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

Holly Stinnett,
Plaintiff and Appellant

v.

Tony Tam, M.D., et al.,
Defendants and Respondents

The Honorable David G. Vander Wall, Judge
Superior Court of Stanislaus County, Case No. 384025

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF TONY TAM, M.D., ET AL.; BRIEF OF AMICI CURIAE CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA HOSPITAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION

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APPLICATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to California Rules of Court, Rule 8.200(c), the California Medical Association (CMA), California Hospital Association (CHA), the California Dental Association (CDA), and American Medical Association (AMA) request permission to file the attached amici curiae brief in support of Respondents Tony Tam, M.D., et al.

I. INTERESTS OF AMICI CURIAE

CMA is a nonprofit, incorporated, professional association of more than 33,000 physicians practicing in California, in all specialties. CDA represents almost 24,000 California dentists, over 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 is the statewide leader representing the interests of nearly 450 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 non-profit and governmental entities engaging physicians for the provision of medical services, specifically: Cooperative of American Physicians, Inc.; Kaiser Foundation Health Plan, Inc; MedAmerica Mutual; Medical Insurance Exchange of California; The Dentists Insurance Company; The Doctors Company; and The Regents of the University of California.

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

II. NEED FOR FURTHER BRIEFING

This appeal involves the limitation on non-economic 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 CMA, CDA, CHA, and AMA.

Counsel for CMA, CHA, CDA, and AMA have reviewed the Appellant's Opening Brief, the Respondents' Brief, and Appellant's

Reply Brief. Respondents' Brief discusses many of the issues directly affecting amici and their involvement in the medical care and medical malpractice insurance industries in California. For example, Respondents correctly point out that eliminating the damages cap in Section 3333.2 will increase malpractice insurance rates (Respondents' Brief (RB), p. 13), note that the California Legislature has considered and rejected an increase in the damages cap (RB, pp. 14-15), and explain how MICRA creates and maintains a stable medical malpractice insurance market in California (RB, pp. 34-37). Amici fully support these points in Respondents' Brief, and affirm that amici are indeed affected by these issues as represented by Respondents.

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 non-economic 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.; *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: October 26, 2010 TUCKER ELLIS & WEST

By _____/S/_____
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BRIEF OF AMICI CURIAE

INTRODUCTION

This Court and the Supreme Court have already held that the statute at issue complies with the rights to jury trial and equal protection enshrined in the California Constitution. In fact, the Supreme Court has made clear that Civil Code section 3333.2 ("Section 3333.2") correctly "operates as a limitation on liability," and that "[t]o hold otherwise would undermine the Legislature's express limit on health care liability for noneconomic damages as well as jeopardize the purpose of MICRA to ensure the availability of medical care." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 116 ("*Western Steamship*"). Nevertheless, Plaintiff Holly Stinnett asks this Court to assume the traditional legislative function and use new evidence to second-guess the wisdom and effectiveness of MICRA and Section 3333.2.

Plaintiff's argument is two-fold. First, she contends Section 3333.2 violates equal protection because it discriminates against medical malpractice plaintiffs without a rational basis. But the California Supreme Court has already held that Section 3333.2 is rationally related to a legitimate legislative purpose; thus an equal protection claim on such grounds has no merit. (See, e.g., *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 162 ("*Fein*").)

Second, Plaintiff argues that Section 3333.2 violates her right to a jury determination of damages. But the Supreme Court has rejected this argument as well, making clear 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.) The Supreme Court has also held that "a plaintiff has no vested property right in a particular measure of damages, and that the Legislature has broad authority to modify the scope and nature of such damages" without offending a plaintiff's constitutional right to a jury trial. (*American Bank v. Community Hospital of Los Gatos-Saratoga, Inc.* (1984) 36 Cal.3d 359, 368 ("*American Bank*").)

Plaintiff's desired result—a rejection of Section 3333.2—would require that this Court disregard established case law and second-guess the wisdom of the Legislature's decision to enact the provisions of MICRA. There is no basis for such a result.

A. Civil Code section 3333.2 does not violate equal protection.

1. Rational basis as the standard of review.

The constitutionality of Section 3333.2 is reviewed under the rational basis standard. (See Appellant's Opening Brief ("AOB"), p. 13.) "[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification*. Where there are 'plausible reasons' for [the classification] 'our inquiry is at an end.'" (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482 (quoting *F.C.C. v. Beach Communications, Inc*. (1993) 508 U.S. 307, 313) (emphasis in original).) "On rational-basis review, a classification [bears] a strong presumption of validity. . . ." (*F.C.C. v.*

Beach Communications, Inc., 508 U.S. at pp. 314-315 (internal quotes and citations omitted).) Inherent in the rational basis standard is the recognition that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." (*Id.*, 508 U.S. 307 at p. 313.)

Yet this is exactly what Plaintiff asks this Court to do: review the facts and reasoning behind Section 3333.2, disregard case law holding that Section 3333.2 does not violate equal protection or the right to jury trial, and pass judgment on whether the Legislature reached the proper conclusion in enacting and maintaining MICRA. Second-guessing the wisdom of the Legislature is not the province of the judiciary. Plaintiff offers no sufficient grounds to justify a departure from this well-established rule.

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

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

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

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

Plaintiff apparently agrees that the purposes of Section 3333.2—"to limit increases in medical malpractice insurance premiums and thereby to preserve availability of health care" (AOB, p. 1)—are legitimate state purposes. Thus, the controversy in this

case centers on the narrow issue of whether the legislative classification between "severely injured medical malpractice plaintiffs" (AOB, p. 3) and other tort plaintiffs is rationally related to achievement of the statutory purposes of MICRA. (See *Kadrmas v. Dickinson Public Schools* (1988) 487 U.S. 450, 457-458 (legislation will "survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose").)

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

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

(*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 843-844, quoting *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 577-578; see also *American Bank*, 36 Cal.3d 359, 371 [same].) Just this year, the Supreme Court recognized "MICRA's goal of reducing costs in the resolution of malpractice claims and therefore malpractice insurance premiums"

as a basis for upholding the arbitration provision enacted as part of MICRA in 1975. (*Ruiz v. Podolsky*, *supra*, 50 Cal.4th at p. 844.)

The question to be addressed, therefore, is whether the classification is rationally related to the Legislature's interest in making malpractice insurance affordable for California physicians and ensuring access to care for Californians. (See *Western Steamship*, 8 Cal.4th at 112 (MICRA "reflects a strong public policy to contain the costs of malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs.") The classification at issue, according to Plaintiff, is two-fold: medical malpractice plaintiffs compared to other tort plaintiffs, and medical malpractice plaintiffs with noneconomic damages over $250,000 compared to medical malpractice plaintiffs with noneconomic damages of less than $250,000. (AOB, p. 15 (quoting the plaintiff's allegations in *Fein*, 38 Cal.3d 137, 161-162).)

This exact question of law has already been decided by the California Supreme Court. In *Fein*, the plaintiff challenged Section 3333.2 on due process and equal protection grounds. The Court stated, "[W]e have already said that the Legislature limited the application of section 3333.2 to medical malpractice cases because it was responding to an insurance 'crisis' in that particular area and that the statute is rationally related to the legislative purpose." (*Fein*, 38 Cal.3d at p. 162.) The Court went on to say, "[T]he Legislature clearly had a reasonable basis for drawing a distinction between economic and noneconomic damages, providing that the desired cost savings should be obtained only by limiting the recovery of

noneconomic damage." (*Id*.) Furthermore, the Court held that "the $250,000 limit—which applies to all malpractice victims—does not amount to a constitutional discrimination." (*Id*.) The Court stated that "the Legislature retains broad control over the *measure*, as well as the *timing*, 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." (*Id.* at p. 158.) The Court concluded: "It appears obvious that this section—by placing a ceiling of $250,000 on the recovery of noneconomic damages—is rationally related to the objective of reducing the costs of malpractice defendants and their insurers." (*Id.* at p. 159.)

Thus there is no question that Section 3333.2 is rationally related to a legitimate government purpose. Plaintiff argues, however, that new evidence somehow undermines that rational basis. As discussed below, this argument is without merit.

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

Plaintiff alleges that because California is no longer suffering from the 1975 malpractice insurance crisis,[1] the changed

[1] Though Plaintiff argues that the crisis that drove MICRA is "over," the Supreme Court 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

circumstances have so undermined the rationality of Section 3333.2's classification that it no longer passes constitutional muster. (See ARB, p. 6.) In support of her argument, Plaintiff purports to present evidence that "no party has ever presented to the Legislature" and concludes that the new evidence justifies a judicial repeal of MICRA. (ARB, p. 9; see also p. 22 ("[B]ecause of improved conditions in the insurance market . . . and because [of] inflation . . . section 3333.2 has no rational basis").)

Plaintiff's argument represents an approach to the judicial review of legislation that has been universally rejected: "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*. (1993) 508 U.S. 307, 315 ("[A] legislative choice is not subject to courtroom fact-finding"); see also *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").)

Although Plaintiff argues MICRA has lost its rational basis because the 1975 insurance crisis has passed, "the constitutionality

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physicians") (enacted 2005, emphasis added); Bus. & Prof. Code, § 2425.1 ("Currently, *California is experiencing an access to health care crisis*. . . .") (enacted 2001, emphasis added).)

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, a similar argument was asserted in *American Bank*, where amici 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.)

Thus, there is no support for Plaintiff's argument that changed circumstances justify the invalidation of a previously-constitutional law. Respondents' Brief discusses the cases cited by Plaintiff and shows why those cases are inapposite—namely, none of the cases held that a previously valid law became unconstitutional based on changed circumstances. (See RB, pp. 23-26.) In short, changed circumstances cannot eviscerate the already-established rational basis for Section 3333.2. [2]

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[2] The amicus brief of the Consumer Attorneys of California attacks a number of studies and reports about the practice of medicine in California and the effect of Section 3333.2, concluding that certain studies and information are false, mythical, or fallacious. Not only are many of their conclusions incorrect and based on faulty assumptions, but the mere fact that competing data may exist makes clear that there is indeed a rational basis for Section 3333.2 since the rational basis standard is met "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482.)

4. Proposition 103 does not make Section 3333.2 obsolete.

Even if evidence of changed circumstances could affect the rational basis for a statute, the 1988 enactment of Proposition 103 does not undermine the constitutionality of Section 3333.2 as Plaintiff argues.

Proposition 103 established a regulatory mechanism for insurance rates in California. According to Plaintiff, the passage of Proposition 103 left MICRA without a rational basis because Proposition 103 is more effective at reducing malpractice insurance rates than MICRA. (AOB, 45-46.) But the Supreme Court has upheld MICRA provisions and recognized continued threats to MICRA's goals numerous times since Proposition 103 was passed in 1988. (See, e.g., *Western Steamship* (1994) 8 Cal.4th 100, 111-114; *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 577-578; *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 843-844.) In *Western Steamship*—decided eight years after Proposition 103 was enacted—the Court upheld the applicability of Section 3333.2 and noted that MICRA "reflects a strong public policy to contain the costs of malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs. . . ." (*Western Steamship*, 8 Cal.4th at 112.) To further this goal and to avoid the risk of reverting to pre-MICRA instability, the Court refused to limit the applicability of the $250,000 non-economic damages cap:

> Exempting indemnity actions from the $250,000 limit would threaten not only this goal but also the broader purpose of

> MICRA by resurrecting the pre-MICRA instability associated with unlimited noneconomic damages and increasing the overall cost of malpractice insurance to account for these larger recoveries. [Citations.] We conclude that applying section 3333.2 to such claims is both necessary to effectuate the intent and policies prompting the MICRA legislation.

(*Id*.) The court noted, "To hold otherwise would . . . jeopardize the purpose of MICRA to ensure the availability of medical care." (*Id*. at 116.)

Furthermore, MICRA, not Proposition 103, is primarily responsible for the slow rate of growth in medical malpractice insurance rates—compared to insurance rate increases in other industries and other states. (Frech, et al., *Controlling Medical Malpractice Insurance Costs—Congressional Act or Voter Proposition?* (2006) 3 Ind. Health L.Rev. 33; see also RB, pp. 37-39, and authorities cited therein.)

Moreover, the enactment of a later statute touching upon a similar subject as an earlier statute does not render the earlier statute obsolete and therefore unconstitutional. Even if MICRA and Proposition 103 were deemed to touch upon a common subject, they "must be read together and so construed as to give effect, when possible, to all the provisions thereof." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778-779 (citing *Tripp v. Swoap* (1979) 17 Cal.3d 671, 679).) Plaintiff would have this Court do the opposite, and hold that MICRA and Proposition 103 cannot constitutionally exist

together even though they have been coexisting peacefully for more than two decades. There is no basis for such a holding.

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

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

5. Plaintiff has no right to a particular measure of "purchasing power."

Plaintiff argues Section 3333.2 lacks a rational basis because the purchasing power of the spending cap has been diminished over time. This argument does not address whether the classification is rationally related to a legitimate state interest; rather, it challenges

the *effect* of the legislation, which plaintiff claims has become unfair with the passage of time.

The Supreme Court has held that the $250,000 statutory cap has a sufficient basis to pass rational basis scrutiny. (See *Fein*, 38 Cal.3d at 163 (listing four reasons the Legislature may have chosen the $250,000 limit and concluding, "Each of these grounds provides a sufficient rationale for the $250,000 limit.").) In fact, the *Fein* Court pointed out that there is no constitutional right to recover non-economic damages in *any* amount:

> Thoughtful 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. While the general propriety of such damages is, of course, firmly imbedded in our common law jurisprudence [citations], *no California case of which we are aware 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 159-160, emphasis added.)

As Respondents point out, the Legislature has twice considered increasing the damages cap in Section 3333.2, but has declined to do so. (RB, pp. 14-15.) 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* (1996) 13 Cal.4th 45, 52.)

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." (*Ferguson v. Skrupa* (1963) 372 U.S. 726, 729.) This Court should not effectively change a statute in a manner that the Legislature has considered and rejected.

B. Civil Code section 3333.2 does not violate the right to a jury trial.

Plaintiff argues Section 3333.2 violates her right to a jury trial because it limits her right to have a jury determine her damages. She does not dispute, however, that a jury actually determined her damages. Thus Plaintiff's claim is essentially that she 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 non-economic damages in medical malpractice cases: "One of the problems identified in the legislative hearings was the unpredictability of the size of large non-economic damage awards, resulting from the inherent difficulties in valuing such damages and the great disparity in the price tag which different juries placed on such losses." (*Id.* at 163.)

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

Plaintiff also argues that Section 3333.2 is unconstitutional because "plaintiffs receive no offsetting benefit." (AOB, p. 60.) This "quid pro quo" argument was flatly rejected by the Supreme Court in its due process ruling in *Fein*:

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

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

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

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 non-economic 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 non-economic damages cap in this case violates her right to a jury trial.

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

CONCLUSION

Section 3333.2 does not violate the Constitution. The Supreme Court has held repeatedly that MICRA generally and Section 3333.2 specifically are rationally related to legitimate state interests, and none of Plaintiff's arguments change that analysis. It is not the role of the judiciary to engage in fact finding to determine the wisdom of the Legislature's actions, and the extensive support in Respondents' brief about the success of MICRA shows that the legitimate state interests are well-served by this statute.

Respectfully submitted,

Dated: October 26, 2010 TUCKER ELLIS & WEST

By _____/S/_____
E. Todd Chayet
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Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 4005 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By _____/S/_____

E. Todd Chayet