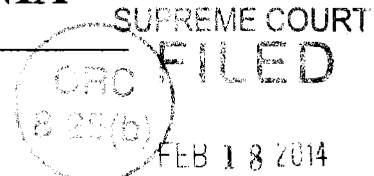
COPY

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

OPENING BRIEF ON THE MERITS

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
HOLLY N. BOYER, BAR NO. 221788
234 EAST COLORADO BOULEVARD,
SUITE 750
PASADENA, CALIFORNIA 91101
TELEPHONE: (626) 535-9860

ATTORNEYS FOR PLAINTIFF, RESPONDENT AND CROSS-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

INTRODUCTION 1

STATEMENT OF FACTS AND PROCEEDINGS BELOW 4

ARGUMENT 7

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. 7

CONCLUSION 16

CERTIFICATE OF WORD COUNT 17

TABLE OF AUTHORITIES

CASES

Atkins v. Strayhorn (1990) 223 Cal.App.3d 1380 13

Bernard v. Foley (2006) 39 Cal.4th 794 9

Campbell v. Zolin (1995) 33 Cal.App.4th 489 10

Canales v. City of Alviso (1970) 3 Cal.3d 118 14

Casa de Valley View Owner's Assn. v. Stevenson (1985) 167 Cal.App.3d 1182 13

Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal.4th 945 . . . 9

Espinoza v. Machonga (1992) 9 Cal.App.4th 268 8

Freedom Newspapers, Inc. v. Orange County Employees Retirement System
(1993) 6 Cal.4th 821 9

Gilman v. Beverly California Corp. (1991) 231 Cal.App.3d 121 . . . . 13, 14

Hoch v. Allied-Signal, Inc. (1994) 24 Cal.App.4th 48 10

Mayes v. Bryan (2006) 139 Cal.App.4th 1075 . . . . 13, 14

McAdory v. Rogers (1989) 215 Cal.App.3d 1273 . . . . 12, 13

McComber v. Wells (1999) 72 Cal.App.4th 512 7

Osumi v. Sutton (2007) 151 Cal.App.4th 1355 13

People v. Banks (1993) 6 Cal.4th 926 14

Poire v. C.L. Peck/Jones Brothers Construction Corp. (1995) 39 Cal.App.4th 1832 . . . 7

Romano v. Mercury Ins. Co. (2005) 128 Cal.App.4th 1333 11

Salazar v. Eastin (1995) 9 Cal.4th 836 15

Torres v. Xomox Corp. (1996) 49 Cal.App.4th 1 10

Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal.3d 245 10

STATUTES

Civ. Code, § 1431.2 . . . . *Passim*

Civ. Code, § 3333.2 . . . . *Passim*

Code Civ. Proc., § 877 . . . . 7, 10

ISSUE PRESENTED

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?

INTRODUCTION

A medical malpractice defendant decides not to settle and forces a trial. That defendant is found liable by a jury for significant noneconomic damages (here well over $1 million). That award is reduced to $250,000 under Civil Code section 3333.2. This matter presents the Court with the opportunity to decide whether this defendant is not only entitled to have the noneconomic damage award reduced under section 3333.2 but is also entitled to then have that capped amount reduced even further (to $16,655) because the malpractice victim settled with another tortfeasor before trial and a portion of that settlement was attributable to noneconomic damages. Under Civil Code section 1431.2

noneconomic damages are not joint and several in nature and therefore a nonsettling tortfeasor is not entitled to an offset for that portion of a settlement attributable to such damages. This rule applies to medical malpractice and non medical malpractice actions alike. As now explained, there is nothing in the text, history or purpose of Civil Code section 3333.2 entitling a medical malpractice defendant, who elects to not settle, to escape liability for the noneconomic damages he caused the plaintiff below even the $250,000 cap based on the fact that there was a pretrial settlement.

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, under the Court of Appeal's opinion, 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.

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.) Plaintiff sued Dr. Moser, Cedars Sinai Hospital (where the surgery took place) and Biosphere Medical (a products manufacturer). (See AA 1.)

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.) The jury was not asked to and did not find that any other tortfeasor was responsible for any of plaintiff's injuries. (Ibid.)

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.

ARGUMENT

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 reached this conclusion even though it 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. Under Code of Civil Procedure § 877, an offset is required when 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. (*Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 276.)

The Court of Appeal in this case nevertheless concluded that section 1431.2 did not control in a medical malpractice action because section 3333.2 operated as an absolute cap to the recovery of non economic damages in the action by way of settlement or 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.)

As now explained, neither the text or purpose of section 3333.2 warrants the result that was reached. Rather, a tortfeasor sued for medical malpractice is not entitled to preferential treatment under Civil Code section 1431.2. Accordingly, since non economic damages are not joint and several in nature regardless of the nature of the action in which they are recovered, a medical malpractice defendants is not entitled to an offset for that

portion of a pretrial settlement attributable to such damages. For several reasons, section 3333.2 does not warrant a contrary result.

First, the Court of Appeal's conclusion is not consistent with the text of section 3333.2 . Section 3333.2 provides in pertinent part: "(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).*" (Italics added.)

Section 3333.2 thus 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; 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.)"])

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 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 the Legislature 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].)

Dr. Moser has argued that section 3333.2's use of the word "action" supports his position that section 3333.2 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, Dr. Moser's position ignores that Section 3333.2's limitation on recovery in an action applies to the "amount of *damages*" in an action and as just explained "damages" does not include amounts paid in settlement.

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.

Further, according to 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 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.

In this case, the jury found that Dr. Moser was entirely responsible for the $1,325,000 plaintiff suffered.[1] 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

---

[1]Dr. Moser has asserted that the jury did not find him to be 100% at fault for purposes of Proposition 51. (Answer to Petition for Review 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 has argued 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 has argued that "Plaintiff knows that Dr. Moser was far less than '100% at fault' for his injury. . ." (Answer to Petition for Review 10), he supplied 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.

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 arguing to the contrary, Dr. Moser has relied on *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075 or *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121. However, neither of these cases addresses the issue presented here. 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, in 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.

CONCLUSION

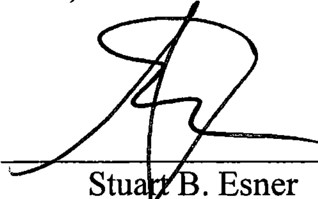
For the foregoing reasons plaintiff respectfully urges this Court to reverse the Court of Appeal in this matter and to conclude that Civil Code section 3333.2 does not afford a non settling defendant the right to offset a portion of a settlement attributable to non economic damages.

Dated: February 13, 2014

Respectfully submitted,

BALABAN & SPIELBERGER, LLP

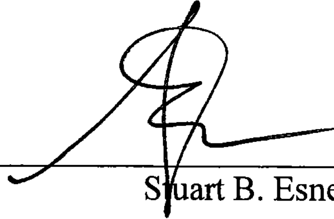
ESNER, CHANG & BOYER



By:____________________
Stuart B. Esner
Attorneys for Plaintiff, Respondent and Cross-Appellant Hamid Rashidi

CERTIFICATE OF WORD COUNT

This Opening Brief on the Merits contains 4,015 words per a computer generated word count.



Stuart B. Esner

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:

Date Served: February 14, 2014

Document Served: Opening Brief on the Merits

Parties Served: See attached Service List

(BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Pasadena, California.

Executed on February 14, 2014, at Pasadena, California.

(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)