* (Spring 1999) 62 Law & Contemp. Probs. 7, 13.)

In the United States, on the other hand, civil cases can be tried to juries, which is to say that that method of trial is "inviolate." But that is not to say that the substantive outcome of trial, each of the jury's factual determinations, is "inviolate." The outcome of jury trial – in particular, the judgment – must conform to the law, including the law of damages, regardless of what the jury may think the judgment ultimately will be. That includes Civil Code section 3333.2.

More to the point, had the framers of the California Constitution intended to limit the Legislature's power to modify the measure of damages in a common law case, they certainly could, and would, have said so. (See, *e.g.*, Wyo. Const., art. X, § 4, subd. (a ["No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person"]; Ariz. Const., art. II, § 31 ["No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of

any person"]; Ky. Const., § 54 ["The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property"].)

3. Civil Code section 3333.2 is a policy decision – set forth in a statute – that limits the legal consequences of the jury's finding of damages but does not infringe upon the jury's right to decide the factual questions relating to damages

Civil Code section 3333.2 is a policy decision that noneconomic damages will not exceed $250,000 in any given case. Although the statutory limitation is applied after the jury's determination, the statute does not constitute a *reexamination* of the factual question of damages. It is not, as plaintiff argues, a "legislative revision of the jury's assessment of damages[.]" (Pet. for Rev., p. 20.) Rather, it is a modification of the legal effect of the factual resolution. It does not infringe upon the jury's right to decide. The jury is still allowed to act as the fact-finder.

The statute simply limits the legal consequences of the jury's finding. Many jurisdictions view their statutes in that same way. (See, *e.g.*, *Kirkland v. Blaine County Medical Center* (Idaho 2000) 4 P.3d 1115, 1120; *Etheridge v. Medical Center Hospitals* (Va. 1989) 376 S.E.2d 525; *Franklin v. Mazda Motor Corp.* (D.Md. 1989) 704 F.Supp. 1325.)

The California Legislature merely set the legal parameters applicable to the jury's noneconomic damages calculation. The

Legislature did not interfere with the constitutional right to a jury's factual finding as to the amount of damages suffered.

4. Plaintiff essentially argues that there is no role for the law in regard to damages

Plaintiff begrudgingly admits that Civil Code section 3333.2 might be characterized "as a legislative attempt to define the 'legal' import of the jury's factual determination of necessary compensatory damages" (Pet. for Rev., p. 20), but nevertheless argues that the California Constitution requires that the dollar amount of the noneconomic damages that a trial court orders a defendant to pay must equal the dollar amount of noneconomic detriment that a jury finds the plaintiff to have sustained. To that end, plaintiff urges this Court to interpret the California Constitution to say that the Legislature is prohibited from enacting any statute that limits the amount of compensatory damages that will be awarded by a court. Plaintiff's analysis is wrong, for at least three reasons.

First, plaintiff ignores the law of tort damages, *i.e.,* the "species of relief" that are provided by the law, specifically, by the California Civil Code. (See Civ. Code, §§ 3274, 3281-3282.) The Civil Code defines the "measure of damages." One example is Section 3333.2, at issue here. Plaintiff focuses myopically on the jury's role in the process. Plaintiff's unstated assumption is that the law has no role in the decision-making process as it relates to the issue of damages. However, it has been true at least since 1872 that "**compensation** is the relief or remedy **provided by the law of this State** for the

violation of private rights[] . . . ." (Civ. Code, § 3274, emphasis added.) That general statement is followed by the specific statement of the law regarding "Compensatory Relief," commencing with Civil Code section 3281: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." "Detriment" is defined in Section 3282, as "a loss or harm suffered in person or property." The Legislature authorized "Damages for Wrongs" in Section 3333: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

Second, plaintiff ignores the law of remedies. An award of monetary damages is a "remedy" rather than a question of fact or even a substantive question of law. Remedies can be either monetary or non-monetary. That is, remedies can be "at law" or "in equity." Either way, however, remedies are fashioned by the judge, according to the applicable law. That is true even though the remedies are based upon factual determinations that are made by jurors. That is why statutes that relate to remedies do not deprive the parties of their right to jury trial. While the right to the method of trial by jury is preserved, the right to recover a specific amount of damages is not. The constitutional state and federal guarantees apply to the right to

jury trial, not to the remedy that follows jury trial.[3] That explains why the common law never recognized a right to full recovery in tort. (*Duke Power Co. v. Carolina Environmental Study Group, Inc.* (1978) 438 U.S. 59, 88, fn. 32 [98 S.Ct. 2620, 2638, fn. 32].)

Third, plaintiff ignores the role of the judge, who applies the law. As explained by this Court in the decision that plaintiff cites (at Pet. for Rev., p. 18), *Jehl v. Southern Pac. Co.* (1967) 66 Cal.2d 821, 831, fn. 12, the modern view of the relationship between the judge and the jury is "to promote economy and efficiency in judicial proceedings." The goal is to preserve "the essentials of the right to jury trial without shackling modern procedure to outmoded precedents." (*Jehl, supra,* 66 Cal.2d at 831-832.) The noneconomic damages limitation of Section 3333.2 does just that.

5. There are many other jurisdictions in which the courts have rejected the jury trial argument made by plaintiff here

The out-of-state cases on which plaintiff relies (Pet. for Rev., p. 21) are not compelling. Plaintiff does not even touch upon the numerous decisions of courts in sister states which reject the right to jury trial arguments nearly identical to those made by plaintiff in this case. (See *Judd v. Drezga* (Utah 2004) 103 P.3d 135, 144; *Etheridge v. Medical Center Hospitals, supra,* 376 S.E.2d at 529; *Gourley v. Nebraska Methodist Health System, Inc.* (Neb. 2003) 663 N.W.2d 43, 75; *Kirkland v. Blaine County Medical Center, supra,* 4 P.3d at 1120;

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[3] That also explains why the constitutional guarantee of the right to jury trial does not require that juries decide equitable remedies.

Evans ex rel. Kutch v. State (Alaska 2002) 56 P.3d 1046, 1051; *Robinson v. Charleston Area Medical Center, Inc.* (W.Va. 1991) 414 S.E.2d 877, 885; *Phillips v. Mirac, Inc.* (Mich. 2004) 658 N.W.2d 174, 190; *Edmonds v. Murphy* (Md.Ct.App. 1990) 573 A.2d 853, 859.)

Numerous federal cases have held that similar damages caps do not violate the Seventh Amendment right to jury trial. (See *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1202; *Madison v. IBP, Inc.* (8th Cir. 2001) 257 F.3d 780, 804, judg. vacated and cause remanded for further consideration in light of *National R.R. Passenger Corp. v. Morgan* (2002) 536 U.S. 101 [122 S.Ct. 2061]; *Davis v. Omitowoju* (3d Cir. 1989) 883 F.2d 1155, 1159-1165; *Boyd v. Bulala* (4th Cir. 1984) 877 F.2d 1191, 1196; *Franklin v. Mazda Motor Corp., supra*, 704 F.Supp. at 1330-1335.)

This substantial line of cases rejecting arguments such as plaintiff's argument in this case is persuasive, and it is in line with California jurisprudence. As noted by the Utah Supreme Court in *Judd v. Drezga, supra*, 103 P.3d at 144-145,

> [I]t is the jury's duty to determine the amount of damages a plaintiff in fact sustained, but it is up to the court to conform the jury's findings to the applicable law . . . . [T]he damage cap does not violate [a plaintiff's] right to a jury trial because it allows the jury to determine the facts in the first instance, before requiring the court to apply relevant law to the jury's verdict.

(Citation omitted.) Or, as stated by the Virginia Supreme Court in *Etheridge v. Medical Center Hospitals, supra*, 376 S.E.2d at 529, "although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment."

6. Plaintiff cites *Seffert v. Los Angeles Transit Lines* but ignores the observation that Justice Traynor made in his dissenting opinion and that Justice Kaus subsequently quoted in *Fein v. Permanente Medical Group*

Plaintiff quotes *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498: "[T]he 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." (Pet. for Rev., p. 15, quoting *Seffert, supra,* 56 Cal.2d at 506.) Plaintiff's point, apparently, is that, regarding damages, the discretion of the jury and the discretion of the trial judge is unlimited, such that any statute that limits the discretion of the jury and the trial judge is a "legislative override." (Pet. for Rev., p. 16.) That would mean, however, that many, if not most, statutes relating to damages would be improper limits on that discretion.

That also would mean that the Legislature did not have the power to address the recurring problem in the courts of excessive awards of noneconomic damages, which power the Legislature must have if it is to serve its role in our constitutional system of checks and balances. As Justice Traynor pointed out in his dissenting opinion in

Seffert v. Los Angeles Transit Lines, supra, 56 Cal.2d at 509-514, to which two other justices concurred, although there has been "forceful criticism" of pain and suffering damages, it is up to the Legislature to reexamine such damages. (*Id.* at 511 (dis. opn. of Traynor, J.).) It was just such a legislative reexamination that led to the enactment of Civil Code section 3333.2.

Even more importantly, Justice Traynor's statement was quoted by Justice Kaus in his opinion for the majority in *Fein v. Permanente Medical Group, supra,* 38 Cal.3d 137. Justice Kaus underscored Justice Traynor's observation that "*any change in this regard must await reexamination of the problem by the Legislature.*" (*Fein, supra,* 38 Cal.3d at 160, fn. 16, original italics.) The *Fein* Court explained that the Legislature confined the damages limitation to noneconomic damages – the court found no authority precluding such a legislative limitation. (*Fein, supra,* 38 Cal.3d at 159-160.) That statement by Justice Kaus was quoted by the Court of Appeal in *Yates v. Pollock, supra*, 194 Cal.App.3d at 200.

B. The Court of Appeal Correctly Held That Civil Code Section 3333.2 Does Not Violate Equal Protection

Plaintiff's equal protection / inflation argument (at Pet. for Rev., pp. 24-29) fails, as well, if only for the reasons given by the Court of Appeal (at Slip Opn., pp. 10-11). As the court stated in *Stinnett v. Tam, supra,* 198 Cal.App.4th at 1432, when it rejected the equal protection / inflation argument in that case: "[t]he statute does not address purchasing power; instead, it addresses the maximum

dollar amount of noneconomic damages a plaintiff may recover in an action against a health care provider based on professional negligence, which is the same amount for every such plaintiff."

Plaintiff's inflation argument also should be rejected because the Legislature specifically considered and rejected the idea of inflation indexing. As noted by one commentator,

> As the bill progressed through the State Senate, Senate Judiciary Committee consultant and later legislative counsel Bion Gregory suggested indexing the non-economic damages cap. [Fn. 81.] However, this suggestion was disregarded because the plaintiff lawyers' lobby would not support the idea. [Fn. 82.] Ironically, some of the representatives of the trial bar thought indexing the cap would improve the bill's overall chance for passage and increase the likelihood of the Governor signing it. [Fn. 83.] As a result, they withheld their support of the indexed cap in order to try to kill the bill altogether. [Fn. 84.]

(Edwards, *Recent Development: Medical Malpractice Non-Economic Damages Caps* (2006) 43 Harv. J. on Legis. 213, 224, fns. 81-84 citing CAPP News (Californians Allied For Patient Protection, Sacramento, Cal.), *Perspectives: An Interview With MICRA Author Barry Keene* (Aug. 8, 2005 p. 3.)

More recently, the Legislature specifically considered and rejected the idea of indexing the damages cap. (Assem. Com. on Judiciary, Medical Injury Compensation Reform Act of 1975: Hearing on Assem. Bill No. 1380 (1999–2000 Reg. Sess.) May 24,

1999, p. 10. Assembly Bill 1380 (1999–2000 Reg. Sess.) would have indexed the MICRA cap annually to the Consumer Price Index, but the bill was rejected. The Legislature also rejected another bill (Assem. Bill No. 250 (1997–1998 Reg. Sess) May 13, 1997), which would have repealed the noneconomic damages limitation of MICRA altogether.

Plaintiff argues that "[j]ust because the Legislature considered but then rejected indexing the $250,000 cap to inflation (as was argued below) is not dispositive" (Pet. for Rev., p. 28), but this Court should reject plaintiff's invitation to do what the Legislature chose not to do. It is an invitation to do what the judicial branch is not constitutionally permitted or equipped to do – to evaluate the wisdom of legislation. The United States Supreme Court made this point clear: "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." (*Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 469 [101 S.Ct. 715], internal citation and quotation marks omitted.) Where the evidence is "at least debatable," the court would err in "substituting its judgment for that of the legislature." (*Ibid.*, internal citation and quotation marks omitted.)

CONCLUSION

It is not necessary for this Court to review either of the "Issues Presented" by plaintiff. The petition should be denied.

DATED: November 22, 2013

REBACK, MCANDREWS, KJAR, WARFORD & STOCKALPER, LLP

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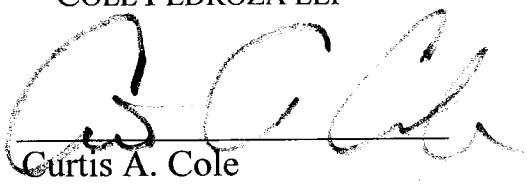
COLE PEDROZA LLP

By: 

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CERTIFICATION

Appellate counsel certifies that this petition contains 7,362 words. Counsel relies on the word count of the computer program used to prepare the brief.

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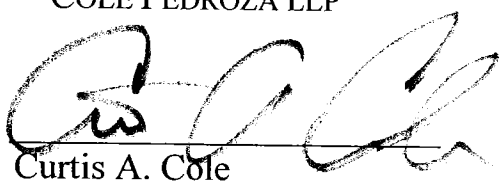
By: 

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PROOF OF SERVICE

I am employed by Cole Pedroza LLP, in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 200 S. Los Robles Ave., Suite 300, Pasadena, California 91101.

On the date stated below, I served in the manner indicated below, the foregoing document described as: **ANSWER TO PETITION FOR REVIEW** on the parties indicated below by placing a true copy thereof, enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

By United States Postal Service – I am readily familiar with the business's practice for collecting and processing of correspondence for mailing with the United States Postal Service. In that practice correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, with the postage thereon fully prepaid, in Pasadena, California. The envelope was placed for collection and mailing on this date following ordinary business practice.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 22nd day of November, 2013.

Kathleen Eastham

Kathleen Eastham

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