A138234

Court of Appeal of the State of California
First Appellate District, Division One

JESSICA CHAN,
Plaintiff and Appellant,

v.

PETER CURRAN, M.D., ET AL.,

Defendants and Respondents.

APPEAL FROM THE SUPERIOR COURT OF SAN FRANCISCO COUNTY
CASE NO. CGC-10-502053; HON. WALLACE P. DOUGLASS

Application for Leave to File Amici Curiae Brief in Support of Respondents Peter Curran, M.D., et al.; Brief of Amici Curiae California Medical Association, California Dental Association, California Hospital Association, and American Medical Association

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APPLICATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to California Rules of Court, Rule 8.200(c), the California Medical Association (CMA), California Hospital Association (CHA), California Dental Association (CDA), and American Medical Association (AMA) request permission to file the attached Amici Curiae Brief in support of Respondents Peter Curran, M.D., et al.

I. INTERESTS OF AMICI CURIAE

CMA is a nonprofit, incorporated, professional association of more than 39,000 physicians practicing in California, in all specialties. CDA represents almost 24,000 California dentists, over 70 percent of the dentists engaged in the private practice of dentistry in California. CMA and CDA are the largest organizations representing physicians and dentists engaged in private practice in California. CHA is the statewide leader representing the interests of nearly 400 hospitals and health systems in California. CMA, CDA, and CHA are active in California's courts in cases involving issues of concern to the healthcare community.

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

The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus

the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

Some funding for this brief was provided by organizations and entities that share Amici's interests, including physician-owned and other medical and dental professional liability organizations and nonprofit and governmental entities engaging physicians for the provision of medical services, specifically: Cooperative of American Physicians, Inc.; Kaiser Foundation Health Plan, Inc.; The Mutual Risk Retention Group, Inc.; The Dentists Insurance Company; The Doctors Company; NORCAL Mutual Insurance Company; and The Regents of the University of California.

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

II. NEED FOR FURTHER BRIEFING

This appeal involves the limitation on noneconomic damages in the Medical Injury Compensation Reform Act of 1975 (MICRA), codified at Code of Civil Procedure section 3333.2. This statute, its effect on noneconomic damages awards in medical malpractice cases, and its effect on the practice of medicine and access to care for patients is of great interest to Amici.

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

Amici believe this Court will benefit from additional briefing. This brief supplements, but does not duplicate, the parties' briefs.

Rather, it discusses case law and aspects of other authorities not directly addressed by the parties.

The limit on noneconomic damages is an important part of MICRA, which amici have endeavored to protect since the Legislature enacted MICRA in 1975. (See, e.g., *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 851 fn. 4; *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412; *Leung v. Verdugo Hills Hosp*. (2008) 168 Cal.App.4th 205, 212; *Palmer v. Superior Court* (2002) 103 Cal.App.4th 953, 961; *Delaney v. Baker* (1999) 20 Cal.4th 23, 31 fn. 4; *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 188 fn. 3; *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 640 fn. 2, 643 n. 3, 649 fn. 7; *Hrimnak v. Watkins* (1995) 38 Cal.App.4th 964, 979; *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 171.)

Respectfully submitted,

Dated: June 3, 2014

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BRIEF OF AMICI CURIAE

I. INTRODUCTION

The Supreme Court has held that the Medical Injury Compensation Reform Act of 1975 (MICRA), and the specific statute at issue, Civil Code section 3333.2 ("Section 3333.2"), comply with the rights to jury trial and equal protection enshrined in the California Constitution. In fact, the Supreme Court has made clear that 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*").)

Plaintiff Jessica Chan argues that in order to ensure access to justice, California needs more medical malpractice lawsuits. According to Plaintiff, the potential for "low" awards may dissuade contingency-fee lawyers from taking up cases. Thus, Plaintiff argues, this Court should hold that the limitation for noneconomic damages in Section 3333.2 is unconstitutional, thereby increasing contingency fees and inspiring more lawyers to sue health care professionals. Plaintiff also argues that Section 3333.2 violates her right to the damages awarded by a jury, and that changed circumstances render MICRA as a whole obsolete.

Amici respectfully disagree. To strike down the damages limitation in Civil Code section 3333.2—especially with a goal of *increasing* professional negligence litigation against California's health care providers—would contravene decades of California law, directly violate Supreme Court precedent, and contradict the Legislature's stated

purposes in enacting MICRA. Furthermore, Plaintiff does not have a right to a certain measure of damages, and courts may not invalidate legislation by second-guessing whether that legislation is adequately serving its purpose.

It is clear that Section 3333.2 has a rational basis and is constitutional. Plaintiff's challenge to it should be rejected.

II. DISCUSSION

A. MICRA's constitutionality is settled law.

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

The California Supreme Court has upheld MICRA numerous times and has specifically found Section 3333.2 constitutional. (See, e.g., *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137 ("*Fein*") [upholding Section 3333.2's damages cap despite equal protection and due process arguments]; *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920 ("*Roa*") [upholding MICRA's limitation on contingent fee arrangements despite equal protection and due process arguments]; *Barme v. Wood* (1984) 37 Cal.3d 174 [upholding MICRA's bar on collateral source reimbursements despite equal protection and due process arguments]; *American Bank v. Community Hospital of Los Gatos-Saratoga, Inc.* (1984) 36 Cal.3d 359 ("*American Bank*") [upholding MICRA's periodic payment provision despite equal protection, due process, and right-to-jury arguments]; *Reigelsperger v. Siller* (2007) 40 Cal.4th 574 [holding that patients are bound to arbitrate claims based on future services, consistent with MICRA's arbitration provision]; *Ruiz*

v. Podolsky (2010) 50 Cal.4th 838, 843-844 [holding that heirs are bound by a patient's agreement to arbitrate under MICRA's arbitration provision].)

Likewise, the California Court of Appeal has repeatedly rejected constitutional challenges to MICRA. Addressing nearly identical arguments, the Fifth Appellate District recently held in *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412 ("*Stinnett*") that Section 3333.2's limitation on noneconomic damages is constitutional. The *Stinnett* court also found no merit in the argument that Section 3333.2 violated the right to equal protection or to a jury trial. (*Stinnett*, 198 Cal.App.4th at 1418, 1433.) The Second Appellate District ruled similarly in *Yates v.Pollock* (1987) 194 Cal.App.3d 195, 200 ("*Yates*"). Plaintiff's arguments are at odds with the consistent and numerous pronouncements by the Supreme Court and Court of Appeal that MICRA is constitutional.

B. Civil Code section 3333.2 does not violate the right to due process; there is no right to unlimited damages.

Plaintiff argues that potential professional negligence plaintiffs who have suffered primarily noneconomic losses are "denied access to justice" because Section 3333.2 acts as an economic disincentive for attorneys who take cases on a contingency basis. Because of the noneconomic damages limitation in Section 3333.2, according to Plaintiff, these "low-damages" plaintiffs are denied equal access to the courts. (AOB 28-29.) Plaintiff's argument rests on the premise that only the potential for an "ample recovery" will "incentivize any rational contingent fee lawyer to represent med/mal victims without significant economic loss claims." (AOB 25.)

Plaintiff calls this an "entirely new argument" (AOB 2) but it is essentially the argument rejected by the Supreme Court in *Roa v. Lodi*

Medical Group (1985) 37 Cal.3d 920. In that case, the plaintiffs challenged Business and Professions Code section 6146, a MICRA provision that limits the amount of contingency fees an attorney may collect in a professional negligence action. The plaintiffs in *Roa* argued that "the limits established by section 6146 are invalid because the authorized fees are so low that in practice the statute will make it impossible for injured persons to retain an attorney to represent them." (*Roa*, 37 Cal.3d 920, 928.) The Supreme Court rejected this assertion, saying that Section 6146 "does not in any way abrogate the right to retain counsel, but simply limits the compensation that an attorney may obtain when he represents an injured party under a contingency fee arrangement." (*Id.*, at p. 926.) The Court also noted that "legislative ceilings on attorney fees are in no way 'constitutionally suspect' or subject to 'strict' judicial scrutiny." (*Id.*, at p. 927.)

Plaintiff makes a similar argument here, but one step removed—arguing not that the contingency limitation itself makes malpractice cases unattractive to plaintiff attorneys, but instead that the cap on one form of damages affects contingency fees and therefore makes medical malpractice cases unattractive to plaintiff attorneys. The *Roa* decision makes clear that a limitation on contingency fees—whether directly stated or a possible result of the overall statutory structure—does not constitute the deprivation of any constitutional right. Under *Roa*, Plaintiff's arguments fail.

Plaintiff has not cited any cases from any jurisdiction holding that a plaintiff has a right to a certain recovery to ensure her attorney gets subjectively "ample" contingency fees. And the Supreme Court has made clear that a plaintiff does not have a right to recover noneconomic damages in any amount: "[N]o 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.) Plaintiff's position that professional negligence plaintiffs are constitutionally entitled to higher noneconomic damages awards to ensure plaintiffs' attorneys get "ample recovery" is simply not supported by law.

Plaintiff's argument also represents poor public policy that directly contradicts the policies and purposes underlying MICRA. California suffered a medical malpractice insurance crisis "when the insurance companies which issued virtually all of the medical malpractice insurance policies in California determined that the costs of affording such coverage were so high that they would no longer continue to provide such coverage as they had in the past." (*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 843, quoting *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 577–578.) In response, the Legislature enacted a number of statutes intended to lower costs associated with professional negligence litigation, including Civil Code §§ 3333.1 (allowing evidence of collateral source payments), 3333.2 (limiting the recovery of noneconomic damages); Code Civ. Proc. §§ 340.5 (establishing the relevant statute of limitations), 364, 365 (requiring advance notice of a claim), 667.7 (allowing for periodic payments of future economic damages), 1295 (providing for binding arbitration); and Bus. & Prof. Code § 6146 (limiting attorney contingency fees). Plaintiff's argument that the Court should strike down Section 3333.2 to encourage *more* lawsuits against health care providers with no limit on the recovery of noneconomic damages would be directly contrary to the intent of the Legislature in enacting MICRA. In fact, Plaintiff's suggestion would re-introduce the very volatility that led to MICRA's enactment. And as discussed below in Section C(2) and C(3), later-enacted laws and changed circumstances do not support Plaintiff's argument.

Moreover, Plaintiff's argument that MICRA does not allow attorneys to be sufficiently compensated is aided by mathematical sleight of hand. She argues that out-of-pocket expenses make professional negligence claims not worth pursuing. (AOB 28, 34-35.) But she also admits that her calculation of litigation costs fails to provide for the cost-shifting inherent in every California case under the Code of Civil Procedure (AOB 17-18), whereby the prevailing party can recoup the costs of filing fees, motion fees, jury fees, witness fees, court reporter fees, deposition costs, costs of exhibits, expert witness fees, and prejudgment interest. (See Code Civ. Proc., §§ 998, 1032, 1033.5.) As these costs are recoverable, Plaintiff's arguments that the "dramatic" rise of such costs inhibit the prosecution of lawsuits (AOB, pp. 37-42)—and her arguments about the costs involved in prosecuting this lawsuit[1]—are nothing more than a straw man.

In short, Plaintiff's arguments that professional negligence plaintiffs are denied due process because of limitations on the recovery of noneconomic damages and the effect that has on attorney contingency fees is not supported by California law or policy. A more direct form of this argument was rejected by the Supreme Court in *Roa*, and it should be rejected here.

C. Civil Code section 3333.2 does not violate the right to a jury trial because there is no right to recover the jury's determination of damages.

Plaintiff attacks Section 3333.2 on the grounds that it violates her right to a jury trial because "the jury's determination of damages is

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[1] Amici do not have the appellate record in this case, but a May 20, 2013 order available online from the San Francisco Superior Court's website indicates that Plaintiff recouped more than $70,000 in costs and prejudgment interest.

disregarded and replaced by the arbitrary and absolute $250,000 ceiling." (AOB, p. 44.) She also argues that it violates her right of consent or new trial, and improperly applies without regard to the evidence. (AOB at 44.)

As Defendants point out, Plaintiff's argument is not that her right to a jury trial was abridged—a jury trial did occur in this case and the jury completed its duty and fulfilled its function. (ARB, pp. 35-36.) Rather, Plaintiff's argument is that she has a right to collect the particular measure of damages determined by a factfinder: "In sum, section 3333.2's damages cap violates plaintiffs' constitutional right to a jury trial because it mandates an absolute reduction of the jury's award…." (AOB 47.)

Plaintiff's argument is assessed under the rational basis test. "[T]he constitutionality of measures affecting…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…. 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 pp. 157-58, quoting *American Bank*, 36 Cal.3d 359, 368–369.)

The Supreme Court has pointed out 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 (emphasis added).) And a plaintiff has no right to the particular damages assessed by the jury: "It is well established that a plaintiff has no vested property right in a particular measure of damages…the Legislature has broad authority to modify the scope and nature of such damages." (*American Bank,* 36 Cal.3d 359, 368; see also *Fein*, 38 Cal.3d

at p. 159-60.) The Supreme Court also acknowledged that disparate jury awards themselves were one of the reasons for the Legislature's decision to cap noneconomic damages in medical malpractice cases: "One of the problems identified in the legislative hearings was the unpredictability of the size of large noneconomic damage awards, resulting from the inherent difficulties in valuing such damages and the great disparity in the price tag which different juries placed on such losses." (*Fein*, 38 Cal.3d at p. 163.)

Section 3333.2 "operates as a limitation on liability" no matter what the plaintiff's damages are. (*Western Steamship,* 8 Cal.4th at p. 116.) The Supreme Court has acknowledged that in some ways MICRA does redistribute costs: 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 p. 112.) But this redistribution is appropriate, because "[t]o hold otherwise would undermine the Legislature's express limit on health care liability for noneconomic damages as well as jeopardize the purpose of MICRA to ensure the availability of medical care." (*Western Steamship,* 8 Cal.4th at p. 116.) The Supreme Court has acknowledged that some plaintiffs may recover less in damages than they would without MICRA, but that result is not constitutionally improper. (See, e.g., *Fein*, 38 Cal.3d 137, 159-60.)

The Courts of Appeal have also rejected the argument that Section 3333.2 violates the right to have an amount of damages determined by a jury. The Second Appellate District in *Yates* recognized this argument for what it is: "Plaintiffs' contention that section 3333.2 unconstitutionally abridges the right to a jury trial (Cal. Const., art. 1, § 16) is but an indirect attack upon the Legislature's power to place a

cap on damages." (*Yates*, 194 Cal.App.3d at 200.) Supreme Court precedent makes clear that the Legislature *does* have that power, and the *Yates* court relied on *Fein* and *American Bank* to reject the plaintiff's argument. (*Ibid*.) The Fifth Appellate District in *Stinnett* similarly rejected this argument, noting that "*Fein* and *American Bank* are not by any means the only California Supreme Court cases holding that the Legislature possesses broad authority to modify the scope and nature of recoverable damages." (198 Cal.App.4th at p. 1433, citing *Werner v. Southern Cal. etc. Newspapers* (1950) 35 Cal.2d 121, 128; *Feckenscher v. Gamble* (1938) 12 Cal.2d 482, 499.)

Plaintiff argues that *Yates* and *Stinnett* are not controlling. (ARB 51.) But no California case has held that a party's constitutional right to a jury trial includes a right to recover the particular damages that the jury assessed. This Court should follow existing precedent.

D. Civil Code section 3333.2 does not violate the right to equal protection because it is rationally related to a legitimate state interest.

Plaintiff argues that Section 3333.2 discriminates against severely injured plaintiffs and that it no longer has a rational basis. Plaintiff's argument is largely based on the argument that changed circumstances have undermined the rational basis for Section 3333.2.

The parties agree the constitutionality of Section 3333.2 is reviewed under the rational basis standard. (See AOB, p. 54; ARB, pp. 14-15.) "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.*, at p. 313.)

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

The noneconomic damages cap provided for by Section 3333.2 is rationally related to the legitimate state interest of ensuring access to affordable healthcare. In the 1970s, California faced a serious medical malpractice insurance crisis in which insurance rates were so high they became impossible for physicians to reasonably afford:

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

(*Ruiz*, 50 Cal.4th at p. 843-844, quoting *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 577-578; see also *American Bank,* 36 Cal.3d at 371 [same].)

The Supreme Court has unequivocally found that Section 3333.2 is rationally related to a legitimate state interest. In *Fein*, the Court stated that it is "obvious that this section—by placing a ceiling of $250,000 on the recovery of noneconomic damages—is rationally related to the objective of reducing the costs of malpractice defendants and their insurers." (*Id.* at 159.) The Court also noted that "the Legislature clearly had a reasonable basis for drawing a distinction between economic and noneconomic damages, providing that the desired cost savings should be obtained only by limiting the recovery of noneconomic damage." (*Id.* at 162.)

The importance of MICRA has by no means waned over time. Nearly twenty years after the enactment of MICRA, the Supreme Court, considering the policy behind the statutory scheme, held that Section 3333.2 was "necessary":

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

(*Western Steamship*, 8 Cal.4th 100, 104.) And as recently as 2010, the Supreme Court recognized "MICRA's goal of reducing costs in the resolution of malpractice claims and therefore malpractice insurance premiums" as a basis for upholding the arbitration provision enacted as part of MICRA in 1975. (*Ruiz*, 50 Cal.4th at p. 844.)

Thus, the California Supreme Court has repeatedly held that Section 3333.2 is rationally related to a legitimate government purpose. Arguments that this Court should undermine decades of precedent and find to the contrary should be rejected.

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

Plaintiff argues that prior decisions finding MICRA constitutional do not apply because of changed circumstances. She asserts that the medical malpractice crisis that drove MICRA no longer exists. (See AOB 10, 55-73 ("Ms. Chan does not claim the prior Supreme Court decision are wrong; only that they did not consider the constitutionality of the damages cap in today's circumstances, when no insurance-induced 'crisis' exists.".)

As an initial matter, the Supreme Court already rejected this shortsighted view when it acknowledged that a "rise in insurance

rates…is not a temporary problem; it is a chronic situation….” (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821.) Indeed, in recent years the Legislature has recognized the ongoing threats to the healthcare industry. (See, e.g., Bus. & Prof. Code, § 2418(a)(1) (“The Legislature hereby finds and declares . . . The State of *California is facing a growing crisis in physician supply* due, in part, to difficulties in recruiting and retaining physicians.”) (enacted 2005, emphasis added); Bus. & Prof. Code, § 2425.1 (“Currently, *California is experiencing an access to health care crisis*….”) (enacted 2001, emphasis added).)

Changed circumstances cannot justify the invalidation of a law that has been held constitutional by the Supreme Court. In fact, the Supreme Court has explicitly refused to reexamine MICRA’s legislative findings and statutory success: “[T]he constitutionality of a measure under the equal protection clause does not depend on a court’s assessment of the empirical success or failure of the measure’s provisions.” (*American Bank*, 36 Cal.3d at 374.) Indeed, an argument similar to Plaintiff’s was asserted in *American Bank*, where amici supporting the plaintiff argued that statistics showed a change in the costs of medical care following MICRA. The Supreme Court rejected this “changed circumstances” argument stating, “[T]here can be no question but that—from the information before it—the Legislature could rationally have decided that the enactment might serve its insurance cost objective.” (*Id.*, emphasis added, referring to Code Civ. Proc., § 667.7, a MICRA provision.)

The analysis of *American Bank* and *Fein* is just as relevant today as when the cases were decided, as explained by the Fifth Appellate District in *Stinnett*. The *Stinnett* court noted that the finding of MICRA’s constitutionality has never rested on factual findings by the courts and,

therefore, there is no merit to the argument that a new or different factual finding by the court could justify a contradictory result:

> [T]he [*Fein*] court did not find section 3333.2 constitutional based on a particular set of facts, i.e. whether a medical malpractice insurance crisis actually existed, but instead did so based on the Legislature's power to determine whether such a crisis existed and to craft remedies to solve the crisis the Legislature found. Put another way, in determining that section 3333.2 did not violate the equal protection clause, the court deferred to the Legislature, concluding it had made the requisite inquiry and decided, based on the facts before it, there was a need to regulate medical malpractice insurance and the scheme it enacted, MICRA, was rationally related to that need. Accordingly, the "changed circumstances" principle stated in *Brown* and *Chastleton* is not applicable here.

(*Stinnett v. Tam*, 198 Cal.App.4th at p. 1430 [emphasis added], citing *Brown v. Merlo* (1973) 8 Cal.3d 855; *Chastleton Corp. v. Sinclair* (1924) 264 U.S. 543.)

This approach conforms to the longstanding, well-established approach to the judicial review of legislation: "Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." (*Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 464; see also *F.C.C. v. Beach Communications, Inc.*, *supra*, 508 U.S. at 315 ["[A] legislative choice is not subject to courtroom fact-finding."]; *Heller v. Doe* (1993) 509 U.S. 312, 319 ["[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices"][citation omitted]; *Ferguson v. Skrupa* (1963) 372

U.S. 726, 730 ["[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies"]; *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52 ["The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation"].) As the California Supreme Court stated more than sixty years ago, "We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to remain a democratic system. The forum for correction of ill-considered legislation is a responsive legislature." (*Werner v. Southern Cal. etc. Newspapers* (1950) 35 Cal.2d 121,130.)

MICRA should be left in the legislature's hands. It addresses complex issues of fact and policy involving overall costs of healthcare; accessibility of healthcare in low-income, rural, and inner-city areas; the availability of physicians working in high-risk specialties such as obstetrics and neurosurgery; the impact of healthcare costs on California patients and taxpayers; and the cost of medical insurance for Californians and their employers. (See, e.g., William G. Hamm, et al., "MICRA and Access to Healthcare," available at http://www.cmanet.org/files/pdf/ micra/lecg-capp-report.pdf; RAND Corporation, "Malpractice Risk by Physician Specialty," available at http://www.rand.org/pubs/ research_briefs/RB9610/index1.html.)

Neither trial nor appellate courts are in a position to assess arguments asserted by interested, individual parties to determine whether MICRA continues to adequately serve the needs of California as a whole. Rather, the approach taken in *Fein*, *American Bank*, and *Stinnett* is the correct one: As long as the Legislature did not abuse its power in enacting MICRA, the ongoing wisdom or effectiveness of the measure should not be second-guessed by the judiciary.

As the Supreme Court stated in *Fein*, "Although reasonable persons can certainly disagree as to the wisdom of this provision, we cannot say that it is not rationally related to a legitimate state interest." (*Fein*, 38 Cal.3d at 160-161.) Nothing in this case changes that assessment. Plaintiff's "changed circumstances" argument cannot justify the invalidation of a law that has been held constitutional by the California Supreme Court.

3. Proposition 103 does not make Section 3333.2 obsolete.

Plaintiff argues that Proposition 103 "preclud[es] any possible threat to health care and thereby eliminat[es] any rational basis for the cap." (AOB at 66.) However, 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.

Proposition 103 established a regulatory mechanism for insurance rates in California. According to Plaintiff, the passage of Proposition 103 "render[ed] section 3333.2 superfluous" because it "gave the power to regulate insurance rates to the Insurance Commissioner." (AOB at 59, 64.) But the Supreme Court has upheld MICRA's provisions and recognized continued threats to MICRA's goals numerous times since Proposition 103 was passed in 1988. (See, e.g., *Western Steamship*, *supra*, 8 Cal.4th at pp. 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 stressed MICRA's importance in ensuring access to healthcare. To that end, 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…necessary to effectuate the intent and policies prompting the MICRA legislation….

(8 Cal.4th at p. 112.) 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 relative to increases in other industries and in 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. 56-58, and authorities cited therein.)

The enactment of a statute that touches on a similar subject to a statute already in place 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.

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

III. CONCLUSION

The Supreme Court and Court of Appeal repeatedly have held that MICRA generally and Section 3333.2 specifically are rationally related to legitimate state interests. None of Plaintiff's arguments change that analysis or those conclusions and Plaintiff cannot deny that it is beyond the role of the judiciary to engage in fact finding to determine the wisdom of the Legislature's actions. Moreover, Section 3333.2 does not violate Plaintiff's due process or equal protection rights, or her right to a jury trial. There is no legitimate basis to question the constitutionality of Section 3333.2.

Dated: June 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5,258 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/Rebecca A. Lefler*
Rebecca A. Lefler

PROOF OF SERVICE

Jessica Chan
Plaintiff and Appellant
v
Peter Curran, M.D., et al.
Defendants and Respondents

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE
CASE NO. A138234

I, Cynthia M. Harris, declare as follows:

On June 3, 2014, I served the foregoing document(s) described as **Application for Leave to File Amici Curiae Brief in Support of Respondents Peter Curran, M.D., et al.; Brief of Amici Curiae California Medical Association, California Dental Association, California Hospital Association, and American Medical Association** on the interested party(ies) in this action as follows:

[See Attached Service List]

(**X**) **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on that date following ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in Los Angeles, California, in a sealed envelope with postage fully prepaid.

(**X**) **STATE**: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 3, 2014, at Los Angeles, California.

CYNTHIA M. HARRIS

SERVICE LIST

Jessica Chan
Plaintiff and Appellant
v
Peter Curran, M.D., et al.
Defendants and Respondents

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE
CASE NO. A138234

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