E071146

IN THE

Court of Appeal

OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

KEITH BURCHELL,
Plaintiff and Respondent,

v.

FACULTY PHYSICIANS & SURGEONS OF THE LOMA LINDA UNIVERSITY SCHOOL OF MEDICINE,
Defendant and Appellant.

Appeal from the Superior Court of the State of California
for the County of San Bernardino, Case No. CIVDS1503214
Hon. Donald Alvarez

AMICI CURIAE BRIEF OF AMERICAN MEDICAL ASSOCIATION, CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND CALIFORNIA HOSPITAL ASSOCIATION

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INTRODUCTION

This case illustrates the basic problem that led to the enactment of tort reform and, in particular, California's Medical Injury Tort Compensation Reform Act ("MICRA"). A patient with a poor outcome sues his physician and others involved in his care, claiming there was professional negligence. The patient's expectation, of course, is that the physician's professional liability insurer and/or his employer's will pay the judgment. At trial, in order to prevail and maximize his recovery of damages, the patient urges the jury to send a message to and, essentially, punish the physician. If the jury finds the defendant physician liable, the amount of damages is excessive, usually in the noneconomic damages component of the damages award.

Plaintiff in this case achieved excessive damages by characterizing the physician's conduct as both professional negligence and "medical battery" and by urging the jury "to send a message" in the form of "a lot of money." To send this message, the jury awarded $9,250,000 noneconomic damages. Plaintiff avoided the noneconomic damages limitation in MICRA, Civil Code section 3333.2, by arguing his claim is a "hybrid" of professional negligence and medical battery.

Amici curiae American Medical Association, California Medical Association, California Dental Association, and California Hospital Association submit that, even though the

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claim in this case is a "hybrid" of professional negligence and medical battery, MICRA still should apply. *Amici* further submit that, even if there was *no* finding of professional negligence and the physician was found by the jury to have intentionally committed a traditional battery, the noneconomic damages award in this case would be excessive. The purpose of such damages is to compensate, not "to send a message."

INTERESTS OF *AMICI* IN THE ISSUES

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

The AMA files 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.

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The California Medical Association ("CMA") is a nonprofit, incorporated, professional association of more than 44,000 member-physicians practicing in the State of California, in all specialties. The California Dental Association ("CDA") represents over 27,000 California dentists, more than 70 percent of the dentists practicing in the State. CMA's and CDA's memberships include most of the physicians and dentists engaged in the private practices of medicine and dentistry in California. The California Hospital Association ("CHA") represents the interests of more than 400 hospitals and health systems in California, having approximately 94 percent of the patient hospital beds in California, including acute-care hospitals, county hospitals, nonprofit hospitals, investor-owned hospitals, and multi-hospital systems. Thus, *Amici* represent much of the health care industry in California.

CMA, CDA, and CHA have been active before the appellate courts in all aspects of litigation affecting California health care providers. Such cases have included *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, *Barme v. Wood* (1984) 37 Cal.3d 174, *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704,

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Delaney v. Baker (1999) 20 Cal.4th 23, *Bird v. Saenz* (2002) 28 Cal.4th 910, *Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, and *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771. More recently, CMA, CDA, and CHA filed briefs in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, and *Rashidi v. Moser* (2014) 60 Cal.4th 718. Most recently, CMA, CDA, and CHA filed briefs in *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, and *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148.

AMA, CMA, CDA, and CHA have long been concerned that a wide variety of health care providers and hospitals face the potential of unreasonably large and unpredictable awards in professional negligence actions. That was one of the reasons why the Medical Injury Compensation Reform Act ("MICRA") was enacted. CMA, CDA, and CHA provided substantial input to the legislative process that led to MICRA's enactment, and they continue to support MICRA's ongoing viability.

AMA, CMA, CDA, and CHA are aware that, in order to avoid the MICRA damages provision or statute of limitations, many plaintiffs pursue hybrid claims of negligence and battery against California health care providers, particularly surgeons. Published appellate decisions in which hybrid claims of negligence and battery were pursued against health care providers include *Daley v. Regents of University of California*

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(Aug. 30, 2019, A153501) ___ Cal.App.5th ___, *Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, *Massey v. Mercy Medical Center Redding* (2009) 180 Cal.App.4th 690, *Dennis v. Southard* (2009) 174 Cal.App.4th 540, *Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, *Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, *Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.* (2003) 107 Cal.App.4th 1260, *Perry v. Shaw* (2001) 88 Cal.App.4th 658, *Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, *Szkorla v. Vecchione* (1991) 231 Cal.App.3d 1541 (review dism. and cause remanded (1992) 838 P.2d 781), *Ashcraft v. King* (1991) 228 Cal.App.3d 604, *Bommareddy v. Superior Court* (1990) 222 Cal.App.3d 1017 (disapproved in *Central Pathology Service Medical Clinic, Inc. v. Superior Court, supra,* 3 Cal.4th 181, 191), *Freedman v. Superior Court* (1989) 214 Cal.App.3d 734, *Noble v. Superior Court* (1987) 191 Cal.App.3d 1189, *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, *Rains v. Superior Court* (1984) 150 Cal.App.3d 933, *Herrera v. Superior Court* (1984) 158 Cal.App.3d 255, and *Depenbrok v. Kaiser Foundation Health Plan, Inc.* (1978) 79 Cal.App.3d 167. There are many unpublished decisions, as well.

The result, when courts allow plaintiffs to characterize professional negligence as medical battery, is arbitrary decision-

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making by juries. Juries occasionally are inflamed by the characterization of a surgical decision as "battery." Jury awards of noneconomic damages often have a punitive component. This case is an illustration.

Amici reassure the Court that this brief was not authored, either in whole or in part, by any party to this litigation or by any counsel for a party to this litigation. No party to this litigation or counsel for a party to this litigation made a monetary contribution intended to fund the preparation or submission of this brief.

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 entities engaging physicians, dentists, and other health care providers for the provision of medical services, specifically The Cooperative of American Physicians, Inc., The Dentists Insurance Company, The Doctors Company, Kaiser Foundation Health Plan, Inc., Medical Insurance Exchange of California, Norcal Mutual Insurance Company, and The Regents of the University of California.

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STATEMENT OF THE CASE

This is a "hybrid" claim of professional negligence and medical battery. That is, Plaintiff simultaneously pursued two separate legal theories, both of which were based on the same set of facts, for a single act by a surgeon.

Plaintiff's first cause of action was for professional negligence. (Appellant's Appendix ("AA") 15-17.)

> 7. Mr. Burchell subjected himself to the care of Defendant GARY RAY BARKER, M.D., (hereinafter referred to as Defendant BARKER) for the purpose addressing a small scrotal mass. In pre-operative examination it was determined that Plaintiff BURCHELL had a scrotal mass which grew from a pea size mass to one centimeter within a three month period. It was recommended by Defendant BARKER that Plaintiff should have the cyst surgically removed. The consent form provided to Plaintiff was limited in scope to merely a "local excision of scrotal mass, possible cystoscopy." In the consent form, it further indicated that the procedure has the potential benefit to "remove mass for diagnosis." Plaintiff was assured that the likelihood of success is 90% and that risks and the side effects or risks of doing nothing or engaging in medical alternatives is the progression of the mass. **Nowhere on the form was Plaintiff advised that immediate action would be taken during the procedure to remove additional tissue without testing or consent**. On August 12, 2014, the procedure was undertaken by Defendant BARKER at the Highland Springs Surgical Center in Beaumont, California. At the time of the

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procedure, Defendant BARKER had no information or indication as to whether the cyst was benign or malignant.

8. Plaintiff is informed and believes, and thereon alleges, that **Defendant BARKER indicated that the mass was palpable on the right side of the bulbar urethra. Defendant BARKER also indicated that during the procedure, without any pathology on the cyst or any other suspect tissues found during the procedure, made the assumption that the mass was malignant.** Proceeding on that assumption, without supporting fact, testing, or consent, Defendant BARKER began to excise the right corpus cavernosum as well as a portion of the left corpus cavernosum. Defendant BARKER placed in the operative report stating: "Consideration was given to resecting just a biopsy versus resection of the entire mass, which ultimately was completed." **The decision to perform the resection was made by Defendant BARKER alone, without consent or with[out] consultation with Plaintiff or any representative of Plaintiff.**

9. Following the surgery, the excised tissue was sent to pathology for testing. Pathology reported receiving a tissue sample of 8.0 x. 5.0 x 2.5 cm in size. The testing concluded with the following findings: "Perineal, benign cystic lymphangioma, and adjacent small nodule showing calcification/ossification. No evidence of atypia or malignancy, lesion appears completely excised." Thus, the extent of the surgery was wholly unnecessary and caused significant, irreparable damages to Plaintiff.

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(AA 15:22-16:23. Emphasis in bold added.) In other words, Defendant committed professional negligence by operating without informing Plaintiff that the surgeon might discover during surgery that additional tissue should be removed. That is, Plaintiff alleged negligence for Defendant's failure to provide Plaintiff an informed consent and for Defendant's failure to get Plaintiff's consent to the removal of the additional tissue.

Plaintiff's second cause of action was for medical battery. (AA 17-18.)

> 15. Plaintiff consented to certain medical procedures as set forth herein above in the preceding paragraphs, however, Defendant BARKER, **performed additional and substantially different medical procedure which was not agreed to by Plaintiff as set forth in paragraphs 7 through 9 above**.

(AA 17:26-28. Emphasis in bold added.) That is, Plaintiff alleged negligence for Defendant's failure to get separate consent to the medical procedure that was different from the procedure for which Defendant provided an informed consent. "Defendant was the only person who could have and did control the nature and scope of the surgery he was to perform based upon the informed consent of Plaintiff BURCHELL." (AA 18:4-6.)

Significantly, Plaintiff did not plead that Defendant intended to defeat Plaintiff's wishes, let alone that Defendant intended to harm Plaintiff. Rather, Plaintiff pleaded that

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Defendant's intent was medically related, *i.e.,* based on "the assumption that the mass was malignant." (AA 16:11.)

The case was tried to a jury. Both sides presented expert witness opinion testimony on the questions of whether Dr. Barker violated the standard of care and whether he exceeded the scope of consent. (Appellant's Opening Brief ("AOB"), pp. 18-20, 33-36; Respondent's Opening Brief ("RB"), pp. 13-19.)

As to the first cause of action for professional negligence, the jury was instructed that, in order for Plaintiff to prove failure to obtain informed consent,

> A patient's consent to a medical procedure must be "informed." A patient gives an "informed consent" only after the urologist has adequately explained the proposed treatment or procedure.
>
> A urologist must explain the likelihood of success and the risks of agreeing to a medical procedure in language that the patient can understand. A urologist must give the patient as much information as he needs to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the proposed treatment or procedure, and any other information skilled practitioners would disclose to the patient under the same or similar circumstances. **The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is performed.** A urologist is not required to explain minor risks that are not likely to occur.

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(AA 59 [CACI 532]. Emphasis in bold added.) The jury then was instructed how to analyze lack of informed consent in this case:

> 1. That Gary Ray Barker, M.D., performed an excision of a perineal or scrotal mass with a proximal corporal excision on Keith Burchell;
>
> 2. That Gary Ray Barker, M.D. **did not disclose to Keith Burchell the important potential results and risks of, and alternatives to the an [*sic*] excision of a perineal or scrotal mass with a proximal corporal excision**;
>
> 3. That a reasonable person in Keith Burchell's position would not have agreed to the an [*sic*] excision of a perineal or scrotal mass with a proximal corporal excision if he had been adequately informed; and
>
> 4. That Keith Burchell was harmed by a result or risk that Gary Ray Barker, M.D. should have explained.

(AA 60 [CACI 533]. Emphasis in bold added.) The jury then was further instructed as to Plaintiff's theory of informed consent:

> When a patient consents to certain treatment and the doctor performs that treatment but **an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears**.

(AA 61 [Special Jury Instruction Number 1]. Emphasis in bold added.) This was the only instruction which used the word "intentional."

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As to the second cause of action for medical battery, there was no definition of “medical battery” like CACI 532, which provided a definition of “informed consent” to the jury. Instead, the jury was instructed that, to prove medical battery, Plaintiff must prove:

> 1. That Gary Ray Barker, M.D., performed a medical procedure without Keith Burchell's consent;
>
> or
>
> That Keith Burchell consented to one medical procedure, but Gary Ray Barker, M.D. **performed a substantially different medical procedure**;
>
> 2. That Keith Burchell was harmed; and
>
> 3. That Gary Ray Barker, M.D.’s conduct was a substantial factor in causing Keith Burchell’s harm.

(AA 58 [CACI 530A]. Emphasis in bold added.) Since there was no instruction providing a definition of “medical battery,” the implication was that the jury should apply *this* instruction, like CACI 533, under the definition of “informed consent.” The jury then was instructed,

> A doctor may not act beyond the patient’s authorization except in life- or health-threatening situations.

(AA 62 [Special Instruction No. 1, “Limitation to Act Beyond Patient’s Authorization”].) Together, these two instructions on medical battery left the jury with only one conclusion to draw,

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that the medical battery theory should be understood in terms of the informed consent that Defendant allegedly failed to provide Plaintiff. The two theories essentially were identical. That was because the jury was not required to find that Defendant intended to deviate from the consent, let alone that Defendant intended to harm Plaintiff.

Plaintiff's counsel urged the jury to send a message. He began his argument by telling them to "change the future." (3 Reporter's Transcript on Appeal ("RT") 574:18.) "The constitution gives you the right as individuals to help us govern the future. This small corner of the world, San Bernardino County, can direct the future of care for patients." (3 RT 575:1-4.) He reminded the jury of "the McDonald's case, the hot coffee case" (3 RT 576:2-8), "the Ford Pinto case" (3 RT 576:9-17), and the Chevrolet "exploding tank" case (3 RT 576:18-21), which he compared to this case. He argued, "the issue is far more important than just that one issue between one patient and one doctor." (3 RT 576:23-25.) "This verdict does not end here in this room. This verdict is a message that will be sent, that we are the protectors of the consumer, the patient, the person on whom a doctor is working." (3 RT 577:7-10.) He ended his argument, "you need to make sure that this doesn't happen again, send the message, this is not acceptable. Send the message the patient is in control. Send the message that damages to a human being are

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significant and need to be properly compensated." (3 RT 615:15-19.)

The jury sent a message. In a ten to two decision (3 RT 639:1-25), the jury found for Plaintiff on both causes of action and awarded $9,250,000 for noneconomic loss. The following is their verdict:

MEDICAL NEGLIGENCE

1. Was GARY RAY BARKER, M.D. negligent in the diagnosis or treatment of KEITH BURCHELL?

_X_ Yes ___ No

If you answered question 1 "Yes", then answer question 2. Otherwise proceed to the section entitled MEDICAL BATTERY.

2. Was GARY RAY BARKER, M.D.'S negligence a substantial factor in causing harm to KEITH BURCHELL?

_X_ Yes ___ No

Proceed to the section, MEDICAL BATTERY.

MEDICAL BATTERY

3. Did GARY RAY BARKER, M.D. perform a medical procedure without KEITH BURCHELL'S consent?

___ Yes _X_ No

4. Did KEITH BURCHELL consent to one medical procedure, but GARY RAY BARKER, M.D. perform a substantially different medical procedure?

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X Yes ___ No

If your answer is "Yes", to 3 or 4, then answer question 5.

5. Was GARY RAY BARKER, M.D.'S performance of the medical procedure a substantial factor in causing harm to KEITH BURCHELL?

X Yes ___ No

If you answered "Yes" to 2 or 5 proceed to the section entitled DAMAGES. Otherwise, skip this section and have the jury foreperson sign the verdict.

DAMAGES

What are KEITH BURCHELL'S damages?

a.	Past non-economic loss	$ 4,000,000.00
b.	Future non-economic loss	$ 5,250.000.00
Total non-economic damages		$ 9,250.000.00

(AA 82:2-83-1.) Thereafter, pursuant to the stipulation of counsel, economic damages of $22,346.11 were added to the judgment. (AA 90:11-13.)[1]

Defendant moved for partial judgment notwithstanding the verdict, pursuant to Code of Civil Procedure section 629, "on the ground that the portion of the noneconomic damages verdict in

[1] The jury was never informed of the special damages incurred by Plaintiff, nor did they know of the stipulation of counsel.

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excess of the limit imposed by Civil Code section 3333.2, subdivision (b), is barred as a matter of law and must be reduced to $250,000." (AA 98:9-11.) The court denied the motion, reasoning that "MICRA does not apply to medical battery." (AA 503:1. Emphasis in heading omitted.) The court also denied the motion based on the argument of excessive damages. (AA 509:5-511:14.)

Defendant filed notice of appeal. (AA 520.)

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SUMMARY OF ARGUMENT BY *AMICI CURIAE*

The issues in this case are significant to *Amici* for two reasons.

First, health care providers are increasingly being named as defendants in such combined or "hybrid" claims of professional negligence and intentional torts. Intentional infliction of emotional distress, breach of fiduciary duty, misrepresentation, elder abuse, and fraud are all theories being pursued, but battery is the most common. "Medical battery" is the usual way the claim is characterized. The goal is to avoid one or more features of medical malpractice tort reform, almost always including the limitation on noneconomic damages. In California, it is Civil Code section 3333.2.

Second, even in cases where the only theory is professional negligence, health care provider defendants always have faced the risk of excessive damages awards, based on exhortations to jurors to send a message for better health care. The result is damages awards, usually in the noneconomic component, that are calculated to send a message rather than to compensate.

This case illustrates both problems.

Here, the claim is medical battery for lack of patient consent for the surgeon to extend the surgery to adjacent tissue, which Plaintiff characterizes as both professional negligence and "medical battery." Plaintiff characterizes it as a so-called

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"hybrid" claim, admitting that the same set of facts gave rise to both theories. Notably, Plaintiff did not plead that the surgeon intended to defeat the patient's wishes, let alone intended to harm the patient, and the jury did not find that the surgeon had such intent. Instead, Plaintiff proved his case by relying upon expert witness opinion testimony that the surgeon breached the standard of care in deciding to proceed as he did.

Plaintiff strongly implies (see, *e.g.*, RB, pp. 24, 27, 30-31) but never expressly argues that the specific type of "medical battery" in this case was an intentional tort.[2] Plaintiff characterizes the conduct in question as "Dr. Barker's misadventure beyond Plaintiff's consent" (RB, p. 9), *i.e.*, Dr. Barker's "independent decision to extend the surgery beyond Plaintiff's consent" (RB, p. 31). Plaintiff explains, "[w]ithout consent, absent exigent circumstances, a physician engaging in an unauthorized medical procedure commits *a form of battery*" (RB, p. 32, citing *Cobbs v. Grant* (1972) 8 Cal.3d 229; emphasis in italics added), referring to "the type defined by jury instruction CACI 530A." (RB, p. 30.) That is, "the type" in which the jury is not required to find intent. (Compare CACI 530A (*Medical*

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[2] Plaintiff cites *Perry v. Shaw* (2001) 88 Cal.App.4th 658 (RB, pp. 24, 27, 29, 30-31, 34) and quotes language from that case about the difference between professional negligence and intentional tort for purposes of MICRA (*id.* at p. 27).

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Battery with CACI 1300, *Battery–Essential Factual Elements* ["with the intent to harm or offend"].)

Even though lack of patient consent under the factual background and procedural history of this case may be characterized as "*a form of battery*," it fundamentally is professional negligence. As such, Civil Code section 3333.2, the MICRA noneconomic damages limitation that is applicable in cases of medical professional negligence, should apply.

Even if there was no mention of professional negligence in the factual background and procedural history of this case, the noneconomic damages still should be reduced. The award is excessive, precisely because it was calculated to send a message. If the award had been calculated only to compensate Plaintiff for his nonpecuniary loss, it would have been for far less. That is the only reasonable inference to draw from the appellate record, in particular, the closing argument of Plaintiff's counsel.

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LEGAL ANALYSIS

I. MICRA APPLIES TO BOTH THEORIES IN THIS "HYBRID" CLAIM

A. Plaintiff's Theories Of Professional Negligence And Medical Battery Were Based On The Same Set Of Facts

Whether analyzed in terms of professional negligence or medical battery, both of Plaintiff's theories were based on the same set of facts. Plaintiff's first cause of action for professional negligence (AA 15-17) alleged "[t]he decision to perform the resection was made by Defendant BARKER alone, without consent or with[out] consultation with Plaintiff or any representative of Plaintiff." (AA 16:15-17.) Plaintiff's second cause of action for medical battery (AA 17-18) was based on the same allegation: "Plaintiff consented to certain medical procedures as set forth herein above in the preceding paragraphs, however, Defendant BARKER, performed additional and substantially different medical procedure which was not agreed to by Plaintiff[.]" (AA 17:26-28.) Any doubt in that regard is dispelled by the final words of that sentence "as set forth in paragraphs 7 through 9 above" (AA 17:28), referring to the set of facts alleging professional negligence.

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Plaintiff succeeded in defeating MICRA simply by characterizing his claim as a "hybrid" and emphasizing the "medical battery" side of that dual characterization.

The "professional negligence" side of that dual characterization can be emphasized just as easily, as Defendant does. Defendant's argument is more persuasive because, in this "hybrid" case, both aspects of the dual characterization were based on the same evidence.[3]

B. Plaintiff's Theory Of Medical Battery Is Not A Traditional *Intentional* Tort Because He Did Not Plead And The Jury Did Not Find That Defendant Acted Without A Medical Purpose

Amici submit that few if any hybrid claims against physicians, particularly surgeons, for professional negligence and medical battery qualify as truly "intentional" torts that would fall outside of the ambit of MICRA. Most such claims are for professional negligence that is also artificially characterized as "intentional" professional care. The battery theory in such cases is "intentional" only in the sense that the contact with the patient

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[3] The only possible feature of this case that would have distinguished the two was if the jury decided that Dr. Barker *intended to deviate* from what he understood to be Plaintiff's wishes or, even more to the point, if the jury decided that Dr. Barker *intended to harm* Plaintiff.

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is volitional. This sort of conduct, however, differs in kind from the category of "intentional" torts to which MICRA does not apply.

This case illustrates the point. The jury here was asked to decide whether the surgeon performed "a medical procedure without [Plaintiff's] consent," and the jury answered, "No." (AA 89:13-15.) The jury then was asked to decide whether the surgeon performed "a substantially different medical procedure," and the jury answered, "Yes." (AA 89:16-18.) The jury's analysis of both questions turned on the technical language of the consent form.

That is different from a health care provider who commits a traditional type of battery, such as the anesthesiologist's alleged assault and battery of her patient that was analyzed in *So v. Shin* (2013) 212 Cal.App.4th 652, 667-671, where the physician's purpose was to persuade her patient not to report an incident that occurred during surgery, rather than to provide the patient with medical care. "In other words, plaintiff alleges that Dr. Shin acted for her own benefit, to forestall an embarrassing report that might damage her professional reputation—*not* for the benefit of her patient." (212 Cal.App.4th at 667. Emphasis in original.) The Court of Appeal reversed the demurrer to the cause of action for alleged assault and battery because the physician's conduct allegedly did not have a medical purpose and,

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therefore, did not fall within the patient's consent. (212 Cal.App.4th at 669-671.)[4]

Here, on the other hand, the surgeon's conduct definitely had a medical purpose. The surgeon was concerned that the mass might be malignant and that it could damage the patient's urethra if it were not removed. The surgeon did not intend to harm the patient; rather, the surgent proceeded on the belief that the patient would be harmed if the mass were *not* removed. The surgeon's "intent" in deciding to extend the surgery was thus to benefit the patient. That is why the jury finding of medical battery should be characterized as professional negligence rather than a "intentional" tort.

Larson v. UHS of Rancho Springs, Inc., supra, 230 Cal.App.4th 336, supports that conclusion. The Court of Appeal affirmed the demurrers to the patient's causes of action for battery and intentional infliction of emotional distress on the MICRA statute of limitations, Code of Civil Procedure section 340.5. Both causes of action were based on the allegations that the anesthesiologist defendant in that case had injured the plaintiff patient "by forcefully grabbing and twisting his arm

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[4] The Court of Appeal in *So v. Shin* also reversed the demurrer to the cause of action for intentional infliction of emotional distress. (212 Cal.App.4th at 673 ["the trial court erred in concluding that Dr. Shin's conduct was not extreme or outrageous as a matter of law"].)

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while conducting a preoperative checkup, and by prying open [plaintiff's] mouth and violently punching, lifting, and pushing [plaintiff's] face as he put on the mask to administer anesthesia." (230 Cal.App.4th at 351-352.) The Court concluded the claims related to how the anesthesiologist performed his professional services and, therefore, were based on professional negligence. (*Ibid*.) The Court reasoned, "[t]hese allegations challenge the manner in which [the anesthesiologist] rendered the professional health care services he was hired to perform; they do not allege intentional torts committed **for an ulterior purpose**." (*Id.* at 351. Emphasis in bold added.)

The *Larson* court distinguished *So v. Shin,* on which the plaintiff in that case relied.

> Because the plaintiff alleged the defendant engaged in conduct **for her own benefit**—for the purpose of persuading the plaintiff not to report that she awoke during the procedure—the *So* court concluded "the alleged negligence was not undertaken 'in the rendering of professional services,' and thus it does not constitute professional negligence within the meaning of [Code of Civil Procedure] section 340.5. [Citation.]
>
> *So* does not change the result in this case because Larson's allegations show Shuman necessarily undertook the alleged conduct in providing professional services—a preoperative checkup and administration of anesthesia. Unlike the allegations in *So*, Larson does not allege Shuman acted **for**

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> **any reason other than rendering professional services**.

(230 Cal.App.4th at 354, quoting *So v. Shin, supra,* 212 Cal.App.4th at 667. Emphasis in bold added.) In other words, the difference in the two cases was **the nonmedical intent** of the anesthesiologist in *So,* which was why *So* was analyzed in terms of traditional battery, and **the medical intent** of the anesthesiologist in *Larson,* which was why *Larson* was analyzed in terms of professional-negligence medical battery.

Like the plaintiff in *Larson,* Plaintiff in this case does not allege that Defendant acted for any reason other than rendering professional services. That is true even though Plaintiff in this case characterizes his action as a "hybrid." This entire action is based on professional negligence and, therefore, falls within the definition of such in Civil Code section 3333.2, subdivision (c), "(2) 'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury[.]"

C. Plaintiff Does Not Deny This Is A Case Of Professional Negligence

Plaintiff admits, as he must, that he pursued and recovered damages under his theory of professional negligence. Plaintiff discusses *Larson v. UHS of Rancho Springs, Inc., supra,* 230

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Cal.App.4th 336 (at RB, pp. 27, 32-33) but does not persuasively explain why the reasoning of the *Larson* court that the medical battery there was professional negligence should not be applied here. At most, he argues, "when a physician extends a medical procedure beyond the scope of a patient's consent to a substantially different procedure, especially one with significantly greater risks and complications not otherwise accepted by the patient, the physician violates the patient's fundamental right to exercise control over his body[.]" (RB, pp. 32-33.) In that way, Plaintiff purports to distinguish the defendant physician's physical striking of the patient in *Larson* from Dr. Barker's extension of his surgical exploration in this case.

Plaintiff acknowledges that he relied upon expert testimony and Dr. Barker's admission that he extended the surgery to prove his medical battery theory.

> Plaintiff's experts made it clear that Dr. Barker exceeded the scope of consent and that there was never any life-threatening circumstance nor any emergency health concern requiring a "proximal corporal resection" without Plaintiff's consent. (1 RT 89-98, 122; 2 RT 408-409, 415.) Dr. Barker also agreed that his procedure was not the same procedure as was discussed with the patient. (1 RT 195-197.) This testimony is sufficient evidence to support a claim of medical battery.

(RB, p. 34.)

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One possible reason why Plaintiff does not deny that the jury found that there was professional negligence is that he hopes to recover the entire noneconomic damages award from professional liability insurers. If he argues that the recovery of the $9,000,000 premium over the MICRA limitation he achieved was based on Dr. Barker's "intentional" misconduct, they might cite that argument to justify refusing to pay. Regardless, if this Court concludes the noneconomic damages in this case are for an intentional tort, they might cite the Court's opinion.

On the other hand, if this Court agrees with Defendant, there will be no doubt the claim is covered and paid by professional liability insurance, which is the purpose of MICRA.

II. THE JURY AWARD OF NONECONOMIC DAMAGES IS EXCESSIVE

A. The Trial Of This Case Was An Example Of A Strategy That Has Been And Continues To Be Pursued Against Health Care Providers

California health care providers are very familiar with tort litigation, specifically professional negligence litigation, in which plaintiffs pursue a strategy of demonizing defendant physicians, dentists, hospitals, and/or other health care providers. Arguably, the medical malpractice insurance crisis that led to the enactment of MICRA was a result, at least in part, of the very high awards of compensatory damages against health care

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providers that were the result of such a strategy being pursued in the late 1960's and early 1970's.

The strategy continues to be pursued today. For example, it was pursued against the health care provider, manufacturer, and distributor defendants in the trial that led to the recent decision in *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276 ("*Bigler-Engler*").[5]

There are similarities between *Bigler-Engler* and this case. In *Bigler-Engler*, one of the issues was whether the jury's awards of noneconomic compensatory damages and punitive damages were excessive. (7 Cal.App.5th at 298-311.) The plaintiff made a so-called "per diem" argument for damages, and the jury awarded $900 per day for past noneconomic damages and $100 per day for the rest of the plaintiff's projected life expectancy. (*Id.* at 301.) The jury awarded $68,270.38 in economic compensatory damages and $5,127,950 in noneconomic compensatory damages. (*Id.* at 284.) The jury allocated responsibility for the plaintiff's harm as follows: 50 percent to the physician, 10 percent to the distributor of the product, and 40 percent to the manufacturer. (*Ibid.*) The jury found malice, oppression, or fraud as to each defendant on at least one claim. (*Ibid.*) In the punitive damages phase of trial,

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[5] *Bigler-Engler* was cited by both sides in this appeal, although for different propositions. (AOB, pp. 31, 36-37, 39-40, 42, 47; RB, p. 43.)

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the jury awarded $500,000 against the physician and $7 million against the manufacturer. (*Ibid.*)

Another issue in *Bigler-Engler* was whether Engler's counsel committed prejudicial misconduct, including during closing argument to the jury. (7 Cal.App.5th at 292-298.) The Court of Appeal agreed there was misconduct but concluded that prejudice was not shown by the defendants. (*Id*. at 292.)

> Although we conclude Chao and Oasis have not shown prejudice here, Stern's conduct was improper. Such conduct not only falls below professional standards, it unnecessarily places the client at risk. "'[P]unishment of counsel to the detriment of his client is not the function of the court. [Citation.] Intemperate and unprofessional conduct by counsel . . . runs a grave and unjustifiable risk of sacrificing an otherwise sound case for recovery, and as such is a disservice to a litigant.'" (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 489, 130 Cal.Rptr. 786 (*Neumann*).) We expect more from our attorneys; in another context reversal may well have been warranted.

(*Id*. at 298.)

The Court of Appeal found the noneconomic damages to be excessive (7 Cal.App.5th at 298-306), concluding,

> the jury's noneconomic compensatory damages award is excessive, is not supported by the evidence, and appears to be the result of passion and prejudice. For reasons we will explain, and as a matter of judicial economy, we will exercise our authority to reverse the jury's noneconomic compensatory damages award and remit the award to the

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> maximum amount supported by the current record, conditioned on Bigler-Engler's acceptance of the reduced amount. If Bigler-Engler does not accept the reduced amount, the trial court should conduct a new trial on that issue.

(*Id.* at 299.) After explaining the lack of evidence supporting the jury's award and the disproportionality of the award shown by the reported cases (*id.* at 300-304), the Court of Appeal explained how the verdict "was influenced by improper factors" (*id.* at 304), referring to counsel's many episodes of misconduct, motivating the jury to award noneconomic damages based on passion or prejudice (*id.* at 304-305). The Court reversed and remitted the award to $1.3 million. (*Id.* at 305.)

Here, there also were aggressive arguments by Plaintiff arguably calculated to inflame the jury.

B. Arguments Based On Such A Strategy Often Succeed In Achieving Excessive Awards Of Noneconomic Damages

The *Bigler-Engler* court cited the seminal case of *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, for the authority of an appellate court to address the problem of excessive damages in cases such as this. (*Bigler-Engler, supra,* 7 Cal.App.5th at 299.) In *Seffert*, Justice Peters summarized the standard for appellate analysis of excessive noneconomic damages. "Basically, the question that should be decided by the appellate courts is

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whether or not the verdict is so out of line with reason that it shocks the conscience and necessarily implies that the verdict must have been the result of passion and prejudice." (56 Cal.2d at 508.) He and three other justices acknowledged that "the amount of the award is high, and may be more than we would have awarded were we the trier of the facts," but affirmed nevertheless because "we cannot say, as a matter of law, that it is so high that it shocks the conscience and gives rise to the presumption that it was the result of passion or prejudice on the part of the jurors." (*Id.* at 509.)

Justice Traynor, writing for the minority of three, agreed with that standard (56 Cal.2d at 510 (dis opn. of Traynor, J.) ["A reviewing court, however, has responsibilities not only to the litigants in an action but to future litigants and must reverse or remit when a jury awards either inadequate or excessive damages"]), but dissented because the award for pain and suffering was "so excessive as to indicate that it was prompted by passion, prejudice, whim, or caprice." (*Id.* at 509. Footnote omitted.) He then explained why the award was "undoubtedly the result of the improper argument of plaintiff's counsel to the jury." (*Id.* at 513-514.)

The fundamental problem is that such excessively high noneconomic damage awards are **punitive**. Justice Traynor characterized that as "**primitive**."

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> There has been forceful criticism of the rationale for awarding damages for pain and suffering in negligence cases. (Morris, *Liability for Pain and Suffering*, 59 Col. L.Rev. 476; Plant, *Damages for Pain and Suffering*, 19 Ohio L.J. 200; Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 Law and Contemporary Problems 219; Zelermyer, *Damages for Pain and Suffering*, 6 Syracuse L.Rev. 27.) Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged. (Morris, *Liability for Pain and Suffering*, *supra,* 59 Col. L.Rev. at 478; Jaffe, *Damages for Personal Injury: The Impact of Insurance*, *supra*, 18 Law and Contemporary Problems at 222-223.) They become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. Ultimately such losses are borne by a public free of fault as part of the price for the benefits of mechanization. (Cf. *Peterson v. Lamb Rubber Co*. [(1960)] 54 Cal.2d 339, 347-348, 5 Cal.Rptr. 863; *Henningsen v. Bloomfield Motors, Inc*. [(N.J. 1960)] 32 N.J. 358, 161 A.2d 69, 77, 75 A.L.R.2d 1; *Escola v. Coca Cola Bottling Co*. [*of Fresno* (1944)] 24 Cal.2d 453, 462, 150 P.2d 436 (concurring opinion).

(56 Cal.2d at 511 (dis. opn. of Traynor, J.).) He acknowledged that,

> Nonetheless, this state has long recognized pain and suffering as elements of damages in negligence cases [citations]; any change in this regard must await reexamination of the problem by the Legislature.

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> Meanwhile, awards for pain and suffering serve to ease plaintiffs' discomfort and to pay for attorney fees for which plaintiffs are not otherwise compensated.

(*Ibid.*)

Justice Traynor was prescient. The Legislature, in part responding to the excessive noneconomic damages awards in medical malpractice litigation later in that decade and the beginning of the next, enacted Civil Code section 3333.2, limiting noneconomic damages in such litigation to $250,000. Not surprisingly, when the California Supreme Court upheld Section 3333.2 from constitutional attack in *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, the Court quoted Justice Traynor's dissent in *Seffert v. Los Angeles Transit Lines*. (38 Cal.3d at 159, fn. 16.)

This case illustrates that there still is a problem and the MICRA is a solution. Even if that legislatively mandated reduction of excessive noneconomic damages is held not to apply, there still is a solution: judicial reduction of excessive noneconomic damages. *Bigler-Engler* is an illustration.

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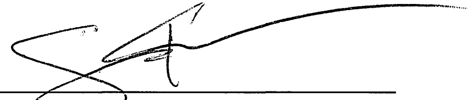
CONCLUSION

MICRA applies to this case even though the claim is a "hybrid" of professional negligence and medical battery.

Even if there was *no* finding of professional negligence and the physician was found by the jury to have intentionally committed a traditional battery, the noneconomic damages award in this case would be excessive. The purpose of such damages is to compensate, not "to send a message."

Dated: September 17, 2019

COLE PEDROZA LLP

By: 

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CERTIFICATION

Appellate counsel certifies that this document contains 7,019 words. Counsel relies on the word count of the computer program used to prepare the document.

Dated: September 17, 2019 COLE PEDROZA LLP

By: ______________________

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PROOF OF SERVICE

I am a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 2295 Huntington Drive, San Marino, California 91108.

On this date, I served the ***AMICI CURIAE*** **BRIEF OF AMERICAN MEDICAL ASSOCIATION, CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND CALIFORNIA HOSPITAL ASSOCIATION** on all persons interested in said action in the manner described below and as indicated on the service list:

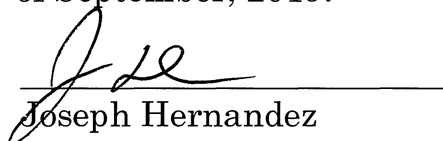
See Attached Service List

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

By TrueFiling – I electronically transmitted the above-referenced documents pursuant to California Rules of Court, rule 8.71(a) through the TrueFiling electronic filing system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 17th day of September, 2019.



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