B237476

Court of Appeal of the State of California
Second Appellate District, Division Four

HAMID RASHIDI,
Plaintiff and Appellant,

v.

FRANKLIN MOSER, M.D.,
Defendant and Respondent.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
CASE NO. BC392082; HON. RICHARD FRUIN, JR.

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

TUCKER ELLIS LLP
E. Todd Chayet, SBN 217694
Rebecca A. Lefler, SBN 225414
Corena G. Larimer, SBN 277188
515 South Flower Street, Forty-Second Floor
Los Angeles, CA 90071-2223
Telephone: 213.430.3400; Facsimile: 213.430.3409
todd.chayet@tuckerellis.com
rebecca.lefler@tuckerellis.com
corena.larimer@tuckerellis.com
Counsel for 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), California Dental Association (CDA), and American Medical Association (AMA) request permission to file the attached Amici Curiae Brief in support of Appellant and Cross-Respondent Franklin Moser, 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; Norcal Mutual Insurance 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 the AMA, CMA, CHA, and CDA 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. 28-69.) Amici support these points in Appellant's Reply.

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: June 6, 2013

TUCKER ELLIS LLP
E. Todd Chayet

By: _____
E. Todd Chayet
Counsel for Amici Curiae
California Medical Association,
California Dental Association,
California Hospital Association,
and American Medical
Association

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. The Supreme Court has made clear that MICRA's cap on noneconomic damages, contained in 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 Supreme Court has rejected equal protection claims such as Plaintiff's, holding 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 the constitutional right to a jury trial. (*American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc.* (1984) 36 Cal.3d 359, 368 ("*American Bank*").) The Court of Appeal has also rejected Plaintiff's equal protection and right to jury trial arguments. (*Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1419 ("*Stinnett*"); *Yates v. Pollock* (1987) 194 Cal.App.3d 195, 200 ("*Yates*").)

Plaintiff's argument that Section 3333.2 violates the separation of powers is incompatible with California cases holding that limiting noneconomic damages (and other aspects of jury trials) is a proper

legislative function. Plaintiff's separation of powers argument has been rejected in the vast majority of states that have addressed that argument.

Plaintiff nonetheless argues that this Court should reject precedent and hold that he has a right to collect damages in the amount determined by the jury without regard to Section 3333.2. (As Plaintiff obtained settlements with various parties in an aggregate amount far greater than the amount of damages the jury determined he suffered, he actually seeks to recover damages in excess of the jury's award.)

Plaintiff's arguments are no more availing here than they were before the Supreme Court and they should be rejected.

II. DISCUSSION

A. MICRA's constitutionality is settled law.

This appeal is the latest in a protracted line of cases challenging MICRA's constitutionality since the Legislature first enacted the statute in 1975. Despite that prolonged attack, California's Supreme Court and numerous appellate courts uniformly have held MICRA constitutional and there is no basis for departing from those holdings here.

The California Supreme Court has upheld MICRA multiple times and has even held the particular section at issue here—the cap on nonmonetary compensatory damages—constitutional. (See *Fein*, 38 Cal.3d 137 [upholding Section 3333.2's damages cap despite equal protection and due process arguments]; see also *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920 [upholding limitations on contingent fee arrangements despite equal protection and due process arguments]; *Barme v. Wood* (1984) 37 Cal.3d 174 [upholding MICRA's bar on collateral source reimbursements despite equal protection and due process arguments]; *American Bank,* 36 Cal.3d 359 [upholding MICRA's periodic payment provision despite equal protection, due process and right-to-a-jury arguments]; *Reigelsperger v. Siller* (2007) 40 Cal.4th 574

[holding that patients are bound to arbitrate claims based on future services, consistent with MICRA's arbitration provision]; *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 843-844 [holding that heirs are bound by a patient's agreement to arbitrate under MICRA's arbitration provision].)

The Court of Appeal, including this District, likewise has repeatedly rejected constitutional challenges to MICRA—most recently by finding the noneconomic damages cap at issue constitutional. (See *Stinnett*, 198 Cal.App.4th 1412; *Yates*, 194 Cal.App.3d 195.) The *Stinnett* court held the plaintiff's claims that Section 3333.2 violated equal protection and a jury trial rights under the California Constitution were "without merit." (*Stinnett*, 198 Cal.App.4th at 1418, 1433.) As the *Stinnett* court explained, "judicial challenges to various provisions of MICRA were abundant, but unsuccessful." (198 Cal.App.4th 1412, 1419.) Plaintiff's arguments here are no different. They run counter to the Supreme Court's and Court of Appeal's numerous pronouncements on the issue: MICRA is constitutional.

B. Section 3333.2 does not violate equal protection.

1. Rational basis is the proper standard of review.

The rational basis standard of review applies to Plaintiff's equal protection claim, as courts have consistently found when analyzing challenges to MICRA. (*See American Bank,* 36 Cal.3d at 373; *Fein,* 38 Cal.3d at 163-164; *Stinnett*, 198 Cal.App.4th at 1426-27; *Young v. Haines* (1986) 41 Cal.3d 883, 899 ["The MICRA cases establish the general rule that the rational basis test is the appropriate standard for reviewing legislative classifications among personal injury plaintiffs."].)

Strict scrutiny does not apply here, as Plaintiff argues. Only "[c]lassifications that . . . impinge upon the exercise of a 'fundamental right' are subject to strict scrutiny." (*Jensen v. Franchise Tax Bd.* (2009)

178 Cal.App.4th 426, 434.) There is no fundamental right to the recovery of damages. (See, e.g., *Durham v. City of Los Angeles* (1979) 91 Cal.App.3d 567, 572 ["the Supreme Court has rejected the contention that the right to sue for negligently inflicted injuries is a 'fundamental interest' analogous to voting rights or education"], citing *Brown v. Merlo* (1973) 8 Cal.3d 855, 862, fn. 2; *Miller v. Sciaroni* (1985) 172 Cal.App.3d 306, 312 ["the right to sue for negligently inflicted injuries is not a fundamental right"].) Not only is a claim to damages not a *fundamental* right, but case law makes clear that there is no right at all to a specific measure of damages. See Section II(B)(4), *infra*. Thus, rational basis is the proper standard of review.

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....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 omitted].) "On rational-basis review, a classification [bears] a strong presumption of validity. . . ." (508 U.S. at pp. 314-315.)

Second-guessing the wisdom of the Legislature is not the province of the judiciary and is not properly part of the rational basis test. Plaintiff offers no sufficient grounds to justify a departure from this well-established rule.

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

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. Plaintiff advances two equal protection arguments. In addition to arguing that Section 3333.2 discriminates between medical malpractice plaintiffs and other tort plaintiffs, he argues that Section 3333.2 discriminates against the "most 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. 41.)

Though Plaintiff argues that MICRA's noneconomic damages cap "irrationally singles out the victims of medical malpractice for unfair treatment" (XAOB 41), the cap is fairly and evenly applied. The cap applies to everyone who is injured by malpractice. Every patient in California has the same right to sue for up to $250,000 in noneconomic damages. And every Californian benefits from the access to care that MICRA's damages cap fosters.

Plaintiff's equal protection arguments are identical to arguments already presented to—and rejected by—the California Supreme Court. In *Fein*, the plaintiff challenged MICRA's damages cap as "violat[ing] the equal protection clause, both because it impermissibly discriminates between medical malpractice victims and other tort victims, imposing its limits only in medical malpractice cases, and because it improperly discriminates within the class of medical malpractice victims, denying a 'complete' recovery of damages only to those malpractice plaintiffs with noneconomic damages exceeding $250,000." (*Fein*, 38 Cal.3d 137, 161-62.) The Supreme Court rejected those arguments, finding it "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 159.) The Court held that "the 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." (*Id.* 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.*)

As the Supreme Court found, 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*, 50 Cal.4th at p. 843-844, quoting *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 577-578; see also *American Bank,* 36 Cal.3d at 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*, 50 Cal.4th at p. 844.)

Nearly twenty years after the enactment of MICRA, the Supreme Court, considering the policy behind the statutory scheme, 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.)

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.

Plaintiff focuses heavily on the argument that the medical malpractice crisis that drove MICRA no longer exists. As an initial matter, the Supreme Court already rejected this shortsighted view when it acknowledged that a "rise in insurance rates . . . is not a temporary problem; it is a chronic situation. . . ." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821.) Indeed, the Legislature has repeatedly recognized ongoing threats to the healthcare industry. (See, e.g., Bus. & Prof. Code, § 2418(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, emphasis added]; Bus. & Prof. Code, §

2425.1 ["Currently, *California is experiencing an access to health care crisis....*"] [enacted 2001, emphasis added].)

Changed circumstances cannot justify the invalidation of a law that has been held constitutional by the Supreme Court. Plaintiff asks this Court to do just that, inappropriately inviting the Court to engage in legislative fact-finding. The California Supreme Court has foreclosed that approach:

> 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 Supreme Court has explicitly rejected the invitation to reexamine legislative findings and statutory success. "[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 Plaintiff's 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 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 [emphasis added], citing *Brown v. Merlo* (1973) 8 Cal.3d 855; *Chastleton Corp. v. Sinclair* (1924) 264 U.S. 543.)

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. at 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 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.)

MICRA and its effects, which go far beyond Mr. Rashidi and Dr. Moser, should be left in the legislature's hands. 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.)

Neither trial nor appellate courts are in a position to assess arguments asserted 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. Plaintiff's "changed circumstances" argument cannot justify the invalidation of a law that has been held constitutional by the California Supreme Court.

4. Plaintiff has 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. 44-46 ["While the MICRA cap might have once provided reasonable compensation to severely injured plaintiffs, the amount of damages plaintiffs are able to recover in real dollars has significantly decreased over time."].) This

argument does not address whether the classification is rationally related to a legitimate state interest and should, therefore, be rejected.

As noneconomic damages are intangible and immeasurable in any event, it is illogical to tie noneconomic damages limits to economic measurements such as an inflation index. (See Civ. Code § 1431.2(a) ["'economic damages' means objectively verifiable monetary losses"], Civ. Code § 1431.2(b) ["'non-economic damages' means subjective non-monetary damages"]; *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600 ["'Proposition 51 . . . retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damages were limited by Proposition 51 to a rule of strict proportionate liability."].)

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 *Fein*, the Supreme 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 MICRA's enacting legislation, 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).) Twice since then, the Legislature has considered increasing the damages cap in Section 3333.2, but has declined to do so. (Appellant's Reply and Cross-Respondent's Brief, pp. 59-60.) 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.)

Plaintiff's argument that MICRA's noneconomic damages cap no longer has a rational basis due to inflation ignores the fact that many states have adopted $250,000 caps on certain noneconomic damages against healthcare providers much more recently than 1975. (See, e.g., Alaska Stat. § 9.17.010 (1997); Idaho Code Ann. § 6-1603 (2003); Kansas Stat. Ann. §§ 60-1902, 60-1903 (1998); Montana Code Ann. § 25-9-411 (1997); Ohio Rev. Code § 2315.18 (2002); Texas Civil Practice & Remedies Code § 74.301 (2003); West Virginia Code Ann. § 55-7B-8 (2003); see also *MacDonald v. City Hospital* (W. Va. 2011) 715 S.E.2d 405 [upholding West Virginia's noneconomic damages cap].)

While other state legislatures may have decided to index the noneconomic damages caps for inflation, there is no authority to suggest such indexing is required in California. "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. at 729.) The Legislature has considered and rejected a modification to Section 3333.2, and there is no basis for holding it unconstitutional.

C. <u>Section 3333.2 does not violate the right to a jury trial.</u>

Plaintiff also attacks Section 3333.2 on the grounds that it violates his right to a jury trial because it limits his right to have a jury determine damages. He does not dispute, however, that a jury actually determined his damages. Thus, Plaintiff's claim is essentially that he is

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. (*Stinnett*, 198 Cal.App.4th at 1433, *Yates*, 194 Cal.App.3d 195, 200.)

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.) Here, the trial court did not usurp the jury's role by making determinations of fact about the value of Plaintiff's 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* 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,* 194 Cal.App.3d at 200.) Plaintiff argues that *Stinnett* was wrongly decided on this issue (XARB 8-10), but *Stinnett* is 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 Plaintiff's argument that applying MICRA's noneconomic damages cap in this case violates her right to a jury trial.

Plaintiff argues that "both *Yates* and *Stinnett* were wrongful death actions, not common law medical negligence to which the jury-trial right applies" (XAOB 37; XARB 8), but he does not say why he believes that is significant. As Dr. Moser points out in his Cross-Respondent's Brief, the legislature has the power to modify the common law and appropriately did so in enacting MICRA's noneconomic damages cap. That is why the Supreme Court in *Fein*—which was also an injury rather than a wrongful death case—upheld MICRA's noneconomic damages cap. (*Fein*, 38 Cal.3d at 159-60.) The fact that the present case is an injury case rather than a wrongful death case is immaterial. As the Supreme Court noted, "no California case . . . has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision." (*Id.*)

In short, Plaintiff does not have a constitutional entitlement to the amount of damages awarded by the jury. Section 3333. 2, which limits liability for certain damages, is not unconstitutional and cannot be overturned on such grounds.

D. Section 3333.2 does not violate the separation of powers.

Section 3333.2 does not impinge on "the inherent authority of the judiciary to decide cases and enter judgments," as Plaintiff argues. (XAOB 48.) Plaintiff asserts that "recalculating damages after the jury's assessment constitutes a form of remittitur." (XAOB 49.)

Remittitur, however, necessarily relies 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; Code Civ. Proc., § 662.5.) An application of MICRA's noneconomic damages cap requires no such finding. Section 3333.2 simply "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.)

Thus, Section 3333.2 does not result in the Legislature usurping the jury's role by making determinations of fact about the *value* of a particular plaintiff's damages. As noted above, Plaintiff does not suggest that Section 3333.2 prevented the jury in this case from finding that he suffered more than $250,000 in noneconomic damages. By enacting MICRA the Legislature has not stepped beyond the bounds of its proper role, which includes limiting the amount of recoverable damages when appropriately related to a state interest. (See *American Bank,* 36 Cal.3d 359, 368 ["It is well established that . . . the Legislature possesses broad authority to modify the scope and nature of such damages."].)

The Supreme Court has repeatedly indicated that placing limitations on noneconomic damages is a proper exercise of legislative power rather than judicial power. (*Fein, supra,* 38 Cal.3d at pp. 157-160; *American Bank, supra,* 36 Cal.3d at pp. 368-370; *Werner v. Southern California Associated Newspapers, supra,* 35 Cal.2d at pp. 126-128; *Feckenscher v. Gamble, supra,* 12 Cal.2d at pp. 499-500.)

In *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, the Court held that Business and Professions Code section 6146, a MICRA provision limiting the amount of fees an attorney may obtain in a

medical malpractice action, does not violate the separation of powers doctrine. The Court rejected the plaintiffs' argument "that in light of this court's inherent power to review attorney fee contracts and to prevent overreaching and unfairness [citation], the question of the appropriateness of attorney fees is a matter committed solely to the judicial branch." (*Id.* at 933.) The Court reasoned that "legislative bodies have imposed limits on attorney fees in a variety of fields throughout our history. Applicable California authority expressly refutes the claim that the Legislature has no power to act in this setting." (*Id.*)

The overwhelming majority of states that have addressed a separation of powers argument in the context of a limit on noneconomic damages for medical malpractice have rejected that argument. (See, e.g. *Miller v. Johnson* (Kan. 2012) 289 P.3d 1098; *Verba v. Ghaphery* (W. Va. 2001) 552 S.E. 2d 406; *Boyd v. Bulala* (4th Cir. (Va.) 1989) 877 F.2d 1191; *Etheridge v. Medical Center Hospitals* (Va. 1989) 237 Va. 87, 376 S.E.2d 525; *Gourley v. Nebraska Methodist Health System, Inc.* (Neb. 2003) 265 Neb. 918, 663 N.W.2d 43; *Pulliam v. Coastal Emergency Services of Richmond, Inc.* (Va. 1999) 509 S.E.2d 307; *Garhart v. Columbia/HealthOne, L.L.C.* (Col. 2004) 95 P.3d 571, 581–82; *Zdrojewski v. Murphy* (Mich.App. 2002) 657 N.W.2d 721, 739; *Judd v. Drezga* (Utah 2004) 103 P.3d 135; *Evans v. State* (Alaska 2002) 56 P.3d 1046, 1055–56; *Kirkland v. Blaine County Medical Center,* (Idaho 2000)14 P.3d 1115, 1121–22; *Owens–Corning v. Walatka* (Md. App. 1999) 725 A.2d 579, 590–92; but see *Sofie v. Fibreboard Corp.* (Wash. 1989) 771 P.2d 711; *Lebron v. Gottlieb Memorial Hospital* (Ill. 2010) 237 Ill.2d 217.) In the Illinois case of *Lebron v. Gottlieb Memorial Hospital*, one justice noted that the

majority's decision was contrary to every decision on the issue since 1997:

> Because reduction of an award to comport with legal limits does not involve a substitution of the court's judgment for that of the jury, but rather is a determination that a higher award is not permitted as a matter of law, it is not a remittitur at all. [Citations.] State courts of review considering damages caps in the wake of *Best* [*v. Taylor Machine Works* (Ill. 1997) 179 Ill.2d 367], have uniformly reached the same conclusion. Rejecting *Best,* they have held that such caps are distinguishable from judicial remittiturs and constitute a legitimate exercise of legislative power.

(*Lebron v. Gottlieb Memorial Hospital,* 237 Ill.2d at 274-275 [J. Karmeier, concurring in part and dissenting in part].)

As the Utah Supreme Court explained in *Judd v. Drezga*, 103 P.3d 135 "[t]he power to declare what the law shall be is legislative. The power to declare what is the law is judicial." (*Id.* at 145.) Noting the long-established legislative involvement in establishing standards, elements and controls to guide juries, the Court held: "The damage cap represents law to be applied, not an improper usurpation of jury prerogatives. Consequently, it does not violate the separation of powers provision of the constitution." (*Id.*)

While determining whether the damages in a particular case are excessive may be a judicial function, setting a damages cap applicable to all medical malpractice cases is a legislative function. Nothing about Section 3333.2 undermines the role of the judiciary and, therefore, the separation of powers doctrine is not violated.

III. CONCLUSION

The Supreme Court and Court of Appeal repeatedly have held that MICRA generally and Section 3333.2 specifically are rationally related to legitimate state interests. None of Plaintiff's arguments

change that analysis or those conclusions and Plaintiff cannot deny that it is beyond 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 Plaintiff's right to a jury trial or the separation of powers. There is no legitimate basis to question the constitutionality of Section 3333.2.

Dated: June 6, 2013

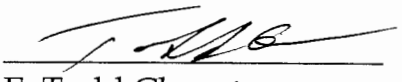
Respectfully submitted,

TUCKER ELLIS LLP
E. Todd Chayet

By: _____
E. Todd Chayet
Counsel for Amici Curiae
California Medical Association,
California Dental Association,
California Hospital Association,
and American Medical
Association

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 6,335 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By 

E. Todd Chayet

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Estella Licon

SERVICE LIST

Curtis A. Cole, Esq.
Kenneth R. Pedroza, Esq.
Cole Pedroza LLP
200 South Los Robles Ave.
Suite 300
Pasadena, CA 91101-4006
Tel: (626) 431-2787
Fax: (626) 431-2788

(Attorneys for Defendant, Appellant and Cross-Respondent Franklin Moser, M.D.)

Robert C. Reback, Esq.
Reback, McAndrews, Kjar, Warford & Stockalper, LLP
1230 Rosecrans Ave., Suite 450
Manhattan Beach, CA 90266
Tel: (310) 297-9900
Fax: (310) 297-9800

(Attorneys for Defendant, Appellant and Cross-Respondent Franklin Moser, M.D.)

Daniel K. Balaban, Esq.
Andrew J. Spielberger, Esq.
Balaban & Spielberger, LLP
11999 San Vicente Blvd., Suite 345
Los Angeles, CA 90049
Tel: (424) 832-7677

(Attorneys for Plaintiff & Appellant Hamid Rashidi)

Stuart B. Esner, Esq.
Holly N. Boyer, Esq.
Esner, Chang & Boyer
234 East Colorado Blvd.
Suite 750
Pasadena, CA 91101
Tel: (626) 535-9860
Fax: (626) 535-9859

(Attorneys for Plaintiff & Appellant Hamid Rashidi)

Hon. Richard L. Fruin, Jr.
Los Angeles Superior Court
111 North Hill Street, Dept. 15
Los Angeles, CA 90012
(Trial Judge)

Clerk's Office
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303
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