2nd Civ. No. B250519

IN THE

Court of Appeal

OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

DIORESLY LORA,
Plaintiff and Appellant,

v.

UNIVERSAL HEALTH SERVICES,
Defendant and Respondent.

APPLICATION OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA HOSPITAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT; AMICUS BRIEF IN SUPPORT OF RESPONDENT

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
Hon. Victor E. Chavez
Case No. MC023074

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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), California Dental Association (CDA), and American Medical Association (AMA) request permission to file the attached Amici Curiae Brief in support of Respondent Lancaster Hospital Corporation.

This brief will not delay the proceedings in any way. Amici submit this application and brief well in advance of the current March 4, 2015 due date for the Appellant's Reply Brief. Therefore, the Court need not allow any additional time, beyond the due date for her Appellant's Reply Brief, for plaintiff to answer the amicus brief.

I. INTERESTS OF AMICI CURIAE

CMA is a nonprofit, incorporated, professional association of more than 40,000 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 health care 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 policymaking 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.; The Mutual Risk Retention Group, Inc.; Medical Insurance Exchange of California; The Dentists Insurance Company; The Doctors Company; NORCAL Mutual Insurance Company; and The Regents of the University of California.

No party or counsel for any party authored the proposed Amici Curiae Brief in whole or in part, nor has any party or counsel for any party made a monetary contribution intended to fund the preparation or the 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 Civil Code section 3333.2. This statute, its effect on noneconomic damages awards in medical malpractice cases, and its effect on the practice of medicine and access to care for patients is of great interest to Amici.

Counsel for the CMA, CHA, CDA, and AMA have reviewed the parties' briefs in this case. Appellant's Opening Brief, Respondent's Brief, and Appellant's Reply Brief discuss many of the issues directly affecting Amici and their involvement in the medical care and medical malpractice insurance industries in California.

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 Hospital* (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, fn. 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.)

DATED: February 9, 2015

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By 

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INTRODUCTION

Plaintiff urged the trial court to declare Civil Code section 3333.2 unconstitutional, and plaintiff now urges this Court to do so. She would have this Court ignore the presumption of constitutionality that applies to every California statute and ignore prior California Supreme Court and Court of Appeal authority upholding the Medical Injury Compensation Reform Act's ("MICRA") constitutionality. In other words, plaintiff would have this Court ignore its responsibility to enforce California law and, in effect, repeal Section 3333.2.

Plaintiff's justification for judicial repeal of Section 3333.2 is that it has not achieved its stated purposes of curbing medical malpractice insurance premiums and assuring the availability of medical care in California. In other words, plaintiff argues that the statute no longer is necessary. As purported proof, she relies upon the "fact" that, in 1988, the Voters enacted Proposition 103 to modify the regulation of insurance in California, which she characterizes as a "changed circumstance" that should have had the *effect* of repealing MICRA. Plaintiff does not argue that the *intent* of the initiative was to replace MICRA – nor can she. In fact, last November, the vast majority of California voters – in every County in the State – rejected Proposition 46, an initiative that would have allowed an increase in MICRA's $250,000 cap on noneconomic damages in medical malpractice cases. (California Secretary of State, *State Ballot*

Measures (2014) <http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/88-ballot-measures.pdf> [as of Feb. 6, 2015].)

Instead, plaintiff's argument is that, without regulation, professional liability insurers will be too profitable. That argument virtually demonstrates that the *effects* of MICRA are to make it possible for insurers to achieve a fair rate of return so they will continue to provide insurance to California health care providers.

Of course, what plaintiff really invites this Court to do is make a legislative decision. Even then, however, plaintiff would have this Court ignore the adverse *impact* on patients and health care providers if this Court declared Section 3333.2 to be unconstitutional. For example, she fails to explain how much the change from the current maximum of $250,000 to *completely unlimited* noneconomic damage recoveries will increase total insurance claims payouts and, in turn, how much those increased payouts will require insurers to increase premiums to avoid insolvency and how those increased premiums will affect access to care for patients in California.

The two "Issues presented" which plaintiff has raised in this appeal (Appellant's Opening Brief ("AOB"), p. 5), can be reduced to a single basic question – **whether there is a constitutional right to unlimited noneconomic damages?** The Supreme Court and Court of Appeal have consistently answered that question in the negative.

This Court should reject plaintiff's invitation to judicially repeal Section 3333.2.

LEGAL ANALYSIS

I. PLAINTIFF FAILED TO OVERCOME THE PRESUMPTION OF CONSTITUTIONALITY, AND FAILED TO ADDRESS THE TRIAL COURT'S RULING

A. There Is A Presumption Of Constitutionality, And The Party Attacking The Statute Has The Burden Of Proving That The Statute Is Not Valid, Which Burden Plaintiff Did Not Meet

The evaluation of constitutionality begins with the rule that a duly enacted statute "is presumed to be constitutional." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1302, internal quotation marks omitted.) The California Supreme Court held that "[u]nconstitutionality must be clearly, positively, and certainly shown by the party attacking the statute, and we resolve doubts in favor of the statute's validity." (*Ibid.*, citations omitted; see *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1434-1435 (conc. & dis. opn. of Dawson, J.).)

Plaintiff failed to carry this heavy burden.

Neither the declaration of plaintiff's expert witness actuary, nor the documents that plaintiff provided to the trial court answered the central question: what will be the effect of repeal of the $250,000 limitation on noneconomic damages on medical malpractice claims and, therefore, on medical malpractice insurance? Instead, plaintiff invited the court to speculate that there will be no significant effect on the availability and affordability of medical malpractice insurance. The conclusory declaration of Mr. Schwartz, that "the possibility of

radically rising medical malpractice insurance rates that would threaten the availability of health care (as occurred in 1975) is not reasonably foreseeable[,]" did not even refer to the $250,000 limit on noneconomic damages. (1 Clerk's Transcript ("CT") 161.) The apparent purpose of the declaration was to reassure the trial court that the situation – though likely to be bad – will not be as bad as it was in 1975.

Defendant had no burden to establish a rational basis for Section 3333.2. The statute is "presumed to be constitutional" (*Copley Press, Inc. v. Superior Court*, *supra,* 39 Cal.4th at 1302) and will survive an equal protection challenge if the statute has any "realistically conceivable purpose or goal. . . ." (*Cooper v. Bray* (1978) 21 Cal.3d 841, 848.)

MICRA continues to assure that professional liability insurance is available and affordable, such that health care continues to be available.

B. The California Supreme Court And The Courts Of Appeal Have Held And Continue To Hold That Civil Code Section 3333.2 Is Constitutional, For Reasons That Plaintiff Did Not Rebut

The California Supreme Court emphatically held in *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137 (hereafter "*Fein*"), that Section 3333.2 is constitutional, and the United States Supreme Court then dismissed plaintiff's direct appeal. (*Fein v. Permanente Medical Group* (1985) 474 U.S. 892.) Any lingering doubt as to whether Section 3333.2 is unconstitutional was resolved in *Yates v.*

Pollock (1987) 194 Cal.App.3d 195 (hereafter "*Yates*"). Since then, the Court of Appeal again found Section 3333.2 constitutional, in *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412 (hereafter "*Stinnett*"). (See also *Rashidi v. Moser* (2014) 60 Cal.4th 718 (hereafter "*Rashidi*") [noting that the Court of Appeal in that case also rejected a constitutional challenge to Section 3333.2].).

In addition, all other MICRA provisions have survived constitutional challenge, including the periodic payment of future damages pursuant to Code of Civil Procedure section 667.7 (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 371-374 [hereafter "*American Bank*"]), reversal of the collateral source rule contained in Civil Code section 3333.1 (*Barme v. Wood* (1984) 37 Cal.3d 174, 181-182), and the limitation on attorneys' fees contained in Business and Professions Code section 6146 (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 930-932).

Even though many years have passed since MICRA was enacted, and many years have passed since the statute was first held constitutional, the statute continues to be attacked by plaintiffs whose noneconomic damages are reduced. Recently, there was an attack in *Stinnett, supra,* 198 Cal.App.4th at 1432-1433, where the plaintiff raised virtually the same arguments that plaintiff raises here regarding the right to jury trial and equal protection. The *Stinnett* Court rejected the attack and reiterated that Section 3333.2 is constitutional. Even more recently, this Court rejected a challenge to the constitutionality of Section 3333.2, as noted in *Rashidi, supra*, 60 Cal.4th at 724.

This Court should likewise reject plaintiff's attacks in this case, if for no other reason than decisions of the California Supreme Court

"are binding upon and must be followed by all the state courts of California." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) "Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction." (*Ibid.*)

1. Courts have held that Section 3333.2 does not deny plaintiffs their right to a jury trial

On two occasions the Courts of Appeal have rejected jury trial challenges to Section 3333.2 in published opinions. The first, *Yates*, involved "an indirect attack upon the Legislature's power to place a cap on damages." (194 Cal.App.3d at 200.) Citing *Fein*, the Court of Appeal concluded that the Legislature retains broad control over the measure as well as timing of damages. (*Ibid.*) "While the general propriety of noneconomic damages is 'firmly imbedded in our common law jurisprudence [citation],' no California case 'has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision.'" (*Ibid.*, quoting *Fein, supra,* 38 Cal.3d at 159-160.)

Next, the *Stinnett* Court rejected the jury trial argument for the same reason identified in *Yates*, *Fein*, and *American Bank*. (*Stinnett*, *supra*, 198 Cal.App.4th at 1433.) The Court also noted that *Fein* and *American Bank* were not the only Supreme Court cases holding that the Legislature possesses broad authority to modify the scope and nature of recoverable damages. (*Ibid.*, citing *Werner v. Southern California Associated Newspapers* (1950) 35 Cal.2d 121, 128 & *Feckenscher v. Gamble* (1938) 12 Cal.2d 482, 499.)

2. The California Supreme Court has held that Section 3333.2 does not violate equal protection

There have been several equal protection challenges to Section 3333.2 over the years – each one has been rejected. (See *Fein*, *supra*, 38 Cal.3d at 161-163; see also *Stinnett*, *supra*, 198 Cal.App.4th at 1426-1432.) Plaintiff concedes that the California Supreme Court addressed this issue in *Fein*, but argues that the *Fein* decision no longer applies because there is no longer an insurance "crisis." (AOB, p. 9.) This argument is addressed, *infra*, at § III.

C. The California Supreme Court's Recent Decisions Addressing MICRA Provisions Support The Validity Of The Noneconomic Damages Cap

In *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, the Supreme Court rejected the argument that applying MICRA's arbitration provision to bind a 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, supra,* 50 Cal.4th at 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 may limit the liability for those damages. The fact that the present case is an injury case rather than a wrongful death case like *Ruiz* is immaterial. As the Supreme Court noted in *Fein* — an injury rather than a death case — "no California case . . . has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision." (*Fein, supra,* 38 Cal.3d at 159-60.)

Even more recently, in *Rashidi v. Moser* (2014) 60 Cal.4th 718, the Supreme Court concluded "that the cap imposed by section 3333.2, subdivision (b) applies only to judgments awarding noneconomic damages" — and held that an award reduced to $250,000 in accordance with MICRA is not to be further reduced by an amount received through *settlement* with other parties. (*Rashidi, supra,* 60 Cal.4th. at 727.) The court reasoned that "**the cap performed its role** in the settlement arena by providing [a settling hospital] with a limit on its exposure to liability." (*Ibid.*, emphasis added.) The Court noted, "Had [the non-settling physician] established any degree of fault on his codefendants' part at trial, he would have been entitled to a proportionate reduction **in the capped award** of noneconomic damages." (*Ibid.*, emphasis added.)

While the *Rashidi* Court's order granting the plaintiff's petition for review limited "the question to the propriety of the setoff against noneconomic damages granted by the Court of Appeal" (*Rashidi, supra,* 60 Cal.4th at 724), the Court nevertheless affirmed the Court of Appeal's judgment rejecting the plaintiff's constitutional challenge to MICRA. The Court acknowledged that the plaintiff had "cross-appealed, challenging the constitutionality of MICRA" (*id.* at 722)

and that the Court of Appeal "rejected Rashidi's constitutional challenge to MICRA." (*Id.* at 724.) Ultimately, the Supreme Court concluded: "The Court of Appeal's judgment is reversed insofar as it reduced the award of noneconomic damages below $250,000, and affirmed in all other respects." (*Id.* at 728.)

Deferring to the Legislature, the *Rashidi* Court reasoned "that the Legislature knew how to include settlement dollars when it designed limits for purposes of medical malpractice litigation reform." (*Rashidi, supra,* 60 Cal.4th at 726.) The *Rashidi* Court acknowledged,

> In *Fein. . .*, **where the constitutionality of the cap was upheld**, this court observed that one problem identified in the legislative hearings was the unpredictable 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. The Legislature could reasonably have determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates. Furthermore, as one amicus suggests, 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." '

(*Id.* at 726-727, citing *Fein v. Permanente Medical Group, supra,* 38 Cal.3d at 163, emphasis added.) The Court further noted, "Thus, the Legislature was primarily concerned with capricious jury awards

when it established the MICRA cap." (*Rashidi, supra,* 60 Cal.4th at 727.)

The Court here should apply similar reasoning in upholding the constitutionality of the limits which the Legislature designed in Section 3333.2.

II. COURTS HAVE REJECTED PLAINTIFF'S RIGHT TO JURY TRIAL ARGUMENT – MORE ACCURATELY, PLAINTIFF SEEKS TO CREATE A RIGHT TO UNLIMITED DAMAGES

A. There Was A Jury Trial In This Case

Plaintiff asserts that Section 3333.2 "abridges the 'inviolate' right to jury trial." (AOB, p. 17, emphasis in heading omitted.) The first and most obvious reason why her argument is wrong is that there *was* a jury trial in this case. The jury decided the many factual disputes in the case relating to negligence, causation, and damages. After the jury rendered its verdict, the trial judge entered judgment, which is all the Constitution requires. The right to jury trial relates to the *method* of trial, not the *outcome* of a particular case. What matters is that the jury, not a judge, decides the questions of fact. Once that is done, the right to jury trial is satisfied. (See *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 746.)

Section 3333.2 is a policy decision that noneconomic damages will not exceed $250,000 in any given case. Although the statutory limitation is applied after the jury's determination, the statute does not constitute a *reexamination* of the factual question of damages. It is a modification of the legal effect of the jury's factual resolution. It does

not infringe upon the jury's right to decide. The jury still acts as the fact finder.

B. There Is Appellate Authority Rejecting Plaintiff's Jury Trial Argument, But Plaintiff Urges This Court To Disregard That Authority

Plaintiff urges this Court to disregard all appellate authority that contradicts her argument that Civil Code section 3333.2 is a deprivation of the right to jury trial. (AOB, pp. 7, 24-25.) This Court should reject plaintiff's invitation to do so.

1. The California Supreme Court rejected arguments that MICRA infringes the right to jury trial

In *American Bank, supra*, 36 Cal.3d 359, the California Supreme Court considered the issue of whether Code of Civil Procedure section 667.7 infringed on article I, section 16, of the California Constitution. Section 667.7 provides that when a plaintiff in a medical malpractice case has sustained "future damages" of $50,000 or more, compensation for those future damages is to be paid periodically over the course of time the plaintiff incurs the losses, rather than in a lump sum payment at the time of judgment. (Code Civ. Proc., § 667.7, subd. (a).) And, in the event the plaintiff dies, future payments stop. (*Id.* at subd. (b)(1).) That is, the statute reduces the amount of damages plaintiff recovers notwithstanding the jury's factual determination.

The Court rejected the constitutional attack. (*American Bank, supra*, 36 Cal.3d at 375-376.) The Court explained,

> Once the jury has designated the amount of future damages – and has thus identified the amount of damages subject to periodic payment – we believe that the court's authority under section 667.7, subdivision (b)(1), to fashion the details of a periodic payment schedule does not infringe the constitutional right to jury trial.

(*American Bank, supra,* 36 Cal.3d at 376.)

While Section 667.7 is not identical to Section 3333.2, *American Bank* is a compelling endorsement of all of the MICRA statutes. The effect of Section 667.7 is to reduce the value to plaintiff of the jury's determination of damages, in the event plaintiff dies, yet this does not violate the jury trial right. In so holding, the Supreme Court noted that "the court's function in this regard is similar to the authority long exercised by courts in the disbursement of the proceeds of a judgment under a number of well-established statutory schemes." (*American Bank, supra,* 36 Cal.3d at 376.)

This point was reinforced the following year, in *Fein.* The Court reiterated what it previously said in *American Bank*: "One feature of the periodic payment provision upheld in *American Bank* – terminating payments for future damages, other than damages for loss of earnings, on the plaintiff's death – clearly does operate to *reduce the amount of damages ultimately recovered.*" (*Fein, supra*, 38 Cal.3d at 158, fn. 14, emphasis added.)

2. The Courts of Appeal have repeatedly rejected plaintiff's right to jury trial argument

Twenty-five years ago, the *Yates* court rejected a right to a jury trial challenge. (194 Cal.App.3d at 200.)

The *Stinnett* court more recently explained, "[t]his argument was rejected more than 20 years ago in *Yates* [], and we reject it again here for the same reason – *Fein* and *American Bank* instruct us otherwise and we are bound to follow the precedents of the California Supreme Court." (*Stinnett*, *supra*, 198 Cal.App.4th at 1433, citing *Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at 455.)

Those decisions were correctly decided.

3. The California Constitution does not prohibit the Legislature from enacting statutes that limit damages

Plaintiff essentially argues that the California Constitution requires that the dollar amount of noneconomic damages that a superior court orders a defendant to pay must equal the dollar amount of noneconomic detriment that a jury finds the plaintiff sustained. Plaintiff's analysis is wrong, for at least three reasons.

First, plaintiff ignores the law of tort damages, *i.e.*, the "species of relief" that are provided by the law, specifically, by the California Civil Code. (See Civ. Code, §§ 3274, 3281, 3282.) Plaintiff focuses myopically on the jury's role in the process. Her unstated assumption is that the law has no role in the decision-making process as it relates to the issue of damages. However, it has been true at least since 1872, that "compensation is the relief or remedy **provided by the law of**

this State for the violation of private rights . . . ." (Civ. Code, § 3274, emphasis added.) The Legislature also authorized "Damages for Wrongs" in Section 3333.

Second, plaintiff ignores the law of remedies. A judgment for damages is a "remedy" rather than a question of fact or even a substantive question of law. Remedies can be either monetary or non-monetary. That is, remedies can be "at law" or "in equity." Either way, however, remedies are fashioned by the judge, according to the applicable law. That is true even though the remedies are based upon factual determinations that are made by jurors. That is why statutes that relate to remedies do not deprive the parties of their right to jury trial. While the right to the method of trial by jury is preserved, the right to recover a specific amount of damages is not. The constitutional state and federal guarantees apply to the right to jury trial, not to the remedy that follows jury trial.[1] That explains why the common law never recognized a right to full recovery in tort. (*Duke Power Co. v. Carolina Environmental Study Group, Inc.* (1978) 438 U.S. 59, 88, fn. 32.)

Third, plaintiff ignores the role of the judge, who applies the law. As explained by the California Supreme Court in the decision plaintiff cites, *Jehl v. Southern Pacific Co.* (1967) 66 Cal.2d 821, 831, footnote 12 (cited at AOB, pp. 7, 8, 20-21), the modern view of the relationship between judge and jury is to "promote[] economy and efficiency in judicial proceedings." (*Jehl, supra,* 66 Cal.2d at 832.) The goal is to preserve "the essentials of the right to jury trial without

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[1] That also explains why the constitutional guarantee of the right to jury trial does not require that juries decide equitable remedies.

shackling modern procedure to outmoded precedents." (*Id.* at 831-832.) The noneconomic damage limitation of Section 3333.2 does just that.

Plaintiff essentially argues that the law has no role in the jury decision-making process, at least as it relates to the issue of damages, and that the process is *totally discretionary* with the jury. Plaintiff is wrong. The judge fashions the remedy of monetary damages for noneconomic harm, consistent with the law.

C. Juries Do Not Have Unlimited Discretion To Award Damages, Nor Is Plaintiff Entitled To Unlimited Damages

Plaintiff's point is that any statute that limits the discretion of the jury in awarding damages is unconstitutional. That would mean, however, that many if not most statutes relating to damages would be improper limits on that discretion. That also would mean that the Legislature did not have the power to address the recurring problem in the courts of excessive awards of noneconomic damages, which power the Legislature must have if it is to serve its role in our constitutional system of "checks and balances."

Plaintiff is wrong. She does not have the "inviolate" right to a judgment for an unlimited amount of compensation. Nor, for that matter, does plaintiff have a right to jury trial in which the jury is free to answer any question in any way the jury desires. The jury does not have unlimited discretion. Rather, the questions to be answered by the jury, and the legal effect of the jury's answers, are framed by the law. That is, the jury's discretion is limited by law. Or, as stated by

another court that looked at the question of whether such a statute is constitutional, "although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment." (*Etheridge v. Medical Center Hospitals* (Va. 1989) 376 S.E.2d 525, 529.)

The right to jury trial is not a guarantee of *damages*. It is not a guarantee of *outcome*. It is a guarantee of the *method* of trial.

D. Reduction Of Noneconomic Damages Does Not Require Plaintiff's Consent, Nor Does It Require A New Trial

Next, plaintiff argues that reduction of noneconomic damages should either "require plaintiffs' consent or offer the alternative of a new trial." (AOB, p. 21.) Essentially, plaintiff argues that, in order to pass constitutional muster, Civil Code section 3333.2 should have been drafted by the Legislature to require new trials whenever juries award more than $250,000 in noneconomic damages. Plaintiff relies upon one authority, *Jehl*, *supra*, 66 Cal.2d 821 (cited at AOB, pp. 20-21) to support that argument. Again, plaintiff is wrong.

Plaintiff turns the logic of *Jehl* on its head. *Jehl* overruled *Dorsey v. Barba* (1952) 38 Cal.2d 350, to accommodate "the demands of fair and efficient administration of justice" in disposing of a "tremendous increase in filings in civil cases including contested matters." (*Jehl*, *supra*, 66 Cal.2d at 828-829.) That is precisely the reason why the *Jehl* decision is *consistent* with the noneconomic damage limitation of Section 3333.2. Section 3333.2 "preserves the

essentials of the right to jury trial without shackling modern procedure to outmoded precedents." (*Jehl, supra,* 66 Cal.2d at 831-832.)

Plaintiff does not deny that under the California Constitution, the Legislature has the power to modify or repeal common law causes of action. As the California Supreme Court stated: "No question can arise as to the power of the legislature to modify or abrogate a rule of the common law." (*Fall River Valley Irrigation Dist. v. Mount Shasta Power Corp.* (1927) 202 Cal. 56, 67.) As an example, the Legislature constitutionally limited the liability of newspapers and radio stations in libel actions to *special* damages unless a retraction was demanded and not published. (Civ. Code, § 48a; *Werner v. Southern California Associated Newspapers, supra,* 35 Cal.2d at 136-137 [affirming constitutionality of Civil Code section 48a].)[2]

More recently, the Court reiterated this point, explaining that the Legislature has broad authority, including the ability to abolish tort claims. (*Cory v. Shierloh* (1981) 29 Cal.3d 430, 439.) This broad authority can be exercised as long as the statute is rationally based and does not draw constitutionally prohibited distinctions. (*Hung v. Wang* (1992) 8 Cal.App.4th 908, 921-922.)

The Legislature could have enacted a statute that disallowed noneconomic damages altogether, as it did in the context of workers compensation, or as it did with libel actions against newspapers and

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[2] Another example is the statutory elimination of common law "joint and several" liability for general damages. (Civ. Code, § 1431.2, subd. (a); *Henry v. Superior Court* (2008) 160 Cal.App.4th 440, 449-450.)

radio stations. (Civ. Code, § 48a; *Werner v. Southern California Associated Newspapers, supra*, 35 Cal.2d 121.)

Finally, Section 3333.2 is *efficient* because it does not require new trials of medical malpractice cases whenever noneconomic damages are greater than $250,000. It obviates the need for trial judges to evaluate whether noneconomic damages are excessive.

E. The Vast Majority Of Other State Courts Have Rejected The Jury Trial Argument That Plaintiff Makes To This Court

Plaintiff's final argument regarding the right to jury trial is based on the decisions of other state courts. (AOB, pp. 21-24.) The majority of states have rejected the argument.

1. Although a minority of other state courts have accepted the argument that plaintiff makes here, those out-of-state decisions are distinguishable or simply not compelling

Plaintiff only cites out-of-state cases which are consistent with her position on the issue. Yet, none are persuasive.

Plaintiff cites (at AOB, pp. 21-22) the recent Missouri Supreme Court decision in *Watts v. Lester E. Cox Medical Centers* (Mo. 2012) 376 S.W.3d 633, where that court held the Missouri limitation on noneconomic damages in medical malpractice cases was an unconstitutional deprivation of the right to jury trial under the Missouri state constitution simply because:

> [S]tatutory caps on damage awards simply did not exist and were not contemplated by the common law when the people of Missouri adopted their constitution in 1820 guaranteeing that the right to trial by jury as heretofore enjoyed shall remain inviolate. The right to trial by jury 'heretofore enjoyed' was not subject to legislative limits on damages.

(*Id.* at 639.) Worse, the *Watts* Court overruled its own well-reasoned opinion upholding the statute, *Adams By and Through Adams v. Children's Mercy Hospital* (Mo. 1992) 832 S.W.2d 898. Worst of all, the author of the majority opinion wrote in such a conclusory fashion that the court effectively declared that the Missouri constitution guarantees unlimited discretion to juries. "Once the right to a trial by jury attaches, as it does in this case, the plaintiff has the full benefit of that right free from the reach of hostile legislation." (*Watts, supra,* 376 S.W.3d at 640.) For those and other reasons, the decision is unpersuasive.

Plaintiff also cites (at AOB, p. 23) one of the decisions cited by the *Watts* Court, *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt* (Ga. 2010) 691 S.E.2d 218, even though the Georgia Supreme Court did not consider – let alone analyze – the California cases on this issue. In fact, the Georgia Supreme Court did not consider *any* of the sister state decisions rejecting constitutional challenges to damages caps based on a right to jury trial. The recent Georgia decision is as conclusory and unpersuasive as the recent Missouri decision which cites it.

Plaintiff cites (at AOB, p. 23) *Lakin v. Senco Products, Inc.* (Or. 1999) 987 P.2d 463, which has been widely criticized by sister state courts. *Lakin* addressed a general statutory cap on noneconomic damages in personal injury actions which, unlike Civil Code section 3333.2, was not limited to medical malpractice cases. The court in *Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.* (Neb. 2003) 663 N.W.2d 43 disagreed with the analysis of *Lakin,* noting "[i]f the Legislature has the constitutional power to abolish a cause of action, it also has the power to limit recovery in a cause of action." (*Id.* at 75; see *Kirkland v. Blaine County Medical Center* (Idaho 2000) 4 P.3d 1115, 1120 [rejecting *Lakin*]; see also *Evans ex rel. Kutch v. State* (Alaska 2002) 56 P.3d 1046, 1051, fn. 30 [same].)

Lakin conducted a perfunctory analysis of out-of-state cases, relying largely on another case cited by plaintiff (at AOB, p. 22), *Sofie v. Fibreboard Corp.* (Wash. 1989) 771 P.2d 711. *Lakin* did not cite or address any California decisions on the issue of damages caps and right to jury trial. This was likely because *Lakin* was limited to the particular jurisprudence of Oregon and wholesale reliance on the Washington decision in *Sofie.*

Like *Lakin, Sofie* is unpersuasive and at odds with California jurisprudence. The majority in *Sofie* acknowledged the Washington Legislature had the power to define the parameters of a cause of action, but concluded this is somehow "different from directly predetermining the limits of a jury's fact-finding powers in relevant issues, which offends the constitution." (*Sofie, supra,* 771 P.2d at 727.) But, this conclusion makes no sense. As the dissenters

correctly observed, there is no principled distinction between a legislative modification of common law rules regarding punitive damages or immunities and modification of common law rules regarding noneconomic damages. The dissenters stated: "Why is the alteration of the jury's determination of damages in this case different from other allowable alterations? The majority never says why; it simply says it is so." (*Id.* at 734 (dis. opn. of Dolliver, J.).)

Indeed, the *Sofie* decision has been expressly rejected as not "persuasive." (*Phillips v. Mirac, Inc.* (Mich.Ct.App. 2002) 651 N.W.2d 437, 441, fn. 5.) More importantly, the distinction drawn by *Sofie* is inconsistent with the stated rule in California that the Legislature's power to determine the rights of individuals is "complete." (*Cory v. Shierloh, supra,* 29 Cal.3d at 439.)

Further, the *Sofie* decision was based on the District Court's decision in *Boyd v. Bulala* (W.D.Va. 1986) 647 F.Supp. 781, which *Sofie* described as "instructive." (*Sofie*, *supra*, 771 P.2d at 722.) However, that "instructive" decision was later reversed by the Fourth Circuit Court of Appeals in *Boyd v. Bulala* (4th Cir. 1989) 877 F.2d 1191, 1195, in which the Court of Appeals upheld the State's legislative cap on medical malpractice claims. It relied on a then-recent decision of the Supreme Court of Virginia, which upheld the Virginia damage cap on all grounds, including the challenge based on a right to jury trial. (*Ibid.,* citing *Etheridge*, *supra,* 376 S.E.2d 525.) In *Etheridge*, the Virginia Supreme Court noted the distinction between fact-finding and remedies, noting that the trial court applies the remedy limitation only after jury fact-finding is complete, and in this way does not violate the right to jury trial. (*Etheridge, supra,* 376

S.E.2d at 529.) Even more recently, the Supreme Court of Virginia reaffirmed *Etheridge* in *Pulliam v. Coastal Emergency Services of Richmond, Inc.* (Va. 1999) 509 S.E.2d 307, 310.

2. The majority of jurisdictions have rejected the same right to jury trial argument that plaintiff makes here

The Missouri Supreme Court majority in *Watts v. Lester E. Cox Medical Centers* at least *reconsidered* the few out-of-state authorities upon which that court previously had relied when it upheld its statute, in *Adams By and Through Adams v. Children's Mercy Hospital.* Even better, the dissent pointed out the many, many other out-of-state authorities that are consistent with *Adams.* (*Watts, supra,* 376 S.W.3d at 648-652 (conc. & dis. opn. of Russell, J.).) These decisions include *Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., supra,* 663 N.W.2d at 75; *Kirkland v. Blaine County Medical Center, supra,* 4 P.3d at 1118-1120; *Arbino v. Johnson & Johnson* (Ohio 2007) 880 N.E.2d 420, 430-432; *Murphy v. Edmonds* (Md.Ct.App. 1992) 601 A.2d 102, 118; *Etheridge v. Medical Center Hospitals, supra,* 376 S.E.2d at 529; *Boyd v. Bulala, supra,* 877 F.2d at 1195; *Evans ex rel. Kutch v. State, supra,* 56 P.3d at 1051; *Wright v. Colleton County School Dist.* (S.C. 1990) 391 S.E.2d 564, 569-570; *Judd v. Drezga* (Utah 2004) 103 P.3d 135, 146; *Samsel v. Wheeler Transport Services, Inc.* (Kan. 1990) 789 P.2d 541, 558; *Johnson v. St. Vincent Hospital, Inc.* (Ind. 1980) 404 N.E.2d 585, 599-600 (overruled on other grounds in *In re Stephens* (Ind. 2007) 867 N.E.2d 148, 156); and the California Supreme Court decision in *Fein v.*

Permanente Medical Group, supra, 38 Cal.3d at 164. Additional cases include *Robinson v. Charleston Area Medical Center, Inc.* (W.Va. 1991) 414 S.E.2d 877, 887-888, and *English v. New England Medical Center, Inc.* (Mass. 1989) 541 N.E.2d 329, 331-332.

Even though plaintiff relies upon *Watts*, plaintiff does not mention even one of those out-of-state decisions cited in *Watts* that rejected the very right to jury trial argument that plaintiff makes in this case. Nor does plaintiff mention any of the federal decisions rejecting the argument that damages caps violate the Seventh Amendment right to a jury trial. (See, *e.g.*, *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1202; *Madison v. IBP, Inc.* (8th Cir. 2001) 257 F.3d 780, 804, judg. vacated and case remanded for further consideration in light of *National Railroad Passenger Corp. v. Morgan* (2002) 536 U.S. 101; *Davis v. Omitowoju* (3d Cir. 1989) 883 F.2d 1155, 1159-1165; *Boyd v. Bulala, supra,* 877 F.2d at 1196; *Franklin v. Mazda Motor Corp.* (D.Md. 1989) 704 F.Supp. 1325, 1330-1335.)

This substantial line of cases rejecting arguments such as plaintiff's argument in this case is persuasive, and it is in line with California jurisprudence. As noted by the Utah Supreme Court in *Judd, supra*, 103 P.3d at 144-145, the jury decides the facts and the court conforms the findings to the law (damages cap), thereby complying with the right to a jury trial. Or, as it was stated by the Virginia Supreme Court in *Etheridge, supra*, 376 S.E.2d at 529, "although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment."

In summary, the majority of states have rejected the argument that statutory caps are unconstitutional deprivations of the right to jury trial, and California is one of those states.

III. PLAINTIFF'S EQUAL PROTECTION ARGUMENT FAILS BECAUSE SECTION 3333.2 REMAINS RATIONALLY RELATED TO LEGITIMATE STATE INTERESTS

A. The Supreme Court And Court Of Appeal Already Found That The MICRA Cap Is Rationally Related To Curbing Medical Malpractice Insurance Premiums And Insuring The Availability Of Medical Care

Plaintiff's equal protection argument (at AOB, pp. 26-50) is that, although Civil Code section 3333.2 did have a "rational basis" at the time of its enactment, that rational basis was eliminated by the passage of time. Plaintiff attributes this to three contentions: (1) an assertion that medical malpractice insurers are profitable, (2) the passage of Proposition 103, and (3) inflation since MICRA was passed. (AOB, pp. 6-7, 9-10.) Plaintiff frames the question in terms of "the availability of health care." (AOB, p. 5 ["Issues presented"].) In other words, plaintiff's equal protection argument requires this Court to answer one or more factual questions.

Plaintiff cites to the preamble of MICRA (at AOB, pp. 9-10, 33) to suggest that the statutory scheme would remain valid only if the crisis that triggered its enactment existed for the "foreseeable future." The identical argument was made and rejected by the Fifth District Court of Appeal in *Stinnett*, *supra*, 198 Cal.App.4th at 1430-1431.

The court explained, "[e]ven if that is the case, it is not the judiciary's function to determine when constitutionally valid legislation has served its purpose." (198 Cal.App.4th at 1430-1431.) Ultimately, plaintiff assumes that there was only one state interest – affordability of professional liability insurance – when there were others – the availability of such insurance and the availability of medical care.

Civil Code section 3333.2 was and is constitutional. (See, *e.g.*, *Fein*, *supra*, 38 Cal.3d at 162.)

B. The California Supreme Court And Court Of Appeal Have Rejected The Equal Protection Challenge To Civil Code Section 3333.2

1. Section 3333.2 has been held constitutional against equal protection challenges

As discussed previously, Section 3333.2 was found to be constitutional, despite equal protection challenges, in *Fein* and *Stinnett*. As the Court observed in *Fein*:

> [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. [Citation.] The equal protection clause certainly does not require the Legislature to limit a victim's recovery for out-of-pocket medical expenses or lost earnings simply because it has found it appropriate to place some limit on damages for pain and suffering and similar noneconomic losses.

(*Fein, supra*, 38 Cal.3d at 162.)

2. Plaintiff's argument based on *Brown v. Merlo* essentially is drawn from the dissent in *Fein*

Plaintiff relies upon *Brown v. Merlo* (1973) 8 Cal.3d 855 in support of her changed circumstance argument. (AOB, pp. 29-30.) In doing so, plaintiff is simply following the dissent of former Chief Justice Bird in *Fein, supra,* 38 Cal.3d at 167-178, which dissent relied on *Brown v. Merlo.*

The majority in *Fein* rejected the dissent's argument based on *Brown v. Merlo* and *Cooper v. Bray* (1978) 21 Cal.3d 841. (*Fein, supra*, 38 Cal.3d at 163.) The *Fein* majority opinion explained that the majority conducted a "*serious and genuine judicial inquiry*" and concluded that Section 3333.2 was constitutional, noting in the process that *Brown* and *Cooper* have never been interpreted as a tool to strike down statutes with which the court questions the wisdom. (*Fein, supra*, 38 Cal.3d at 163-164, citing *Cory v. Shierloh, supra, 29* Cal.3d at 437-439.)

"[A] court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature." (*Werner, supra*, 35 Cal.2d at 130, internal quotation marks omitted.)

Another reason why plaintiff's argument based on *Brown v. Merlo* should be rejected is that *Brown v. Merlo* has never been extended as plaintiff proposes. To the contrary, the Court of Appeal rejected the very same constitutional challenge that plaintiff raises

here, although largely on procedural grounds. (*Stinnett, supra*, 198 Cal.App.4th at 1429-1432.) The other decision cited by plaintiff (at AOB, pp. 31-32), *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, does not support their argument. The case was not decided based on *Brown v. Merlo*; the "changed circumstances" language was dicta. (23 Cal.3d at 311 ["But even if these events had not occurred simultaneously, we would not be precluded from considering matters which followed the enactment of [Government Code] section 16280"].)

C. Plaintiff's "Changed Circumstances" Argument Is Nothing More Than A Variation On The Equal Protection Challenge To Civil Code Section 3333.2 That Has Been Repeatedly Rejected

Plaintiff argues that "changed circumstances" justify repealing Section 3333.2 as not rationally related to its legislative purpose, even though the argument was already rejected in *Stinnett*. Plaintiff attempts to distinguish *Fein* and the other decisions addressing this issue by arguing that the problems facing the Legislature at the time MICRA was enacted no longer exist. (AOB, pp. 8-10, 32-33.)

Reaffirming its decision in *American Bank*, which involved a similar challenge to MICRA's periodic payment provision, the Supreme Court in *Fein* held that the noneconomic damages cap of Section 3333.2 is rationally related to the objective of reducing the costs of medical malpractice litigation, and thereby restraining the increase in medical malpractice insurance premiums. (*Fein, supra,* 38 Cal.3d at 159.)

> Faced with the prospect that, in the absence of some cost reduction, medical malpractice plaintiffs might as a realistic matter have difficulty collecting judgment for *any* of their damages – pecuniary as well as nonpecuniary – the Legislature concluded that it was in the public interest to attempt to obtain some cost savings by limiting noneconomic damages.

(*Fein, supra,* 38 Cal.3d at 160, emphasis in original.) The Court emphasized that, "[a]lthough 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." (*Ibid.*, fns. omitted.)

Fein was the fourth Supreme Court opinion rejecting due process challenges to MICRA provisions. (See *American Bank, supra,* 36 Cal.3d at 368-369 [Code Civ. Proc., § 667.7]; *Barme v. Wood, supra,* 37 Cal.3d at 180 [Civ. Code, § 3333.1]; *Roa v. Lodi Medical Group, supra,* 37 Cal.3d at 931-932 [Bus. & Prof. Code, § 6146].)

The *Fein* court relied on its discussion of the legislative history and purposes of MICRA in *American Bank.* The "serious problems" facing the Legislature in 1975 arose due to the increase in medical malpractice insurance premiums. (*American Bank, supra,* 36 Cal.3d at 363.) "[O]ne of the factors which contributed to the high cost of malpractice insurance was the need for insurance companies to retain large reserves to pay out sizeable lump sum awards." (*Id.* at 372-373.) A consequence of this problem was that many physicians decided either to stop providing medical care with respect to certain

high risk procedures, terminate their practice altogether, or practice without malpractice insurance. (*Id.* at 371.)

The Legislature's solution to the problem was to enact MICRA:

> In broad outline, the act (1) attempted to reduce the incidence and severity of medical malpractice injuries by strengthening governmental oversight of the education, licensing and discipline of physicians and health care providers, (2) sought to curtail unwarranted insurance premium increases by authorizing alternative insurance coverage programs and by establishing new procedures to review substantial rate increases, and (3) attempted to reduce the cost and increase the efficiency of medical malpractice litigation by revising a number of legal rules applicable to such litigation.

(*American Bank, supra,* 36 Cal.3d at 363-364.)

Plaintiff asserts that "no crisis now exists in medical malpractice insurance rates and no threat is posed by insurance rates to health care," and thus, "the damages cap no longer has a 'rational basis.'" (AOB, p. 11.) This identical argument was rejected in *Stinnett*. (*Stinnett, supra,* 198 Cal.App.4th at 1427-1429.) "'[I]n the absence of a constitutional objection it is generally held that the courts have no right to declare a statute obsolete by reason of a supervening change in the conditions under which it was enacted.'" (*Stinnett, supra*, 198 Cal.App.4th at 1428, quoting *Palermo v. Stockton Theatres* (1948) 32 Cal.2d 53, 63.)

The *Stinnett* court acknowledged "the principle of changed circumstances," noting that "'[a] law depending upon the existence of

an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."' (*Stinnett, supra,* 198 Cal.App.4th at 1428, quoting *Chastleton Corp. v. Sinclair* (1924) 264 U.S. 543, 547-548.) Only then did the *Stinnett* Court cite *Brown v. Merlo*: "'the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.'" (*Stinnett, supra,* 198 Cal.App.4th at 1428, quoting *Brown, supra,* 8 Cal.3d at 869, quoting *Milnot Co. v. Richardson* (N.D.Ill. 1972) 350 F.Supp. 221, 224; see also *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 153.)

The *Stinnett* Court did not get beyond that point, however. The court refused to take judicial notice of certain documents offered by plaintiff. (*Stinnett, supra,* 198 Cal.App.4th at 1428, fn. 2.) The plaintiff in *Stinnett* had argued that there had been "changed circumstances" since the California Supreme Court decided *Fein* in 1985. The *Stinnett* Court observed that plaintiff was mistaken, since the *Fein* Court specifically *declined* to determine whether such a medical malpractice insurance crisis actually existed. (*Stinnett, supra,* 198 Cal.App.4th at 1429, citing *American Bank, supra,* 36 Cal.3d at 368-372, *Fein, supra,* 38 Cal.3d at 157-161, and *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114.) The *Stinnett* Court concluded,

> the [*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.

(*Stinnett, supra*, 198 Cal.App.4th at 1430.)

Finally, the *Stinnett* Court agreed that "it is a judicial responsibility to determine the constitutionality of a statute," but observed,

> [o]ur Supreme Court, however, has already determined the constitutionality of section 3333.2 in *Fein*, in which it concluded the statute does not violate equal protection because the Legislature rationally could conclude a medical malpractice crisis existed that required legislative intervention to reduce medical malpractice insurance costs, and that section 3333.2 is rationally related to the cost reduction goal.

(*Stinnett, supra*, 198 Cal.App.4th at 1431.)

In other words, although the *Stinnett* Court acknowledged "the principle of changed circumstances," that court deferred to the California Supreme Court, which, in turn, deferred to the Legislature.

D. Plaintiff's Changed Circumstances Argument Should Be Rejected

Plaintiff's "changed circumstances" argument is premised on three so-called new factors: the enactment of Proposition 103, the profitability of professional liability insurers, and inflation. (AOB, pp. 25, 32-46.) Plaintiff urges this Court to draw the inference that "the rational basis upon which section 3333.2's damages cap was

enacted and upheld by the Supreme Court *no longer exists*." (AOB, p. 32, emphasis in original.) In effect, plaintiff invites this Court to infer that Civil Code section 3333.2 no longer is necessary because Proposition 103 requires the Commissioner of Insurance to approve insurance rates. This Court should not draw the inference plaintiff invites.

1. Plaintiff's premise is irrelevant, insufficient, and incomplete

The three factors upon which plaintiff relies for her argument (profitability, Proposition 103, and inflation) are not *relevant* to the question of whether Civil Code section 3333.2 has *any* rational basis. The obvious purpose of Section 3333.2 is to limit the amount of noneconomic damages in medical malpractice litigation, not to regulate insurance rates. The obvious purpose of Proposition 103 is insurance rate regulation, not to limit the amount of noneconomic damages in medical malpractice litigation. The two are distinct, which explains why they are set forth in different codes.

Just as obviously, these three disputed factors are not *sufficient* to draw the inference that Civil Code section 3333.2 has no rational basis. For example, these three factors do not explain the relationship between the amount of noneconomic damages in medical malpractice litigation and the amount of malpractice insurance premiums that health care providers must pay. Far more information is necessary, beginning with projections of the increased amount that insurers will have to pay for claims with unlimited noneconomic damages.

Regardless, there still is the question whether Section 3333.2 does not achieve *any* of its legislative purposes. That is the true constitutional question. As noted above, MICRA had many features and, therefore, many purposes. In order to demonstrate that Section 3333.2 has no "rational basis," plaintiffs must rule out the other bases for the statute, not the least of which is the availability of insurance coverage. Plaintiff does not bother addressing these issues

2. Plaintiff's premise is unfounded

Plaintiff claims that Section 3333.2 did not have an impact upon insurance premiums, but rather credits the 1988 passage of Proposition 103 with premium reductions in the late 80's.[3] Not so. As the *American Bank* court explained, after passage, the provisions of MICRA were constitutionally challenged and not fully implemented until those challenges concluded. (*American Bank, supra*, 36 Cal.3d at 373-374.) *Fein* was not decided until 1985. Only thereafter could Section 3333.2 have an impact upon insurance premiums, but even then the impact would take time.

Furthermore, plaintiff relies upon such measures as loss ratios, reserves, and surplus to argue for the judicial repeal of MICRA. Plaintiff misses the mark. Loss ratios exclude consideration of any defense costs or operating costs.

Equally troubling is plaintiff's argument related to the adequacy of reserves and surplus. Companies need a level of reserves and

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[3] Of course, constitutionality does not depend upon the success of the measure. (*Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 466; *American Bank, supra*, 36 Cal.3d at 374.)

surplus to respond to their policyholder obligations, regardless of the market volatility. It is only with adequate reserves and surplus that insurers are able to withstand the market fluctuations and provide the type of stability that MICRA was meant to insure.

Finally, plaintiff touts inflation as her final factor. It goes without saying that legislators were aware of inflation in 1975. What is more, the Court of Appeal has rejected the impact of inflation over time as a basis to challenge the constitutionality of Section 3333.2. (*Stinnett, supra*, 198 Cal.App.4th at 1432.) The Legislature originally considered indexing the noneconomic damages cap to inflation, but the plaintiff lawyers' lobby withheld their support for an indexed cap, believing indexing would improve the chances of passing a cap. (Edwards, *Medical Malpractice Non-Economic Damages Caps* (2006) 43 Harv. J. on Legis. 213, 224, citing *Perspectives: An Interview With MICRA Author Barry Keene*, CAPP [Californians Allied for Patient Protection] (Aug. 8, 2005) p. 3.)

More recently, the Legislature specifically considered and rejected the idea of indexing the damages cap. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1380 (1999-2000 Reg. Sess.) as amended May 24, 1999.) Assembly Bill No. 1380 (1999-2000 Reg. Sess.) would have indexed the MICRA cap annually to the Consumer Price Index, but the bill was rejected.

3. Plaintiff asks this Court to make factual determinations and policy by decisions that should be made by the legislature.

Plaintiff's proposed conclusion that Civil Code section 3333.2 no longer is necessary to keep insurance rates affordable requires factual findings and policy decisions that only the Legislature should make. Neither the parties nor this Court is equipped to consider the many complex and intricate issues required to evaluate the wisdom and utility of Section 3333.2. The United States Supreme Court made this point clear: "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." (*Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. at 469, quoting *Ferguson v. Skrupa* (1963) 372 U.S. 726, 729, internal quotation marks omitted.) Where the evidence is "at least debatable," the Court would err in "substituting its judgment for that of the legislature." (*Ibid.*)

F. The Florida Supreme Court Case Cited By Plaintiff, *Estate of McCall v. U.S.*, Is Inapposite

1. *McCall* is limited to wrongful death medical malpractice claims

The Florida Supreme Court case cited by plaintiff (at AOB, pp. 46-51), *Estate of McCall v. U.S.* (Fla. 2014) 134 So.3d 894 (*McCall*), is limited to wrongful death noneconomic damages based on medical malpractice claims. (*McCall, supra,* 134 So.3d at 899.) The *McCall* Court explicitly stated, "[t]he legal analyses for personal injury damages and wrongful death damages are not the same. The present case is *exclusively* related to wrongful death, and our analysis is

limited accordingly." (*McCall, supra,* 134 So.3d at 900, fn. 2, italics added.)

As there is no wrongful death claim in this case, *McCall*'s limited holding has no potential application here.

2. The Florida statute distinguishes between a per-claimant cap and an aggregate cap

The *McCall* plurality based its decision, in part, on the fact that Florida's statute included an aggregate cap of $1 million recoverable by all plaintiffs (in addition to a $500,000 per-claimant cap). *McCall, supra,* 134 So.3d at 915 ["Health care policy that relies upon discrimination against Florida families is not rational or reasonable when it attempts to utilize aggregate caps to create unreasonable classifications."].) MICRA has no such "aggregate" cap and simply limits the recovery to $250,000 per claimant. (Civ. Code, § 3333.2.) While all plaintiffs' claims merge into one in California wrongful death claims to yield only one $250,000 for all claimants, California courts — unlike Florida courts — have universally endorsed this procedure. (See *Engala v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 969 ["upon the passing of [the decedent], the case of *Yates v. Pollock* (1987) 194 Cal.App. 3d 195 [ ], required merger of the widow's loss of consortium claim into an indivisible claim for wrongful death, which warrants only a single general damage claim limited to $250,000."].)

3. The history of the damages cap in Florida is vastly different than that of the California damages cap

The Florida statute was enacted in 2003. California Civil Code section 3333.2 was enacted in 1975. While the California Supreme Court and Court of Appeal have universally acknowledged the legitimacy of the legislature's decision to enact MICRA's noneconomic damages cap (see, *e.g.*, *Fein*), the Florida Supreme Court found the Florida legislature's reasoning "dubious" from the outset:

> [A]lthough medical malpractice premiums in Florida were undoubtably high in 2003, we conclude the Legislature's determination that "the increase in medical malpractice liability insurance rates is forcing physicians to practice medicine without professional liability insurance, to leave Florida, to not perform high-risk procedures, or to retire early from the practice of medicine" is unsupported. . . . Thus, the finding by the Legislature and the Task Force that Florida was in the midst of a bona fide medical malpractice crisis, threatening the access of Floridians to health care, is dubious and questionable at the very best.

(*McCall, supra*, 134 So.3d at 909.)

Unlike the Florida Supreme Court, the California Supreme Court has acknowledged that a "rise in insurance rates . . . is not a temporary problem; **it is a chronic situation** . . . ." (*Calfarm Insurance Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821, emphasis added.) Moreover, in recent years the Legislature has recognized

ongoing threats to the health care industry. (See, *e.g.*, Bus. & Prof. Code, § 2418, subd. (a)(1) ["The Legislature hereby finds and declares . . . The State of California is facing a growing crisis in physician supply due, in part, to difficulties in recruiting and retaining physicians"] (enacted 2005); Bus. & Prof. Code, § 2425.1 ["**Currently, California is experiencing an access to health care crisis**...."] (enacted 2001), emphasis added.)

Florida case law, interpreting a Florida statute, has no application to this case which is controlled by California law.

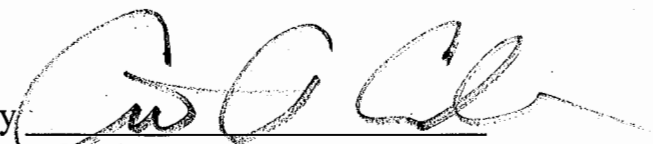
CONCLUSION

No court has ever held that MICRA is unconstitutional. To the contrary, the California Supreme Court and Courts of Appeal have rejected repeated challenges to MICRA, whether based on due process, equal protection, or interference with the right to jury trial.

Plaintiff's challenge to MICRA should be rejected by this Court.

DATED: February 9, 2015

COLE PEDROZA LLP

By 

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CERTIFICATION

As determined by the software used to prepare this brief, this brief consists of 9,863 words.

DATED: February 9, 2015

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PROOF OF SERVICE
(State of California)

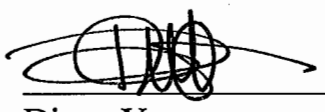
I am employed by Cole Pedroza LLP, in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2670 Mission Street, Suite 200, San Marino, California, 91108.

On the date stated below, I served in the manner indicated below, the foregoing document described as: **APPLICATION OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA HOSPITAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT; AMICUS BRIEF IN SUPPORT OF RESPONDENT** on the parties indicated below by placing a true copy thereof, enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

By United States Postal Service – I am readily familiar with the business's practice for collecting and processing of correspondence for mailing with the United States Postal Service. In that practice correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, with the postage thereon fully prepaid, in San Marino, California. The envelope was placed for collection and mailing on this date following ordinary business practice.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9th day of February 2015, at San Marino, California.



Diane Yee

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Honorable Victor E. Chavez Los Angeles Superior Court 111 North Hill Street Los Angeles, CA 90012	TRIAL COURT
California Supreme Court 350 McAllister Street San Francisco, CA 94102	Served electronically pursuant to California Rules of Court, rule 8212(c)(2)(a)