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 4, CASE NO. B237476
SUPERIOR CASE NO. BC392082

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

In his Petition for Review, plaintiff Hamid Rashidi presented two issues that are ripe for review by this Court. The first issue concerns whether, under Civil Code section 3333.2's $250,000 cap on non economic damages, a defendant who refuses to settle is entitled to an offset for that portion of a pre trial settlement attributable to non economic damages. According to Dr. Moser, the maximum a malpractice victim can receive for non economic losses in any action is $250,000. Accordingly, Dr. Moser argues that a non settling defendant is entitled to an offset for that portion of any pretrial settlement attributable to non economic losses so that the non economic losses recovered from the non settling defendant and the settling defendant combined does not exceed $250,000. Otherwise, Dr. Moser claims that the plaintiff is recovering more than $250,000 for non economic losses and section 3333.2 is subverted.

As explained in the Petition, Dr. Moser (and the Court of Appeal) are mistaken. Section 3333.2 serves to cap only the "damages" awarded by a jury or by a court. It does not cap the amount in non economic losses recovered by a plaintiff as a result of a voluntary settlement. A non settling tortfeasor such as Dr. Moser is therefore not entitled to an offset for amounts paid in settlement which are not joint and several in nature such as amounts paid for non economic losses.

The second issue concerns the constitutionality of Section 3333.2. As explained, that section both violates a plaintiff's constitutional right to have a jury – and not the

Legislature – assess his or her compensatory damages and it violates equal protection because it arbitrarily awards a 2013 malpractice victim only a small fraction of what a victim with identical injuries would have been able to recover under that section in 1975 (when it was enacted).

As now explained, Dr. Moser's arguments only serve to highlight why review is warranted.

ARGUMENT

I. Nothing Dr. Moser Argues Negates That Review Is Warranted So this Court Can Determine That a Non Settling Defendant Is Not Entitled to an Offset Based on the Portion of a Pretrial Settlement Attributable to Non Economic Losses.

Dr. Moser's Answer to the petition for review is long on rhetoric and short on meaningful analysis. As to the issue whether a medical malpractice defendant should obtain an offset for the portion of a pretrial settlement attributable to noneconomic losses – even though tortfeasors in every other type of action are not entitled to such an offset – Dr. Moser initially urges that this result is mandated by the clear language of Civil Code section 3333.2. (Answer 4.) Dr. Moser bases this argument on section 3333.2's use of the word "action" to assert that it imposes an absolute cap on the recovery of non

economic losses in any action regardless whether that recovery was by way of verdict or settlement. However, as explained in the Petition, that section must be read in full and not just in the isolated manner Dr. Moser proposes. The relevant subdivision of section 3333.2 provides in full; "In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)." (Civ. Code, § 3333.2, subd. (b).)

Thus, the relevant focus should be placed not on the word "action" in isolation as Dr. Moser proposes but rather the focus should include the phrase "*damages* for noneconomic losses." As described in the Petition, when the Legislature used the word "damages" in this phrase it created a limitation on the amounts awarded by a court or jury. It did not intend to create a limitation on the amount parties voluntarily paid pursuant to a settlement.

In arguing to the contrary, Dr. Moser takes plaintiff to task for not citing *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075 or *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121. (Answer 4.) However, Dr. Moser's hyperbole notwithstanding, neither of these cases addresses the issue presented in this Petition. In both of these cases the issue was whether the jury's verdict for non economic damages should first be reduced to $250,000 before determining the verdict's ratio between economic and non economic damages which would then be applied in determining what portion of a pretrial settlement was attributable to *economic damages*. The very premise of these cases was that under Proposition 51 the non settling defendant is entitled to an offset only for the portion of a

settlement attributable to economic losses which are joint and several in nature and not for the portion of the settlement attributable to non economic damages which, under Civil Code section 1431.2, are not joint and several in nature.

In both *Mayes* and *Gilman*, the compensation recovered by the plaintiff for non economic damages from both the settlement and the judgment were less than $250,000. Therefore, there was no need for the Court address the issue presented here. Of course, "It is well settled that language contained in a judicial opinion is '"to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not there considered. [Citation.]"' [Citations.]" (*People v. Banks* (1993) 6 Cal.4th 926, 945.) "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.' [Citation.]" (*Canales v. City of Alviso* (1970) 3 Cal.3d 118, 128, fn 2.)

Next, Dr. Moser accuses plaintiff of providing an incomplete "Statement of Facts and Proceedings Below" by not describing that Dr. Moser and the settling defendants were sued in one action. (Answer 6.) Plaintiff has never contended otherwise. But this begs the question. The true question is whether section 3333.2 limits the recovery for non economic losses in on action regardless whether that recovery is by way of settlement or verdict. Indeed, Dr. Moser's accusations reveals the absurdity of his position. Under Dr. Moser's position, under which the entire focus is on whether the plaintiff received more than $250,000 for non economic damages in any action, it would be the case that if a

plaintiff settled with a tortfeasor prior to the commencement of the action and only then initiated his or her action against the remaining tortfeasors, the portion of that pre litigation settlement attributable to non economic losses would not count toward the $250,000 cap. There is absolutely no rhyme or reason on why a malpractice victim's ability to recover even the already arbitrarily low $250,000 cap from non settling tortfeasors should depend on whether that victim settled before or after the filing of an action.

Next, Dr. Moser asserts that the jury did not find him to be 100% at fault for purposes of Proposition 51. (Answer 9.) Of course it did. Dr. Moser and Dr. Moser alone was on the verdict fault. The jury attributed no percentage of fault to any other tortfeasors, including the settlement defendants. (AA 99-100.)

Dr. Moser argues that because the form of the verdict was ordered by the trial court, he should be given a pass as to this and the fact that the jury assigned fault only to him should be ignored. The problem with Dr. Moser's position is that he did not argue on appeal that the verdict form was erroneous and the form of the verdict was not addressed by the Court of Appeal. On this record, the only tortfeasor the jury found to be responsible was Dr. Moser. While Dr. Moser argues that "Plaintiff knows that Dr. Moser was far less than '100% at fault' for his injury. . ." (Answer 10), he supplies no authority whatsoever to support his position that the unchallenged verdict could be ignored and fault in some unspecified amount could be attributed to another alleged tortfeasor whose fault was not considered by the jury.

Dr. Moser next reargues why *Mayes* and *Gilman* somehow support his position. (Answer 10-13.) However, as already described each of these cases concerned an entirely different issue (whether the jury's award for non economic damages should be reduced to $250,000 before determining the ratio between economic and non economic damages). Neither of these cases dealt with the issue whether an amount received in settlement which is attributable to non economic losses is subject to the $250,000 cap. Ironically, in a footnote in this section of its answer Dr. Moser chastises an amici for citing to an unpublished decision in part because that decision "failed to address the Key point of this case" that very same criticism applies to Dr. Moser's fascination with *Mayes* and *Gilman.*

Finally, Dr. Moser gets around to addressing the argument actually made in the Petition asserting that plaintiff "argues for an exception" to section 3333.2. (Answer 13.) Plaintiff asks for no such thing. Rather, plaintiff simply asks this Court to conclude that section 3333.2 should be limited to its terms so that it applies to "damages" and not to amounts that are voluntarily paid pursuant to a settlement.

As explained in the Petition, this Court has recognized in other contexts that "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 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].)

Dr. Moser does not cite or discuss any of these authorities in his answer. Nor does he offer any plausible reason why the Legislature's use of the word "damages" should not be given its ordinary and popular meaning and instead should be given a meaning that leads to the harsh and arbitrarily consequences explained in the Petition. (See Petition pages 10-13.) For instance, under Dr. Moser'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.

Nor does Dr. Moser deal with the fact that, again as explained in the Petition, when the Legislature intends to require an offset for amounts received by way of settlement, it knows exactly how to say that. (See Petition page 9.)

Rather, Dr. Moser argues that because a supposed purpose of section 3333.2 was to reduce insurance premiums, its interpretation should be accepted because that position results in the recovery of lower damages. (Answer 14.) But just because a particular

interpretation of section 3333.2 results in lower liability for a non settling defendant does not mean that that interpretation should automatically be accepted.

It remains the case that the words of the statute are the most important guidepost of what the Legislature intended. (See *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826 ["When interpreting a statute our primary task is to determine the Legislature's intent. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724, 257 Cal.Rptr. 708, 771 P.2d 406.) In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826, 4 Cal.Rptr.2d 615, 823 P.2d 1216.)"])

Here, the Legislature's use of the word "damages" is clear indication it did not intend that section to apply to amounts voluntarily paid in settlement. Further, the fact remains that, under plaintiff's position, the non settling defendant's potential liability for non economic damages is still capped at $250,000. This was the amount the Legislature fixed in 1975 as the appropriate balance between allowing a malpractice victim to recover for his or her non economic damages and the amount that was necessary to stem the perceived insurance crisis. (As explained in the Petition, since there is no index for inflation, this capped amount is now a fraction of the amount the Legislature deemed to be appropriate.) Thus, under plaintiff's position the non settling defendant's potential liability is still capped at precisely the amount the Legislature fixed. That defendant is simply not awarded an even greater windfall because the plaintiff settled with other

tortfeasors.

Finally, Dr. Moser speculates that defendant Cedars-Sinai likely "took into consideration the $250,000 limitation on noneconomic damages when they 'voluntarily' agreed to settle for $350,000." (Answer 14.) There is nothing to demonstrate that this is the case and in any event, so what? If a settling defendant pays less in settlement then it would have paid if the $250,000 did not exist, then that is still no reason to afford the non settling defendant an offset as to the portion of that settlement attributable to non economic harm which is not joint and several in nature. It is not clear just what Dr. Moser's point is.

II. Nothing Dr. Moser Argues Negates That the Time Has Now Come for this Court to Review the Constitutionality of Section 3333.2.

In his petition for review, plaintiff focused on two reasons why the time has come for this Court to consider the constitutionality of section 3333.2. The first concerned how that section deprived plaintiff of his right to a jury trial and the second concerned why the failure to adjust the $250,000 cap in the 38 years since it was enacted operated to violate equal protection. As now explained, nothing Dr. Moser argues negates the need for review.

A. Constitutional right to a jury trial.

Initially, and predictably, Dr. Moser argues that review by this Court is not needed with respect to plaintiff's argument that section 3333.2 violates his right to a jury trial because, according to Dr. Moser, this Court has considered the issue already in *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359. However, as explained in the Petition and ignored by Dr. Moser, the manner in which this Court concluded that Code of Civil Procedure section 667.7 did not deprive plaintiffs of their jury trial rights in *American Bank*, serves to establish why section 3333.2 constitutes such a deprivation.

In *American Bank & Trust Co. v. Community Hospital, supra,* 36 Cal.3d at pp. 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.

In attempting to overcome this truth, Dr. Moser makes the simplistic argument that "[t]he 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!" (Answer 19.) But, just because plaintiff was afforded a jury trial does not mean that the jury's verdict could be altered with impunity without violating the plaintiff's jury trial rights. Affording a jury trial and then refashioning the jury's verdict amounts to nothing more than a charade. That is why this Court was so careful to explain in *Jehl v. S. Pac. Co.* (1967) 66 Cal. 2d 821, 828-33, that a trial court's conditional award of an additur increasing the plaintiff's damages did not violate the defendant's jury trial rights because the defendant was afforded the option of rejecting the conditional additur and insisting on a new trial.

Dr. Moser's argument that section 3333.2 simply concerns the measure of damages and therefore does not violate a plaintiff's jury trial rights (Answer 22-23) is equally unavailing. None of the statutes Dr. Moser references purport to erase a jury's factual determination. They simply provide the legal standard the jury is required to use in making its factual determinations. That is far different than 3333.2. Indeed, this very same analysis, if accepted, would apply with equal force to economic damages so that a trial court could be empowered to reweigh the evidence and fix an amount of economic damages that was different from what the jury decided. Even Dr. Moser would not advocate that position.

Next, simply labeling something as a "remedy" as Dr. Moser seeks to do (Answer 23) does not mean that parties have no constitutional right to have the jury resolve factual

determinations. If accepted, Dr. Moser's analysis would mean that a trial court could be given unfettered liberty to determine whatever remedy it seeks is appropriate without violating a party's jury trial rights. But, as explained in the Petition, this Court has already determined that this is not the case.

Finally, Dr. Moser references a dissenting opinion in *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, where the dissenters expressed some concern about pain and suffering damages. However, the fact remains that such damages reflect actual harm suffered by the plaintiff, are allowed in this state, and fall squarely within a plaintiff's jury trial rights. (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]) Because of Dr. Moser's negligence plaintiff is now blind in one of his eyes. This caused him harm for which he is entitled to be compensated. The fact that Dr. Moser may not like that this is the case is inconsequential. *Fein v. Perminente Medical Group* (1985) 38 Cal.3d 137, 158, does not support Dr. Moser's cynical argument. In *Fein*, this Court addressed certain due process and equal protections challenges to section 3333.2. It did not address the jury trial argument raised in plaintiff's Petition.

B. Equal Protection.

In the petition, plaintiff explained that a second reason section 3333.2 is unconstitutional is that the dollar value of the amount successful plaintiffs can receive in medical negligence cases has been eroded 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. Dr. Moser argues that this argument should be rejected because the statute does not address purchasing power but instead addresses maximum recovery. (Answer 27-28.)

What Dr. Moser ignores is that section 3333.2 reflects a legislative determination in 1975 balancing a malpractice victim's right to recover for his or her injuries with the need to combat the supposed malpractice insurance crisis. Even if such a crisis existed in 1975 (doubtful) and even if it continued to exist today (it doesn't) then the fact remains that the side of the equation dealing with the malpractice victim's compensation has been significantly eroded over time with absolutely no showing that such an erosion is warranted let alone necessary to accomplish the Legislature's goal.

Dr. Moser offers no plausible explanation why a malpractice victim in 2013 should be able to recover only one fourth of the non economic damages as a 1975 malpractice victim receiving the same injuries. Instead, this deprivation is wholly arbitrary and therefore violates equal protection.

Finally, Dr. Moser argues that because the Legislature considered but decided not to index the $250,000 cap for inflation in 1999 is dispositive of this issue. (Answer 28-

29.) Dr. Moser cites to *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 469 for the proposition that "'it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.'" (Answer 29.) That may be the case, but there still has to be at least an arguable rationale basis for treating two discrete categories of individuals differently. "The equal protection clause 'imposes a requirement of some rationality in the nature of the class singled out.' [Citations.]" (*People v. Doyle* (2013) 220 Cal.App.4th 1251, __; [164 Cal.Rptr.3d 86, 97].) Here, neither the Court of Appeal nor Dr. Moser has suggested any rationale basis (even if that were the governing standard) for treating 1975 malpractice victims so differently than present day victims.

CONCLUSION

For the foregoing reasons and for the reasons explained in the Petition, Supreme Court review is warranted.

Dated: December 4, 2013 Respectfully submitted,

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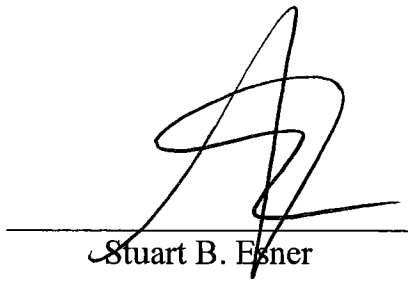

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