No. S067733

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

DAWNELLE BARRIS,

Plaintiff, Appellant and Cross-Respondent,

vs.

COUNTY OF LOS ANGELES,

Defendant, Respondent and Cross-Appellant.

After A Decision By The Court Of Appeal
Second Appellate District, Division Four
Case No. 2d Civil B105216

ANSWER BRIEF ON THE MERITS OF RESPONDENT COUNTY OF LOS ANGELES

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INTRODUCTION

The decision of the Court of Appeal in this case to apply California's $250,000 cap on noneconomic damages to a recovery under the federal Emergency Medical Treatment and Active Labor Act (EMTALA; 42 U.S.C. § 1395dd, et seq.) is not the radical departure from established law that plaintiff Dawnelle Barris depicts in her opening brief. Rather, the decision is firmly grounded in this Court's analysis of the language in and intent of statutes governing claims against health care providers since the enactment of the Medical Injury Compensation Reform Act (MICRA).

While EMTALA proscribes certain conduct on the part of hospitals with emergency departments, it leaves the question of remedy to state law, providing that a plaintiff who has proved she suffered personal harm resulting from a hospital's violation of EMTALA is entitled to recover "those damages available for personal injury under the law of the State in which the hospital is located . . . ." (42 U.S.C. §1395dd, subd. (d)(2)(A).) The jury in this case found an EMTALA violation on the part of Martin Luther King, Jr./Drew Medical Center (MLK), a hospital operated by defendant County of Los Angeles, specifically, the failure to stabilize the medical condition of plaintiff's daughter, Mychelle, before transferring her to a Kaiser hospital. The Court of Appeal assumed that the jury's finding of an EMTALA violation was correct for purposes of its analysis and addressed only the question of whether the trial court had correctly

reduced plaintiff's noneconomic damages to $250,000, pursuant to Civil Code section 3333.2, a MICRA statute.

The Court of Appeal viewed its task as one of deciding "whether the underlying conduct challenged in the EMTALA claim, if brought under state law, would be encompassed within MICRA." (Opinion 9; see also *Power v. Arlington Hosp. Ass'n* (4th Cir. 1994) 42 F.3d 851, 861-862, 864 [Virginia medical malpractice cap applied to EMTALA claim for failure to appropriately screen because injurious conduct fell within the ambit of malpractice under the Virginia statute insofar as it was "'based on health care or professional services rendered . . .'"].) Relying primarily on the analysis of this Court in *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, the Court of Appeal concluded that the challenged conduct in this case would be encompassed within MICRA because stabilizing a patient is directly related to a hospital's duty to care for sick persons. (Opinion 16.)

Plaintiff faults the Court of Appeal for its approach. In her view, whether or not the MICRA cap applies turns not on the conduct alleged, but on the theory a plaintiff has chosen to plead. If a plaintiff pleads negligence, the cap applies; if, on the same facts, she pleads an EMTALA violation (or any theory other than negligence), there is no cap. Merely to state the proposition is to refute it.

When plaintiff turns to the Court of Appeal's substantive conclusions, she is also far off course. First, she dismisses the significance of *Central Pathology*,

arguing its analysis is inapplicable to MICRA statutes. She then argues, in essence, that Civil Code section 3333.2 applies only to traditional medical negligence causes of action where breach of the standard of care is alleged, and since EMTALA does not create a federal medical negligence cause of action, the cap embodied in section 3333.2 does not limit her EMTALA recovery.

As discussed more fully below, the Court of Appeal approached the question correctly, applied the correct analysis, and reached the correct result, a result which is firmly grounded in prior decisions of this Court and which balances the interests of Congress in assuring access to emergency medical care with California's concerns about controlling medical costs. When Congress left the question of damages to the separate states, it intended exactly this balance to be struck. The Court of Appeal's decision should be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 6, 1993, plaintiff's 18-month old daughter, Mychelle, was brought to the emergency room at MLK. (RT 911-912, 919.) She had a temperature of 106.6 degrees, was experiencing shortness of breath, and during the day had suffered episodes of diarrhea and vomiting. (RT 919-920.) She had a history of asthma for which she had been followed at Kaiser. (RT 919, 920.) She also had a history of febrile seizure. (RT 920.)

After being seen in the emergency room, she was transferred to the pediatric outpatient clinic, part of the emergency department, where she was examined by Dr. Trach Phoung Dang. (RT 911.) Her temperature was 105.4 degrees. (RT 1017.) She was slightly lethargic with elevated heart and respiratory rates. (RT 920, 1001, 1024.) She had an abnormal pulse indicating possible respiratory compromise, and dry lips suggesting dehydration. (RT 744, 921, 1002-1003.) There was evidence of ear infection. (RT 920, 1011.)

About two hours after her transfer to pediatrics she had a seizure that Dang concluded was most likely a febrile seizure. (RT 818, 978.) Dang diagnosed bilateral middle ear infection, acute viral gastroenteritis with dehydration, and a flare up of asthma. (RT 922, 1014-1015.) He concluded the fever was mostly likely caused by acute viral infection, or possibly by the ear infection. (RT 1016-1017.)

Mychelle was treated with Tylenol and Ibuprofen for fever. (RT 986-987, 1028-1029, 1043-1044.) She was given fluids intravenously for dehydration, and Albuterol and oxygen for her breathing. (RT 816, 966, 1003, 1007, 1014, 1028.) Her seizure was treated with Ativan. (RT 1044.)

At approximately 9:00 p.m., Mychelle was transferred by ambulance to a Kaiser hospital. (RT 792, 1498.)[1/] Dang testified he reassessed her before transfer and believed she was stable for transfer. (RT 1040, 1045.) Mychelle

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1/ Plaintiff was a member of Kaiser through her employment. (RT 1339.)

died shortly after reaching Kaiser, and the death certificate listed cardiac respiratory arrest caused by septicemia, or sepsis. (Exhibit 1, Exhibit 3.)

Dang testified he never suspected Mychelle had sepsis while she was in the emergency room. (RT 1026.) He acknowledged during his deposition that sepsis was a possible cause for her high fever, which he had not ruled out. (RT 926-927, 1017.) Ruling out sepsis would require a blood count and culture. (RT 927-928, see also RT 855-856 [absolute confirmation of a sepsis diagnosis requires a blood culture].) He believed a blood count and culture needed to be done. (RT 928.) Results of a blood culture normally takes two or three days. (RT 807.) The blood work was not done at MLK because Dang had agreed in a telephone conversation with a Kaiser physician that it would be done at Kaiser. Plaintiff's expert at trial testified Dang failed to meet the standard of care because he failed to do a test to rule out sepsis and then to place Mychelle on intravenous antibiotics. (RT 802-803, 805.)

Plaintiff filed suit on May 2, 1994, alleging causes of action against the County and Dang, among others, for medical negligence and violation of EMTALA. (AA 1.) The EMTALA claim alleged violations in the form of a failure to provide an appropriate medical screening examination and a failure to stabilize Mychelle's medical condition before transferring her to Kaiser. (AA 7-9.)

Before the case was submitted to the jury, the trial court granted the County's motion for nonsuit as to the screening claim. (AA 105.)

The jury found Dang and the County, as well as a Kaiser physician, Brian Thompson, negligent. It found the County had violated EMTALA. (AA 174-175.) The jury assessed noneconomic damages at $1.35 million dollars and economic damages at $3,000, apportioning fault 75% to Dang and 25% to Thompson. (AA 175-176.)

The trial court ruled that the MICRA cap on noneconomic damages set forth in Civil Code section 3333.2 applied to the EMTALA cause of action, as well as to the negligence cause of action. (AA 169-170.) Judgment was entered accordingly on June 20, 1996. (AA 172-178.)

Plaintiff appealed the trial court's application of the MICRA cap on damages to her EMTALA cause of action against the County, but not the nonsuit on the screening claim. (AA 180.) The County filed a protective cross-appeal with respect to the EMTALA judgment contending that the evidence did not support a judgment based on an EMTALA violation. (AA 182-183.) Since the County did not challenge the negligence verdict and since only a determination that the MICRA caps did not apply would significantly increase its exposure, the County noted in its brief that the Court of Appeal need not address the cross-appeal based on substantial evidence if it determined that the caps did apply. (Combined RB and XAOB 3, fn. 1.)

The Court of Appeal held that "the MICRA cap on damages applies to the EMTALA claim for failure to stabilize prior to transfer because the conduct underlying that claim is 'based on professional negligence.'" (Opinion 2.) It did not reach the cross-appeal. (Opinion 4, fn. 3.) Plaintiff sought a rehearing in the Court of Appeal that was denied on January 14, 1998.

This Court granted review on March 18, 1998.

LEGAL ARGUMENT

THE $250,000 MICRA CAP IMPOSED BY CIVIL CODE SECTION 3333.2 APPLIES TO PLAINTIFF'S RECOVERY UNDER EMTALA

A. This Court's Analysis In *Central Pathology* Governs the Construction of Civil Code Section 3333.2.

1. Code of Civil Procedure Section 425.13 and Civil Code Section 3333.2 Should Be Construed To Harmonize With Each Other.

In *Central Pathology*, this Court addressed the issue of whether the restrictions of Code of Civil Procedure section 425.13 pertaining to punitive damages in medical malpractice actions applied to torts other than negligence,

such as the intentional tort of fraud. Section 425.13, subdivision (a), imposes certain procedural requirements in "any action for damages arising out of the professional negligence of the health care provider . . . ." The Court first found that the existing MICRA definition of professional negligence ("'a negligent act or omission to act by a health care provider in the rendering of professional services . . . '") was intended to apply to section 425.13. (*Central Pathology*, *supra*, 3 Cal.4th at p. 187.) It then turned to the meaning of "arising out of," a phrase that it equated to the phrase "based upon" found in the MICRA statutes. (*Id.* at pp. 187, fn. 3, 192.) After analyzing legislative history, the Court noted the original intention of section 425.13 "'was to provide protection to health practitioners *in their capacity as practitioners* . . . . '" (*Id.* at p. 189, original italics.) The Court then held as follows:

> "[W]henever an injured party seeks punitive damages for an injury that is directly related to the professional services provided by a health care provider acting in its capacity as such, then the action is one 'arising out of the professional negligence of a health care provider,' . . . ."

(*Id.* at pp. 191-192; see also *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 709, 714 [section 425.13 applied in *Central Pathology* because the intentional misconduct "concerned the manner in which medical services were

performed"; statute applies in actions "involving the quality and nature of health services"].)[2/]

In *Central Pathology*, this Court instructed that "[t]he words of [a] statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Central Pathology*, *supra*, 3 Cal.4th at p. 187.) The Court of Appeal in this case construed Civil Code section 3333.2 in harmony with this Court's construction of Code of Civil Procedure section 425.13, as it was entirely proper to do.

First, as the *Central Pathology* court recognized, the critical language of each statute is virtually identical. (*Id.* at pp. 187, fn. 3, 192.) Section 3333.2 defines professional negligence as "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 or wrongful death . . . ," the definition this Court read into Code of Civil Procedure section 425.13. (Civ. Code, § 3333.2, subd. (c)(2); *Central Pathology*, *supra*, 3 Cal.4th at p. 187.) Civil Code

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2/ *Central Pathology*'s broad approach to the question of when an action is one "arising out of" or "based on" professional negligence was, as the Court of Appeal recognized (at Opinion 11-12), anticipated by earlier decisions of this Court. (See *Hedlund v. Superior Court* (1983) 34 Cal.3d 695, 704 [professional negligence includes psychotherapist's duty to warn because that duty is "inextricably interwoven" into the therapist's professional responsibilities]; *Waters v. Bourhis* (1985) 40 Cal.3d 424, 435-436 [MICRA provisions are implicated when a health care provider acts contrary to professional standards or engages in unprofessional conduct].)

section 3333.2 pertains to "any action for injury against a health care provider *based on professional negligence*, . . ." (Civ. Code, § 3333.2, subd. (a), emphasis added.) Again, this Court found "the Legislature did not intend to distinguish the terms 'based upon' and 'arising out of.'" (*Central Pathology*, *supra*, 3 Cal.4th at p. 187, fn. 3.)

The similarity in language of Civil Code section 3333.2 and Code of Civil Procedure section 425.13 reflects a more substantive relationship between the statutes. Each is part of one statutory scheme that relates to the same subject matter—damages claims against health care providers acting in their capacity as such. Moreover, each statute serves a protective purpose with respect to health care providers, and ultimately the public: as a MICRA statute, Civil Code section 3333.2 has "the objective of reducing the costs of malpractice defendants and their insurers" (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 159); similarly, Code of Civil Procedure section 425.13 protects health care providers from the onerous burden (and attendant costs) of defending against unsubstantiated punitive damage claims. (*Central Pathology*, *supra*, 3 Cal.4th at p. 190.) This Court has recognized that controlling such costs has a critically positive effect on the delivery of medical services in this state, "maximizing the availability of medical services to meet the state's health care needs." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 112.)

2. Plaintiff's Argument That *Central Pathology* Does Not Apply To MICRA Statutes Is Meritless.

It is only with *Central Pathology* out of the way that plaintiff can argue for a strict construction of professional negligence in Civil Code section 3333.2, because *Central Pathology* rejects the very construction plaintiff espouses: "[W]e have not limited application of MICRA provisions to causes of action that are based solely on a 'negligent act or omission' as provided in the statutes." (*Central Pathology*, *supra*, 3 Cal.4th at p. 192.)

Plaintiff argues that the courts below incorrectly assumed that in extending the application of Code of Civil Procedure section 425.13 to non-negligent causes of action, this Court intended its analysis to apply to all MICRA statutes, because *Central Pathology* contains "no hint" of such intention. (AOBM 37.) Whatever this Court's actual intention at the time it decided *Central Pathology*, it makes no sense to say there is "no hint" in the decision of how the Court would construe a MICRA statute, since virtually the entire analysis in *Central Pathology* is founded upon an analysis of the MICRA statutes, as the foregoing discussion makes clear.

Plaintiff also contends that *Central Pathology* has no bearing on the construction of MICRA statutes and on the question of whether the MICRA cap is applicable because the rationale for the decision does not extend to any MICRA statute, including Civil Code section 3333.2. (AOBM 36, 38.)

However, plaintiff focuses only on a portion of the rationale of *Central Pathology*, the desire to avoid a construction that would render a provision meaningless, the notion being that if a statute addressing punitive damages were limited to negligent causes of action, it would have no application at all. (*Central Pathology*, *supra*, 3 Cal.4th at p. 191.) However, the desire to avoid an absurd result is not the sole rationale underlying *Central Pathology* analysis. This Court was mindful of the Legislature's intent to protect health care providers from the burden of defending against unsubstantiated punitive damage claims and the attendant costs that would be involved (3 Cal.4th at p. 190), and that purpose is clearly consistent with and reflects the broader legislative effort to control health care costs that included the passage of the MICRA statutes, and in particular the cap on noneconomic damages. The fact that every reason to construe one statute in a certain way would not necessarily pertain to a second statute does not require ignoring a construction of both statutes that is harmonious and consistent with legislative purpose and historical circumstance.

As an additional reason for not extending *Central Pathology* analysis to Civil Code section 3333.2, plaintiff points to cautionary language in the decision to the effect that the scope of conduct afforded protection under MICRA must be determined after consideration of the purposes underlying each individual statute. (AOBM 37, citing *Central Pathology*, *supra*, 3 Cal.4th at p. 192.) It is precisely

because of the cost-control purpose of Civil Code section 3333.2, that *Central Pathology* analysis must extend to it.

3. Plaintiff's Reliance On Decisions Pre-Dating *Central Pathology* Is Misplaced.

Plaintiff characterizes the Court of Appeal's decision as a "radical departure from established law" and relies on a number of authorities pre-dating *Central Pathology* for the proposition that Civil Code section 3333.2 applies only to causes of action alleging medical negligence. (AOBM 24-29, 31.) However, plaintiff's reliance on these cases to avoid the application of Civil Code section 3333.2 to her EMTALA claim is misplaced, as the Court of Appeal recognized. (Opinion 13-15.)

In *Flores v. Natividad Medical Center* (1987) 192 Cal.App.3d 1106, the reviewing court held that Civil Code section 3333.2 was not applicable to a cause of action under Government Code section 845.6 against the state for failure to summon medical assistance for a state prisoner; however, the state had never argued it was a health care provider, and so Civil Code section 3333.2, which pertains to actions against health care providers, was not triggered. (*Id.* at p. 1114.) Moreover, the Court of Appeal was justifiably critical of the *Flores* decision, stating, "To the extent the *Flores* decision holds that an allegation of failure to summon care is a non-MICRA cause of action because it is not based

on 'professional negligence,' it is inconsistent with *Central Pathology*, which was decided five years later. It is difficult to imagine how summoning aid when it is needed is not a part of a health care provider's professional duties." (Opinion 15.)

In *Baker v. Sadick* (1984) 162 Cal.App.3d 618, the plaintiff alleged negligence and various intentional torts, such as fraudulent inducement to surgery. When the matter was arbitrated, she was awarded compensatory and punitive damages. The trial court reduced the compensatory damages to $250,000 pursuant to Code of Civil Procedure section 3333.2. The plaintiff in *Baker* never questioned that reduction of the compensatory damage award, which included damages for intentional torts, and the sole question before the reviewing court was whether the arbitration agreement authorized an award for punitive damages. (*Id.* at p. 621.) The reviewing court rejected the defendant's argument that Civil Code section 3333.2 precluded punitive damages. The court did not suggest, must less hold (as plaintiff asserts) that the section 3333.2 cap on economic damages applies only to negligence causes of action.[3/]

In *Noble v. Superior Court* (1987) 191 Cal.App.3d 1189, the court held that the tolling provisions of Code of Civil Procedure section 364 for actions based on "professional negligence" apply only to causes of action for negligence

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3/ Plaintiff has misread the text in *Baker*. (AOBM 26.) The statement, ". . . Civil Code section 3333.2 applies only to a 'negligence case' . . . " was *not* one of the court's statements but apparently part of the defendant's argument. (162 Cal.App.3d at p. 626.)

and not to intentional torts, such as battery, during the course of treatment. (*Id.* at p. 1192.) The Court of Appeal in this case observed that *Central Pathology's* subsequent broad interpretation of professional negligence "undermines the continued validity of this portion of the opinion," although *Central Pathology* did not explicitly disapprove of *Noble*. (Opinion 13-14.) Significantly, the *Central Pathology* court *did* expressly disapprove of *Bommareddy v. Superior Court* (1990) 222 Cal.App.3d 1017, in which the analysis was derived whole cloth from *Noble*. (*Central Pathology*, *supra*, 3 Cal.4th at p. 191; see *Bommareddy*, *supra*, 222 Cal.App.3d at pp. 1023-1024.) Thus, the Court of Appeal's observation about *Noble* is at the least implicitly supported by *Central Pathology*.

Finally, in *Waters v. Bourhis* (1985) 40 Cal.3d 424, this Court reversed summary judgment in an action that addressed whether MICRA limits on attorney fees[4/] applied where the plaintiff had alleged, in an underlying action against her former psychiatrist, that he had engaged her in a variety of sexual activities during the course of treatment. The plaintiff had pleaded both negligent and intentional tort theories in the action against the psychiatrist, a fact which led this Court to anticipate the trial court might be faced with a hybrid situation of MICRA and non-MICRA claims. (*Id.* at p. 436.) It held, "[W]hen a plaintiff knowingly chooses to proceed on both non-MICRA and MICRA causes of action, and obtains a recovery that may be based on a non-MICRA theory, the

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4/ See Business & Professions Code § 6146.

limitations of section 6146 should not apply." (*Id.* at p. 437.) However, this Court did *not* specify which, if any, of the plaintiff's causes of actions would not be MICRA claims and, indeed, expressly declined to consider whether MICRA should extend to intentional torts. (*Id.* at pp. 435, fn. 11, 436-437.) The decision did note, however, that MICRA applies where the conduct upon which a cause of action is based is "'inextricably interwoven' with the doctor's professional responsibilities." (*Id.* at p. 432, citing *Hedlund v. Superior Court*, *supra*, 34 Cal.3d at p. 704.) Such language plainly anticipates the language of *Central Pathology*—"directly related to the professional services provided"—as did the decision's focus on the conduct underlying a cause of action rather than on the legal theory of a cause of action.

In short, none of the cases relied upon by plaintiff provide reason to ignore the analysis in *Central Pathology*, and the Court of Appeal properly rejected them.

B. The MICRA Cap Applies Because The Conduct Underlying An EMTALA Claim, And Plaintiff's Claim In Particular, Is "Based On Professional Negligence".

1. As A Threshold Matter, The Fact That EMTALA Is Not A Federal Malpractice Statute Is Immaterial.

Having argued (incorrectly) that Civil Code section 3333.2 applies only to medical negligence claims, plaintiff asserts that it does not apply to her EMTALA claim because EMTALA does not address medical negligence. (AOBM 32; see also AOBM 20-23.)[5/] She cites multiple authorities for this indisputable point. (AOBM 21-22.) However, authorities that emphasize EMTALA is not a federal malpractice statute do so in order to distinguish between common law and statutory standards of proof with respect to liability. For example, a failure to diagnose through *faulty* screening may be negligence under state law standards, but such conduct would not be an EMTALA violation absent proof of *disparate* screening. (*Correa v. Hospital San Francisco* (1st Cir. 1995) 69 F.3d 1184, 1192-1193.) Standards of *proof* with respect to liability are

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5/ Plaintiff asserts (without citation) that the County maintains EMTALA addresses "a medical negligence situation" and thus the MICRA cap applies. (AOBM 20.) To the contrary, the County has acknowledged, and argued, that EMTALA is not intended to federalize state malpractice actions. (See Combined RB and XAOB 21-22, 31-32.) However, EMTALA does address the manner in which medical services are provided, i.e., acts and omissions directly related to the professional services provided by a hospital acting as such.

immaterial to the question of *remedy* and any limitation upon it. The resolution of the latter turns on the question of "the nature and cause of a plaintiff's injury," that is to say, on the underlying conduct. (*Central Pathology*, *supra*, 3 Cal.4th at p. 192.)

2. The Conduct EMTALA Requires Of Hospitals Is Directly Related To The Manner In Which They Provide Professional Services.

As mentioned, EMTALA mandates that hospital emergency rooms provide individuals seeking emergency care with an "appropriate medical screening examination . . . to determine whether or not an emergency medical condition . . . exists." (42 U.S.C. §1395dd, subd. (a).) A hospital must apply its "standard screening procedure for identification of an emergency medical condition uniformly to all patients . . . ." (*Baber v. Hospital Corp. of America* (4th Cir. 1992) 977 F.2d 872, 878.) The screening requirement is violated when persons perceived to have the same medical condition receive disparate treatment. (*Vickers v. Nash General Hosp., Inc.* (4th Cir. 1996) 78 F.3d 139, 142, 143.)

If the hospital "determines that the individual has an emergency medical condition," it must provide "such treatment as may be required to stabilize the medical condition." (42 U.S.C. §1395dd, subd. (b)(1).) The hospital may not transfer an unstable individual unless certain conditions, such as the weighing of

medical risks and benefits of transfer, are met. (42 U.S.C. §1395dd, subd. (c); *Vargas By And Through Gallardo v. Del Puerto Hosp.* (9th Cir. 1996) 98 F.3d 1202, 1204-1205.) A failure to stabilize claim requires proof that the hospital had "actual knowledge of the individual's unstabilized emergency medical condition" and transferred her without stabilizing the condition. (*Summers v. Baptist Medical Center Arkadelphia* (8th Cir. 1996) 91 F.3d 1132, 1140.) Plaintiff's surviving EMTALA claim was based on her allegation that the County failed to stabilize Mychelle's condition before transferring her to Kaiser.

The conduct EMTALA requires falls squarely within the definition of conduct that is "directly related to the manner in which professional services were provided," i.e., conduct that is based on professional negligence. (*Central Pathology*, *supra*, 3 Cal.4th at p. 192.) Certainly the Court of Appeal was correct that, at least in this case, the failure to stabilize claim was based on professional negligence; it was based on the fact that Dang did not stabilize Mychelle's sepsis before transfer. As the Court of Appeal stated, "Stabilizing a patient is 'inextricably interwoven' with a hospital's professional duty to care for sick persons . . . [and] is directly related to the manner in which professional services are rendered." (Opinion 16-17.)[6/]

6/ The Court of Appeal did not address the County's contention that any EMTALA claim is based on "professional negligence," given the conduct that constitutes a violation of EMTALA. (Opinion 17, fn. 8.)

To undermine the validity of the Court of Appeal's conclusion that the MICRA cap applies because her EMTALA claim is based on professional negligence, plaintiff suggests that the decision rests on disputed facts and is inconsistent with the jury's verdict. (AOBM 44, et seq.; see also AOBM 12, fn. 4.) This is not borne out by either the Opinion or the record. Plaintiff expends considerable effort to argue that substantial evidence supported the jury verdict that Dang had actual knowledge Mychelle was suffering from an emergency medical condition at the time of transfer, but nonetheless transferred her, in violation of EMTALA. (AOBM 45-48.) However, whether the evidence was sufficient to support an EMTALA verdict was *not* an issue the Court of Appeal needed to or did resolve.[7/] The Court of Appeal *accepted as given that a violation of EMTALA had occurred*, stating, "The procedural posture of this case requires us to accept the jury's factual finding that County violated EMTALA and to consider only the application of MICRA to the EMTALA claim." (Opinion 16.) Moreover, as the Court of Appeal correctly observed, "The essential facts pertinent to this issue are not disputed." (Opinion 2.) The critical fact relevant to the MICRA issue was that Dang did not administer the antibiotics necessary to stabilize the sepsis, and that fact was undisputed. Contrary to

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7/ The substantial evidence issue was the basis of the County's cross-appeal, which the Court of Appeal did not reach, wherein the County contended there was no evidence that Dang had actual knowledge of Mychelle's *sepsis*, and that actual knowledge of that particular medical condition was an element of plaintiff's EMTALA claim. (Combined RB and XOB 29-36.)

plaintiff's assertion (at AOBM 49), the Court of Appeal did not conclude Dang transferred Mychelle because of "mistaken medical judgment" regarding her stability. In any event, the issue of Dang's state of mind (*why* he did what he did, what his motive may have been) was wholly immaterial to the single question presented by the appeal--whether his conduct, whatever the reasons for it, was "based on professional negligence" within the meaning of Civil Code section 3333.2, so that the MICRA cap would apply.[8/]

3. Plaintiff's Argument That The Application Of MICRA Turns On The Legal Theory Pleaded Rather Than On The Conduct Alleged Ignores Basic Legal Principles.

Plaintiff also faults the Court of Appeal for looking at the facts at all. Rather, she contends, a determination of whether the MICRA cap applies must be based on the legal theory attached to a claim. (AOBM 40-42.) To support her argument, she points to her previously cited cases which distinguished between MICRA and non-MICRA "causes of action" and did not, as did the Court of Appeal, focus on facts. (AOBM 42; see discussion above in § A.3.)

8/ As mentioned, state of mind—"actual knowledge" of the emergency medical condition—is an element of a failure to stabilize claim that a plaintiff must prove to establish liability. (See, e.g., *Eberhardt v. City of Los Angeles* (9th Cir. 1995) 62 F.3d 1253, 1259 [hospital had no duty to stabilize alleged suicidal tendency it failed to detect].) For liability purposes, a plaintiff need not establish *motive* for either a screening or a stabilization claim under EMTALA. (*Power v. Arlington Hosp. Ass'n, supra*, 42 F.3d at pp. 857-858.)

Only the decisions in *Flores* and *Noble* appear to give any weight to the labels attached to a claim, and to that extent should be disapproved as inconsistent with *Central Pathology*. More significantly, however, under California law, a "cause of action" is characterized and determined by the facts, not the theory, pleaded. (See, e.g., *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795 ["the 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant"]; 4 Witkin Cal. Procedure (4th ed. 1997) Pleading, § 24, p. 85 ["'The cause of action . . . will . . . always be the *facts* from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the *facts* which constitute the defendant's delict or act of wrong'"].) In sum, apparent distinctions between "causes of action" in, for example, *Waters v. Bourhis*, without more, do nothing to advance plaintiff's argument; the "more" that gives distinctions between causes of action substance is the conduct underlying them and it is upon conduct—the facts—that any analysis must focus, as the Court of Appeal rightly concluded in this case.

Further, plaintiff suggests that the grant of review in *Mueller v. St. Joseph Medical Center* somehow invalidates the appellate decision in this case.[9/] The Court of Appeal cited *Mueller* for the proposition that focussing on the theory of pleading eviscerates a statute by allowing a plaintiff to plead around any limitations the statute may contain. (AOBM 41.) However, the *Mueller* court

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9/ *Mueller v. Saint Joseph Medical Center* (1997) 58 Cal.App.4th 1531, review granted Jan. 14, 1998 (SO65893).

was not the first, nor will it be the last, court to criticize a plaintiff's attempt to plead around a statutory limit by switching theories. (See, e.g., *Rubin v. Green* (1993) 4 Cal.4th 1187, 1201-1203 [plaintiff cannot "plead around" litigation privilege under Civil Code section 47, subdivision (b), by recasting his claim for damages based on communicative conduct as one for injunctive relief under unfair competition statute]; see also *Central Pathology, supra*, 3 Cal.4th at p. 191 [reflecting the Court's concern that a distinction between negligence and intentional torts for purposes of Code of Civil Procedure section 425.13 would result in "artful pleading" to sidestep procedural requirements, thus "annul[ling] the protection afforded by that section"].)

Plaintiff also challenges the Court of Appeal's focus on conduct rather than theory as "unworkable" because, supposedly, a determination of whether MICRA limits apply will then require a full trial of the facts and make settlement and predictions of potential costs at an early stage virtually impossible. (AOBM 42.) In contrast, she contends, a focus on legal theory is sound policy because it encourages settlement and will allow insurance companies to predict the cost of litigation more accurately. (AOBM 42-43.) It is difficult to see how *not* applying the MICRA cap contributes to predictability rather than exactly the reverse; the unpredictability of noneconomic damages triggered the MICRA legislation in the first instance. (See *Western Steamship Lines, Inc. v. San Pedro*

Peninsula Hospital, supra, 8 Cal.4th at p. 112 [referring to "the pre-MICRA instability associated with unlimited noneconomic damages . . ."].)

In any event, plaintiff's premise that if the Court of Appeal's decision stands, trial and a detailed analysis of the facts will be necessary in every instance before the value of a case can be estimated, is incorrect. Given the nature of the conduct constituting a violation of EMTALA—disparate treatment in the screening for an emergency medical condition and the failure to stabilize an emergency medical condition--one could safely look at the allegations of a complaint, such as those in this action (AA 7-9), and determine whether the conduct alleged is by its nature directly related to the hospital's function of providing health services. It simply will *not* be difficult to predict whether or not a MICRA cap is going to apply at the outset of a case.

C. The District Court's Decision In *Jackson v. East Bay Hospital* Incorrectly Interprets California Law.

In *Jackson v. East Bay Hosp.* (N.D.Cal. 1997) 980 F.Supp. 1341, the district court held that "the MICRA damages cap does not apply to the recovery of damages under an EMTALA cause of action." (*Id.* at p. 1350.) Plaintiff faults the Court of Appeal in this case for being inattentive to "the interplay of federal and state law" and for finding the reasoning in *Jackson* unpersuasive. (AOBM 40; see Opinion 18.) However, plaintiff makes no attempt to

demonstrate the merits of that reasoning. The omission is understandable since the reasoning in *Jackson* is seriously flawed, and it is no wonder that the Court of Appeal found it unpersuasive on the construction of MICRA.[10/]

First, the district court refused to be guided by this Court's decision in *Central Pathology*, stating that it would be impermissible "[to] condition the operation of a federal substantive cause of action on a state court's interpretation of a state procedural rule." (*Jackson, supra*, 980 F.Supp. at p. 1349.) This rationale appears to be an adaptation of the rule that it is generally impermissible to burden a federal cause of action with conflicting state procedural requirements. (See, e.g., *Reid v. Indianapolis Osteopathic Medical Hosp.* (S.D.Ind. 1989) 709 F.Supp. 853, 855-856 [EMTALA does not incorporate state procedural requirements].) While that rule involves considerations of federal preemption, it is all together unclear why, as a general proposition, it would be "impermissible" to consider state court analysis of statutory language on a subject left to state law by a federal statute. If the district court simply means to say that since the analysis in *Central Pathology* is directed towards language in a procedural statute—Code of Civil Procedure section 425.13—it has no bearing on the substantative issue of available damages, its reasoning is equally baffling: the analysis in *Central Pathology* does not turn on any distinction between

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10/ In an unpublished opinion, the district court in *Burrows v. Redbud Community Hospital District* (N.D.Cal. 1997) No. C-96-4345 simply followed *Jackson*, without analysis. (Opinion 18.)

substantive and procedural law, but rather focuses on the meaning of "arising out of professional negligence."

The district court found another reason to dismiss *Central Pathology* in the fact that section 425.13 is a non-MICRA provision. (*Id.* at p. 1349.) However, this Court expressly relied on the MICRA statutes and the language that the Legislature chose in order to effect MICRA purposes to interpret the language of section 425.13. (*Central Pathology, supra,* 3 Cal.4th at p. 187, fn. 3, 192.) It did so to harmonize and make consistent with legislative intent the law governing claims against health care providers. (See *id.* at pp. 186-187 [statutes related to same subject matter should be harmonized with consideration given to consequences flowing from a particular interpretation and to historical context].) It makes no sense to say, as the *Jackson* court did and as plaintiff does in her brief in this case, that an analysis based on MICRA statutes cannot then be used to construe MICRA statutes.

Significantly, in reaching its decision, the district court made no mention of this Court's explanation as to *when* an action is one "arising out of" or "based on" professional negligence. That is, the district court made no attempt to explain how injuries derived from failing to treat and stabilize, for example, are *not* "directly related to the professional services provided by a health care provider acting in its capacity as such," because any such attempt would obviously be futile.

Since there is no *reasoned* basis to conclude EMTALA is not a cause of action arising from or based upon professional negligence, the *Jackson* court was compelled to adopt a superficial reading of *Central Pathology*, dismissing it as essentially a case about procedure with no relevance beyond Code of Civil Procedure section 425.13 issues. In order to justify ignoring *Central Pathology*, the district court cites *Waters v. Bourhis, supra,* 40 Cal.3d 424 and *Flores v. Nativitad Medical Center, supra,* 192 Cal.App.3d 1106 for the proposition that California courts have "clearly held that the same set of facts can support both MICRA and non-MICRA claims." (*Jackson v. East Bay Hosp., supra,* 980 F.Supp. at p. 1349.) The County does not repeat its discussion regarding *Waters* and *Flores* set forth above. Suffice it to say that the same set of facts might support different overlapping *theories* of recovery, but whatever the theory or theories alleged, after *Central Pathology*, either MICRA would apply or it would not, depending on the nature of the underlying *conduct*.

D. Application Of The MICRA Cap To Plaintiff's EMTALA Recovery Is Consistent With And Serves The Underlying Purposes Of Both Statutes.

The application of California's limits on noneconomic damages as set forth in Civil Code section 3333.2 to plaintiff's EMTALA cause of action is consistent with the underlying purposes of both statutes.

MICRA was a response to the medical malpractice insurance crisis in this state, which the Legislature perceived threatened the quality of health care. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital*, *supra*, 8 Cal. 4th at p. 111.) "The continuing availability of adequate medical care depends directly on the availability of adequate insurance coverage, which in turn operates as a function of costs associated with medical malpractice litigation." (*Ibid.*)

EMTALA, too, was passed in response to a concern about medical care, specifically adequate emergency care. "[EMTALA] was passed in 1986 amid growing concern over the availability of emergency health care services to the poor and uninsured." (*Gatewood v. Washington Healthcare Corp.* (D.C. Cir. 1991) 933 F.2d 1037, 1039; see also *Eberhardt v. City of Los Angeles*, *supra*, 62 F.3d at p. 1258 ["Congress enacted the EMTALA not to improve the overall standard of medical care, but to ensure that hospitals do not refuse essential emergency care because of a patient's inability to pay"].)[11/]

Moreover, the legislative history of 42 U.S.C. §1395dd, subdivision (d)(2)(A) regarding the application of state law to the issue of damages reflected a concern about "'the potential impact of . . . enforcement provisions on the current medical malpractice crisis.'" (*Power v. Arlington Hosp. Ass'n*, *supra*, 42

11/ EMTALA provides a right of action to "any individual" suffering the effect of a violation. (42 U.S.C. § 1395dd, subd. (d)(2)(A).) As noted by the Court of Appeal, there was originally a split of authority among federal courts as to whether EMTALA applied to all individuals or only to indigent patients, but that division has been resolved in favor of applying EMTALA to all individuals. (Opinion 5, fn. 4; *Power v. Arlington Hosp. Ass'n*, *supra*, 42 F.3d at p. 857.)

F.3d at p. 862, citing *H.R. Rep. No. 241*, 99th Cong., 1st Sess., pt. 3, at 6.) "Congress was clearly aware of a growing concern in some states that excessive damage awards were fueling a medical malpractice 'crisis,' and . . . apparently wished to preserve state-enacted ceilings on the amount of damages that could be recovered in EMTALA through the incorporation of §1395dd(d)(2)(A)." (*Ibid.*, internal quotations omitted; see also Opinion 17-18 [noting that legislative history of section 1395dd(d)(2)(A) supported its conclusion that MICRA cap should apply].) In allowing state law to govern the type and amount of damages available in enforcement action under EMTALA, Congress deliberately chose "the . . . inclusive phrase 'personal injury' so that it would not be necessary to delineate each and every type of limitation on damages, e.g. limitations on punitive damages, noneconomic losses, and malpractice damages caps, that the states might have enacted." (*Power v. Arlington Hosp. Ass'n*, *supra*, 42 F.3d at p. 862.)[12/]

12/ Accordingly, in *Power*, the court asked whether the *conduct* underlying an EMTALA claim was based on health care services rendered and determining that it was, held Virginia's medical malpractice cap applied to a failure to screen claim under EMTALA. (42 F.3d at pp. 862, 863, 869.) In *Reid v. Indianapolis Osteopathic Medical Hospital*, *supra*, 709 F.Supp. at pp. 855-856, the court held the Indiana damage cap on medical malpractice actions applied to EMTALA claims. In *Cooper v. Gulf Breeze Hosp., Inc.* (N.D.Fla. 1993) 839 F.Supp. 1538, 1542, the court held Florida's malpractice caps did not apply; however, the *Cooper* court relied on the reasoning in *Power v. Arlington Hosp.* (E.D.Va. 1992) 800 F.Supp. 1384, which the Fourth Circuit reversed in *Power*, *supra*, 42 F.3d at p. 868. As to other types of state law limitations, in *Taylor v. Dallas County Hosp. Dist.* (N.D. Tex. 1996) 976 F.Supp. 437, 438, the court found no punitive damages could be recovered on an EMTALA claim against a county hospital because the Texas Tort Claims Act does not allow punitive damages

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Plainly, the application of Civil Code section 3333.2 to EMTALA balances the Congressional purpose of assuring access to emergency medical care with state concerns about insurance costs as they relate to the availability of quality health care. (See Comment, *Power v. Arlington Hospital Association: Extending Cobra's Striking Distance While Weakening The Power Of Its Venom* (1995) 29 Ga.L.Rev. 1171, 1203 [*Power* and the application of caps balances goals of EMTALA with state concerns about insurance availability].) It certainly would not be inconsistent with Congressional purpose to apply Civil Code section 3333.2 to claims under EMTALA, and it would advance California's own important public policy concerns to do so. On the other hand a refusal to apply the MICRA cap would surely threaten the goals of MICRA by "resurrecting the pre-MICRA instabilities associated with unlimited noneconomic damages . . . ." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital, supra*, 8 Cal.4th at p. 112 [explaining why an indemnity action was not exempt from MICRA limits].)

12/(...continued)
against public entities. In *Lane v. Calhoun-Liberty County Hosp. Ass'n Inc.* (N.D.Fla. 1994) 846 F.Supp. 1543, 1553, the court held that under Florida law, and thus under EMTALA, an estate could not pursue a decedent's claim for personal injury but the plaintiff parents could recover damages for their own pain and suffering as permitted by Florida's Wrongful Death Act.

CONCLUSION

For all the reasons discussed, this Court should affirm the judgment of the Court of Appeal. If this Court decides otherwise, the County requests it to remand the matter to the Court of Appeal for resolution of the County's cross-appeal and the issue of whether there was substantial evidence to support an EMTALA violation in the first instance.

Dated: May 12, 1998

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