A132291

Court of Appeal of the State of California
First Appellate District, Division Two

KRISTINA GAVELLO, ET AL.,
Plaintiffs, Respondents, and Cross-Appellants,

v.

BERNARD MILLMAN, M.D.,
Defendant, Appellant, and Cross-Respondent.

Appeal from the Superior Court of San Francisco,
Case No. CGC09485616; The Honorable James McBride

Application for Leave to File Amici Curiae Brief in Support of Bernard Millman, M.D.; Brief of Amici Curiae California Medical Association, California Dental Association, California Hospital Association, and American Medical Association

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APPLICATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to California Rules of Court, Rule 8.200(c), the California Medical Association (CMA), California Hospital Association (CHA), the California Dental Association (CDA), and American Medical Association (AMA) request permission to file the attached Amici Curiae Brief in support of Appellant Bernard Millman, M.D.

I. INTERESTS OF AMICI CURIAE

CMA is a nonprofit, incorporated, professional association of more than 37,000 physicians practicing in California, in all specialties. CDA represents almost 24,000 California dentists, over 70 percent of the dentists engaged in the private practice of dentistry in California. CMA and CDA are the largest organizations representing physicians and dentists engaged in private practice in California. CHA is the statewide leader representing the interests of nearly 400 hospitals and health systems in California. CMA, CDA, and CHA are active in California's courts in cases involving issues of concern to the healthcare community.

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus

the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

Some funding for this brief was provided by organizations and entities that share Amici's interests, including physician-owned and other medical and dental professional liability organizations and nonprofit and governmental entities engaging physicians for the provision of medical services, specifically: Cooperative of American Physicians, Inc.; Kaiser Foundation Health Plan, Inc; MedAmerica Mutual; Medical Insurance Exchange of California; The Dentists Insurance Company; The Doctors Company; and The Regents of the University of California.

No party or counsel for a party authored the proposed Amici Curiae Brief in whole or in part, nor has any party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the proposed Amici Curiae Brief.

II. NEED FOR FURTHER BRIEFING

This appeal involves the limitation on noneconomic damages in the Medical Injury Compensation Reform Act of 1975 (MICRA), codified at Code of Civil Procedure section 3333.2. This statute, and its effect on noneconomic damages awards in medical malpractice cases, is of great interest to Amici.

Counsel for CMA, CHA, CDA, and AMA have reviewed the parties' briefs in this case. The Combined Appellant's Reply and Cross-Respondent's Brief ("Appellant's Reply") discusses many of the issues directly affecting Amici and their involvement in the medical care and medical malpractice insurance industries in California. (See Appellant's Reply, pp. 50-94.) Amici support these points in Appellant's Brief.

Amici believe this Court will benefit from additional briefing. This brief supplements, but does not duplicate, the parties' briefs.

Rather, it discusses case law and aspects of other authorities not directly addressed by the parties.

The limit on noneconomic damages is an important part of MICRA, which Amici have endeavored to protect since the Legislature enacted MICRA in 1975. (See, e.g., *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 851 fn. 4; *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412; *Leung v. Verdugo Hills Hosp.* (2008) 168 Cal.App.4th 205, 212; *Palmer v. Superior Court* (2002) 103 Cal.App.4th 953, 961; *Delaney v. Baker* (1999) 20 Cal.4th 23, 31 fn. 4; *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 188 fn. 3; *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 640 fn. 2, 643 n. 3, 649 fn. 7; *Hrimnak v. Watkins* (1995) 38 Cal.App.4th 964, 979; *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 171.)

Respectfully submitted,

Dated: March 6, 2013

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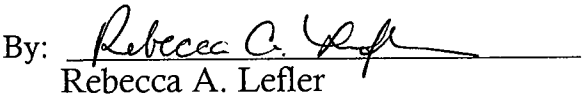
By: 
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BRIEF OF AMICI CURIAE

I. INTRODUCTION

The California Supreme Court has already held that the statute at issue complies with the rights to jury trial and equal protection enshrined in the California Constitution. In fact, the Supreme Court has made clear that Civil Code section 3333.2 ("Section 3333.2") correctly "operates as a limitation on liability," and that "[t]o 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." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 116 ("*Western Steamship*").

The California Supreme Court has also rejected equal protection claims such as those asserted by Plaintiffs; it has held that Section 3333.2 is rationally related to a legitimate legislative purpose. (See, e.g., *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 162 ("*Fein*").) Furthermore, the Supreme Court has held that "a plaintiff has no vested property right in a particular measure of damages, and that the Legislature has broad authority to modify the scope and nature of such damages" without offending a plaintiff's constitutional right to a jury trial. (*American Bank v. Community Hospital of Los Gatos-Saratoga, Inc.* (1984) 36 Cal.3d 359, 368 ("*American Bank*").)

Plaintiffs nonetheless argue that this Court should reject precedent and hold to the contrary, because they have a right to collect damages in the amount determined by the jury without interference of Civil Code section 3333.2. Plaintiffs' arguments are unavailing for the reasons discussed below.

A. Section 3333.2 does not violate equal protection.

1. Rational basis is the proper standard of review.

The constitutionality of Section 3333.2 is reviewed under the rational basis standard. (See Respondent's Brief/Cross-Appellant's Opening Brief ("XAOB"), p. 70.) "[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.* Where there are 'plausible reasons' for [the classification] 'our inquiry is at an end.'" (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482 (quoting *F.C.C. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313) (emphasis in original).) "On rational-basis review, a classification [bears] a strong presumption of validity. . . ." (*F.C.C. v. Beach Communications, Inc.*, 508 U.S. at pp. 314-315 (internal quotes and citations omitted).)

Inherent in the rational basis standard is the recognition that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." (*Id.*, 508 U.S. 307 at p. 313.) Yet that is exactly what Plaintiffs ask this Court to do: review the facts and reasoning behind Section 3333.2, disregard case law holding that Section 3333.2 does not violate equal protection or the right to jury trial, and pass judgment on whether the Legislature reached the proper conclusion in enacting and maintaining MICRA. Second-guessing the wisdom of the Legislature is not the province of the judiciary and is not properly part of the rational basis test. Plaintiffs offer no sufficient grounds to justify a departure from this well-established rule.

2. MICRA is rationally related to a legitimate state interest.

Under the rational basis test, legislation will "survive an equal protection attack so long as the challenged classification is rationally

related to a legitimate governmental purpose." (*Kadrmas v. Dickinson Public Schools* (1988) 487 U.S. 450, 457-458.) A statute must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482 (quoting *F.C.C. v. Beach Communications, Inc.*, supra, 508 U.S. 307, 313) (emphasis omitted).)

The question here is whether the classification created by the noneconomic damages cap in Section 3333.2 is rationally related to a legitimate state interest. Plaintiffs argue that Section 3333.2 "discriminates against severely injured plaintiffs" because plaintiffs with $250,000 or less in noneconomic damages receive their full measure of damages, but plaintiffs with higher damages receive less than their full measure of damages. (XAOB, p. 77.) They also argue that Section 3333.2 discriminates "between medical malpractice victims and other tort victims," because unlike victims of other torts, medical malpractice plaintiffs are limited to $250,000 in noneconomic damages. (XAOB, p. 77 (quoting *Fein*, 38 Cal.3d 137, 161.)

The legitimate governmental purposes of MICRA are clear. In the 1970s, California faced a serious medical malpractice insurance crisis in which insurance rates were so high they became impossible for doctors to reasonably afford:

> [M]any doctors decided either to stop providing medical care with respect to certain high risk procedures or treatment, to terminate their practice in this state altogether, or to "go bare," i.e., to practice without malpractice insurance. The result was that in parts of the state medical care was not fully available, and patients who were treated by uninsured doctors faced the prospect of obtaining only unenforceable

> judgments if they should suffer serious injury as a result of malpractice.

(*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 843-844, quoting *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 577-578; see also *American Bank,* 36 Cal.3d 359, 371 [same].)

MICRA therefore "reflects a strong public policy to contain the costs of malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs." (*Western Steamship*, 8 Cal.4th 100, 112.) As recently as 2010 the Supreme Court recognized "MICRA's goal of reducing costs in the resolution of malpractice claims and therefore malpractice insurance premiums" as a basis for upholding the arbitration provision enacted as part of MICRA in 1975. (*Ruiz v. Podolsky*, *supra*, 50 Cal.4th at p. 844.)

Nearly twenty years after the enactment of MICRA, the Supreme Court reconsidered the policy behind the statutory scheme and held that Section 3333.2 was "necessary":

> After careful consideration of the public policy underlying the Medical Injury Compensation Reform Act (MICRA), of which section 3333.2 is an integral part, we conclude that such limitation is necessary to effectuate the statutory scheme.

(*Western Steamship*, 8 Cal.4th 100, 104.)

In *Fein,* 38 Cal.3d 137, the California Supreme Court rejected the argument that Section 3333.2 results in unequal treatment for different classes of plaintiffs: "[T]he Legislature clearly had a reasonable basis for drawing a distinction between economic and noneconomic damages, providing that the desired cost savings should be obtained only by limiting the recovery of noneconomic damage." (38 Cal.3d at 162.)

Furthermore, the Court held that "the $250,000 limit—which applies to all malpractice victims—does not amount to an unconstitutional discrimination." (*Id.*) The Court concluded: "It appears obvious that this section—by placing a ceiling of $250,000 on the recovery of noneconomic damages—is rationally related to the objective of reducing the costs of malpractice defendants and their insurers." (*Id.* at p. 159.)

Thus the California Supreme Court has expressly held that Section 3333.2 is rationally related to a legitimate government purpose. Arguments that this Court should undermine decades of precedent and find to the contrary should be rejected.

3. Changed circumstances cannot undermine the rational basis for Section 3333.2.

Cross-Appellants' Reply Brief focuses heavily on the argument that the medical malpractice crisis does not still exist, but changed circumstances cannot justify the invalidation of a law that has been held constitutional by the Supreme Court. Plaintiffs ask this Court to do just that based on evidence for which they have sought judicial notice, but their argument represents a fundamental misunderstanding of the role of the courts and an inappropriate invitation to engage in legislative fact-finding. Such an approach has been explicitly rejected by the California Supreme Court:

> Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties. The duty to uphold the legislative power is as much the duty of appellate courts as it is of trial courts, and under the doctrine of separation of powers neither the trial nor appellate courts are authorized to "review" legislative determinations. The only function

> of the courts is to determine whether the exercise of legislative power has exceeded constitutional limitations.

(*Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462; see also *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 974 ("[W]e leave to legislative bodies rather than the courts to evaluate whether the legislation has fallen so far short of its goals as to warrant repeal or amendment.").)

With respect to MICRA specifically, the invitation to reexamine legislative findings and statutory success has already been considered and explicitly rejected. "[T]he constitutionality of a measure under the equal protection clause does not depend on a court's assessment of the empirical success or failure of the measure's provisions." (*American Bank*, 36 Cal.3d at 374.) Indeed, an argument similar to Plaintiffs' was asserted in *American Bank*, where amici supporting the plaintiff argued that statistics showed a change in the costs of medical care following MICRA. The Supreme Court rejected this "changed circumstances" argument, stating, "[T]here can be no question but that—from the information before it—the Legislature could rationally have decided that the enactment might serve its insurance cost objective." (*Id.*, emphasis added, referring to Code Civ. Proc., § 667.7, a MICRA provision.)

The analysis of *American Bank* and *Fein* is just as relevant today as when the cases were decided, as explained by the Fifth Appellate District recently in *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412. The *Stinnett* court noted that the finding of MICRA's constitutionality has never rested on factual findings by the courts, and therefore there is no merit to the argument that a new or different factual finding by the court could justify a contradictory result:

> [T]he [*Fein*] court did not find section 3333.2 constitutional based on a particular set of facts, i.e. whether a medical malpractice insurance crisis actually existed, but instead did so based on the Legislature's power to determine whether such a crisis existed and to craft remedies to solve the crisis the Legislature found. Put another way, in determining that section 3333.2 did not violate the equal protection clause, the court deferred to the Legislature, concluding it had made the requisite inquiry and decided, based on the facts before it, there was a need to regulate medical malpractice insurance and the scheme it enacted, MICRA, was rationally related to that need. Accordingly, the "changed circumstances" principle stated in *Brown* and *Chastleton* is not applicable here.

(*Stinnett v. Tam*, 198 Cal.App.4th at p. 1430, review denied Nov. 30, 2011, S197135.)

This approach conforms to the longstanding, well-established approach to the judicial review of legislation: "Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." (*Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 464; see also *F.C.C. v. Beach Communications, Inc.*, *supra*, 508 U.S. 307, 315 ("[A] legislative choice is not subject to courtroom fact-finding"); *Heller v. Doe* (1993) 509 U.S. 312, 319 ("[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices") (citation omitted); *Ferguson v. Skrupa* (1963) 372 U.S. 726, 730 ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies"); *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52 ("The judiciary, in reviewing

statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation").) As the California Supreme Court stated more than sixty years ago, "We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to remain a democratic system. The forum for correction of ill-considered legislation is a responsive legislature." (*Werner v. Southern Cal. etc. Newspapers* (1950) 35 Cal.2d 121,130.)

It would be poor public policy to hold that the constitutionality of a statute could be undermined by the presentation of evidence submitted by advocates in a trial setting. MICRA and its implications go far beyond the Gavellos and Dr. Millman. MICRA addresses complex issues of fact and policy involving overall costs of healthcare; accessibility of healthcare in low-income, rural, and inner-city areas; the availability of doctors working in high-risk specialties such as obstetrics and neurosurgery; the impact of healthcare costs on California patients and taxpayers; and the cost of medical insurance for Californians and their employers. (See, e.g., William G. Hamm, et al., "MICRA and Access to Healthcare," available at http://www.cmanet.org/files/pdf/micra/lecg-capp-report.pdf; RAND Corporation, "Malpractice Risk by Physician Specialty," available at http://www.rand.org/pubs/research_briefs/RB9610/index1.html.)

Inherent in the rational basis standard is the recognition that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." (*F.C.C. v. Beach Communications, supra*, 508 U.S. 307 at p. 313.) Neither trial nor appellate courts are in a position to assess new evidence presented by interested, individual parties to determine whether MICRA continues to adequately serve the needs of California as a whole. Rather, the approach taken in *Fein*,

American Bank, and *Stinnett* is the correct one: As long as the Legislature did not abuse its power in enacting MICRA, the wisdom or effectiveness of the measure should not be second-guessed by the judiciary.

As the Supreme Court stated in *Fein*, "Although reasonable persons can certainly disagree as to the wisdom of this provision, we cannot say that it is not rationally related to a legitimate state interest." (*Fein*, 38 Cal.3d at 160-161.) Nothing in this case changes that assessment. Plaintiffs' "changed circumstances" argument cannot justify the invalidation of a law that has been held constitutional by the California Supreme Court.

4. Proposition 103 does not make Section 3333.2 obsolete.

Even if evidence of changed circumstances could affect the rational basis for a statute, the 1988 enactment of Proposition 103 does not undermine the constitutionality of Section 3333.2. Plaintiffs argue that the passage of Proposition 103 left MICRA without a rational basis because Proposition 103 more effectively reduced malpractice insurance rates than MICRA. (XAOB, pp. 78-83.)

At the outset, Plaintiffs' argument is based on an incorrect factual premise. MICRA—not Proposition 103—is primarily responsible for the slow rate of growth in medical malpractice insurance rates, as compared to insurance rate increases in other industries and other states. (Frech, et al., *Controlling Medical Malpractice Insurance Costs—Congressional Act or Voter Proposition?* (2006) 3 Ind. Health L.Rev. 33.) Proposition 103 established a regulatory mechanism for limiting insurance rates in California. But the Supreme Court has upheld MICRA's provisions and recognized continued threats to MICRA's goals numerous times since Proposition 103 was passed in 1988. (See, e.g., *Western Steamship* (1994) 8 Cal.4th 100, 111-114; *Reigelsperger v.*

Siller (2007) 40 Cal.4th 574, 577-578; *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 843-844.) In *Western Steamship*—decided eight years after Proposition 103 was enacted—the Court upheld the applicability of Section 3333.2 and noted that MICRA "reflects a strong public policy to contain the costs of malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs. . . ." (*Western Steamship*, 8 Cal.4th at 112.) To further this goal and to avoid the risk of reverting to pre-MICRA instability, the Court refused to limit the applicability of the $250,000 noneconomic damages cap:

> Exempting indemnity actions from the $250,000 limit would threaten not only this goal but also the broader purpose of MICRA by resurrecting the pre-MICRA instability associated with unlimited noneconomic damages and increasing the overall cost of malpractice insurance to account for these larger recoveries. [Citations.] We conclude that applying section 3333.2 to such claims is both necessary to effectuate the intent and policies prompting the MICRA legislation.

(*Id.*) The court noted, "To hold otherwise would . . . jeopardize the purpose of MICRA to ensure the availability of medical care." (*Id.* at 116.) And as Dr. Millman notes, Proposition 103 addresses "excessive" rates but does not aim to reduce insurers' costs, as MICRA does, by, among other things, limiting noneconomic damage awards. (Appellant's Reply and Cross-Respondent's Brief, pp. 50-51.) As the Supreme Court has noted, the impetus for MICRA's enactment was, in part, the withdrawal of insurers from the market entirely when their costs became too high. (*American Bank,* 36 Cal.3d 359, 371.)

But more importantly, the enactment of a later statute touching upon a similar subject as an earlier statute does not render the earlier

statute obsolete and therefore unconstitutional. Even if MICRA and Proposition 103 were deemed to touch upon a common subject, they "must be read together and so construed as to give effect, when possible, to all the provisions thereof." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778-779 (citing *Tripp v. Swoap* (1979) 17 Cal.3d 671, 679).) Plaintiffs would have this Court do the opposite, and hold that MICRA and Proposition 103 cannot constitutionally coexist even though they have done so for more than two decades. There is no basis for such a holding.

Finally, if Proposition 103 and Section 3333.2 were to conflict, Section 3333.2 would prevail. MICRA is specifically intended to address the crisis affecting doctors' ability to obtain affordable medical malpractice insurance, and Section 3333.2 is a specific provision intended to address that crisis. (See *Western Steamship*, 8 Cal.4th at 111 ("MICRA includes a variety of provisions all of which are calculated to reduce the cost of insurance by limiting the amount and timing of recovery in cases of professional negligence").) The stated purpose of Proposition 103, on the other hand, is to ensure *generally* that "insurance is fair, available, and affordable for all Californians." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 813.) To the extent these two laws conflict, Section 3333.2 should be given full effect and Proposition 103 should be subordinated. "[W]hen a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (Code Civ. Proc., § 1859.)

Thus, the fact that Proposition 103 affects insurance rates generally does not mean it trumps Section 3333.2, nor does it make that statute unconstitutional.

5. Plaintiffs have no right to a particular measure of purchasing power.

There is also no validity to the argument that Section 3333.2 lacks a rational basis because it has become unfair with the passage of time for lack of an inflation adjustment. (See XAOB, pp. 77-78 (arguing the section is "a fortiori unconstitutional" because "the effect of inflation to reduce the permitted noneconomic damage award to one-fourth of what the Legislature intended in 1975, has aggravated the discriminatory impact of section 3333.2's damages cap").) This argument does not address whether the classification is rationally related to a legitimate state interest; rather, it challenges the effect of the legislation.

A decade after MICRA's enactment, the Supreme Court held that the $250,000 statutory cap had a sufficient basis to meet the rational basis test. (See *Fein*, 38 Cal.3d at 163 (listing four reasons the Legislature may have chosen the $250,000 limit and concluding, "Each of these grounds provides a sufficient rationale for the $250,000 limit.").) In fact, the *Fein* Court pointed out that there is no constitutional right to recover noneconomic damages in any amount. (See *Fein*, 38 Cal.3d at 159-160.)

When first considering passing MICRA, the Senate Judiciary Committee considered indexing the damages cap, but ultimately rejected the idea. (See Amanda Edwards, "Recent Development: Medical Malpractice Non-Economic Damages Caps," 43 Harv. J. on Legis. 213, 224 (2006).) As Dr. Millman points out, the Legislature has twice considered increasing the damages cap in Section 3333.2, but has declined to do so. (Appellant's Reply and Cross-Respondent's Brief, p. 93.) It is not for this Court to implement changes considered and rejected by the Legislature. "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the

policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." (*Superior Court v. County of Mendocino*, *supra*, 13 Cal.4th 45, 52.)

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." (*Ferguson v. Skrupa*, *supra*, 372 U.S. 726, 729.) The Legislature has considered and rejected a modification to Section 3333.2, and there is no basis for holding it unconstitutional.

B. Section 3333.2 does not violate the right to a jury trial.

Plaintiffs also attack Section 3333.2 on the grounds that it violates their right to a jury trial because it limits their right to have a jury determine their damages. They do not dispute, however, that a jury actually determined their damages. Thus Plaintiffs' claim is essentially that they are constitutionally entitled to the entire amount of damages the jury awarded.

The Supreme Court has rejected this claim as well, noting that Section 3333.2 "places no limit on the amount of injury sustained by the plaintiff, as assessed by the trier of fact, but only on the amount of the defendant's liability therefor." (*Salgado v. County of Los Angeles* (1999) 19 Cal.4th 629, 640). In rejecting a due process challenge to Section 3333.2 in *Fein*, the Supreme Court noted that "no California case . . . has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision." (*Fein*, 38 Cal.3d at 159-60.) The *Fein* Court also acknowledged that disparate jury awards themselves were one of the reasons for the Legislature's decision to cap noneconomic damages in medical malpractice cases: "One of the problems identified in the legislative hearings was the unpredictability of the size of large

noneconomic damage awards, resulting from the inherent difficulties in valuing such damages and the great disparity in the price tag which different juries placed on such losses." (*Id.* at 163.)

Similarly, the Court of Appeal, relying on *Fein* and *American Bank*, has rejected the argument that Section 3333.2 violates the right to have an amount of damages determined by a jury. (*Yates v. Pollock* (1987) 194 Cal.App.3d 195, 200.)

Plaintiffs also argue that Section 3333.2 is unconstitutional because "plaintiffs receive no offsetting benefit." (XAOB, p. 65.) This "quid pro quo" argument was flatly rejected by the Supreme Court in its due process ruling in *Fein*:

> [T]he constitutionality of measures affecting such economic rights under the due process clause does not depend on a judicial assessment of the justifications for the legislation or of the wisdom or fairness of the enactment [i.e., the 'adequacy' of the quid pro quo]. So long as the measure is rationally related to a legitimate state interest, policy determinations as to the need for, and the desirability of, the enactment are for the Legislature.

Fein, 38 Cal.3d at 157-158 (quoting *American Bank*, 36 Cal.3d 359, 368-369) (brackets in *Fein*).) Thus Plaintiffs' claim that they were not offered a sufficient quid pro quo must be rejected.

The Supreme Court has held "unequivocally that no one has a vested right in a measure of damages." (*Feckenscher v. Gamble* (1938) 12 Cal.2d 482, 499 (citing *Tulley v. Tranor* (1878) 53 Cal. 274).) Plaintiffs' arguments regarding additur and remittitur miss the mark because those procedures necessarily rely on a judge's finding that the jury award is inadequate or excessive. (See *Jehl v. Southern Pac. Co.* (1967) 66 Cal.2d 821, 835.)

Here, the trial court did not usurp the jury's role by making determinations of fact about the value of Plaintiffs' damages; it simply applied Section 3333.2 based on the mandate of MICRA. Section 3333.2 "operates as a limitation on liability" no matter what the plaintiff's damages are; "[t]o 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." (*Western Steamship,* 8 Cal.4th at p. 116.)

The Second Appellate District in *Yates v. Pollock* (1987) 194 Cal.App.3d 195 has recognized this argument for what it is: "Plaintiffs' contention that section 3333.2 unconstitutionally abridges the right to a jury trial (Cal. Const., art. 1, § 16) is but an indirect attack upon the Legislature's power to place a cap on damages." (*Yates v. Pollock*, 194 Cal.App.3d at 200.) Plaintiffs argue that *Stinnett* was wrongly decided on this issue (Cross-Appellant's Reply Brief, pp. 8-10), but it was in line with existing precedent, citing *Fein* and *American Bank* in rejecting the argument that only a jury may have control over the amount of recoverable damages for which a defendant is liable. (*Stinnett, supra,* 198 Cal.App.4th at 1433.) The *Stinnett* court went on to say, "*Fein* and *American Bank* are not by any means the only California Supreme Court cases holding that the Legislature possesses broad authority to modify the scope and nature of recoverable damages." (*Id.*)

In *Ruiz v. Podolsky*, the Supreme Court rejected the argument that applying MICRA's arbitration provision to bind the patient's heirs, who did not sign an arbitration agreement, would violate the plaintiffs' right to a jury trial:

> [T]he Legislature by statute has created the right of certain heirs to a wrongful death action and may also by statute place reasonable conditions on the exercise of that

> right. . . . [W]e cannot say that under these particular circumstances this reasonable delegation of authority to enter into arbitration agreements violates the state constitutional right to a jury trial.

(*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 853-854.) The same reasoning applies with respect to MICRA's noneconomic damages cap; the Legislature created the right to recover damages in medical malpractice cases and is entitled to limit the liability for those damages. This Court should reject Plaintiffs' argument that applying MICRA's noneconomic damages cap in this case violates her right to a jury trial.

In short, Plaintiffs do not have a constitutional entitlement to the amount of damages awarded by the jury. Section 3333.2 is not unconstitutional because it limits liability for certain damages and it cannot be overturned on these grounds.

II. CONCLUSION

The Supreme Court and Court of Appeal have held repeatedly that MICRA generally and Section 3333.2 specifically are rationally related to legitimate state interests. None of Plaintiffs' arguments change that analysis or conclusions, nor can Plaintiffs deny that it is not the role of the judiciary to engage in fact finding to determine the wisdom of the Legislature's actions. Moreover, Section 3333.2 does not violate Plaintiffs' right to a jury trial. There is no legitimate basis to question the constitutionality of Section 3333.2.

Respectfully submitted,

Dated: March 6, 2013

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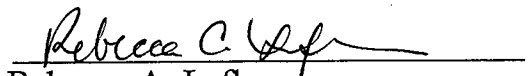
Rebecca A. Lefler

By: 
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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5,082 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By Rebecca A. Lefler

Rebecca A. Lefler

PROOF OF SERVICE

Kristina Gavello, et al.
Plaintiffs, Respondents, and Cross-Appellants
v.
Bernard Millman
Defendant, Appellant, and Cross-Respondent

Court of Appeal, First Appellate District, Division Two
Case No. A132291

I, **Estella Licon,** declare as follows:

On March 6, 2013, I served the following: **Application for Leave to File Amici Curiae Brief in Support of Bernard Millman, M.D.; Brief of Amici Curiae California Medical Association, California Dental Association, California Hospital Association, and American Medical Association** the interested parties in this action by:

X **U. S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on that date following ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in Los Angeles, California, in a sealed envelope with postage fully prepaid.

PLEASE SEE ATTACHED SERVICE LIST

X **(STATE):** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California on March 6, 2013.

Estella Licon
ESTELLA LICON

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Electronically per Rule 8.212(c)(2)