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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JAMES VAN BUREN,
Plaintiff and Appellant,

vs.

SIAN EVANS, M.D. and YOSEMITE SURGERY ASSOCIATES,
Defendants and Respondents.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF MERCED
RONALD W. HANSEN, JUDGE • 146178

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA HOSPITAL ASSOCIATION, AND CALIFORNIA DENTAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Under California Rules of Court, rule 8.200(c), the California Medical Association (CMA), California Hospital Association (CHA), and California Dental Association (CDA) request permission to file the attached amici curiae brief in support of defendants and respondents Sian Evans, M.D. and Yosemite Surgery Associates.

CMA is a nonprofit, incorporated, professional association of more than 35,000 physicians practicing in California, in all specialties.

CDA represents almost 24,000 California dentists, approximately 70 percent of the dentists practicing in this state. CMA's and CDA's membership includes most of the physicians and dentists engaged in the private practice of medicine and dentistry in California. CHA (formerly known as the California Association of Hospitals and Health Systems) represents approximately 450 hospitals, including virtually all of this state's acute care hospitals. CMA, CHA, and CDA have been very active in California's courts in cases involving issues of concern to the healthcare community.

This appeal involves numerous challenges to the validity of Civil Code section 3333.2, which is an integral part of the Medical Injury Compensation Reform Act of 1975 (MICRA). This legislation is of great interest to CMA, CHA, and CDA.

As counsel for CMA, CHA, and CDA, we have reviewed the Appellant's Opening Brief and the Respondents' Brief in this case and believe this court will benefit from additional briefing on the validity of section 3333.2. The attached amici curiae brief supplements, but does not duplicate, the parties' briefs. It puts section 3333.2 in context with the rest of the MICRA legislation, and also discusses authorities that are relevant to the issues raised but are not cited by either party.

Accordingly, amici respectfully request that this court accept and file the attached amici curiae brief.

Dated: October 10, 2008.

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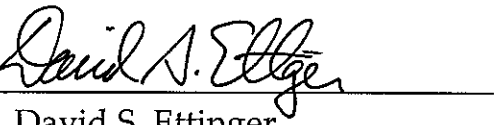
By 
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AMICI CURIAE BRIEF

INTRODUCTION

Civil Code section 3333.2 limits the amount of noneconomic damages that a medical malpractice plaintiff may recover to $250,000. Plaintiff makes various challenges to the statute's validity.

More than 20 years ago, in upholding section 3333.2 against other attacks, the Supreme Court stated that "no California case of which we are aware has ever suggested that the right to recover . . . noneconomic injuries is constitutionally immune from legislative limitation or revision." (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 159-160.) Plaintiff presents no good reason why this court should blaze a new trail.

LEGAL DISCUSSION

I.

MICRA'S LIMIT ON NONECONOMIC DAMAGES IS A KEY COMPONENT OF A COMPLEX AND BALANCED LEGISLATIVE PLAN THAT HAS INSURED THE AVAILABILITY OF ADEQUATE MEDICAL CARE IN CALIFORNIA.

Plaintiff's appeal is primarily an attack on the constitutionality of Civil Code section 3333.2. This statute limits to $250,000 "the amount of damages for noneconomic losses" that a plaintiff may recover "[i]n any action for injury against a health care provider based on professional negligence." (Civ. Code, § 3333.2, subds. (a), (b).)

Although not apparent from plaintiff's briefing, section 3333.2 is a key part of the Medical Injury Compensation Reform Act (MICRA). The Legislature enacted MICRA as "a comprehensive, multifaceted scheme designed to address a perceived threat to our state's health care system." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114 (*Western Steamship*).) This threat came from a dramatic rise in medical malpractice insurance premiums that endangered "[t]he continuing availability of adequate medical

care[, which] depends directly on the availability of adequate insurance coverage." [1/] (*Id.* at p. 111.)

MICRA added or amended dozens of statutes. (Stats. 1975 (1975-1976 Second Ex. Sess.) chs. 1, 2, pp. 3949-4007.) As the Supreme Court explained, MICRA is "a lengthy statute which attacked the problem on several fronts. 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

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1/ MICRA was enacted at a special session of the Legislature. When he called the special session, the Governor stated in a proclamation, "The cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people of this State, and threatens the closing of many hospitals. The longer term consequences of such closings could seriously limit the health care provided to hundreds of thousands of our citizens." (Governor's Proclamation to Leg. (May 16, 1975) Stats. 1975 (1975-1976 Second Ex. Sess.) p. 3947.)

MICRA's preamble states, "The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide an adequate and reasonable remedy within the limits of what the foregoing public health and safety considerations permit now and into the foreseeable future." (Stats. 1975 (1975-1976 Second Ex. Sess.) ch. 2, § 12.5, p. 4007.)

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 & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 363-364 (*American Bank & Trust*).)

Section 3333.2 is, of course, one of the MICRA provisions designed to reduce the cost of medical malpractice litigation.

MICRA took a balanced approach to cost reduction. To begin with, "the Legislature *placed no limits whatsoever on a plaintiff's right to recover for all of the economic, pecuniary damages—such as medical expenses or lost earnings—resulting from the injury,* but instead confined the statutory limitations to the recovery of *noneconomic damages,* and—even then—permitted up to a $250,000 award for such damages." (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 159 (*Fein*), original emphases.) The Legislature allowed the recovery of up to $250,000 in noneconomic damages despite the fact that "[t]houghtful jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting, inter alia, the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers." (*Ibid.*)

Further, other MICRA provisions mitigate the inability to recover unlimited amounts of noneconomic damages. For example, the amount of a contingent attorney fee is limited in a medical malpractice case. (Bus. & Prof. Code, § 6146, subd. (a); see *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 932 (*Roa*) ["The Legislature may reasonably have concluded that a limitation on contingency fees in this field was an 'appropriate means of protecting the already diminished compensation' of [medical malpractice] plaintiffs from further reduction by high contingency fees"].) MICRA also protects the plaintiff against reimbursement claims by those paying benefits to the plaintiff as a result of the injury caused by medical malpractice. (Civ. Code, § 3333.1, subd. (b).)

Finally, if malpractice insurance is not affordable, there is "the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments." (*Fein, supra,* 38 Cal.3d at p. 158; see also *id.* at pp. 160-161, fn. 18 [""It should be emphasized . . . that it is collecting a judgment, not filing a lawsuit, that counts . . . . [A] defendant with theoretically 'unlimited' liability may be unable to pay a judgment once obtained""].) One of the Legislature's aims was "to insure that insurance would in fact be available as a protection for patients injured through medical malpractice." (*American Bank & Trust, supra,* 36 Cal.3d at p. 372.)

Focusing, as plaintiff does, on section 3333.2 in isolation, rather than in the context of all the interrelated MICRA provisions, provides too narrow a vantage point.

II.

IN A CASE INVOLVING THE MICRA LIMIT ON NONECONOMIC DAMAGES, THE SUPREME COURT HELD THAT "THE LEGISLATURE RETAINS BROAD CONTROL OVER THE MEASURE" OF A MEDICAL MALPRACTICE PLAINTIFF'S DAMAGES.

In *Fein, supra,* 38 Cal.3d 137, the Supreme Court upheld the constitutionality of section 3333.2's limit on noneconomic damages. (See also *Hoffman v. United States* (9th Cir. 1985) 767 F.2d 1431, 1433-1437.)

Plaintiff dismisses *Fein* because the constitutional attacks it rejected are different than the ones he makes now. *Fein* cannot be so easily brushed aside. In that case, the Supreme Court performed a thoughtful and detailed analysis of the Legislature's policy-making

power in the area of medical malpractice litigation. [2/] The court's conclusions are important here.

The *Fein* plaintiff argued that the Legislature acted unconstitutionally when it limited the recoveries of medical malpractice claimants. Disagreeing, the Supreme Court began by noting that "'[i]t is well established that *a plaintiff has no vested property right in a particular measure of damages*, and that *the Legislature possesses broad authority to modify the scope and nature of such damages.*'" (*Fein, supra*, 38 Cal.3d at p. 157, original emphasis, quoting *American Bank & Trust, supra*, 36 Cal.3d at p. 368.) The court said that the "*Legislature retains broad control over the measure . . . of damages* that a defendant is obligated to pay and a plaintiff is entitled to receive, and that the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest." (*Fein*, at p. 158, emphasis added.) "[N]o California case of which we are aware," the court observed, "has ever suggested that the right to recover

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2/ Besides upholding the cap on noneconomic damages in *Fein*, the Supreme Court has upheld the MICRA statutes (1) providing for the periodic payment of future damages (*American Bank & Trust, supra*, 36 Cal.3d 359 [Code Civ. Proc., § 667.7]), (2) barring reimbursement rights of collateral sources (*Barme v. Wood* (1984) 37 Cal.3d 174 [Civ. Code, § 3333.1, subd. (b)]), and (3) limiting the amount of a contingent attorney fee (*Roa, supra*, 37 Cal.3d 920 [Bus. & Prof. Code, § 6146]). The *Fein* court also upheld Civil Code section 3333.1, subdivision (a), which allows a defendant to introduce evidence of collateral source benefits. (*Fein, supra*, 38 Cal.3d at pp. 164-167.)

for . . . noneconomic injuries is constitutionally immune from legislative limitation or revision." (*Id.* at pp. 159-160.)

Despite the Supreme Court's comprehensive pronouncement about the Legislature's authority to limit the recovery of noneconomic damages, plaintiff here still claims that the Constitution prohibited the Legislature from enacting such a limit.

III.

NONE OF PLAINTIFF'S ARGUMENTS CASTS DOUBT ON THE SUPREME COURT'S DETERMINATION THAT THE LEGISLATURE HAS BROAD POWER TO LIMIT NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES.

A. The statutory limit on liability for noneconomic damages does not violate the constitutional right to jury trial.

Article I, section 16 of the California Constitution provides in pertinent part, "Trial by jury is an inviolate right and shall be secured to all." Plaintiff claims that the Legislature violated this right by

limiting noneconomic damages in medical malpractice cases to $250,000. [3/]

One Court of Appeal has already expressly rejected the argument plaintiff makes. In *Yates v. Pollock* (1987) 194 Cal.App.3d 195 (Second District, Division Two), the court concluded the jury-trial contention was "but an indirect attack upon the Legislature's power to place a cap on damages" and found dispositive the *Fein* court's analysis, discussed above, that the Legislature has "'broad control'" over the amount of allowable damages. (*Id.* at p. 200.)

As the *Yates* court suggested, it does not make sense that a statutory damage limit could at the same time be within the Legislature's broad powers under equal protection and due process principles, yet violate the right to a jury trial. (See Comment, *Challenging Medical Malpractice Damage Award Caps on Seventh Amendment Grounds: Attacks in Search of a Rationale* (1990) 59 U. Cin. L.Rev. 213, 239 ["The constitutional basis for arguments [about the validity of damage limits], if necessary, should be grounded in state due process or equal protection provisions, not the . . . right to a jury trial"].)

Article I, section 16 is usually invoked by a litigant who did not have a jury trial at all, for example, because the action was not one to

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3/ Presumably, plaintiff's claim is under the California Constitution only. The Seventh Amendment to the United States Constitution also provides a right to jury trial in civil cases, but that amendment does not apply to the States. (*Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1173; *Jehl v. Southern Pac. Co.* (1967) 66 Cal.2d 821, 827 (*Jehl*).)

which the jury-trial right applies (see *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8 ["As a general proposition, '[T]he jury trial is a matter of right in a civil action at law, but not in equity'"]; *NMSBPCSLDHB v. County of Fresno* (2007) 152 Cal.App.4th 954, 958), or because a jury trial was waived (see *People v. $17,522.08 United States Currency* (2006) 142 Cal.App.4th 1076).

Here, plaintiff *did* have a jury trial, and the jury rendered a verdict determining both liability and damages. Plaintiff's complaint is that, after the jury had completed its job, the trial court reduced one element of his damages under the mandate of section 3333.2. This complaint is outside the scope of the right to jury trial.

In *Estate of Bainbridge* (1915) 169 Cal. 166, 169, the Supreme Court held that "*the [jury trial] constitutional guarantee . . . is fully observed when the verdict of the jury in the case is rendered and recorded.* The remaining and different question—whether judgment shall be pronounced upon the verdict or the verdict set aside—is 'strictly of legal cognizance,' which must be determined by the trial court." (Emphasis added; accord, *Estate of Baird* (1924) 195 Cal. 59, 67; *Tramell v. McDonnell Douglas Corp.* (1984) 163 Cal.App.3d 157, 174; *People v. Capps* (1984) 159 Cal.App.3d 546, 552; see *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 889 [citing *Bainbridge*]; see also *Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 786 [right to jury trial was not violated by legislation that "does not preclude a trial"].)

The *Bainbridge* court's conclusion about the scope of the jury trial right accurately reflects the English common law. Blackstone stated:

"When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. *And so ends the trial by jury.*" (3 Blackstone's Commentaries 378, emphasis added.) This is significant because, "[t]he right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the Constitution was adopted" and "what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. . . . It is necessary, therefore, to ascertain what was the rule of the English common law upon this subject in 1850." (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 286-287 (*One 1941 Chevrolet Coupe*).)

The *Bainbridge* court was evaluating the constitutional propriety of a court granting a new trial on the ground of insufficient evidence. However, its holding—that the right to jury trial is satisfied when a jury's verdict is "rendered and recorded" and that it is a "'strictly . . . legal'" decision for the court whether to enter judgment on the verdict—applies equally to the present case where, after the jury's verdict, the trial court reduced the plaintiff's damages as required by statute. Indeed, courts in other states have used this very rationale in upholding statutory damage limitations against right-to-jury-trial challenges.

In *Etheridge v. Medical Center Hospitals* (1989) 237 Va. 87 [376 S.E.2d 525], the Virginia Supreme Court upheld a statute limiting total damages (not just noneconomic damages) in medical malpractice cases. Rejecting the plaintiff's claim that the statute violated her constitutional

right to a jury trial, the court said, "The resolution of disputed facts continues to be a jury's sole function. . . . [¶] Without question, the jury's fact-finding function extends to the assessment of damages. [Citations.] *Once the jury has ascertained the facts and assessed the damages, however, the constitutional mandate is satisfied.* [Citation.] *Thereafter, it is the duty of the court to apply the law to the facts.* [Citation.] [¶] The limitation on medical malpractice recoveries . . . does nothing more than establish the outer limits of a remedy provided by the General Assembly. A remedy is a matter of law, not a matter of fact. [Citations.] A trial court applies the remedy's limitation only *after* the jury has fulfilled its fact-finding function. Thus, [the statutory limitation] does not infringe upon the right to a jury trial because the [statute] does not apply until after a jury has completed its assigned function in the judicial process." (*Id.* at p. 529, first emphasis added.)

Numerous other courts have followed *Etheridge* or used similar reasoning to find that statutory damage limitations do not violate jury-trial rights. (See *Smith v. Botsford General Hosp.* (6th Cir. 2005) 419 F.3d 513, 519 ["the jury's role 'as factfinder [is] to determine the extent of a plaintiff's injuries,' not 'to determine the legal consequences of its factual findings'"]; *Phillips v. Mirac, Inc.* (2004) 470 Mich. 415, 431 [685 N.W.2d 174, 183] (*Phillips*) ["Plaintiff's right to a jury trial is not implicated. She has had a jury trial and the jury determined the facts of her case. The jury's function is complete"]; *Maurin v. Hall* (2004) 274 Wis.2d 28, 71 [682 N.W.2d 866, 888] ["There can be no claim that the . . . constitutional right to a trial by jury was *directly* infringed in this

case because the case *was* tried to a jury, and the jury in fact decided the issue of damages"], overruled on other grounds by *Bartholomew v. Patients Comp. Fund* (2006) 293 Wis.2d 38 [717 N.W.2d 216]; *Kirkland v. Blaine County Medical Center* (2000) 134 Idaho 464, 469 [4 P.3d 1115, 1120] (*Kirkland*) [the plaintiffs "had a jury trial during which they were entitled to present all of their claims and evidence to the jury and have the jury render a verdict based on that evidence. That is all to which the right to jury entitles them"]; *Adams v. Children's Mercy Hosp.* (Mo. 1992) 832 S.W.2d 898, 907 ["Here, the jury assessed liability and then determined damages, both economic and noneconomic. With that the jury completed its constitutional task"]; *Boyd v. Bulala* (4th Cir. 1989) 877 F.2d 1191, 1196 ["once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law"]; *Johnson v. St. Vincent Hospital, Inc.* (1980) 273 Ind. 374, 400-401 [404 N.E.2d 585, 602], overruled on other grounds by *In re Stephens* (Ind. 2007) 867 N.E.2d 148.) [4/]

Of course, the Legislature cannot improperly interfere with a jury's verdict. (See *Jehl, supra,* 66 Cal.2d at p. 829 ["Once a verdict

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4/ Plaintiff relies on a letter from Thomas Jefferson extolling the importance of jury trials. (AOB 5.) Plaintiff fails to point out, however, that Jefferson also recognized the limited nature of the jury's function: "'JURIES therefore . . . determine all matters of fact, leaving to the permanent judges to decide the law resulting from those facts.'" (*Phillips, supra,* 685 N.W.2d at p. 181, fn. 10, quoting Thomas Jefferson to the Abbé Arnoux, July 19, 1789, reprinted in 5 Kurland & Lerner, The Founder's Constitution (1986) p. 364.)

has been returned, . . . the effect of the constitutional provision [guaranteeing the right to jury trial] is to prohibit improper interference with the jury's decision"; holding trial court additur after inadequate jury damage award does *not* violate jury-trial right].) However, a statutory damage limitation is not interference; it does not usurp the jury's important—but limited—role as a fact finder. "[A] legislature adopting a prospective rule of law that limits all claims for pain and suffering in all cases is not acting as a fact finder in a legal controversy. It is acting permissibly within its legislative powers that entitle it to create and repeal causes of action. The right of jury trials in cases at law is not impacted. Juries always find facts on a matrix of laws given to them by the legislature and by precedent, and it can hardly be argued that limitations imposed by law are a usurpation of the jury function." (*Franklin v. Mazda Motor Corp.* (D.Md. 1989) 704 F.Supp. 1325, 1331 (*Franklin*).)

Again, numerous other courts have adopted this reasoning in upholding statutory damage limitations against attacks based on the constitutional right to a jury trial. (See *Arbino v. Johnson & Johnson* (2007) 116 Ohio St.3d 468, 476 [880 N.E.2d 420, 432] (*Arbino*) ["Courts must simply apply the limits as a matter of law to the facts found by the jury; they do not alter the findings of facts themselves, thus avoiding constitutional conflicts"]; *Judd v. Drezga* (Utah 2004) 103 P.3d 135, 144 (*Judd*) ["The damage cap enacted by the legislature represents law, similar to an element of a claim to which the trial court must comport the jury's factual determinations"]; *Phillips, supra,* 685 N.W.2d at p. 182

["excluded from the jury's purview [is] . . . the legal import of the amount of damages found by the jury"]; *Gourley ex rel. v. Methodist Health System* (2003) 265 Neb. 918, 954 [663 N.W.2d 43, 75] (*Gourley*) ["the trial court applies the remedy's limitation only after the jury has fulfilled its factfinding function"]; *Evans ex rel. Kutch v. State* (Alaska 2002) 56 P.3d 1046, 1051 ["The decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury"]; *Madison v. IBP, Inc.* (8th Cir. 2001) 257 F.3d 780, 804 [statutory damage cap does not violate jury-trial right "because it does not impinge upon the jury's fact finding function. In applying the provision, a court does not 'reexamine' the jury's verdict or impose its own factual determination as to what a proper award might be. Rather, it implements the legislative policy decision by reducing the amount recoverable to that deemed to be a reasonable maximum by Congress"], vacated on unrelated grounds (2002) 536 U.S. 919 [122 S.Ct. 2583, 153 L.Ed.2d 773], overruled on unrelated grounds by *Jones v. R.R. Donnelley & Sons Co.* (2004) 541 U.S. 369 [124 S.Ct. 1836, 158 L.Ed.2d 645]; *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1202 (*Hemmings*) [same]; *Kirkland, supra,* 4 P.3d at p. 1120 ["The legal consequences and effect of a jury's verdict are a matter for the legislature (by passing laws) and the courts (by applying those laws to the facts as found by the jury)"]; *Murphy v. Edmonds* (1992) 325 Md. 342, 373 [601 A.2d 102, 117] [statutory limit "fully preserves the right of having a jury resolve the factual issues with regard to the amount of noneconomic damages"];

Robinson v. Charleston Area Med. Center, Inc. (1991) 186 W.Va. 720, 731 [414 S.E.2d 877, 888]; *Davis v. Omitowoju* (3d Cir. 1989) 883 F.2d 1155, 1162 ["the jury's damage verdict was not reduced by the district court judge by an act of reexamination of the jury verdict followed by an independent finding of a verdict for a different amount. Rather, the reduction that was effected came about as a result of—indeed as a requirement of—the legislation enacted by the . . . legislature"]; *English v. New England Medical Center, Inc.* (1989) 405 Mass. 423, 426 [541 N.E.2d 329, 331] ["the right to a jury trial means that, with respect to those questions of fact that the substantive law makes material, the party has the right to have the determination made by a jury" and "the plaintiffs had no right to a jury determination of damages in excess of [the legislatively limited] amount"].)

In a related context, the Court of Appeal in California has recognized the distinction between the jury's limited fact-finding role and the court's role in applying a general legislative policy choice concerning the amount of damages to be recovered. In *Marshall v. Brown* (1983) 141 Cal.App.3d 408 (*Marshall*), the court held that a jury need not be told that its damage award will be tripled according to statute, explaining, "'[I]t is not for the jury to determine the amount of a *judgment*. Its function is to compute the amount of *damages*.'" (*Id.* at p. 418.)

If it were otherwise, the constitutionality of many statutes favoring *plaintiffs*—such as the treble damage statute in *Marshall* and any other legislation providing for double or treble damages—would

be in doubt. The Ohio Supreme Court recently noted the relationship between its state's treble damage statutes—in which "the General Assembly demonstrated a clear policy choice to modify the amount of jury awards"—and the statute under review there that limited the amount of noneconomic damages. (*Arbino, supra,* 880 N.E.2d at p. 432.) The court concluded, "We have never held that the legislative choice to *increase* a jury award as a matter of law infringes upon the right to a trial by jury; the corresponding *decrease* as a matter of law cannot logically violate that right." (*Ibid.*; see also *Phillips, supra,* 685 N.W.2d at pp. 182, 183 ["It is up to the court to determine the legal effect of [the jury's] findings, whether it be that [the plaintiff's] damages are capped, reduced, increased, tripled, reduced to present value, or completely unavailable"]; *Hemmings, supra,* 285 F.3d at p. 1202 [noting "the paradoxical implications of Plaintiffs' claim: If a judge cannot limit damages found by a jury in accordance with a statute, how can a judge impose statutorily mandated double or treble damages without also imposing on the jury's province as sole factfinder?"].)

Indeed, double- and treble-damage statutes are of particular constitutional significance. As explained, the scope of the jury-trial right depends on "the rule of the English common law . . . in 1850," when California's Constitution was adopted. (*One 1941 Chevrolet Coupe, supra,* 37 Cal.2d at p. 287.) "The common law at the time the Constitution was adopted includes not only the *lex non scripta* but also the written statutes enacted by Parliament." (*Ibid.*) "Awards of double or treble damages authorized by statute date back to the 13th century."

(*Browning-Ferris Industries v. Kelco Disposal, Inc.* (1989) 492 U.S. 257, 274 [109 S.Ct. 2909, 106 L.Ed.2d 219]; see also 3 Blackstone's Commentaries 118 [statutory treble damages for waste], 121 ["If the ear be cut off, treble damages are given by statute"].)

Because the modification of jury damage awards by double and treble damage statutes long predates the Constitution, such statutes do not offend the right to jury trial. And, because there should be no constitutional difference between statutorily modifying a jury award upwards or downwards, section 3333.2's limitation on noneconomic damages does not offend the right to jury trial, either. (See *Hemmings, supra,* 285 F.3d at p. 1202; *Kirkland, supra,* 4 P.3d at p. 1119.)

Compared to the large number of cases from other jurisdictions that have held statutory damage limitations do not violate the constitutional right to a jury trial, plaintiff relies on only three cases from other states. (AOB 12-17.) Two of them are of little, if any, value to plaintiff. [5/] The third case—*Sofie v. Fibreboard Corp.*

5/ *Condemarin v. University Hosp.* (Utah 1989) 775 P.2d 348 states the view of only one of five justices on the right-to-jury-trial issue, and even that one justice later acknowledged that her opinion "left open the question, not before us in that case, whether a damage cap on noneconomic damages could survive constitutional scrutiny under" the state's right-to-jury-trial provision (*Judd, supra,* 103 P.3d at p. 150 [dis. opn. of Durham, C.J.]). Moreover, Utah's high court has since *rejected* the argument that a statutory limit on noneconomic damages violates the constitutional right to jury trial. (*Id.* at p. 144.) *Lucas v. U.S.* (Tex. 1988) 757 S.W.2d 687 is of no more relevance. Although the court there struck down a statutory damage limitation, it did so on grounds

(continued...)

(1989) 112 Wash.2d 636 [771 P.2d 711]—did find a damage limitation in violation of the right to jury trial, but based on an analysis at odds with California Supreme Court decisions. First, the *Sofie* court held that applying the damage limitation after the jury has reached a verdict "den[ied] litigants an essential function of the jury" (*id.* at p. 719), which is the opposite of *Bainbridge*'s conclusion that "the [jury trial] constitutional guarantee . . . is fully observed when the verdict of the jury in the case is rendered and recorded" (*Estate of Bainbridge, supra,* 169 Cal. at p. 169). Second, *Sofie* relied on *Dimick v. Schiedt* (1935) 293 U.S. 474 [55 S.Ct. 296, 79 L.Ed.2d 603] (*Sofie,* at p. 717), a United States Supreme Court decision regarding the additur procedure that the California Supreme Court has found unpersuasive (*Jehl, supra,* 66 Cal.2d at p. 828 ["*Dimick* was a five-to-four decision and has been vigorously criticized . . . [and] was based on an historical and logical analysis that was open to serious question" (fns. omitted)]).

There are a few other cases, not cited by plaintiff, that have found statutory damage limitations in violation of the constitutional right to jury trial. (*Lakin v. Senco Products, Inc.* (1999) 329 Or. 62 [987 P.2d 463]; *Matter of Certif. of Questions of Law* (S.D. 1996) 544 N.W.2d 183; *Moore v. Mobile Infirmary Ass'n* (Ala. 1991) 592 So.2d

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5/ (...continued)
other than the constitutional right to a jury trial. (See also *Rose v. Doctors Hosp.* (Tex. 1990) 801 S.W.2d 841 [*upholding* damage cap in wrongful death action].)

156.) These cases, like *Sofie*, are inconsistent with California Supreme Court decisions.

The case law on the constitutional right to a jury trial is overwhelmingly against plaintiff's position. His right to a jury trial was not violated when the trial court entered judgment for an amount different than the jury's noneconomic damage verdict.

B. The statutory limit on liability for noneconomic damages does not encroach on the Judiciary's powers.

Plaintiff contends that, by enacting section 3333.2, the Legislature infringed on the Judiciary's powers in violation of the California Constitution. (See Cal. Const., art. III, § 3 ["The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution"], art. VI, § 1 ["The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record"]; see generally *People v. Bunn* (2002) 27 Cal.4th 1, 14 (*Bunn*).) According to plaintiff, "the Legislature arrogated to itself the uniquely and purely judicial function of determining the maximum award of noneconomic damages in a medical malpractice case." (AOB 20.) Not so. The Legislature's action was well within its constitutional role.

As the Supreme Court has recognized, "The Legislature is charged, among other things, with 'mak[ing] law . . . by statute.'

(Cal. Const., art. IV, § 8, subd. (b).) This essential function embraces the far-reaching power to weigh competing interests and determine social policy." (*Bunn, supra,* 27 Cal.4th at pp. 14-15; see also *id.* at pp. 22-23 [referring to that legislative power as "paramount"].) Accordingly, "[i]n most matters, the judicial branch must necessarily yield to the legislative power to enact statutes." (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104 (*Le Francois*); see *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 54 (*County of Mendocino*).)

This is one of those many situations where the Judiciary "must necessarily yield" to the Legislature. In general, "the Legislature possesses a broad authority both to establish and to abolish tort causes of action." (*Cory v. Shierloh* (1981) 29 Cal.3d 430, 439; see *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1069 ["Within constitutional limits, the Legislature may, if it chooses, modify the common law by statute"].) Specifically, as the Supreme Court stated in upholding the very statute at issue here, "'*the Legislature possesses broad authority to modify the scope and nature of* [a plaintiff's] *damages.*'" (*Fein, supra,* 38 Cal.3d at p. 157.)

What the Legislature cannot do is decide an individual case. *Mandel v. Myers* (1981) 29 Cal.3d 531 (*Mandel*) illustrates this important distinction. In *Mandel,* the Legislature deleted an appropriation to pay a court-ordered attorney fee award that had been made in a concluded litigation. The Supreme Court held that action impermissible because, "while the Legislature enjoys very broad governmental power under our constitutional framework, it does not possess the authority to review or to readjudicate final court judgments on a case-by-case

basis." (*Id.* at p. 549.) The court stressed, however, that the Legislature *did* have the power to broadly regulate attorney fee awards in all cases, such as by "establish[ing] a fixed or maximum hourly rate of recovery for attorney services" or "prescrib[ing] a maximum 'per-case' limit on attorney fee awards." (*Id.* at p. 551.) The critical distinction was between the adoption of a "*generally* applicable mechanism," which is permissible, and the "reject[ion of] a *particular* attorney fee award," which is not. (*Ibid*, emphases added; see *Bunn, supra*, 27 Cal.4th at p. 15 ["Quite distinct from the broad power to pass laws is the essential power of the judiciary to resolve 'specific controversies' between parties"].)

Courts in other states have made clear the important distinction between the general policy making of a legislature and the case-specific decisions of a court: "There can be little doubt that were a legislative body to review a dispute between two parties and resolve the compensation to be awarded, the activity would be a judicial one reserved to courts and juries. On the other hand, when a legislative body, *without regard to facts of a particular case, dispute or incident*, but rather as a matter of policy and rule determines for all citizens in all incidents that may occur thereafter that recovery will be limited, the function is legislative, completely analogous to the adoption or repeal of causes of action and remedies therefor. Juries function as parts of the dispute resolution apparatus between parties; a legislature functions to make rules in advance of disputes to be applied to the disputes. The Court here can discern no blurring of the lines

separating these functions in this case where Maryland adopted a prospective law limiting awards for pain and suffering." (*Franklin, supra,* 704 F.Supp. at p. 1331; see *Rhyne v. K-Mart Corp.* (2004) 358 N.C. 160, 168 [594 S.E.2d 1, 8] [statutory damage limitation "does not grant the General Assembly the authority to remit excessive awards on a case-by-case basis. Rather, . . . [the] function [of imposing a limit] is wholly distinct from that within the trial court's authority to apply fixed laws to individual controversies"].)

When the California Legislature enacted section 3333.2, it obviously did not single out the noneconomic damage award for the plaintiff in this case. Rather, three decades before plaintiff's lawsuit, the Legislature, employing its "far-reaching power to weigh competing interests and determine social policy" (*Bunn, supra,* 27 Cal.4th at p. 15), passed a "generally applicable mechanism" (*Mandel, supra,* 29 Cal.3d at p. 551) to modify the common law by limiting noneconomic damages in all medical malpractice cases. This was the exercise of a quintessentially legislative prerogative.

While not addressing a separation-of-powers challenge to section 3333.2 itself, the California Supreme Court has rejected such a challenge to another MICRA limitation. In *Roa, supra,* 37 Cal.3d 920, the court upheld the statutory limitation on the amount of the contingent fee that an attorney can charge a medical malpractice plaintiff (Bus. & Prof. Code, § 6146). The plaintiffs there "argue[d] that in light of th[e] 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." (*Roa*, at p. 933.) The court held, however, 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." (*Ibid.*)

The Legislature did not, as plaintiff claims, exercise a "purely judicial function." (AOB 20.) It did not, as plaintiff puts it, "*determin*[*e*] the maximum award . . . in *a* medical malpractice case." (*Ibid.*, emphasis added.) Instead, it *established* a maximum for *all* medical malpractice cases. As explained, that distinction is of great constitutional significance.

Even assuming arguendo that section 3333.2 does concern a "purely judicial function," the Legislature still acted well within its authority. "The Legislature . . . does not necessarily violate the separation of powers doctrine whenever it legislates with regard to an inherent judicial power or function." (*Obrien v. Jones* (2000) 23 Cal.4th 40, 48; see *People v. Standish* (2006) 38 Cal.4th 858, 879; *County of Mendocino, supra*, 13 Cal.4th at pp. 57-58.) Indeed, the Supreme Court has "regularly approved legislation affecting matters over which the judiciary has inherent power and control." (*Bunn, supra*, 27 Cal.4th at p. 16.) "As long as such enactments do not '"defeat" or "materially impair"' the constitutional functions of the courts, a 'reasonable' degree of regulation is allowed." (*Ibid.*; see *Le Francois, supra*, 35 Cal.4th at p. 1104.) For example, the Legislature can limit the penalty a court can

impose for contempt, even though contempt is an inherent judicial power. (*In re McKinney* (1968) 70 Cal.2d 8, 10-13.)

Plaintiff suggests no reason why the Legislature can limit attorney fee awards (*Roa, supra,* 37 Cal.3d at p. 933; *Mandel, supra,* 29 Cal.3d at p. 551) and contempt penalties (*In re McKinney, supra,* 70 Cal.2d at pp. 10-13), but not noneconomic damage awards. Instead, he relies on *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, which concerns the authority of a "nonconstitutional" administrative agency (*id.* at p. 271). It is ironic indeed that plaintiff should rely on a case that held the *absence* of a legislative cap on the amount of damages that an agency can award causes constitutional problems. (*Ibid.*) In any event, nothing in *Walnut Creek* indicates the Legislature did anything other than act within its historic authority when it enacted a generally applicable statute that modifies the common law of damages.

C. The statutory limit on liability for noneconomic damages (still) does not violate equal protection.

In *Fein, supra,* 38 Cal.3d 137, the Supreme Court expressly rejected the argument that section 3333.2's limit on noneconomic damages violates equal protection principles. Plaintiff nonetheless claims that, because of inflation since section 3333.2's enactment, the statute has *become* an equal protection violation. The claim is meritless. Section 3333.2 was and is constitutional.

Plaintiff apparently relies on the equal protection clauses in both the federal and state constitutions. The tests under each "are substantially the same." (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 15, fn. 13.) One difference that does exist is that the federal courts apply an "intermediate scrutiny" standard of review in some circumstances where the California courts apply a "strict scrutiny" standard. (See *In re Marriage Cases* (2008) 43 Cal.4th 757, 832, fn. 55.) This difference is of no consequence here, however, because neither heightened-scrutiny standard is appropriate. The right to sue for negligently inflicted injuries is not a fundamental interest; therefore, the "rational relationship" standard applies. (*Brown v. Merlo* (1973) 8 Cal.3d 855, 862, fn. 2 (*Brown*); see *Fein, supra,* 38 Cal.3d at pp. 157-158, 162; *American Bank & Trust, supra,* 36 Cal.3d at p. 373, fn. 12.)

The "rational relationship" standard of review "'"manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing, it invests legislation involving . . . differentiated treatment [between classes or individuals] with a presumption of constitutionality and 'requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.' [Citation.] . . . Moreover, the burden of demonstrating the invalidity of a classification under this standard rests squarely upon *the party who assails it.*"'" (*Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 298-299, quoting *Warden v. State Bar* (1999) 21 Cal.4th 628, 640-641; see also *Bunn, supra,* 27 Cal.4th at pp. 16-17 ["separation of powers principles compel courts

to effectuate the purpose of enactments . . . . The judiciary may be asked to decide whether a statute is arbitrary or unreasonable for constitutional purposes [citation], but no inquiry into the 'wisdom' of underlying policy choices is made"].)

Plaintiff relies on the rule that "a classification which once was rational because of a given set of circumstances may lose its rationality if the relevant factual premise is totally altered" (*Brown, supra,* 8 Cal.3d at p. 869). He asserts that, due to inflation, section 3333.2 improperly discriminates between him and "an otherwise identically situated plaintiff in 1975" (AOB 26), because "[w]hat was an adequate and reasonable remedy in 1975 [when section 3333.2 was enacted] was palpably a grossly inadequate remedy in 2007 [when plaintiff's case was tried]" (AOB 25). This argument misconstrues the legitimate state purpose that section 3333.2 serves. There has been no total alteration of the premise for the statute.

As explained in section I, *ante,* section 3333.2 is but one part of MICRA, and the purpose of the entire statutory scheme was to address the crisis in California's health care system caused by skyrocketing medical malpractice insurance premiums, not to provide plaintiffs with "an adequate and reasonable remedy" (AOB 25).[6/] The Supreme Court

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6/ Plaintiff cites the legislative finding that MICRA was "intended to provide an adequate and reasonable remedy." (Stats. 1975 (1975-1976 Second Ex. Sess.) ch. 2, § 12.5, p. 4007; see AOB 25.) However, read in context (see *ante,* fn. 1), the "remedy" the Legislature was (continued...)

concluded that section 3333.2 is rationally related to that legislative purpose. (*Fein, supra,* 38 Cal.3d at p. 162.)

The statute continues to serve the legitimate goal of controlling the cost of medical malpractice insurance by controlling the cost of malpractice litigation. (See *American Bank & Trust, supra,* 36 Cal.3d at pp. 363-364 [MICRA "attacked the problem on several fronts," including "attempt[ing] to reduce the cost and increase the efficiency of medical malpractice litigation by revising a number of legal rules applicable to such litigation"].) Certainly, plaintiff has not satisfied his burden of showing otherwise. In fact, plaintiff appears to concede that section 3333.2 is doing just what it was designed to do. (AOB 23 ["Given inflation in the 33 years since the enactment of MICRA and given that MICRA's cap on non-economic damages has not changed in that time, *it is reasonable to conclude that the costs of medical malpractice-related litigation have substantially decreased in real terms*" (emphasis added, fn. omitted)].)

Implicit in plaintiff's equal protection challenge is the notion that, in order to treat plaintiffs who sue at different times the same, section 3333.2 cannot provide a set dollar limit on noneconomic damages. Presumably, plaintiff would require a limit that is indexed to increase with inflation or that is expressed as a percentage of a plaintiff's noneconomic damages. The Legislature, however, had legitimate

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6/ (...continued)
referring to was for the medical malpractice insurance crisis, not for one element of damages in medical malpractice cases.

reasons for not doing it plaintiff's way, as the Supreme Court has found.

First, as noted, a primary goal of MICRA was "to reduce the cost . . . of medical malpractice litigation." (*American Bank & Trust, supra,* 36 Cal.3d at p. 364.) This goal of *reducing* costs is clearly not furthered by *increasing* the amount of noneconomic damages that must be paid.

Second, the *Fein* court specifically rejected the argument that "the $250,000 limit is unconstitutional because the Legislature could have realized its hoped-for cost savings by mandating a fixed-percentage reduction of all noneconomic damage awards." (*Fein, supra,* 38 Cal.3d at pp. 162-163.) The court explained that "[o]ne of the problems identified in the legislative hearings [before MICRA's enactment] 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. The Legislature could reasonably have determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates." (*Id.* at p. 163; see also *Western Steamship, supra,* 8 Cal.4th at p. 112.) As with the overall goal of reducing malpractice litigation costs, the Supreme Court concluded that providing a more stable base on which to calculate insurance rates was a "ground[] [that] provides a sufficient rationale for the $250,000 limit." (*Fein,* at p. 163.)

Plaintiff's argument is reminiscent of *Northwest Financial, Inc. v. State Bd. of Equalization* (1991) 229 Cal.App.3d 198 (*Northwest Financial*), where a renewed constitutional attack on Proposition 13 was made over a decade after the property tax initiative had been enacted and the Supreme Court had upheld its constitutionality. That attack failed for reasons similar to those that defeat plaintiff's claim here.

Proposition 13 required taxation based on the value of a property when it was acquired rather than on the property's constantly changing current value. Even though the Supreme Court had rejected an equal protection challenge to Proposition 13 soon after its passage, the *Northwest Financial* plaintiff argued that equal protection problems had developed because of "the disparities between property taxes imposed on comparable properties which . . . ar[ose] from the passage of time and an inflationary real estate market," e.g., two otherwise identical properties would be taxed at very different rates if they were acquired years apart. (*Northwest Financial, supra,* 229 Cal.App.3d at p. 201.) The Court of Appeal disagreed, holding the Supreme Court had already found that Proposition 13's taxation scheme had "a rational basis related to a legitimate state purpose"; therefore, "no equal protection violation has been shown since the alleged disparity arises from a rationally based classification system, rather than from different treatment of those within the same classification." (*Id.* at p. 202.) [7/]

7/ Interestingly, the legitimate state purpose is similar to one of MICRA's purposes. Just as section 3333.2's "across-the-board (continued...)

The *Northwest Financial* court also noted policy arguments that were made "as to the ever-widening tax disparity between comparable properties with the passage of time." (*Northwest Financial, Inc., supra,* 229 Cal.App.3d at p. 206.) The court rejected those arguments "[s]ince the system was determined [by the Supreme Court] to be premised on a rationally based classification system to satisfy constitutional equal protection requirements." (*Ibid.*)

Inflation and the passage of time have not changed the constitutional calculus for section 3333.2, either. The fixed limit on noneconomic damages is still serving the goals of reducing the cost of medical malpractice litigation and providing a stable base on which to determine insurance rates, which the Supreme Court held are legitimate state purposes. Plaintiff's complaint is that the statute is perhaps doing its job too well. As the Supreme Court held in *Fein,* however, its past decisions "have never been interpreted to mean that we may properly strike down a statute simply because we disagree with the wisdom of the law or because we believe that there is a fairer method for dealing with the problem." (*Fein, supra,* 38 Cal.3d at p. 163.)

Other states' courts have to come to the same conclusion in evaluating arguments similar to plaintiff's here. For example, in *Verba*

7/ (...continued)
limit . . . provide[s] a more stable base on which to calculate insurance rates" (*Fein, supra,* 38 Cal.3d at p. 163), Proposition 13, by not taxing property on "an unforeseen, perhaps unduly inflated, current value," allows "[e]ach property owner [to] be able to estimate his future tax liability" (*Northwest Financial, supra,* 229 Cal.App.3d at p. 203).

v. Ghaphery (2001) 210 W.Va. 30 [552 S.E.2d 406], the court held: "We do not believe that the mere passage of time has rendered the medical malpractice cap unconstitutional or invalid. 'Presumably the legislature was aware of the effects of inflation and could have opted for some cap indexed to inflation. That the legislature did not index the cap to inflation but set forth an absolute dollar amount does not render the cap unconstitutional.' [Citation.] . . . This Court 'may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" (*Id.* at pp. 411-412; accord, *Gourley, supra,* 663 N.W.2d at p. 69.)

D. The statutory limit on liability for noneconomic damages does not conflict with statutes that encourage settlements.

Plaintiff's final attack on section 3333.2's noneconomic damage limit is not a constitutional one. He claims the limit conflicts with the policy to encourage settlements that underlies Code of Civil Procedure section 998 and Civil Code section 3291—statutes that penalize a party who rejects a settlement offer and then does not obtain a result at trial better than the rejected offer. Plaintiff's argument is meritless.

First, there is no policy conflict. To the contrary, the Supreme Court explained that, in enacting section 3333.2, "the Legislature may have felt that the fixed $250,000 limit would *promote settlements* by

eliminating 'the unknown possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble.'" (*Fein, supra,* 38 Cal.3d at p. 163, emphasis added.)

Second, there is nothing in the language of any of the three statutes that suggests the Legislature intended the result plaintiff seeks. Section 3333.2 provides for no exceptions to the $250,000 limit on noneconomic damages in medical malpractice cases. Neither Code of Civil Procedure section 998 nor Civil Code section 3291 provides any hint of an intent to override section 3333.2 under any circumstances. Therefore, fundamental rules of statutory construction require that plaintiff's argument be rejected. (See, e.g., *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 211 ["We apply well-established principles of statutory construction in seeking 'to determine the Legislature's intent in enacting the statute "'so that we may adopt the construction that best effectuates the purpose of the law.'"' [Citations.] We begin with the statutory language because it is generally the most reliable indication of legislative intent. [Citation.] If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls"]; *People v. Lai* (2006) 138 Cal.App.4th 1227, 1252 ["amendment or repeal of a statute by implication is disfavored. The doctrine is applied 'only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent

operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together"'"].)

CONCLUSION

For the reasons stated here and in the Respondents' Brief, this court should affirm the judgment.

Dated: October 10, 2008

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 8,108 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

DATED: October 10, 2008

David S. Ettinger

PROOF OF SERVICE [C.C.P. § 1013a]

I, **Victoria Beebe**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **October 10, 2008**, I served the within document entitled **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA HOSPITAL ASSOCIATION, AND CALIFORNIA DENTAL ASSOCIATION IN SUPPORT OF RESPONDENTS** on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

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and, following ordinary business practices of Horvitz & Levy LLP, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 15760 Ventura Boulevard, Encino, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **October 10, 2008**, at Encino, California.

Victoria Beebe