S214430

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

HAMID RASHIDI,
Plaintiff, Respondent and Cross-Appellant,

VS.

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

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

REPLY 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

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INTRODUCTION

In his opening brief on the merits, plaintiff Hamid Rashidi provided a straight forward analysis of why Civil Code section 3333.2's limitation on the recovery of noneconomic "damages" does not apply to amounts voluntarily paid by a medical defendant pursuant to a settlement. Rather, in keeping with the generally recognized definition of the word "damages," section 3333.2 applies to limit the recovery of awarded by a court or a jury to $250,000. Defendant Franklin Moser, M.D. has attempted to obfuscate rather than address the issue. According to defendant, section 3333.2 should be expansively interpreted beyond its express terms so that plaintiff's recoverable damages are reduced to almost nothing. In this reply brief, plaintiff will endeavor to refocus the issue to where it belongs and explain why defendant's arguments do not justify interpreting section 3333.2 to allow a nonsettling defendant to an offset for the portion of a pretrial settlements attributable to noneconomic damages – even though under Civil Code section 1431.2 – such damages are not even joint and several in nature. Plaintiff therefore respectfully requests that the Court reverse the Court of Appeal's opinion and direct that plaintiff's noneconomic damages award should be reinstated.

ARGUMENT

I. Nothing Dr. Moser Argues Negates That Section 3333.2 on its Face Does Not Apply to Amounts Voluntarily Paid in a Pretrial Settlement Since Such Amounts are not "Damages."

As an initial matter, both parties agree that the starting point for analyzing the issue presented is the actual language used by the Legislature in Civil Code section 3333.2. That section 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.)

In his opening brief, plaintiff explained that the Legislature's use of the word "damages" was the key to understanding why that section did not apply to amounts voluntarily paid in settlement. Plaintiff referenced the line of cases by both this Court and Courts of Appeal explaining that the term 'damages" in its "full context" and in its "ordinary and popular sense" is limited to "money ordered by a court." (See Opening Brief pp. 9-10 citing *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 961-963; *Walnut Creek Manor v. Fair Employment & Housing Com.*

(1991) 54 Cal.3d 245, 263; *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 67-68; *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 37.

Defendant pretends that this line of cases does not exists and instead cites to *Nordahl v. Department of Real Estate* (1975) 48 Cal.App.3d 657, 664. *Nordahl* does not help defendant. There, the issue was what portion of a judgment the victim of a real estate fraud who had earlier sued his broker was able to recover from a state fund which was statutorily created to aid such victims. The statute in question provided that the fraud victim could recover "'*the amount of actual and direct loss* in such transaction up to the sum of ten thousand dollars ($10,000) of the amount unpaid upon the judgment. . . .'" (*Id.* at p. 660, quoting Business and Professions Code section 10471, italics added.)

That section had previously provided for the recovery of the "*amount of actual damages* up to the sum of ten thousand dollars ($10,000) of the amount unpaid upon the judgment." (*Id.* at p. 661, fn.1, italics added.)

Because the statutory language had been changed from "damages" to "loss" the defendant Department of Real Estate argued that the "actual and direct loss" as used in this section did not include the interest and costs that had been awarded the victim in its earlier action. The Court of Appeal disagreed concluding that the recovery of these amounts was necessary to make the plaintiff whole. The Court – reciting the language on which defendant now focuses – stated: "The words "loss" and "damage" have long been considered virtually synonymous, and both terms refer to that which is necessary to make the plaintiff whole. In *Fay v. Parker* (1874) 53 N.H. 342 the court said: "A synonym of

damage (when applied to a person sustaining an injury) is loss. Loss is the generic term. Damage is a species of loss. Loss signifies the act of losing, or the thing lost. Damage - in French, dommage; Latin, damnum, from demo, to take away - signifies the thing taken away, - the lost thing, which a party is entitled to have restored to him so that he may be made whole again." (*Id.* at p. 664.)

This passage does not support what defendant argues. The Court agreed that "damages" were one subcategory fitting with the broader category of "losses." The Court did not conclude, however, that the reverse was also true. It did not conclude that all "losses" are necessarily "damages." Since "damages" are a subcategory of "losses," there necessarily are "losses" which do not fit within the narrower category of "damages."

Moreover, the amounts in question in *Nordahl* were all awarded as part of a judgment. Thus, the *Nordahl* court did not have cause to and did not consider whether an amount voluntarily paid by a tortfeasor constituted damages as that word is used by the Legislature. That is the issue presented here.

Defendant next attempts to avoid this issue by urging that the Court should not focus on the Legislature's use of the word "damages" but instead focus on section 3333.2's use of "recover" in subdivision (a) and "exceed" in subdivision (b). (Answer 16.) This is a non sequitur.

First, the use of the word "recover" in subdivision (a) signified only that a medical malpractice victim is entitled to recover noneconomic damages as part of his or her

recovery.[1] Subdivision (a) has nothing to do with the $250,000 cap on those damages which is contained entirely in subdivision (b). Indeed, the language the Legislature used in subdivision (a) provides additional proof that when it used the word "damages" in subdivision (b) it meant something narrower than "losses."

Subdivision (a) broadly provides that the malpractice victim may "recover noneconomic losses. . . ." The fact that the Legislature used the word "losses" in this provision dealing with the right to recovery rather than the word "damages" as it does in subdivision (b), is proof that the Legislature intended those two words to have different meanings for purposes of section 3333.2.

"When the Legislature uses different words as part of the same statutory scheme, those words are presumed to have different meanings. 'Where a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent.' (*Craven v. Crout* (1985) 163 Cal.App.3d 779, 783, 209 Cal.Rptr. 649.) And, '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.' (*Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 497, 39 Cal.Rptr.2d 348.)" (*Romano v. Mercury Ins. Co.* (2005) 128 Cal.App.4th

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[1]Subdivision (a) provides: "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."

1333, 1343.)

If the Legislature intended the word "damage" to have the same meaning as the word "loss" as defendant argues, then it would not have used differing language in the allowance provision of subdivision (a) than it did in the limitation provision of subdivision (b).

Likewise, the Legislature's use of the word "exceed" in subdivision (b) does not aid defendant. That portion of section 3333.2 provides: "In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)." Again, in this provision the Legislature used the word "losses" to signify that "damages" means something different from "losses." Further the Legislature's use of the word "exceed" simply qualifies the limits in the amount of damages a malpractice victim could recover. The word "exceed" therefore does nothing to elucidate what the Legislature intended when it capped recovery at $250,000 in "damages."

In short, in order to determine whether a plaintiff's "recovery" of noneconomic damages "exceeds" the amount allowed under section 3333.2, it must first be determined what the Legislature meant when it used the word "damages." And as explained, "damages" does not include amounts voluntarily paid in settlement.

II. Defendant's Argument That Plaintiff Is Seeking to Manipulate the Cap Based on the Number of Health Care Providers He Elected to Name as Defendants, Is a Red Herring.

Defendant argues that the amount recovered should not depend on the number of healthcare provider defendants from whom the plaintiff seeks compensation. (Answer 21.) This is a red herring. Plaintiff's position is not based on the fact that there was more than one healthcare provide defendant. Rather, and to repeat what defendant ignores, plaintiff's position is based on the fact that one healthcare provider elected to settle before trial and before judgment and to voluntarily make payment to plaintiff while the remaining healthcare defendant (Dr. Moser) proceeded to trial and was the only defendant found to be at fault by the jury. It is plaintiff's position that because section 3333.2 limits the recovery of "damages," that section only serves to cap the recovery against the nonsettling defendant. If it had been the case that there were multiple healthcare defendants who went to trial and as to whom a judgment was rendered, then plaintiff would have acknowledged that section 3333.2 capped the total recovery of noneconomic damages as to these multiple defendants.

Defendant next argues that, if plaintiff's assertion were accepted, section 3333.2 could be subverted through settlements. (Answer 23-24.) This argument makes no sense. In order for there to be a settlement, a healthcare defendant must first voluntarily decide that it is in its interest to settle rather than litigate. As Dr. Moser acknowledges, such a

decision will be made with full knowledge of the cap under section 3333.2. If a defendant, knowing of section 3333.2's cap, nevertheless concludes that it should settle, there is no rationale reason why that decision subverts a statute whose sole purpose is to provide protection to such healthcare defendants.

Defendant next argues that it is "irrelevant" whether the payment was "'voluntary' or 'involuntary'" (Answer 22) and launches into a discussion – unsupported by any evidence or law – that when a healthcare provider decides the amount to pay in settlement it obviously takes into account the statutory cap. Whether or not that is the case is besides the point. The settling defendant's motivation for determining the amount to offer or the plaintiff's motivation to agree to a certain amount has nothing to do with whether the Legislature intended section 3333.2's cap on noneconimic damages to apply to amounts that were voluntarily paid by the settling defendant.

As explained in the opening brief, applying the cap to these amounts would mean that the defendant who elects not to settle is rewarded because he is entitled to an offset for that portion of the settlement attributable to noneconomic damages even though (1) those damages are not joint and several in nature and (2) even though there is no risk of a double recovery.

Next, defendant argues that this Court's application of section 3333.2 to indemnity agreements in *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100 supports its position. Defendant grasps at straws. In *Western Steamship* this Court concluded that section 3333.2's limitation on the recovery of noneconomic

damages applied to a claim of partial indemnity against a concurrent tortfeasor. (*Id.* at p. 104.) That conclusion, however, has nothing to do with the issue presented here. The Court did not have cause to and did not consider whether the terms of section 3333.2 applies to amounts voluntarily by an alleged tortfeasor even though those amounts were not "damages" and were therefore not within the express terms of the statute.

According to defendant, plaintiff's argument that section 3333.2 governs damages awarded by a court or a jury and does not apply to amounts voluntarily paid in settlement, assumes that section 3333.2 is procedural in nature and is not substantive. (Answer 25.) Plaintiff's argument assumes no such thing. This is just another smoke screen.

Regardless whether section 3333.2 is procedural or substantive in nature, the primarily means of ascertaining the Legislature's intent is language used. "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.)"])

Here, it is the words used by the Legislature that supports plaintiff's position.

III. Plaintiff Is Not Contesting That the $250,000 Cap on Noneconomic Damages Applies to the Entire Action. Rather, His Position Is That the Cap Applies to "Damages" and Not to Amounts Voluntarily Paid in Settlement.

Defendant next asserts that "[p]laintiff does not deny that the maximum he can 'recover' for his noneconomic losses' in this 'action' for professional negligence is $250,000." (Answer 25.) Defendant conveniently leaves out the word "damages." Plaintiff agrees that the maximum amount of *damages* he can 'recover' for his noneconimic losses' in this 'action' for professional negligence is $250,000. However, that is a far cry from agreeing that section 3333.2's cap applies to amounts voluntarily paid in settlement.

According to defendant "plaintiff reads the words 'recover,' 'losses,' and 'action' out if the statute, and reads the words 'judgment' and involuntary' into the statute." (Answer 27.) Plaintiff does no such thing. Rather, and contrary to the approach defendant urges this Court to take, plaintiff simply reads the statute as a whole giving meaning to each of the words used – including the use of the key word "damages" which qualifies the very portion of section 3333.2 defendant claims is controlling here. It is defendant who asks this Court to ignore the words selected by the Legislature.

IV. Defendant's Argument Based on Code of Civil Procedure Section 877 Is a non Sequitur.

Defendant next argues that Code of Civil Procedure section 877 requires offsets for the entirety of the pretrial settlement by Cedars (but apparently not as to the products defendant). (Answer 28.) Defendant's argument is frankly difficult to follow. As explained in the opening brief, section 877 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.) Non economic damages are no longer joint and several in this State in the aftermath of Proposition 51 (Civil Code section 1431.2). (*Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 276.) There is nothing in either section 877 or section 1431.2 that allows for treating noneconomic damages awarded in a medical malpractice action any differently than noneconomic damages awarded in any other action.

Defendant next engages in an exercise in semantics asserting that there is a distinction between the words "allocated" and "attributable" and here there is no evidence to show how "plaintiff and the settling defendants 'allocated' their settlements between economic damages and noneconomic damages." (Answer 30.) Defendant's point is again unclear, but in any event has no legal significance. First of all, to the extent it was

necessary to establish how the parties "allocated" the settlements then that is a matter as to which defendant – the party seeking the offset – carried the burden of proof. (See *Textron Fin. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1077 ["Consistent with the general rule imposing on a party the burden of proving the existence or nonexistence of each fact essential to a claim or defense (Evid. Code, § 500), '[a] defendant seeking an offset against a money judgment has the burden of proving the offset. [Citation.].' (*Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 444, 29 Cal.Rptr.2d 441.)"]) Therefore, any failure of evidence in this regard negates defendant's offset rights.

In any event, however, there is no legal distinction between "allocation" and "attributable." When a settlement is not allocated by the parties, then, for purposes of determining the amount of any offset, the allocation is done by the court after trial based on the percentages of economic and noneconomic damages awarded by the jury. *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268 established a formula for segregating economic and noneconomic damages in a defendant's undifferentiated settlement payment (i.e. a payment that did not separate economic and noneconomic damages).

In *Espinoza*, one defendant settled and the other went to trial (and a third was found not liable). The court calculated the ratio of noneconomic damages in the jury award and then applied the same ratio to the settling defendant's undifferentiated settlement. (*Id.* at p. 277.) The nonsettling defendant had to make up for the economic damages not paid in the settlement. (Ibid.) The *Espinoza* formula has been consistently

followed. (*Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 864; *Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1312; *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443-444; *Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1841.) Under the *Espinoza* formula: "When prior recoveries have not previously been allocated in a manner found by the court to be in good faith, the posttrial allocation of prior settlements should mirror the jury's apportionment of economic and noneconomic damages." (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1006.)[2]

Defendant next launches a discussion of the policy of encouraging settlements and that somehow, his position will further that goal. (Answer 31.) Just the opposite is true. As explained in the Opening Brief, if a non settling defendant is entitled to offset that portion of a pretrial settlement attributable to noneconomic damages in a medical malpractice action, then there is a perverse disincentive to settlement. Once there is a settlement for $250,000 (or close to that) then the nonsettling defendant will know that he gets a free pass with respect to noneconomic damages. It is therefore defendant's argument thus runs afoul of the strong public policy in favor of encouraging settlements. (See *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 745 ["It is important to recognize there is a strong public policy favoring settling of disputes. (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1475, 69 Cal.Rptr.3d 273.) 'We note that there

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[2]In *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, the Court applied the *Espinoza* formula in the context of a medical malpractice claim.

is a well-established policy in the law to discourage litigation and favor settlement. Pretrial settlements are highly favored because they diminish the expense of litigation.' (*Nicholson v. Barab* (1991) 233 Cal.App.3d 1671, 1683, 285 Cal.Rptr. 441.)"])

Defendant accuses plaintiff of ignoring the "corresponding disincentive for the plaintiff to settle if there were no offsets pursuant to Section 877." (Answer 32.) No such disincentive exists.

First, plaintiff is not arguing that there are no offsets under Section 877. Rather, plaintiff is only arguing that a medical malpractice victim should be subject to the very same offsets under that section as any other plaintiff. No more and no less. Thus, plaintiff is claiming that a medical malpractice victim's judgment should not be offset by that portion of a settlement attributable to noneconomic damages because those damages are not joint and several in nature. It is unclear why this would create a disincentive to settle and defendant does not explain why this is the case. But even if it were such a disincentive, then that same disincentive applies to all tort actions already.

Next, defendant argues that "There is nothing in Section 877 to suggest that the setoff does not apply to the 'portion' of a settlement 'attributable' to noneconomic damages." (Answer 33.) According to defendant "If plaintiff's logic was followed, there would be no setoffs at all." (Answer 33.) It is hard to know where to begin to respond to this argument because it has absolutely no relation to what plaintiff is arguing. At the risk of repeating what defendant continues to ignore, plaintiff is simply asserting that a medical malpractice plaintiff should be subject to the same offsets as other plaintiffs.

Interpreting section 3333.2 according to its terms so that the cap created in that section applies to damages awarded by a court or a jury and not to amounts voluntarily paid in settlement accomplishes this parity of treatment.

The conclusion by this Court that the Legislature's use of the word "damages" in section 3333.2 meant that the cap applied to amounts awarded in court would not affect the meaning of section 877, as defendant appears to believe. Indeed, and as explained in the Opening Brief, section 877 does not even use the word "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].)

Defendant next shifts into a discussion of double recovery arguing that if plaintiff's position were accepted then there would be a risk of such a double recovery.

(Answer 33-34.) First, it is ironic for a medical malpractice defendant to even mouth the words "double recovery" when discussing section 3333.2 since that section precludes a malpractice victim from obtaining anything approaching full recovery, never mind double recovery. Here the jury concluded that plaintiff suffered $ 1,325,000 in noneconomic damages. Because of the MICRA cap this amount was reduced by approximately 80%.

In any event, there is no possible double recovery *because noneconomic damages are not joint and several in nature*. Therefore, no matter how much a plaintiff receives in noneconomic damages as a result of a pretrial settlement that plaintiff could not possibly recover any portion of that amount from *the nonsettling defendant because he could be liable for only that portion of plaintiff's noneconomic damages which the jury determines he caused.*

V. Defendant's Analysis of Civil Code Section 1431.2 Is Meritless.

Defendant argues that Civil Code section 1431.2 does not bar a setoff. (Answer 36.) Defendant unabashedly asserts that because section 1431.2 was intended to reduce the recovery of compensatory damages it should not be used to limit an offset in this case which will result in an increased recovery for plaintiff (although far less than the amount of damages the jury found was appropriate). Defendant cites no authority for this novel legal doctrine under which whatever outcome is best for a defendant should be accepted just because it is best for that defendant.

Defendant then argues that section 1431.2 somehow uses the words "damages" and "losses" interchangeably apparently to support its position that "damages" in section 3333.2 should be interpreted to mean "loss." Again defendant's argument collapses upon itself. If anything, defendant's argument proves plaintiff's point. Section 1431.2 by its terms only applies to an amount awarded in court. That section provides:

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

Obviously a separate judgment could be entered under subdivision (a) only as to those defendants who did not settle. Thus, the fact that the word "damages" is sued in section 1431.2 lends further support for plaintiff's position that the Legislature's use of "damages" in section 3333.2 was intended to signify and amount awarded in Court and not an amount voluntarily paid in settlement. This is further established by the fact that section 1431.2 defines economic and non-economic damages as one type of loss,

supporting plaintiff's position that "damages" has a narrower meaning than the word "loss."

Next, defendant rehashes his position that plaintiff's argument against a setoff somehow defeats the purpose of section 3333.2. According to defendant, plaintiff is seeking to make an end run around section 3333.2 by settling with a healthcare provider. (Answer 40.) Plaintiff is attempting no such thing. Rather plaintiff is only seeking to have this Court apply section 3333.2 according to its terms. Under that interpretation a health care provider's liability for noneconomic damages is still limited at $250,000 even though the jury may have found plaintiff suffered far in excess of that amount as a result of that defendant's wrongful conduct.

Defendant then asserts that plaintiff has acted in an untoward manner by not allocating his settlement with Cedars between economic and non economic damages. First of all, if defendant believed that this lack of allocation were somehow inappropriate then he should have objected to the good faith settlement motion on that ground. In any event, there was nothing wrong or for that matter unusual about the fact that the settlement was not allocated. All parties understood that this would not empower plaintiff to determine how that settlement would be allocated after the verdict based upon what served his interests. Instead, the absence of an allocation simply meant that the settlement would be allocated in accordance with the jury's verdict – which is exactly what happened.

Defendant next asserts that there is no basis for asserting that the jury found Dr. Moser to be 100% at fault for his injuries. (Answer 43.) The easy answer to this assertion is that Dr. Moser and Dr. Moser alone was on the verdict form. The jury found Dr. Moser liable and did not attribute fault to any other tortfeasor. In attempting to deflect this fact, defendant asserts that plaintiff somehow knows that others at fault because he (1) named them in the complaint and (2) they settled with plaintiff before trial and paid plaintiff money.

Of course plaintiff contended that there were others at fault for his injuries along with Dr. Moser. Plaintiff is not challenging that this is the case. Rather, plaintiff is simply pointing out that when it came time for the jury to actually ascribe fault, it found that Dr. Moser was at fault only. Dr. Moser next argues that this was attributable to the trial court's ruling that it would not allow the others to be on the verdict form because Dr. Moser failed to present evidence supporting their liability. Dr. Moser does not contest that this was an appropriate ruling by the trial court and acknowledges that he did not challenge that ruling on appeal.

Instead, defendant argues that somehow plaintiff's position will lead the nonsettling defendant to question the settling defendant about the terms of the settlement in front of the jury. (Answer 45.) Why this is the case defendant does not explain. Nor does he explain why it would be appropriate for a jury to assign fault to an alleged tortfeasor without evidence that that tortfeasor was at fault. But more fundamentally, nothing defendant argues alters the truth that he was found by the jury to be exclusively at

fault.

VI. Defendant's Attempted Support of the Court of Appeal's Analysis Falls Flat.

Dr. Moser ends his brief attempting to support the Court of Appeal's conclusion that because section 3333.2 is more specific than section 1431.2, it should control. (Answer 45.) This argument also fails. As explained in the opening brief, this principle applies only when the two statutes are inconsistent and here 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. Under section 1431.2, on the other hand, noneconomic damages are no longer joint and several in nature.

Second, as further explained, even if there were an inconsistency then it is still not the case that section 3333.2 is more limited in scope than Civil Code section 1431.2. Defendant twists plaintiff's position as being that section 1431.2 creates an exception to section 3333.2. (Answer 48.) That is not plaintiff's position. Rather, plaintiff's point is that section 1431.2 is narrowly focused on whether noneconomic damages are joint and several in nature while section 3333.2 caps noneconomic damages in medical malpractice action. Although Section 1431.2 applies to all tort actions and not just medical malpractice actions, it is not necessarily more general in nature than the cap in section 3333.2 just because that cap applies only to medical malpractice actions. Thus it is not the case that section 33333.2 is necessarily narrower than section 1431.2.

CONCLUSION

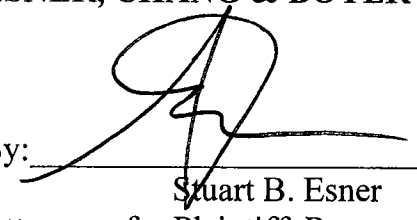
For the foregoing reasons and for the reasons explained in his Opening Brief on the Merits, plaintiff respectfully urges this Court to reverse the Court of Appeal in this matter and to conclude that Civil Code section 3333.2 does not afford a non settling defendant the right to offset a portion of a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

Dated: May 9, 2014

Respectfully submitted,

BALABAN & SPIELBERGER, LLP

ESNER, CHANG & BOYER



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

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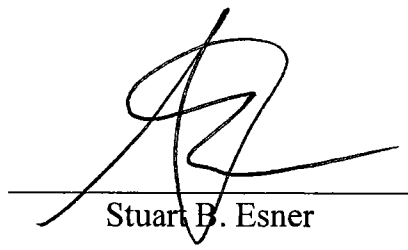

Stuart B. Esner

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Carol Miyake

SERVICE LIST

Kenneth R. Pedroza, Esq.
Cole Pedroza LLP
2670 Mission Street, Suite 200
San Marino, CA 91108
(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)