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 BRIEF ON THE MERITS

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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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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 THE TWO QUESTIONS PRESENTED

Yes, Civil Code section 3333.2 entitles the healthcare provider defendant to the setoff, pursuant to Code of Civil Procedure 877, that is based on the amount of a pretrial settlement entered into by another healthcare provider that is attributable to noneconomic losses.

No, the rule of Civil Code section 1431.2, that liability for noneconomic damages is several only (not joint and several), does not bar such a setoff.

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[1] This brief only responds to the Court's version of the "Issue Presented," not to plaintiff's version. (Opening Brief on the Merits ("OBM"), p. 1.) Plaintiff simply repeats the first of the two questions in his own Petition for Review. His version of the "Issue Presented" is argumentative, repetitious, and incomplete. By comparison, this Court's version of the "Issue Presented" includes all three words in the statute – "damages," "losses," and "action" – as well as the key word in Code of Civil Procedure section 877, "amount."

SUMMARY OF ANSWER BRIEF ON THE MERITS

As Justice Epstein noted at the outset of the Court of Appeal opinion, "[i]n this case, we deal with the intersection of three statutes addressing the recovery of damages[.]" (*Rashidi v. Moser* (2013) 219 Cal.App.4th 1170, review granted Jan. 15, 2014, S214430 ("Slip Opn."), p. 2.) What Justice Epstein failed to point out is that each of the three statutes to which he was referring are intended to *reduce* plaintiffs' recovery of compensation for noneconomic damages in cases such as this. The reduction required by Civil Code section 3333.2 is based on the *type of loss*. The reduction required by Code of Civil Procedure section 877 is based on the *pretrial settlements*. The reduction required by Civil Code section 1431.2 is based on the *degree of fault*.[2] Each of the statutes is intended to provide plaintiff with accurate compensation – not overcompensation.

The point is that none of these three statutes are intended to cancel the others, as plaintiff essentially proposes. To the contrary, the three statutes should complement, if not reinforce, one another.

In a medical malpractice action against two or more healthcare provider defendants, Civil Code section 3333.2 subdivision (a) requires the court to allow plaintiff to recover monetary compensation for his *non*monetary losses, but subdivision (b) requires the court to limit the *total* amount of that compensation – including compensation by way of settlement – to $250,000. That the Legislature was referring to *total* recovery of compensation "for noneconomic losses"

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[2] At one time or another during this action, plaintiff has opposed the application of each of these three statutes.

in both subdivisions (a) and (b) of Section 3333.2 is apparent in the corresponding phrases "*recover noneconomic losses*" in subdivision (a) and "*the amount of damages for noneconomic losses*" in subdivision (b). (Emphasis added.) That the subdivisions are complementary is apparent in the repeated use of the word "*action*" in subdivisions (a) ("in any *action*") and (b) ("in no *action*").

Civil Code section 3333.2 subdivision (b) required the trial court to reduce the *total* amount of compensation, in the form of "damages for noneconomic losses," and Code of Civil Procedure section 877 required the trial court to apply a setoff for "the amount stipulated" in pretrial settlements. As plaintiff acknowledges, "the Legislature clearly stated that a settlement which is found to be in good faith . . . '*shall reduce the claims against the others in the amount stipulated*[.]'" (OBM, p. 10, emphasis added.) Because plaintiff recovered compensation from a healthcare provider defendant in the action as a result of one of the pretrial settlements, "the amount stipulated" in the settlement should be "setoff" from the total "amount of damages for noneconomic losses" that plaintiff recovered in the action. In other words, the total amount of compensation for plaintiff's noneconomic losses, including compensation by way of the settlement with the other healthcare provider defendant in the action, is the $250,000 specified in Civil Code section 3333.2.

The rule of Civil Code section 1431.2, that liability for noneconomic damages is several only (not joint and several), does not bar such a setoff. One of the reasons why is that, to again quote Code of Civil Procedure section 877, the Legislature used the phrase "the

amount *stipulated*" (emphasis added) to describe the setoff. Ideally, that refers to the amounts the settling parties "allocate" to economic and noneconomic damages in their "stipulation" for settlement. If they do not "allocate" the settlement, the trial court must do so after the fact, by reference to the jury's allocation of the total verdict between economic and noneconomic damages, which is required by Civil Code section 1431.2.

Those are the reasons why the Court of Appeal did not err in modifying the judgment to reflect a reduction of the noneconomic damages. The court correctly applied the three statutes, Civil Code section 3333.2, Code of Civil Procedure section 877, and Civil Code section 1431.2, to ensure that plaintiff was accurately compensated for his nonmonetary losses. The Court correctly rejected plaintiff's demand for overcompensation.

Those also are the reasons why plaintiff reframes the "Issue Presented" and argues that the limitation on "damages for noneconomic losses" in Civil Code section 3333.2 subdivision (b) *only should apply* to the "damages" awarded against a tortfeasor, but not to any settlement monies. Plaintiff is wrong.

STATEMENT OF THE CASE

STATEMENT OF FACTS

Plaintiff has a history of chronic nose bleeds. (4 Reporter's Transcript on Appeal ("RT") 655.) In April 2007, at the age of 26, plaintiff went to the emergency room at Cedars-Sinai Medical Center with severe nose bleeding. He was treated and discharged.

In May 2007, plaintiff again went to the emergency room at Cedars-Sinai for a severe nose bleed. He was examined by Dr. Moser, who advised him "to have an operation to treat his nose bleeds and/or arteriovenous malformation." (AA 6.)

Dr. Moser recommended an embolization procedure, whereby a small catheter is navigated through the blood vessels in the leg, up to the site of the nose bleed, and then small particles – known as embospheres – are injected through the catheter to block the bleeding vessel. Dr. Moser performed the operation that day. (AA 6.)

The embospheres used to occlude plaintiff's blood vessel were manufactured by Biosphere Medical, Inc. Dr. Moser chose embospheres that were labeled 300-500 microns in size (as opposed to 200-300 microns) because they would be too large to unintentionally migrate to a collateral vessel. (6 RT 1349.) However, the embospheres were not uniform in size, as the manufacturer represented. (AA 15.) Approximately 20% of the batch of embospheres used on plaintiff were smaller than 300 microns, which resulted in some of the embospheres traveling through very small

blood vessels and collateral veins to occlude the vessels of plaintiff's right eye. (3 RT 462-463, 466.)

When plaintiff regained consciousness after the procedure, he was blind in one eye. That blindness is permanent. Plaintiff has a 20% total visual disability in his right eye. (4 RT 656-657, 666.) His eyelid and orbit are normal, he has full range of motio, but he has no light perceptionn. (*Ibid.*) Plaintiff has 20/20 vision in his left eye.

Plaintiff alleged that the hospital provided Dr. Moser and plaintiff's other healthcare providers with defective equipment and devices. (Appellant's Appendix ("AA") 8.) He further alleged that Biosphere Medical should not have aggressively marketed its embospheres to hospitals and physicians as being uniform in size, which would allow for accurate targeting of particular arteries. (AA 15.) Plaintiff criticized Dr. Moser for failing to use larger embospheres. (8 RT 1809-1810, 1819.)

Ultimately, plaintiff was awarded $125,000 to compensate for his medical care. (AA 99-100.) He was not awarded any damages for loss of earnings, as plaintiff continued to operate the very successful lighting company that he owns with his brother after his injury. (AA 100; 6 RT 1246, 1266, 1279-1280, 1305.) Before his injury, plaintiff earned an annual income of approximately $2 million. (5 RT 970.) His business was growing by millions of dollars per year. (5 RT 940.) After his injury, business sales continued to increase and plaintiff's salary doubled. (6 RT 1248-1250, 1255, 1260, 1266.) In other words, plaintiff's high income kept growing after his injury.

PROCEDURAL BACKGROUND

A. PLAINTIFF FILED SUIT AGAINST THE HOSPITAL, THE MANUFACTURER, AND DR. MOSER UNDER THE THEORY THAT THE EMBOSPHERE PARTICLES, WHICH WERE NOT UNIFORM IN SIZE, TRAVELED TO AN UNINTENDED PART OF PLAINTIFF'S BODY

Mr. Rashidi brought this action against Dr. Moser, Cedars-Sinai, and Biosphere Medical.

He alleged causes of action against Dr. Moser and Cedars-Sinai for medical malpractice and medical battery. (AA 7-17.) He alleged causes of action against Biosphere Medical for product liability based on design or manufacturing defect, failure to warn, negligence per se, breach of express and implied warranty, and misrepresentation. His theory was that the particles Biosphere Medical manufactured had specific chemical and elastic physical qualities which enhanced their ability to travel through very small blood vessels and collateral veins, causing a significant risk that they would travel through the blood system to sites other than the intended surgical sites. Plaintiff alleged that Biosphere failed to disclose this risk, and failed to disclose that the embosphere microspheres were not of uniform size, instead marketing the product as being of uniform size which allowed for accurate targeting of particular arteries.

Plaintiff's theory of causation was that the particles did so in this case, causing blindness.

B. PLAINTIFF RECOVERED $2.35 MILLION IN SETTLEMENT WITH THE HOSPITAL AND MANUFACTURER

Plaintiff settled with Biosphere Medical for $2 million. (2 RT A-3; AA 46-49.) Plaintiff settled with Cedars-Sinai for $350,000. (AA 51, 60-61.)

The settling defendants each moved for a determination that its settlement was in good faith. Notice was served on all parties, including Dr. Moser. Neither motion disclosed an apportionment of the settlement between economic and noneconomic damages, as would have been required if the parties had reached such an agreement. (AA 35-41, 50-59.) The motions were unopposed and were granted by the court.

C. AT TRIAL, THE SUPERIOR COURT DENIED DR. MOSER'S REQUEST FOR A COMPARATIVE FAULT FINDING AND THE JURY RETURNED A VERDICT AGAINST DR. MOSER

Plaintiff mischaracterizes this case when, in the first sentence of his brief, he argues that "[a] medical malpractice defendant decides not to settle and forces a trial." (OBM, p. 1.) That is absolutely untrue. The only reason why this case was tried was that plaintiff was determined to recover substantial economic damages for loss of earnings. That also is the reason why the codefendants paid more to settle than the jury determined the entire case to be worth. Finally, the reason why Dr. Moser did not settle is because of the likelihood that the jury would reject plaintiff's claim for substantial economic damages.

Despite recovering $2.35 million in settlement, plaintiff was not satisfied. He demanded still more from Dr. Moser, likely because he knew an allocation of at least 1% comparative fault at trial would require Dr. Moser to pay the entirety of his claimed economic damages. To that end, plaintiff elicited testimony from his economist that his lighting company would be less successful in the future and that, consequently, his future loss of earnings would be as high as $28.5 million (present cash value), and his counsel explained in closing argument that this astonishingly large number was not plaintiff's fault. (5 RT 977; 8 RT 1830-1831.) With expectations like this, and joint liability for economic damages, plaintiff had no interest in settling for a reasonable amount.

Trial proceeded solely against Dr. Moser. Dr. Moser argued to the trial court for the jury to determine comparative fault. (7 RT 1732 ["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 opposed the request. (7 RT 1738-1739.) The trial court stated, after the parties argued for and against comparative fault, that "the jury verdict will not have a comparative fault question." (7 RT 1739.) The trial court simply stated in its "Comments on the Court's Entry of Judgment" that "the jury was not requested to make any finding of proportionate fault attributed to the settling defendants." (AA 105.)

The jury found Dr. Moser was negligent in the diagnosis or treatment of Mr. Rashidi and that his negligence was a cause of injury to Mr. Rashidi.

The jury awarded Mr. Rashidi $125,000 in present cash value for future medical care resulting from this negligence, $331,250 for past noneconomic damages, and $993,750 for future noneconomic damages. The jury rejected plaintiff's loss of earnings claim entirely.

In accordance with MICRA's cap on noneconomic damages, the trial court reduced the noneconomic damages to $250,000, but refused to apply a settlement offset.

D. THE COURT OF APPEAL MODIFIED THE JUDGMENT TO REFLECT OFFSETS AGAINST PLAINTIFF'S ECONOMIC AND NONECONOMIC DAMAGES

Defendant appealed. Plaintiff cross-appealed from the reduction of noneconomic damages, arguing that Civil Code section 3333.2 is unconstitutional.

Defendant raised two issues, both relating to the trial court's denial of any settlement offsets: (1) Should the "settlement offset" of Code of Civil Procedure section 877 – taking into consideration the noneconomic damage limitations of Civil Code sections 1431.2 and 3333.2 – reduce the judgment against the non-settling defendant? And, (2) should the "settlement offset" reduce the judgment, even though plaintiff and the settling defendants did not allocate their settlements between economic and noneconomic damages and even though the non-settling defendant did not prove the comparative negligence of the settling defendants? (Appellant's Opening Brief ("AOB"), p. 1.)

On appeal, Dr. Moser argued that the trial court erred in denying settlement offsets to both economic and noneconomic

damages. Plaintiff argued that Dr. Moser was not entitled to any offsets. Plaintiff argued in the alternative that, Dr. Moser should be entitled to an offset only as to the $125,000 portion of the judgment reflecting the joint and several economic damages. (Respondent's Brief/Cross-Appellant's Opening Brief ("RB/XAOB"), p. 26.) As to the trial court's refusal to order an offset even as to the economic damages, however, plaintiff conceded that, under the formula of *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, Dr. Moser at least was entitled to an offset of economic damages. (RB/XAOB, pp. 24-25.)

Plaintiff argued in such a way that the question of noneconomic damages should be addressed before the question of economic damages. In its opinion, the Court of Appeal disagreed with plaintiff, and first addressed the economic damages.

Essentially, the Court of Appeal's analysis assumed that the $250,000 limitation of Civil Code section 3333.2 includes all payments by codefendant healthcare providers that are allocated to noneconomic damages, which includes amounts paid by way of settlements.

E. THIS COURT GRANTED REVIEW

This Court granted review:

> If a jury awards the plaintiff in a medical malpractice action noneconomic damages against a healthcare provider defendant, does Civil Code section 3333.2 entitle that defendant to a setoff based on the amount of

> a pretrial settlement entered into by another healthcare provider that is attributable to noneconomic losses or does the statutory rule that liability for noneconomic damages is several only (not joint and several) bar such a setoff?

(Order granting review, Jan. 15, 2014.)

Plaintiff's version of the "Issue Presented" in this case (at OBM, p. 1) refers to Civil Code section 3333.2. It does not refer to Code of Civil Procedure section 877 or Civil Code section 1431.2.

Plaintiff's answer to the questions presented in this case is that the $250,000 limitation on "damages for noneconomic losses" in Civil Code section 3333.2 subdivision (b) should not include plaintiff's recovery of compensation for noneconomic damages by way of pretrial settlements. The basis of his argument is that the Legislature used the word "damages" but did not use the word "settlement" in subdivision (b). (OBM, pp. 3, 9-11, 15-16.)

In other words, plaintiff argues that, despite recovering $2.35 million in settlement, and despite the fact that the jury's unreduced award is $1.45 million, and despite the fact that the jury's reduced award is $16,500, he nevertheless should recover more. He argues for overcompensation. Again, plaintiff is wrong.

STANDARD OF REVIEW

The issue presented by this Court is a pure question of law. Accordingly, the Court conducts a de novo review of the trial court's refusal to apply an offset to the jury's award, pursuant to Code of Civil Procedure section 877, that is based on the amount of pretrial settlements entered into by other healthcare provider defendants for noneconomic losses. (See *Wade v. Schrader* (2008) 168 Cal.App.4th 1039, 144 [where appellate court must decide whether the trial court's ruling was consistent with the statutory requirements of Section 877, the Court applies the independent standard of review]; *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432 [courts independently determine the proper interpretation of a statute]; *International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611-612 [application of statute to undisputed facts presents a question of law subject to independent appellate determination].)

LEGAL ANALYSIS

I. CIVIL CODE SECTION 3333.2 APPLIES TO PLAINTIFF'S *ENTIRE ACTION* AGAINST THE TWO HEALTHCARE PROVIDER DEFENDANTS, NOT JUST TO THE *JURY VERDICT* AGAINST ONE OF THOSE DEFENDANTS

Civil Code section 3333.2, like all of the provisions of the Medical Injury Compensation Reform Act ("MICRA"), should be read broadly to effectuate the statutory purposes, one of which is to promote settlements. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 163 ["the fixed $250,000 would promote settlements by eliminating 'the unknown possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble'"].) The word "damages" in Section 3333.2 should be read broadly to refer not only to an amount that was awarded by a court or jury in trial of the action, but also to an amount that was paid by a co-defendant in settlement of the action. The Court of Appeal correctly held that "MICRA does apply, and it sets an absolute limit on the total amount of damages a plaintiff can recover from healthcare providers for noneconomic losses." (Slip Opn., p. 8.)

A. Civil Code Section 3333.2 Should Be Broadly Applied To Include The Amount Plaintiff Recovered From The Other Healthcare Provider Defendants In This Action For Professional Negligence

Civil Code section 3333.2 applies to the entire action, not just to the judgment at the end of the action, as plaintiff suggests but never explicitly argues. Section 3333.2 provides:

> (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).

(Emphasis added.) The noun "**action**" appears at the beginning of both subdivision (a) and subdivision (b), just as it does in other MICRA statutes. (See, *e.g.*, Bus. & Prof. Code, § 6146, subd. (a) ["an action"]; Civ. Code, § 3333.1, subd. (a) ["in an action"]; Code Civ. Proc., § 340.5 ["In an action"], Code Civ. Proc., § 364, subd. (a) ["No action," "the action"], Code Civ. Proc., § 667.7, subd. (a) ["In any action"].) Like all MICRA provisions, Civil Code section 3333.2 should be liberally construed. (*Preferred Risk Mutual Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208, 215; see *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 578.)

Simply stated, the statute broadly applies to the entire "action," not just to the jury "verdict" in the action, as plaintiff argues.

The operative words in Section 3333.2 are the verbs "***recover***" in subdivision (a) and "***exceed***" in subdivision (b). The statutory language, "[i]n no action shall the amount of damages for noneconomic losses ***exceed*** two hundred fifty thousand dollars," in subdivision (b) broadly refers to all compensation plaintiff will ***recover*** in the action "for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage," as authorized in subdivision (a). (Emphasis added.) That includes damages in wrongful death actions (*Yates v. Pollock* (1987) 194 Cal.App.3d 195), even though the Legislature did not use the words "society" or "comfort" or "companionship" in subdivision (a). More to plaintiff's point, the statutory language, "[i]n no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars," in subdivision (b) broadly applies no matter how the action concludes, whether plaintiff recovers "by settlement or verdict." (OBM, p. 2.)

Admittedly, the Legislature did not use the word "settlement" in the statute, but neither did it use the words "trial" or "arbitration" or any other mechanism by which plaintiffs recover compensation for injury. Nor did the Legislature use the words "verdict" or "award" or "judgment" that might suggest a limitation to one specific mechanism by which plaintiffs recover compensation for injury.

In summary, the Legislature's repeated use of the word "action," not only in Section 3333.2 but in other MICRA statutes, reinforces the conclusion that Section 3333.2 applies to compensation

recovered by plaintiffs at any time during a lawsuit, including compensation by settlement.

B. The Statutory Language In Subdivision (a) And The Statutory Language In Subdivision (b) Refer To The Same Thing: Monetary Compensation For Nonmonetary Harm

The same concept is stated in both subdivisions (a) and (b) of Section 3333.2:

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to **recover noneconomic losses** to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other **nonpecuniary damage**.
>
> (b) In no action shall the amount of **damages for noneconomic losses** exceed two hundred fifty thousand dollars ($250,000).

(Emphasis added.) The $250,000 limitation in subdivision (b) applies whenever a plaintiff "recovers" money from medical malpractice defendants for "noneconomic losses." Another way of stating the same thing is that Section 3333.2 applies when the defendants in a medical malpractice action "compensate" the plaintiff with money for "nonpecuniary damage."

The three phrases in the statute,

- "noneconomic losses to compensate for pain, suffering," etc. in subdivision (a),

- "nonpecuniary damage" in subdivision (a), and
- "the amount of damages for noneconomic losses" in subdivision (b)

all refer to the same concept:

- money to compensate for nonmonetary harm.

That concept could be stated even more simply:

- nonmonetary harm.

To illustrate the point, assume that the Legislature had used the single phrase of "money to compensate for nonmonetary harm," instead of the two phrases in subdivisions (a) ("noneconomic losses to compensate for pain, suffering," etc.), and (b) ("damages for noneconomic losses"), the statute would read,

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover [**money to compensate for nonmonetary harm**] for pain, suffering, inconvenience, physical impairment, disfigurement and other [**nonmonetary harm**].
>
> (b) In no action shall the [**money to compensate for nonmonetary harm**] exceed two hundred fifty thousand dollars ($250,000).

The meaning would be the same as the actual wording of the statute with the word "losses" in subdivisions (a) and (b), and the word "damages" in subdivision (b).

C. The Word "Damages" Is Synonymous With The Word "Losses," And The Legislature Used Both Words In The Statute

The word "damages" in subdivision (b) is synonymous with the word "losses," and the Legislature used the word "losses" in *both* subdivision (a) and subdivision (b) of the statute. As the Court of Appeal explained in *Nordahl v. Dept. of Real Estate* (1975) 48 Cal.App.3d 657, 664, "[t]he words 'loss' and 'damage' have long been considered virtually synonymous, and both terms refer to that which is necessary to make the plaintiff whole."[3] The words "losses" and "damage," as well as the word "injury," are interchangeable with the word "harm." (See, *e.g.,* CACI No. 400 ["Negligence – Essential Factual Elements"], Directions for Use ["The word 'harm' is used throughout these instructions, instead of terms like 'loss,' 'injury,' and 'damage,' because 'harm' is all-purpose and suffices in their place"].) The point is that, between the interchangeable words of "damages" and "loss" that the Legislature used in the statute, "loss" is the generic term and "damage" is a species of that generic term. (*Nordahl v. Dept. of Real Estate, supra,* 48 Cal.App.3d at 664.) The Legislature used that generic term in both subdivision (a) and subdivision (b).

More importantly, the complete phrase in which the word "damages" appears in the statute, at subdivision (b), is "damages for noneconomic losses." The phrase "noneconomic losses" is in *both* subdivision (a) and subdivision (b) of the statute.

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[3] Interestingly, *Nordahl v. Dept. of Real Estate* was decided in 1975, the same year that Civil Code section 3333.2 and the other provisions of MICRA were enacted.

Plaintiff's statutory interpretation of Section 3333.2 is based entirely on the word "damages." (OBM, pp. 3 ["the word 'damages' means an amount that was awarded by a court or jury, [and] therefore does not include an amount voluntarily paid as part of a settlement"], 9-11, 15-16.) Plaintiff's analysis does not consider the statute as a whole. Plaintiff even ignores the other three words in the statutory phrase in which the word "damages" appears: "damages *for noneconomic losses*." By narrowing his analysis to just one word in the statute, plaintiff apparently hopes to persuade the Court to accept his narrow interpretation of the statute – that the $250,000 limitation only applies to jury verdicts. He argues against a broad interpretation of the statute – that the $250,000 limitation applies to all conceivable means by which plaintiffs recover compensation in actions for medical malpractice.

Plaintiff's analysis does not mention, let alone explain, the Legislature's use of the word "losses" in both of the operative subdivisions of the statute in the phrase "noneconomic losses." Most importantly, plaintiff ignores the parallel structure of the statute, in which subdivision (a) begins with the phrase "[i]n any action" and subdivision (b) begins with the parallel phrase "[i]n no action."

Finally, the Legislature also used the word "damage" in subdivision (a) in the phrase "nonpecuniary damage."

The point is that the Legislature used the words "losses," "damage," and "damages" interchangeably in the statute.

D. The Total Amount Of Compensation Plaintiff Recovers For His Nonmonetary Losses Should Not Vary Depending On The Number Of Healthcare Provider Defendants From Whom Plaintiff Receives Compensation

1. It is irrelevant for purposes of Section 3333.2 whether plaintiff named one or many healthcare provider defendants

Plaintiff's ultimate position is that, by naming two healthcare providers as defendants and then settling with one of them, he can collectively recover more than $250,000 in noneconomic damages from them. That is, plaintiff seeks to avoid the limitation on noneconomic damages simply by settling with one healthcare provider defendant and then filing a lawsuit against a second healthcare provider defendant for the same injury.

Plaintiff cannot, if only because he alleged those defendants jointly contributed to his single injury. More importantly, however, it is irrelevant for purposes of Section 3333.2 whether plaintiff named one or many healthcare provider defendants. "Under MICRA, where more than one healthcare provider jointly contributes to a single injury, the maximum a plaintiff may recover for noneconomic damages is $250,000." (*Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121, 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." (*Id.* at 129, citing *Yates v. Pollock, supra,* 194 Cal.App.3d at 200-201.)

Even though plaintiff settled this "action" with one of the healthcare provider defendants, this continued to be the same "action" for injury against the two healthcare provider defendants. Section 3333.2 applies to the entire medical malpractice "action," not just to the portion of the "action" that plaintiff tried against the non-settling codefendant.

2. It is irrelevant for purposes of Section 3333.2 whether a defendant's payment to plaintiff was "voluntary" or "involuntary"

Plaintiff also is wrong in his argument regarding the distinctions between defendants' "voluntary" and "involuntary" contributions to the compensation he recovers for his noneconomic losses.

Plaintiff's analysis is that "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." (OBM, p. 3, emphasis added.) His analysis continues, "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" (OBM, p. 3, emphasis added), referring to the "voluntary" settlement. Plaintiff suggests, but never expressly argues, that when defendant healthcare providers evaluate cases for purposes of settlement, they do so without regard to the statutory limitation on noneconomic damages. (See OBM, p. 11.) It is in this way that

plaintiff contrasts a "voluntary" settlement with "*involuntary*" judgment. (OBM, p. 13, emphasis added.)

That obviously is not true. Healthcare provider defendants determine whether and how to pay in settlement based on their maximum "exposure" to economic and noneconomic damages, and California law is a factor they take into consideration. So too do *plaintiffs* who file professional liability actions against healthcare providers. They decide whether and how to settle based on the maximum compensation they are likely to "recover." California law is a factor they take into consideration. One of the most important features of California law in that regard is the $250,000 limitation. To evaluate that, it is necessary for them to allocate between the maximum likely compensation for economic losses and the maximum likely compensation for noneconomic losses.

Plaintiff argues that Civil Code section 3333.2 can be avoided simply by settling with one healthcare provider defendant and then filing a lawsuit against a different healthcare provider defendant for the same injury. (OBM, pp. 11-12 ["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"].) That is not true. (*Gilman v. Beverly California Corp.*, *supra*, 231 Cal.App.3d at 128, citing *Yates v. Pollock*, *supra*, 194 Cal.App.3d at 200-201.)

If plaintiff's argument was true, the public policy basis of Section 3333.2, to limit the liability of healthcare providers, could be easily defeated by the device of settlements. That would contradict

one of the possible justifications for the limitation. For example, as this Court observed in rejecting the argument that Section 3333.2 was unconstitutional, "the Legislature may have felt that the fixed $250,000 limit would promote settlements by eliminating 'the unknown possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble.'" (*Fein v. Permanente Medical Group, supra,* 38 Cal.3d at 163.) For another example, as the Court observed in rejecting the argument that Business and Professions Code section 6146 was unconstitutional, "it is unrealistic to suggest that such limits will not reduce the costs to malpractice defendants and their insurers in the large number of malpractice cases that are resolved through settlement." (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 931.)

In analyzing the related context of indemnity actions against healthcare providers, the Court broadened the application of Section 3333.2 to indemnity actions against healthcare providers, reasoning that it limits joint liability. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114-116.) The Court held that concurrent tortfeasors have no right to indemnity in excess of $250,000. (*Id.* at 116 ["To hold otherwise would undermine the Legislature's express limit on health care liability for noneconomic damages as well as jeopardize the purpose of MICRA to ensure the availability of medical care"].)

> If, under section 3333.2, a health care provider has no liability for noneconomic damages in excess of $250,000, then a concurrent tortfeasor that satisfies a

> judgment or settles with the injured party for a greater amount has not been "compelled to pay" on behalf of another who would have otherwise incurred the loss.

(*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital, supra,* 8 Cal.4th at 116-117.)

In summary, the total amount of compensation plaintiff recovers for his nonmonetary losses should not vary depending on the number of healthcare provider defendants who jointly contributed to plaintiff's single injury. That is true, even where plaintiff named those providers as defendants in different actions. That is true, even where plaintiff settled with one of those providers and, therefore, did not name that provider as a defendant in the action against the others.

E. The Court Of Appeal Did Not Err In Concluding That $250,000 Is The "Total" Amount Of Noneconomic Damages Recoverable By Plaintiff In This Medical Malpractice Action

The Court of Appeal correctly concluded that Section 3333.2 "sets an absolute limit on the total amount of damages a plaintiff can recover from health care providers for noneconomic losses," and that "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." (Slip. Opn., p. 8, original italics.) The Court observed that "[t]his serves the purpose of MICRA," and quoted *Fein v. Permanente Medical Group, supra,* 38 Cal.3d at 159. (*Ibid.*) It is a limit on the *total* amount of compensation received by the plaintiff, whether in the form of "settlement" or "judgment," or both. Stated in

terms of the "Issue Presented," when a jury awards the plaintiff in a medical malpractice action noneconomic damages against a healthcare provider defendant, Civil Code section 3333.2 entitles that defendant to a setoff, pursuant to Code of Civil Procedure section 877, that is based on the amount of a pretrial settlement entered into by another healthcare provider that is attributable to noneconomic losses.

Plaintiff argues that the Court of Appeal erred when it held that $250,000 is the maximum amount that plaintiff can recover for noneconomic losses, whether by settlement or verdict, or both. (OBM, p. 2.) The basic point of plaintiff's argument, of course, is that he wants to recover *more* than $250,000 for noneconomic losses due to medical malpractice simply because he settled with one of the defendants. The fundamental flaw in plaintiff's argument is that Civil Code section 3333.2 should only apply at one point in time during a medical malpractice action – after the jury renders its verdict and before judgment is entered.

Plaintiff is wrong, if only because he assumes that Section 3333.2 is *procedural* in nature. It is *substantive,* which means it applies throughout the entire life of the medical malpractice action.

Plaintiff does not deny that the maximum he can "recover" for his "noneconomic losses" in this "action" for professional negligence is $250,000. That is, he does not deny that the phrases "in any action" and "in no action" apply to the same "action." He completely ignores those words and phrases in the statute. Instead, plaintiff focuses on the word "damages" in subdivision (b). (OBM, pp. 3, 9-11, 15-16.) He ignores the corresponding word "losses" in subdivisions (a) and (b), and the phrase "nonpecuniary damage" in subdivision (a).

Plaintiff reframes subdivisions (a) and (b) in terms of his recovery for noneconomic losses when a defendant pays "voluntarily" by way of settlement and what a defendant pays "involuntarily" by way of judgment. (OBM, p. 13 ["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"].)

Essentially, plaintiff reads the words "recover," "losses," and "action" out of the statute, and reads the words "judgment" and "involuntary" into the statute. Plaintiff is wrong in both steps of his analysis.

II. CODE OF CIVIL PROCEDURE SECTION 877 APPLIES TO THIS CASE AND REQUIRES OFFSETS FOR THE PRETRIAL SETTLEMENTS

Plaintiff recovered compensation from the other healthcare provider defendant he named in this medical malpractice action. Because he did so by way of pretrial settlement, Code of Civil Procedure section 877 required the trial court to apply a setoff against the total amount of compensation that plaintiff can recover for his noneconomic losses, $250,000, but the trial court failed to do so. The Court of Appeal correctly modified the judgment to reflect an offset against the noneconomic damages award.

A. Section 877 Requires That The Amounts Paid By The Settling Defendants "Reduce The Claims Against The Others In The Amount Stipulated"

Code of Civil Procedure section 877 is the statute that requires setoffs for pretrial settlements. Specifically, Section 877 subdivision (a) provides that a settlement "shall reduce the claims against the others [*i.e.,* the non-settling codefendants] 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." These also are known as "offsets."

Section 877 applies to this case. While plaintiff argues that the statute should not apply to the noneconomic damages that he recovered in pretrial settlements (OBM, pp. 7-13), plaintiff does not deny that the statute applies to the *economic* damages he recovered

that way. Nor, for that matter, does plaintiff deny that if the jury had not separately calculated economic and noneconomic damages, Section 877 would apply to the *total* amount of damages he recovered in the settlements. In that regard, plaintiff specifically quotes the language of the statute and then, for good measure, declares the statutory language to be "clearly" stated: "the Legislature clearly stated that a settlement which is found to be in good faith . . . '*shall reduce the claims against the others in the amount stipulated*[.]'" (OBM, p. 10, emphasis added.) Plaintiff further reinforces the point: "[t]his 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.*" (OBM, p. 10, emphasis added.)

Plaintiff's precise argument regarding the application of Section 877 to this case is limited to the "*portions*" of the two settlements that are "*attributable*" to noneconomic damages. (OBM, pp. 1, 7-11, emphasis added.)

It is significant that plaintiff uses the word "*attributable*" rather than the word "*allocated,*" which is the word normally used in describing the economic and noneconomic "*portions*" of settlements. "Allocated" refers to the amounts of compensation for economic and noneconomic damages that the settling parties actually calculated in arriving at their settlement. "Attributable" refers to a ratio between economic and noneconomic damages that someone other than the settling parties applies to the total, unallocated amount of compensation for both economic and noneconomic damages.

In this case, the distinction between the words "allocated" and "attributable" is significant because there is no evidence to show whether and, if so, how plaintiff and the settling defendants "allocated" their settlements between economic damages and noneconomic damages. By using the word "attributable," plaintiff means (1) comparing the amount of damages for economic losses and the amount of damages for noneconomic losses the jury calculated in arriving at its verdict, (2) calculating the ratio between those two categories of damage for plaintiff's losses, and (3) *attributing* that ratio to the amounts of the settlements. In other words, the allocation of the settlements was done by the trial court, long after the settlements were completed.

Plaintiff's basic argument is that Civil Code section 3333.2 subdivision (b) uses the word "damages," whereas Code of Civil Procedure section 877 subdivision (a) does not. (OBM, pp. 7-13.) That is, plaintiff argues that juries calculate verdicts in terms of the amount of "damages" for economic losses and "the amount of damages for noneconomic losses" (Civ. Code, § 3333.2, subd. (b)), whereas the parties who settle cases do not calculate the amount to be paid in terms of "damages." Plaintiff ignores the fact that settlement calculations are based on the settling parties' estimates of what juries are likely to award. More importantly, plaintiff ignores the rest of the statutory language of Section 3333.2 subdivision (b) – "the amount of damages for noneconomic losses" – which corresponds to the statutory language of Section 877 subdivision (a), "the amount stipulated." Most importantly, plaintiff ignores the legislative purpose

that Sections 3333.2 and 877 have in common, to encourage settlements and ensure accurate compensation.

B. Offsets Pursuant To Section 877 Encourage Pretrial Settlements, Including Settlement Between A Plaintiff And The Remaining Defendant

Settlement offsets are intended to *encourage* both plaintiffs and defendants to enter into settlements. As one Court of Appeal put it, the goals of the Legislature when it enacted Section 877 included the goal of equitable sharing of costs among defendants and the goal of encouraging pretrial settlements. (*Arbuthnot v. Relocation Realty Service Corp.* (1991) 227 Cal.App.3d 682, 687.) As this Court explained, Code of Civil Procedure section 877 embodies "the strong public policy in favor of encouraging settlement of litigation." (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 603.) The setoff requirement helps to ensure an equitable apportionment of liability among the tortfeasors who contributed to plaintiff's injury. (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 871-873.)

Thus, both the language and the goals of Section 877 compel the conclusion that there must be a setoff as to the amount paid in settlement. That includes both the economic damages portion and the noneconomic damages portion of "the amount of the consideration paid for" the plaintiff's agreement to release the settling defendant from the action.

While plaintiff acknowledges the public policy of encouraging settlements (OBM, p. 13), he does not acknowledge that that same public policy is one of the bases of Section 877. As to medical malpractice cases, which are subject to the damage limitation of Civil Code section 3333.2, plaintiff argues that setoffs pursuant to Section 877 will have the "perverse effect" of discouraging settlements. (OBM, p. 13.) This is an argument against settlement offsets altogether – whether for economic damages, noneconomic damages, or both – in medical malpractice cases.

Plaintiff is wrong. Even the remaining defendant has an incentive to settle. What plaintiff essentially argues is that the remaining defendant would have *greater* incentive to settle than if there were no settlement offsets pursuant to Section 877. But plaintiff ignores the corresponding *disincentive* for the plaintiff to settle if there were no settlement offsets pursuant to Section 877. After all, without such settlement offsets, there is the probability of double recovery.

In summary, plaintiff only considers the public policy relating to settlement from his own perspective. He fails to consider the public policy from all three perspectives – the plaintiff's perspective, the settling defendants' perspective, and the non-settling defendants' perspective – as this Court and the Courts of Appeal always do.

C. There Is Nothing In Section 877 To Suggest That The Setoff Does Not Apply To The "Portion" Of A Settlement That Is "Attributable" To Noneconomic Damages

There is nothing in Code of Civil Procedure section 877 to suggest that the setoff only applies to economic damages and does not apply to noneconomic damages, which is understandable because Section 877 (added in 1957) *predates* the two statutes that injected the distinction between economic and noneconomic damages into California law – first in Civil Code section 3333.2 (added in 1975) and then in Civil Code section 1431.2 (added in 1987). Plaintiff completely ignores that evolution of the law and argues that instead of the word "damages" in Civil Code section 3333.2, the Legislature should have "clearly stated" – as plaintiff claims the Legislature did in Section 877 – that a settlement "'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.'" (OBM, p. 10, quoting Code Civ. Proc., § 877, subd. (a).) Setting aside the all-too-obvious question whether that statutory language is "clearly stated" and ignoring the historical background of the law that gave rise to that incredibly complex statutory language, the problem with plaintiff's argument is that it could be applied to *economic* damages, as well. If plaintiff's logic was followed, there would be no setoffs at all.

Perhaps because he recognizes that argument is weak, plaintiff offers another argument for distinguishing between settlements and verdicts: settlements are *voluntary* compensation, and jury verdicts

are *involuntary* compensation. (OBM, pp. 11-14.) That same logic could be applied to *economic* damages, as well. Again, there would be no setoffs at all.

Plaintiff's goal, of course, is to recover both the amount of compensation he was *voluntarily* paid by the settling defendant and the amount of compensation he wants Dr. Moser to *involuntarily* pay. In other words, his goal is double recovery.

In order to avoid the problem of double recovery, Section 877 should be read to apply to the entire settlement amount, just as the statute provides: "shall reduce the claims against the others in *the amount stipulated*" in the settlement. Thus, unless the settling parties separately stipulate to the amount of damages for economic losses and the amount of damages for noneconomic losses, "the amount stipulated" necessarily refers to the *total* amount of damages for both economic losses and noneconomic losses. If the settling parties do separately stipulate, then it follows that Section 877 can be reconciled with the statutes enacted after Section 877 that distinguish between economic and noneconomic damages.

Court of Appeal Justice Croskey's concurring opinion in *Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80 proposed a different approach to the problem of double recovery:

> It is my view that in order to be consistent with the purpose of section 877 to avoid a double recovery, the plaintiff's total recovery for noneconomic damages, including the sum of the separate awards of noneconomic damages and the noneconomic portion of any good faith settlements, should

> be no greater than the plaintiff's total noneconomic loss reduced in proportion to the plaintiff's share of fault. Thus, a noneconomic damages award against a defendant should be reduced, by application of a section 877 setoff, *but only to the extent necessary to avoid a double recovery by the plaintiff.* If the noneconomic portion of one or more good faith settlements exceeds the total amount of plaintiff's noneconomic loss, reduced in proportion to the plaintiff's share of fault, the award of noneconomic damages against each nonsettling defendant will be reduced to zero by means of a setoff. At the other extreme, if the noneconomic portion of good faith settlements is equal to or less than the total amount of the plaintiff's noneconomic damages apportioned to those settling defendants, the award of noneconomic damages against each nonsettling defendant will not be reduced at all by means of a setoff. In between these two extremes, a noneconomic damages award against a defendant should be reduced by a setoff to the extent necessary to avoid a double recovery by the plaintiff. I believe the cases that have articulated a contrary rule (i.e., *Espinoza, supra,* 9 Cal.App.4th 268, 11 Cal.Rptr.2d 498, and its progeny) were wrongly decided.

(*Bostick v. Flex Equipment Co., Inc., supra,* 147 Cal.App.4th at 113-114 (conc. opn. of Croskey, Acting P.J.), original italics, fn. omitted.)

In this case, the parties followed the approach of *Espinoza v. Machonga* and its progeny. The Court of Appeal did so, as well. (Slip Opn., pp. 5-6.) Therefore, the best way to avoid double recovery

is to apply the reduction required by Civil Code section 3333.2 and then the reduction required by Code of Civil Procedure section 877.

III. CIVIL CODE SECTION 1431.2 DOES NOT BAR A SET OFF IN THIS CASE

Like the rules in Civil Code section 3333.2 and Code of Civil Procedure section 877, the rule in Civil Code section 1431.2, that liability for noneconomic damages is several only (not joint and several), is intended to *reduce* the recovery of compensation in tort litigation. It is not intended to defeat the other two rules for reduction of plaintiff's recovery of compensation. It does not bar reduction of the total amount of plaintiff's compensation for noneconomic damages to $250,000. It does not bar the application of a settlement offset pursuant to Code of Civil Procedure section 877. The Court of Appeal correctly observed that "[t]his is consistent with the way MICRA has phrased its damages cap," and "[t]his serves the purpose of MICRA." (Slip Opn., p. 8.)

A. Section 1431.2 And Section 3333.2 Are Easily Reconciled, And The Two Statutes Should Be Applied In Such A Way As To Reinforce One Another

Civil Code section 1431.2 should be applied in such a way as to reinforce Section 3333.2. To begin with, the two statutes use the same words and phrases. Section 3333.2, which ameliorated the problem of excessive liability of California healthcare providers for noneconomic damages, uses the words "action" and "losses," as well

as the phrases "noneconomic losses" and "damages for noneconomic losses." So too does Section 1431.2 subdivision (a), which ameliorated the problem of excessive liability of all Californians for joint and several liability of noneconomic damages, by providing that,

> **In any action** for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for **noneconomic damages** shall be several only and shall not be joint. Each defendant shall be liable only for **the amount of noneconomic damages** allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(Emphasis added.) Like Civil Code section 3333.2, section Civil Code 1431.2 subdivision (b) uses the words "damages" and "losses" interchangeably:

> (1) For purposes of this section, the term "**economic damages**" means objectively verifiable **monetary losses** including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.
>
> (2) For the purposes of this section, the term "**noneconomic damages**" means subjective, **non-monetary losses** including, but not limited to, pain, suffering, inconvenience,

> mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

(Emphasis added.) Section 1431.2 applies *both* to "losses" and to damages.

In summary, Civil Code sections 3333.2 and 1431.2 are easily reconciled. They use the same words and phrases. They have the same goal of reducing the amount of compensation for noneconomic damages.

B. Plaintiff's Argument Against A Setoff Required By Code Of Civil Procedure Section 877 Is Based On Civil Code Section 1431.2, And His Argument Is Calculated To Defeat The Reduction Of Noneconomic Damages Required By Section 3333.2, Contrary To The Statutory Language And Purposes Of All Three Statutes

Plaintiff's argument that the setoff required by Code of Civil Procedure section 877 does not apply to noneconomic damages in this case (OBM, pp. 1-3, 7-10) is based on Civil Code section 1431.2. Plaintiff cites the Court of Appeal decisions in *Espinoza v. Machonga, supra,* 9 Cal.App.4th at 276 (at OBM, p. 8), *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 67-68 (at OBM, p. 10), *Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1837 (at OBM, p. 7), *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 37 (at OBM, p. 10), and *McComber v. Wells* (1999) 72 Cal.App.4th 512, 516 (at OBM, p. 7), all of which relied on Section 1431.2. This Court does not need to address those

decisions to answer the issues presented in this case. The statutory language speaks for itself. To the extent the Court is inclined to review the Court of Appeal decisions, it should focus its review on *Gilman v. Beverly California Corp., supra,* 231 Cal.App.3d at 126-130, which is the only case that addresses the interplay between Proposition 51(codified at Section 1431.2) and Section 3333.2.

Plaintiff proposes to use Section 1431.2 to the disadvantage of defendant, by defeating the damages reduction in Civil Code section 3333.2, even though Section 1431.2 itself is a damages reduction statute. So too is Code of Civil Procedure section 877, which plaintiff is equally determined to avoid.

To that end, as demonstrated as early as the Introduction to his Opening Brief on the Merits, plaintiff disparagingly addresses noneconomic "losses" and "damages" from the perspective of the "defendant" who seeks to *reduce* the "award." He emphasizes that Section 3333.2 *reduces* damages but ignores that Section 1431.2 does so, as well. (OBM, p. 1 ["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"].) Throughout his brief (OBM, pp. 7-16), plaintiff emphasizes the damages *reduction* of Section 3333.2. The "Argument" in his brief, which has only one point heading, also emphasizes that "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." (OBM, p. 7, original italics, emphasis in heading partially omitted.)

Plaintiff's **goal**, of course, is to recover the $250,000 in noneconomic damages from Dr. Moser even though he already recovered noneconomic damages from Cedars-Sinai, as well as from the other, non-healthcare provider defendant, with whom plaintiff settled. His ultimate goal is to recover a *total* amount of noneconomic damages that exceeds the $250,000 limitation of Civil Code section 3333.2. That is why it can and should be characterized as double recovery.

Plaintiff's basic **contention**, which contention plaintiff curiously chooses not to expressly state in his Opening Brief on the Merits, is that the $250,000 limitation on noneconomic damages can be avoided simply by settling with one of the healthcare provider defendants.

Plaintiff's **strategy** is to turn Proposition 51, Civil Code section 1431.2, to his advantage and to the disadvantage of defendant. He does so even though the voters expressly stated their purpose in enacting Section 1431.2, to ameliorate the "inequity and injustice" to defendants of joint and several liability. Section 1431.1, states, "The People of the State of California find and declare as follows: . . . that *reforms in the liability laws in tort actions are necessary and proper* to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses." (Emphasis added.) Like Section 1431.2, Civil Code section 3333.2 is such a "reform." Nevertheless, plaintiff urges the Court to apply Section 1431.2 in such a way as to defeat Section 3333.2.

Plaintiff is wrong. As noted above, plaintiff's argument is based almost entirely on a single word in subdivision (b) of Section

3333.2 – "damages." Plaintiff disregards the other words and phrases in the statute. Plaintiff ignores the intent of the statute. For that matter, plaintiff ignores the statutory purposes of all three statutes – to reduce compensation – and the statutory intent of all three statutes – to promote settlements.

It is important to remember that Section 1431.2 went into effect in 1987, well after Code of Civil Procedure section 877 was enacted in 1957, and more than 10 years after Civil Code section 3333.2 was enacted in 1975. That alone explains why Section 877 does not distinguish between economic and noneconomic damages. That explains why it did not become important to "allocate" settlements between economic and noneconomic damages until after the enactment of Section 1431.2.

It also is important to remember that one of the purposes of Section 877 is to avoid double recovery. The ultimate goal of plaintiff's analysis is to achieve double recovery.

Plaintiff's analysis should be rejected.

C. That There Were No Allocations By The Settling Parties Further Suggests Plaintiff's Strategy To Use Proposition 51 To His Advantage And To Defendant's Disadvantage

Plaintiff says nothing in his brief about (1) whether and how *he* allocated the settlement between the economic and noneconomic damage components, nor (2) whether and how *he* allocated liability between Dr. Moser and Cedars-Sinai Medical Center – the two healthcare provider defendants from whom he received compensation.

Instead, plaintiff argues about (3) "*the ability of health care providers to pay whatever amount they deem appropriate in settlement of an action*" (OBM, p. 3, emphasis added), which argument appears to be calculated to deflect the Court's attention from his own responsibility for the lack of information regarding the settlements. After all, plaintiff knew at the time of the settlement, as he argues now in his appeal, that "a settlement will operate *to reduce the plaintiff's ultimate recovery at trial.*" (OBM, p. 10, emphasis added.)

The only evidence in the record regarding the settlement is that the settling parties agreed to settle, but that they only stipulated to the *total* amount of compensation paid by the settling defendants. They apparently chose not to stipulate to the amounts plaintiff would recover for his economic and noneconomic losses. Instead, they chose to leave that determination to the jury, when the action went to trial against the non-settling defendant, who is referred to in Code of Civil Procedure section 877 as one of the "others." Simply stated, the settling parties did not "allocate" the settlement.

Recognizing that he and the settling defendant did not stipulate as to the amount of the settlement they allocated to noneconomic damages, plaintiff now suggests that the settling healthcare provider defendant may have agreed to pay *more* than $250,000 in damages for his noneconomic losses. (OBM, p. 11 ["voluntarily pays $260,000 in settlement of a claim for non economic damages"].) That is not true. There was no indication by Cedars-Sinai as to whether or how it allocated its settlement of $350,000. In any event, it would be irrational for a defendant to agree to pay more in settlement for noneconomic damages than the law requires.

The only reason why any defendant would agree to pay more in settlement for noneconomic damages than the law requires would be to disadvantage the non-settling defendant. That settlement would be in "bad faith." More to the point, such an allocation would result in the settlement not being approved by the court.

Plaintiff ignores the obvious implication of his argument (that the settling defendant "voluntarily" paid more than the statutory limit to achieve the settlement) for purposes of determining the "good faith" of that settlement. Such an allocation would appear to be in "bad faith" by shifting most of the settlement amount to noneconomic damages because the non-settling defendant is only severally liable for noneconomic damages. The effect would be to increase the amount of economic damages for which the non-settling defendant is jointly and severally liable, while not affecting the amount of noneconomic damages for which the non-settling defendant is only severally liable for noneconomic damages.

D. Plaintiff's Basic Assumption, That Dr. Moser Was Found By The Jury To Be 100% At Fault, Is Wrong; There Was No Jury Finding On The Issue Of Comparative Fault

Plaintiff argues that the jury found Dr. Moser 100% at fault. (OBM, p. 12, fn. 1 ["Of course it did"].) Plaintiff reasons that, "[t]he jury attributed no percentage of fault to any other tortfeasors, including the settlement defendants." (*Ibid.*, citing AA 99-100.)

There is no basis for plaintiff's argument that Dr. Moser was found by the jury to be 100% at fault for the simple reason that there

was no determination of comparative fault. The reason why the jury did not determine the comparative fault of Dr. Moser was because the trial court directed the parties to prepare a special verdict form that made *no* reference to comparative fault. (7 RT 1739 ["straight med/mal, only have Moser in it, no comparative"].)

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 and Biosphere Medical, Inc. (2 RT A-3; AA 46-49, 51, 60-61.) Plaintiff never specifically acknowledges in his brief that he named Cedars-Sinai and Biosphere as defendants in this lawsuit, let alone *why* he named them as defendants. More to the point, 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 (which Dr. Moser acknowledged was a non medical malpractice defendant) for $2 million." (OBM, p. 5, citing AA 68.) In other words, plaintiff offers no insight to this Court as to why those two defendants paid him so much money.

Plaintiff argues that Dr. Moser waived his right to have the jury make a comparative fault allocation by failing to ask the jury to make such an allocation. That is not true, however. Dr. Moser did ask the court to have the jury make a comparative fault determination, but the trial court refused. The trial court stated that it would not do so because Dr. Moser presented no evidence that Cedars-Sinai was at fault. Dr. Moser did not appeal from that ruling.

Regardless, the logical extension of plaintiff's waiver argument – and the logical extension of the trial court's ruling – is that

non-settling defendants like Dr. Moser should cross-examine plaintiffs in deposition, and then again at trial, about any settlements with codefendants. Such would include the question of why plaintiff settled with those codefendants. Dr. Moser submits that this is an approach to the allocation of responsibility between codefendants that neither plaintiff, nor other plaintiffs like him, would welcome.

E. The Court Of Appeal Correctly Analyzed The Three-Way Intersection Of Civil Code Sections 3333.2 And 1431.2 And Code Of Civil Procedure Section 877

Civil Code section 3333.2 is a specific statute and, therefore, prevails over Civil Code section 1431.2, which is a general statute. As the Court of Appeal correctly explained,

> 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 Opn., p. 9.)

Civil Code section 3333.2 ["Negligence of health care provider; noneconomic losses; limitation"] applies to "any action for injury against a health care provider based on professional negligence[.]" (Civ. Code, § 3333.2, subd. (a).) In other words, Section 3333.2 only applies to those specific actions that are commonly referred to as "medical malpractice" actions and, as to those, requires that, "[i]n no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)." (Civ. Code, § 3333.2, subd. (b).) As the Court of Appeal correctly observed about the action for professional negligence that Mr. Rashidi filed against Dr. Moser and Cedars-Sinai, "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." (Slip Opn., p. 8.)

For purposes of the Issue Presented in this case, the point is that Section 3333.2 is a statute of *specific* application. It is not a statute of *general* application, because it does not apply to *all* actions for personal injury, property damage, and wrongful death. It does not apply to *all* tortfeasors. Section 3333.2 is *specific* in that it applies *only* to healthcare providers and, even then, *only* to actions against healthcare providers for professional negligence. That is one of the reasons why plaintiffs like Mr. Rashidi argue that Section 3333.2 is an unconstitutional denial of equal protection. (See, *e.g.,* Petition for Review, p. 24 ["Section 3333.3's [*sic*] $250,000 cap violates equal protection"].)

Civil Code section 1431.2 ["Several liability for noneconomic damages"] is a statute of *general* application. It applies to "any action for personal injury, property damage, or wrongful death[.]" (Civ.

Code, § 1431.2, subd. (a).) In other words, Section 1431.2 applies to all personal injury actions generally, not just to one kind of action specifically, such as medical malpractice. Section 1431.2 requires joint and severally liability of all codefendants – like Dr. Moser and Cedars-Sinai in this case – for all plaintiffs' economic damages. Section 1431.2 requires only several liability (but not joint liability) of all codefendants – like Dr. Moser and Cedars-Sinai in this case – for all plaintiffs' noneconomic damages. With respect to noneconomic damages, therefore, "each defendant is liable for only that portion of the plaintiff's noneconomic damages which is commensurate with that defendant's degree of fault for the injury." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1198, fn omitted.)

The Court of Appeal correctly recognized that Civil Code section 3333.2 is the more specific of the two statutes. (Slip Opn., p. 9.) And, as the court noted, "'[t]o 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.'" (Slip Opn., p. 9, quoting *Salazar v. Eastin* (1995) 9 Cal.4th 836, 857, [quoted at OBM, p. 15].)

Plaintiff argues that the Court of Appeal erred in that regard. (OBM, pp. 15-16.) Plaintiff claims the two statutes do not clash because Section 3333.2 applies only to damages and not settlement monies. (OBM, p. 15 ["no such clash exists"].) Plaintiff also claims that Section 1431.2 is specific and Section 3333.2 is general. (OBM, pp. 15-16 ["section 1431.2 is the more specific section"].) Plaintiff is wrong on both points, if only as a matter of common sense.

As previously discussed, Civil Code section 3333.2 is not limited to the amount a plaintiff recovers by jury verdict. Section 3333.2 applies to the total amount of compensation a plaintiff recovers for his nonmonetary losses, including compensation by way of settlement. For that reason, Sections 3333.2 and 1431.2 cover the same ground. (See *In re Williamson* (1954) 43 Cal.2d 651, 654 ["'where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment"'], quoting *People v. Breyer* (1934) 139 Cal.App. 547, 550.)

As to plaintiff's second argument, he does not explain why Section 3333.2 is the general statute, other than to state, "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." (OBM, pp. 15-16.) According to plaintiff's logic, Section 1431.2 must be read as an exception to Section 3333.2. That is, Section 3333.2 limits recovery of noneconomic damages in *all* medical negligence actions, but Section 1431.2 creates several liability for noneconomic damages *only* in a subgroup of medical negligence actions. Of course plaintiff does not make this argument expressly in his Opening Brief on the Merits, because to do so would be absurd.

In summary, the Court of Appeal was correct in concluding that Section 3333.2 is a statute of specific application, that Section 1431.2

is a statute of general application, and therefore that Section 3333.2 must be read as an exception to Section 1431.2.

CONCLUSION

When a jury awards the plaintiff in a medical malpractice action noneconomic damages against a healthcare provider defendant, Civil Code section 3333.2 entitles that defendant to a setoff, pursuant to Code of Civil Procedure section 877, that is based on the amount of a pretrial settlement entered into by another healthcare provider which is attributable to noneconomic losses. The rule of Civil Code section 1431.2, that liability for noneconomic damages is several only (not joint and several), does not bar the setoffs in this case.

DATED: April 21, 2014

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CERTIFICATION

Appellate counsel certifies that this petition contains 11,315 words. Counsel relies on the word count of the computer program used to prepare the brief.

DATED: April 21, 2014

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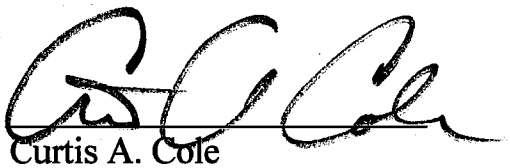
By: 

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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 BRIEF ON THE MERITS** on the parties indicated below by placing a true copy thereof, enclosed in a sealed envelope addressed as follows:

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I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 21st day of April, 2014.

Michelle McGrath

MiChelle McGrath

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